IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Senior Airman (E-4) **TYRION N. DAVIS,** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME (FIRST) (OOT)** Before Panel No. 2 Case No. ACM 40307 Filed on: 28 December 2022

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

Pursuant to Rule 23.3(m)(1), (2), and (7) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a first enlargement of time to file an Assignment of Errors. Good cause exists to grant Appellant's EOT OOT as appellant's counsel is on maternity leave and undersigned counsel was assigned for the purpose of filing this EOT. As a result of a miscommunication, undersigned counsel did not file the EOT on time. Undersigned counsel takes full responsibility for the error and it was done through no fault of Appellant. Appellant requests an enlargement for a period of 60 days, which will end on March 2, 2023. The record was docketed with this Court on 2 November 2022. On the date requested, 120 days will have elapsed from the date this case was docketed.

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

Respectfully Submitted,

//signedASK28Dec22//

ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 28 December 2022.

//signedASK28Dec22//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

29 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) TYRION N. DAVIS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40370 Panel No. 2

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

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

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

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 29 December 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 2
Senior Airman (E-4) **TYRION N. DAVIS,** United States Air Force *Appellant*	)	No. ACM 40370
	)	22 February 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 to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **1 April 2023**. The record of trial was docketed with this Court on 2 November 2022. From the date of docketing to the present date, 112 days have elapsed. On the date requested, 150 days will have elapsed. Appellant withdraws his previous motion for a second enlargement of time dated 22 February 2023 and substitutes this motion to correct a typographical error in the docketing date.

From 13-23 June 2022, Appellant was tried by a general court-martial at RAF Lakenheath, United Kingdom. Contrary to his pleas, the panel of officer and enlisted members found Appellant guilty of one charge and one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §920. Record of Trial (ROT) Vol. 1, Entry of Judgment, dated 21 July 2022; *see also* R. at 1188-89. The panel acquitted Appellant of ten specifications of sexual assault and abusive sexual contact in violation of Article 120, UCMJ; one charge with one specification of aggravated assault and one specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. §928; and one charge with one specification of wrongful use of marijuana in violation of Article 112a, UCMJ, 10 U.S.C. §912a.

Id. The same panel sentenced Appellant to be reduced to the grade of E-1, to be confined for 10 months, and to be discharged from the service with a dishonorable discharge. R. at 1256. The convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. SrA Tyrion Davis*, dated 13 July 2022.

The record of trial is 11 volumes consisting of 40 prosecution exhibits, 20 defense exhibits, 69 appellate exhibits, and one court exhibit; the transcript is 1258 pages. Appellant is not currently confined.

Through no fault of Appellant, undersigned counsel has been unable to complete her review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

KASEY W. HAWKINS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

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

KASEY W. HAWKINS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

23 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) TYRION N. DAVIS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40370 Panel No. 2

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

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

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

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 February 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	)	**MOTION TO EXAMINE**
Appellee	)	**SEALED MATERIALS**
	)	
v.	)	Before Panel No. 2
	)	
Senior Airman (E-4)	)	No. ACM 40370
TYRION N. DAVIS,	)	
United States Air Force	)	16 February 2023
Appellant	)	

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

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

1) Preliminary Hearing Officer (PHO) Exhibits 8, 9, 10, and 11, located in Volume 7 of the Record of Trial (ROT). These exhibits were reviewed by government and defense counsel and ordered sealed by the PHO in item 13a of her report, located in Volume 6 of the ROT.

2) Appellate Exhibits XI, XII, XIII, XIV, XV, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, XXVII, XXX, XXXII, XXXIV.

    a. Appellate Exhibits XI, XII, XIII, XIV, XV, and XXVII are notices and motions under Mil. R. Evid. 412. These matters were reviewed by trial and defense counsel and ordered sealed by the military judge. R. at 28.

    b. Appellate Exhibit XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, and XXV are motions and supporting documents under Mil. R. Evid. 513. These matters were reviewed by trial and defense counsel and ordered sealed by the military judge. R. at 28.

    c. Appellate Exhibit XXX is the military judge's ruling regarding the Mil. R. Evid. 513 issues. This exhibit was reviewed by trial and defense counsel and ordered sealed by the military judge. R. at 151.

    d. Appellate Exhibits XXXII and XXXIV are the military judge's rulings regarding the Mil. R. Evid. 412 issues. These exhibits were reviewed by trial and defense counsel and ordered sealed by the military judge. R. at 151.

3) Transcript pages 29-77. These pages contain the transcription of the closed hearing for the Mil. R. Evid. 412 and 513 motions. This hearing was attended by trial and defense counsel, and the transcript pages were reviewed by trial and defense counsel and ordered sealed by the military judge. R. at 28.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these materials is reasonably necessary to appellate counsel's responsibilities, undersigned counsel asserts that review of the referenced exhibits is necessary to conduct a complete review of the record of trial and be in a position to advocate competently on behalf of Appellant. A complete review of the PHO exhibits is necessary to ensure Appellant's Preliminary Hearing was conducted correctly and that his case was properly referred to trial.

Appellate Exhibits XIV, XV, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, XXX and XXXII involve the named victim L.C.C. Undersigned counsel acknowledges that Appellant was acquitted of all offenses involving L.C.C. However, L.C.C. was friends with C.D., Appellant's wife and the victim identified in Specification 5 of Charge I, the only offense of which the court members convicted Appellant. In fact, it was L.C.C.'s report that Appellant sexual assaulted her that precipitated C.D.'s report. R. at 490-91. Furthermore, C.D. became involved in a romantic relationship with L.C.C.'s ex-boyfriend, SSgt J.V., immediately prior to the sexual assault alleged in Specification 5 of Charge I. R. at 480. L.C.C. and C.D.'s allegations are linked such that it is necessary to review the sealed exhibits involving L.C.C. to determine whether they contain grounds for this Court to grant relief in Appellant's case.

Moreover, a review of the entire record of trial is necessary because this Court is empowered by Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, to grant relief based on a review and analysis of "the entire record." To determine whether the record of trial yields grounds for this Court to grant relief under Article 66, UCMJ, 10 U.S.C. § 866, appellate defense counsel must, therefore, examine "the entire record."

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

United States v. May, 47 M.J. 478, 481, (C.A.A.F. 1998). The sealed materials referenced above must be reviewed to ensure undersigned counsel provides "competent appellate representation." *Id*. Accordingly, examination of these exhibits is reasonably necessary since undersigned counsel cannot fulfill her duty of representation under Article 70, UCMJ, 10 U.S.C. § 870, without first reviewing the complete record of trial.

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

Respectfully submitted,

KASEY W. HAWKINS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

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

KASEY W. HAWKINS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

22 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) TYRION N. DAVIS, USAF *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIAL ACM 40370 Panel No. 2

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

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

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

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

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 22 February 2023.

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 40370**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Tyrion N. DAVIS	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 16 February 2023, Appellant's counsel submitted a Motion to Examine Sealed Materials, requesting to examine Preliminary Hearing Officer (PHO) Exhibits 8, 9, 10, and 11; Appellate Exhibits XI, XII, XIII, XIV, XV, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, XXVII, XXX, XXXII, and XXXIV; and transcript pages 29–77.

Appellant's motion states the materials were reviewed by trial and defense counsel and sealed by the military judge or the PHO. Appellant's counsel avers that viewing the sealed materials is reasonably necessary to fulfill her duty of representation, since counsel cannot perform her duty of representation without first reviewing the complete record of trial.

The Government responded to the motion on 22 February 2023. It does not object to Appellant's counsel reviewing materials that were released to both parties at trial, as long as the Government can also review the sealed portions of the record as necessary to respond to any assignment of error that refers to the sealed materials.

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

Accordingly, it is by the court on this 2d day of March, 2023,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view **PHO Exhibits 8, 9, 10, and 11; Appellate Exhibits XI, XII, XIII, XIV, XV, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, XXVII, XXX, XXXII, and XXXIV; and transcript pages 29–77**, 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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT**
Appellee	)	**OF TIME (THIRD)**
	)	
v.	)	Before Panel No. 2
	)	
Senior Airman (E-4)	)	No. ACM 40370
TYRION N. DAVIS,	)	
United States Air Force	)	17 March 2023
Appellant	)	

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **1 May 2023**. The record of trial was docketed with this Court on 2 November 2022. From the date of docketing to the present date, 135 days have elapsed. On the date requested, 180 days will have elapsed.

From 13-23 June 2022, Appellant was tried by a general court-martial at RAF Lakenheath, United Kingdom. Contrary to his pleas, the panel of officer and enlisted members found Appellant guilty of one charge and one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §920. Record of Trial (ROT) Vol. 1, Entry of Judgment, dated 21 July 2022; *see also* R. at 1188-89. The panel acquitted Appellant of ten specifications of sexual assault and abusive sexual contact in violation of Article 120, UCMJ; one charge with one specification of aggravated assault and one specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. §928; and one charge with one specification of wrongful use of marijuana in violation of Article 112a, UCMJ, 10 U.S.C. §912a. *Id.* The same panel sentenced Appellant to be reduced to the grade of E-1, to be confined for 10 months, and to be discharged from the service with a dishonorable discharge. R. at 1256. The

convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. SrA Tyrion Davis*, dated 13 July 2022.

The record of trial is 11 volumes consisting of 40 prosecution exhibits, 20 defense exhibits, 69 appellate exhibits, and one court exhibit; the transcript is 1258 pages. Appellant is not currently confined.

Through no fault of Appellant, undersigned counsel has been unable to complete her review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

KASEY W. HAWKINS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 17 March 2023.

KASEY W. HAWKINS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

20 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) TYRION N. DAVIS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40370 Panel No. 2

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

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

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

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 20 March 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.

TYRION N. DAVIS,
Senior Airman (E-4),
United States Air Force
Appellant.

No. ACM 40370

BRIEF ON BEHALF OF APPELLANT

KASEY W. HAWKINS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

Counsel for Appellant

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**BRIEF ON BEHALF OF**
Appellee	)	**APPELLANT**
	)	
v.	)	Before Panel No. 2
	)	
Senior Airman (E-4)	)	No. ACM 40370
TYRION N. DAVIS,	)	
United States Air Force	)	17 April 2023
Appellant	)	

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

ASSIGNMENTS OF ERROR

I.

WHETHER APPELLANT'S CONVICTION FOR SEXUAL ASSAULT IS LEGALLY AND FACTUALLY SUFFICIENT?

II.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING UNDATED HANDWRITTEN NOTEBOOK PAGES FROM THE ALLEGED VICTIM AS PRIOR CONSISTENT STATEMENTS OVER A DEFENSE OBJECTION THAT THE MOTIVE TO FABRICATE PRECEDED THE CREATION OF THE NOTEBOOK?

III.

WHETHER THE MILITARY JUDGE ERRED BY GRANTING A GOVERNMENT CHALLENGE FOR CAUSE WHEN THE RECUSAL OF A SPECIFIC TRIAL COUNSEL WOULD HAVE CURED THE CHALLENGED MEMBER'S BIAS?

IV.

WHETHER THE MILITARY JUDGE ERRED BY DENYING THE DEFENSE CHALLENGE FOR CAUSE OF STAFF SERGEANT DMC?

V.

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

VI.

WHETHER THE MILITARY JUDGE ERRED IN FINDING A GOOD FAITH BASIS FOR THE GOVERNMENT TO ASK DEFENSE SENTENCING WITNESSES "HAVE YOUR HEARD" AND "DID YOU KNOW" QUESTIONS WHEN THE BASIS FOR THOSE QUESTIONS WAS AN OVERHEARD THIRD-PARTY REPORT THAT WAS DIRECTLY CONTRADICTED BY OTHER EVIDENCE?

VII.

WHETHER TRIAL COUNSEL'S SUGGESTION THE MEMBERS WOULD BE PERSONALLY RESPONSIBLE FOR ANY FUTURE MISCONDUCT COMMITTED BY APPELLANT IN SENTENCING ARGUMENT WAS IMPROPER?

STATEMENT OF THE CASE

From 13-23 June 2022, Senior Airman (SrA) Tyrion Davis, Appellant, was tried by a general court-martial at RAF Lakenheath, United Kingdom (UK). Contrary to his pleas, the panel of officer and enlisted members found SrA Davis guilty of one charge and one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920.[1] Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 21 July 2022; *see also* Record (R.) at 1188-89. The panel acquitted SrA Davis of ten specifications of sexual assault and abusive sexual contact in violation of Article 120, UCMJ; one charge with one specification of aggravated assault and one specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928; and one charge with one specification of wrongful use of marijuana in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. *Id.* The same panel sentenced Appellant to be reduced to the grade of E-1, to be confined for 10 months, and to be discharged from the service with a dishonorable discharge. R. at 1256. The convening authority took no

[1] Unless otherwise noted, all references to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*).

action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. SrA Tyrion Davis*, dated 13 July 2022.

STATEMENT OF FACTS

Background

SrA Davis joined the Air Force in December of 2016, and was stationed at RAF Lakenheath, UK, from June of 2017 until his court-martial in June of 2022. Prosecution Exhibit (Pros. Ex.) 36. In February of 2018, SrA Davis met CJD, a local British national, through a mutual friend, LCC. R. at 358-59. When CJD and SrA Davis met, LCC was dating SrA Davis's friend Staff Sergeant (SSgt) JV. R. at 569-70. SrA Davis and CJD began a dating and sexual relationship and were married in December of 2018. R. at 363. At the time of their wedding, CJD was eighteen years old and SrA Davis was twenty years old. R. at 375, Pros. Ex. 36. LCC and SSgt JV's relationship ended in early 2019. R. at 569. SrA Davis and CJD were still legally married at the time of his court-martial in June 2022. R. at 434.

CJD and SSgt JV

In June and July 2019, SrA Davis took CJD on a trip to the United States to visit his family in California. R. at 393. The day they flew back to the UK, CJD did not return home with SrA Davis. R. at 401. Instead, she immediately left on another flight—this time to Ibiza, Spain, with SSgt JV, whom she described as her "best friend at the time." R. at 401-402. SSgt JV and CJD traveled alone together to Ibiza. R. at 402. Despite being concerned that CJD was cheating on him with SSgt JV, SrA Davis encouraged CJD to go on the trip. R. at 403, 413, 426-27; Pros. Ex. 5 at 7. While in Ibiza, CJD and SSgt JV had sexual intercourse. R. at 403. However, CJD did not tell SrA Davis that she had cheated on him with SSgt JV. *Id.* In fact, CJD denied having sexual intercourse with SSgt JV until she testified at SrA Davis's court-martial. R. at 439-40;

Pros. Ex. 6 at 20. CJD was interviewed by both the prosecution and defense before SrA Davis's court-martial, and during those interviews she maintained that she did not have sex with SSgt JV in Ibiza. *Id.* The night before CJD testified in SrA Davis's court-martial, she spoke with SSgt JV and learned that he had been granted testimonial immunity. R. at 443-44. After that conversation, for the first time, CJD confessed to having sexual intercourse with SSgt JV in Ibiza. R. at 444. On cross-examination, CJD admitted that she had lied multiple times to conceal that she had sex with SSgt JV in Ibiza. R. at 441. She stated she lied because "it wasn't something [she] was proud of or something that [she] wanted to talk about," and because she did not want SSgt JV to get in trouble. R. at 494.

The Charged Offense

When CJD and SSgt JV returned from their trip to Ibiza around the end of July 2019, SSgt JV moved out of the dorms and into CJD and SrA Davis's home, as SSgt JV was outprocessing in preparation for a permanent change of station. R. at 404. CJD's friend, D, also stayed in their home during this time. *Id.* Since their return from America and her return from Ibiza, SrA Davis and CJD had not been in their home without houseguests. Pros. Ex. 5 at 3. SrA Davis missed his wife and was looking forward to having one-on-one time with her. Pros. Ex. 5 at 3, 4. SSgt JV left around 22 July 2019, but D remained at the Davis home. R. at 480. According to CJD, one evening around the time SSgt JV departed, SrA Davis wanted to have sex, but she did not. R. at 404, 480. She testified that they were in bed, and she told him she did not want to have sex. *Id.* She claimed that she told him no when he tried to touch her and rolled onto her side. *Id.* She stated that after cuddling for several minutes, he pushed her onto her back, got on top of her, inserted his penis into her vagina and had sex with her, despite her telling him to stop and pushing him away. *Id.* CJD explained that while SrA Davis was having sex with her, she laid still on her

back. R. at 408. After SrA Davis ejaculated, CJD went to the toilet, then got back in bed with SrA Davis and went to sleep. R. at 409. The next day, SrA Davis and CJD had consensual sex, but CJD could not recall the details of that consensual sexual encounter when she testified at SrA Davis's court-martial. *Id.* That was the last time CJD and SrA Davis ever had sex. R. at 414.

The End of SrA Davis and CJD's Relationship

According to CJD, she had a conversation with SrA Davis wherein she told him how the "nonconsensual" sex made her feel. R. at 414. SrA Davis "got pretty emotional" and told her that she "didn't say no in a tone of voice that made him think that [she] wanted to stop." *Id.* The couple "had a pretty long conversation about it." *Id.* CJD moved out of SrA Davis's home less than a week later, around the end of July 2019. *Id.*

On 10 August 2019, CJD admitted to SrA Davis that she had feelings for SSgt JV via Facebook Messenger.[2] Pros. Ex. 6 at 22. SrA Davis asked her if something happened in Ibiza, remarking that she had not shown him any attention since she returned from her trip with SSgt JV. Pros. Ex. 6 at 21. CJD denied anything happened between her and SSgt JV in Ibiza. Pros. Ex. 6 at 20. CJD also denied, multiple times, that her feelings for SSgt JV caused the end of her relationship with SrA Davis. Pros. Ex. 6 at 16, 20, 21. SrA Davis challenged her on these denials, observing that she had treated him differently since her return from Ibiza and that the change was sudden. Pros. Ex. 6 at 19. CJD doubled down on her denial that her relationship with SSgt JV had anything to do with their breakup and pointed to the "nonconsensual" sex as the cause of their

[2] Facebook Messenger was the primary means of communication SrA Davis and CJD used throughout their dating relationship and marriage. R. at 411. Pros. Ex. 5-12 are excerpts of their Facebook Messenger conversations. The messages in each exhibit are in reverse chronological order, with the beginning of the conversation on the last page of the exhibit. R. at 423. To read the conversations in order, one must begin at the bottom right corner of the last page and then work from the bottom right to the top left of each page. R. at 424.

marriage's demise. Pros. Ex. 6 at 21. In response to this, SrA Davis pointed out that he and CJD had never had a miscommunication during sex before she went to Ibiza with SSgt JV. Pros. Ex. 6 at 20. CJD had always been straightforward when she did not want to have sex and would "seriously" tell him to stop. *Id.* SrA Davis explained to CJD that she did not say "stop" like she meant it, but instead said stop in the way she often did when she did not actually want him to stop. Pros. Ex. 6 at 8, 19, 20. CJD agreed that the charged offense was a "miscommunication" and not intentional and acknowledged that she "should have been clearer" in her desires. Pros. Ex. 6 at 2, 3, 8. When SrA Davis told CJD "The way you're saying it is you're saying I raped you," CJD responded "That's not what I'm saying." Pros. Ex. 6 at 3, 4.

SrA Davis and CJD continued to discuss the alleged "nonconsensual" sexual encounter over the following months. CJD reassured SrA Davis multiple times that she understood "that it wasn't intentional," and that she knew he "didn't mean it the way it happened." Pros. Ex. 7 at 4, Pros. Ex. 9. In October of 2019, CJD told SrA Davis "I know that you didn't think I wanted to stop even though I said it four times and pushed you away because I didn't say it in a tone of voice that made you think I wanted to stop." Pros. Ex. 10 at 4.

On cross examination, CJD agreed that SrA Davis did not realize she wanted him to stop. R. at 488. CJD also admitted that, in the course of her relationship with SrA Davis, there were multiple times she would say "stop" but then continue with the same consensual sexual activity, or with another consensual sexual activity. R. at 488-89. CJD also testified that she had issues achieving an orgasm, as she had a reflex of pushing away during sex when she was close to climax. R. at 387, 460. She and SrA Davis had purchased and experimented with handcuffs to help her overcome this reflex of pushing away. R. at 460.

The Investigation into SrA Davis

In September of 2020, LCC informed CJD that SrA Davis had locked her in his house, drugged her, and raped her.[3] R. at 491. CJD was still dating SSgt JV (LCC's ex-boyfriend) when LCC contacted her. R. at 490. LCC provided CJD with contact information for the Air Force Office of Special Investigations (AFOSI). R. at 491. After hearing from LCC, CJD contacted AFOSI and reported that SrA Davis sexually assaulted her on multiple occasions during their relationship and nonconsensually strangled her once.[4] R. at 491-92.

Additional facts are included in the relevant assignments of error below.

ARGUMENT

I.

APPELLANT'S CONVICTION FOR SEXUAL ASSAULT IS LEGALLY AND FACTUALLY INSUFFICIENT.

Standard of Review

Under Article 66(d), UCMJ, *Manual for Courts-Martial, United States* (2019 ed.) (*2019 MCM*), this Court can only approve findings of guilty that it determines to be correct in both law and fact. Issues of legal and factual sufficiency are reviewed *de novo*. *See United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [the Court is]

[3] LCC's allegations formed the basis for Specifications 6-11 of Charge I, and Specification 2 of Charge II. *See* ROT Vol. 1, EOJ. SrA Davis was acquitted of all specifications involving LCC. *Id.*

[4] CJD's allegations against SrA Davis were charged in Specifications 1-5 of Charge I and Specification 1 of Charge II. *See* ROT Vol. 1, EOJ. SrA Davis was acquitted of all but Specification 5 of Charge I.

convinced of [the appellant's] guilt beyond a reasonable doubt." *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). In weighing factual sufficiency, this Court takes "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Wheeler*, 76 M.J. at 568 (quoting *Washington*, 57 M.J. at 399). As the C.A.A.F. explained:

> Essentially, the Court of Military Review [now Court of Criminal Appeals] provides a *de novo* trial on the record at appellate level, *with full authority to disbelieve the witnesses*, determine issues of fact, approve or disapprove findings of guilty, and, within the limits set by the sentence approved below, to judge the appropriateness of the accused's punishment.

United States v. Leak, 61 M.J. 234, 244 (C.A.A.F. 2005) (quoting *United States v. Crider*, 46 C.M.R. 108, 111 (C.M.A. 1973)) (emphasis added).

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

In order to convict SrA Davis of sexual assault, the members had to find beyond a reasonable doubt (1) that SrA Davis committed a sexual act upon CJD; and (2) that SrA Davis did so without CJD's consent. *MCM*, pt. IV, ¶ 60.b.(2)(d). Mistake of fact is a defense to sexual assault. R. at 1053; R.C.M. 916(j). The prosecution had the burden of proving beyond a reasonable doubt that the defense of mistake of fact did not exist. R. at 1054; R.C.M. 916(b)(1).

Analysis

SrA Davis is entitled to relief on legal and factual sufficiency grounds. The evidence adduced at trial demonstrates that CJD fabricated the non-consensual nature of the sexual encounter such that this Court cannot be convinced of SrA Davis's guilt beyond a reasonable doubt. Even if CJD did not fabricate her lack of consent, no reasonable fact finder could have found beyond a reasonable doubt that SrA Davis did not mistakenly believe that CJD consented.

A. CJD's Motive to Fabricate

CJD fell in love with SrA Davis's friend and needed a way out of their marriage. SrA Davis had long suspected that something was going on between CJD and SSgt JV. R. at 403, 413, 426-27; Pros. Ex. 5 at 7; Pros. Ex. 6 at 18. His suspicions were heightened when CJD returned from her trip to Ibiza with SSgt JV and became distant; and then confirmed when CJD left SrA Davis and admitted to him that she had feelings for SSgt JV. Pros. Ex. 5 at 4; Pros. Ex. 6 at 22. Accusing SrA Davis of sexual assault enabled CJD to change the narrative from unfaithful wife to victim. No one could fault CJD for leaving SrA Davis if he sexually assaulted her, and they would certainly not question the speed with which she coupled with SSgt JV if she was a "victim" of sexual assault.

The evolution of CJD's story is illustrative. According to CJD, she and SrA Davis had consensual sex the day after the alleged nonconsensual sex. R. at 409. Following that consensual encounter, on 23 July 2019, CJD and SrA Davis exchanged messages about how CJD was "sore" after the sex. Pros. Ex. 5 at 2-3; R. at 413-14. CJD did not accuse SrA Davis of any nonconsensual behavior at this point. She did not attribute her "soreness" to a sexual assault. In fact, consensual sex was often painful for CJD during her relationship with SrA Davis. R. at 452. When SrA Davis expressed concern that CJD was in pain, she told him that everything was "fine," that he did not "make [her] do anything," and to "stop making it a big deal." Pros. Ex. 5 at 2-3. CJD testified

that sometime after this message exchange, in late July, CJD told SrA Davis about how the alleged "nonconsensual" sex made her feel and then she moved out. R. at 414. On 10 August 2019, CJD confessed to SrA Davis that she had feelings for SSgt JV. Pros. Ex. 6 at 22. At this point, she still agreed with SrA Davis that what she called "nonconsensual" sex was "just a miscommunication" and not intentional. Pros. Ex. 6 at 3. However, as SrA Davis became more suspicious and began to press CJD about the overlap of her leaving him and developing feelings for SSgt JV, her narrative began to shift. When it became clearer to SrA Davis that CJD had cheated on him with SSgt JV, CJD began to paint what was originally a "miscommunication" as a more forceful sexual assault. *Compare* Pros. Ex. 6 at 3 *with* Pros. Ex. 10 at 4 ("what you did that night fucked me up . . . . I am still getting nightmares from it.").

As word spread that CJD had cheated on SrA Davis before leaving him, she used the victim narrative to deflect judgment from others as well. CJD was upset that SrA Davis was telling people that she had been cheating on him for months. For example, CJD messaged:

> So many people think that I am a terrible person now . . . . It caused so many issues, especially with [LCC]. . . the things that [LCC] is saying about me now also isn't fair. I had nothing to do with her and [SSgt JV] splitting up, but she is now saying that [SSgt JV] and I were sleeping together this whole time . . .

Pros. Ex. 10 at 5. CJD then spun an unfortunate marital miscommunication into a sexual assault, telling SSgt JV and her mother that SrA Davis sexually assaulted her.[5] R. at 485. CJD's motive to avoid the truth persisted, and when LCC informed her that LCC had accused SrA Davis of sexual assault, CJD had an opening to get back into LCC's good graces. R. at 491. CJD joined LCC's case against SrA Davis, and in doing so rectified her relationship with LCC such that at the time of the court-martial, they were back on amicable terms. R. at 571.

[5] CJD's mother testified at the court-martial and denied that CJD told her she had been sexually assaulted before CJD reported to AFOSI. R. at 564.

CJD's desire to appear as a victim and not as an adulteress was so strong that she denied having sexual intercourse with SSgt JV in Ibiza continuously up until SrA Davis's court-martial. R. at 439-40. It was only when she learned that SSgt JV planned to truthfully testify about when their sexual relationship started that she came clean. R. at 443-44. CJD made clear that she lied because "it wasn't something that [she] was proud of," further proof of her desire to change the story from cheating wife to sexual assault victim. R. at 494.

Bearing in mind CJD's motive to fabricate and how it shaped her retelling and eventual reporting of the charged offense, this Court cannot be convinced beyond a reasonable doubt that she did not consent to the sexual encounter. Moreover, considering her willingness to lie to protect her own reputation, CJD's testimony lacks credibility such that it cannot be relied upon to prove lack of consent. As CJD's testimony was the Government's only proof that she did not consent to the sexual encounter, no reasonable finder of fact could find that she did not consent beyond a reasonable doubt.

B. SrA Davis's Reasonable Mistake of Fact

CJD's credibility issues notwithstanding, even if her testimony is to be believed, SrA Davis had a reasonable mistake of fact as to consent and is not guilty of sexual assault. The readiest demonstration of SrA Davis's reasonable mistake of fact is found in the myriad messages exchanged between the couple. From the beginning, CJD agreed that the entire encounter was a miscommunication. Pros. Ex. 6 at 3, 8. The word "miscommunication" indicates a mistaken understanding—in this case, SrA Davis mistook that his wife was not consenting to the sexual encounter. Her initial characterization was closest in time to the charged offense and is therefore the most accurate account of the event. Moreover, these were private messages between spouses which CJD had no intention of using as evidence against SrA Davis in a court-martial, making

them more reliable than her description of the event after she had time to rationalize and develop her accusations to fit her "victim" narrative. R. at 487. The fact that CJD initially agreed that SrA Davis did not understand her lack of consent shows that SrA Davis's mistake of fact was reasonable. Pros. Ex. 6 at 2, 3, 8.

SrA Davis's mistake of fact as to consent is even more reasonable when put in the context of his sexual relationship with CJD. CJD and SrA Davis were very young when they got married, and CJD admitted she was sexually inexperienced. R. at 368. CJD had difficulty dealing with intense pleasure during sex and would often reflexively push SrA Davis away as she approached orgasm. SrA Davis was aware of this, and they were working together, as husband and wife, to overcome this and get her to climax. R. at 460. Therefore, even if CJD pushed SrA Davis away as she claimed, he could very reasonably believe that, like previous instances, that pushing away did not actually mean she wanted him to stop. Similarly, CJD often said "no" or "stop" before and during sex with SrA Davis without meaning it. She would say "no" and then continue participating in the same or other sexual activity. R. at 489. Thus, it was reasonable for SrA Davis to believe that, just like on previous occasions, CJD was consenting to the sexual activity. The messages between CJD and SrA Davis reveal that, based upon their prior sexual history, there was a certain tone and forcefulness required of her "no" or "stop" for SrA Davis to understand that she was revoking or withholding consent to the sexual conduct. The messages also show that CJD did not use that tone during the alleged "nonconsensual" sexual encounter, making it reasonable that SrA Davis did not understand that CJD did not consent. Finally, CJD's testimony at trial demonstrated that she was incredibly quiet, as she had to be asked to speak up or verbalize her answers no less than 15 times. R. at 357, 359, 372, 393, 410, 412, 417, 439, 462, 463, 465, 474, 481, 494, 535. While CJD claimed she told SrA Davis no four times during the alleged sexual

assault, it is entirely plausible that he did not hear her given her soft-spoken nature. Pros. Ex. 10 at 4.

CJD's testimony was the only evidence the government presented to prove her claim of sexual assault. Her motive to fabricate and her admitted lies preclude a finding that SrA Davis sexually assaulted her beyond a reasonable doubt. On the other hand, if this Court finds CJD to be credible, a thorough review of her testimony and her statements in the weeks following the alleged sexual assault lead to a conclusion that her allegation was the result of an unfortunate marital miscommunication, and SrA Davis possessed a reasonable mistake of fact as to her consent.

