IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Airman (E-2) **JAMIESON T. HENDERSON,** United States Air Force *Appellant*	)	No. ACM 40338 2 November 2022

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **13 January 2023**. The record of trial was docketed with this Court on 15 September 2022. From the date of docketing to the present date, 48 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

HEATHER M. CAINE, 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 2 November 2022.

Respectfully submitted,

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

2 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JAMIESON T. HENDERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40338 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.

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 November 2022.

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	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (SECOND)**
	)	
v.	)	Before Panel No. 2
	)	
Airman (E-2)	)	No. ACM 40338
JAMIESON T. HENDERSON,	)	
United States Air Force	)	6 January 2023
Appellant	)	

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

Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **12 February 2023**. The record of trial was docketed with this Court on 15 September 2022. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

On 28 April 2022, at a general court-martial convened at Travis Air Force Base, California, Appellant was found guilty, contrary to his pleas, of one charge and four specifications of Article 120, Uniform Code of Military Justice (UCMJ); and was found not guilty, consistent with his pleas, of one charge and specification of Article 129, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgement*, 7 June 2022. The military judge sentenced Appellant to a Reprimand, reduction to the rank of E-1, total forfeiture of all pay and allowances, 42 months' confinement and a dishonorable discharge. *Id.* The convening authority took no action on the findings and sentence. ROT, Vol. 1, *Convening Authority Decision on Action*, 24 May 2022.

The trial transcript is 634 pages long and the record of trial is comprised of five volumes containing 18 prosecution exhibits, six defense exhibits, 36 appellate exhibits, and two court exhibits. Counsel is reviewing the record of trial. Appellant is currently confined.

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

Respectfully submitted,

HEATHER M. CAINE, 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 6 January 2023.

Respectfully submitted,

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

9 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JAMIESON T. HENDERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40338 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 9 January 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. Airman (E-2) **JAMIESON T. HENDERSON,** United States Air Force *Appellant*	)))))))))	**MOTION FOR ENLARGEMENT OF TIME (THIRD)** Before Panel No. 2 No. ACM 40338 3 February 2023

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

Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **14 March 2023**. The record of trial was docketed with this Court on 15 September 2022. From the date of docketing to the present date, 141 days have elapsed. On the date requested, 180 days will have elapsed.

On 28 April 2022, at a general court-martial convened at Travis Air Force Base, California, Appellant was found guilty, contrary to his pleas, of one charge and four specifications of Article 120, Uniform Code of Military Justice (UCMJ); and was found not guilty, consistent with his pleas, of one charge and specification of Article 129, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 7 June 2022. The military judge sentenced Appellant to a Reprimand, reduction to the rank of E-1, total forfeiture of all pay and allowances, 42 months' confinement and a dishonorable discharge. *Id.* The convening authority took no action on the findings and sentence. ROT, Vol. 1, *Convening Authority Decision on Action*, 24 May 2022.

The trial transcript is 634 pages long and the record of trial is comprised of five volumes containing 18 prosecution exhibits, six defense exhibits, 36 appellate exhibits, and two court exhibits. Counsel is reviewing the record of trial. Appellant is currently confined.

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

Respectfully submitted,

HEATHER M. CAINE, 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 3 February 2023.

Respectfully submitted,

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

3 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JAMIESON T. HENDERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40338 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 3 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 *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 2
Airman (E-2) **JAMIESON T. HENDERSON,** United States Air Force *Appellant*	)	No. ACM 40338 7 March 2023

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

Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **13 April 2023**. The record of trial was docketed with this Court on 15 September 2022. From the date of docketing to the present date, 173 days have elapsed. On the date requested, 210 days will have elapsed.

On 28 April 2022, at a general court-martial convened at Travis Air Force Base, California, Appellant was found guilty, contrary to his pleas, of one charge and four specifications of Article 120, Uniform Code of Military Justice (UCMJ); and was found not guilty, consistent with his pleas, of one charge and specification of Article 129, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 7 June 2022. The military judge sentenced Appellant to a Reprimand, reduction to the rank of E-1, total forfeiture of all pay and allowances, 42 months' confinement and a dishonorable discharge. *Id.* The convening authority took no action on the findings and sentence. ROT, Vol. 1, *Convening Authority Decision on Action*, 24 May 2022.

The trial transcript is 634 pages long and the record of trial is comprised of five volumes containing 18 prosecution exhibits, six defense exhibits, 36 appellate exhibits, and two court exhibits. Appellant is currently confined.

Undersigned counsel is currently assigned 15 cases, with 10 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Eight cases have priority over the present case:

1. *United States v. Cabuhat, Jr.*, ACM 40191: Oral argument was ordered on three issues in this case and is scheduled for 22 March 2023. Counsel has reviewed the record of trial and is preparing for oral argument.

2. *United States v. Walker,* ACM S32737: The trial transcript is 90 pages long and the record of trial is comprised of three volumes containing four prosecution exhibits, eight defense exhibits, three appellate exhibits, and zero court exhibits.

3. *United States v. Edwards,* ACM 40349: The trial transcript is 1,505 pages long and the record of trial is comprised of 12 volumes containing 37 prosecution exhibits, 38 defense exhibits, 70 appellate exhibits, and one court exhibit.

4. *United States v. Greene-Watson,* ACM 40293: The trial transcript is 536 pages long and the record of trial is comprised of 11 volumes containing 21 prosecution exhibits, 12 defense exhibits, 46 appellate exhibits, and one court exhibit.

5. *United States v. Emerson*, ACM 40297: The trial transcript is 255 pages long and the record of trial is comprised of four volumes containing seven prosecutions exhibits, seven defense exhibits, 27 appellate exhibits, and zero court exhibits.

6. *United States v. Dugan,* ACM 40320: The trial transcript is 225 pages long and the record of trial is comprised of four volumes containing six prosecutions exhibits, 22 defense exhibits, 10 appellate exhibits, and zero court exhibits.
7. *United States v. Milla*, ACM 40307: The trial transcript is 210 pages long and the record of trial is comprised of five volumes containing three prosecutions exhibits, nine defense exhibits, 22 appellate exhibits, and zero court exhibits.
8. *United States v. Douglas*, ACM 40324: The trial transcript is 777 pages long and the record of trial is comprised of five volumes containing 11 prosecution exhibits, 13 defense exhibits, 56 appellate exhibits, and zero court exhibits.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

HEATHER M. CAINE, 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 7 March 2023.

Respectfully submitted,

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

8 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JAMIESON T. HENDERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40338 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.

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 8 March 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. Airman (E-2) **JAMIESON T. HENDERSON,** United States Air Force *Appellant*	)))))))))	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)** Before Panel No. 2 No. ACM 40338 6 April 2023

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

Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **13 May 2023**. The record of trial was docketed with this Court on 15 September 2022. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 28 April 2022, at a general court-martial convened at Travis Air Force Base, California, Appellant was found guilty, contrary to his pleas, of one charge and four specifications of Article 120, Uniform Code of Military Justice (UCMJ); and was found not guilty, consistent with his pleas, of one charge and specification of Article 129, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 7 June 2022. The military judge sentenced Appellant to a Reprimand, reduction to the rank of E-1, total forfeiture of all pay and allowances, 42 months' confinement and a dishonorable discharge. *Id.* The convening authority took no action on the findings and sentence. ROT, Vol. 1, *Convening Authority Decision on Action*, 24 May 2022.

The trial transcript is 634 pages long and the record of trial is comprised of five volumes containing 18 prosecution exhibits, six defense exhibits, 36 appellate exhibits, and two court exhibits. Appellant is currently confined.

Undersigned counsel is currently assigned 15 cases, with 10 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Seven cases have priority over the present case:

1. *United States v. Walker,* ACM S32737: The trial transcript is 90 pages long and the record of trial is comprised of three volumes containing four prosecution exhibits, eight defense exhibits, three appellate exhibits, and zero court exhibits. Counsel has filed a consent motion to examine the sealed evidence in the Record of Trial and will complete the Assignment(s) of Error once the review is accomplished.
2. *United States v. Edwards,* ACM 40349: The trial transcript is 1,505 pages long and the record of trial is comprised of 12 volumes containing 37 prosecution exhibits, 38 defense exhibits, 70 appellate exhibits, and one court exhibit. Counsel's consent motions to examine and transmit sealed materials were granted. Counsel transmitted sealed material to the civilian appellate defense counsel.
3. *United States v. Greene-Watson,* ACM 40293: The trial transcript is 536 pages long and the record of trial is comprised of 11 volumes containing 21 prosecution exhibits, 12 defense exhibits, 46 appellate exhibits, and one court exhibit.
4. *United States v. Emerson*, ACM 40297: The trial transcript is 255 pages long and the record of trial is comprised of four volumes containing seven prosecutions exhibits, seven

defense exhibits, 27 appellate exhibits, and zero court exhibits.

5. *United States v. Dugan,* ACM 40320: The trial transcript is 225 pages long and the record of trial is comprised of four volumes containing six prosecutions exhibits, 22 defense exhibits, 10 appellate exhibits, and zero court exhibits.

6. *United States v. Milla*, ACM 40307: The trial transcript is 210 pages long and the record of trial is comprised of five volumes containing three prosecutions exhibits, nine defense exhibits, 22 appellate exhibits, and zero court exhibits.

7. *United States v. Douglas*, ACM 40324: The trial transcript is 777 pages long and the record of trial is comprised of five volumes containing 11 prosecution exhibits, 13 defense exhibits, 56 appellate exhibits, and zero court exhibits.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

HEATHER M. CAINE, 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 6 April 2023.

Respectfully submitted,

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

6 April 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JAMIESON T. HENDERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40338 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 6 April 2023.

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

United States Air Force Court of Criminal Appeals

UNITED STATES	)	**No. ACM 40338**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jamieson T. HENDERSON	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 6 April 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 7th day of April, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **13 May 2023**.

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

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Airman (E-2) **JAMIESON T. HENDERSON,** United States Air Force *Appellant*	)))))))))	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)** Before Panel No. 2 No. ACM 40338 5 May 2023

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

Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **12 June 2023**. The record of trial was docketed with this Court on 15 September 2022. From the date of docketing to the present date, 232 days have elapsed. On the date requested, 270 days will have elapsed.

On 28 April 2022, at a general court-martial convened at Travis Air Force Base, California, Appellant was found guilty, contrary to his pleas, of one charge and four specifications of Article 120, Uniform Code of Military Justice (UCMJ); and was found not guilty, consistent with his pleas, of one charge and specification of Article 129, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 7 June 2022. The military judge sentenced Appellant to a Reprimand, reduction to the rank of E-1, total forfeiture of all pay and allowances, 42 months' confinement and a dishonorable discharge. *Id.* The convening authority took no action on the findings and sentence. ROT, Vol. 1, *Convening Authority Decision on Action*, 24 May 2022.

The trial transcript is 634 pages long and the record of trial is comprised of five volumes containing 18 prosecution exhibits, six defense exhibits, 36 appellate exhibits, and two court exhibits. Appellant is currently confined.

Undersigned counsel is currently assigned 16 cases, with 10 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Eight cases have priority over the present case:

1. *United States v. Edwards,* ACM 40349: The trial transcript is 1,505 pages long and the record of trial is comprised of 12 volumes containing 37 prosecution exhibits, 38 defense exhibits, 70 appellate exhibits, and one court exhibit. Counsel is currently reviewing the record of trial and drafting the Assignment of Errors brief.
2. *United States v. Greene-Watson,* ACM 40293: The trial transcript is 536 pages long and the record of trial is comprised of 11 volumes containing 21 prosecution exhibits, 12 defense exhibits, 46 appellate exhibits, and one court exhibit.
3. *United States v. Flores*, ACM 40294: The petition for grant of review is due to the CAAF on 7 June 2023.
4. *United States v. Emerson*, ACM 40297: The trial transcript is 255 pages long and the record of trial is comprised of four volumes containing seven prosecutions exhibits, seven defense exhibits, 27 appellate exhibits, and zero court exhibits.
5. *United States v. Dugan,* ACM 40320: The trial transcript is 225 pages long and the record of trial is comprised of four volumes containing six prosecutions exhibits, 22 defense exhibits, 10 appellate exhibits, and zero court exhibits.

6. *United States v. Milla*, ACM 40307: The trial transcript is 210 pages long and the record of trial is comprised of five volumes containing three prosecutions exhibits, nine defense exhibits, 22 appellate exhibits, and zero court exhibits.
7. *United States v. Douglas*, ACM 40324: The trial transcript is 777 pages long and the record of trial is comprised of five volumes containing 11 prosecution exhibits, 13 defense exhibits, 56 appellate exhibits, and zero court exhibits.
8. *United States v. Cook*, ACM 40333: The trial transcript is 639 pages long and the record of trial is comprised of 11 volumes containing 28 prosecutions exhibits, 10 defense exhibits, 48 appellate exhibits, and zero court exhibits.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

HEATHER M. CAINE, 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 5 May 2023.

Respectfully submitted,

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

5 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JAMIESON T. HENDERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40338 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 5 May 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 FOR ENLARGEMENT OF**
Appellee	)	**TIME (SEVENTH)**
	)	
v.	)	Before Panel No. 2
	)	
Airman (E-2)	)	No. ACM 40338
JAMIESON T. HENDERSON,	)	
United States Air Force	)	5 June 2023
Appellant	)	

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **12 July 2023**. The record of trial was docketed with this Court on 15 September 2022. From the date of docketing to the present date, 263 days have elapsed. On the date requested, 300 days will have elapsed.

On 28 April 2022, at a general court-martial convened at Travis Air Force Base, California, Appellant was found guilty, contrary to his pleas, of one charge and four specifications of Article 120, Uniform Code of Military Justice (UCMJ); and was found not guilty, consistent with his pleas, of one charge and specification of Article 129, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 7 June 2022. The military judge sentenced Appellant to a Reprimand, reduction to the rank of E-1, total forfeiture of all pay and allowances, 42 months' confinement and a dishonorable discharge. *Id.* The convening authority took no action on the findings and sentence. ROT, Vol. 1, *Convening Authority Decision on Action*, 24 May 2022.

The trial transcript is 634 pages long and the record of trial is comprised of five volumes containing 18 prosecution exhibits, six defense exhibits, 36 appellate exhibits, and two court exhibits. Appellant is currently confined.