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

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING UNDATED HANDWRITTEN NOTEBOOK PAGES FROM THE ALLEGED VICTIM AS PRIOR CONSISTENT STATEMENTS OVER A DEFENSE OBJECTION THAT THE MOTIVE TO FABRICATE PRECEDED THE CREATION OF THE NOTEBOOK.

Additional Facts

During redirect of CJD, the Government moved to admit Pros. Ex. 13 into evidence. R. at 499. CJD testified that Pros. Ex. 13 was a "journal" that she wrote sometime after Christmas of 2019 but before May or June of 2020. *Id.* The Defense objected on hearsay grounds. R. at 500. Trial Counsel responded that the journal was a prior consistent statement and therefore not hearsay pursuant to Mil. R. Evid. 801(d)(1)(B)(i) and (ii). *Id.* The Defense countered that CJD's motive to fabricate started in mid-July 2019, when CJD began her sexual relationship with SSgt JV, and that any statement offered under Mil. R. Evid. 801(d)(1)(B)(i) would have to have been made prior

to mid-July 2019 to qualify as a prior consistent statement. R. at 508. Trial Counsel argued that the Defense raised multiple motives to fabricate during their cross examination of CJD, and that a prior consistent statement need only precede the motive it is offered to rebut. R. at 509. Trial Counsel contended that the defense implied a motive to fabricate by pointing out that CJD did not report the sexual assault until after learning of LCC's alleged sexual assault, and that the journal predates CJD learning about LCC's report in August of 2020. R. at 510. Defense Counsel clarified that the report from LCC did not provide any motive to lie. R. at 511. Rather, the motive to lie and the lie began in July of 2019, and LCC's report did not provide any fresh motivation to lie but merely brought the lie forward to a new forum. *Id.* Defense Counsel argued:

> [T]here is but one motive to fabricate. That is created when [CJD] started taking up with her husband's good friend and decided to leave her husband for the good friend. Her motive was self-preservation, whether through appearance and reputation, essentially, and is more palatable to leave your husband because he was sexually abusing you, rather than, I just like his friend better. That is the motive to fabricate.

R. at 519.

The Defense further objected under Mil. R. Evid. 403, pointing to the "journal's" low probative value, given that it was handwritten, undated, and not actually an ongoing journal or diary because her allegations against SrA Davis were the only things CJD wrote in the notebook. R. at 523-24. Trial Counsel responded that argument concerned the weight of the evidence and not its admissibility. R. at 527.

The military judge ultimately admitted Pros. Ex. 13 under Mil. R. Evid. 801(d)(B)(i), with some redactions. R. at 532, 540-41. The military judge found the Defense raised two motives for CJD to fabricate, including explaining "why she was with [SSgt JV]" and "to support [LCC's] allegations." R. at 531. With regard to LCC, the military judge opined that Defense Counsel's cross-examination implied that CJD was motivated to say she was a victim and report only because

LCC had reported a sexual assault, or that CJD had some other ulterior motive and fabricated the allegation at that time. *Id.* The military judge found that the statements in Pros. Ex. 13 were "generally consistent to rebut a recent motive to fabricate that [CJD] did not make these allegations until she found out about [LCC's] allegations." R. at 532. The military judge later clarified that an additional motive to fabricate or improper influence raised by the Defense was "collusion with [SSgt JV]" immediately before CJD's testimony. R. at 551. The military judge found that Pros. Ex. 13 "would precede that improper influence" but explained that he admitted Pros. Ex. 13 "to rebut the express or implied charge that [CJD] had recently fabricated or acted from a recent improper influence, and that being [LCC's] allegations." *Id.*

On cross-examination, CJD admitted that the notebook containing Pros. Ex. 13 was not an ongoing journal—there were no prior entries in the notebook, and the first page of Pros. Ex. 13 was the first page of the notebook. R. at 542-43. She agreed that the last page of Pros. Ex. 13 was the last thing she wrote in the notebook. R. at 543. CJD also acknowledged that the notebook was not dated, and there was no way to verify when it was written. R. at 544. CJD admitted that she brought the notebook to her interview with AFOSI and referenced it while making allegations against SrA Davis. R. at 544-45. AFOSI did not keep the notebook as evidence and returned it to CJD after making photocopies. R. at 545-46.

Standard of Review

A preserved objection to the admission of evidence is reviewed for an abuse of discretion. *United States v. Norwood*, 81 M.J. 12, 17 (C.A.A.F. 2021). "The military judge's decision constitutes an abuse of discretion if his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or [his decision] is outside the range of choices

reasonably arising from the applicable facts and the law." *Id*. (alteration in original & internal quotations omitted).

Law

In *United States v. Finch*, the Court of Appeals for the Armed Forces (CAAF) reviewed the scope of admissibility for prior consistent statements. 79 M.J. 389 (C.A.A.F. 2020). The CAAF held "the prior consistent statement must serve one of the express purposes cited by Mil. R. Evid. 801(d)(1)(B): it must either rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or it must rehabilitate the declarant's credibility 'when attacked on another ground.'" *Id*. at 391.

Finch stepped through a Mil. R. Evid. 801(d)(1)(B) analysis. Actual consistency is a threshold requirement, and this has been interpreted to mean "generally consistent." *Id*. at 394 (*citing United States v. Muhammad*, 512 F. App'x 154, 166 (3d Cir. 2013)). Next, if generally consistent, the statement could be admitted as non-hearsay if "offered 'to rebut an express or implied charge that the declarant recently fabricated [the in-court testimony] or acted from a recent improper influence or motive in so testifying.'" *Id*. at 395; *see also* Mil. R. Evid. 801(d)(1)(B)(i). The prior consistent statement must occur before the improper influence. *See United States v. Frost*, 79 M.J. 104, 111 (C.A.A.F. 2019) ("Statements made *after* an improper influence arose do not rehabilitate a witness's credibility." (emphasis in original)). "[W]here multiple motives to fabricate or multiple improper influences are asserted, the statement need not precede all such motives or inferences, but only the one it is offered to rebut." *Id.* at 110. Alternatively, if the threshold requirement of actual consistency has been met, the statement may be offered as non-hearsay if offered "to rehabilitate the declarant's credibility as a witness when attacked on another ground." *Finch*, 79 M.J. at 395; *see also* Mil. R. Evid. 801(d)(1)(B)(ii).

When evidence was erroneously admitted at trial, this Court must determine whether the error materially prejudiced the Appellant's substantial rights. *See* Article 59(a), UCMJ, 10 U.S.C. § 859(a). The Government "bears the burden of demonstrating that the admission of erroneous evidence is harmless." *United States v. Flesher*, 73 M.J. 303, 318 (C.A.A.F. 2014). "For [preserved] nonconstitutional evidentiary errors, the test for prejudice is whether the error had a substantial influence on the findings." *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (citation omitted) (internal quotation marks omitted). "In conducting prejudice analysis, this Court weighs: (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *Id.* (citations omitted) (internal quotation marks omitted).

Analysis

The military judge erred in finding the journal entries in Pros. Ex. 13 preceded CJD's motive to fabricate, and that error prejudiced SrA Davis. The military judge's error in admitting the journal, which was used as substantive evidence, had a substantial influence on the findings because the Government's case was otherwise very weak, and the materiality and quality of the journal entries were essential for achieving the conviction.

A. The "journal" is not a prior consistent statement.

CJD had only one motive to fabricate—to portray herself as a victim of sexual assault rather than as a cheating wife. CJD admitted this herself on the stand when she said she lied about having sex with SSgt JV in Ibiza because "it wasn't something that [she] was proud of." R. at 494. This motivation preceded the creation of the "journal" sometime between Christmas 2019 and May of 2020. Therefore, the journal is not a prior consistent statement. The motivation to lie formed when CJD left SrA Davis for SSgt JV in late July 2019. The motivation was solidified no

later than 10 August 2019 when SrA Davis confronted CJD with the accusation that CJD left SrA Davis because "something" happened with SSgt JV in Ibiza. Pros. Ex. 6 at 21. From then on, CJD was motivated to deflect the truth—that she was an adulteress—by weaving a story where she was a victim. Her motivation did not change as she told different people the story. She wanted SSgt JV, her mother, LCC, and AFOSI to all believe that she was justified in leaving SrA Davis for SSgt JV. Telling the same lie based on the same motive to different people does not create a different or new motive to fabricate.

The Defense's theory of the case raised only a single motive to fabricate—the motive of "self-preservation . . . through appearance and reputation" because it is "more palatable to leave your husband because he was sexually abusing you, rather than, I just like his friend better." R. at 519. The military judge's determination that the Defense raised multiple motives to fabricate was erroneous. The Defense's opening statement focused on the timing of CJD going to Ibiza with SSgt JV, leaving SrA Davis, and then beginning a relationship with SSgt JV. R. at 353. The opening statement did not insinuate that LCC influenced CJD's allegations of sexual assault in any way. In closing argument, in discussing LCC's contact with CJD before CJD reported to AFOSI, the Defense did not allege that LCC improperly influenced CJD's report, but rather that CJD continued her false narrative, initiated in July of 2019. R. at 1139. Furthermore, Defense Counsel's cross examination did not raise an additional motive to fabricate when they questioned CJD about learning that LCC had accused SrA Davis of sexual assault. Defense Counsel did not insinuate that CJD's story changed after hearing from LCC, or that she fabricated her allegations of sexual assault after LCC's report. When LCC contacted CJD in August of 2020, CJD was still in a relationship with SSgt JV, LCC's ex-boyfriend. R. at 490. At that time, CJD was operating under the same motivation to fabricate that began in July of 2019. CJD wanted to portray herself

to LCC not as a cheater who coupled up with her ex-boyfriend, but as an abused wife who was rescued by her relationship with SSgt JV. The fact that LCC's contact with CJD in August of 2020 did not provide any new motivation to fabricate is confirmed by the Government's own evidence. On 28 October 2019, CJD messaged SrA Davis that she was angry with him because he told people she had cheated on him with SSgt JV, and it had caused issues with LCC. Pros. Ex. 10 at 5. CJD complained that LCC was saying negative things about CJD, including that CJD had never been a good friend because CJD was sleeping with LCC's ex-boyfriend. *Id.* CJD was motivated to fabricate in October of 2019 to prove to LCC she was not just a cheater but instead a sexually abused wife. When LCC contacted her in August of 2020, it did not give her any new motive to fabricate but gave her an opportunity to act on the motive she harbored for almost a year. The military judge's finding that LCC's contact gave her a new motive to fabricate is not supported by the record.

This case is similar to *United States v. Frost*. In *Frost*, the military judge admitted the initial statement of the alleged victim as a prior consistent statement, finding that the defense had alleged an improper influence on the alleged victim by her psychotherapist during counseling sessions and that the initial statement predated the alleged improper influence. 79 M.J. at 109-110. However, the defense's sole theory in the case was that it was the alleged victim's mother who improperly influenced the alleged victim's testimony, and that the improper influence occurred prior to the initial statement. *Id.* at 111. The CAAF analyzed the defense's approach during opening statement, questioning, and closing argument and held "the military judge made a clearly erroneous finding of fact" when he determined that the defense had alleged improper influence by the psychotherapist. *Id.* This case is analogous in that the Defense's theory in opening statement, cross-examination, and closing argument was that CJD was motivated to

fabricate the sexual assault because of her concern that she looked like an adulteress when she left SrA Davis for SSgt JV. As in *Frost*, this motivation to fabricate preceded the offered prior consistent statement, and the military judge's determination otherwise was clearly erroneous.

Additionally, while the military judge clarified that he did not admit Pros. Ex. 13 because of an implication that CJD's testimony was improperly influenced by her discussion with SSgt JV the week of the court-martial, that discussion could not serve as a motive to fabricate or an improper influence on testimony because the facts show that it motivated CJD to tell the truth about her relationship with SSgt JV. CJD agreed that after her conversation with SSgt JV, she "changed [her] story" to finally tell the *truth*—that she had sexual intercourse with SSgt JV in Ibiza. R. at 444. Thus, the military judge could not, and this court cannot, find that CJD's conversation with SSgt JV provided a motive to fabricate or improperly influenced her testimony to support the admission of Pros. Ex. 13 as a prior consistent statement.

Finally, the characteristics of Pros. Ex. 13 and CJD's testimony demonstrate that it was created after CJD had a motive to fabricate. CJD testified that she was unsure when she wrote the "journal," but it was sometime between Christmas of 2019 and the end of May 2020. The pages are handwritten and undated and appear to all have been written in one sitting. *See* Pros. Ex. 13. She admitted that the first page of Pros. Ex. 13 was the first page of the notebook, and that the last page of the exhibit was the last thing she wrote in the notebook. R. at 542-43. These were not journal entries that she recorded close in time to the alleged events, but her post-reflection narrative of different interactions that she wanted to portray as sexual assaults. No evidence but her testimony supports a finding that the exhibit was written when she claims, and her credibility was questionable at best. Considering that she brought the notebook to AFOSI and referenced it throughout her interview, it is apparent CJD wrote the notebook in order to plan her allegations

against SrA Davis *after* she had the motive to fabricate. This considerably diminishes the reliability of the exhibit and further proves that it does not qualify as a prior consistent statement.

B. Admission of the "journal" materially prejudiced SrA Davis.

The admission of Pros. Ex. 13 prejudiced SrA Davis. The notebook was admitted not just to rehabilitate CJD's credibility, but also as substantive evidence of her claims of sexual assault which the members were permitted to consider as evidence of truth of the matters asserted therein. R. at 1062. Pros. Ex. 13 gave the members a written, hard copy depiction of CJD's story that went with them into the deliberation room. The fact that the members took a handwritten memorialization of CJD's narrative into the deliberation room, and were able to use it for the truth of the matter asserted, increases the materiality and quality of Pros. Ex. 13. While Defense Counsel was able to cross-examine CJD on the characteristics of the notebook that made it appear untrustworthy, the military judge's admission of Pros. Ex. 13 indicated an endorsement of the exhibit to the members. R. at 543-45.

As discussed in Issue I above, the Government's case was not strong. This is also demonstrated by the panel's acquittal of SrA Davis on all but Specification 5 of Charge I. CJD was the sole witness who provided testimony regarding that specification. The Defense's case centered on CJD's lack of credibility and her motive to fabricate. The admission of Pros. Ex. 13 undermined this defense as it improperly rehabilitated CJD with a statement that was not made prior to the motive to fabricate. Circuit Trial Counsel compounded this prejudice by repeatedly arguing how Pros. Ex. 13 corroborated CJD's story, claiming the notebook "speaks volumes about her credibility and truthfulness." R. at 1080, 1083-84. Circuit Trial Counsel's arguments also demonstrate the materiality of Pros. Ex. 13, as the Government relied on this evidence to achieve a conviction despite CJD's glaring credibility issues.

CJD had only one motive to fabricate—she wanted to appear as an abused wife instead of the adulteress she became when she began her relationship with SSgt JV. This motive to fabricate continued, unchanged, from July of 2019 until her testimony at trial. Therefore, the "journal" entries in Pros. Ex. 13 were not made prior to any motive to fabricate and should not have been admitted as prior consistent statements. The erroneous admission of Pros. Ex. 13 materially prejudiced SrA Davis because the exhibit provided the members with a tangible recitation of CJD's allegations, and the Government relied on the notebook to bolster their weak case.

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

III.

THE MILITARY JUDGE ERRED IN GRANTING A GOVERNMENT CHALLENGE FOR CAUSE BASED UPON THE CHALLENGED MEMBER'S BIAS AGAINST A SPECIFIC TRIAL COUNSEL WHOSE REMOVAL FROM THE PROSECUTION TEAM WOULD HAVE REMEDIED THE MEMBER'S BIAS.

Additional Facts

During group *voir dire*, Maj NS answered in the affirmative when asked if anyone "thinks that he or she, for any reason at all, may not be able to give this accused or the United States a fair trial." R. at 214-15. In individual *voir dire*, Maj NS elaborated that he "could" have a bias against the government based on a previous case where he served as a member. R. at 215. Maj NS stated he was "unhappy with the method and way the U.S. government represented the case." *Id.* He explained that he served as a panel member in an administrative separation board, and he did not feel the Government proved the knowledge requirement for use of a controlled substance, but the member was still separated, leaving him with the impression that the accused was not given a fair

hearing. R. at 215-16. Maj NS stated the board was a few weeks prior to SrA Davis's court-martial and was fresh in his memory. R. at 216.

The military judge asked for counsel's assessment on whether there was any reason to continue *voir dire* of Maj NS or if both sides would agree to a challenge for cause. R. at 218. The Government expressed intent to challenge Maj NS for cause, but the Defense did not agree. *Id.* Defense Counsel explained that it sounded like Maj NS would actually "hold the government to their burden." *Id.* During further individual *voir dire* by Defense Counsel, Maj NS clarified that a member of the Government's trial team, Capt CA, was the Government Recorder in the administrative separation board, and was the source of his bias. R. at 219. Maj NS stated that if Capt CA was removed from the trial team, he would consider all of the evidence the prosecution presented "fairly and openly." *Id.* Maj NS agreed he would consider the evidence independently, follow the judge's instructions, and deliberate openly with the other members. R. at 220. Maj NS said that if Capt CA was removed from the court-martial, he could give both sides a fair trial. *Id.* Finally, Maj NS agreed that he would hold the government to their burden but not require anything further. R. at 221-22.

The Government challenged Maj NS for actual and implied bias. R. at 309. The Defense objected. *Id.* The Defense pointed out that Maj NS's bias was only against Capt CA, and not against the United States as a whole. R. at 312. The Defense further argued that the Government could remedy Maj NS's bias by removing Capt CA from the trial team. R. at 312-13. Circuit Defense Counsel asked Capt CA to recuse herself from the case, but she refused. R. at 313.

The military judge granted the Government's challenge for implied bias. R. at 316. The military judge reasoned that an objective public observer would have substantial doubt as to the fairness of the proceeding, focusing on Maj NS's demeanor and body language. *Id.* The military

judge characterized Maj NS as being "put out" and not happy to be on the panel. *Id.* The military judge expressed that he was "not totally convinced" of Defense Counsel's position that if Capt CA were removed from the trial team, Maj NS's bias would be resolved. R. at 317.

Standard of Review

This Court reviews rulings on challenges for implied bias under "a standard that is less deferential than abuse of discretion, but more deferential than *de novo* review." *United States v. Hennis*, 79 M.J. 375, 385 (C.A.A.F. 2020) (quoting *United States v. Dockery*, 76 M.J. 91, 96 (C.A.A.F. 2017)).

Law

"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). R.C.M. 912(f)(1)(N) provides that "[a] member shall be excused for cause whenever it appears that the member . . . should 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 "encompasses challenges based upon both actual bias and implied bias." *United States v. Elfayoumi*, 66 M.J. 354, 356 (C.A.A.F. 2008).

"Actual and implied bias are 'separate legal tests, not separate grounds for a challenge.'" *United States v. Nash,* 71 M.J. 83, 88 (C.A.A.F. 2012) (quoting *United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000)). "The test for actual bias is whether any personal bias 'is such that it will not yield to the evidence presented and the judge's instructions.'" *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997) (internal citations and quotation marks omitted). "Because a challenge based on actual bias involves credibility judgments, and because the military judge has an opportunity to observe the demeanor of court members and assess their credibility

during voir dire, a military judge's ruling on actual bias is afforded great deference." *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007) (internal citations and quotations omitted).

"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). 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). 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)). "While cast as a question of public perception, this test may well reflect how members of the armed forces, and indeed the accused, perceive the procedural fairness of the trial as well." *United States v. Castillo*, 74 M.J. 39, 42 (C.A.A.F. 2015) (quoting *United States v. Peters*, 74 M.J. 31, 34 (C.A.A.F. 2015)).

Military judges are "mandated to err on the side of granting a challenge." *Peters*, 74 M.J. at 34. "This is what is meant by the liberal grant mandate." *Id.* (citing *United States v. Rome,* 47 M.J. 467, 469 (C.A.A.F. 1998)). However, the liberal grant mandate does not apply to challenges for cause brought by the Government. *United States v. Rodriguez-Rivera*, 63 M.J. 372, 382-83 (C.A.A.F. 2006) (citing *United States v. James*, 61 M.J. 132, 139 (C.A.A.F. 2005)).

"[P]rosecutors are fungible; and procedures are readily available to compensate for their unavoidable absences during a trial." *United States v. Royster*, 42 M.J. 488, 490 (C.A.A.F. 1995).

Analysis

The military judge erred in granting the Government's challenge for cause of Maj NS. The only reason that Maj NS had any bias was because he disagreed with the approach of Capt CA, a

single member of the three-person trial team, in a completely separate hearing. R. at 314. Maj NS agreed that, had Capt CA been removed from the prosecution, he could give both sides a fair trial. R. at 220. Even if Capt CA had stayed on the prosecution team, Maj NS believed he could give the United States a "full, fair and impartial hearing." R. at 225.

In granting the Government's challenge for cause, the military judge enabled the Government to have their cake and eat it too. The Government, through the Convening Authority, selected Maj NS to serve on the panel. *See* ROT Vol. 1, Special Order A-17, dated 11 February 2022. The Government, through the Staff Judge Advocate, detailed Capt CA to the court-martial. R. at 2. Maj NS was a perfectly qualified panel member, but for his issues with Capt CA. Removal of Capt CA as trial counsel would have completely remedied any bias. Trial counsel are fungible, and in these circumstances, there was no reason Capt CA could not have been removed from the trial team. The trial team was led by an experienced Circuit Trial Counsel – "one of the most senior prosecutors the Air Force has." R. at 314. The Circuit Trial Counsel had the assistance of another local trial counsel. R. at 2, 315. The Staff Judge Advocate could have detailed another base level trial counsel if needed. Instead, the legal office chose to keep Capt CA on the trial team, cementing Maj NS's bias and ensuring he would be removed from the panel. Maj NS professed that he would hold the Government to their burden, but not require more than that. R. at 221-22. By keeping Capt CA on the trial team and guaranteeing Maj NS's removal from the panel, the Government created a situation where an outside observer would question the fairness of our justice system as the Government effectively eliminated a member who had expressed that he would hold the Government to its high burden of proving the charges beyond a reasonable doubt. When the Government was able to easily remedy this issue, a member of the public would find it offensive that the Government failed to do so, thus, leading to the removal of a perfectly qualified

panel member chosen to serve on SrA Davis's panel by the convening authority. Therefore, the military judge's decision to grant the Government's challenge for cause was error.

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

IV.

THE MILITARY JUDGE ERRED BY DENYING THE DEFENSE CHALLENGE FOR CAUSE OF STAFF SERGEANT DMC.

Additional Facts

During group *voir dire*, SSgt DMC stated she was aware of the charges in SrA Davis's case. R. at 119-20. SSgt DMC worked promotions at the Military Personnel Flight and became aware of the charges against SrA Davis when updating his record to prevent him from promoting. R. at 301. SSgt DMC did not ask for any additional information about the case before updating SrA Davis's record. *Id.*

SSgt DMC's husband was sexually assaulted by a family member during his childhood. R. at 300. SSgt DMC learned about her husband's sexual assault at the beginning of their marriage, five years before SrA Davis's court-martial. *Id.* Her husband's sexual assault had also been a topic of discussion about a year prior to the court-martial during couple's counseling. *Id.* SSgt DMC stated that her husband's victimization had an impact on their marriage because it caused communication issues which caused a strain on their relationship. R. at 302-303. At the time of trial, SSgt DMC said she "believed" those communication issues were resolved but then clarified that while "it's a lot better than it was before" the couple was still "working." R. at 303. SSgt DMC denied that her husband's sexual assault was something she thought about on a routine basis and claimed that seeing the charges in SrA Davis's case did not make her think about her husband's situation. R. at 300, 303.

SSgt DMC was pregnant and less than three weeks from her due date during SrA Davis's court-martial. R. at 299 (SSgt DMC stated her due date was 5 July 2022, and opening statements took place on 16 June 2022). She informed the military judge that if required to sit for more than two hours, she got "a little tired" and had to stand up. *Id.* She also informed the parties that she had a prenatal medical appointment scheduled during the court-martial. R. at 304. Nonetheless, she did not think her pregnancy would interfere with her paying attention to the proceedings and following the military judge's instructions. R. at 303. SrA Davis's court-martial lasted for 6 days, including being in session on a holiday.[6] It was quite warm in the courtroom, and the military judge authorized the members to remove their service coats. R. at 492, 711. On the day the findings were announced, 22 June 2022, the members began hearing instructions and argument at 0854, had a lunch break from 1212-1315, closed for deliberations at 1543, and announced their findings at 2201. R. at 1037, 1122-23, 1182, 1187. Taking into account their lunch recess, the members were in court for more than twelve hours that day and deliberated for more than six hours.

The Defense challenged SSgt DMC for cause on the basis of implied bias due to her experience with her husband being a victim of sexual assault and her late stage of pregnancy and invoked the liberal grant mandate. R. at 321. Trial Counsel objected to the challenge. *Id.* The military judge denied the Defense challenge for cause, finding that SSgt DMC's husband's sexual assault was not "in the forefront of her mind" and that while she had "some exposure to the verbiage" of the charges against SrA Davis, it was just in her "professional capacity to ensure that the accused was not promoted." R. at 324. The military judge did not comment on SSgt DMC's pregnancy during his initial ruling on the challenge, but later added that the did not think the

[6] Court was in session on 16 June 2022 (R. at 338-548), 17 June 2022 (R. at 552-753), 20 June 2022 (a holiday) (R. at 756-923), 21 June 2022 (R. at 966-1018), 22 June 2022 (R. at 1037-1189), and 23 June 2022 (R. at 1208-1256).

proximity to her due date was a compelling argument. R. at 326. SSgt DMC and one other SSgt were the most junior members on the panel. R. at 326.

Standard of Review

This Court reviews rulings on challenges for implied bias under "a standard that is less deferential than abuse of discretion, but more deferential than *de novo* review." *Hennis*, 79 M.J. at 385 (quoting *Dockery*, 76 M.J. at 96).

Law

SrA Davis adopts the statement of law from Issue III, above, for use in this issue. Additionally, this Court considers "the totality of the circumstances in determining 'whether there is implied bias, namely, a perception or appearance of fairness of the military justice system.'" *United States v. Covitz*, No. ACM 40193, 2022 CCA LEXIS 563, at *23 (A.F. Ct. Crim. App. 30 Sep. 2022) (unpub. op.) (quoting *Peters*, 74 M.J. at 34 (internal quotation and citation omitted)).

Analysis

When the totality of the circumstances of SSgt DMC's involvement in SrA Davis's court-martial are considered, her continued participation leaves a perception of unfairness in the military justice system. SSgt DMC's pregnancy, or her husband's victimization, or her involvement in preventing SrA Davis from promoting, each standing alone, may not rise to the level of injury to the appearance of fairness in the military justice system. However, when considered in total, those circumstances create a high risk that the public would perceive that the panel that convicted SrA Davis was less than the constitutionally fair and impartial panel he was entitled to.

First, with regards to SSgt DMC's involvement in preventing SrA Davis's promotion, while SSgt DMC stated she did not ask for any additional information before updating his record, she was not asked and did not state whether she could put aside her previous involvement and

knowledge of SrA Davis's promotion cancellation and only consider the evidence presented in the court-martial. Unlike any other member of the panel, SSgt DMC knew about the charges against SrA Davis before his court-martial began, and before being instructed by the military judge about the presumption of innocence and burden of proof. It is human nature that SSgt DMC could have made a snap judgment based on the verbiage of the charges. Furthermore, SSgt DMC knew that SrA Davis's commander decided to remove his selection for promotion based on the charges. This would signal to SSgt DMC an endorsement by SrA Davis's commander of the quality of the evidence against him. To an outside objective observer, the presence on the panel of someone who effectuated an adverse personnel action against the accused, canceling his promotion, raises serious questions about the fairness of the proceedings.

Next, considering the sexual assault experienced by SSgt DMC's husband, contrary to the military judge's assessment that the sexual assault was not forefront in her mind, her husband's sexual assault had a real and palpable impact on SSgt DMC's life. She and her husband experienced communication problems that were serious enough to warrant couples' counseling, through which they learned the root of their communication problems was her husband's victimization years prior. The military judge noted that communication is an issue for many couples, but for this specific couple, the source of their issue was the same offense at play in SrA Davis's court-martial. R. at 324. Additionally, communication itself was an issue in SrA Davis's court-martial, as his mistake of fact centered around him misunderstanding that when CJD told him to "stop" that she actually wanted him to stop. Having communication issues at the forefront of SSgt DMC's mind may have caused her to judge SrA Davis's actions differently than someone without these same biases. Additionally, while SSgt DMC noted that the situation had improved through couples' counseling, she qualified that it was still something the couple worked

on. R. at 303.

Finally, with regards to SSgt DMC's pregnancy, she was twenty days from her due date during member selection. R. at 321. However, due dates are projections and notoriously inaccurate. During individual voir dire, Trial Counsel informed SSgt DMC that there were procedures in place in case she went into labor before her due date and could no longer serve as a court-member, and then asked her if she thought her "pregnancy would interfere with [her] paying attention to the proceedings here?" R. at 303. SSgt DMC said no, her pregnancy would not interfere, and she would be able to follow the military judge's instructions. *Id.* In a culture of service before self, military members consistently make physical, mental, and emotional sacrifices. When asked by multiple superior officers whether she could do her duty as a court-member, SSgt DMC undoubtedly wanted to prove that she could tough it out and sit on SrA Davis's court-martial. However, her answer did not take into account the tediousness of listening to hours of testimony and reviewing volumes of evidence. Additionally, while the military judge assured SSgt DMC that there would be frequent recesses to allow her to stretch her legs, there was no discussion with SSgt DMC of the length of time spent in court each day. On the most critical day of the court-martial, when the members received instructions from the military judge, heard closing arguments from both sides, and closed to deliberate, SSgt DMC had to endure a more than twelve-hour workday, not including her time spent commuting and at lunch. Her "duty day" ended after 2200 hours that night. R. at 1190. Given the weight of the court-members' responsibilities, that day would be grueling for anyone, not to mention someone almost two weeks away from giving birth. The courtroom was so warm that the military judge authorized the members to remove their

service coats, but that was not an option for SSgt DMC in the maternity service uniform.[7] Furthermore, SSgt DMC was one of the most junior members of the panel and would likely have felt less able to request to recess for the night during deliberations. No military member wants to admit that they lack the physical or mental stamina to complete the mission. Nevertheless, the military judge had a duty to consider not just SSgt DMC's ability to sit as a court-member, but how an objective member of the public would perceive a service-member in the ninth month of pregnancy enduring a more than twelve-hour duty day deliberating on the fate of an airman accused of fourteen serious offenses.

Considering the totality of circumstances, including SSgt DMC's pregnancy coupled with the fact that SSgt DMC processed SrA Davis's removal from the promotion list, and SSgt DMC's husband was a victim of sexual assault, and in light of the liberal grant mandate, the military judge should have granted the Defense challenge for cause. SSgt DMC's presence on the panel created a significant risk that the public would perceive SrA Davis received a less than fair trial.

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

V.

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

Additional Facts

Appellant filed a motion requesting the military judge honor his right to a unanimous verdict. AE IX. The military judge denied the motion. AE XXXI. In providing Appellant forum

[7] *See* Department of the Air Force Instruction (DAFI) 36-2903, *Dress and Personal Appearance of United States Air Force and United States Space Force Personnel*, ¶ 6.3 (7 Feb. 2020, incorporating change 4, 12 Apr. 2022).

advice, he advised Appellant that he could be convicted if three-fourths of the members concurred as to guilt. R. at 10. Later, the members received the same instruction. R. at 1175. The members returned a finding of guilty to Specification 5 of Charge I after deliberating for more than 6 hours[8] and requesting instruction on reconsideration. R. at 1183.

Standard of Review

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

Law and Analysis

The CAAF granted review in *United States v. Anderson* to determine whether a military accused has a constitutional right to a unanimous verdict. 82 M.J. 440 (C.A.A.F. 2022) (order granting review). The CAAF has granted trailer review of several cases wherein the appellant preserved the issue at trial. *See, e.g., United States v. Veerathanongdech*, 82 M.J. 441 (C.A.A.F. 2022) (order granting review); *United States v. Martinez*, 83 M.J. 8 (C.A.A.F. 2022) (order granting review); *United States v. Apgar*, 83 M.J. 21 (C.A.A.F. 2022) (order granting review); *United States v. Miramontes*, 83 M.J. 47 (C.A.A.F. 2022) (order granting review); *United States v. Aikanoff*, __ M.J. __, No. 22-0258/AR, 2022 CAAF LEXIS 706 (C.A.A.F. 4 Oct. 2022) (order granting review); *United States v. Cunningham*, __ M.J. __, No. 23-0027/AF, 2022 CAAF LEXIS 888 (C.A.A.F. 13 Dec. 2022) (order granting review); *United States v. Bentley*, __ M.J. __, No. 23-0037/AR, 2022 CAAF LEXIS 903 (C.A.A.F. 16 Dec. 2022) (order granting review); *United States v. Tarnowski*, __ M.J. __, No. 23-0075/AF, 2023 CAAF LEXIS 178 (C.A.A.F. 31 Mar. 2023) (order granting review); *United States v. McCameron*__ M.J. __, No. 23-0084/AF, 2023

[8] The Court closed for deliberations at 1543 hours on 22 June 2022, and findings were announced at 2201 hours the same day. R. at 1182, 1187.

CAAF LEXIS 198 (C.A.A.F. 6 Apr. 2023) (order granting review). As Appellant preserved this issue at trial by motion, this Court should—and must—decide this assignment of error in accordance with the CAAF's forthcoming decision in *Anderson*.

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

VI.

THE MILITARY JUDGE ERRED IN FINDING A GOOD FAITH BASIS FOR THE GOVERNMENT TO ASK DEFENSE SENTENCING WITNESSES "HAVE YOUR HEARD" AND "DID YOU KNOW" QUESTIONS WHEN THE BASIS FOR THOSE QUESTIONS WAS AN OVERHEARD THIRD-PARTY REPORT THAT WAS DIRECTLY CONTRADICTED BY OTHER EVIDENCE.

Additional Facts

After the Government rested their sentencing case, the Defense asked the military judge to rule on whether the Government had a good faith basis to ask defense sentencing witnesses "have you heard" and "did you know" questions regarding whether SrA Davis had molested his niece before joining the Air Force. R. at 1197, 1199. The Government's basis for asking these questions was an email from the AFOSI detachment at Mountain Home Air Force Base, Idaho. R. at 1198, Appellate Exhibit (App. Ex.) LXIV.

According to the email, the detachment at Mountain Home was investigating a complaint raised by an unidentified victim against SrA Davis's brother (identified as SUBJECT in the email and hereinafter referred to as subject).[9] App. Ex. LXIV. The case was completely unrelated to SrA Davis's case. R. at 1198-99. That unidentified victim informed AFOSI that they overheard

[9] It is unclear from the email whether the subject of the Mountain Home investigation was actually SrA Davis's brother. The email states that the subject's sister "disclosed she caught *their brother*" and that the subject requested legal counsel, so AFOSI was unable to ask the subject about "his brother," both implying that the subject was SrA Davis's brother.

a phone call between subject and his mother and sister in which subject's sister stated she caught "their brother," SrA Davis, touching their niece, JF. App. Ex. LXIV. AFOSI interviewed the mother of JF who stated the allegations against SrA Davis were false. *Id.* She did not give AFOSI permission to talk to JF. *Id.* AFOSI interviewed another sister of subject who also stated the accusations against SrA Davis were false. *Id.* Three other witnesses declined to speak with AFOSI. *Id.* The victim in the Mountain Home case had never met SrA Davis and did not know much about him. *Id.*

Circuit Defense Counsel argued the Government did not have a good faith basis to ask questions about this allegation because their basis was "hearsay, within hearsay, within hearsay." R. at 1199. The Circuit Trial Counsel stated the good faith basis was "[a] victim in another case made a formal statement to law enforcement that she overheard a conversation from an eyewitness to the accused molesting his niece." R. at 1201. The military judge asked Circuit Trial Counsel what the standard was for "what constitutes a good faith basis or is it inherent in the label?" R. at 1202. Circuit Trial Counsel affirmed that it is inherent in the label and stated they "have a good faith reason to believe this is the case." *Id.* Circuit Defense Counsel chimed in that they could not find any precedent in military law defining good faith basis, but cited *United States v. Abair*, 746 F.3d 260 (7th Cir. 2014), which dealt with Federal Rule of Evidence 608(b)(1) and cross-examination on conduct relevant to a character for truthfulness. R. at 1202. Circuit Defense Counsel quoted *Abair* stating a good faith basis is a "well-reasoned suspicion that a circumstance is true is sufficient."[10]

The military judge reviewed *Abair* and a case cited therein, *United States v. Benabe*, 436

[10] While not explained on the record by Circuit Defense Counsel or the military judge, this quote comes from the dissent in *Abair*. *See Abair*, 746 F.3d at 270 (Sykes, Circuit Judge, dissenting) (quoting *United States v. Holt*, 817 F.2d 1264, 1274 (7th Cir. 1987)).

F. App'x 639 (7th Cir. 2011), and stated:

> The prosecutor's questions on cross-examination must be based on more than the prosecutor's own suspicions. Here, we have more than a hunch. We have more than suspicions. Good faith basis is a low standard. We've got an email that indicates that the incident – I should say, there's some evidence that the incident did happen, so it's enough to get over the low bar of good faith basis for the question.

R. at 1204. The military judge emphasized that he was "not making any other ruling at this time" and that he did not know "whether the door is opened." R. at 1205. The military judge did not perform an analysis under Mil. R. Evid. 403.

Standard of Review

A military judge's ruling to admit evidence is reviewed for an abuse of discretion. *United States v. Ayala*, 81 M.J. 25, 27 (C.A.A.F. 2021); *Frost*, 79 M.J. at 109. "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *Ayala*, 81 M.J. at 27-28. "When the military judge conducts a proper balancing test under Mil. R. Evid. 403 on the record, [his] ruling will not be overturned absent a clear abuse of discretion." *United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009) (internal citations omitted).

Law

The balancing test in Mil. R. Evid. 403 applies to "have you heard" and "do you know" questions intended to test the basis of a witness's opinion. *United States v. Pearce*, 27 M.J. 121, 125 (C.M.A. 1988) (citations omitted). "In the application of this balancing test, the trial judge is universally recognized as exercising 'wide discretion[.]'" Id. at 125 (quoting *Michelson v. United States*, 335 U.S. 469, 480 (1948)); *see also United States v. Westcott*, No. ACM 39936, 2022 CCA LEXIS 156, at *45 (A.F. Ct. Crim. App. 17 Mar. 2022) (unpub. op.). A military judge's "rulings

in this area are to be reversed only when he has abused that discretion." *Id*. This discretion, "is nevertheless 'accompanied by heavy responsibility . . . to protect the practice from any misuse.'" *Id*.

Long ago, the Supreme Court explained, "The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." *Michelson*, 335 at 479. If an accused opens that door, then "his own witness is subject to cross-examination as to the contents and extent of the hearsay on which he bases his conclusions, and he may be required to disclose rumors and reports that are current even if they do not affect his own conclusion." *Id.*

"Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." Mil. R. Evid. 404(a)(1). However, "The accused may offer evidence of the accused's pertinent trait and, if the evidence is admitted, the prosecution may offer evidence to rebut it." Mil. R. Evid. 404(a)(2)(A). Military Rule of Evidence 405(a), methods of proving character, states:

> *By Reputation or Opinion*. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the military judge may allow an inquiry into relevant specific instances of the person's conduct.

Mil. R. Evid. 405(a). References to such "relevant specific instances" of the accused's character "must be predicated upon a good faith basis for believing that they actually occurred." *United States v. Kitching*, 23 M.J. 601, 603 (A.F.C.M.R. 1986) (citing *Michelson* 335 U.S. at 469); *United States v. Donnelly,* 13 M.J. 79 (C.M.A. 1982). In *Kitching*, this Court's predecessor did not opine on whether trial counsel provided an adequate showing of a good faith basis when he stated the accused's squadron commander possessed a file containing a letter of reprimand received by the

appellant, as well as a memorandum claiming the appellant had assaulted a female noncommissioned officer and was sleeping with the wife of another noncommissioned officer. 23 M.J. at 603. However, the court did relay that "it would have been better practice for the military judge to ask to review the documentation." *Id.*

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Mil. R. Evid. 403. "The overriding concern of M.R.E. 403 'is that evidence will be used in a way that distorts rather than aids accurate fact finding.'" *Stephens*, 67 M.J. at 236 (internal citation omitted).

Analysis

The Government did not have a good faith basis to believe SrA Davis "molested" his niece when multiple witnesses stated the alleged touching did not occur. The military judge's finding otherwise was an abuse of discretion, and the military judge's ruling should not be given deference because he failed to conduct a balancing test under Mil. R. Evid. 403. SrA Davis was prejudiced by this erroneous ruling as it caused his defense team to change their entire sentencing case.

The military judge relied on the *Abair* and *Benabe* cases to determine whether a good faith basis existed. The *Abair* dissent states a "well-reasoned suspicion that a circumstance is true is sufficient" to find a good faith basis. 746 F.3d at 270 (Sykes, Circuit Judge, dissenting) (quoting *Holt*, 817 F.2d at 1274). *Benabe* states "It is improper for the prosecution to ask a question that 'implies a factual predicate which the examiner knows he cannot support by evidence or for which he has no reason to believe that there is foundation of truth.'" 436 F. App'x at 655 (quoting *United States v. Harris*, 542 F.2d 1283 (7th Cir. 1976)). The Government's basis for questioning

sentencing witnesses about SrA Davis's alleged inappropriate touching or molesting of his niece fails both of these definitions. The information available to the Government was in the form of hearsay, within hearsay, within hearsay—an AFOSI agent relayed in an email (hearsay one) that an unnamed victim told AFOSI (hearsay two) that they overheard a telephone conversation between three other people (hearsay three). App. Ex. LXIV. AFOSI relayed additional hearsay within hearsay, stating the mother of the subject of their investigation also received a phone call claiming SrA Davis molested his niece. *Id.* When AFOSI tried to follow-up on this allegation, the witnesses, including the mother of the supposed niece/victim, denied the incident ever happened. *Id.* The AFOSI agent admitted in the email that "it isn't much." *Id.* A suspicion cannot be "well-reasoned" when the evidence – in this case actual witness statements – demonstrates that the event in question never occurred. In fact, it would be poor reasoning to conclude there is a foundation of truth for this allegation. The military judge's finding that "there's some evidence that the incident did happen, so it's enough to get over the low bar of good faith basis" is clearly erroneous because the evidence actually indicates the incident did not happen.

Furthermore, applying the reasoning from *Kitching*, there was not a good faith basis to believe this incident occurred when those closest to the incident, including the mother of the alleged victim, unequivocally stated the allegations were false. The only "evidence" that this incident happened is a third-party report, overheard by a victim who was making an allegation against a close family member of SrA Davis. This is a far thinner reed than the basis in *Kitching*, where the accused's misconduct was documented in a file maintained by his squadron commander. 23 M.J. at 603.

This Court should not give deference to the military judge's finding that a good faith basis existed to ask about this alleged "molestation" because the military judge failed to conduct any

analysis under Mil. R. Evid. 403. The tenuous factual support for the allegation, and the fact that the Government's basis was third-order hearsay, show the incredibly low probative value of "have you heard" or "did you know" questions regarding this incident. This is in stark contrast to the deeply prejudicial value of Trial Counsel insinuating to the members that SrA Davis molested his niece, in a case where they had just convicted SrA Davis of sexually assaulting his wife. *See Westcott*, unpub. op. at *47. Moreover, this prejudice was unfair to SrA Davis as there was a substantial risk that these unfounded allegations would be "used in a way that distorts rather than aids accurate fact finding." *Stephens*, 67 M.J. at 236.

The military judge's finding of a good faith basis prejudiced SrA Davis because it caused his Defense team to completely alter their sentencing case. R. at 1253. The Defense originally intended to call three in-person witnesses—SSgt DH, SSgt SD, and Ms. JW. R. at 1254. Based on the judge's ruling, and a concern that "anything that could be remotely characterized as character evidence" could open the door to the highly prejudicial cross-examination questions by the Government, the Defense changed their strategy and instead submitted letters from those three witnesses. *Id.*; Defense Exhibits (Def. Ex.) J, K, and Q. To avoid opening the door, the Defense also had to significantly redact other character letters as follows:

- In TSgt MH's letter, omitted "From what I have personally witnessed of SrA Davis's actions and demeanor, they don't indicate a person of bad character." *Compare* Def. Ex. I *with* App. Ex. LXIX at 3.
- In Ms. MWD's letter, removed, inter alia, "He has always been an example of how I wanted my boys to represent themselves." *Compare* Def. Ex. L *with* App. Ex. LXIX at 4.
- In Ms. CD's letter, omitted "he was raised with high morals, values, and standards. He has always been very polite, genuine, honest, and giving. I would describe SrA T. Davis as a

gentleman, chivalrous, and always willing to support or help anyone. He has always had a vibrant energy and kind spirit. . . . He is a sweet, caring person. SrA Davis is a selfless, helpful and loving person, often times putting the wellbeing and care of others before his own." *Compare* Def. Ex. M *with* App. Ex. LXIX at 5.

- In Ms. KH's letter, removed "He was raised to always respect . . . any individuals he comes in contact with" and "Tyrion is [a] sweet, kind and giving individual…truly a loving and caring individual." *Compare* Def. Ex. N *with* App. Ex. LXIX at 6.
- In Ms. AR's letter, omitted "kind, compassionate, empathetic . . . Respectful friend." *Compare* Def. Ex. O *with* App. Ex. LXIX at 7.
- In Ms. BS's letter, removed "he cares for everyone," "I can confirm in all the time I have known him, he has only proven to be a respectful and loving man with a great character," and "Despite the current charges against him, I genuinely believe that he is a good human." *Compare* Def. Ex. P *with* App. Ex. LXIX at 8.

These changes significantly diminished the strength of SrA Davis's sentencing case. Furthermore, it enabled Trial Counsel to argue in sentencing that the letters simply described SrA Davis as a "decent worker and a nice guy" and that "being a hard worker doesn't undo the crime that he committed." R. at 1238. Trial Counsel asked for at least three years of confinement. R. at 1240. The Defense argued that 30 days of confinement was more appropriate. R. at 1244. The members ultimately sentenced SrA Davis to ten months of confinement. R. at 1256. The prejudice from SrA Davis's weakened sentencing case is shown in the sentence adjudged.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside his sentence.

VII.

TRIAL COUNSEL'S SUGGESTION THE MEMBERS WOULD BE PERSONALLY RESPONSIBLE FOR ANY FUTURE MISCONDUCT COMMITTED BY APPELLANT IN SENTENCING ARGUMENT WAS IMPROPER.

Additional Facts

During the Government's sentencing argument, Trial Counsel asked for a sentence that included three years of confinement. R. at 1240. In justifying that length of confinement to the members, Trial Counsel asked "next time that [SrA Davis is] intimate with someone, are you going to feel confident that he's going to stop when someone says stop? Because, right now, the answer to that is no." R. at 1239. Trial Counsel went on to argue "Members, you are charged with protecting the public from Senior Airman Davis and making sure that what happened here, doesn't happen again. What kind of risk are you willing to accept?" R. at 1240. Trial Counsel continued this theme, challenging the members: "Ask yourself, how long is it going to take for you to feel sure that this won't happen again. Don't allow Senior Airman Davis to walk out of this courtroom and take advantage of the next unsuspecting person. This is your moment to send a message that this kind of behavior won't be tolerated." *Id.*

Standard of Review

If there is no objection to an improper argument, this Court reviews for plain error. *Norwood*, 81 M.J. at 19. 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*. (quoting *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011)). "[M]aterial prejudice to the substantial rights of the accused occurs when an error creates an unfair prejudicial impact on the court members' deliberations. In other words, the appellant must show 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 and citations omitted).

In assessing prejudice, the Court will look "at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial." *United States v. Erickson*, 65 M.J. 221, 224 (C.A.A.F. 2007) (citing *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005)). This determination is based on "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence to support the [sentence]." *Norwood*, 81 M.J. at 19 (citing *United States v. Voorhees*, 79 M.J. 5, 12 (C.A.A.F. 2019)). Indicators of severity of misconduct include:

> (1) the raw numbers – the instances of misconduct as compared to the overall length of the argument, (2) whether the misconduct was confined to the trial counsel's rebuttal or spread throughout the findings argument or the case as a whole; (3) the length of the trial; (4) the length of the panel's deliberations, and (5) whether the trial counsel abided by any rulings from the military judge.

Fletcher, 62 M.J. at 184.

Law

"Improper argument is one facet of prosecutorial misconduct." *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017) (citing *United States v. Young*, 470 U.S. 1, 7-11 (1985)). "A prosecutor proffers an improper argument amounting to prosecutorial misconduct when the argument '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.'" *Norwood*, 81 M.J. at 19 (quotations marks and citations omitted).

"When arguing for what is perceived to be an appropriate sentence, the trial counsel is at liberty to strike hard, but not foul, blows." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). Counsel are consistently cautioned to "limit arguments on findings or sentencing to evidence in the record and to such fair inferences as may be drawn therefrom." *United States v.*

White, 36 M.J. 306, 308 (C.M.A. 1993) (citations omitted); *accord Baer*, 53 M.J. at 237 (citation omitted). "Arguing an inflammatory hypothetical scenario with no basis in evidence amounts to improper argument that [this Court has] repeatedly, and quite recently, condemned." *Norwood*, 81 M.J. at 21 (citing *Voorhees*, 79 M.J. at 14-15).

Trial counsel may include sentencing philosophies in argument, including general deterrence and societal retribution. R.C.M. 1001(g). However, it is error for trial counsel to make arguments that unduly inflame the passions of the court members. *United States v. Halpin*, 71 M.J. 477, 481 (C.A.A.F. 2013) (citations omitted). Members are therefore "not to be asked to fashion their sentence 'upon blind outrage and visceral anguish,' but upon 'cool, calm consideration of the evidence and commonly accepted principles of sentencing." *Baer*, 53 M.J. at 237 (quoting *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983)). Counsel's words are not reviewed in isolation, but in context of the entire court-martial. *Baer*, 53 M.J. at 238 (citations omitted). Care is necessary in "determining whether a trial counsel's statement is improper or has improper connotations" and "a court should not lightly infer" the most "damaging meaning" from an "ambiguous remark" when there is a "plethora of less damaging interpretations." *United States v. Palacios Cueto*, 82 M.J. 323, 333 (C.A.A.F. 2022) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974)).

In *United States v. Witt*, decided six months prior to SrA Davis's court-martial, this Court found error in trial counsel asking the members "how much risk they would personally accept by virtue of the sentence they adjudged." No. ACM 36785 (reh), 2021 CCA LEXIS 625, at *142 (A.F. Ct. Crim. App. 19 Nov. 2021) (unpub. op.), *rev. granted*, 82 M.J. 424 (C.A.A.F. 2022). In *Witt*, the appellant's risk of future misconduct was an appropriate consideration in sentencing as it was an issue introduced by the defense, but this Court opined "the suggestion that the members

would be personally responsible for any such misconduct was not." *Id.* "[I]t was entirely inappropriate to tell the members they would be accepting the risk of a future victim" if they adjudged a less severe sentence than trial counsel requested. *Id.*

Where improper argument occurs during sentencing, this Court must determine whether it can be confident that the appellant "was sentenced on the basis of the evidence alone." *United States v. Pabelona*, 76 M.J. 9, 12 (C.A.A.F. 2017) (internal quotation marks and citation omitted). The CAAF has recognized that it is "harder for the Government to meet its burden of showing that a sentencing error did not have a substantial influence on a sentence than it is to show that an error did not have a substantial influence on the findings." *United States v. Edwards*, 82 M.J. 239, 247 (C.A.A.F. 2022). This is due to the "broad spectrum of lawful punishments that a panel might adjudge," as opposed to the "binary decision to be made with respect to the findings (guilty or not guilty)." *Id.* Additionally, "it is much more difficult to compare the 'strengths' of the competing sentencing arguments than it is to weigh evidence of guilt." *Id.*

Analysis

Trial Counsel's argument sought to inflame the passions and prejudices of the panel by improperly suggesting the members would be responsible for any future sexual assaults committed by SrA Davis. These plainly erroneous comments were prejudicial and this Court should not be confident that SrA Davis was sentenced on the basis of the evidence alone.

Trial Counsel's arguments about what risk the members would be "willing to accept" were plain error because they are the exact same arguments this Court found improper in *Witt*. Unpub. op. at *132, 142. As in *Witt*, when Trial Counsel admonished the members to not "allow Senior Airman Davis to walk out of this courtroom and take advantage of the next unsuspecting person," (R. at 1240), she was informing the members they would be "personally responsible for some

indeterminate future harm." *Witt*, unpub. op. at *142. Trial Counsel's argument was not ambiguous, and there is no "less damaging" interpretation of her words. *Donnelly*, 416 U.S. at 647. Moreover, this Court had issued its decision in *Witt* six months prior to SrA Davis's sentencing proceedings. Trial Counsel, armed with knowledge of this Court's finding of error in *Witt*, should have steered clear of any reference to the risk that members were "willing to accept." Instead, she did the opposite.

Unlike in *Witt*, where evidence of the appellant's recidivism risk was before the panel, there was no evidence in this case that SrA Davis had any risk of re-offending. *Witt*, unpub. op. at *142. Viewing Trial Counsel's arguments in the context of the entire court-martial, as required by *Baer*, only further demonstrates their impropriety. 53 M.J. at 238. The Government attempted to portray SrA Davis as a serial sex-offender who sexually assaulted CJD and LCC multiple times. *See* ROT Vol. 1, Charge Sheet, referred 11 Feb. 2022. However, the members acquitted SrA Davis of four of the charged sexual assaults of CJD and completely acquitted him of the sexual assaults of LCC, which were alleged to have occurred a year after the single sexual assault of CJD of which he was convicted. *See* ROT Vol. 1, EOJ. Therefore, Trial Counsel's argument that SrA Davis would "take advantage" of some "unsuspecting person" insinuated that SrA Davis was a serial sex-offender and impeached the members' verdict. R. at 1240. This further demonstrates the only purpose served by Trial Counsel's arguments was to inflame the members' passions and incite them to sentence SrA Davis based on an "inflammatory hypothetical scenario with no basis in evidence." *Norwood*, 81 M.J. at 21.

Trial Counsel's improper arguments were prejudicial because they were severe, there were no curative measures by the military judge, and the weight of the evidence does not support the sentence. Turning first to the severity of the misconduct, the first factor to consider is the "raw

numbers – the instances of misconduct as compared to the overall length of the argument." *Fletcher*, 62 M.J. at 184. Trial Counsel's comments on SrA Davis's future risk comprise six sentences spanning two pages of the five total pages of her sentencing argument. R. at 1236-1240. This is similar to *United States v. Frey*, 73 M.J. 245, 249 (C.A.A.F. 2014), where trial counsel argued, without any evidence in support, that the appellant would be likely to molest other children in the future. The CAAF found trial counsel's argument to be severe misconduct, emphasizing that "[t]hough this comment comprises three sentences in eight pages of sentencing argument, one is hard pressed to imagine many statements more damaging than the implication that someone who has been convicted of molesting a single child will go on to molest many more." *Id.* In SrA Davis's case, Trial Counsel's misconduct was even more pervasive, constituting six sentences out of five pages, compared to *Frey*'s three sentences out of eight pages. Moreover, Trial Counsel's implication was that someone who had been convicted of sexually assaulting a single person would go on to sexually assault many more—and that the members would be personally liable for those future sexual assaults.

Considering the other factors for the severity of the misconduct, Trial Counsel was not afforded rebuttal argument, but ended her sentencing argument by challenging the members not to "allow Senior Airman Davis to walk out of this courtroom and take advantage of the next unsuspecting person." Additional factors to consider in determining the severity of the misconduct include the length of the trial, the length of the panel's deliberations, and whether trial counsel abided by any rulings from the military judge. *Fletcher*, 62 M.J. at 184. From the time the members were impaneled, SrA Davis's trial lasted 6 days, with the last day completely devoted to the sentencing hearing. *See supra* note 6. The members received evidence in sentencing for only

21 minutes out of that day.[11] The members deliberated on a sentence for over two and a half hours. R. at 1249, 1256. As there was no objection to Trial Counsel's improper argument, there were no rulings from the military judge.

Turning to the measures adopted to cure the misconduct, it is apparent that "[p]rompt and effective action by the [judge] *may* neutralize the damage by admonition to counsel or by appropriate curative actions to the [panel]." *United States v. Simtob*, 901 F.2d 799, 806 (9th Cir. 1990) (emphasis added). However, in this case, the military judge and SrA Davis's Defense Counsel did not take adequate action to address Trial Counsel's improper argument. While there was no objection from Defense Counsel, the military judge had a "*sua sponte* duty to [e]nsure that an accused receives a fair trial." *Norwood*, 81 M.J. at 21 (quoting *Voorhees*, 79 M.J. at 14-15) (alterations in original). The military judge failed to fulfill that duty and provided only the standard sentencing instructions regarding argument from counsel: "During argument, counsel may recommend that you consider a specific sentence in this case. You are advised that the arguments and recommendation of trial counsel are only their individual suggestions and may not be considered as the recommendation or opinion of anyone other than such counsel." This standard instruction failed entirely to "convey[] a sufficient sense of judicial disapproval of both content and circumstances needed to dispel the harm in the core of the prosecutor's statements." *Simtob*, 901 F.2d at 806 (finding the trial judge's generalized comments addressing arguments he found improper were insufficient to cure the harm).

Finally, the weight of the evidence does not support the sentence. As discussed in Issue I, above, the Government's findings case was incredibly weak. Even if the evidence was legally

[11] The members received the Government's sentencing evidence and CJD's unsworn statement from 0959 to 1008 hours on 23 June 2022. R. at 1208, 1213. The members received the Defense sentencing evidence from 1246-1258 hours. R. at 1214, 1219.

sufficient to support the conviction, the facts show that this was a marital misunderstanding and not a case of a serial sex-offender who takes advantage of unsuspecting victims as argued by Trial Counsel. The Government's sentencing case consisted only of SrA Davis's personnel records, of which his personal data sheet and enlisted performance reports were favorable to his Defense. *See* Pros. Ex. 36-39. The letter of counseling offered by the Government is inconsequential, as it was for missing squadron physical training a single time over a year before the offense occurred. *See* Pros. Ex. 40. The Defense sentencing case was still stronger than the Government's case despite being considerably weakened by the military judge's erroneous finding that there was a good faith basis for the Government to cross-examine Defense sentencing witnesses on a third-order hearsay molestation allegation. SrA Davis had considerable support from fellow Airmen, family members, and local community members. *See* Def. Ex. I-Q.

As the CAAF recently opined, it is more difficult to determine that an improper sentencing argument did not have a substantial influence on a sentence than to determine that an error did not have a substantial influence on findings. *Edwards*, 82 M.J. at 247. The panel in this case had a range of options for sentencing, and there were many variables that certainly played into their sentencing decision. The severity of Trial Counsel's misconduct and the lack of any measures to cure these pervasive errors tip the scales to show that SrA Davis was prejudiced.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside his sentence.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 17 April 2023.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME OUT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Senior Airman (E-4) **TYRION N. DAVIS** United States Air Force *Appellant.*	)	No. ACM 40370 11 May 2023

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

Pursuant to Rule 23.3(m)(5), the United States respectfully requests a 15-day enlargement of time, out of time, to respond in the above captioned case. This case was docketed with the Court on 2 November 2022. Since docketing, Appellant has been granted three enlargements of time. Appellant filed his brief with this Court on 17 April 2023. This is the United States' first request for an enlargement of time. As of the date of this request, 190 days have elapsed. The United States' response in this case is currently due on 17 May 2023. If the enlargement of time is granted the United States' response will be due on 1 June 2023, and 211 days will have elapsed since docketing.

There is good cause for the enlargement of time in this case. The undersigned counsel is currently preparing to serve as trial counsel for a Dubay hearing scheduled for 30 May to 1 June 2023. This Court ordered the Dubay hearing in the case of In Re Banker, a 20-year-old case requiring extensive efforts to find witnesses. She is also assigned to United States v. Bennett, a two-issue brief due 17 May 2023. In last 30 days, the undersigned counsel has also filed United

States v. Romero-Alegria (a three-issue brief) and United States v. Flores (a three-issue brief) with this Court, and a brief on four specified issues with CAAF in In Re M.W.

The trial transcript in this case is 1,258 pages, and Appellant has raised seven assignments of error in a 50-page brief. It has taken assigned counsel significant time to review the lengthy record and answer all seven assignments of error. Undersigned counsel has finished reviewing the record and has completed over half of brief in this case, but additional time is necessary to provide a fully responsive brief to assist this Court in its Article 66 review. This is undersigned counsel's second priority assignment, after the Dubay hearing in Banker.