Undersigned counsel is currently assigned 17 cases, with 10 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 6 in this case, undersigned counsel has filed the Brief on Behalf of Appellant in *United States v. Edwards* (ACM 40349); the Reply Brief in *United States v. Walker* (ACM S32737); and a Motion to Withdraw from Appellate Review and Motion to Attach in *United States v. Milla* (ACM 40307). Undersigned Counsel also attended the CAAF CLE training on 10-11 May 2023. There are now five cases before this Court with priority over the present case:

1. *United States v. Greene-Watson,* ACM 40293: The trial transcript is 536 pages long and the record of trial is comprised of 11 volumes containing 21 prosecution exhibits, 12 defense exhibits, 46 appellate exhibits, and one court exhibit. Counsel has reviewed the record of trial and will return to drafting the Assignments of Error after responding to the Government's Motion to Dismiss in *United States v. Cooley* (ACM 40376) and filing the Petition and Supplement to the Petition for Grant of Review in *United States v. Flores* (ACM 40294).

2. *United States v. Emerson*, ACM 40297: The trial transcript is 255 pages long and the record of trial is comprised of four volumes containing seven prosecutions exhibits, seven defense exhibits, 27 appellate exhibits, and zero court exhibits.

3. *United States v. Dugan,* ACM 40320: The trial transcript is 225 pages long and the record of trial is comprised of four volumes containing six prosecutions exhibits, 22 defense exhibits, 10 appellate exhibits, and zero court exhibits.
4. *United States v. Douglas*, ACM 40324: The trial transcript is 777 pages long and the record of trial is comprised of five volumes containing 11 prosecution exhibits, 13 defense exhibits, 56 appellate exhibits, and zero court exhibits.
5. *United States v. Cook*, ACM 40333: The trial transcript is 639 pages long and the record of trial is comprised of 11 volumes containing 28 prosecutions exhibits, 10 defense exhibits, 48 appellate exhibits, and zero court exhibits.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

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

<u>CERTIFICATE OF FILING AND SERVICE</u>

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 5 June 2023.

Respectfully submitted,

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

6 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JAMIESON T. HENDERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40338 Panel No. 2

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

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

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

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

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 6 June 2023.

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

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

Before Panel 2

UNITED STATES *Appellee* v. Jamieson T. HENDERSON Airman (E-2) U. S. Air Force *Appellant*	**NOTICE OF APPEARANCE** No. ACM 40338 6 July 2023

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

The undersigned has been retained to represent the Appellant before this Court.

Respectfully submitted,

Philip D. Cave
Cave & Freeburg, LLP

MADC

CERTIFICATE OF FILING AND SERVICE

I certify that this document was emailed to the Court's electronic filing address on 6 July 2023, that military counsel has been directed to upload a copy into the Court's case management system, and that a copy of the foregoing was emailed to the Chief, Appellate Government Division.

Philip D. Cave
Civilian Appellate Counsel

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Panel No. 2
Airman (E-2) **JAMIESON T. HENDERSON,** United States Air Force *Appellant*	)	No. ACM 40338 5 July 2023

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **11 August 2023**. The record of trial was docketed with this Court on 15 September 2022. From the date of docketing to the present date, 293 days have elapsed. On the date requested, 330 days will have elapsed.

On 28 April 2022, at a general court-martial convened at Travis Air Force Base, California, Appellant was found guilty, contrary to his pleas, of one charge and four specifications of Article 120, Uniform Code of Military Justice (UCMJ); and was found not guilty, consistent with his pleas, of one charge and specification of Article 129, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 7 June 2022. The military judge sentenced Appellant to a Reprimand, reduction to the rank of E-1, total forfeiture of all pay and allowances, 42 months' confinement and a dishonorable discharge. *Id.* The convening authority took no action on the findings and sentence. ROT, Vol. 1, *Convening Authority Decision on Action*, 24 May 2022.

The trial transcript is 634 pages long and the record of trial is comprised of five volumes containing 18 prosecution exhibits, six defense exhibits, 36 appellate exhibits, and two court exhibits. Appellant is currently confined.

Civilian appellate defense counsel has an active docket with cases pending before this Court, the Army Court of Criminal Appeals, and a petition for certiorari to the Supreme Court of the United States. While he has reviewed Appellant's case, he has not started drafting the Assignments of Error brief. This is civilian appellate defense counsel's second priority case before this Court with *United States v. Ramirez* (ACM 40373) being first priority.

Military appellate counsel is currently assigned 18 cases, with 9 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 7 in this case, military appellate counsel has filed a Response to the Government's Motion to Dismiss in *United States v. Cooley* (ACM 40376); the Petition and Supplement to the Petition for Grant of Review in *United States v. Flores* (ACM 40294); a Motion for Leave to File a Responsive Pleading in *United States v. Cooley* (ACM 40376); a Brief on Behalf of Appellant in *United States v. Greene-Watson* (ACM 40293); and a Reply Brief on of Appellant in *United States v. Edwards* (40349). Undersigned counsel also had scheduled and approved leave starting late afternoon on Wednesday, 21 June 2023, through Sunday, 25 June 2023. Additionally, Monday and Tuesday of this week, 3-4 July 2023, were a Family Day and Holiday. There are now four cases before this Court with priority over the present case:

1. *United States v. Emerson*, ACM 40297: The trial transcript is 255 pages long and the

record of trial is comprised of four volumes containing seven prosecutions exhibits, seven defense exhibits, 27 appellate exhibits, and zero court exhibits. Undersigned counsel filed a Consent Motion to Examine Sealed Material on 30 May 2023, which was granted on 9 June 2023. Undersigned counsel subsequently reviewed the sealed material on 15 June 2023. Undersigned counsel completed review of the record of trial, is nearly finished drafting the Assignments of Error and will finish coordination with the appellant on any potential *Grostefon* submissions.

2. *United States v. Dugan,* ACM 40320: The trial transcript is 225 pages long and the record of trial is comprised of four volumes containing six prosecutions exhibits, 22 defense exhibits, 10 appellate exhibits, and zero court exhibits. Reservist co-counsel has been recently assigned and is nearly finished reviewing the record of trial. Undersigned counsel will start review once finished drafting the Assignments of Error for *United States v. Emerson*.

3. *United States v. Douglas*, ACM 40324: The trial transcript is 777 pages long and the record of trial is comprised of five volumes containing 11 prosecution exhibits, 13 defense exhibits, 56 appellate exhibits, and zero court exhibits.

4. *United States v. Cook*, ACM 40333: The trial transcript is 639 pages long and the record of trial is comprised of 11 volumes containing 28 prosecutions exhibits, 10 defense exhibits, 48 appellate exhibits, and zero court exhibits.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

HEATHER M. CAINE, 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 5 July 2023.

Respectfully submitted,

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

7 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JAMIESON T. HENDERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40338 Panel No. 2

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

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

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

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

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 7 July 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	)	**CONSENT MOTION**
Appellee	)	**TO EXAMINE**
	)	**SEALED MATERIALS**
v.	)	
	)	Before Panel No. 2
Airman (E-2)	)	
JAMIESON T. HENDERSON	)	No. ACM 40338
United States Air Force	)	
Appellant	)	4 August 2023

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

Pursuant to Rules 3.1 and 23.3(f) of this Court's Rules of Practice and Procedure and Rule for Courts-Martial (R.C.M.) 1113(b)(3(B)(i), the Appellant moves for both parties, to include civilian appellate defense counsel, to examine the following sealed materials:

1) Transcript pages 45-56, 69-112, and 135-140; and the closed sessions' audio recording. These transcriptions and audio are of closed sessions litigating issues related to Mil. R. Evid. 412, 413, 304(d), and 403, were attended by trial and defense counsel, and were ordered sealed by the military judge. R. at 57, 113, 141. The sealed closed session audio is in a sealed manila folder in Appellate Defense's copy of the Record of Trial (ROT). These transcript pages are included in the transcript found on the Trial Transcript page. Appellate Defense has alerted the Government to this. Appellate Defense has not reviewed any of the sealed audio or pages and only looked to see what the page numbers were for the sealed portions in order to file this motion.

2) Appellate Exhibits VI, VII, VIII, X, XI, XII, XIII, XIV, XXI, XXIX, and XXXI were motions, related evidence, and rulings under Mil. R. Evid. 412, 413, 304(d), and 403. These matters were reviewed by trial and defense counsel and ordered sealed by the military judge. R. at 40, 126, and 131. These sealed exhibits are in sealed manila

folders in the Appellate Defense's copy of the ROT. Appellate Defense has not opened or viewed any of the sealed materials in the manila folders.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these matters is reasonably necessary to appellate counsels' 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.

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.

Appellate Government Counsel have been consulted about this motion and consent to the relief sought by the Appellant. Civilian appellate defense counsel is available to travel to Joint Base Andrews to conduct his review of the sealed material. Appellate Government Counsel has

indicated they agree the parties should be able to keep the sealed portions already in their possession until the end of appellate review.

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

Respectfully submitted,

HEATHER M. CAINE, 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 4 August 2023.

Respectfully submitted,

HEATHER M. CAINE, 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 40338**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jamieson T. HENDERSON	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 4 August 2023, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials requesting both parties be allowed to examine transcript pages 45–56, 69–112, and 135–140 and Appellate Exhibits VI–VIII, X–XIV, XXI, XXIX, and XXXI. These items were reviewed by trial and defense counsel as well as the military judge.

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

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

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

ORDERED:

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

Appellate defense counsel and appellate government counsel may view transcript pages 45–56, 69–112, and 135–140 and Appellate Exhibits VI–VIII, X–XIV, XXI, XXIX, and XXXI, 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

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

United States Air Force Court of Criminal Appeals

UNITED STATES	)	**No. ACM 40338**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Jamieson T. HENDERSON	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 8th day of August, 2023,

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Panel 2 and referred to Panel 3 for appellate review.

This panel letter supersedes all previous panel assignments.

FOR THE COURT

TANICA S. BAGMON
Appellate Court Paralegal

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40338**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jamieson T. HENDERSON	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 4 August 2023, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials requesting both parties be allowed to examine transcript pages 45–56, 69–112, and 135–140 and Appellate Exhibits VI–VIII, X–XIV, XXI, XXIX, and XXXI. Appellant's motion states the sealed exhibits and transcript pages are included in appellate defense's copy of the record of trial. On 8 August 2023, the court granted Appellant's motion.

The court submits this subsequent order because according to Appellant's motion, the sealed transcript pages, ordered sealed by the military judge, are in the possession of both appellate defense and appellate government counsel. Further, the sealed audio recording of the closed session and Appellate Exhibits VI, VII, VIII, X, XI, XII, XIII, XIV, XXI, XXIX, and XXXI, also sealed per order of the military judge and enclosed in a manila folder, are also in appellate defense and government counsel's possession. The parties have not opened or viewed these sealed materials, but "agree the parties should be able to keep the sealed portions already in their possession until the end of appellate review."

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

ORDERED:

If appellate defense counsel and appellate government counsel possess copies of transcript pages 45–56, 69–112, and 135–140, the sealed audio recording of the closed session, and Appellate Exhibits VI–VIII, X–XIV, XXI, XXIX, and XXXI, counsel are authorized to retain copies in their possession until completion of our Article 66, UCMJ, 10 U.S.C. § 866, review of Appellant's case, to include the period for reconsideration in accordance with JT. CT. CRIM. APP. R. 31. After this period, appellate defense and appellate government counsel shall destroy any retained copies of transcript pages 45–56, 69–112, and 135–140, the sealed audio recording, and Appellate Exhibits VI–VIII, X–XIV, XXI, XXIX,

and XXXI, in their possession. Appellant's civilian defense counsel may view the sealed material in appellate military defense counsel's possession.

It is further ordered:

Except as specified in this order, 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.

To view the sealed material, appellate civilian defense counsel may coordinate with the court or appellate military defense counsel.

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Airman (E-2) **JAMIESON T. HENDERSON,** United States Air Force *Appellant*	)))))))))	**MOTION FOR ENLARGEMENT OF TIME (NINTH)** Before Panel No. 2 No. ACM 40338 4 August 2023

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **10 September 2023**. The record of trial was docketed with this Court on 15 September 2022. From the date of docketing to the present date, 323 days have elapsed. On the date requested, 360 days will have elapsed.

On 28 April 2022, at a general court-martial convened at Travis Air Force Base, California, Appellant was found guilty, contrary to his pleas, of one charge and four specifications of Article 120, Uniform Code of Military Justice (UCMJ); and was found not guilty, consistent with his pleas, of one charge and specification of Article 129, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 7 June 2022. The military judge sentenced Appellant to a Reprimand, reduction to the rank of E-1, total forfeiture of all pay and allowances, 42 months' confinement and a dishonorable discharge. *Id.* The convening authority took no action on the findings and sentence. ROT, Vol. 1, *Convening Authority Decision on Action*, 24 May 2022.

The trial transcript is 634 pages long and the record of trial is comprised of five volumes containing 18 prosecution exhibits, six defense exhibits, 36 appellate exhibits, and two court exhibits. Appellant is currently confined.

Civilian appellate defense counsel has an active docket with cases pending before this Court and the Army Court of Criminal Appeals. During the current enlargement, civilian appellate defense counsel has been unavailable for eight days because of surgical procedures and recovery. He has completed the trial in *United States v. Rosser*, Eastern Dist. of Virginia, and completed (as co-counsel) a petition for a writ of certiorari in *Lattin v. United States*. In addition, civilian appellate defense counsel traveled to Naval Consolidated Brig Miramar to meet with Appellant and an appellant in another case. While he has reviewed Appellant's case, he has not completed the Assignments of Error brief. Civilian appellate defense counsel has discussed the status of Appellant's case with him: (1) a potential Declaration of the Appellant, (2) re-advice about the constitutional and statutory right to have the effective assistance of military counsel at this stage of his appeals, (3) military counsel's workload and assignment of work within the "team," (4) the request for an extension of time to file a brief and the effect on his speedy review right. Knowing that, Appellant consents to this enlargement request.

Military appellate counsel is currently assigned 23 cases, with 11 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 8 in this case, military appellate counsel has filed a Brief on Behalf of Appellant in *United States v. Emerson* (ACM 40297); a Reply Brief on Behalf of Appellant in *United States v. Greene-Watson* (ACM

40293); and a Brief on Behalf of Appellant in *United States v. Dugan* (40320). Additionally, on 20 July 2023, the Court of Appeals for the Armed Forces (CAAF) granted an issue for review in *United States v. Flores* (ACM 40294) with a brief due on or before 21 August 2023. On 27 July 2023, the CAAF also granted an issue for review in *United States v. Guihama* (ACM 40039) with a brief originally due 28 August 2023, but now due 27 September 2023. As for cases before this Court, military appellate counsel has since prioritized this case over *United States v. Cook*, ACM 40333, given the Appellant in this case is currently confined and the appellant in *Cook* is not. As such, there is now one case before this Court with priority over the present case:

1. *United States v. Douglas*, ACM 40324: The trial transcript is 777 pages long and the record of trial is comprised of five volumes containing 11 prosecution exhibits, 13 defense exhibits, 56 appellate exhibits, and zero court exhibits. Undersigned counsel completed review of the sealed materials in this case on 2 August 2023. Counsel has yet to review the rest of the record.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

HEATHER M. CAINE, 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 4 August 2023.

Respectfully submitted,

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

7 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JAMIESON T. HENDERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40338 Panel No. 2

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 7 August 2023.

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

United States Air Force Court of Criminal Appeals

UNITED STATES	)	**No. ACM 40338**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jamieson T. HENDERSON	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 4 August 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Ninth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 9th day of August 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Ninth) is **GRANTED**. Appellant shall file any assignments of error not later than **10 September 2023**.

Appellant's counsel is advised that given the number of enlargements granted thus far, any further requests for an enlargement of time may necessitate a status conference.

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	) **MOTION FOR ENLARGEMENT OF**) **TIME (TENTH)**)
v.	) Before Panel No. 2)
Airman (E-2) **JAMIESON T. HENDERSON** United States Air Force *Appellant*	) No. ACM 40338)) 1 September 2023)

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **10 October 2023**. The record of trial was docketed with this Court on 15 September 2022. From the date of docketing to the present date, 351 days have elapsed. On the date requested, 390 days will have elapsed.

On 28 April 2022, at a general court-martial convened at Travis Air Force Base, California, Appellant was found guilty, contrary to his pleas, of one charge and four specifications of Article 120, Uniform Code of Military Justice (UCMJ); and was found not guilty, consistent with his pleas, of one charge and specification of Article 129, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 7 June 2022. The military judge sentenced Appellant to a Reprimand, reduction to the rank of E-1, total forfeiture of all pay and allowances, 42 months' confinement and a dishonorable discharge. *Id.* The convening authority took no action on the findings and sentence. ROT, Vol. 1, *Convening Authority Decision on Action*, 24 May 2022.

The trial transcript is 634 pages long and the record of trial is comprised of five volumes containing 18 prosecution exhibits, six defense exhibits, 36 appellate exhibits, and two court exhibits. Appellant is currently confined.

Civilian appellate defense counsel has an active docket with cases pending before this Court and the Army Court of Criminal Appeals (ACCA). During the current enlargement, civilian appellate defense counsel has filed a brief in *United States v. Hansen* with the ACCA. This is civilian appellate defense counsel's first priority before this Court.

Military appellate counsel is currently assigned 23 cases, with 12 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 9 in this case, military appellate counsel has filed the Grant Brief in *United States v. Flores* (ACM 40294) with the Court of Appeals for the Armed Forces (CAAF). Undersigned counsel trained new appellate defense counsel during our office orientation on 9-10 August 2023. Undersigned counsel also planned and coordinated the 10th Annual Joint Appellate Advocacy Training (JAAT), which was held 24-25 August 2023.

Of note, there is a scheduled Family Day on Friday, 1 September 2023, and Labor Day is on Monday, 4 September 2023. Undersigned counsel then currently has scheduled and approved leave Monday through Thursday, 11-14 September 2023. Undersigned counsel also has two Reply Briefs due to this Court in *United States v. Emerson* (ACM 40297), calculated as being due 20 September 2023, and in *United States v. Dugan* (ACM 40320), now calculated as being due 21 September 2023. Additionally, on 27 July 2023, the CAAF granted an issue for review in

United States v. Guihama (ACM 40039) with a brief, after an extension of time request, due on or before 27 September 2023. Finally, the Reply Brief in *United States v. Flores* (ACM 40294) is due to the CAAF on or before 30 September 2023.

There is now one case before this Court with priority over the present case:

1. *United States v. Douglas*, ACM 40324: The trial transcript is 777 pages long and the record of trial is comprised of five volumes containing 11 prosecution exhibits, 13 defense exhibits, 56 appellate exhibits, and zero court exhibits. Undersigned counsel completed review of the sealed materials in this case on 2 August 2023. Counsel is finishing her review of the record and has started drafting the Assignments of Error. Due to a personal emergency, counsel requested a two-week extension of time for the brief to be due on 20 September 2023.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

HEATHER M. CAINE, 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 1 September 2023.

Respectfully submitted,

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

7 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JAMIESON T. HENDERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40338 Panel No. 2

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 7 September 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Airman (E-2) **JAMIESON T. HENDERSON** United States Air Force *Appellant*	)))))))))	**MOTION FOR WITHDRAWAL OF APPELLATE DEFENSE COUNSEL** Before Panel No. 3 No. ACM 40338 15 September 2023

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

Pursuant to Rules 12(b), 12.4, and 23.3(h) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel respectfully requests to withdraw as counsel in the above-captioned case. Appellant has released undersigned counsel due to her congested docket. Major Allen Abrams has been detailed substitute counsel in undersigned counsel's stead and will file his notice of appearance within 10 days pursuant to Rule 12.4. Counsel have completed a thorough turnover of the record and Maj Abrams is available to start review of the record immediately.

Appellant has been advised of this motion to withdraw as counsel and consents to undersigned counsel's withdrawal. A copy of this motion will be delivered to Appellant following its filing.

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

Respectfully submitted,

HEATHER M. CAINE, 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 15 September 2023.

Respectfully submitted,

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**NOTICE OF APPEARANCE**
	)	
	)	
v.	)	Before Panel No. 3
	)	
	)	No. ACM 40338
Airman (E-2) **JAMIESON T. HENDERSON** United States Air Force *Appellant*	)	19 September 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.

ALLEN S. ABRAMS, Major, USAF
Deputy Chief
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762

Counsel for Appellant

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 19 September 2023.

ALLEN S. ABRAMS, Major, USAF
Deputy Chief
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40338**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jamieson T. HENDERSON	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 15 September 2023, Appellant's counsel, Major Heather Caine, requested to withdraw as counsel in the above-captioned case. Appellant's counsel stated that this request was due to her congested docket; the Appellant does not object to the withdrawal; and provisions have been made for continued representation in that Major Allen Abrams has been detailed to represent Appellant, and "is available to start review of the record immediately." *See* JT. CT. CRIM. APP. R. 12(b). The Government did not submit any opposition.

Appellant's case was docketed on 15 September 2022. The record of trial consists of 18 prosecution exhibits, 6 defense exhibits, 36 appellate exhibits, and 634 transcript pages. According to Appellant's motion, counsel for Appellant currently has 23 cases, with 12 initial briefs pending before this court.

On 27 September 2023, the court held a status conference to discuss the progress of Appellant's case in relation to this motion. Moving counsel, Major Caine, as well as Appellant's civilian defense counsel, Mr. Philip Cave, Major Abrams, and Senior Civilian Counsel for the Appellate Defense Counsel Division, Ms. Megan Marinos, represented Appellant. The Associate Chief for the Appellate Government Counsel Division, Ms. Mary Ellen Payne, represented the Government. Major Caine explained that her docket recently became congested due to unexpected grants of review before the United States Court of Appeals for the Armed Forces and that she did not want some of her older cases to be delayed. Major Abrams' availability will allow him to work Appellant's case more expeditiously at this time. He anticipates needing no more than one additional enlargement of time before he and Mr. Cave are able to file Appellant's brief in this case.

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

ORDERED:

Appellant's Motion for Withdrawal of Appellate Defense Counsel in the

above captioned case is **GRANTED**.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

United States Air Force Court of Criminal Appeals

UNITED STATES	**)**	**No. ACM 40338**
Appellee	**)**	
	)	
v.	**)**	
	)	**ORDER**
Jamieson T. HENDERSON	**)**	
Airman (E-2)	**)**	
U.S. Air Force	**)**	
Appellant	**)**	**Panel 3**

On 15 September 2023, Appellant's counsel, Major Heather Caine, requested to withdraw as counsel in the above-captioned case. Appellant's counsel stated that this request was due to her congested docket; the Appellant does not object to the withdrawal; and provisions have been made for continued representation in that Major Allen Abrams has been detailed to represent Appellant, and "is available to start review of the record immediately." *See* JT. CT. CRIM. APP. R. 12(b). The Government did not submit any opposition.

Appellant's case was docketed on 15 September 2022. The record of trial consists of 18 prosecution exhibits, 6 defense exhibits, 36 appellate exhibits, and 634 transcript pages. According to Appellant's motion, counsel for Appellant currently has 23 cases, with 12 initial briefs pending before this court.

On 27 September 2023, the court held a status conference to discuss the progress of Appellant's case in relation to this motion. Moving counsel, Major Caine, as well as Appellant's civilian defense counsel, Mr. Philip Cave, Major Abrams, and Senior Civilian Counsel for the Appellate Defense Counsel Division, Ms. Megan Marinos, represented Appellant. The Associate Chief for the Appellate Government Counsel Division, Ms. Mary Ellen Payne, represented the Government. Major Caine explained that her docket recently became congested due to unexpected grants of review before the United States Court of Appeals for the Armed Forces and that she did not want some of her older cases to be delayed. Major Abrams' availability will allow him to work Appellant's case more expeditiously at this time. He anticipates needing no more than one additional enlargement of time before he and Mr. Cave are able to file Appellant's brief in this case.

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

ORDERED:

Appellant's Motion for Withdrawal of Appellate Defense Counsel in the

above captioned case is **GRANTED**.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Airman (E-2) **JAMIESON T. HENDERSON** United States Air Force *Appellant*	)))))))))))	**MOTION FOR ENLARGEMT OF TIME (ELEVENTH)** Before Panel No. 3 No. ACM 40338 2 October 2023

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

Under Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which would end on **9 November 2023**.

This case was docketed 382 days ago, on 15 September 2022. On the date requested, 420 days will have elapsed. Appellant is currently confined.

The prosecution's allegations against Appellant were tried by a military judge sitting alone as a general court-martial at Travis Air Force Base, California, from 25 through 28 April 2022. (R. at Vol. 1, *Entry of Judgment* at 1-2; Tr. at 1, 634.) Contrary to his pleas, Appellant was convicted of one charge and two specifications of sexual assault and two specifications of abusive sexual contact, all in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. (R. at Vol. 1, *Entry of Judgment* at 1-2.) A fifth specification under a separate charge was litigated and resulted in an acquittal. (*Id.*) The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, forfeiture of all pay and allowances, 42 months of

confinement, and a dishonorable discharge. (*Id.* at 1-3.) The Convening Authority took no action on the findings and sentence. (R. at Vol. 1, *Convening Authority Decision on Action*.)

The record of trial is five volumes. It contains a 634-page transcript, four motions, 18 prosecution exhibits, six defense exhibits, two court exhibits, and 36 appellate exhibits.

Civilian appellate defense counsel, Mr. Phil Cave, has an active docket; however, this case is his top priority appeal. Civilian appellate defense counsel has reviewed the record, but has not yet completed briefing the Assignments of Error.

Undersigned counsel entered a notice of appearance on 19 September 2023. This is undersigned counsel's only case before any Court. Undersigned counsel has reviewed almost all of the record, with the exceptions being the sealed materials and the digital media. As Deputy Chief of the Appellate Defense Division, undersigned counsel is assigned to carry out a variety of duties over the duration of the requested enlargement beyond his own docket, to include administering the Military Justice and Discipline Directorate's annual climate survey of approximately 400 personnel, revision of the Appellate Defense Division's operating instruction, supervisory review of various briefs to be filed with this Court and the Court of Appeals for the Armed Forces, and assisting Division counsel with preparation for at least three scheduled oral arguments before the United States Court of Appeals for the Armed Forces and two before this Court. The requested time will be used to complete review of the record, coordinate with co-counsel, advise Appellant accordingly, and assist military appellate defense counsel towards completion of the Assignments of Error.

Appellant has been advised of his right to a timely appeal and of this request for an enlargement of time. Appellant has provided limited consent to disclose his consent for the requested enlargement of time.

WHEREFORE, this Court should grant the requested enlargement of time.

Respectfully Submitted,

ALLEN S. ABRAMS, Major, USAF
Deputy Chief
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762

Counsel for Appellant

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 2 October 2023.

ALLEN S. ABRAMS, Major, USAF
Deputy Chief
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762

4 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JAMIESON T. HENDERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40338 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 420 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 4 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's military counsel has not completed review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 4 October 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**BRIEF ON BEHALF OF APPELLANT**
	)	Before Panel No. 3
v.	)	Case No. ACM 40338
Airman (E-2) **JAMIESON T. HENDERSON** United States Air Force *Appellant*	)	9 November 2023

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

Assignments of Error

I.

IS THE EVIDENCE FOR SPECIFICATION 4 OF CHARGE I LEGALLY AND FACTUALLY SUFFICIENT?

II.

IS THE EVIDENCE FOR SPECIFICATIONS 1-3 OF CHARGE I FACTUALLY SUFFICIENT?

III.

DID THE MILITARY JUDGE ABUSE HIS DISCRETION WHEN FAILING TO EXCLUDE THE APPELLANT'S STATEMENTS UNDER MIL. R. EVID. 304(D), MIL. R. EVID. 403? [1]

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[1] Assignments of error III-IV are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982) and are set out in the Appendix. In accordance with Rule 17.2(b) of this Court's Rules of Practice and Procedure, additional facts, law, and argument concerning sealed matters addressed in Appellant's fourth assignment of error are submitted on paper as a supplemental filing, as well assignments of error V-VIII in an Appendix to that filing pursuant to *Grostefon*, 12 M.J. 431.

IV.

WAS APPELLANT DENIED A SPEEDY TRIAL IN VIOLATION OF RULE FOR COURTS-MARTIAL 707?