There is no other JAJG attorney who would be able to file a brief sooner because one of the five appellate government counsel is on extended TDY, and the other appellate government counsel are also assigned extensive briefs. Attorneys assigned to the trial side of JAJG have only been able to provide minimal support to the appellate side, due to their own trial caseloads. Reservists are being engaged to help with the workload, but JAJG currently has 13 assignments of error briefs pending before this Court.

This filing is made out of time because counsel has been in a continuing legal education course over the last two days and only realized today she lacked sufficient time to complete the United States' answer.

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

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Appellate Government Counsel
Government Trial and Appellate Operations Division
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MARY ELLEN PAYNE
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 11 May 2023.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S OPPOSITION TO GOVERNMENT'S MOTION FOR ENLARGEMENT OF TIME**
v.	)	Before Panel No. 2
Senior Airman (E-4) **TYRION N. DAVIS,** United States Air Force *Appellant*	)	No. ACM 40370
	)	12 May 2023

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

Pursuant to Rule 23.2 of this Honorable Court's Rules of Practice and Procedure, Appellant hereby enters his general opposition to the Government's Motion for an Enlargement of Time, dated 11 May 2023. Appellant requests speedy appellate review of his case.

WHEREFORE, Appellant respectfully requests that this Honorable Court deny the Government's Motion for Enlargement of Time.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 12 May 2023.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	Before Panel No. 2
Senior Airman (E-4) **TYRION N. DAVIS** United States Air Force *Appellant.*	)	No. ACM 40370
	)	1 June 2023

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

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INDEX OF BRIEF

VI.

THERE IS NO ERROR TO CORRECT, BECAUSE THE MILITARY JUDGE NEVER ISSUED A FINAL RULING ON THE ADMISSIBILITY OF "HAVE YOUR HEARD" AND "DID YOU KNOW" QUESTIONS, AND THOSE QUESTIONS WERE NEVER ASKED AT TRIAL.

VII.

TRIAL COUNSEL'S ARGUMENT WAS NOT IMPROPER AND DID NOT PREJUDICE A SUBSTANTIAL RIGHT OF APPELLANT.

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UNITED STATES, *Appellee,*	)	**ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	Before Panel No. 2
Senior Airman (E-4) **TYRION N. DAVIS** United States Air Force *Appellant.*	)	No. ACM 40370
	)	1 June 2023

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

ISSUES PRESENTED

I.

WHETHER APPELLANT'S CONVICTION FOR SEXUAL ASSAULT IS LEGALLY AND FACTUALLY SUFFICIENT?

II.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING UNDATED HANDWRITTEN NOTEBOOK PAGES FROM THE ALLEGED VICTIM AS PRIOR CONSISTENT STATEMENTS OVER A DEFENSE OBJECTION THAT THE MOTIVE TO FABRICATE PRECEDED THE CREATION OF THE NOTEBOOK?

III.

WHETHER THE MILITARY JUDGE ERRED BY GRANTING A GOVERNMENT CHALLENGE FOR CAUSE WHEN THE RECUSAL OF A SPECIFIC TRIAL COUNSEL WOULD HAVE CURED THE CHALLENGED MEMBER'S BIAS?

IV.

WHETHER THE MILITARY JUDGE ERRED BY DENYING THE DEFENSE CHALLENGE FOR CAUSE OF STAFF SERGEANT DMC?

V.

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

VI.

WHETHER THE MILITARY JUDGE ERRED IN FINDING A GOOD FAITH BASIS FOR THE GOVERNMENT TO ASK DEFENSE SENTENCING WITNESSES "HAVE YOUR HEARD" AND "DID YOU KNOW" QUESTIONS WHEN THE BASIS FOR THOSE QUESTIONS WAS AN OVERHEARD THIRD-PARTY REPORT THAT WAS DIRECTLY CONTRADICTED BY OTHER EVIDENCE?

VII.

WHETHER TRIAL COUNSEL'S SUGGESTION THE MEMBERS WOULD BE PERSONALLY RESPONSIBLE FOR ANY FUTURE MISCONDUCT COMMITTED BY APPELLANT IN SENTENCING ARGUMENT WAS IMPROPER?

STATEMENT OF CASE

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

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STATEMENT OF FACTS

At a general court-martial, a panel of enlisted and officer members convicted Appellant of one charge and one specification of sexual assault in violation of Article 120, UCMJ, contrary to Appellant's pleas. (*Entry of Judgment*, dated 23 June 2022, ROT, Vol. 1.)[1] The panel convicted Appellant of Specification 5 of Charge I which read:

[1] The panel acquitted Appellant of ten specifications in violation of Article 120, UCMJ, one charge and two specifications in violation of Article 128, UCMJ, and one charge and one specification in violation of Article 112a, UMCJ. (*Entry of Judgment*, ROT, Vol. 1)

> In that Senior Airman Tyrion N. Davis, United States Air Force, 48th Equipment Maintenance Squadron, Royal Air Force Lakenheath, United Kingdom, did at or near Brandon, United Kingdom, between on or about 1 July 2019 and on or about 30 September 2019, commit a sexual act upon [CJD] by penetrating her vulva with his penis, without her consent.

(*Charge Sheet*, dated ROT, Vol. 1.) The panel sentenced Appellant to a reduction to the grade of E-1, ten months confinement, and a dishonorable discharge. (*Entry of Judgment*, ROT, Vol. 1.)

Appellant met CJD, a British national, in February 2018 through their friend LCC. (R. at 359.) When LCC introduced Appellant to CJD, LCC was dating SSgt JV, Appellant's friend. (R. at 569-570.) Appellant and CJD began dating in April 2018 and married in December 2018. (R. at 363.) The two were legally married at the time of Appellant's court-martial in June 2022. (R. at 434.)

LCC and SSgt JV broke up in early 2019. (R. at 569.) In the summer of 2019, Appellant and CJD took a trip to the United States together. (R. at 393.) After the trip to the United States, immediately CJD took a trip to Ibiza, Spain, with SSgt JV, her "best friend." (R. at 401-402.) Appellant was concerned CJD was cheating on him with SSgt JV. (R. at 403, 413, 426-427.) CJD and SSgt JV had consensual sex while in Ibiza. (R. at 403.) CJD did not tell Appellant she had sex with SSgt JV. (R. at 403, 439-440.) CJD testified that after she returned from Ibiza:

> [O]ne night Ty wanted to have sex and I didn't. We were in bed and I told him that I didn't want to have sex. When he tried to touch me, I pushed his hand away and I told him no several times. I rolled on to my side. He then cuddled me and then, several minutes later, he then – he pushed me on to my back. I asked him what he was doing. He got on top of me. I told him to stop and I tried to push him away. Then he inserted his penis into my vagina and continued to have sex with me.

(R. at 404.) Appellant ejaculated. (R. at 409.) CJD cleaned herself up and went to sleep in their bed with Appellant. (Id.) CJD and Appellant engaged in consensual sex the next day, and they did not have sex again after this occurrence. (Id.)

CJD testified she "just laid still on [her] back" while Appellant had sex with her. (R. at 408.) On other occasions when CJD had consensual sex with Appellant she did not remain motionless on her back. (R. at 408.) During previous consensual activity, she would put her arms around Appellant, move her body to affirm what was happening, and kiss him, but she did not do any of those things this time. (R. at 408-409.) CJD moved out of their home at the end of July, a week after the conversation about the nonconsensual sex. (R. at 414.)

CJD and Appellant discussed the nonconsensual sexual encounter on Facebook messenger, just a couple of weeks after the incident. (R. at 414; Pros. Ex. 6.) Appellant admitted to hearing CJD say no multiple times and he agreed that she pushed him away. (Pros. Ex. 6.)

Appellant admitted, "I never said you didn't say stop[.] I said you didn't say it like you meant it[.]" (Pros. Ex. 6 at 20.) He said, "I'm not blaming you for what I did." (Pros. Ex. 6. at 19.) CJD explained to Appellant, "We had sex after I told you to stop more than once[.] I don't know how you expect me to get over that[.]" (Pros. Ex. 6 at 16.) CJD told Appellant, "The only reason I left is because of what happened[.] It's too similar to what happened in my past[.] Except this time I actually said no[.]" (Pros. Ex. 6 at 9.)

> [Appellant]: The times you really want me to stop[.] Like when you're tied up[.] There were times I didn't respond[.] So you say TY! STOP! So I do[.]
>
> [CJD]: I did say stop[.]
>
> [Appellant]: And untie you[.] Not like that you didn't[.]

> [CJD]: In a tone that said stop[.]
>
> [Appellant]: You said stop[.]
>
> [CJD]: I pushed your hand away[.] I asked what you were doing
>
> [Appellant]: You do that too[.] All the time[.] It didn't seem any different[.]

(Pros. Ex. 6 at 7-9.) Appellant told her to press charges. (Pros. Ex. 6 at 2, 3, 15.) But CJD testified that she did not report the offenses until after LCC told CJD something similar happened to her when LCC was with Appellant. (R. at 491.)

The night before CJD testified, SSgt JV told CJD that he received testimonial immunity because he was suspected of having an affair with CJD. (R. at 443-444.) During her sworn testimony, CJD admitted to having sex with SSgt JV while on their trip in Ibiza. (R. at 444.) She explained she lied because she did not want SSgt JV to get in trouble, and she did not want to talk about it because she was not proud of what she had done. (R. at 494.)

ARGUMENT

I.

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

Standard of Review

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

Law

Sexual assault in violation of Article 120, UCMJ requires these elements: (1) that the accused committed a sexual act on another person; and (2) that the accused did so without the

consent of the other person. Manual for Courts-Martial, pt. IV, 60.b.(2)(d) (2019 ed.). Congress defined consent as:

> a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent.
>
> …
>
> A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.

10 USCS § 920(g)(7)(A). "All the surrounding circumstances are to be considered in determining whether a person gave consent." 10 USCS § 920(g)(7)(C).

The military judge provided the following mistake of fact as to consent instruction for Specification 5 of Charge I[2] to the members:

> Mistake of fact means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person consented to the sexual conduct. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented to the sexual conduct.
>
> Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances.

(R. at 1053); *See also* R.C.M. 916(j)(1).

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

[2] The military judge explained the mistake of fact instruction applied to Specifications two through eleven of Charge I. (R. at 1053).

convinced of Appellant's guilt beyond a reasonable doubt. United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987). "In conducting this unique appellate role, [the court] take[s] "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilty" to "make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." United States v. Chisum, 75 M.J. 943, 952 (A.F. Ct. Crim. App. 2016) (citing Washington, 57 M.J. at 399). This Court's "assessment of appellant's guilt or innocence for legal and factual sufficiency is limited to the evidence presented at trial." United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993).

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

"In determining whether any rational trier of fact could have determined that the evidence at trial established guilt beyond a reasonable doubt, [this Court is] mindful that the term 'reasonable doubt' does not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable inferences from the evidence presented." Id. The standard for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve

conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011).

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

Analysis

A. Although Appellant identified two motives to fabricate for CJD, they were unpersuasive.

Appellant claims on appeal that CJD fell in love with Appellant's friend, then to save her reputation, she said Appellant sexually assaulted so that she would not be seen as an unfaithful wife. (App. Br. at 9.) And Appellant alleges CJD joined LCC's case against Appellant to remedy her relationship with LCC. (App. Br. at 10.) But just because the defense highlighted motives to fabricate, does not mean the fact finder was persuaded by them or even believed CJD was motivated to fabricate the allegations.

Although Appellant raised two motives to fabricate, a reasonable fact finder and this Court are not required to find them persuasive. CJD admitted during her testimony that for much of the charged conduct in other specifications, she gave in and allowed it to happen. But Specification 5 of Charge I was the exception. When testifying about that offense, she stated she said no and made it clear with her actions that she did not want to have sex. (R. at 404, 407.)

With these verbal and physical expressions of non-consent, a reasonable fact finder and this Court can find the government met its burden.

Appellant argues "CJD's desire to appear as a victim and not as an adulteress was so strong that she denied having sexual intercourse with SSgt JV in Ibiza continuously up until SrA Davis's court-martial." (App. Br. at 11.) But under oath she stated the reason she did not disclose the relationship with SSgt JV was because he could have been prosecuted for an extramarital affair under the UCMJ. CJD omitted the information to protect SSgt JV, not to perpetrate the narrative alleged by Appellant. The trigger for her honesty was finding out that SSgt JV was granted testimonial immunity for the extramarital affair. Then under oath she admitted that she had a sexual relationship with SSgt JV. She took her oath seriously and was willing to make statements against her own interest by admitting she was unfaithful to her husband. She revealed damaging information that she had withheld, but her desire to hide the infidelity stemmed from protecting SSgt JV and once she realized threat of discipline no longer existed, she admitted to the adultery.

Appellant argues that CJD was the government's only witness to the offense, and CJD's motive to fabricate destroys her credibility. (App. Br. at 11.) But our superior court has determined one witness may be enough to meet the government's burden of beyond a reasonable doubt "so long as the members find that the witness's testimony is relevant and is sufficiently credible." United States v. Rodriguez-Rivera, 63 M.J. 372, 383 (C.A.A.F. 2006). Even if CJD was the only government witness for the specification, her testimony alone was enough to convict Appellant, and the panel believed she was credible. But her testimony was not the only evidence available to the members. And Appellant's argument ignores his own Facebook messages to CJD corroborating the events of the sexual assault in Specification 5 of Charge I.

(Pros. Ex. 6.) He messaged CJD, "You said stop." (Pros. Ex. 6 at 8.) Appellant admitted, "I never said you didn't say stop[.] I said you didn't say it like you meant it[.]" (Pros. Ex. 6 at 20.) He also said, "I'm not blaming you for what I did." (Pros. Ex. 6. at 19.) Appellant knew CJD did not want to have sex with him, but he proceeded anyway.

Appellant's alleged motives to fabricate are unpersuasive, and this Court should find CJD's explicit testimony about her lack of consent combined with Appellant's corroborating statements make the conviction legally and factually sufficient.

B. CJD physically and verbally demonstrated her lack of consent, making Appellant's mistake of fact as to consent defense unreasonable.

Appellant argues "CJD had difficulty dealing with intense pleasure during sex and would often reflexively push SrA Davis away as she approached orgasm," and she regularly said no to sexual acts but continued to participate in them. (App. Br. at 12.) Appellant continues that even though CJD pushed him away in this instance Appellant's mistake of fact was reasonable because of the couple's previous sexual interactions. (App. Br. at 12.) But in the instance charged in Specification 5 of Charge I, CJD demonstrated her unwillingness to participate in sex with Appellant.

Appellant argues CJD supposedly said "no" and "stop" before without meaning it. (App. Br. 12.) But here, she went further than just saying no or pushing him away. Unlike their previous sexual encounters where CJD would push him away but continued to participate, here she stopped participating. She pushed him away, turned her entire body away from him, and then said "no" loud enough for Appellant to hear. (R. at 404, 407; Pros. Ex. 6 at 9.) Appellant confirmed that he heard her. Considering the totality of the circumstances of CJD's physical and verbal rejection of Appellant, this Court and a rational trier of fact could find beyond a

reasonable doubt that CJD demonstrated a lack of consent and Appellant's belief she was consenting was unreasonable.

Appellant argues CJD allegedly admitted that the encounter was a miscommunication in her Facebook messages. (App. Br. at 6.) Appellant also argues CJD "initially agreed that SrA Davis did not understand her lack of consent." (App. Br. at 12.) But CJD testified that *Appellant* identified the incident as a miscommunication, and she was parroting back the language he used in a conversation that occurred before the Facebook messages were sent. (R. at 422.) She testified, "I didn't say no in a tone of voice that made him think that I wanted to stop and, therefore, the miscommunication. That's what he said to me." (R. at 422.) When she was writing the Facebook messages, she still thought the sexual assault was her fault. (Id.) CJD was arguably still processing what happened between her an Appellant – her husband, the person she was supposed to trust the most - when she was writing these messages. But a reasonable fact finder could have found that under the totality of the circumstances, it was not reasonable for Appellant to have believed that CJD was actually consenting to sex when she told him "no."

Appellant claims CJD's "testimony at trial demonstrated that she was incredibly quiet" because she was told to speak up several times. (App. Br. at 12-13.) But testifying in a room full of strangers as a victim of sexual assault is not a comfortable experience, and her quiet manner at trial is not necessarily demonstrative of her demeanor with Appellant in private. Appellant argues, "it is entirely plausible that he did not hear her given her soft-spoken nature," thus his mistake was reasonable. (App. Br at 13.) This argument is directly contradicted by Appellant's own statement, "You said stop." (Pros. Ex. 6 at 8.) He heard her say no. He ignored it and penetrated CJD's vulva with his penis. If Appellant actually had a mistake of fact as to CJD's consent, it was unreasonable.

CJD's actions in the circumstances surrounding Specification 5 of Charge I were different from the other charged offenses – of which Appellant was acquitted. In those, the panel members may have ultimately determined a mistake of fact applied because CJD did not pull away or verbalize a lack of consent. Her testimony tended to show she acquiesced to Appellant's conduct. In contract, CJD's conduct surrounding Specification 5 of Charge II demonstrated physical and verbal manifestations of non-consent.

CJD manifested her physical and verbal lack of consent by saying no several times, turning on her side, and pulling away from Appellant. But Appellant got on top of her and penetrated her with his penis even though she said no. A rational fact finder, viewing the evidence in the light most favorable to the prosecution, could find that Appellant's alleged mistake of fact as to consent was unreasonable and CJD's alleged motives to fabricate were unpersuasive. This Court should determine that Appellant's mistake of fact as to consent was unreasonable beyond a reasonable doubt, and that CJD's alleged motives to fabricate were unpersuasive did not affect her credibility. This Court should find Appellant committed the sexual assault on CJD without her consent beyond a reasonable doubt. This Court should deny this assignment of error.

II.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN ADMITTING THE VICTIM'S HANDWRITTEN JOURNAL ENTRIES AS PRIOR CONSISTENT STATEMENTS.

Additional Facts

Prosecution Exhibit 13 contained 11 pages of undated journal entries written by CJD about the sexual assaults Appellant committed on her. (Pros. Ex. 13; R. at 498.) After the government offered the exhibit into evidence, trial defense counsel objected to Prosecution

Exhibit 13 as hearsay. (R. at 499.) The government stated the journal entries were prior consistent statements offered after trial defense counsel implied CJD possessed a motive to fabricate. (R. at 499-501.) During cross-examination, trial defense counsel highlighted that CJD did not report her allegations against Appellant until after LCC told CJD that Appellant had "locked her in the house, drugged her, and raped her." (R. at 490.) CJD agreed that LCC's allegations prompted her to report allegations against Appellant. (R. at 491.)

The government offered Prosecution Exhibit 13 as prior consistent statements to show CJD wrote about the sexual assault allegations in her journal before LCC alleged Appellant sexually assaulted LCC. (R. at 500.) In her journal, CJD wrote:

> You started trying to touch me but I didn't want to. I pushed your hand away several times and said no. I rolled over onto my right side facing towards the wardrobes. You said okay and also rolled to you [sic] side to cuddle me. But that just wasn't good enough! You pulled me onto my back and started to get on top of me. I asked what you were doing. I remember thinking to myself, 'I said no.' Usually I just lay there and let you do whatever you want to my body. But this time I actually said NO! Although that didn't matter because that isn't what you wanted. You got on top of me, ignoring my protest and pushed inside of me, DRY! Causing me a LOT of pain.

(Pros. Ex. 13 at 1-2.)

The first three pages of her journal discuss the conduct in Specification 5 of Charge I. (Id.) The remaining pages addressed conduct of which Appellant was acquitted. On page five, CJD wrote, "There were so many times throughout our relationship that I didn't want to have sex but you either made me feel like I couldn't say no or made me feel guilt when I would change my mind." (Id. at 5.) On pages six and seven, she wrote about New Years Eve at her mother's house. (Id. at 6-7.) On page eight, she wrote about the incident at her aunt's home in California when her 15-year-old cousin was in the room with them. (Id. at 8.) One page nine she wrote

about the first time she had sex with Appellant. (Id. at 9.) Then on page eleven, she wrote about being handcuffed to the bed and choked. (Id. at 11.)

CJD testified the exhibit contained the journal entries she wrote during her "second year at University," "after Christmas, but before May, June time" of 2020. (R. at 498-499.). She stated she wrote them after she moved out of her marital home with Appellant but before LCC told CJD about LCC's accusations of sexual assault against Appellant. (R. at 498, 499.) CJD reported the sexual assault allegations to the Air Force Office of Special Investigations in September 2020. (R. at 491.)

The military judge took a recess to review the journal entries. (R. at 516.) The military judge stated he "had a chance to read Prosecution Exhibit 13 for identification," and he ordered redactions to irrelevant or prejudicial portions of the journal before it could be admitted. (R. at 528-531.) The military judge then put his findings of fact, conclusions of law, and Mil. R. Evid. 403 balancing test on the record. (R. at 531-533.) The military judge explained:

> The court has found that the statements that it will allow are generally consistent to rebut a recent motive to fabricate that [CJD] did not make these allegations until she found out about L.C.C.'s allegations. Under 801(d)(B)(i), to rebut an express or implied charge that the declarant recently fabricated or acted from a recent improper influence or motive in so testifying. The journal was written, as the court understands, after Christmas 2019, up until as late as 31 May 2020 and predated the motive to fabricate that has been asserted when L.C.C. made the allegations, that was August 2020. The relevancy link is that the statements she made in the journal – [CJD] made in the journal to herself is to rebut that the implication that she was either piling on, or some other ulterior motive, in relation to L.C.C.'s allegations.

(R. at 532.) The military judge cited United States v. Frost, 79 M.J. 104 (C.A.A.F. 2019), United States v. Finch, 79 M.J. 389 (C.A.A.F. 2020), and United States v. Norwood 81 M.J. 12, 17

(C.A.A.F. 2021), in his analysis. (R. at 533.) In his Mil. R. Evid. 403 balancing test, he determined:

> I think the probative value of this information is high to -- for its stated purpose to rebut an allegation of recent fabrication. I don't -- in other words, the probative value is high and the probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, waste of the court's time, et. cetera. To the extent that there is any minimal danger of unfair prejudice, as I mentioned, Defense Counsel, I will give you an opportunity to cross-examine this witness on, obviously, when she wrote the journal, why it's undated, those sorts of things, and, of course, allow argument on the issue.

The redacted version of Prosecution Exhibit 13 was provided to the members, and the military judge instructed them that they could use it both to rebut an allegation of fabrication by CJD and as substantive evidence. (R. at 1062.)

Standard of Review

A military judge's decision to admit evidence is reviewed for an abuse of discretion. Frost, 79 M.J. at 109. "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." Id. (internal quotation marks omitted) (citation omitted).

Law and Analysis

A. CJD's journal entries were properly admitted as prior consistent statements.

Generally, hearsay is inadmissible in courts-martial. Mil. R. Evid. 802. But a prior consistent statement is "not hearsay." M.R.E. 801(d)(1)(B). The plain language of the rule provides three criteria for the admission of a prior consistent statement as substantive evidence: (1) the statement's declarant must testify and be subject to cross-examination about the prior statement; (2) the statement is consistent with the declarant's testimony; and (3) the statement is

offered "to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in testifying." Mil. R. Evid. 801(d)(1)(B)(i). Appellant does not dispute that CJD was subject to cross-examination about her journal entries. Her statements were consistent with her in court testimony. And the statement was offered by trial counsel to rebut a motive to fabricate or improper influence alleged by the trial defense counsel. The government and Appellant agree that CJD – the declarant – testified and was subject to cross-examination and that the journal entries were consistent with her in court testimony.

Appellant's argument focuses on the third prong of Mil. R. Evid. 801 and CAAF's "two additional guiding principles" for the admission of prior consistent statements. Frost, 79 M.J. at 110. In Frost, CAAF determined, first, "the prior statement, admitted as substantive evidence, must precede any motive to fabricate or improper influence that it is offered to rebut." 79 M.J. at 110. And second, "where multiple motives to fabricate or multiple improper influences are asserted, the statement need not precede all such motives or inferences, but only the one it is offered to rebut." Id.

Appellant argues CJD's journal entries are not prior consistent statements because CJD only had one motive to fabricate – to portray herself as a victim of sexual assault rather than as a cheating wife. (App. Br. at 19.) And Appellant argues CJD consistently told the same lie based on the same motivation to different people. (App. Br. at 19.) Appellant argues on appeal the motive to fabricate was the same throughout. (App. Br. at 18.) But at trial, trial defense counsel implied a second motive to fabricate during cross-examination – that LCC influenced CJD to report the charged offenses. (R. at 491.) And Mil. R. Evid. 801(d)(1)(B)(1) allows for the

admission of prior consistent statements "to rebut an express or *implied* charge" that the declarant fabricated her in court testimony. (emphasis added).

In his findings of fact, the military judge discussed both motives to fabricate. (R. at 531-532.) But the military judge determined the journal only rebutted the "the implication that [CJD] was either piling on, or some other ulterior motive, in relation to L.C.C.'s allegations." (R. at 532.) A prior consistent statement need only precede one of the motives to fabricate. Frost, 79 M.J. 104, 110.

Appellant compares this case to Frost by stating, "[T]his motivation to fabricate preceded the offered prior consistent statement, and the military judge's determination otherwise was clearly erroneous." (App. Br. at 20.) But the Court in Frost found that the military judge erred because his finding that the victim had two motives to fabricate was unsupported by the record. The Frost military judge found the defense alleged improper influence by Dr. L, but the testimony at trial did not focus on anything Dr. L may have said to influence the victim. This case is different than Frost because trial defense counsel drew a direct link between LCC telling CJD about her own allegation, and CJD then deciding to report. (R. at 490-491.) Trial defense counsel highlighted two separate motives to fabricate on the record: (1) CJD's motive to maintain her reputation, and (2) CJD's attempt to mend her friendship with LCC by piling on more allegations against Appellant. (R. at 490-491.)

Appellant argued in his brief that CJD admitted she slept with SSgt JV only after she talked with him, and he told her he had testimonial immunity. (App. Br. at 20.) Appellant briefly argues that "the military judge could not, and this court cannot, find that CJD's conversation with SSgt JV provided a motive to fabricate or improperly influenced her testimony to support the admission of Pros. Ex. 13 as a prior consistent statement." (App. Br. at 20.) But

the military judge focused his analysis on a different motive, the motive trial defense counsel highlighted on cross: that CJD only reported her allegations to mend her relationship with LCC by piling on offenses against Appellant.

Appellant now argues the journal was created after CJD formed her single motive to fabricate – saving her reputation by lying about her infidelity. (App. Br. at 20.) But a prior consistent statement need not rebut all motives to fabricate, but it needs to precede the motive it is rebutting. A prior consistent statement need only precede one of the motives to fabricate. Frost, 79 M.J. 104, 110. CJD testimony laid the foundation for the date range in which she wrote them, and she testified that they preceded her report to OSI and her conversation with LCC. (R. at 491, 498-499.)

This case is like Norwood. 81 M.J. 12. In Norwood, trial defense counsel tried to argue the victim possessed only one motive to fabricate, but the record in that case supported multiple motives to fabricate even though trial defense counsel only argued one existed. Id. This case is similar because trial defense counsel highlighted two motives to fabricate but attempted to shoehorn them into one. Trial defense counsel had no other purpose in highlighting that CJD only reported the allegations for the first time after LCC, if not to imply that there was some sort of improper influence. Trial defense counsel was trying to imply that LCC's statement caused CJD to report untruthful allegations. So it was a fair inference for the military judge to draw that trial defense counsel was alleging a motive to fabricate or improper influence. This Court, like the court in Norwood, should find trial defense counsel identified two distinct motives to fabricate, and the military judge did not err when he allowed trial counsel to rebut one of them with the journal as a prior consistent statement.

The military judge did not abuse his discretion because his findings of fact are supported by the record, thus they are not clearly erroneous. He cited the relevant case law in his conclusions of law, and his view of the law was not erroneous. Finally, the military judge's decision to admit the redacted journal as a prior consistent statement was within "the range of choices reasonably arising from the applicable facts and law. This Court should deny this assignment of error.

B. Appellant did not suffer a material prejudice to a substantial right by admission of CJD's prior consistent statement.

"[A] finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Article 59(a), UCMJ, 10 USC § 859(a). Appellant alleges he was prejudice because "the members took a handwritten memorialization of CJD's narrative into the deliberation room and were able to use it for the truth of the matter asserted," and the materiality and quality of the exhibit was increased. (App. Br. 21.) But Prosecution Exhibit 13 discussed not only Specification 5 of Charge I (the offense on which Appellant was convicted), but also conduct for which Appellant was ultimately acquitted. The exhibit contained CJD's thoughts on multiple specifications of Charge I. Despite CJD's journal entries on these specifications, the panel did not find the prior consistent statements (along with CJD's testimony) persuasive enough to convict Appellant of those offenses. "[A]n error is more likely to be prejudicial if the fact was not already obvious from the other evidence presented at trial and would have provided new ammunition against an appellant." United States v. Barker, 77 M.J. 377, 384 (C.A.A.F. 2018) (citing United States v. Harrow, 65 M.J. 190, 200 (C.A.A.F. 2007)). The journal was not "new ammunition against" Appellant because the information was "already obvious" from CJD's testimony and the Facebook messages between Appellant and CJD. *See* (Pros. Ex. 6.) The panel heard CJD's

testimony and read the Facebook messages before they were provided the journal entries. Barker, 77 M.J. at 384.

"[A] finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Article 59(a), UCMJ, 10 USC § 859(a). This Court evaluates the harmlessness of an evidentiary ruling by weighing: "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." United States v. Kerr, 51 M.J. 401, 405 (C.A.A.F. 1999).

Appellant claims the government's case was not strong because only CJD testified about the sexual assault. (App. Br. at 21.) But Appellant fails to recognize the lethality of his own statements in the Facebook messages sent close in time to the alleged offense of which he was convicted. (Pros. Ex. 6.) Appellant admitted that he heard CJD say no but then he had sex with her anyway. (Id.)

Appellant claims the defense case was strong because it focused on CJD's lack of credibility and motive to fabricate. (App. Br. at 21.) But just because the defense identified a motive to fabricate does not mean it was persuasive, as discussed in Issue I.

Looking to the materiality of the evidence, Appellant alleges the circuit trial counsel repeatedly referred to the journal entries as corroboration of CJD's testimony and stated the notebook "speaks volumes about her credibility and truthfulness." (App. Br. at 21.) But trial counsel's discussion of the journal was not rampant throughout his 90 minutes closing argument. (R. at 1069-1119.) He only mentioned the journal entries six times in 50 pages of transcript. (R. at 1080, 1082-1084, 1092, 1139.) The journal entries acted as corroboration for CJD's statements, but they were not the cornerstone of the government's case. Appellant's admissions

via the Facebook messages, in which he admitted he heard her say no to his sexual advances, were more persuasive than her journal entries. (Pros. Ex. 6.) But the quality of the evidence was still high because CJD testified to when she wrote them, and they were essentially consistent with her testimony at trial.

The military judge's admission of the exhibit was not an endorsement of the exhibit as Appellant alleges. (App. Br. 21.) The military judge instructed the panel, "If you believe that such consistent statements were made, you ***may*** consider them from their tendency to refute a charge of recent fabrication, improper influence or improper motives." (R. at 1062.) The military judge did not indicate a requirement to believe or give greater weight to the prior consistent statement. Rather, he instructed the members that "[t]he final determination as to the weight or significance of the evidence and the credibility of the witnesses in this case rests solely upon you." (R. at 1067.) Without a finding of prejudice, "a finding or sentence of a court-martial may not be held incorrect on the ground of an error of law." Article 59(a), UCMJ, 10 USC § 859(a). Appellant experienced no prejudice with the admission of the evidence, so no relief is warranted.

The military judge's decision to admit the victim's handwritten journal entries as a prior consistent statement was within the range of options arising from the facts and the law. The military judge did not err, and the Appellant did not suffer a material prejudice to a substantial right. This Court should deny this assignment of error.

III.

THE MILITARY JUDGE DID NOT ERR BY GRANTING A GOVERNMENT CHALLENGE FOR CAUSE RATHER THAN DISQUALIFYING TRIAL COUNSEL.

Additional Facts

During group voir dire, the military judge asked the venire if anyone "thinks that he or she, for any reason at all, may not be able to give this accused or the United States a fair trial." (R. at 135.) Maj NS answered affirmatively. (R. at 135.) In individual voir dire, Maj NS explained, "I do think that there could be a bias for me against the government in this case based on a previous case that I was involved with and I was a jury member for." (R. at 215.) The military judge asked Maj NS:

> MJ: You think that you would not be able to give both sides a fair trial then based on your previous experience?
>
> [Maj NS]: I would like to think that I would try, but I feel like there could be a slight bias against U.S. government.

(R. at 216.) During the individual voir dire of Maj NS, the military judge observed:

> I'm judging by your, sort of, demeanor. I don't know you, obviously, but ***you seem resolute*** in your position and you sort of qualified your answers where you said you believed that you might be able to. I'm just -- what I'm trying to do is get a sense of is this something that you're -- ***obviously, you feel strongly*** about it.

(R. at 216.) (emphasis added). The military judge then asked:

> MJ: Are you entrenched in your position, if that makes sense?
>
> [Maj NS]: I believe what I said is true. However, I do think that I would make every effort to not have a bias one way or the other, to look at the facts as presented in this case. Considering that event was only a few weeks ago -- it was rather recent. In an effort of disclosing, which was requested upon us at the beginning, I wanted to make that known.

(R. at 216-217.) Trial defense counsel questioned Maj NS further:

> [CDC]: When you say "a slight bias" based on your previous interactions, what do you mean as that applies to this case?
>
> [Maj NS]: I specifically mean that some of the U.S. government that was represented in that case are here today, so anything presented by that individual could be -- cause a bias for me.

(R. at 219.) Maj NS identified assistant trial counsel, Capt CA, as the recorder in the discharge board. (R. at 219.) He agreed with circuit defense counsel that if Capt CA was not on the case then he would be able to "consider all of the evidence that the prosecution presented just as fairly and openly as [he] would in any other trial." (R. at 219.) Maj NS then agreed, if Capt CA was not present as counsel then he would be able to consider the evidence and follow instructions. (R. at 219-220.)

The circuit defense counsel asked, "Granted, you had a -- I guess a sour experience in your last --that last board. Can you set that aside, absent the counsel themselves, and consider this independently of that other board?" (R. at 220.) Maj NS responded, "I'm going to do my best." (R. at 220.) Maj NS agreed that if Capt CA was removed from the case, then he could give both sides a fair trial. (R. at 220.)

> [CTC]: You talked about, I guess, let's say Captain [A] is up here and she's going to make some type of argument about what the panel should or shouldn't do and the defense counsel gets up here and is making some argument about what the panel should or shouldn't do, will you be able to completely set aside that other experience from a few weeks ago when Captain [A] might be advancing some argument or advocating for what should be done in the case?
>
> [Maj NS] ***I'm not sure.***

(R. at 222.) (emphasis added). The military judge asked a final question about Maj NS's ability to be impartial:

> [MJ]: All right. Do you believe that you can give this accused a full, fair and impartial hearing?

> [Maj NS]: I do.
>
> [MJ]: I'm going to ask you one more question and, again, no right or wrong answer. Do you believe that you can give the United States a full, fair and impartial hearing?
>
> [Maj NS]: ***I think so.***

(R. at 225.) (emphasis added). The government challenged Maj NS for actual and implied bias. (R. at 309.) Circuit defense counsel conceded Maj NS's "bias is centered solely around Captain [CA]." (R. at 312.) "His problem is with Captain [CA]." (Id.)

Circuit defense counsel did not allege unethical behavior against Capt CA. (R. at 312.) Circuit trial counsel stated she could not find a basis for Capt CA's disqualification under the "rules and the case law," and she declined to make the motion for disqualification of trial counsel because she couldn't "make a ***baseless*** motion." (R. at 313-314.) (emphasis added).

The military judge granted the government's challenge for cause of Maj NS for implied bias, but he determined actual bias did not apply. (R. at 316.) He put his findings of fact and conclusions of law on the record. (R. at 316.) The military judge stated, "I will note in noticing Major [NS's] demeanor and body language, even yesterday, he did not appear happy. He didn't appear like he wanted to be here. He seemed put out, honestly." (R. at 316.)

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). For implied bias claims, 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).

Law and Analysis

A. The military judge's decision to grant the government's challenge for cause against Maj NS was not error.

"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[3]).

Implied bias is "bias conclusively presumed as [a] matter of law." Hennis, 79 M.J. at 385 (quoting Wood, 299 U.S. at 133) (alteration in original). 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." Hennis, 79 M.J. at 385 (quoting United States v. Wood, 74 M.J. 238, 243 (C.A.A.F. 2015)); *see also* United States v. Peters, 74 M.J. 31, 33–34 (C.A.A.F. 2015) (stating that implied bias exists where "the public would question the fairness" of the trial).

The burden of establishing that grounds for a challenge exist is upon the party making the challenge. R.C.M. 912(f)(3). As the challenging party, the government highlighted Maj NS's statement that he did not think he could give the government a fair trial because Capt CA was part of the prosecution team. (R. at 219.) Maj NS strenuously objected to Capt CA's

[3] Actual bias is "personal bias which will not yield to the military judge's instructions and the evidence presented at trial." Nash, 71 M.J. at 88 (citation omitted). The military judge determined actual bias did not apply to the government's challenge of Maj NS.

participation in the trial, and admitted he would only be able to give the government a fair and impartial trial if Capt CA was removed as the government's representative. (R. at 219-220.)

Appellant argues, "[t]he only reason that Maj NS has any bias was because he disagreed with the approach of Capt CA." (App. Br. at 25.) He continues by arguing the government created this problem when the convening authority selected Maj NS and the staff judge advocate detailed Capt CA. (App. Br. at 26.) The legal office chose not to remove Capt CA, "cementing Maj NS's bias." (App. Br. at 26.) But Appellant argument does not deny Maj NS had a bias but highlights it. He reiterates again and again Maj NS had a bias but blames the government for removing Maj NS from the panel. "The purpose of voir dire and challenges is, in part, to ferret out facts, to make conclusions about the members' sincerity, and to adjudicate the members' ability to sit as part of a fair and impartial panel." United States v. Bragg, 66 M.J. 325, 327 (C.A.A.F. 2008). The government, along with the military judge, ferreted out facts demonstrating Maj NS's unfairness and partiality.

"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)). The military judge allowed for extensive individual voir dire of Maj NS and provided him ample opportunity to explain his beliefs. Maj NS waivered every time he was asked if he could give the United States a fair trial. (R. at 216, 217, 219, 220, 222, 225.) Maj NS stated he was "unhappy" with the way that the United States behaved in the administrative discharge board. (R. at 215.) He said, "I think there could be a bias against the government." (R. at 216.) He failed to affirmatively state that he would set aside his feelings about the recent experience

with Capt CA. Instead, he used phrases like, "I'm going to do my best," and "I think so." (R. at 220, 225.)

The military judge found Maj NS so resolute in his bias against the government that the military judge felt it necessary to point out Maj NS's demeanor. The military judge stated, "[H]e did not appear happy. He didn't appear like he wanted to be here. He seemed put out, honestly." (R. at 316.) Based on a totality of the circumstances – compiling Maj NS's words and demeanor – an objective outside member of the public "familiar with the unique structure of the military justice system" would not believe Maj NS could be a fair and impartial member. Hennis, 79 M.J. at 385. For these reasons, the military judge did not err in granting the government's challenge for cause against Maj NS.

B. Capt CA was qualified to serve as trial counsel and did not commit any misconduct that would require her disqualification.

Appellant argues, "Trial counsel are fungible, and in these circumstances, there was no reason Capt CA could not have been removed from the trial team." (App. Br. at 26.) But there was no reason to remove her either. "Court members, military judges, and prosecutors are fungible; and procedures are readily available to compensate for their unavoidable absences during a trial." United States v. Royster, 42 M.J. 488, 490 (C.A.A.F. 1995). Here we do not have an "unavoidable" absence. We have a panel member with a bias against a trial counsel. A trial counsel who did not commit misconduct to warrant disqualification or become ill creating an unavoidable absence.

A panel member lacks the authority to dictate which attorney serves as counsel on a court-martial. Such power lies with the military judge. "If it appears that any counsel may be disqualified, the military judge shall decide the matter and take appropriate action." R.C.M. 901(d)(3). Counsel may be disqualified because of lack of necessary qualifications, or because

of duties or actions which are inconsistent with the role of counsel. R.C.M. 901(d)(3), Discussion. On the other hand, as discussed above, a panel member may be disqualified for implied or actual bias. Elfayoumi, 66 M.J. 356.

The record does not provide any evidence that Capt CA lacked the necessary qualifications to be detailed as trial counsel, or that she performed duties or actions inconsistent with the role of counsel. Capt CA was properly detailed by the staff judge advocate and she had the proper qualifications under Article 27(b), UCMJ. (R. at 2-3.) She did not act as a preliminary hearing officer, court member, military judge, military magistrate, or appellate judge in Appellant's case. (R. at 3.); *See* R.C.M. 502(d)(3) (stating the potential reasons for disqualification of trial counsel.) Finally, trial defense counsel explicitly stated any motion for disqualification of Capt CA was "baseless." (R. at 314.)

As a practical matter disqualifying an attorney without cause is highly prejudicial to the government. When severe prosecutorial misconduct warrants such prejudice to the government, the government adjusts its strategy out of necessity. But removing one counsel without reason, would have severely injured the government trial team, forcing them to scramble to make up the work Capt CA was assigned. Disqualifying counsel for "baseless" reasons is not appropriate or required.

In addition, there was no guarantee Maj NS would have been seated on the panel after challenges for cause. The random number generator would have needed to assign him a number qualifying him for service on the panel. R.C.M. 912(f)(5). Then he would have needed to survive the government's peremptory challenge. Article 41(b)(1), UCMJ. Based on his answers and the trial counsel's argument challenging Maj NS it is reasonable to infer the government would have used its peremptory challenge on Maj NS.

The accused is statutorily afforded the right to a panel of impartial members, but he has no right to the panel he wants. United States v. Easton, 71 M.J. 168, 176 (C.A.A.F. 2012). Maj NS was impliedly bias against the government and could not be an impartial member capable of providing both sides with a fair trial. Even if Maj NS's removal was error, Appellant would not have been prejudiced unless there was some showing that the other panel members who actually sat were biased, which Appellant has not shown. Dockery, 76 M.J. 99. The military judge did not err in granting the government's challenge for cause against Maj NS, and this Court should deny this assignment of error.

IV.

THE MILITARY JUDGE DID NOT ERR BY DENYING THE DEFENSE'S CHALLENGE FOR CAUSE OF STAFF SERGEANT DMC.

Additional Facts

During group voir dire, SSgt DMC answered affirmatively when asked if she was aware of the charges against Appellant. (R. at 119-120.) While working in the Military Personnel Flight, SSgt DMC updated Appellant's record to indicate he could not promote. (R. at 301.) Trial counsel asked SSgt DMC:

> [CTC]: Got it. Did you ask anyone questions about what's going on with Senior Airman Davis?
>
> [SSgt DMC]: No. We get a lot, so we just update and keep going really.

(R. at 301.)

SSgt DMC also stated she knew someone who had been a victim of sexual assault. During individual voir dire, she revealed she was thinking of her spouse who was sexually assaulted as a child, and she learned of the sexual assault 5 years before Appellant's court-

martial. (R. at 303.) Following up on her answer, circuit trial counsel asked, "Going back to your spouse, did learning that he had been the victim of sexual abuse, did that effect [sic] you in any way?" SSgt DMC answered, "No." (R. at 302.) She explained her husband tended to be a poor communicator because of the childhood sexual assault he experienced, and his poor communication skills strained their relationship. (R. at 303.) SSgt DMC explained after counseling, "I believe it's been resolved. It's still working, but its lot better than it was before. (R. at 303.) The marital counseling occurred one year before the court-martial. (R. at 300.) She did not think of her husband's sexual assault regularly. (R. at 303.)

SSgt DMC was pregnant and about three weeks from her due date. (R. at 299.) When asked about her ability to serve due to her pregnancy, she stated her pregnancy would not interfere with her paying attention in proceedings. (R. at 303.) She told the military judge she did get "a little tired" if she sat for more than two hours. (R. at 303.) She also stated she had a medical appointment scheduled during the court-martial. (R. at 304.) She stated she could pay attention during the court-martial and follow the court's instructions. (R. at 303.)

Trial defense counsel challenged SSgt DMC for implied bias because of her experience with her husband being a victim of sexual assault and her late stage of pregnancy. Counsel also invoked the liberal grant mandate. (R. at 321.) Trial counsel objected to the challenge. (Id.)

The military judge considered the challenge on actual and implied bias grounds, and he considered the liberal grant mandate. (R. at 324.) He denied the trial defense counsel's challenge for cause. (Id.) The military judge found that SSgt DMC's husband's sexual assault was not "in the forefront of her mind" and that while she had "some exposure to the verbiage" of the charges against SrA Davis, it was just in her "professional capacity to ensure that the accused was not promoted." (R. at 324.) The military judge added that the did not think the proximity to

her due date was a compelling argument. (R. at 326.) Trial defense counsel did not use a peremptory challenge on SSgt DMC. (R. at 326.) SSgt DMC served on the panel. (R. at 326.) The military judge considered the liberal grant mandate. (R. at 324.)

Standard of Review

The United States incorporates the standard of review from Issue III above.

Law and Analysis

The United States incorporates the law from Issue III above. For an accused's implied bias challenges, military judges also apply a "liberal grant" mandate, which "recognizes that the trial judiciary has the primary responsibility of preventing both the reality and the appearance of bias involving court members." United States v. Clay, 64 M.J. 274, 277 (C.A.A.F. 2007). That means that "if after weighing the arguments for the implied bias challenge the military judge finds it a close question, the challenge should be granted." Peters, 74 M.J. at 34.

Appellant argues the military judge should have granted Appellant's challenge against SSgt DMC for implied bias fueled by her husband's childhood sexual assault, her dealings with Appellant's promotion status, and her pregnancy. (App. Br. at 29.) Appellant argues that individually each basis does not create a challenge for cause, but cumulatively they "create a high risk" of injury to the public's perception of the court-martial's fairness. (App. Br. at 29.) They do not. Zero plus zero is still zero. The three unavailing bases do not create a perception of unfairness in Appellant's court-martial. And an objective observer would not have a substantial doubt as to the fairness of Appellant's court-martial panel because SSgt DMC remained on the panel.

SSgt DMC learned of her husband's childhood sexual assault five years before Appellant's court-marital, and they discussed it one year before the court-martial while they were

in marital counseling. (R. at 300.) But SSgt DMC's husband's sexual assault was an adult on child offense and none of the offenses with which Appellant was charged involved children. (*Charge Sheet*, ROT, Vol. 1.) CAAF has held that the mere fact that a relative of a potential court member has similarly suffered is not per se disqualifying. Terry, 64 M.J. at 297. A potential panel member could provide such positive assurances of impartiality to outweigh the assertions of implied bias against her – as SSgt DMC did in this case. United States v. Porter, 17 M.J. 377, 379 (C.A.A.F. 1984).

SSgt DMC was adamant that her husband's sexual assault did not affect her, and she did not think of it when she read the flyer. (R. at 303.) She credited the sexual assault with her husband's poor communication skills, but she stated the issue was largely resolved. (R. at 303.) Communication issues were not unique to SSgt DMC and her spouse; they exist in many romantic and platonic relationships. Simply having communication issues is not a reason to align SSgt DMC's experience with that of Appellant's experience and questioning her ability to be fair and impartial on a panel. The record does not show any similarities between the type of marital communication issues SSgt DMC had with her husband compared to those of Appellant's and his wife. The military judge did not err in denying the challenge for this reason because an objective observer would not have a substantial doubt as to SSgt DMC's impartiality simply because she had communication issues with her husband. The communication issues were largely resolved at the time of the trial and were not similar to those of Appellant's with his wife. Also an objective observer would not have a substantial doubt as to SSgt DMC's impartiality simply because the sexual assault perpetrated against her husband – not her – occurred years before she met or married him and it did not affect her or her marriage.

Moreover, it was a sexual offense against a child – significantly different from the spouse-on-spouse crime Appellant was charged with.

SSgt DMC was notified Appellant would not promote because he was facing court-martial charges, and she was not provided any other details. (R. at 301.) She did her job and ensured his records stated he could not promote. (Id.) She did not dig into the facts of Appellant's case. She plainly stated she could follow the military judge's instructions which includes an instruction on the burden of proof and the presumption of innocence. (R. at 303.) Appellant argues that the charges themselves signaled "to SSgt DMC an endorsement by SrA Davis's commander of the quality of the evidence against him." (App. Br. at 30.) But the record does show SSgt DMC, a member of the 48th Force Support Squadron, was influenced by the accuser's decision to prefer charges – a commander of the 48th Equipment Maintenance Squadron who was not in SSgt DMC's chain of command. (Charge Sheet, ROT, Vol. 1; Convening Order, ROT, Vol. 1.) An objective observer would not have a substantial doubt as to SSgt DMC's impartiality because she was no more influenced or informed of the specifics of Appellant's offenses than an average Airman reading the public Air Force Court Docket or of her fellow panel members reading the flyer.

Despite being in the late stages of pregnancy, SSgt DMC stated she could sit through and pay attention to the court-martial if she was chosen for the panel. (R. at 304-305.) Any person sitting for long periods of time in a warm setting may become drowsy, and the military judge instructed the members if they needed a break "because of drowsiness or for comfort reasons" they should let him know and he would attend to their needs. (R. at 114.) At no point during the court-martial did SSgt DMC express concerns with her health or her ability to focus. Most importantly SSgt DMC said – under oath – that she was physically capable of participating as a

panel member. (R. at 105, 303, 305); *See* R.C.M. 807(b)(2). But Appellant wants this Court to decide for SSgt DMC that she could not understand her own body and its limits. The record does not support a claim that SSgt DMC could not handle the heat in the courtroom or maintain her focus during the court-martial, and it was not error for the military judge to take a panel member at her word that she was physically capable of performing her duties. Doing otherwise could have potentially amounted to unlawful discrimination against pregnant servicemembers.

Finally, the military judge considered the liberal grant mandate. (R. at 324.) The liberal grant mandate "recognizes that the trial judiciary has the primary responsibility of preventing both the reality and the appearance of bias involving court members." Clay, 64 M.J. at 277. But in this case there was no reality of a bias and there was no appearance of a bias on which the military judge could grant the challenge.

The military judge considered actual and implied bias and the liberal grant mandate. (R. at 324.) He did not err in denying the trial defense counsel's challenge for cause because the identified grounds for causes did not individually or cumulatively create a doubt as to the fairness of the proceeding in the mind of a reasonable observer. This Court should deny this assignment of error.

V.

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

Standard of Review

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

Law and Analysis

At the time of Appellant's court-martial, Article 52, UCMJ, required the concurrence of three-fourths of the panel members for a conviction. At trial, the military judge instructed the members as such. (R. at 1175; App. Ex. LXII). Appellant filed a pretrial motion for appropriate relief requesting a unanimous verdict. (App. Ex. IX). The military judge denied Appellant's motion. (App. Br. XXXI). Appellant argues, in light of the Supreme Court's decision in Ramos v. Louisiana, 140 S. Ct. 1390 (2020), the Sixth Amendment and the Fifth Amendment rights to due process and equal protection required a unanimous verdict by the court-martial panel. (App. Br. at 33).

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

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

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

> This court has repeatedly held that Fifth Amendment due process does not require unanimous verdicts in courts-martial.

Further, in Anderson this Court found that non-unanimous verdicts did not constitute an equal protection violation under the Fifth Amendment. Id. at *56. *See also*, United States v. Monge, No. ACM 39781, 2022 CCA LEXIS 396, at *30-31 (A.F. Ct. Crim. App. July 5, 2022) (holding that Appellant's unanimous verdict claim did not warrant discussion or relief). This Court should adopt its reasoning from Anderson and deny Appellant's requested relief.

VI.

THERE IS NO ERROR TO CORRECT, BECAUSE THE MILITARY JUDGE NEVER ISSUED A FINAL RULING ON THE ADMISSIBILITY OF "HAVE YOUR HEARD" AND "DID YOU KNOW" QUESTIONS, AND THOSE QUESTIONS WERE NEVER ASKED AT TRIAL.

Additional Facts

Trial defense counsel asked for a preliminary decision from the military judge about the government's did you know and have you heard evidence. The Article 39(a) hearing occurred after the government rested and before Appellant began his sentencing case-in-chief. (R. at 1198.) Trial defense counsel challenged the government's good-faith basis for asking did you know and have you heard questions of Appellant's sentencing witnesses. (Id.) The military judge stated he would only provide a ruling on whether a good-faith basis existed for the government to ask the question, but he would not analyze the issue beyond that. (R. at 1197-1198.)

An email between OSI agents discussing an allegation that Appellant molested his niece formed the government's good-faith basis for asking the did you know and have you heard questions. (App. Ex. LXIV.) Circuit trial counsel explained the context of Appellate Exhibit

LXIV, "A victim in another case made a formal statement to law enforcement that she overheard a conversation from an eyewitness to the accused molesting his niece." (R at 1201.)

Trial defense counsel did not call any live witnesses during their sentencing case. Instead, they admitted written character statements. (R. at 1214; Def. Ex. I-Q.) Trial defense counsel stated they altered their sentencing strategy because the military judge determined a good-faith basis existed for the government to ask the questions. (R. at 1254.) In response, the military judge explained:

> Obviously, I did make a finding that trial counsel had a good faith basis to ask the questions. However, as you know, I did not make a ruling as to any specifics because, obviously, I didn't know any specifics of, you know, what would open the door to what or anything where that's concerned.
>
> I also didn't do a 403 balancing test because the issue was not presented to me and, obviously, I can't make a ruling on an issue that's not before me.

(R at 1254-1255.) The military judge explained he understood trial defense counsel made a "tactical decision" based on trial counsel's proffer and the military judge's finding that a basis existed. (R. at 1255.)

Standard of Review

The Court tests "for an abuse of discretion by the trial judge when reviewing an averment of improper cross-examination." United States v. Brewer, 1993 CMR LEXIS 308, *11 (A.F. Ct. Crim. App. 1993).

Law and Analysis

On cross-examination, a witness' opinion or knowledge may be tested by inquiring into relevant specific instances of conduct. Mil. R. Evid. 405(b); *see* United States v. Catrett, 55 M.J.

400, 406 (C.A.A.F. 2001); United States v. Pruitt, 43 M.J. 864, 868 (A.F. Ct. Crim. App. 1996), aff'd, 46 M.J. 148 (C.A.A.F. 1997).

This "specific act" cross-examination of a defendant's reputation witness is allowed not to prove that the defendant committed the particular bad acts but is permitted so that the government may "test the knowledge and credibility of the witness." Gross v. United States, 394 F.2d 216, 220 (8th Cir. 1968). "The rationale given for allowing such questions is that, if answered affirmatively, they might cast serious doubt on the witness's testimony, thus serving a legitimate rebuttal function, and that, if answered negatively, they would show that the witness did not know enough about the accused's reputation to testify." Awkard v. United States, 352 F.2d 641, 643 n. 4 (D.C. Cir. 1965) (quoting Note, Other Crimes Evidence at Trial: Of Balancing and Other Matters, 70 Yale L.J. 763, 779 (1961)). A counsel must possess a "good faith belief" that the conduct that forms the basis of the cross-examination occurred. United States v. Robertson, 39 M.J. 211, 214 (C.M.A. 1994). Even though inquiries into specific instances of conduct are subject to a Mil. R. Evid. 403 balancing test, a military judge has "wide discretion" in the application of that test. United States v. Pearce, 27 M.J. 121, 123-25 (C.M.A. 1988).

Appellant alleges that the government lacked a good-faith basis to believe Appellant molested his niece. (App. Br. at 38.) And Appellant argues he was prejudiced because trial defense counsel altered their strategy based on the military judge's finding of the good faith basis. (App. Br. at 38.) But the issue was never ripe at the trial level for full adjudication because trial defense counsel changed their sentencing strategy.

"Ripeness" is the "state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made." Ripeness, Black's Law Dictionary 1589 (11th ed. 2019). According to our superior Court in

United States v. Wall, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." 79 M.J. 456, 460 (citing Texas v. United States, 523 U.S. 296, 300, 118 S. Ct. 1257, 140 L. Ed. 2d 406 (1998).

In this case, the facts never "developed sufficiently." Id. Trial defense counsel never had a chance to "test the knowledge and credibility of the witness" because trial defense counsel never called any witnesses in sentencing. Gross, 394 F.2d at 220. The parties never fully litigated the issue. Neither the trial defense counsel nor the government ever took up the issue beyond trial counsel's proffer. Without live defense witnesses there was no means for trial counsel to test their credibility.

Even if the military judge erred in finding a good faith basis existed for trial counsel to ask the questions, Appellant was not prejudiced because the military judge did not actually admit any evidence, and his preliminary ruling did not guarantee that the evidence would have been admitted against Appellant. The preliminary ruling also did not prevent the defense from introducing the entirety of the character evidence they planned to admit. Rather, they made the strategic decision not to risk opening the door to any impeachment evidence. But, in the end, it would be improper for this Court to find prejudicial, reversible error based on a finding of the military judge that did not actually admit or exclude any evidence. For all we know, after hearing from the defense witnesses and the issue becoming ripe, the military judge might have changed his mind and decided that no good faith basis existed to admit the "did you know" questions.

Moreover, Appellant was not prejudiced by the "did you know" questions because the questions were never asked. Trial defense counsel pivoted their case strategy and used nine character letters instead of live testimony. (Def. Ex. I-Q.) They could provide the same

information to the panel without the risk opening the door to any "did you know" questions on cross-examination. Any prejudice suffered by Appellant was minimal and speculative. The record does not support Appellant's assertion that his sentence would have been less harsh if there had been live testimony of the character witnesses. (App. Br. at 41.)

In conclusion, Appellant failed to show that the military judge committed error in issuing a preliminary finding that the Government had a good faith basis to ask certain questions, and no prejudice resulted from the preliminary ruling because the questions were never asked in front of the sentencing authority. Thus, this assignment of error should be denied.

VII.

TRIAL COUNSEL'S ARGUMENT WAS NOT IMPROPER AND DID NOT PREJUDICE A SUBSTANTIAL RIGHT OF APPELLANT.

Additional Facts

During the Government's sentencing argument, trial counsel asked "next time that [SrA Davis is] intimate with someone, are you going to feel confident that he's going to stop when someone says stop? Because, right now, the answer to that is no." (R. at 1239.) Trial counsel then argued, "Members, you are charged with protecting the public from Senior Airman Davis and making sure that what happened here, doesn't happen again. What kind of risk are you willing to accept?" (R. at 1240.) Trial counsel later argued:

> Ask yourself, how long is it going to take for you to feel sure that this won't happen again. Don't allow Senior Airman Davis to walk out of this courtroom and take advantage of the next unsuspecting person. This is your moment to send a message that this kind of behavior won't be tolerated.

(R. at 1240.) Trial defense counsel did not object to any of trial counsel's statements. (R. at 1236-1240.) During trial defense counsel's brief sentencing argument, trial defense counsel did not mention trial defense counsel's arguments. (R. at 1243-1244.)

Trial counsel recommended the panel sentence Appellant to three years (36 months) of confinement during sentencing argument. (R. at 1240.) Trial defense counsel recommended the panel sentence Appellant to 30 days of confinement. (R. at 1244.) Thirty years confinement was the maximum confinement available for the offense of which Appellant was convicted. (R. at 1220.) The panel sentenced Appellant to only ten months confinement. (*Entry of Judgment*, ROT, Vol. 1; R. at 1220, 1256.)

Standard of Review

When no objection is made to improper argument at trial, this Court reviews for plain error. United States v. Rodriguez, 60 M.J. 87, 88 (C.A.A.F. 2004). To establish plain error, the appellant bears the burden of proving: (1) there was error; (2) such error was plain, obvious, or "clear under current law"; and (3) the error resulted in material prejudice to a substantial right. Id. at 88-89; United States v. Olano, 507 U.S. 725, 734 (1993).

Law

The Supreme Court cautioned prosecutors to "refrain from improper methods calculated to produce a wrongful conviction . . . ." Berger v. United States, 295 U.S. 78, 88 (1935). Our adversarial system allows a prosecutor to "prosecute with earnestness and vigor." Id. Trial counsel is "charged with being as zealous an advocate for the Government as defense counsel is for the accused." United States v. McPhaul, 22 M.J. 808, 814 (A.C.M.R. 1986), pet. denied, 23 M.J. 266 (C.M.A. 1986). Trial counsel may "argue the evidence of record, as well as all

reasonable inferences fairly derived from such evidence." United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000).