Statement of the Case

Airman Jamieson Henderson was tried by a military judge sitting alone as a general court-martial at Travis Air Force Base, California, on 25-28 April 2022. (R. at Vol. 1, *Entry of Judgment* at 1-2; R. at 1, 19-20, 634. [2]) Contrary to his pleas, Airman Henderson, the Appellant, was convicted of one charge and two specifications of sexual assault and two specifications of abusive sexual contact, all in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. (R. at Vol. 1, *Entry of Judgment* at 1-2; R. at 142.) A fifth specification under a separate charge alleging burglary but ultimately litigated as the lesser included offense of unlawful entry in the lead-up to the sexual misconduct involving one of the two named victims resulted in an acquittal. (R. at Vol. 1, *Entry of Judgment* at 1-2; R. at 540.)

The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, forfeiture of all pay and allowances, 42 months of confinement after taking into account the impact of individual assignments of consecutive and concurrence sentences, and a dishonorable discharge. (R. at 633.) The Convening Authority took no action on the findings and sentence. (R. at Vol. 1, *Convening Authority Decision on Action*.)

[2] Citations to "R. at" followed by a page number reference the trial transcript. Citations to other matters from the Record of Trial will include a reference to the applicable volume (e.g., R. at Vol. 1).

Statement of Facts

Key Relationships

Around the time of the charged conduct, the two named victims in this case, SA and TE, were each other's "best friend" and did "everything together." (R. at 204, 288; *see also* R. at 256 (describing the two as part of a broader friend group "would do everything.") Both arrived at Travis Air Force Base as junior Airmen at the outset of the respective Air Force careers in November 2019, and they worked in the same unit and lived in the same dormitory. (R. at 201-02, 215, 253-55.)

When SA met Airman Henderson at a birthday party in her dormitory roommate's room in January of 2020—a pajama-themed party where TE performed a lap dance on Airman Henderson—Airman Henderson completed his connection with all four sides of a group of friends containing parallel and collectively discussed romantic pursuits. (R. at 205-06, 230, 293-94, 421-22.) In addition to SA and TE, the other two parties were EN and DP.

A junior enlisted member who worked in the same unit as SA and TE, DP was also TE's neighbor in the dormitory and, due to the positioning of their beds on either side of a shared wall, could hear even a knock on the drywall coming from her room. (R. at 204, 255, 304, 406-07.) Whereas DP considered TE "like [his] best friend," the "feelings involved" instead pertained to his friendship with SA, whom he met at a Christmas party in 2019. (R. at 409, 422.) Those feelings were not exactly mutual, with DP "always interested" in SA, but "it wasn't exclusive" and "was never anything serious" from the perspective of SA, who "just wanted to be friends" and considered their romantic and sexual relationship brief before returning to a state of friendship. (R. at 208; 419-20.)

DP met Airman Henderson in late 2019. (R. at 407.) They met while doing laundry in the dormitory. (*Id.*) Their daily encounters spanned both work and social activities. (R. at. 407-08.)

In a similar vein, EN first knew Airman Henderson from work, meeting in July 2019 on EN's first day in the same squadron as DP and later TE and SA. (R. at 202, 253, 406, 441.) Airman Henderson and EN lived in a dormitory. (*Id.*) While EN met DP through work, he met SA through TE. (R. at 442-43.) EN and TE had what EN described as a "complicated" relationship. (R. at 444.)

TE and EN's Shifting Relationship Leading up to February 2020

The "complicated" relationship between TE and EN started after they first met around December 2019. (R. at 444.) A twenty-seven-year-old naturalized citizen after immigrating from West Africa who had already started college and joined the Air Force seeking to complete his degree and commission as an officer, EN was sensitive to the age gap relative to the nineteen-year-old TE. (R. at 424, 446, 456; R. at Vol. 1, Prosecution Exhibit (Pros. Ex.) 5 at 1.) His career was very important to him, and he denied that he bought TE alcohol, though other witnesses, including TE, testified he had. (R. at 295, 423, 466-68.)

Both TE and EN consulted Airman Henderson about their relationship. TE claimed that when she sought Airman Henderson's thoughts about her relationship with EN, Airman Henderson said the age difference was too much and conveyed that TE should be single and promiscuous as part of her "ho phase." (R. at 258 (internal quotations omitted).) When asked by EN about the relationship with TE, EN recounted that Airman Henderson initially advised EN on working things out, then shifted to later counseling EN to focus on his plans because TE and EN were "not on the same path." (R. at 445-47.) Indeed, whereas TE did not see "drinking alcohol

and partying" as a barrier between her and EN, EN felt otherwise. (*Compare* R. at 292, *with* R. at 447.)

Apart from these background differences between EN and TE, friction arose between the pair because EN had a romantic interest in someone else, a local civilian named Eliza.[3] (R. at 293.) EN wanted an exclusive romantic relationship with EN. (R. at 292.) But, as TE put it, "[h]e just wasn't faithful." (*Id.*)

TE agreed she had some "bad feeling" towards Eliza and when EN brought Eliza to the January 2020 birthday party where SA met Airman Henderson, the "awkward moment" that followed when EN arrived with Eliza prompted EN's departure and was followed later in the night by TE's lap dance on Airman Henderson. (R. at 293-94.) The tensions surrounding EN's relationship with TE and Eliza would come up again closer to Valentine's Day of 2020, but were preceded by SA's allegations against Airman Henderson arising from the day before, 13 February 2020. (R. at 213, 218-226, 457-58.)

SA's Allegations

Before 13 February 2020, Airman Henderson had visited SA's dormitory room to chat on multiple occasions, often encouraging SA to "give [DP] a chance" in furtherance of DP's romantic interest in SA. (R. at 213-14.) And so, when Airman Henderson knocked on her door and asked to hang out, she let him in. (R. at 218.)

Seated on opposite sides of the square-shaped dormitory room, with DP on her bed and Airman Henderson in a chair, the two discussed "working out." (R. at 218, 235.) SA claimed

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[3] No witness testified to this individual's last name, so her first name only is used here.

other topics were discussed but could not "remember exactly" what they were. (R. at 236.) She did not testify at any point about a more generalized recollection of the other topics that were discussed.

During this discussion, SA introduced the subject of her butt.[4] (*Id.*) She brought up her butt "in context of the gym," as her personal workout regimens would either be "glute and leg day, or cardio and abs." (R. at 236; *see also glutes*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/glute (last visited Oct. 26, 2023) (defining the "glute" as a large muscle of the buttocks).) She agreed that she explained further to investigators how focusing on the former would "work on her butt tone" through weightlifting but that she would "gain a little bit of stomach," whereas the "cardio and abs" work would cause her to "lose [her] butt." (R. at 235-36.) She wanted to "get back into" going to the gym, but when Airman Henderson said something about SA working out that day or with Airman Henderson and others at some other time, SA testified that she declined and "was being pretty short." (R. at 222, 236.) She claimed she "didn't want to do anything that night. [She] was staying in." (R. at 235.)

So, after no more than ten or fifteen minutes of conversation, according to SA, Airman Henderson said, "'[O]kay,' like, 'I won't bother you anymore." (R. at 236.) Per SA's account,

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[4] Although charged as "buttocks," the record regularly refers to this anatomical part by the term "butt." (*See*, *e.g.*, R. at 236.) The terms are used interchangeably here, as their meaning is the same. (*butt*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/butt (last visited Nov. 6, 2023)). *See also* Adel Elanie and Judith Borger, *Anatomy, Bony Pelvis and Lower Limb, Glueteus Maximus Muscle*, STATPEARLS (Apr. 1, 2023), https://www.ncbi.nlm.nih.gov/books/NBK538193/ (last visited Nov. 9, 2023); Evan James, *Ultimate Glute Blog (Part 1 of 2): Glute Anatomy and Function*, NATIONAL INSTITUTE FOR FITNESS AND SPORT (May 7, 2023), https://www.nifs.org/blog/ultimate-glute-blog-part-1of-2-glute-anatomy-and-function (last visited Nov. 9, 2023); Daniel Richter, *How to Train Your Glute Muscles: Exercises and Workout*, STRENGTHLOG (Mar. 8, 2023), https://www.strengthlog.com/glute-muscles-exercises-workout/ (last visited Nov. 9, 2023).

Airman Henderson did not depart as his statement indicated but rather crossed the room, and SA "was concerned, like, why he was coming up to me." (R. at 221.) SA did not testify to saying or doing anything as Airman Henderson purportedly approached. (*See id.*) SA testified that Airman Henderson then touched her butt and concurrently said that he wanted to see what she was "working with," specifically, "'that I was fine, I looked good.'" (R. at 222.) SA testified that the gym discussion was "what [Airman Henderson] was referring to" and denied there was "any conversation of a sexual nature." (*Id.*)

At this time, SA claimed she was laying on her bed on her right side, with her butt facing away from Airman Henderson and the rest of the room. (R. at 222, 224; *see also* R. at Vol. 1, Pros. Ex. 2 and R. at 218-19 (describing the layout of SA's room)). She testified that Airman Henderson "had to actually reach for" her butt. (R. at 224.)

> He started rubbing my butt and grabbed my butt, and I had pushed his hand off, kind of, tried to laugh it off, because I wasn't expecting—and I just asked what he was doing. And then, he had shushed me, and said—so he said, "[S]hhh."

(R. at 223.) Elaborating, SA described the contact as not "like, a pat or anything. (R. at 224.) Rather, she alleged that Airman Henderson rubbed her butt for a few seconds then "squeezed [her] whole butt cheek." (R. at 224.) When this happened, SA acknowledged she "didn't want to make it weird, in that moment," and reiterated that she "tried to laugh it off." (R. at 237.)

SA gave two slightly different versions of what happened next, initially testifying that Airman Henderson then "moved his hand from my butt to my waist band and put his hands in my waistband." (R. at 223.) Rather than two hands in her waistband, she then demonstrated one hand going around one hip, and instead alleged Airman Henderson "had run his fingers across my waistband, in the front . . ." (*Compare id.*, *with* R. at 225.)

According to SA, she then got out of bed, and physically pushed Airman Henderson "towards the door," albeit not in an aggressive manner. (R. at 223, 225.) She "said that he should probably go. And, then he left." (R. at 223.)

Airman Henderson did not see the encounter the same way. In the days that followed, prior to any allegation raised by TE and prior to any notice of alleged impropriety, Airman Henderson told DP that SA put Airman Henderson's hand on her butt. (R. at 425.) It was not uncommon for DP to discuss the different feelings he and SA had for each other with Airman Henderson, who offered relationship advice of some kind. (R. at 410-11.) At some point, and in a conversation that DP could not recall with any definition, DP claimed that Airman Henderson had asked DP something about Airman Henderson receiving oral sex from SA, albeit seemingly in the context of whether DP had any objections to Airman Henderson "get[ting] with her" in light of the fact SA was not romantically interested in DP. (R. at 410-12, 425.)

While Airman Henderson was talking to DP about what happened on 13 February 2020, SA was talking to TE. (*See* R. at 226, 300.) Even though SA's discussion with TE about the alleged contact with her butt purportedly prompted SA and TE to see "red flags in [Airman Henderson's] personality," SA admitted that she told investigators that she "didn't think anything of" what happened, and both SA and TE were comfortable riding alone in a car with Airman Henderson as the driver just a few days later, just prior to the allegations involving TE. (R. at 226, 238-39.) And while these sorts of purported "red flags" could impact how events are recalled later (*see* R. at 523-24), at the time the at-odds nature of SA's and Airman Henderson's accounts regarding 13 February 2020 prompted text messages exclusively between TE and DP identifying the competing narratives, with the contrast being brought to the attention of SA as

DP, TE, SA, and EN came together in the wake of TE's own allegations against Airman Henderson. (R. at 301; *see* R. at 241-42.)

EN and TE Break-Up

The day after the alleged sexual contact involving SA was Valentine's Day, 14 February 2020. (*Compare* R. at 213, *with* R. at 260.) In TE's understanding, she "was supposed to spend" that day with EN. (R. at 260.) Just that morning, EN brought TE chocolates and champagne. (R. at 295.) In her account, she felt "frustrated" and "betrayed" by both EN and Airman Henderson when she got dressed up for a date night with EN, only for EN to speak with Airman Henderson then call her and break up their relationship. (R. at 260-61.) The "upset" TE told EN one thing—that she gave all the gifts away—but did something else, keeping at least the chocolates for herself. (R. at 261, 295.)

EN had a different spin on those events. In his telling, after a run-in between TE and Eliza, who was accompanying EN in a dormitory parking lot, EN and TE had a "falling out" just before Valentine's Day. (R. at 448-49, 457-58.) TE followed up this falling out with angry text messages to EN. (R. at 458.) And so, while he got TE gifts for Valentine's Day, EN claimed it was "to do something nice for her." (R. at 457.) Even DP knew by then what TE testified she did not, namely, that EN did not want to go out with TE any more. (*Compare* R. at 260-61, *with* R. at 423.) In EN's account, he talked to Airman Henderson *after* TE started giving away his Valentine's Day gifts and going back and forth in text messages, and only then did Airman Henderson counsel his friend to end things with TE. (R. at 448-49.)

Notwithstanding TE's testimony that she blamed Airman Henderson for her Valentine's Day break-up from EN—let alone the "red flags" that stood out at this point according to SA's trial testimony, as well as an incident from weeks prior where TE claimed Airman Henderson

slapped her butt in DP's dormitory room then laughed it off, all without DP noticing—the now-single TE went out partying with SA in the local area just a few days later over the holiday weekend, accepting Airman Henderson as their driver to the party, inviting him over to a house party to join TE and SA, offering to pay for Airman Henderson's cover at the party, running up to give him a hug when he arrived, and riding back alone with TE. (R. at 226, 296-98, 315; *see also* R. at Vol. 1, Pros. Ex. 3 and 7 (documenting text messages between TE and Airman Henderson over 15-17 February 2020).)

TE did not recall what they discussed during the car ride back, only that Airman Henderson "continuously nudged and, was like, touching my arm, and placed his hand on my leg." (R. at 298.) TE claimed these contacts made her "super uncomfortable," but that she did not think she "had much of a reaction." (R. at 316.) She also claimed that she communicated what happened to SA, though SA never testified to corroborate that assertion. (*Id.*) There was no evidence that TE shared her purported discomfort with Airman Henderson.

The Night Leading Up to TE's Allegations

The social interactions between Airman Henderson and TE continued into the night of 17 February 2020, with Airman Henderson inquiring over text message whether TE would be going to a dormitory party while TE was in her dormitory room with DP. (*See* R. at Vol. 1, Pros. Ex. 7 at 11-13; *see also* R. at 269 (TE explaining the same messages found in R. at Vol. 1, Pros. Ex. 3 at 10-11).) Consistent with those messages, Airman Henderson visited DP and TE in TE's dormitory room. (R. at 270-71, 413.) While there, DP, TE, and Airman Henderson made a video call to EN, with all three joking with EN and TE inviting EN to join them. (R. at 450-51.) EN declined. (R. at 451.)