As Learned Hand observed: "It is impossible to expect that a criminal trial shall be conducted without some showing of feeling; the stakes are high, and the participants are inevitably charged with emotion." United States v. Wexler, 79 F.2d 526, 529-530 (2d Cir. 1935), cert. denied, 297 U.S. 703 (1936). The law has long recognized that summation is not a "detached exposition," Wexler, 79 F.2d at 530, with every word "carefully constructed . . . before the event." Donnelly v. DeChristoforo, 416 U.S. 637, 646-47 (1974). Because closing and sentencing arguments often require "improvisation," courts will "not lightly infer" that every statement is intended to carry "its most dangerous meaning." Id. It is appropriate for trial counsel—who is charged with being a zealous advocate for the Government—to be "emphatic, forceful, blunt and passionate in addressing the legitimate concerns and objectives of sentencing." United States v. Baer, NMCM 97 02044, 1999 CCA LEXIS 180, 24 at *6 (N-M Ct. Crim. App. 30 June 1999) (unpub. op.), aff'd, 53 M.J. 235 (CAAF 2000).

"If every remark made by counsel outside of the testimony were grounds for reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation." Baer, 53 M.J. at 238 (quoting Dunlop v. United States, 165 U.S. 486, 498 (1897)). To that end, courts have struggled to draw the "exceedingly fine line which distinguishes permissible advocacy from impermissible excess." United States v. Fletcher, 62 M.J. 175, 183 (C.A.A.F. 2005) (internal citations omitted).

In determining whether prejudice exists, military courts balance three factors: "(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. In United States v. Halpin, CAAF extended this test to improper sentencing arguments. 71 M.J. 477, 480 (C.A.A.F. 2013). Reversal for an improper sentencing argument is appropriate only if "trial counsel's comments, taken as a whole, 'were so damaging that [the Court] cannot be confident that [the appellant] was sentenced on the basis of the evidence alone.'" United States v. Frey, 73 M.J. 245, 259 (C.A.A.F. 2014) (quoting Halpin, 71 M.J. at 480)

Analysis

Trial defense counsel did not object to any of trial counsel's statements during sentencing argument. The objection was forfeited and is reviewed for plain error. Appellant challenges two of trial counsel's statements during her sentencing argument. First, the risk the panel was willing to accept for Appellant's future actions, and second, the likelihood of Appellant committing another sexual assault in the future. (App. Br. at 45.)

A. Trial counsel properly argued Appellant's future risk and protection of society.

Appellant cites United States v. Witt as the only case law prohibiting a rhetorical argument of "what risk will you accept?" 2021 CCA LEXIS 625, *141 (unpub. op.) rev. granted, 82 M.J. 424 (C.A.A.F. 2022). But the government disagrees that the statement in Witt – a nonbinding, unpublished opinion currently under review by CAAF – constituted error. Although the government disagrees, this Court found that trial counsel's statements were erroneous, because the trial counsel in Witt "specifically placed on the members' shoulders, both personally and professionally, the weight of the victims' families' judgment." Id. This Court should view this case differently than Witt. Here trial counsel properly argued the member's responsibility to craft a sentence that will "protect others from further crimes by the accused." R.C.M. 1002(f) (2019 ed.). CAAF has long identified evidence of future dangerousness as a

proper matter for sentencing. *See* United States v. George, 52 M.J. 259, 261 (C.A.A.F. 2000). When trial counsel asked the members, "What risk are you willing to accept?" she was highlighting that the members are the ones who decide the sentence in the case. It was not error for trial counsel to argue that the members should consider Appellant's future dangerousness because trial counsel never stated or implied the members would be personally responsible for Appellant's future harm. Her statements only emphasized that future risk is something the members should consider in choosing a punishment.

Trial counsel's legitimate future dangerousness argument should not be rendered improper just because she referred to possible future victims. This Court should decline to interpret trial counsel's comments in the most damaging light, which the Supreme Court has cautioned courts not to do. Trial counsel was requesting that the members consider Appellant's future dangerousness in making their individual, moral judgments on a sentence. Donnelly, 416 U.S. at 646.

Appellant analogizes trial counsel's argument on future dangerousness to the "inflammatory argument" in Frey. (App. Br. at 28.) Frey is a child molestation case in which trial counsel asked the members to use their understanding and ways of the world "about child molesters," and CAAF found the statement was not support by the evidence, and it deserved relief because it was inflammatory. Frey, 73 M.J. at 249. But this case is distinguishable from Frey. Child molestation cases are naturally inflammatory as they focus on society's most vulnerable – children. Arguments about future molestations of children tend to inflame the passions of members. But here we have members who sat through a fully litigated trial with several allegations and only found Appellant guilty of one specification showing that they were a discerning panel unlikely to be swayed by allegedly inflammatory statements. Unlike Frey,

where the sentencing argument focused the members on using their common sense and understanding of the world, trial counsel here tied her argument to proper sentencing principles under R.C.M. 1002.

Thus, trial counsel's arguments on future dangerousness were proper comment on the defense's evidence, and proper aggravation evidence. George, 52 M.J. at 261. Given the "exceedingly fine line which distinguishes permissible advocacy from permissible excess," trial counsel's future dangerousness argument was not improper. Fletcher, 62 M.J. at 183. The remarks did not ask the members to sentence Appellant on anything but the evidence.

This Court should not infer the "most damaging" meaning from trial counsel's references to future risk. Donnelly, 416 U.S. at 646. And considering the absence of binding law condemning such statements, this Court should decline to find plain error.

B. There is no prejudice because a substantial right of the Appellant was not impacted, and the conduct was not severe.

Even if this Court determines some of trial counsel's statements were error, improper sentencing argument does not automatically warrant relief. Relief will be granted only if the trial counsel's misconduct "actually impacted on a substantial right of an accused (i.e., resulted in prejudice)." Fletcher, 62 M.J. at 178. And in assessing the impact of improper sentencing argument on an appellant's substantial rights with no objection, this Court asks whether the outcome would have been different without the error. Norwood, 81 M.J. at 19-20. The panel rejected the government's confinement recommendation of 36 months when they sentenced Appellant to 10 months – less than a third of what trial counsel recommended and a tenth of the maximum available. (R. at 1249.) Trial counsel's effort to "cultivate a severe sentence did not bear fruit," because the panel decided a sentence closer to that of trial defense counsel's recommendation. United States v. Ramos, 42 M.J. 392, 397 (C.A.A.F. 1995). Appellant's

substantial rights were not impacted because the panel did not follow trial counsel's recommendation.

In analyzing the first Fletcher factor, assuming some of trial counsel's arguments amounted to plain error, the severity of the misconduct must have been low with minimal impact on the case because Appellant did not object to any of trial counsel's arguments on the grounds now asserted on appeal. (R. at 1236-1240.) Trial defense counsel's choice not to object to trial counsel's argument is "some measure of the minimal impact of [the] prosecutor's improper argument." United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001). Trial defense counsel "was in the best position to determine the prejudicial effect of the argument." United States v. Scamahorn, No. NMCCA 200201583, 2006 CCA LEXIS 71, at *42 (N-M Ct. Crim. App. 27 March 2006) (unpub. op.). And the comments, even if improper, were not so divorced from the well-recognized sentencing principle of protection of society, that they would tend to inflame the passions of the members.

In analyzing the second Fletcher factor, the military judge provided the standard instruction that "that the arguments and recommendation of trial counsel are only their individual suggestions and may not be considered as the recommendation or opinion of anyone other than such counsel." (R. at 1236.) No other measures were taken to address the alleged misconduct because trial defense counsel never objected to trial counsel's argument thereby triggering the need for a curative instruction. Finally, in analyzing the third Fletcher factor, the weight of the evidence supporting the conviction was strong. CJD provided detailed testimony about her physical and verbal manifestations of non-consent to Appellant. She said no multiple times, and he heard her. (Pros. Ex. 6.) Appellant claimed CJD pushed him away and said no before, but she still participated in the sexual intercourse. But in this instance, she went further in

demonstrating her lack of consent by turning her body away from him. (R. at 404, 407; Pros. Ex. 6 at 9.) He heard her say no, he felt her push him away, and he saw her turn her back on him, yet he persisted and took what he wanted from his wife. In doing so, he hurt his wife "both physically and emotionally." (R. at 1210; Court Ex. A). She explained in her victim impact statement, "To this day, it is still excruciatingly painful that he would hear me say no over and over but refused to stop." (Id.) As a result of Appellant's actions, CJD became anxious and fearful that Appellant would randomly show up to see her. She was constantly looking over her shoulder, and she was unable to "feel safe or relaxed." (Id.) Appellant deprived CJD of her sense of security and her trust in her own husband by violating her. And his actions warranted the ten months of confinement the members adjudged to punish him for his actions and deter future misconduct.

Trial counsel's statements were that of zealous advocacy and did not constitute plain error. If this Court finds plain error, trial counsel's statements, taken as a whole, were not so damaging "that [the Court] cannot be confident that [the appellant] was sentenced on the basis of the evidence alone.'" Frey, 73 M.J. at 259 (quoting Halpin, 71 M.J. at 480). This Court should deny this assignment of error.

CONCLUSION

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

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Appellate Government Counsel
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Military Justice and Discipline Directorate
United States Air Force

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 June 2023.

JOCELYN Q. WRIGHT, Capt, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S MOTION FOR**
Appellee	)	**ENLARGEMENT OF TIME**
	)	**FOR REPLY BRIEF OUT OF TIME**
	)	
v.	)	Before Panel No. 2
	)	
Senior Airman (E-4)	)	No. ACM 40370
TYRION N. DAVIS,	)	
United States Air Force	)	2 June 2023
Appellant	)	

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

Pursuant to Rule 23.3(m)(7) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) out of time to file a reply to the Government's Answer. This motion is filed out of time because the Government's answer was filed after business hours at 2152 on 1 June 2023. The reply is currently due **8 June 2023**. Appellant requests an enlargement for a period of 4 days, which will end on **12 June 2022.** The record of trial was docketed with this Court on 2 November 2022. From the date of docketing to the present date, 212 days have elapsed. On the date requested, 222 days will have elapsed. Undersigned counsel requests an enlargement of time as she is out of the local area on previously approved leave from 2 June 2023 until 5 June 2023.

From 13-23 June 2022, Appellant was tried by a general court-martial at RAF Lakenheath, United Kingdom. Contrary to his pleas, the panel of officer and enlisted members found Appellant guilty of one charge and one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §920. Record of Trial (ROT) Vol. 1, Entry of Judgment, dated 21 July 2022; *see also* R. at 1188-89. The panel acquitted Appellant of ten specifications of sexual assault and abusive sexual contact in violation of Article 120, UCMJ; one

charge with one specification of aggravated assault and one specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. §928; and one charge with one specification of wrongful use of marijuana in violation of Article 112a, UCMJ, 10 U.S.C. §912a. *Id.* The same panel sentenced Appellant to be reduced to the grade of E-1, to be confined for 10 months, and to be discharged from the service with a dishonorable discharge. R. at 1256. The convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. SrA Tyrion Davis*, dated 13 July 2022.

The record of trial is 11 volumes consisting of 40 prosecution exhibits, 20 defense exhibits, 69 appellate exhibits, and one court exhibit; the transcript is 1258 pages. Appellant is not currently confined.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: Counsel is currently assigned 20 cases; 12 cases are pending initial AOEs before this Court. Upon return from leave, the reply brief in this case will be counsel's top priority before this Court.

Through no fault of Appellant, undersigned counsel is currently on approved leave outside the local area. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review the Government's answer and reply. Thus, good cause exists for this four-day delay.

WHEREFORE, Appellant respectfully requests that this Honorable Court deny the Government's Motion for Enlargement of Time.

Respectfully submitted,

KASEY W. HAWKINS, Maj, USAF
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Air Force Appellate Defense Division

1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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2 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) TYRION N. DAVIS, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME FOR REPLY - OUT OF TIME ACM 40370 Panel No. 2

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

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

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

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 2 June 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.	)	**REPLY BRIEF ON BEHALF OF APPELLANT** Before Panel No. 2
Senior Airman (E-4) **TYRION N. DAVIS**, United States Air Force *Appellant*	)	No. ACM 40370 12 June 2023

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

COMES NOW, Appellant, Senior Airman (SrA) Tyrion N. Davis, by and through his undersigned counsel pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, and submits this reply to the United States' Answer to Assignments of Error, filed on 1 June 2023 (hereinafter Gov. Ans.). Appellant primarily rests on the arguments contained in the Brief on Behalf of Appellant, filed on 17 April 2023, but provides the following additional argument in reply to the United States' Answer to Assignments of Error I, II, VI, and VII.

Argument

I.

APPELLANT'S CONVICTION FOR SEXUAL ASSAULT IS LEGALLY AND FACTUALLY INSUFFICIENT.

The Government contends Appellant raised two "unpersuasive" motives to fabricate in his opening brief. Gov. Ans. at 8. As a preliminary matter, Appellant reiterates that CJD had only one motive to fabricate in this case—to portray herself as a victim of sexual assault rather than as a cheating wife. Contrary to the Government's claim, Appellant did not allege that CJD was motivated to fabricate in order to "remedy her relationship with LCC." Gov. Ans. at 8. CJD joined LCC's case against SrA Davis because it furthered her goal of appearing as a victim, rather than

as an adulteress who not only cheated on her husband but did so with her husband's friend and LCC's ex-boyfriend. CJD's concern with how she was perceived by others, including LCC, after cheating on her husband with SSgt JV, was the single overarching motivation for her to fabricate the sexual assault. *See*, *e.g.*, Prosecution Exhibit (Pros. Ex.) 10 at 5; R. at 1137 (trial defense counsel's closing argument explaining the motive to fabricate "to change the narrative from unfaithful wife, to victim of sex assault.").

The Government argues the court members in SrA Davis's court-martial were not persuaded that CJD fabricated the sexual assault. Gov. Ans. at 8. In support of this claim, the Government points to the fact the members acquitted SrA Davis of the other specifications alleged by CJD, which she admitted she allowed to happen. *Id.* The Government's approach is problematic. This Court reviews legal and factual sufficiency de novo, therefore whether the members were persuaded that CJD had a motive to fabricate is immaterial. Additionally, the fact that CJD alleged multiple sexual assaults *despite* admitting she did not communicate a lack of consent only further demonstrates her commitment to fabricating the allegations. CJD was willing to accuse her husband of serious sexual assaults notwithstanding the fact she consented to the sexual activity. This does not lend her testimony on Specification 5 of Charge I more credibility, as the Government argues, but rather proves she was willing to lie in order to continue her narrative.

The Government further asserts CJD's testimony alone was sufficiently credible to convict SrA Davis of sexual assault. Gov. Ans. at 9. The Government attempts to explain away CJD's repeated lies about her sexual relationship with SSgt JV, claiming "she stated the reason she did not disclose the relationship with SSgt JV was because he could have been prosecuted for an extramarital affair under the UCMJ." *Id.* Notably, the Government does not provide any citation

to the record to support this claim. A review of CJD's transcribed testimony reveals her true motivation for lying about having sexual intercourse with SSgt JV— "it wasn't something that [she] was proud of." R. at 494. She then added, "I also didn't want [SSgt JV] to get in any trouble." *Id.* Her chief explanation—the first thing to come to her mind—was that she was not proud of her own adultery. The Government contends the "trigger for [CJD's] honesty was finding out that SSgt JV was granted testimonial immunity for the extramarital affair." Gov. Ans. at 9. However, the facts show CJD only came clean when she realized that SSgt JV intended to testify truthfully and expose her as a liar. R. at 443-44. CJD's repeated lies, motivated by the same concern for her reputation that precipitated her accusations of sexual assault against SrA Davis, considerably tarnish her veracity, such that she is not a sufficiently credible witness upon whom the Government can rest its entire case.

The Government next argues SrA Davis could not have a reasonable mistake of fact as to consent because CJD said "no" and "stop" and pushed him away. Gov. Ans. at 10. However, the Government acknowledges CJD's testimony regarding the other charged offenses "tended to show she acquiesced to Appellant's conduct." Gov. Ans. at 12. The Government overlooks that CJD testified she said "no" and "stop" and pushed or physically moved away during these other charged offenses, yet the members acquitted SrA Davis of those specifications. *See*, *e.g.*, R. at 389-40 (CJD testified she said "stop" two times and physically used her legs to get SrA Davis to stop in relation to Specification 3 of Charge I), R. at 397-99 (CJD testified she physically moved away and "just laid there" in relation to Specification 4 of Charge I). CJD admitted in cross-examination that sometimes she would say "no" and then continue in the same sexual activity, consensually. R. at 489. CJD's testimony shows a pattern of a young married couple exploring their sexual boundaries, where CJD was often initially uninterested or averse to sexual activities but eventually

agreed to participate. CJD's testimony regarding Specification 5 of Charge I shows a continuation of that pattern—she told SrA Davis no and pushed him away, but then "just laid there" during sexual intercourse, indicating the same acquiescence as in their previous consensual sexual encounters. R. at 407-408. CJD testified she did not touch SrA Davis or kiss him, as she would during a consensual sexual encounter. *Id.* But her conduct after the sexual encounter contradicts her claim that it was not consensual, as she got back in bed with SrA Davis and went to sleep. R. at 409. Additionally, when messaging with SrA Davis shortly afterwards about being "sore" from their sexual intercourse, CJD did not accuse SrA Davis of any nonconsensual behavior, and told him he did not "make [her] do anything." Pros. Ex. 5 at 2-3. All of these facts show SrA Davis's reasonable belief that CJD consented to the sexual activity.

Even if CJD's testimony regarding Specification 5 of Charge I was truthful, and she did not consent to the sexual intercourse, the pattern of their sexual relationship was such that SrA Davis reasonably believed CJD consented because she did not act differently than during their previous consensual sexual activities. The messages between the couple bear this out: SrA Davis explained CJD said "no" and "stop" "literally all the time" but had a different tone when she "really" wanted him to stop. Pros. Ex. 6 at 8, 19-20. CJD agreed that it was "just a miscommunication" and "wasn't intentional." Pros. Ex. 6 at 3, 8; Pros. Ex. 7 at 4. The "miscommunication" was SrA Davis's mistaken belief that his wife consented to the sexual activity despite her initial reluctance, just as she had many times before. This marital miscommunication, between two very young adults exploring their sexuality within their relationship, cannot support a conviction of sexual assault.

WHEREFORE, SrA Davis respectfully requests this Honorable Court set aside and dismiss the finding of guilty and set aside the sentence.

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING UNDATED HANDWRITTEN NOTEBOOK PAGES FROM THE ALLEGED VICTIM AS PRIOR CONSISTENT STATEMENTS OVER A DEFENSE OBJECTION THAT THE MOTIVE TO FABRICATE PRECEDED THE CREATION OF THE NOTEBOOK.

The Government argues "[t]rial defense counsel highlighted two separate motives to fabricate on the record: (1) CJD's motive to maintain her reputation, and (2) CJD's attempt to mend her friendship with LCC by piling on more allegations against Appellant." Gov. Ans. at 17. The record shows otherwise. Trial defense counsel were clear they raised only one motive to fabricate—preservation of CJD's reputation. R. at 511, 519. This motive to fabricate began when CJD decided to leave SrA Davis for SSgt JV. R. at 519. CJD was motivated to preserve her reputation in general, not specifically to any one person. LCC's report did not provide any fresh motivation to lie but merely gave CJD the opportunity to continue preserving her reputation, this time with LCC.

The Government claims the defense raised CJD's attempt to mend her friendship with LCC as a motive to fabricate. Gov. Ans. at 17. However, trial defense counsel did not question CJD about her relationship with LCC. Trial defense counsel did not raise that potential motive to fabricate in opening statement. Moreover, in their closing argument, trial defense counsel did not draw any link between CJD making allegations against SrA Davis and CJD trying to repair her relationship with LCC. That is because the defense raised only one motive to fabricate—CJD's overarching desire to preserve her reputation. Even in disagreeing with the defense and admitting the notebook as a prior consistent statement, the military judge did not find that CJD was motivated to fabricate in order to restore her friendship with LCC. R. at 531-32.

The record shows CJD was motivated to fabricate the sexual assault in order to protect her reputation after she left her husband for his friend in July of 2019. That single motive to fabricate predated CJD's creation of her "journal." Moreover, the Government failed to address the characteristics of the "journal" which demonstrate CJD created the notebook to assist in making her allegations against SrA Davis *after* she had the motive to fabricate. The "journal" not only failed to qualify as a prior consistent statement but lacked sufficient indicia of reliability to be admitted to the members. Given the deficiencies of proof discussed above, admission of this unreliable journal materially prejudiced SrA Davis.

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

VI.

THE MILITARY JUDGE ERRED IN FINDING A GOOD FAITH BASIS FOR THE GOVERNMENT TO ASK DEFENSE SENTENCING WITNESSES "HAVE YOUR HEARD" AND "DID YOU KNOW" QUESTIONS WHEN THE BASIS FOR THOSE QUESTIONS WAS AN OVERHEARD THIRD-PARTY REPORT THAT WAS DIRECTLY CONTRADICTED BY OTHER EVIDENCE.

The Government asserts this "issue was never ripe at trial" and the military judge never issued a final ruling on the admissibility of "have you heard" or "did you know" questions. Gov. Ans. at 36, 38. The military judge's statements on the records show otherwise. The military judge framed his decision as a ruling: "I would allow the questions based on the good faith basis only . . . I'm not making any other ruling at this time. I have found that there—based on this email and trial counsel's assertions, that there is a good faith basis to ask the question." R. at 1205. This constituted a final ruling on whether a good faith basis existed.

The Government cites to language from *United States v. Wall* that a "claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed

may not occur at all." Gov. Ans. at 39 (citing 79 M.J. 456, 460 (C.A.A.F. 2020)). In *Wall*, the Court of Appeals for the Armed Forces (CAAF), in determining whether the granted issue was ripe for review, applied the two-part *Abbot* test considering the "fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 460 (quoting *Abbot Labs v. Gardner*, 387 U.S. 136, 149 (1967)). The CAAF found the issue was "fit for resolution" as it was "purely legal" and could be "resolved without further proceedings." *Id.* Additionally, the CAAF found the appellant had shown hardship because the lower court's order was "sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Id.* (quoting *Abbot*, 387 U.S. at 152).

Applying the same analysis here leads to the same conclusion—this issue is ripe for review. The question of whether a good faith basis exists under Mil. R. Evid. 405(b) is a legal question that can be resolved without further proceedings. Contrary to the Government's assertion that the facts were never "developed sufficiently," trial counsel presented all of the facts that formed what they believed to be a good faith basis to impeach defense character witnesses. Gov. Ans. at 39; R. at 1201. In claiming the facts were not fully developed, the Government does not show the issue was not ripe, but instead essentially admits that trial counsel's basis was weak, and the military judge erred. The Government argues this issue was not fully litigated because trial counsel was not able to ask the "have you heard" or "did you know" questions of defense witnesses. Gov. Ans. at 39. However, that conflates the actual use of the military judge's ruling with the fact that he made a ruling which is ripe for review by this Court. The military judge's decision that a good faith basis existed—a decision based upon the facts presented by trial counsel —was a final judgment that does not "rest upon contingent future events that may not occur as anticipated." *Wall*, 79 M.J. at 460. No future events were necessary for this issue to ripen.

Appellant agrees the military judge did not rule whether the defense would open the door to this impeachment evidence if they proceeded with their sentencing case as planned. But that was not required for this issue to ripen. The parties fully litigated the issue of whether a good faith basis existed, and the military judge made a ruling that there was a good faith basis. R. at 1199-1204. This prejudiced SrA Davis as the defense altered their sentencing case in order to avoid opening the door to the improper impeachment evidence. R. at 1253-54.

WHEREFORE, SrA Davis respectfully requests this Honorable Court set aside the sentence.

VII.

TRIAL COUNSEL'S SUGGESTION THE MEMBERS WOULD BE PERSONALLY RESPONSIBLE FOR ANY FUTURE MISCONDUCT COMMITTED BY APPELLANT IN SENTENCING ARGUMENT WAS IMPROPER.

The Government misstates this Court's decision in *United States v. Witt*, No. ACM 36785 (reh), 2021 CCA LEXIS 625 (A.F. Ct. Crim. App. 19 Nov. 2021) (unpub. op.). The Government claims this Court found error in trial counsel's argument of "what risk will you accept?" because it "specifically placed on the members' shoulders, both personally and professionally, the weight of the victims' families' judgment." Gov. Ans. at 43 (quoting *Witt*, unpub. op. at *141). However, this court's reasoning about the weight of the victims' families' judgment applied to trial counsel's improper argument "asking the members what their sentence would say about them personally." *Witt*, unpub. op. at *140. This Court found error in trial counsel's argument of "what risk [the members] would personally accept by virtue of the sentence they adjudged" because "the suggestion the members would be personally responsible" for any future misconduct by appellant was not an appropriate consideration in fashioning a sentence. *Witt*, unpub. op. at *142. "[I]t was entirely inappropriate to tell the members they would be accepting the risk of a future victim by

sentencing Appellant to something less than" what the trial counsel requested. *Id.* In affirming this Court's decision in *Witt* just this past week, the majority of the CAAF assumed without deciding the trial counsel's arguments were improper. *United States v. Witt*, __ M.J. __, No. 22-0090, 2023 CAAF LEXIS 379, at *7 (C.A.A.F. 5 Jun 2023). Separately, Chief Judge Ohlson and Judge Hardy found the arguments were obvious error. *Witt*, 2023 CAAF LEXIS 379, at *14 (Hardy, J., concurring), *18 (Ohlson, C.J., dissenting).

Trial counsel's argument here asking "[w]hat kind of risk are you willing to accept?" and "how long is it going to take for you to feel sure that this won't happen again" parrots the exact improper argument from *Witt*. R. at 1240. This improper argument is made even more flagrant and egregious in that it was delivered mere months after this Court condemned the same argument in *Witt*. The Government attempts to rationalize this argument, claiming it was proper commentary on Appellant's future dangerousness. Gov. Ans. at 44. However, unlike in *Witt*, there was no evidence presented of SrA Davis's future dangerousness. In fact, because SrA Davis was acquitted of all but one offense, the verdict demonstrated he was *not* a serial predator. This makes the argument not only improper, but incredibly prejudicial as its only purpose was to inflame the members' passions and invite them to sentence SrA Davis on hypotheticals with no basis in evidence. *See United States v. Norwood*, 81 M.J. 12, 21 (C.A.A.F. 2021).

In *United States v. Voorhees*, the CAAF expressed concern that "the consistent flow of improper argument appeals to our Court suggests that those in supervisory positions overseeing junior judge advocates are, whether intentionally or not, condoning this type of conduct." 79 M.J. 5, 15 (C.A.A.F. 2019). The trial counsel who made the improper sentencing argument in SrA Davis's case was supervised by both a "senior prosecutor in the United States Air Force" as well as a staff judge advocate. R. at 130. Both supervisory attorneys should have known the

argument was improper due to this Court's decision in *Witt*—an undoubtedly high-profile double-homicide case. That these supervisory attorneys permitted this improper argument demonstrates the CAAF's concerns have come to fruition, as it is apparent prosecutorial misconduct is being condoned by senior judge advocates. The CAAF also found Government appellate counsel's indorsement of trial counsels' arguments in *Voorhees* "deeply troubling." 79 M.J. at 14 n.7. This Court should be similarly concerned about the Government's indorsement of the misconduct in this case. This Court should grant relief to SrA Davis not only because the argument was inflammatory and prejudicial, but because the permissive attitude of supervisory attorneys and Government appellate counsel warrants censure.

SrA Davis submits, as argued in his opening brief, he was prejudiced by trial counsel's argument because the misconduct was severe, the military judge took no curative measures, and the weight of the evidence does not support the sentence. *See United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005). SrA Davis also urges this Court to analyze the prejudice he suffered in light of Judge Hardy's concurring opinion in *Witt*, questioning the suitability of the *Fletcher* factors in sentencing. *Witt*, 2023 CAAF LEXIS 379, at *13. In this case, the panel had a "broad spectrum of lawful punishments" they could impose, as opposed to a "binary choice between guilty and not guilty." *Id.* This Court should apply the *Fletcher* factors in light of all of the nuances involved in crafting "a punishment that best serves the varied purposes of sentencing," and the overarching question of whether this Court can be confident that Appellant was sentenced based on the evidence alone. *Id.* Furthermore, in rendering its decision, this Court should urge our superior Court to revisit the appropriateness of the *Fletcher* factors in sentencing.

WHEREFORE, SrA Davis respectfully requests this Honorable Court set aside the sentence.

Respectfully submitted,

KASEY W. HAWKINS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 12 June 2023.

KASEY W. HAWKINS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40370**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Tyrion N. DAVIS	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

Oral argument is hereby ordered on the following issues:*

I.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING THE ALLEGED VICTIM'S NOTEBOOK ENTRIES AS PRIOR CONSISTENT STATEMENTS PURSUANT TO MIL. R. EVID. 801(d)(1)(B)(i), FINDING MULTIPLE MOTIVES TO FABRICATE.

II.

WHETHER THE MILITARY JUDGE ERRED IN FINDING THAT GOVERNMENT TRIAL COUNSEL HAD A GOOD FAITH BASIS TO INQUIRE INTO SPECIFIC INSTANCES OF APPELLANT'S CONDUCT WITH ANTICIPATED DEFENSE WITNESSES IN SENTENCING.

III.

WHETHER ISSUE II IS PRESERVED WHEN APPELLANT DID NOT CALL THE ANTICIPATED WITNESSES IN SENTENCING.

Accordingly, it is by the court on this 27th day of September, 2023,

ORDERED:

Oral argument in the above-captioned case will be heard at a location, time,

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* Issue I relates to Appellant's second assignment of error. Issues II and III relate to Appellant's sixth assignment of error.

and date to be set by future order of this court.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**NOTICE OF APPEARANCE**
v.	)	Before Panel No. 2
	)	No. ACM 40370
Senior Airman (E-4) **TYRION N. DAVIS** United States Air Force *Appellant*	)	3 October 2023

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

COMES NOW the undersigned counsel, pursuant to Rule 13 of this Honorable Court's Rules of Practice and Procedure, and enters an appearance as counsel for Appellant.

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 3 October 2023.

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40370**
Appellee	)	
	)	
	)	
v.	)	**ORDER**
	)	
	)	
Tyrion N. DAVIS	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 27 September 2023, in the above-captioned case, this court ordered oral argument on the following issues:

I.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING THE ALLEGED VICTIM'S NOTEBOOK ENTRIES AS PRIOR CONSISTENT STATEMENTS PURSUANT TO MIL. R. EVID. 801(d)(1)(B)(i), FINDING MULTIPLE MOTIVES TO FABRICATE.