Likewise, DP and TE declined to go to the party Airman Henderson was attending. (*Id.*) According to DP and TE, DP and TE instead remained in TE's room, with DP lamenting his unreciprocated romantic interest in SA, and TE complaining about EN's behavior towards her. (R. at 426-27.) Though TE was under the legal drinking age, TE and DP were drinking alcohol, with TE consuming two or three shots of vodka. (R. at Vol. 1, Pros. Ex. 5 at 1; R. at 271-72.) After the vodka, TE felt tired and "ready to go to bed." (R. at 273.) As DP relayed a story, TE fell asleep mid-conversation, and DP departed for his own dormitory room next door, where he went to sleep. (R. at 271, 413, 415.)

Meanwhile, after DP's and TE's declination to join him, DP and TE invited Airman Henderson to return later and hang out, and Airman Henderson went to spend time with other friends in another part of the dormitory. (R. at 271, 275, 474; *but see* R. at 434 (DP unable to recall any portion of conversation in TE's room where Airman Henderson was invited to later return).) Later that night, Airman Henderson left his other friends and said that he was going up to his room. (R. at 475.) Waiting for Airman Henderson to go get some food and puzzled by his longer-than-expected absence, one of the friends sent a text message to Airman Henderson asking where he was. (R. at 477.)

Airman Henderson did not reply to this communication but did eventually return. (R. at 477-78, 504.) He asked if his friends were ready to go. (R. at 504.) When asked where he had been, Airman Henderson was upbeat and joked around, saying words to the effect of, "I can't tell you," and "I'm legendary." (R. at 478, 504.) He did not disclose where he had been. (*Id.*)

But motion-activated closed circuit television in the dormitory showed where Airman Henderson went—TE's room—and that he remained inside for approximately ten minutes. (R. at 362-63, 371-72, 376-78; R. at Vol. 1, Pros. Ex. 8; *see also* R. at 540-41 (the prosecution

detailing relevant portions of Pros. Ex. 8).) The prosecution conceded that Airman Henderson did not return to TE's room with the intent to sexually assault her or commit any other crime. (*See* R. at 540 (abandoning burglary with the intent to sexually assault TE).) But trial defense counsel acknowledged what was otherwise supported by DNA evidence and a list Airman Henderson kept on his phone of people with whom he had had sex and claimed to have "sexually satisfied": that Airman Henderson had sex with TE. (R. at 209-213, 259-60, 289, 563; R. at Vol. 1, Pros. Ex. 1, 12.)

TE's Allegations

When DP departed TE's room, he recounted that he left her door unlocked and TE, having already gotten into bed, testified she did not get up to lock it. (R. at 276.) TE regularly left her dormitory room unlocked. (*Id.*) Though common within the dormitory to at least knock before entering, Airman Henderson had entered TE's room on at least one or two occasions prior to 17 February 2020 without knocking, which TE testified she would chastise and which Airman Henderson would, as TE alleged, "laugh it off or say something sly." (R. at 323, 325.)

When Airman Henderson returned to TE's room and entered, TE testified she could see who it was and that he asked, "[W]here is everybody at?" (R. at 275-76 (internal quotation marks omitted).) TE claimed she was confused and continued to talk with Airman Henderson as "[h]e kept getting closer to my bed" and then, as TE was laying on her stomach, Airman Henderson "put his hand on my butt cheek and grabbed it" over her sweatpants. (R. at 277-78, 325.) TE testified that this contact with her left butt cheek was without her consent and lasted "[o]nly a couple of seconds." (R. at 278, 283.)

TE testified about her response. (R. at 277-78.) She asserted that she pushed Airman Henderson's arm away and said, "[W]hat are you doing? Don't do that." (R. at 277 (punctuation modified from original for clarity); *see also* R. at Vol. 1, Pros. Ex. 5 at 3.)

Part of the response by Airman Henderson that TE alleged was verbal. She claimed Airman Henderson repeated three different phrases "over and over again": "[Y]ou're okay," "[I]t's fine," and shushing her. (R. at 278 (punctuation modified from original for clarity); *see also* R. at Vol. 1, Pros. Ex. 5 at 3.)

As TE rolled from her stomach onto her side by the wall, she testified that Airman Henderson "leaned over and stuck his hands inside" her pants, then digitally penetrated her vagina with his fingers without her consent. (R. at 278, 280-83; *see also* R. at Vol. 1, Pros. Ex. 5 at 3.) TE could not recall how long this penetration lasted and, testifying that she "was scared," believed that she "froze." (R. at 282-83.)

Notwithstanding her testimony a moment earlier that she froze during the alleged digital penetration, TE then testified about her verbal and physical responses. (R. at 283-84.) She claimed she told Airman Henderson to "stop this" and asked, "[W]hat are you doing?" (R. at 283.) In TE's account, Airman Henderson responded with the same statements from before: "[Y]ou're okay," "[I]t's fine," and shushing her. (R. at 278, 283 (punctuation modified from original for clarity); *but see* R. at Vol. 1, Pros. Ex. 5 at 3 (omitting these statements at this juncture of the charged sexual assault).) Physically, TE, who at a height of five feet and ten inches was an inch taller than Airman Henderson, claimed, "[T]hat's when I, like, squirmed off the bed or I was trying to get off the edge of the bed, down at the end []. And, that's when he had physically grabbed me by my hips and forced me to the side of my bed, and had bent me over the bed." (R. at 283-84; *compare* R. at 302, *with* R. at Vol. 1, Pros. Ex 6 at 1.)

TE testified that Airman Henderson then penetrated TE's vagina with his penis for about five-to-ten minutes. (R. at 285-86.) TE testified that, at this point, she was "scared to death," that her body physically froze, and that she "waited until it was over." (R. at 285-86.) While penetrating her, TE testified that Airman Henderson told her to "shush" and "be quiet," and that "it's okay." (R. at 286; *but see* R. at Vol. 1, Pros. Ex. 5 at 3 (omitting these statements at this juncture).) This ended when, according to TE, Airman Henderson asked if she orgasmed and she said she had in the hope that he would "go away." (R. at 286-87; *see also* R. at Vol. 1, Pros. Ex. 5 at 3.) According to TE, all Airman Henderson had to say after this sequence of events was "good," and then he "walked out." (R. at 287; *see also* R. at Vol. 1, Pros. Ex. 5 at 3.)

It was possible to hear even a knock on the drywall against which TE's and DP's respective beds leaned. (R. at 304, 435-36.) Slight bumps on the wall while in bed were not uncommon. (R. at 436.) DP, who was half-asleep in his room during this time, testified that he heard one bump—the sort of bump on the wall he would do all the time by accident and that only struck him as unusual for the time of night when it occurred. (*Id.*)

The Morning After and Investigation

After Airman Henderson's departure, TE sought out DP. (*See* R. at 287.) She did not knock on the wall, on the other side of which DP was in bed. (R. at 304, 435-36.) Instead, TE sent a text message to DP around midnight before she went to sleep, which she did after DP did not respond. (R. at 287, 312.) TE wrote:

> Tell me why I'm drunk sleeping and Henderson walks in my room I was like, [DP] left already I'm sleeping this man comes over and touching on me and I was like nah we can't do this chill out bro and kept moving his hands away and gon tell me shhh we good and picks me up and fucks me. I hate myself bro, he def about to tell [EN] like, I shouldn't even care but I'm so mad caz I knew he been plottin

> Like I'm single I can do whatever I want but why with the one person I already know tells everybody my business

(R. at 305-06.[5])

The text message was followed by two female emojis performing a face-palm. (*Id.*) Though not further explained on the record, a "face-palm" means "to cover one's face with the hand as an expression of embarrassment, dismay, or exasperation." (*face-palm*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/face-palm (last visited on Oct. 26, 2023).)

Although TE initially testified at trial that, in contrast to what she wrote in her text message to DP, she was not drunk, she later explained when questioned by the prosecution that she meant tipsy. (*Compare* R. at 301, 305-06, *with* R. at 313.) Indeed, TE asserted at trial that her message to DP "was worded terribly of course" because she "was still wrapping [her] mind around everything that had happened." (R. at 313.) At trial, TE asserted that her concern was that Airman Henderson would tell EN that TE and Airman Henderson had consensual sex and that EN would then believe Airman Henderson. (*Id.*) Notwithstanding her close friendships with DP and SA, TE claimed to have feared that she "would have no support" without EN. (R. at 204, 288, 314, 409.)

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[5] Beyond required changes to comport with this Court's rules, the punctuation and spelling of this quotation have been modified from the court reporter's transcription based on the trial defense counsel's recitation to match the text of what was in two consecutive text messages. (*Compare* R. at 305-06, *with* R. at Vol. 3, *Report of Investigation* at 159.) This brief will reference the two text messages as a single message because the parties did the same at trial, and the substance is unchanged. (*See*, *e.g.*, R. at 313.) The text message from TE to DP statement was admitted only as testimony, not as an exhibit, and was offered as a prior inconsistent statement. (R. at 305-08.)

As DP recalled, TE came to his room the following morning, crying and "basically, saying that Airman Henderson raped her." (R. at 416.) EN then joined them at TE's invitation. (R. at 309, 428, 451-52.) DP—who in 2021 told law enforcement authorities that he lacked knowledge related to a civilian woman's disappearance, only to reverse course and reveal his "extensive relevant and material information"—did not recall SA being there, but EN did. (R; at Vol. 1, Pros. Ex. 13; *compare* R. at 428, *with* R. at 452.) TE recounted what happened, adding a detail left out of her trial testimony that she "was fighting to push [Airman Henderson] away." (*Compare* R. at 277-78, 280-83, *with* R. at 452-53.)

This discussion prompted TE's report to authorities. (R. at 287-88.) The alleged sexual contact with SA's butt, as well as the alleged sexual contact with TE's butt and penetration of TE's vagina with Airman Henderson's fingers and penis, all resulted in conviction. (R. at 591-92.[6])

Additional facts relevant to the assignments of error are included in the applicable Argument sections below.

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[6] The military judge found Airman Henderson not guilty of having unlawfully digitally penetrated TE "on divers occasions" as charged and entered specified findings of a single instance consistent with the description of TE's testimony set out above. (R. at Vol. 2, *Charge Sheet*; R. at 591-92.)

Argument

I.

THE EVIDENCE FOR SPECIFICATION 4 OF CHARGE I IS LEGALLY AND FACTUALLY INSUFFICIENT.

Standard of Review

The standard of review for legal and factual sufficiency is *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))). Beyond a reasonable doubt "does not mean that the evidence must be free of conflict." *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986) (citing *United States v. Steward*, 18 M.J. 506, 508 (A.F.C.M.R. 1984)). Because every reasonable inference from the evidence is drawn in favor of the prosecution, the legal sufficiency "involves a very low threshold to sustain a conviction." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (quotation marks and citations omitted).

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 members of [this Court] are themselves convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. The court takes "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to make an "independent

determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

The factual and legal sufficiency assessment is limited to "the evidence presented at trial." *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

Relevant to the specification involving SA, the prosecution was required to prove that (1) Airman Henderson touched SA's buttocks with his hand, (2) he did so with the intent to gratify or arouse his sexual desire, and (3) Airman Henderson did so without SA's consent. (R. at Vol. 1, *Charge Sheet* at 3); 10 U.S.C. §§ 920(d), 920(g)(2); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019 ed.) (MCM), pt. IV, ¶ 60.b.(4)(d) (defining two elements of (1) committing sexual contact, and (2) doing so without the consent of the other person). "The term 'consent' means a freely given agreement to the conduct at issue by a competent person," and consent is determined based on "[a]ll the surrounding circumstances." 10 U.S.C. § 920(g)(7).

One defense to offenses under Article 120 is a mistake of fact as to consent. *See* 10 U.S.C. § 920(f) (permitting defenses available under the Rules for Courts-Martial (R.C.M.)). Specifically, "it is a defense to an offense that the [appellant] held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the [appellant] believed them, the [appellant] would not be guilt of the offense." R.C.M. 916(j)(1). An appellant does not need to testify to establish this defense. *United States v. Jones*, 49 M.J. 85, 91 (C.A.A.F. 1998) (citations omitted). "The evidence to support a mistake-of-fact instruction can come from the evidence presented by the defense, the prosecution, or the court-martial." *United States v. Thompson*, 83 M.J. 1, 4, (C.A.A.F. 2022).

The defense of the mistake of fact as to consent must have been honest and reasonable. *United States v. Rodela*, 82 M.J. 521, 526 (C.A.A.F. 2021). There must be some evidence

"supporting both the subjective 'honest' and the objective 'reasonable' mistaken belief." *Id.* (citations omitted). Once raised, the prosecution bears the burden of proving the defense did not exist beyond a reasonable doubt. R.C.M. 916(b)(1).

Analysis

Two main storylines emerged about SA's allegation. One was from SA. (R. at 222-236.) The other was from Airman Henderson. (R. at 425.) Neither supports the conviction for abusive sexual contact.

The starting point of the analysis here should be Airman Henderson's own—albeit limited—account of what happened. As DP recounted, Airman Henderson's side of events was that SA placed Airman Henderson's hand on her butt. (R. at 425.) Admittedly, this statement is handicapped in detail by the same shallow memory that plagued much of DP's account of key events in the case (*see*, *e.g.*, 411-12, 416-17, 419, 429, 434), but DP's recollection about this charged conduct remains notable in two respects. First, the crux of the statement—and its absence of any underlying motive for Airman Henderson to defend himself from any allegation when he stated it—is clear: the touching that happened was consensual and at SA's invitation. (R. at 425.) Second, Airman Henderson's statement about what happened did not offer any evidence from which to infer that Airman Henderson intended the contact to be sexual. (*See id.*)

For purposes of the legal sufficiency of the evidence, SA's version of what happens does nothing to inch matters to where "a reasonable factfinder could have found all the essential elements beyond a reasonable doubt," with the critical element here being Airman Henderson's intent to gratify or arouse his sexual desires. *Humphreys*, 57 M.J. at 94 (quotations and citations omitted). Indeed, SA's story of when Airman Henderson's actions took a criminal turn starts at a curious place, claiming that, after working through a ten-to-fifteen-minute conversation, Airman

Henderson conveyed that he was leaving and would not bother his friend anymore, only to reverse course without warning and very much bother SA via abusive sexual contact.

More importantly, Airman Henderson and SA were the only people in the room during the charged sexual contact and, rather than rebut the absence of evidence laying the foundation for its sexual nature arising from Airman Henderson's testimony to DP, SA instead reinforced it. Indeed, her testimony only affirmed that Airman Henderson was not flirting with her or indicating any sexual or romantic interest during their discussion. (*See* R. at 225.) Far from it, as SA denied there was "any conversation of a sexual nature" when asked by trial defense counsel, with the conversation instead focused on "working out." (R. at 220-23, 225.) In SA's version of events, Airman Henderson did not even bring up the discussion about SA's butt, as SA injected her butt into their workout-related discourse on her initiative, with no evidence of any specific prompting from Airman Henderson. (R. at 236.)

Three evidentiary matters could be argued to establish the sexual intent but that this Court should reject for purposes of legal sufficiency. If the Court finds legal sufficiency, then this Court should consider and reject them for factual sufficiency as they relate to Airman Henderson's intent and whether there was consent.

The first is Airman Henderson's alleged comment to DP inquiring whether DP had any objections to Airman Henderson receiving oral sex from SA. (R. at 411-12.) This evidence is plagued by DP's challenge recalling events with any specificity, with DP initially denying that Airman Henderson made any comments about SA in his presence. (*Id.*) The record lacks evidence that the statement preceded the charged sexual contact. If it preceded the charged conduct, it runs into the nearly quarter-hour discussion about fitness and nothing sexual before the acts at issue. (R. at 236.) If the comment was after that charged conduct, it only reinforces

the notion that what happened in SA's room was consensual and conceivably sparked a notion in Airman Henderson that SA might be interested in him, an intra-friend-group step that—if TE's later blame of Airman Henderson for interfering in her already terminal relationship with EN was any indicator—could be a source for substantial drama that should be avoided. (R. at 296.) The lack of detail surrounding Airman Henderson's alleged, particularly given its lack of temporal anchor, should not form a basis to support the conviction.

The second piece of evidence concerns how the alleged butt-touching was executed. And while someone squeezing another person's butt cheek for multiple seconds might be considered sexual in nature when described in a vacuum, that's not what happened here. Instead, the contact here was in the context of, as described by SA, Airman Henderson discussing physical training, not anything sexual. (R. at 222, 235-36.) Though seemingly a misguided means of doing so—at least if conducted as described by SA—Airman Henderson's comment that he intended to see what SA was "working with" as she lamented the efficacy of her workout routine to maintain the contour of her buttocks appears only to have been in furtherance of that conversation. (R. at 235-36.) Again, this only reinforces the non-sexual nature of what happened and, even if it survives legal sufficiency, it undermines the sexual nature of what happened. It manifests what would be an honest and reasonable mistake of fact as to consent to the contact on Airman Henderson's part.

The third and final piece of evidence here is the "shush" described by SA in her testimony. (R. at 223.) The alleged "shush" conveys little because it is neither concurrent with nor preceding the charged contact. This is not a shush evincing sexual intent, silencing SA in her moment of victimization. Instead, it followed a single touching that SA terminated. (R. at 223.) It followed after she "pushed his hand off, kind of, [and] tried to laugh it off." (*Id.*) And it

followed after SA asked, presumably in an excited tone, what Airman Henderson was doing. (*Id.*) Assuming this shush happened as described, there is no evidence of intent, and even if there is sufficient evidence to support legal sufficiency, this only undermines the factual sufficiency of that intent and further reinforces Airman Henderson's mistaken understanding of what happened by evincing him seeking calm a friend getting agitated as a discussion about exercise took a physical but non-sexual turn she was not expecting.

Exclusive to factual sufficiency, what the alleged shush informs about the case is the tie between the two best friends, SA and TE. (R. at. 204, 288.) SA admitted this episode was not a big deal to SA initially. (R. at 238.) It transformed into much more as she engaged with TE and suddenly saw "red flags" surrounding Airman Henderson, albeit ones that did not stop SA and TE from utilizing Airman Henderson as a driver and socializing with him extensively. (R. at 226, 239.) These "red flags" can distort how events are recalled (*see* R. at 523-24) and did so here, with SA's influence from TE's experience molding a nothing-to-see-here fitness discussion that got physically awkward into a full-on sneak attack and a sneak preview of the charged sexual assault of TE to come. Such an account does not support the conviction.

WHEREFORE, this Court should set aside the findings for Specification 4 of Charge I, and reassess the sentence.

II.

THE EVIDENCE FOR SPECIFICATIONS 1-3 OF CHARGE I IS FACTUALLY INSUFFICIENT.

Standard of Review

The standard of review for factual sufficiency is *de novo*. *Washington*, 57 M.J. at 399.

Law

The test for factual sufficiency is the same as described under the first assignment of error above.

Relevant to the alleged abusive sexual contact involving TE, the prosecution was required to prove that (1) Airman Henderson touched TE's buttocks with his hand, (2) he did so with the intent to gratify or arouse his sexual desire, and (3) Airman Henderson did so without TE's consent. (R. at Vol. 1, *Charge Sheet* at 1); 10 U.S.C. §§ 920(d), 920(g)(2); *see also* MCM (2019 ed.), pt. IV, ¶ 60.b.(4)(d) (defining two elements of (1) committing sexual contact, and (2) doing so without the consent of the other person).

Relevant to the alleged digital penetration of TE, the prosecution was required to prove that (1) committed Airman Henderson penetrated TE's vulva with his finger, (2) Airman Henderson did so with the intent to arouse his own sexual desire, and (3) Airman Henderson did so without TE's consent. (R. at Vol. 1, *Charge Sheet* at 1); 10 U.S.C. §§ 920(b)(2)(A), 920(g)(1)(C); *see also* MCM (2019 ed.), pt. IV, ¶ 60.b.(2)(c) (defining two elements of (1) committing a sexual act, and (2) doing so without the consent of the other person).

Relevant to the sexual assault alleged in Specification 1 of Charge I, the prosecution was required to prove that (1) committed Airman Henderson penetrated TE's vulva with his penis and (2) Airman Henderson did so without TE's consent. (R. at Vol. 1, *Charge Sheet* at 1); 10

U.S.C. §§ 920(b)(1)(A), 920(g)(1)(C); *see also* MCM (2019 ed.), pt. IV, ¶ 60.b.(2)(c) (defining two elements of (1) committing a sexual act, and (2) doing so without the consent of the other person).

The defense of mistake of fact applies the same as described under the first assignment of error above.

Analysis

When distilled to its essential components after the abandonment of the burglary theory (*see* R. at 540), the prosecution's theory of the charged conduct involving TE presents a narratively threadbare account: Airman Henderson left his friends. (R. at 475.) He returned to TE's room. (R. at 376.) He entered and saw TE asleep or close to it. (R. at 275-76.) He decided on the spot to abandon his friendship with TE and raced through a sexual assault. (R. at 277-286.) Then he added TE to his list of "satisfied" conquests. (R. at Vol. 1, Pros. Ex. 1; R. at 209-10, 260.)

This bare-bones posture underscores four critical weaknesses in the prosecution's case and, in turn, the insufficiency of the evidence: (1) the list supports that what happened was consensual, (2) the prosecution's presentation centered on a non-existent plan targeting TE, (3) TE's text message to DP contradicts her account of what happened in significant respects, and (4) TE's generalized and competing statements do not support the convictions.

The assessment of Airman Henderson's list is straightforward. It was a list of sexual partners. (R. at Vol. 1, Pros. Ex. 1.) There was no evidence of how it was named or organized, indicating it admitted to anything non-consensual. And the notion that each partner was "satisfied" evinced Airman Henderson's understanding that whatever did happen was consensual or, in the alternative, under the honestly and reasonably mistaken belief that it was. (*See* R. at

260.) That either of the alleged victims' names was on the list is therefore evidence of Airman Henderson's honest and reasonable belief that they consented to any sexual activity.

That's not to say that the prosecution did not seek to put something of a predatory gloss on this list. For much of the case, the prosecution sketched out a theory that Airman Henderson was targeting TE. He was spun as driving a wedge between her and TE (*see* R. at 258, 296, 445-47). He purportedly slapped or groped TE right in front of DP, although DP did not see or hear it. (R. at 315.) These claims propped up a charge of burglary until the prosecution abandoned it—and any notion that Airman Henderson went to TE's room with a plan to assault her sexually—in the finding's argument. (*See* R. at 540.)

The evidence supported that transition by the prosecution. Airman Henderson was invited back to TE's room, seemingly to continue the mini-party he already had with TE and DP. (R. at 271, 275, 451, 474; *but see* R. at 434 (DP unable to recall any portion of a conversation in TE's room where Airman Henderson was invited to return later).) Even on TE's version of events, Airman Henderson wanted to know where that mini-party had gone when he returned. (R. at 275-76.)

In bailing on Airman Henderson having any pre-existing motive, the prosecution's reliance on TE's story—rather than anything DP or EN had to offer—underscored the import of everything TE had to say. That, in turn, spotlighted her very first communication about the facts at issue: her text message to DP.

Aside from the substance of the message itself, the mere sending of it raises questions. TE was not in a foreign environment. She was in her own bed in her own room. (*See* R. at 283-87.) She had a trusted friend in DP on the other side of the thinnest of walls who she could beckon with merely the slightest knock. (R. at 304, 409, 435-46.) By sending the text to begin

with, TE showed she was unhurried in trying to get in touch with DP. There was no reason to limit herself to just this text message if she felt in fear or danger after the charged sexual assault.

Notwithstanding the manner of communication, the substance of TE's message offers mixed messages that underline her motive to mischaracterize what happened. On the one hand, the description of events in the first portion of her text message to DP—describing Airman Henderson coming over, touching TE, and TE responding, "nah we can't do this chill out"—can be read as articulating nonconsensual sexual conduct. (R. at 305-06.) On the other hand, TE's concerns about what boils down to her reputation in the remainder of the message highlight why TE would represent events in the light most favorable to herself and exposes the cracks in the first portion of the text message. (*Id.*)

In the latter portion, beginning with TE saying, "I hate myself, bro," TE's concern was about EN and others finding out about the sex, which she then underscored with her use of exasperated face-palming emojis. (*Id.*; *face-palm*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/face-palm (last visited on Oct. 26, 2023.) Under the attack TE essentially described, there is no basis for her to feel embarrassed. Embarrassment arises from regrets. And such regret comports with consensual activity between TE and Airman Henderson, as even consensual activity would convert TE into an unfaithful ex-girlfriend and permanently sever the relationship she wanted with EN. (R. at 292-93.) Indeed, that social dynamic explains TE's statement in the first portion of the message that "we can't do this" (R. at 305-06)—"can't" really meant "should not" because of the jeopardy to their social network. TE's later reports only doubled down on this motive to protect her reputation.

This motive on TE's part undermined what was already a bare-bones account of events. In TE's telling, Airman Henderson adeptly inserted his hands into her pants as she lay on her

side and digitally penetrated her—he just did it. (R. at 278, 280-823; *see also* R. at Vol. 1, Pros. Ex. 5 at 3.) TE was similarly succinct about the next sexual assault, saying only that "he had physically grabbed me by my hips and forced me to the side of my bed, and had bent me over the bed." (R. at 283-84.) That statement left answered how Airman Henderson allegedly forced TE to the side of the bed, how he bent her over, and what happened to her clothes to effectuate the charged sexual assault. (*See id.*)

Perhaps some of those details could be resolved if TE gave consistent accounts of her actions. Aside from hedging in her testimony about whether she "froze" during the charged conduct (R. at 282-84), TE's testimony at trial was that she tried to "squirm" and sought to escape the bed during the alleged sexual assault. (R. at 283-84.) Yet she told EN she was "fighting to push [Airman Henderson] away." (R. at 452-53.) There is a substantial difference between running away and physical confrontation. But TE's story recounted both.

When paired with her motive to preserve her reputation, the notion of consent embedded in TE's initial text message recounting what happened, and Airman Henderson's record evincing consent, the evidence does not support affirming the convictions related to TE.

WHEREFORE¸ this Court should set aside the findings for Specifications 1-3 of Charge I, and reassess the sentence.

Respectfully Submitted,

Philip D. Cave
Cave & Freeburg, LLP

ALLEN S. ABRAMS, Lt Col, USAF
Deputy Chief
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762

Counsel for Appellant

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.

ALLEN S. ABRAMS, Lt Col, USAF
Deputy Chief
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762

APPENDIX A

Appellant personally requests consideration of the following matters presented pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982):

III.

DID THE MILITARY JUDGE ABUSE HIS DISCRETION WHEN FAILING TO EXCLUDE THE APPELLANT'S STATEMENTS UNDER MIL. R. EVID. 304(D), MIL. R. EVID. 403?

Additional Facts

The defense moved to exclude several statements attributed to the Appellant. (R. at 24, 57, R. at Vol. 2, Appellate Exhibit (App. Ex.) V.) They objected to: (1) "There goes a SARC case or words to that effect," and (2) "on multiple occasions," Airman Henderson told another witness that "he tended to avoid relationships or sexual encounters with white females because they "got you into trouble" or words to that effect." (R. at 58, R. at Vol. 2, App. Ex. V at 2.) The objection was based on Military Rule of Evidence (Mil. R. Evid.) 304(d) and Mil. R. Evid. 403 only. (R. at 64.)

The military judge overruled the defense's objection. (R. at Vol. 2, App. Ex. XXXII.) Though referenced in the prosecution's opening statement, it was not introduced during the presentation of evidence. (R. at 144.)

Standard of Review

A military judge's decision to admit evidence is tested for an abuse of discretion. *United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013).

Law and Analysis

The admissibility of an accused's statements is governed by Mil. R. Evid. 304. Evidence that tends to make a fact of consequence more or less probable is considered relevant and admissible. Mil. R. Evid. 401-402. Relevant evidence may still be excluded "if its probative

value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence. Mil. R. Evid. 403.

Airman Henderson asserts the evidence challenged by his trial defense counsel was irrelevant and, even if relevant, should not have been admitted based on Mil. R. Evid. 403. The evidence was not introduced at trial. There "is no error if the evidence is not admitted." *See United States v. Toto*, 34 M.J. 506, 514 (A.F.C.M.R. 1991).