II.

WHETHER THE MILITARY JUDGE ERRED IN FINDING THAT GOVERNMENT TRIAL COUNSEL HAD A GOOD FAITH BASIS TO INQUIRE INTO SPECIFIC INSTANCES OF APPELLANT'S CONDUCT WITH ANTICIPATED DEFENSE WITNESSES IN SENTENCING.

III.

WHETHER ISSUE II IS PRESERVED WHEN APPELLANT DID NOT CALL THE ANTICIPATED WITNESSES IN SENTENCING.

Accordingly, it is by the court on this 5th day of October, 2023,

ORDERED:

Oral argument in the above-captioned case will be heard at **1000 hours on Wednesday, the 15th day of November 2023**, in the Judge Abraham Lincoln Marovitz Courtroom, at the Chicago-Kent College of Law, Illinois Institute

of Technology, Conviser Law Center, 565 W. Adams Street, Chicago, Illinois 60661.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40370**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Tyrion N. DAVIS	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 5 October 2023, in the above-captioned case, this court ordered oral argument to be heard at 1000 hours on Wednesday, the 15th day of November 2023, in the Judge Abraham Lincoln Marovitz Courtroom, at the Chicago-Kent College of Law, Illinois Institute of Technology, Conviser Law Center, 565 W. Adams Street, Chicago, Illinois 60661. Due to a scheduling conflict, it is no longer practicable to hear this case at 1000 hours, therefore the court amends its order of 5 October 2023.

Accordingly, it is by the court on this 11th day of October, 2023,

ORDERED:

Oral argument in the above-captioned case will be heard at **1300 hours on Wednesday, the 15th day of November 2023**, in the Judge Abraham Lincoln Marovitz Courtroom, at the Chicago-Kent College of Law, Illinois Institute of Technology, Conviser Law Center, 565 W. Adams Street, Chicago, Illinois 60661.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**NOTICE OF APPEARANCE OF**
Appellee	)	**GOVERNMENT COUNSEL**
	)	
v.	)	Before Panel No. 2
	)	
Senior Airman (E-5)	)	No. ACM 40370
TYRION N. DAVIS.	)	
United States Air Force	)	12 October 2023
Appellant	)	

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

The undersigned hereby enters appearance as counsel for the United States in the above captioned case pursuant to Rule 12, Air Force Court of Criminal Appeals Rules of Practice and Procedure. The undersigned counsel will present oral argument on behalf of the United States.

KATE E. LEE, Capt, USAF
Appellate Government Counsel
Government Trial & Appellate Operations Division
Military Justice & Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Appellate Defense Division on 12 October 2023.

KATE E. LEE, Capt, USAF
Appellate Government Counsel
Government Trial & Appellate Operations Division
Military Justice & Discipline Directorate
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40370**
Appellee	)	
	)	
	)	
v.	)	**ORDER**
	)	
	)	
Tyrion N. DAVIS	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

In view of the court's selection of the above-captioned case to be heard as part of an outreach argument at the Chicago-Kent College of Law, Illinois Institute of Technology, on 15 November 2023, the court invites the filing of *amicus curiae* briefs in support of Appellant or Appellee by law students acting under supervising attorneys. *See* JT. CT. CRIM. APP. R. 22(a); A.F. Ct. Crim. App. R. 14.1(c). Such amicus curiae briefs will be filed in accordance with this court's Rules of Practice and Procedure. A.F. Ct. Crim. App. R. 13, 17.

Supervising attorneys will be deemed admitted *pro hac vice*, subject to filing a certificate setting forth required qualifications as directed by the court. A.F. Ct. Crim. App. R. 9(c). The Clerk of Court will provide the application to expedite the process.

Accordingly, it is by the court on this 16th day of October 2023,

ORDERED:

Any amicus briefs filed in support of Appellant or Appellee shall be filed with the court **not later than 10 November 2023**. Law students, with the advice of their supervising attorneys, may brief one or more issues.

It is further ordered:

While the court allots counsel of record for each side 30 minutes to present oral argument on all three issues, A.F. Ct. Crim. App. R. 25.2(b), the court

affords law students 15 minutes for each side to present oral argument on one of the three specified issues.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**NOTICE OF APPEARANCE**
	)	Before Panel No. 2
v.	)	
	)	No. ACM 40370
Senior Airman (E-4) **TYRION N. DAVIS,** United States Air Force	)	16 October 2023
Appellant	)	

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

Pursuant to Rule 12 of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby files this written notice of appearance as counsel for Appellant.

Respectfully submitted,

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

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 16 October 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	MOTION TO CITE SUPPLEMENTAL AUTHORITIES
v.	)	Before Panel No. 2
Senior Airman (E-4) **TYRION N. DAVIS** United States Air Force *Appellant.*	)	No. ACM 40370 6 November 2023

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

Pursuant to Rule 23.3(d) of this Honorable Court's Rules of Practice and Procedure, the United States respectfully moves to submit supplemental citation of authorities because additional relevant law has come to the government's attention. The below cases are relevant for this Court to consider when deciding Issue VI: whether the military judge's ruling on the good-faith basis of anticipated prosecution impeachment questions for defense sentencing witnesses was preserved as error when the defense never called the witnesses in question.[1]

A. Precedent dictates that error related to objected-to evidence is not preserved when the evidence in question is never presented to the factfinder.

In his reply brief, Appellant asserts that the military judge's ruling was a final judgment that did not rest upon future events and that his ruling is therefore reviewable by this Court, irrespective of the fact that the impeachment questions were never asked. (App. Rep. Br. at 6-8). However, both our superior court and this Court have held that an *in limine* ruling that signals the probable admission of prosecution evidence is not preserved as error where such evidence is

[1] This matter is numbered as Issues II and III in the order for oral argument.

never admitted. United States v. Gee, 39 M.J. 311 (C.M.A. 1994); United States v. Napoleon, 44 M.J. 537 (A.F. Ct. Crim. App. 1996).

Much like this case, Gee involved a military judge's denial of a defense motion to preclude the prosecution from asking defense character witnesses certain impeachment questions. 39 M.J. at 311. The appellant in Gee, who was charged with wrongful drug use, originally planned to testify in support of an innocent ingestion defense and support his testimony with various good military character witnesses. Id. The prosecution intended to ask the character witnesses whether they knew of an allegation that the appellant had possessed cocaine in the past. Id. This proposed impeachment was based on an Office of Special Investigations (OSI) complaint form "documenting a confidential source's claim that he had knowledge appellant possessed cocaine in 1981 while in basic training," which the defense contended was "inherently unreliable." Id. In denying the defense motion to exclude such questions, the military judge explained:

> Counsel, I'm going to refuse to limit the prosecution on the use of such questions as a general matter. I will, of course, entertain any relevant objection that you might have at the time but I'm not going to issue at this point a prophylactic rule in limine as to the use of those questions. I'm inclined to think that these are proper questions, and although we are at the limits of chronological relevancy, they are still proper questions.

Id.

Following the military judge's ruling, the defense changed its strategy and chose not to call any character witnesses. Id. On appeal, the appellant asserted that he was prejudiced by the ruling and subsequent change in strategy. Id. In holding that the appellant's failure to call any character witnesses at trial barred review of the military judge's ruling, the Gee court observed that the record was not developed enough, given that the defense did not call the witnesses to testify either before the members or in an Article 39(a) session. Id. at 314 ("We are ill-equipped

to review rulings on motions *in limine* in this evidentiary vacuum."). The court further noted that "[t]actical decisions by defense counsel, designed to keep such 'doors' closed, are a legal fact of life," and that the appellant "must accept the consequences of that decision." Id.

Similarly, in Napoleon, this Court rejected an appellant's claim that a military judge erred by denying a defense motion *in limine* to suppress her inculpatory statements, given that the prosecution never offered the statements in question at trial. 44 M.J. at 540. This Court noted that there was "no authority for the proposition that error may be preserved when an objected-to inculpatory statement by an accused is not presented to the factfinder," and cited Gee as authority to the contrary. Id.

Gee and Napoleon serve as precedent for the principle that error relating to objected-to evidence is *not* preserved when that evidence is never presented to the factfinder. In this case, the record fails to establish whether the military judge "might have changed his mind" during the "ebb and flow of the trial." Gee, 39 M.J. at 314. As Appellant concedes, "the military judge did not rule whether the defense would open the door to this impeachment evidence." (App. Rep. Br. at 8.) The military judge had no such opportunity because Appellant's trial defense made a tactical decision not to call their character witnesses at all, which mooted the issue. Accordingly, the military judge's ruling was not preserved as reviewable error and therefore must be rejected by this Court.

B. This Court has found a "good faith" basis in similar situations where character witness impeachment questions were based on third-party claims.

Even if the purported claim of error was preserved, it is without merit because this Court has previously found a good faith basis in situations similar to this one. *See* United States v. Witt, No. ACM 36785 (reh), 2021 CCA LEXIS 625 (A.F. Ct. Crim. App. 19 November 2021) (unpub.

op.); United States v. Falls Down, No. ACM 40268, 2023 CCA LEXIS 322 (A.F. Ct. Crim. App. 3 August 2023) (unpub. op.).

Witt demonstrates that a third-party report of alleged misconduct can still furnish the good faith basis for impeachment questions. Witt, unpub. op. at 93-94. In Witt, the appellant presented favorable testimony from a social worker who had been the appellant's counselor in prison. Id. at 86. On cross-examination, the prosecution asked the social worker whether other prison staff had expressed concern about the appellant being "very aggressive" with a professor in the prison. Id. at 88. The social worker confirmed that he had been approached by other staff about the matter. Id. The defense then called the professor in question, who "flatly rejected trial counsel's characterization" and testified that she was "disappointed to hear Appellant's conduct had been described as aggressive." Id. at 88-89. On appeal, this Court found that the prosecution had a good faith basis for this line of questioning, because "at least *someone* on the prison staff was concerned Appellant had acted aggressively toward the professor," even though the professor herself disagreed. Id. at 93-94 (emphasis added).

Similarly, in Falls Down, after a defense witness testified that the appellant was not the kind of person who would sexually assault someone, the prosecution asked whether the witness had heard that the appellant "had a prior allegation of sexual assault." Falls Down, unpub. op. at *27. The question was based on statements that the victim had made to law enforcement about what the appellant had reportedly told her—specifically, that a woman had made a sexual assault allegation against the appellant while he was in technical school out of jealousy. Id. at 33. This Court found that the prosecution had a good faith basis for asking the question even though the facts presented in the question were uncorroborated. Id.

These cases, read together, demonstrate that the military judge in this case did not err in finding that there would be a good faith basis for the prosecution's intended question, even though the "facts presented in the question" were contested (like in Witt) and uncorroborated (like in Falls Down).

WHEREFORE, the United States respectfully requests that this Honorable Court grant its motion to submit supplemental citations of authority.

KATE E. LEE, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 6 November 2023.

KATE E. LEE, 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 40370**
Appellee	)	
	)	
	)	
v.	)	**ORDER**
	)	
	)	
Tyrion N. DAVIS	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	**Panel 2**
Appellant	)	

As part of its outreach program, the court will hear oral argument at the Chicago-Kent College of Law, Illinois Institute of Technology, in the above-captioned case on 15 November 2023.

On 16 October 2023, the court invited the filing of *amicus curiae* briefs in support of Appellant or Appellee by law students acting under supervising attorneys. *See* JT. CT. CRIM. APP. R. 22(a); A.F. Ct. Crim. App. R. 14.1(c). Such *amicus curiae* briefs were ordered to be filed not later than 10 November 2023.

Associate Dean Adam J. C. Weber and Professor Douglas Wm. Godfrey, both faculty members of the Chicago-Kent College of Law and attorneys, will be supervising the law students, and have applied for admission to this court *pro hac vice*. The court has examined their qualifications and is satisfied they have met the qualifications necessary to be admitted *pro hac vice* in *United States v. Davis*. JT. CT. CRIM. APP. R. 9(c).

Accordingly, it is by the court on this 8th day of November, 2023,

ORDERED:

Associate Dean Adam J. C. Weber and Professor Douglas Wm. Godfrey are admitted *pro hac vice* to supervise the Chicago-Kent College of Law students in the briefs for and in the oral argument of *United States v. Davis*.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION TO CITE SUPPLEMENTAL AUTHORITIES**
v.	)	Before Panel No. 2
Senior Airman (E-4) **TYRION N. DAVIS** United States Air Force *Appellant*	)	No. ACM 40370 9 November 2023

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

Pursuant to Rule 23.3(d) of this Honorable Court's Rules of Practice and Procedure, Senior Airman (SrA) Tyrion N. Davis, Appellant, hereby moves to cite supplemental authority. Undersigned counsel was not detailed to represent SrA Davis until after the filing of written briefs. She recently discovered additional case law relevant to the issues ordered for oral argument.

Counsel requests this court consider the following supplemental authorities and the decisions cited within:

1. ***United States v. Rudometkin*, 82 M.J. 396 (C.A.A.F 2022)**. In *Rudometkin*, the Court of Appeals for the Armed Forces (C.A.A.F.) wrote that "[a] military judge abuses his or her discretion when . . . the military judge fails to consider important facts." 82 M.J. at 401 (citing *United States v. Solomon*, 72 M.J. 176 (C.A.A.F. 2013)). This is relevant to the standard of review for the issues ordered for oral argument (Issues II and VI in the Brief on Behalf of Appellant).
2. ***Luce v. United States*, 469 U.S. 38 (1984)**. In Appellee's Motion to Cite Supplemental Authorities, Appellee asked this Court to consider *United States v. Gee*, 39 M.J. 311 (C.M.A. 1994) and *United States v. Napoleon*, 44 M.J. 537 (A.F. Ct. Crim. App. 1996) with respect to Issue III ordered for oral argument. Both *Gee* and *Napoleon* relied on the

ruling in *Luce*, which states that a defendant must testify at his trial in order to raise and preserve for review the claim of improper impeachment with a prior conviction. 469 U.S. at 43. The facts and rationale in *Luce* can be distinguished from the facts and circumstances in this case.

3. ***United States v. Rich*, 79 M.J. 472 (C.A.A.F. 2020)**. *Rich* is relevant to the third issue ordered for oral argument. In *Rich*, the C.A.A.F. evaluated whether the appellant affirmatively waived any instructional error at trial. The Court reviewed the multiple discussions between the military judge and the parties regarding findings instructions. Although trial defense counsel told the military judge he planned to ask for a mistake of fact instruction, he did not affirmatively ask for it when the military judge was finalizing his instructions. The military judge asked trial defense counsel whether they had any objections or requests for additional instructions and trial defense counsel said no. When the military judge instructed the members and did not include a mistake of fact instruction, trial defense counsel neither objected nor requested such an instruction at that time. The C.A.A.F. explained the difference between forfeiture and waiver, stating that "a waiver is a deliberate decision not to present a ground for relief that might be available in the law." 79 M.J. at 475. Ultimately the Court held that appellant affirmatively waived any claim of instructional error. *Rich* offers an example of waiver of an issue at the trial level. It can be contrasted with this case because in *Davis*, trial defense counsel deliberately and affirmatively raised their issue and objection regarding the Government's alleged good faith basis during sentencing. Trial defense counsel did not fail to make a timely assertion of a right nor did they intentionally relinquish or abandon a known right. Trial defense

counsel raised the issue (lack of good faith basis), the military judge ruled on the issue, and the appellant's issue is preserved.

WHEREFORE, SrA Davis respectfully requests this Honorable Court grant this Motion to Cite Supplemental Authority and consider the above-noted authorities cited herein.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 9 November 2023.

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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) **TYRION N. DAVIS** United States Air Force *Appellant.*	**BRIEF OF AMICUS CURIAE FOR THE APPELLANT** Before Panel No. 2 No. ACM 40370 10 November 2023

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

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[brackets are used to reference the trial record directly]

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STATEMENT OF INTEREST

This brief explores two defects in a handwritten notebook —evidence trial counsel submitted under Mil. R. Evid. 801(d)(1)(B)(i)— not previously addressed by the parties. The defects are fatal, and they suggest that the military judge abused his discretion when he admitted the notebook as evidence despite them. This position supports Appellant Senior Airman Tyrion N. Davis under Issue I of the Court's 27 Sep 2023 Oral Argument Order.

Amicus Curiae Chase W. Florance submits this brief in support of the Appellant by invitation of the Court. Mr. Florance is a retired US Army infantry officer and a first-year student at the Chicago-Kent College of Law (Chicago-Kent). He volunteered to brief and argue this case as part of an outreach agreement between the U.S. Air Force Court of Criminal Appeals and Chicago-Kent. He has no personal or commercial interest in the outcome of this appeal.

Supervising Attorney Douglas Wm. Godfrey is a Professor of Legal Research and Writing at Chicago-Kent. He has been teaching law at Chicago-Kent for the past 25 years. Before becoming a professor, he was an Assistant District Attorney with the Kings County District Attorney's Office in Brooklyn, NY in the Homicide and the Sex Crimes and Special Victims Bureaus. He has no personal or commercial interest in the outcome of this appeal.

ISSUE

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING THE ALLEGED VICTIM'S NOTEBOOK ENTRIES AS PRIOR CONSISTENT STATEMENTS PURSUANT TO MIL. R. EVID. 801(d)(1)(B)(i), FINDING MULTIPLE MOTIVES TO FABRICATE.

SUMMARY OF THE ARGUMENT

Senior Airman Tyrion N. Davis's conviction was based in part on 11 pages of unsworn, undated notebook paper. In laying a foundation to admit these pages as a prior consistent statement, trial counsel failed to ask the witness whether they contained a true and accurate recital of the events they described. Without this connective testimony, the notebook fails to offer the defendant an opportunity for proper confrontation.

But even if oaths and verifications could authenticate the evidence in a future retrial, it would still fail to meet a special threshold burden of relevancy. The prior consistent statement hearsay exception is exceptionally narrow. Before the military judge could admit the notebook to rebut a charge of recent fabrication, the document itself had to answer a specific preliminary question: when was the document made? Without that answer, the writing lacks the threshold relevance the common law demands from prior consistent statements.

The prejudicial effect on SrA Davis goes beyond memorializing the testimony against him in the jury room. The notebook is a one-note recital of nonconsensual sex acts, with all balancing descriptions of consensual sex redacted. What remains is a vivid and harrowing collection of abuses. The author's raw emotions are on display, uncontested. The jury convicted SrA Davis with the acts described on page one.

The notebook was unsworn, irrelevant for its own offered purpose, and prejudicial. For these reasons, it was an abuse of discretion to admit it as evidence.

ARGUMENT

1. The notebook is not sworn as true, so it must not contribute to SrA Davis's conviction.

Law

The Confrontation Clause of the 6th Amendment to the U.S. Constitution requires that statements against criminal defendants be made under oath, impressing witnesses with the seriousness of the matter and guarding against lies with the penalty of perjury. *California v. Green*, 399 U.S. 149, 158 (1970). People should not be convicted on the basis of unsworn testimony. *Bridges v. Wixon,* 326 U.S. 135, 153-154 (1945). Unsworn assertions do not bear "sufficient indicia of reliability to support [their] accuracy" *United States v. Alfaro,* 919 F.2d 962, 966 (5th Cir. 1990); *Cf.* Mil. R. Evid. 807. Prior unsworn statements of a witness are generally inadmissible as affirmative proof because it increases the possibility that a defendant may be convicted on the basis of unsworn evidence. *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975). Mil. R. Evid. 901(b)(1) requires a witness to verify under oath that a document is what it is claimed to be. *United States v. Lubich*, 72 M.J. 170, 178 (2012).

Analysis

Trial counsel never asked, and CJD never indicated, that Pros. Ex. 13 was a true account of the people[1] and events described in it. The witness explained that the photocopied pages were "fair and accurate representations" of "a journal that I wrote," during "my second year at University." [R. at 498:2 - 499:25]. The witness identified the pages as a copy of a journal she made. The witness described possible dates when she authored the journal. But she does not claim that the journal was a true account of what happened to her. That omission is fatal.

[1] The author used personal pronouns exclusively. Trial counsel did not connect these pronouns to the names of the accused or the witness, despite other people being nearby when the described events occur.

The notebook is an elaborate account of repeated physical and sexual abuse [Pros. Ex. 13 at 5], socially questionable sexual practices [*Id.* p. 6-8], and threats of self-harm [*Id.* at 2]. The sole connection between the exhibit and the allegations against SrA Davis is trial counsel's question: "the very first journal entry… is that related to the final incident of sexual assault that you told the court members about?" and the witness replied "Yes." [R. at 535:23-536:3]. And not "did this happen as written?" or "is this true?". While the writing shares many similarities with the witness's direct testimony, it still must be sworn as true in order to be admitted.

United States v. Jaramillo, 69 F.3d 388 (9th Cir. 1995) illustrates some dangers of relying on unsworn evidence. Guillermo Jaramillo was serving as a confidential informant for the Drug Enforcement Agency (DEA) but was reluctant to testify. As a compromise, the DEA asked Jaramillo to write a witness statement they could use for a grand jury indictment on suspected drug trafficker Jose Garcia. Jaramillo wrote the statement, but never swore to its accuracy. When later called to testify at Garcia's trial, he flatly contradicted the information he wrote in his prior statement, saying on the stand that the written statement was "a lie" he made up based on the movie "Scarface." *Id.* at 389. Dissatisfied with this turn of events, the government indicted Jaramillo and secured a conviction against him under 18 U.S.C. § 1623 for making a false declaration. The circuit court reversed Jaramillo's conviction because his earlier writing was not made under oath. It lacked verification for the truth of the words it contained. *Id.* at 392.

The Court should find the notebook similarly wanting because, like Jaramillo before he testified, the witness gave no indication of whether her writings depicted real heinous acts or a provocative fiction.

Preservation of the Claim of Error

Defense counsel raised a hearsay objection to the notebook at trial [R. at 500:2]. During the Article 39(a) Session, counsel supported the objection with specific grounds: "[t]his isn't something that can be verified," [R. at 524:5-6], preserving the claim of error under Mil. R. Evid. 103(a)(1). Additionally, this argument raises a Constitutional error under Mil. R. Evid. 103(b).

2. The notebook does not address the threshold motive it was admitted to rebut.

Law

Hearsay is not admissible unless an applicable federal statute or another Military Rule of Evidence allows it. Mil. R. Evid. 802. The rules allow the prior consistent statements of a witness for the purpose of proving whether or not testimony predates a motive to fabricate. Mil. R. Evid. 801(d)(1)(B). Where a witness's testimony is attacked as a recent fabrication, proof of an earlier declaration may be admitted to repel such an implication. *Ellicott v. Pearl,* 35 U.S. 412, 413 (1836). The common law historically allowed a prior consistent statement to rebut a charge of recent fabrication as long as the statement was made before the alleged fabrication, influence, or motive took place. *Tome v. United States*, 513 U.S. 150, 156 (1995)[2] (detailing an earlier version of the rule). The evidence rule embodies this temporal requirement. *Id*.

Mil. R. Evid. 401 provides that relevant evidence means evidence having any tendency to make any consequential fact of the action more or less probable than it would be without the evidence. *United States v. Goodin*, 67 M.J. 158 (2008). Evidence that has no probative value is not relevant and is therefore inadmissible. *See United States v. Hendrix*, 76 M.J. 283 (2016). *United States v. Solomon,* 72 M.J. 176 (2012) (noting temporal proximity as a balancing factor in a Mil. R. Evid. 403 analysis). *Cf.* Mil. R. Evid. 104(b). Proof must be introduced sufficient to support a finding that a fact does exist.

[2] This brief draws heavily from *Tome v. United States*, a 5-4 Supreme Court decision that spoke to the narrow application of the prior consistent statement rule in reversing a conviction for child sexual abuse. The justices' approach mirrors the parties' briefs, and their opinions explain the common law history of the rule, the Advisory Committee notes on its revisions, the academic community's position, and how practitioners in trial courts have used the rule consistently with little guidance for a hundred years.

Analysis

The evidence rule allowing prior consistent statements requires a showing of time to rebut a motive of recent fabrication. This pre-motive requirement is a function of relevancy, not the hearsay rules. In the broad category of military cases that rule on the issue of admissibility of prior consistent statements, evidence must precede an express or implied motive to fabricate raised during cross-examination. *See United States v. Ayala*, 81 M.J. 25 (2020), *United States v. Norwood*, 81 M.J. 12 (2020), and *United States v. Frost*, 79 M.J. 104 (2019). The evidence rule, therefore, requires a showing of time to rebut a recent fabrication motive. *Tome*, 513 U.S. at 156.

The oral arguments in *Tome v. United States* elaborate on this point:

> **I am impressed by the fact that this rule does not say you can admit it in order to rebut the charge that the witness is lying.**
>
> **A witness can be lying for a lot of reasons.**
>
> **It's only recent fabrication or improper influence or motive.**
>
> **Now, the mere fact that the person was... you know, gave the same story earlier, I guess you could say indirectly refutes the fact of an improper motive, but very indirectly.**
>
> **All it really proves is that the person is telling the truth now, but that's not what the rule wants you to get at.**
>
> **It wants you to get at rebutting the motive, and the only way you directly rebut the motive, it seems to me, is to show that the statement was made before the motive even ever arose.**
>
> **Justice Antonin Scalia (33:44-34:40) 5 Oct 1994.**

The military judge did not follow the holding in *Tome* or the common law's historic treatment of prior consistent statements. When putting his reasons and bases for admission on the record, he inexplicably found that the notebook evidence had value in rebutting the charge of recent fabrication. "I think the probative value of this information is high to -- for its stated purpose to rebut an allegation of recent fabrication" [R. at 533:3-5]. But the notebook does not

leave the reader with the impression that it was written in December 2019, June 2020, or any time in between. Or that it predates LCC's accusations (even though it may). There are no internal references to the times or dates of its creation at all. The notebook only leaves the reader with the impression that someone sexually assaulted its author. This is the source of the error.

During the 39(a) Session, the military judge focused on the consistency between the notebook and the witness's testimony to decide whether it had probative value. He demonstrated this focus by redacting the parts of the notebook that were inconsistent with CJD's direct testimony and putting his reasons on the record. "We have heard testimony that C.J.D. had concerns that the accused might kill himself, but now we've got words here about she is fearing for her own life. That causes me concern" [R. at 527:11-13]. Then he and trial counsel redacted all instances of consensual sex [R. at 529:5-9] and [R. at 531:8-11]. But the redactions only reveal an imprecise approach to a very precise evidence rule. The military judge's focus was on the witness testimony instead of the threshold issue. But the narrow evidence rule "speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told." *Tome*, 513 U.S. at 157-58. The notebook lacks probative force for the threshold issue of timing, not for its coherence with the allegations. While it elaborates on and bolsters the prior testimony of the witness, that is not the measure of admissibility under 801(d)(1)(B)(i).

In contrast, CJD's sworn testimony that she wrote down her experiences [R. at 498:12-14] prior to LCC's accusations *is* admissible as evidence under the rule. It serves the purpose of rebutting a recent motive to fabricate, it meets the threshold requirement of timing, it has sufficient probative force, and a jury should be permitted to consider that statement in assessing whether or not her conversation with LCC prompted her accusations. But when the notebook followed the statement into evidence, it led to reversible error.

Additional motives to fabricate are largely superfluous

The parties' briefs disagree on whether a second motive to fabricate exists (Appellee Br. of 1 June 2023 at 16). Those arguments do not need to be repeated here. Because the common law demands a prior consistent statement contain a reference to time, and because the notebook is silent on when it was written, the difference between a single or secondary motive to fabricate is largely irrelevant. When a witness presents damaging testimony, the party will often claim she had some motive to fabricate. *Tome*, 513 U.S. at 165. If judges permitted prior statements as substantive evidence to rebut every implicit charge that a witness's testimony results from recent fabrication or motive, the whole trial would shift to out-of-court statements. *Id*. So whether or not the defense opened two doors on the issue, each one has the same threshold condition: rebuttal evidence must have a definite temporal aspect to it. The notebook pages did not, and so they are not admissible under the rule for that purpose no matter when the motive arose.

At the Article 39(a) Session, trial counsel widened the path for the notebook when she suggested that the "changes to the Manual for Courts-Martial in 2016 eviscerated that concern because these documents now may be considered for the truth of the matter asserted" [R. at 526:8-10]. It is true that, once admitted, statements under Mil. R. Evid. 801(d)(1)(B) can be used as substantive evidence. However, this did not change when the language of the rules changed. The missed nuance is that the prior consistent statement has to make it in as evidence first. That the prior consistent statement rule allows out-of-court statements to be used for substantive purposes beyond an improper influence or motive makes it all the more important to observe the preconditions for admitting the evidence in the first place. *Id.* At 163. A consistent statement that predates the motive is a square rebuttal of the charge that the testimony was contrived as a consequence of that motive. The *Tome c*ourt calls this a precondition of admissibility. *Id.* at 158.

Common law context

Much like the Constitution guarantees a criminal defendant's right to confront witnesses, the general rule against hearsay keeps statements in court so they can be verified, scrutinized, and cross-examined. Mil. R. Evid. 802, *United States v. Smith*, 83 M.J. 350, 352. The rules of evidence permit hearsay only when certain conditions are met. The evidence rules do not accord "nonhearsay status" to all prior consistent statements. *Tome*, 513 U.S. at 157.

In their brief, much like in the Article 39(a) session, the Appellee argues that the scope of the rule is much broader than the common law history suggests. "The plain language of the rule provides three criteria for…admission" (Appellee Br. of 1 June 2023 at 15). Appellee goes on to argue that, when these criteria are met, the evidence should be allowed. And because CJD was available to testify and was subject to cross-examination, the rule is largely satisfied.

This is where the parallel to *Tome v. United States* is especially instructive: in response to a weak charge that a victim's testimony was a fabrication created so the child could remain with her mother, the Government was permitted to present "a parade of sympathetic and credible witnesses" who did no more than recount the victim's detailed out-of-court statements to them. *Tome*, U.S. 513 at 165. CJD presented a notebook of 11 paper witnesses that performed an identical function. Courts normally exclude this kind of evidence under the hearsay rule, as the Supreme Court did when it reversed Mr. Matthew Wayne Tome's conviction. *Id.* at 167. When read against the rule's common law history, it is easier to appreciate how narrow the prior consistent statement rule really is.

The risk of the notebook, and hearsay evidence like it, is prejudicial bolstering. These 11 pages are emblematic of what the narrow hearsay exceptions were engineered to prevent.

Preservation of the Claim of Error

Defense counsel raised a hearsay objection to Pros. Ex. 13 at trial [R. at 500:2]. During the Article 39(a) Session, counsel supported the objection with specific grounds: "[b]ecause it's undated, it's just a hand-written document. It could have been created any time" [R. at 521:7-8], preserving the claim of error under Mil. R. Evid. 103(a)(1).

3. The notebook deprived SrA Davis of fundamental rights

As the Supreme Court has observed, people are entitled to fair trials, not perfect ones. The errors explored here go beyond the imperfect; they infringe on a criminal defendant's common law protection against hearsay and his constitutional right to only confront sworn evidence. Trial counsel was able to bring a witness's vivid thoughts and expressions into evidence in a way that SrA Davis could not respond to. and [R. at 531:8-11]. This led to a predictable result: the jury convicted SrA Davis's for the single allegation of unwanted sex that was drawn on the first page of the notebook. That the court redacted accounts of the consensual sex that followed makes the presentation all the more lopsided. [R. at 529:1-15]

The notebook is duplicative. It unfairly bolsters the witness's testimony. And it gives the jury a reason to convict SrA Davis on something other than the sworn facts.

CONCLUSION

The journal is unsworn and does not rebut a motive —whenever formed— of recent fabrication. The journal is prejudicial and impacted the jury's findings. The military judge abused his discretion when he admitted the journal, and it should be excluded as hearsay.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Air Force Appellate Defense Division and the Air Force Appellate Government Division on November 10. 2023.

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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*,	)	
v.	)	Before Panel No. 2
Senior Airman (E-4) **TYRION N. DAVIS** United States Air Force *Appellant.*	)	No. ACM 40370 10 November 2023

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IN THE UNITED STATES AIR FORCE
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UNITED STATES *Appellee*,	)	
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TO THE HONORABLE, THE JUDGES OF THE
UNITES STATES AIR FORCE COURT OF CRIMINAL APPEALS:

ISSUES PRESENTED

I.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING UNDATED HANDWRITTEN NOTEBOOK PAGES FROM THE ALLEGED VICTIM AS PRIOR CONSISTENT STATEMENTS OVER A DEFENSE OBJECTION THAT THE MOTIVE TO FABRICATE PRECEDED THE CREATION OF THE NOTEBOOK?

STATEMENT OF THE CASE

A general court-martial at RAF Lakenheath, United Kingdom, tried Appellant, Senior Airman (SrA) Tyrion Davis, between the dates of 13 and 23 June 2022. Appellant faced several charges and specifications of sexual assault in violation of Article 120 of the Uniform Code of Military Justice (UCMJ). Specification 5 of Charge 1 alleged the Appellant committed a sexual act upon CJD, on or about 1 July 2019 and 30 September 2019, by penetrating her vagina with his penis, without her consent. *See Charge Sheet*, dated ROT, Vol. 1.

The court-martial commenced against Appellant on 15 June 2022. In opening statements, the Government described several incidents of non-consensual sexual contact between the

Appellant and two victims, CJD and LCC. R. at 339-352. Appellant maintained his relationships with CJD and LCC consisted of consensual encounters. R. at 353-355. The court-martial panel received assurances from the Government and the Appellant that they would have the chance to review Facebook messages where Appellant and CJD talked about their relationship, why she left, and the events preceding her departure. R. at 342; R. at 354. Appellant's opening remarks further asserted that CJD did not tell anyone, other than Sergeant Vaughan and Appellant, about how she felt certain events transpired during her relationship with Appellant before October of 2020. R. 353-354.

CJD testified as the first witness on 16 June 2023. Her direct examination detailed several non-consensual sexual encounters with Appellant during their relationship from 2018 through 2019. CJD indicated that Facebook Messenger was the primary way she would communicate with Appellant. R. at 411. With respect to events pertinent to Specification 5 of Charge 1, several Facebook exchanges corroborated CJD's testimony of her last non-consensual sexual encounter with Appellant before she left the relationship. R. at 421-433. A Facebook exchange dated 10 August 2019 (admitted as Prosecution Exhibit 6) stated, *inter alia*, "It's not like I didn't say stop Ty, I said stop more than once"; "We had sex after I told you to stop more than once"; and "I don't know how you expect me to get over that." R. at 419-420. In the same exchange, Appellant responded, *inter alia*, "you needed to, if it would help you, you could press charges on me" R. at 421.

On cross-examination, CJD again confirmed her direct examination testimony that she had sexual intercourse with Sergeant Vaughn during her marriage with the Appellant. R. at 439-400. CJD acknowledged that she lied about her extra-marital affair during previous interviews and made no effort to correct the lie until the morning of her testimony. R. at 441. Appellant's counsel

confronted CJD with the fact she learned Sergeant Vaughn received testimonial immunity a week before trial. R. at 443-444. CJD confirmed she discussed several of the non-consensual events with the Appellant during her OSI and defense interviews. R. at 445, 463, 482, 491-492. However, Appellant's counsel highlighted that CJD did not come forward to the authorities immediately after the non-consensual sexual encounters in 2018 and 2019. R. at 490. Defense counsel elicited from CJD that LCC did not give her a lot of details about what the Appellant had done to LCC, but that LCC did tell CJD "that Airman Davis locked her in the house, drugged her, and raped her." R. at 490. When trial counsel objected on hearsay grounds, defense counsel responded that "[i]t's offered for the effect on the listener. What she did after she learned of this assertion by Ms. Cook," R. at 491. Defense counsel asked CJD more than 15 questions about the timing of her report to law enforcement and its proximity in time to LCC's report to CJD. R. at 490-92.CJD acknowledged she did not report the events to law enforcement until several years later, not until LCC contacted her and informed her of an incident between LCC and Appellant in late 2020. R. at 490-491.

On re-direct, the Government showed CJD Prosecution Exhibit 13. CJD testified the 11-page exhibit was a journal she wrote during her second year at University, by May and June of 2020, and before LCC contacted her in late 2020 about the incident between LCC and Appellant. R. at 498-499. Appellant objected to the admission of the journal entries based on hearsay. R. at 500. The Government responded the Appellant created the impression on cross-examination that CJD recently fabricated the allegations based on her late 2020 conversation with LCC, or at least influenced by the conversation, and argued the journal entries pre-date this conversation – thereby making the journal entries admissible under M.R.E. 801(d)(1)(B)(i) to rebut an express or implied charge that the declarant recently fabricated or acted from a recent improper motive or influence

in testifying. R. at 501-502. Defense counsel argued that they had only implied one motive to fabricate and the questioning of LCC was an extension of that implication. R. at 519.

The court heard extensive arguments from the parties on Prosecution Exhibit 13. R. at 504-531. Prior to giving its ruling, the court discussed *United States v. Frost* and noted, "where multiple motives to fabricate, or multiple improper influences are asserted, the statement […] need not proceed all such motives or inferences." The court then ruled as follows:

> The court has found that the statements that it will allow are generally consistent to rebut a recent motive to fabricate that [CJD] did not make these allegations until she found out about L.C.C.'s allegations. Under 801(d)(1)(B)(i), to rebut an express or implied charge that the declarant recently fabricated or acted from a recent improper influence or motive in so testifying. The journal was written, as the court understands, after Christmas 2019, up until as late as 31 May 2020 and predated the motive to fabricate that has been asserted when L.C.C. made the allegations, that was August 2020. The relevancy link is that the statements she made in the journal – [CJD] made in the journal to herself is to rebut that the implication that she was either piling on, or some other ulterior motive, in relation to L.C.C.'s allegations.
>
> I have consulted, as I mentioned *U.S. v. Frost*. I have also consulted *United States v. Finch* and *United States v. Norwood*. I also conducted an M.R.E. 403 balancing test. I think the probative value of this information is high to -- for its stated purpose to rebut an allegation of recent fabrication. I don't -- in other words, the probative value is high and the probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, waste of the court's time, et. cetera. To the extent that there is any minimal danger of unfair prejudice, as I mentioned, Defense Counsel, I will give you an opportunity to cross-examine this witness on, obviously, when she wrote the journal, why it's undated, those sorts of things, and, of course, allow argument on the issue. R. at 532-533.

The Court also made extensive redactions to the journal. R. at 529.

Following the court's ruling, CJD testified that the first journal entry of Prosecution Exhibit 13 related to the final sexual assault that she described to the court members. R. at 535-536. On re-cross, CJD indicated that she brought the journal entries to her October 2020 OSI interview. R. at 544-545.

In closing, the Government extensively argued that the Facebook messages from August 2019 onward supported CJD's credibility and pre-dated any thought of her bringing criminal charges against Appellant. R. at 1074-1076, 1094-1099. The Government added that the journal entries further support CJD's credibility and reflect a type of self-reflective stream of consciousness based on their content. R. at 1080. Appellant's counsel countered that the journal entries merely represented notes CJD brought to her OSI interview as part of her "plan" to formulate an account in support of LCC. R. at 1139-1140. In rebuttal, the Government returned to the content of the Facebook messages as corroboration of CJD's evidence and did not further argue the journal entries admitted as Prosecution Exhibit 13. R. at 1172-1174.

The court-martial panel convicted Appellant of Specification 5 of Charge 1 in violation of Article 120 of the UCMJ. The panel acquitted Appellant of ten specifications of sexual assault and abusive sexual contact in violation of Article 120 of the UCMJ; one charge with specification of aggravated assault and one specification of assault consummated by battery in violation of Article 128 of the UCMJ; and one charge with one specification of wrongful use of marijuana in violation of Article 112a of the UCMJ. In sum, the Appellant received a conviction for the final sexual assault committed against CJD whose testimony of the event was significantly corroborated by Facebook exchanges between the Appellant and CJD in 2019. He was acquitted of all other violations related to CJD and LCC, including other events described in the journal entries admitted as Prosecution Exhibit 13.

STATEMENT OF FACTS

CJD described her relationship and detailed multiple non-consensual sexual experiences with Appellant during her evidence. According to her testimony, CJD met Appellant through LCC around the time of her 18th birthday. R. at 359. CJD developed close friendships with a group of

airmen, including Appellant. R. at 361. Approximately a month after their first meeting, around March or April of 2018, CJD and Appellant attended a party near Brandon, United Kingdom. R. at 369. She drank a lot of vodka and listened to music. CJD does not recall much from the evening but remembers being in bed with Appellant, Appellant kissing her, and Appellant inserting his penis into her vagina. CJD remembers the pain and told Appellant to stop at the time. R. 363-366. The next day, CJD remained unsure of whether they actually had sex. Following the party, CJD and Appellant began dating. Appellant told CJD several months later that he took her virginity on the night of the party. R. at 368-369.

CJD and Appellant married around Christmastime in 2018. R. at 359. On New Years Eve going into 2019, Appellant and CJD went to the house of CJD's mother in Norwich, United Kingdom. They had a couple drinks and went to bed after midnight in the same room as CJD's 4 or 5-year-old brother. Appellant tried to touch CJD's vagina. She refused because her brother was in the room. Appellant then took CJD's hand and proceeded to move her hand up and down on his penis. CJD tried to let go but could not because Appellant wrapped his hand around hers. Appellant eventually ejaculated and the event ended. R. at 376-379.

In February 2019, CJD and Appellant moved into a house located in Brandon, United Kingdom. R. at 380. In the spring and summer of 2019, Appellant continued to impose himself sexually or violently upon CJD without her consent. That spring, on one occasion Appellant choked CJD while they engaged in intercourse. CJD did not consent to the choking and became afraid for her life. The pressure applied to her neck caused her vision to blur, and she even thought she was going to pass out until the Appellant released her neck. R. at 382-389.

In the summer of 2019, Appellant handcuffed CJD to the bed and began performing oral sex on her. He did not stop, even after she told him to, and repeated her pleas for him to stop. CJD

used her leg to push Appellant away and broke herself free from the handcuffs. R. at 385-386. On one more occasion that summer, CJD went with Appellant to visit his family in California, R. at 393, and experienced a sexual interaction similar to what occurred the previous New Year's. While staying in the bedroom of Appellant's 15-year-old cousin, the Appellant tried to initiate sexual activity, even while the cousin was allegedly awake. CJD did not want to have sex and tried to stop Appellant who responded by forcibly penetrating CJD's vagina with his penis. CJD remained quiet to not draw attention to what was happening in the room. R. at 395-399.

Later that summer, CJD and Sergeant Vaughan travelled to Ibiza, Spain in July 2019. R. at 401. During the trip, CJD and Vaughn engaged in sexual intercourse. R. at 403. CJD did not tell Appellant that she and Sergeant Vaughn had sexual intercourse. R. at 403. Upon her return, while a friend stayed at their house, Appellant and CJD have one last non-consensual sexual interaction. CJD did not want to have sex and told Appellant to stop several times. CJD testified:

> [O]ne night Ty wanted to have sex and I didn't. We were in bed and I told him that I didn't want to have sex. When he tried to touch me, I pushed his hand away and I told him no several times. I rolled onto my side. He then cuddled me and then, several minutes later, he then – he pushed me onto my back. I asked him what he was doing. He got on top of me. I told him to stop and tried to push him away. Then he inserted his penis into my vagina and continued to have sex with me. R. at 404.

After defeating her resistance, the Appellant penetrated CJD on this last occasion while she laid motionless. Appellant ejaculated and left CJD as she went to sleep crying. R. at 407-409.

Five of the six sexual interactions described above between CJD and Appellant are detailed in the CJD's journal, with the only interaction not included in the redacted version of the journal being the second interaction involving handcuffs. *See* Prosecution Exhibit 13.

After the final non-consensual interaction in 2019, CJD left the Appellant and moved out of their home a couple of weeks later. R. at 414. She returned to their home one last time in

September of 2019 to collect the rest of her things, R. at 428, before quickly going to the United States and beginning a relationship with Sergeant Vaughn. R. at 483-84. During this period, CJD and Appellant exchanged numerous Facebook messages containing comments about the final sexual assault by Appellant where CJD told Appellant to stop. R. at 419-21.

ARGUMENT

Standard of Review

Appellate courts review "a military judge's decision to admit evidence for an abuse of discretion. *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *Frost*, 79 M.J. at 109 (C.A.A.F. 2019) (quoting *United States v. Kelly*, 72 M.J. 237, 242 (C.A.A.F. 2013)).

Law and Analysis

A. The Military Judge properly admitted the journal entries and did not commit any error.

The military judge did not abuse his discretion and properly admitted the journal entries. The military judge followed the law governing hearsay exceptions under Military Rule of Evidence 801(d)(1)(B)(i) and case law supports the proposition that for purposes of a prior consistent statement an implied allegation can be implied through cross examination questions, even when there is dispute about the substance of the allegation. Deference to the military judge's decision is warranted in this case because there was no clear error.

To find that a military judge abused his discretion, the reviewing court must have a "firm conviction" that the military judge erred. *United States v. Martin*, 56 M.J. 97, 106 (C.A.A.F. 2001).

"This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently . . . a reviewing court does not take the place of the military judge and consider how it would have decided the issue." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985). Rather, if there is more than one plausible view of the issue, the reviewing court must defer to the military judge and find that the ruling was not clearly erroneous. *Id.* at 574. Conversely, a reviewing court is not obligated to defer to the ruling of a military judge and can still hold that a judge's ruling was clearly erroneous, even if there is evidence for that finding on the record, when the court is convinced, based on the entire body of evidence, that the judge made a mistake. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). A clear record of a military judge's finding of fact and law is important, however, because if a military judge does not make a record of his or her findings, then the reviewing court grants less deference. *United States v. Flesher*, 73 M.J. 303, 311-12 (C.A.A.F. 2014).

The evidence in contention in this case was admitted under Military Rule of Evidence 801(d)(1)(B)(i). The rule states, in part, that a prior statement made by a witness is not hearsay if it "is consistent with the declarant's testimony and is offered: (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying." Mil. R. Evid. 801(d)(1)(B)(i).

This rule admits evidence that would otherwise be hearsay if it is a prior statement by a witness, consistent with the witness's testimony, and it is offered "to rebut three express or implied allegations that the witness's testimony was (1) a recent fabrication; (2) improperly influenced by another person or event, or (3) motivated by some bias or prejudice . . . [and] each of the enumerated allegations is independent for the purposes of the rule." *United States v. Robles*, 53

M.J. 783, 793 (A.F. Ct. Crim. App. 2000). For evidence to be admissible under M.R.E. 801(d)(1)(B)(i), "(1) the declarant of the out-of-court statement must testify, (2) the declarant must be subject to cross-examination about the prior statement, and (3) the statement must be consistent with the declarant's testimony." *United States v. Finch*, 79 M.J. 389, 394–95 (C.A.A.F. 2020). Additionally, "(1) the prior statement, admitted as substantive evidence, must precede any motive to fabricate or improper influence that it is offered to rebut; and (2) where multiple motives to fabricate or multiple improper influences are asserted, the statement need not precede all such motives or inferences, but only the one it is offered to rebut." *Frost*, 79 M.J. at 104.

An allegation of recent fabrication, motive to fabricate, or improper influence does not have to be an explicit allegation to be admitted under M.R.E. 801 (d)(1)(B)(i); it can be implied through cross examination questions. *United States v. Meyers*, 18 M.J. 347, 352 (C.M.A. 1984). For example, in *Meyers*, the Court of Military Appeals held that the following line of questioning was intended to imply an improper motive to testify:

> Q. Okay. Now, you love your work, is that correct?
> A. Yes, sir.
> Q. Okay, you do it—you spend a lot of time at it, don't you?
> A. Yes, sir.
> Q. And in fact you want to get out of the Army and be a policeman, don't you?
> A. Yes, sir.
> Q. In New York City, right?
> A. Yes, sir.
> Q. Do you want a recommendation from the United States Army?
> A. I don't want a recommendation, but it won't hurt to have one.
> Q. All right, thank you.
> Nothing further. *Meyers*, 18 M.J. at 347.

Additionally, in *Norwood*, the Court of Military Appeals held that the defense had indeed alleged two motives to fabricate despite the defense counsel's insistence that they had only alleged one motive. *United States v. Norwood*, 81 M.J. 12, 17 (C.A.A.F. 2021).

In the case at bar, the military judge did not abuse his discretion and his decision to admit the journal into evidence was not clearly erroneous because the defense implied a motive to fabricate or improper influence which the journal preceded, the journal was a prior consistent statement offered to rebut this second motive or influence, and the military judge put his findings on the record. At the end of cross-examination, Defense counsel's implication that CJD either had a motive to fabricate or had been improperly influenced was significant, as they asked CJD more than 15 questions regarding the timing of her report to law enforcement. R. at 490-92. In the course of these questions, defense counsel established that LCC did not give CJD many details about what the appellant had done to her, but that LCC did tell CJD "that Airman Davis locked her in the house, drugged her, and raped her." R. at 490. When trial counsel objected on hearsay grounds, defense counsel's response that "[i]t's offered for the effect on the listener. What she did after she learned of this assertion by Ms. Cook," R. at 491, demonstrates the function of defense's line of questioning. Defense counsel essentially stated that LCC's report to CJD motivated or influenced CJD in some way to report to law enforcement. In fact, defense counsel, during arguments regarding the journal's admissibility, did not contest that they were implying a motive with their questions. Defense counsel only contested the substance of the implication. R. at 519.

When the defense pursued this line of questioning about the timing of CJD's report to law enforcement in their cross examination, their implication could have been one of multiple possibilities. As defense counsel argued to the military judge, they could have been alleging the same allegation that they highlighted throughout the trial—that CJD fabricated the allegations against the appellant to appear as a victim of abuse rather than a cheating wife—but they could have also been implying that she was motivated to fabricate her story to support her friend LCC. Alternatively, defense counsel, with their line of questioning, could have also been implying that

LCC's report to CJD was an improper influence for the purposes of M.R.E. 801(d)(1)(B)(i) in that LCC influenced CJD to construe a consensual sexual encounter into a nonconsensual one.

The journal was a consistent statement, and it was offered to rebut defense's implication because it proved that CJD had formulated all allegations against the appellant before LCC reported to CJD that the appellant had drugged and raped her. The appellant does not contest that the contents of the journal were generally consistent with CJD's account of the relevant incidents to which CJD testified at trial. The prior consistent statements in the journal precede the motive to fabricate or improper influence because even though LCC reported what the appellant had done to her in September of 2020, R. at 491, CJD testified that she had written the journal between December 2019 and May 2020. R. at 499.

Because the journal predated the implied allegation of motive to fabricate or improper influence and the implied allegation had more than one plausible interpretation, the Court should defer to the military judge's ruling. The military judge put his findings on the record, in which he did not clearly misinterpret the implication of the defense's line of questioning regarding LCC. The military judge could have determined the implication of this line of questioning in one of multiple ways and just because the military judge *could have* ruled in favor of the defense does not entitle the appellant to a finding of abuse of discretion. Therefore, the military judge did not abuse his discretion or commit any error.

B. Appellant did not suffer prejudice by the admission of CJD's journal entries as a prior consistent statement.

The admission of the journal entries into evidence did not prejudice the appellant because the exchange of Facebook messages between the victim and Appellant made the Government's case regarding specification 5 of Count 1 strong. The military judge properly weighed all required

considerations in evaluating prejudice, made redactions to the journal, and put his findings on the record. Deference is warranted.

If a court of review finds that a military judge did abuse his discretion in admitting evidence, the court must then determine whether the evidence admitted prejudiced the defendant. *United States v. Ayala*, 81 M.J. 25, 29 (C.A.A.F. 2021). A defendant suffers prejudice when evidence "had a substantial influence on the findings", *U.S. v. Flesher* 73 M.J. 303, 318 (C.A.A.F. 2014), and the party introducing evidence has the burden to prove that the evidence admitted in error was not prejudicial. *Id.* In determining whether evidence prejudiced the defendant, the court considers "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question. *Ayala*, 81 M.J. at 29.

For example, in *Ayala*, the Court of Appeals for the Armed Forces (C.A.A.F.) decided, in a case involving an Army staff sergeant convicted of aggravated sexual contact, that evidence was not substantially prejudicial because it merely repeated the victim's testimony and the government's case was relatively strong, in part because the defendant had sent emails to the victim after the alleged incident indicating that he knew what he did crossed a line and that he was wrong. *Id.* at 30. But in *Flesher*, a case involving an army specialist convicted of sexual assault at a court martial where the victim testified that the sexual contact was nonconsensual and the defendant testified that it was consensual, the C.A.A.F. held that expert testimony was substantially prejudicial because there was no corroborating evidence for either the victim's or defendant's story and the expert testimony lent credibility to the victim. *Flesher*, 73 M.J. at 318.

Additionally, like a judge's findings regarding the admissibility of evidence, a court of review should defer to a military judge's findings regarding prejudice, especially when the military judge clearly put his findings on the record. *Flesher*, 73 M.J. at 311-12.

In this case, even if the Court finds that the military judge did abuse his discretion in admitting the journal into evidence, appellant's conviction should be affirmed because the journal did not substantially prejudice the Appellant. The Government's case was strong regarding specification 5 of Charge 1, for which the Appellant was convicted, as evidenced by CJD's testimony and the Facebook exchanges that shortly followed the sexual assault. The exchange of Facebook messages between the appellant and CJD in which CJD stated "[i]t's not like I didn't say stop Ty, I said stop more than once"; "We had sex after I told you to stop more than once"; and "I don't know how you expect me to get over that" R. at 419-420, and the Appellant responded, *inter alia*, "if it would help you, you could press charges on me" provide strong corroboration of CJD's claim of sexual assault charged in specification 5 of Charge 1. The strength of the Government's case lies with these Facebook messages and the admission of the journal made no impact on the Appellant's conviction on Specification 5 of Charge 1.

This case is like *Ayala*, in which the court found that evidence was not prejudicial because the defendant in that case made corroborating statements. The facts of *Ayala* are similar to the case at bar. In that case, an Army staff sergeant had met a female enlisted soldier on base and brought her to his residence where he started kissing her and touching her sexually. *United States v. Ayala*, 81 M.J. 25, 26-27 (2021). The victim in that case repeatedly told him "no" and that she wasn't interested. *Id.* The victim then removed herself from the situation and used text messaging to inform her mother that she had been sexually assaulted. *Id.* at 27. Shortly after the incident, the

defendant and the accused engaged in a series of email exchanges in which the defendant admitted that he had crossed a line and made a mistake. *Id.*

The text messages from the victim to her mother were admitted as a prior consistent statement, the accused was convicted, and he appealed his conviction on the grounds that the military judge abused his discretion in admitting the statements. The C.A.A.F. declined to consider whether the military judge abused his discretion because the statements had not prejudiced the Appellant. *Id.* at 29. In deciding that the prior consistent statements had not prejudiced the Appellant the C.A.A.F. relied, in part, on the email exchange between the victim and Appellant which corroborated the victim's version of events, the military judge's clear findings on the record, the military judge's significant redactions to the prior consistent statements, and the Appellant's conviction on only two of the three charges. *Id.* at 30. The Court in *Ayala* also pointed out, to count against a finding of substantial prejudice, that the prior consistent statements were not substantial evidence because it merely repeated the testimony at trial.

The case at bar parallels *Ayala* in that CJD's version of events was corroborated by the Facebook messages, which was fatal to the Appellant's defense, and the military judge put his findings regarding prejudice on the record. R. at 532-533. Like in *Ayala*, the military judge demonstrated careful consideration of the prejudice issue when he made extensive redactions of the journal. R. at 529. Additionally, similar to *Ayala*, the Appellant was not convicted of all charges, which demonstrates that the journal was not a significant factor in the Appellant's conviction.

The case at bar is like *Ayala*, but it is unlike *Flesher.* In *Flesher*, the Appellant was convicted of furnishing alcohol to a minor after he gave alcohol to his sixteen-year-old neighbor and her younger brother and then broke into her room later that night and sexually assaulted her.

Flesher, 73 M.J. at 306. Since the victim did not fight back, scream, or call for help, *id,* the Government sought to introduce expert testimony regarding the behavior of sexual assault victims, which the military judge allowed after extensive arguments from both sides. *Id.* at 306-07. But the military judge did not put his findings on the record and did not clearly articulate the relevant law and its application to the case. *Id.* at 311-12. The C.A.A.F. held that the military judge abused his discretion, and that the expert testimony prejudiced the defendant. *Id.* at 306. The Court determined that the expert testimony prejudiced the Appellant because the prosecution presented one version of events through the victim's testimony and the defense presented their version of events through the Appellant's testimony which result[ed] in "a 'he said-she said' case, where the outcome largely depended on whether the panel found [the victim] or Appellant more credible. *Id.* at 318. There was no corroboration for either version of the event and the expert testimony's corroboration of the victim's would have swayed the panel to believe the victim over the Appellant. *Id.*

The case at bar is a clear contrast to *Flesher*, because in that case there was no corroboration for either side, but in our case, the Facebook message exchange between the victim and Appellant provided independent corroboration CJD's testimony. Additionally, our case is unlike *Flesher* in that the military judge was clear about the law and how it related to the admission of the journal.

In conclusion, the journal did not prejudice the defendant because the Facebook messages provided independent corroboration of CJD's testimony, and the journal did not cause the panel to convict the Appellant on the other charges. The military judge applied the law correctly and the Court should affirm the military judge's ruling.

CONCLUSION

For these reasons, the *Amicus Curiae on behalf of Appellee* respectfully request this Honorable Court deny Appellant's claims and affirm the findings in this case.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Air Force Appellate Defense Division and the Air Force Appellate Government Division on November 10, 2023.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION TO CITE SUPPLEMENTAL AUTHORITIES**
v.	)	Before Panel No. 2
Senior Airman (E-4) **TYRION N. DAVIS** United States Air Force *Appellant*	)	No. ACM 40370 9 November 2023

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

Pursuant to Rule 23.3(d) of this Honorable Court's Rules of Practice and Procedure, Senior Airman (SrA) Tyrion N. Davis, Appellant, hereby moves to cite supplemental authority. Undersigned counsel was not detailed to represent SrA Davis until after the filing of written briefs. She recently discovered additional case law relevant to the issues ordered for oral argument.

Counsel requests this court consider the following supplemental authorities and the decisions cited within:

1. ***United States v. Rudometkin*, 82 M.J. 396 (C.A.A.F 2022)**. In *Rudometkin*, the Court of Appeals for the Armed Forces (C.A.A.F.) wrote that "[a] military judge abuses his or her discretion when . . . the military judge fails to consider important facts." 82 M.J. at 401 (citing *United States v. Solomon*, 72 M.J. 176 (C.A.A.F. 2013)). This is relevant to the standard of review for the issues ordered for oral argument (Issues II and VI in the Brief on Behalf of Appellant).
2. ***Luce v. United States*, 469 U.S. 38 (1984)**. In Appellee's Motion to Cite Supplemental Authorities, Appellee asked this Court to consider *United States v. Gee*, 39 M.J. 311 (C.M.A. 1994) and *United States v. Napoleon*, 44 M.J. 537 (A.F. Ct. Crim. App. 1996) with respect to Issue III ordered for oral argument. Both *Gee* and *Napoleon* relied on the

ruling in *Luce*, which states that a defendant must testify at his trial in order to raise and preserve for review the claim of improper impeachment with a prior conviction. 469 U.S. at 43. The facts and rationale in *Luce* can be distinguished from the facts and circumstances in this case.

3. ***United States v. Rich*, 79 M.J. 472 (C.A.A.F. 2020)**. *Rich* is relevant to the third issue ordered for oral argument. In *Rich*, the C.A.A.F. evaluated whether the appellant affirmatively waived any instructional error at trial. The Court reviewed the multiple discussions between the military judge and the parties regarding findings instructions. Although trial defense counsel told the military judge he planned to ask for a mistake of fact instruction, he did not affirmatively ask for it when the military judge was finalizing his instructions. The military judge asked trial defense counsel whether they had any objections or requests for additional instructions and trial defense counsel said no. When the military judge instructed the members and did not include a mistake of fact instruction, trial defense counsel neither objected nor requested such an instruction at that time. The C.A.A.F. explained the difference between forfeiture and waiver, stating that "a waiver is a deliberate decision not to present a ground for relief that might be available in the law." 79 M.J. at 475. Ultimately the Court held that appellant affirmatively waived any claim of instructional error. *Rich* offers an example of waiver of an issue at the trial level. It can be contrasted with this case because in *Davis*, trial defense counsel deliberately and affirmatively raised their issue and objection regarding the Government's alleged good faith basis during sentencing. Trial defense counsel did not fail to make a timely assertion of a right nor did they intentionally relinquish or abandon a known right. Trial defense

counsel raised the issue (lack of good faith basis), the military judge ruled on the issue, and the appellant's issue is preserved.

WHEREFORE, SrA Davis respectfully requests this Honorable Court grant this Motion to Cite Supplemental Authority and consider the above-noted authorities cited herein.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 9 November 2023.

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