WHEREFORE¸ this Court should set aside the findings and the sentence.

IV.

APPELLANT WAS DENIED A SPEEDY TRIAL IN VIOLATION OF RULE FOR COURTS-MARTIAL 707.

Additional Facts

The charges were preferred on 22 September 2020. (R. at Vol. 1, *Charge Sheet* at 1.) Airman Henderson was arraigned 580 days later, on 25 April 2022. (R. at 21-23.) On 24 May 2021, prior to referral, the convening authority followed up on an earlier exclusion of time and excluded 196 days from the R.C.M. 707(c)(1) speedy trial clock, spanning 22 September 2020 through 6 April 2021, due to the unavailability of trial defense counsel. (R. at Vol. 3, *Exclusion of Time*.) At docketing following referral, another 296 days were excluded by the military judge. (R. at Vol. 4, United States v. Amn Jamieson T. Henderson (Travis AFB, CA) – *Confirmation of "Initial Trial Date*.") After these exclusions, and assuming their validity, Airman Henderson was arraigned within 102 days.

Standard of review

Speedy trial claims are reviewed *de novo*. *United States v. Guyton*, 82 M.J. 146, 151 (C.A.A.F. 2022) (citation omitted).

Law and Analysis

Rule for Courts-Martial 707 requires bringing an accused to trial, at least by reaching arraignment, within 120 days of preferral of chares. R.C.M. 707(a)(1), R.C.M. 707(b)()1. Periods of time may be excluded by the convening authority before referral and by the military judge after referral. R.C.M. 707(c).

Here, Airman Henderson asserts his right to a speedy trial was denied through the excessive delay between preferral of charges and arraignment. Notwithstanding the exclusions of time, Airman Henderson personally asserts that he was deprived of the right to a speedy trial within 120 days of preferral, as protected by R.C.M. 707(a)(1).

WHEREFORE¸ this Court should set aside the findings and the sentence.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

<table>
<tr><td>UNITED STATES
Appellee

v.

Airman (E-2)
JAMIESON T. HENDERSON
United States Air Force
Appellant</td><td>)
)
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)
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)
)</td><td>MOTION TO FILE SUPPLEMENT TO BRIEF ON BEHALF OF APPELLANT UNDER SEAL

Before Panel No. 3

Case No. ACM 40338

9 November 2023</td></tr>
</table>

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

COME NOW the undersigned appellate defense counsel and, pursuant to Rule 17.2(b) of this Court's Rules of Practice and Procedure, move to file a supplement to Appellant's brief under seal. Appellant asserts five assignments of error, four of which are pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), that must be filed under seal, either because they draw on matters sealed by the military judge, in particular Appellate Exhibits X-XIII, or because they rely on Appellant's declaration, which contains information that is of a nature to fall under Mil. R. Evid. 412's prohibition and requires being filed under seal. As Appellant's brief requires discussion of these sealed materials, a supplement has been prepared to be filed under seal.

The undersigned appellate defense counsel cannot properly fulfill their responsibilities and cannot explain five of Appellant's assignments of error without proper citation to these materials. It never came out on the record in open trial and, without discussing it in detail, Appellant cannot articulate why or how the military judge and his trial defense counsel erred.

WHEREFORE, this Court should grant this motion for a supplement to the brief on behalf of appellant to be filed under seal.

Respectfully Submitted,

Philip D. Cave
Cave & Freeburg, LLP

ALLEN S. ABRAMS, Lt Col, USAF
Deputy Chief
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762

Counsel for Appellant

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.

ALLEN S. ABRAMS, Lt Col, USAF
Deputy Chief
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION TO ATTACH DOCUMENT**
Appellee	)	**UNDER SEAL**
	)	
	)	
v.	)	Before Panel No. 3
	)	
Airman (E-2)	)	Case No. ACM 40338
JAMIESON T. HENDERSON	)	
United States Air Force	)	
Appellant	)	9 November 2023

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

Pursuant to Rule 17.2(b) and 23.3(b) of this Court's Rules of Practice and Procedure, Appellant hereby moves to attach the Declaration of the Appellant found at Appendix A to the Record of Trial under seal. It is relevant to present factual bases and arguments for three of Appellant's assignments of error concerning his choice of forum and the performance of his trial defense counsel.

WHEREFORE, this Court should grant this motion to attach a document under seal.

Respectfully Submitted,

Philip D. Cave
Cave & Freeburg, LLP

ALLEN S. ABRAMS, Lt Col, USAF
Deputy Chief
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were delivered by e-mail to the Court and served on the Government Trial and Appellate Operations Division on 9 November 2023. Appendix A was hand-delivered to the Court and the Government Trial and Appellate Operations Division on 9 November 2023

ALLEN S. ABRAMS, Lt Col, USAF
Deputy Chief
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	CONSENT MOTION TO TRANSMIT SEALED MATERIALS
v.	)	Before Panel No. 3
Airman (E-2) **JAMIESON T. HENDERSON** United States Air Force *Appellant.*	)	No. ACM 40338 17 November 2023

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

Pursuant to this Honorable Court's Rules of Practice and Procedure, the United States moves for permission to electronically transmit via DoDSAFE one copy each of (a) the Supplement Under Seal to Brief on Behalf of Appellant, filed on 9 November 2023, and (b) the Declaration of Appellant, filed on 9 November 2023, to Appellant's trial defense counsel: Maj A B , Maj T B , and Capt D S .

Because Appellant alleges that he received ineffective assistance of counsel, the United States is seeking declarations from Appellant's three trial defense counsel. Absent permission to transmit the aforementioned filings, the United States is unable to make trial defense counsel sufficiently aware of the issues raised, such that trial defense counsel can make an intelligent decision about whether to provide declarations in the absence of a court order.

Transmitting the sealed filings via DoDSAFE is the most time-efficient and secure method for service to Appellant's trial defense counsel, none of whom are in Washington, DC, or the surrounding area. Undersigned counsel has consulted with Appellant's counsel, who has no objection to this motion.

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

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, the Air Force Appellate Defense Division, and Appellant's civilian appellate defense counsel on 17 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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Airman (E-2) **JAMIESON T. HENDERSON**, United States Air Force *Appellant*	)))))))))	**UNITED STATES' MOTION FOR ENLARGEMENT OF TIME (FIRST)** Before Panel No. 3 No. ACM 40338 20 November 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 that it be given **14 days** after this Court's receipt of a declaration or affidavit from trial defense counsel to submit its answer so that it may incorporate statements provided by Appellant's trial defense counsel in response to the specified ineffective assistance of counsel issue.[1]

This case was docketed with the Court on 15 September 2022. Since docketing, Appellant has been granted eleven (11) enlargements of time. Appellant filed his brief with this Court on 31 July 2023. This is the United States' first request for an enlargement of time. As of the date of this request, 363 days have elapsed since docketing.

There is good cause for the enlargement of time. Appellant has raised various areas in which he claims his trial defense counsel were ineffective. (Supp. App. Br. at 10-16.) The United States cannot prepare its answer to the allegations of ineffective assistance of counsel without a statement from the trial defense counsel. An enlargement of time is necessary to ensure trial defense counsel have time to review the allegations before they draft and submit a

[1] The United States is filing a motion to compel a declaration or affidavit from Appellant's trial defense counsel contemporaneously with this motion.

statement to the Court, and to give the United States sufficient time to incorporate trial defense counsel's statements into its answer. Moreover, additional time is needed for drafting and supervisory review before the United States files its answer.

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

KATE E. LEE, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**UNITED STATES' MOTION TO COMPEL**
Appellee	)	**DECLARATIONS OR AFFIDAVITS**
	)	
v.	)	Before Panel No. 3
	)	
Airman (E-2)	)	No. ACM 40338
JAMIESON T. HENDERSON,	)	
United States Air Force	)	20 November 2023
Appellant	)	

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

Pursuant to Rule 23.3(e) of this Honorable Court's Rules of Practice and Procedure, the United States hereby requests this Court to compel Appellant's trial defense counsel, Maj A B , Maj T B , and Capt D S to provide affidavits or declarations in response to Appellant's allegation of ineffective assistance (IAC) of counsel. In his assignments of error, Appellant claims he received ineffective assistance in the form of deficient advice regarding the number of votes required to convict, deficient advice regarding his decision to testify, and various decisions in trial defense counsels' case presentation that Appellant believes demonstrate a lack of conscientious effort. (Supp. App. Br. at 5-16.)

On 20 November 2023, defense counsel responded to undersigned counsel that they would only provide an affidavit or declaration by order by this Court. To prepare an answer under the test set out in United States v. Polk , 32 M.J. 150, 153 (C.M.A. 1991), the United States requests that this Court compel trial defense counsel to provide an affidavit or declaration. A statement from Appellant's counsel is necessary because the record is insufficient to answer Appellant's IAC allegations, since it provides no information about trial defense counsels' strategic decisions as they relate to Appellant's specific assertions of ineffectiveness. Thus, the United States

requires statements from both trial defense counsel to adequately respond to Appellant's brief. *See* United States v. Rose, 68 M.J. 236, 236 (C.A.A.F. 2009); United States v. Melson, 66 M.J. 346, 347 (C.A.A.F. 2008). In fact, this Court cannot grant Appellant's ineffective assistance of counsel claim without first obtaining statements from both trial defense counsel. *See* Rose, 68 M.J. at 237; Melson, 66 M.J. at 347.

Accordingly, the United States respectfully requests this Court order each trial defense counsel to provide a declaration, containing specific and factual responses to Appellant's allegation of ineffective assistance of counsel, within 30 days of this Court's order.

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

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

CERTIFICATE OF FILING AND SERVICE

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

t, 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 40338**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jamieson T. HENDERSON	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 9 November 2023, counsel for Appellant submitted a Motion to File Supplement to Brief on Behalf of Appellant Under Seal and a Motion to Attach Document Under Seal. The first is a supplement to the original Brief on Behalf of Appellant raising additional assignments of error, requesting to do so under seal. The second is a declaration from Appellant providing information relevant to one or more of the additional assignments of error. The Government did not file opposition to either motion.

On 17 November 2023, Appellee filed a Consent Motion to Transmit Sealed Materials. In this motion, the Government requests the court grant permission to transmit Appellant's Motion to File Supplement to Brief on Behalf of Appellant Under Seal and a Motion to Attach Document Under Seal to Appellant's trial defense counsel—Major A B , Major T B and Captain D S —so they "can make an intelligent decision about whether to provide declarations in the absence of a court order" in response to Appellant's allegation of ineffective assistance of counsel.

The court has considered Appellant's and Appellee's motions, the applicable case law, and the appellate court rules of practice and procedure.

Accordingly, it is by the court on this 29th day of November 2023,

ORDERED:

Appellant's Motion to File Supplement to Brief on Behalf of Appellant Under Seal is **GRANTED**. Appellant's Supplemental Brief is ordered sealed.

Regarding the declaration from Appellant, the court has considered Appellee's motion and the applicable law. Appellant's Motion to Attach Document Under Seal is **GRANTED**; however, it specifically defers consideration of the applicability of *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020), and related case law, to the attachment until it completes its Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, review of Appellant's entire case.

Appellate government counsel and appellate defense counsel may retain copies of the Supplemental Brief and declaration from Appellant in their possession until completion of our Article 66, UCMJ, review of Appellant's case, to include the period for reconsideration in accordance with JT. CT. CRIM. APP. R. 31. After which, counsel shall destroy any retained copies of the Supplemental Brief and Appellant's declaration in their possession.

It is further ordered:

Appellee's Consent Motion to Transmit is **GRANTED** subject to the following conditions:

(1) As necessary to comply with this order, a member of the Appellate Government Division is permitted to scan a hardcopy of the above sealed materials; transfer scanned copies of them to a password protected or encrypted DVD; email them using encryption to his or her government email address; and transmit files containing the sealed materials encrypted or password protected to Major A B , Major T B , and Captain D S via DoD SAFE. Any DVD copies must be labeled with the Appellant's name, ACM number, the date the DVD was produced, and the language "Sealed materials under R.C.M. 1113" and placed in a sealed envelope containing the same identifying information.

(2) Except as outlined in this order, no counsel or member of the Appellate Government Division will photocopy, photograph, or otherwise reproduce this material and will not disclose or make available its contents to any other individual without this court's prior written authorization.

Once all pleadings in this case are filed with the court, appellate counsel shall destroy all copies of the sealed materials created and transmitted. Appellate government counsel will provide confirmation to this court that all such copies have been destroyed.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40338**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jamieson T. HENDERSON	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 29 November 2023, this court granted Appellant's motions to file his supplement to his brief under seal, and to attach a declaration by Appellant under seal. In this same order, the court granted the Government's consent motion to transmit the above-mentioned sealed documents to Appellant's trial defense counsel* in order for them to prepare their responses to Appellant's allegation of ineffective assistance of counsel (IAC). The conditions as to transmittal still stand in that order.

On 20 November 2023, the Government filed a Motion to Compel Declarations or Affidavits and contemporaneously filed a Motion for Enlargement of Time (First). The Government requests this court compel Appellant's trial defense counsel—Major A B , Major T B , and Captain D S —to provide an affidavit or declaration in response to Appellant's allegations of IAC. According to the Government, Appellant's trial defense counsel indicated "they would only provide an affidavit or declaration by an order by this [c]ourt." The Government requests trial defense counsel each provide a declaration or affidavit—each containing specific and factual responses to Appellant's allegations of ineffective assistance of counsel—within 30 days of an order to compel.

In the motion for enlargement of time, the Government requests "that it be given 14 days after this [c]ourt's receipt of a declaration or affidavit from trial defense counsel to submit its answer." Appellant did not file responses to either motion.

The court has examined the claimed deficiencies and finds good cause to compel a response. The court cannot fully resolve Appellant's claims of IAC

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* We note a scrivener's error in our 29 November 2023 order in which Captain D S first name is misspelled on the second page.

without piercing the privileged communications between Appellant and his trial defense counsel. Moreover, in light of the court's order, it finds the Government's requested enlargement of time is appropriate.

Accordingly, after considering the Government's motions and the issues raised by Appellant, it is by the court on this 30th day of November, 2023,

ORDERED:

The Government's Motion to Compel Declarations or Affidavits is **GRANTED**. Major A B , Major T B and Captain D S are each ordered to provide an affidavit or declaration to the court that is a specific and factual response to Appellant's claims that they were ineffective.

A responsive affidavit or declaration by each counsel will be provided to the court not later than **30 December 2023.** The Government shall deliver a copy of the responsive affidavits or declarations upon receipt to Appellant's counsel.

It is further ordered:

The Government's Motion for Enlargement of Time (First) is **GRANTED**. The Government's answer to Appellant's assignments of error brief will be filed not later than **14 January 2024**.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	))	UNITED STATES' MOTION TO ATTACH DOCUMENTS
	)	
v.	)	Before Panel No. 3
	)	
Airman (E-2)	)	No. ACM 40338
JAMIESON T. HENDERSON	)	
United States Air Force	)	3 January 2023
Appellant.	)	

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

Pursuant to Rules 13.2(b), 17.2(b), 23.3(b) and 23.3(o) of this Court's Rules of Practice and Procedure, the United States moves the Court to attach the following documents to the record:

- Appendix A – Declaration of Capt D S dated 28 December 2023 (3 pages)
- Appendix B – Declaration of Maj T B , unsealed portions, dated 29 December 2023 (6 pages) [1]
- Appendix C – Declaration of Maj A B date 29 December 2023 (1 page)

The attached declarations are responsive to this Court's order directing Maj A B Maj T B , and Captain D S provide declarations responsive to Appellant's assignments of error concerning whether he received ineffective assistance of counsel. (Court Order, dated 30 November 2023.) In filings dated 9 November 2023, Appellant claims his trial defense counsel were ineffective. (App. Supp. Br. at

[1] A portion of this declaration discusses sealed matters. Thus, in accordance with Rule 17.2(b) of this Court's Rules of Practice and Procedure, the sealed portions have been redacted and are being submitted as a separate hard copy filing, accompanied by a motion to seal. The sealed portion will also be mailed to civilian defense counsel.

2-4; App. Supp. Br., Appx. A at 5-16.) These declarations are necessary to resolve these assignments of error.

Our superior Court held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court concluded that "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442 (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)). Accordingly, the attached documents are relevant and necessary to address this Court's order and Appellant's assignments of error.

WHEREFORE, the United States respectfully requests this Court grant this Motion to Attach the Documents.

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, civilian appellate defense counsel, and the Air Force Appellate Defense Division on 3 January 2024.

K 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. Airman (E-2) **JAMIESON T. HENDERSON** United States Air Force *Appellant.*	)))))))))	UNITED STATES' MOTION TO FILE UNDER SEAL Before Panel No. 3 No. ACM 40338 3 January 2024

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

Pursuant to Rules 13.2(b), 17.2(b), and 23.3(o) of this Court's Rules of Practice and Procedure, the United States moves to file under seal a portion of the following declaration from Appellant's trial defense counsel:

- Appendix – Page 4 of Declaration of Maj T B dated 29 December 2023 (1 page)

In sealed filings dated 9 November 2023, Appellant claims his trial defense counsel were ineffective. (App. Supp. Br. at 2-4; App. Supp. Br., Appx. A at 5-16.) The above-referenced declaration, which is responsive to Appellant's assignments of error concerning whether he received ineffective assistance of counsel, contains reference to sealed matters. Specifically, page 4 of the declaration—which is six pages in its entirety—references Mil. R. Evid. 412 matters that were sealed by the military judge. Accordingly, this page of the declaration is required to be filed under seal pursuant to Rule 17.2(b).

The above-referenced document will be delivered in hard copy to the Court and the Appellate Defense Division today, and a hard copy will be mailed to Appellant's civilian appellate defense counsel.

WHEREFORE, the United States respectfully requests that this Honorable Court grant this motion to file under seal.

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, civilian appellate defense counsel, and the Air Force Appellate Defense Division on 3 January 2024.

K USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

Appendix

Page 4 of Declaration of Maj T B dated 29 December 2023

(will be delivered in hard copy format)

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,	)	
Appellee,	)	**UNITED STATES' ANSWER TO**
	)	**ASSIGNMENTS OF ERROR**
v.	)	
	)	
	)	Before Panel No. 3
Airman (E-2)	)	
JAMIESON T. HENDERSON, USAF	)	No. ACM 40338
Appellant.	)	
	)	16 January 2024

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

KATE E. LEE, Capt, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762

MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) **JAMIESON T. HENDERSON** United States Air Force *Appellant.*	)))))))))	UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR Before Panel No. 3 No. ACM 40338 16 January 2024

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

ISSUES PRESENTED[1]

I.

IS THE EVIDENCE FOR SPECIFICATION 4 OF CHARGE I LEGALLY AND FACTUALLY SUFFICIENT?

II.

IS THE EVIDENCE FOR SPECIFICATIONS 1-3 OF CHARGE I FACTUALLY SUFFICIENT?

III.

DID THE MILITARY JUDGE ABUSE HIS DISCRETION WHEN FAILING TO EXCLUDE THE APPELLANT'S STATEMENTS UNDER MIL. R. EVID. 304(D), MIL. R. EVID. 403?

IV.

WAS APPELLANT DENIED A SPEEDY TRIAL IN VIOLATION OF RULE FOR COURTS-MARTIAL 707?

[1] Appellant raises issues III-IV and VI-VIII pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

V.

DID THE ADVICE FROM TRIAL DEFENSE COUNSEL AND THE MILITARY JUDGE THAT A PANEL WOULD NOT HAVE TO VOTE UNANIMOUSLY TO CONVICT—RESULTING IN APPELLANT'S ELECTION TO BE TRIED BY THE MILITARY JUDGE—RUN AFOUL OF THE CONSTITUTION?

VI.

DID THE MILITARY JUDGE ABUSE HIS DISCRETION IN ADMITTING EVIDENCE UNDER MIL. R. EVID. 413?

VII.

WERE TRIAL DEFENSE COUNSEL INEFFECTIVE WHERE APPELLANT EXPRESSED HIS WISH TO TESTIFY TO TRIAL DEFENSE COUNSEL, TRIAL DEFENSE COUNSEL DECLINED TO PREPARE HIM TO TESTIFY, AND APPELLANT THEREBY LACKED ANY MEANINGFUL CHOICE TO TESTIFY?

VIII.

DID TRIAL DEFENSE COUNSEL'S CUMULATIVE ERRORS AMOUNT TO INEFFECTIVE ASSISTANCE OF COUNSEL?

STATEMENT OF CASE

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

STATEMENT OF FACTS

The Friend Group

In January 2020, Appellant met SA and TE through a mutual friend, EN. (R. at 205-206.) At the time, SA, TE, EN, and another friend, DP, regularly hung out together. (R. at 204.) After being introduced to the group, Appellant began hanging out with the four airmen in their various dorm rooms. (R. at 257.) At the time, TE and

EN had an on-and-off a romantic relationship. (R. at 257.) Similarly, SA and DP were, for some time, "a little more than friends." (R. at 208-209.)

The Abusive Sexual Contact of SA

On the evening of 13 February 2020, SA was watching TV in her dorm room when Appellant knocked on her door and asked if he could come in and talk. (R. at 214, 218.) Given that Appellant had come to SA to talk several times before—usually about her relationship with DP— SA let Appellant in. (Id.)

Upon entering SA's room, Appellant sat on a chair, while SA sat on her bed across the room. (R. at 218.) In addition to discussing DP, Appellant talked about working out. (R. at 220.) At some point, SA brought up her tendency to lose gluteus muscles if she focused on her abdominal muscles and vice versa. (R. at 236.) Appellant suggested that SA join him for a workout. (R. at 220-21.) SA, who wanted to stay in, declined. (R. at 221.) After 10 to 15 minutes, Appellant told SA, "I won't bother you anymore," and stood up to leave. (Id.)

But instead of leaving, Appellant approached SA, who was laying on her side in her bed, and "started grabbing and rubbing [her] butt." (R. at 221-22.) As Appellant touched SA, he told her he "wanted to see what [she] was working with." (R. at 223.) SA pushed Appellant's hand away and asked Appellant what he was doing. (Id.) SA was confused, given that she had "never given [Appellant] any sort of idea that [she] was interested in [him] that way." (R. at 225.)

Undeterred despite being pushed away, Appellant told SA, "shhh," before moving his hand from SA's buttocks to the waistband of her shorts, running his fingers across the front, and putting his hand inside. (Id.) Concerned that Appellant's behavior would lead to

"more," SA got out of her bed and pushed Appellant towards the door. (Id.) Only then did Appellant leave. (Id.)

The Sexual Assault of TE

Several days later, on the evening of 17 February 2020, TE and DP were hanging out in the former's dorm room when Appellant stopped by and invited them to join him in another airman's room. (R. at 262.) Though the group declined the offer, TE told Appellant that he was welcome to "come back up" and "hang out with [them]" afterwards. (R. at 271.) After Appellant left, TE and DP continued to hang out in her room. (R. at 273.) Eventually, TE fell asleep, at which point DP left and returned to his own room next door. (R. at 273, 413.)

At approximately 1217 hours, TE was roused from her sleep when she heard a creaking sound from her door. (R. at 273; Pros. Ex. 8.) TE looked up and saw Appellant—he had opened her door and was standing in her doorway. (Id.) Appellant then asked TE where the others had gone. (R. at 273.) TE informed Appellant that "everybody's gone to bed" and told him "good night." (R. at 273-74.) Expecting that would be the end of the conversation, TE laid back down. (Id.)

But Appellant did not leave TE's room. (R. at 274.) Realizing she had not heard her door close, TE raised her head again and saw Appellant approaching her bed. (R. at 274.) Confused, TE asked Appellant, "What's going on? What's up?" before asking Appellant what test she had failed—something he had alluded to earlier during the day. (R. at 277; Pros. Ex. 3.) Appellant told TE that she had failed to "help him make his bed," and then proceeded to grope TE's buttocks. (R. at 277.) TE immediately pushed

Appellant's arm away and told him, "Don't do that." (R. at 277.) Appellant responded by "shushing" TE and telling her, "you're okay," and "it's fine." (R. at 277-78.)

In an attempt to get away from Appellant, TE, who had been laying on her stomach, rolled onto her side. (R. at 278.) At that moment, Appellant "leaned over and stuck his hands inside [TE's] pants," "down [her] butt," and "into [her] vagina." (R. at 278, 282.)

TE froze. (R. at 283.) She was "scared" and "had 60 million thoughts in her brain." (Id.) She tried to get away from Appellant and told him to "stop this." (Id.) But Appellant did not stop—instead, he continued to "shush" TE and again told her "you're fine," and "it's okay." (R. at 283.)

Thinking to herself, "I got to get out of here," TE "squirmed [her] way down to the end of the bed." (R. at 284.) As TE attempted to escape, Appellant "picked [her] up by [her] hips, and moved [her] to the edge of the bed, bent over." (R. at 285.) Appellant then pulled down TE's pants, as well as his own, and penetrated her vagina with his penis. (Id.)

For the second time that night, TE froze, "scared to death." (Id.) As he penetrated TE from behind, Appellant continued to tell her, "be quiet"; "shush"; and "it's okay." (Id.) And this time, TE—who felt like her efforts to escape were futile—"just stared at the wall" and "waited until it was over." (R. at 285.)

After five to ten minutes of penetration, Appellant asked TE if she had orgasmed. (R. at 286.) Afraid that Appellant would continue his assault if she answered in the negative, TE told him that she had. (R. at 287.) Appellant said, "good," and promptly left. (Id.) CCTV footage captured him returning to his friend's room at 1228 hours. (Pros. Ex. 8.)

Upon leaving TE's dorm room, Appellant returned to the room he had been hanging out in prior, where he told two other airmen, "I'm legendary." (R. at 475-76, 504.) Shortly

afterwards, at 2:47 A.M., Appellant modified a list of names he kept on his iPhone's Notes application—a running record of the women Appellant had had sex with since 18 April 2017. (Pros. Ex. 1.) The final entry on his list: TE. (R. at 289; Pros. Ex. 1.)

The Aftermath

Once Appellant left, TE texted DP about what had just happened to her. (R. at 287.)

> Tell me why I'm drunk sleeping, and [Appellant] walks in my room, I was like, [DP] left the ready. I'm sleeping. *This man comes over and touching on me, and I was like, "nah we can't do this, chill out bruh" and he kept moving his hands away, and gonna tell me "shhh" "we good" and picks me up and fucks me.* I hate myself bruh. He def about to tell [EN], like, I shouldn't even care but I'm so mad cause I knew he be plotting, like I'm single, I can do whatever I want, but why with the one person, I already know tells everybody my business.

(R. at 305-306) (emphasis added).

After receiving no response, TE went to sleep. (Id.) In the morning, a distraught TE went to DP's room, crying, and told him that she had been sexually assaulted. (R. at 309, 416.) At some point, EN and SA joined them in the room and TE relayed what had happened to her. (R. at 309, 453.) All three Airmen encouraged TE to report the incident. (R. at 453.) SA encouraged TE to "go to the hospital, to get the whole rape test kit done." (R. at 242.) During this conversation, SA learned that Appellant had claimed to DP that SA had "grabbed [Appellant's] hand and placed it on [her] butt." (R. at 242.)

The same day, TE reported the incident to the Office of Special Investigations (OSI) (R. at 351-352), and went to the hospital, where she was examined by Ms. KW, a Sexual Assault Nurse Examiner (SANE). (R. at 331-332.) As part of her examination, Ms. KW collected DNA

swabs from TE's mouth, vagina, and cervix. (R. at 338-39; Pros. Ex. 5.) Several hours later, Appellant was escorted to the same hospital, where Ms. KW performed a forensic exam and collected oral, penal, and scrotal swabs. (R. at 339-40; Pros. Ex. 6.) After the examinations, Ms. KW turned the samples over to OSI. (R. at 339, 344-45.)

The swabs were then sent to the U.S. Army Criminal Investigation Laboratory (USACIL) for testing. (R. at 361.) The testing detected DNA originating from two individuals on both the vaginal swabs collected from TE and the penile and scrotal swabs collected from Appellant. (Pros. Ex. 12.) In both cases, the examining forensic biologist, Dr. RK, opined that assuming one of the two DNA profiles belonged to the individual from whom the swab was collected, the "remaining major DNA profile" matched the other. (Pros. Ex. 12.) Following the conclusion of testing, Dr. RK issued a written report to OSI in which she concluded that the "mixed F2 DNA profile is at least 1.0 quintillion times more likely if it originated from [TE] and [Appellant] than if it originated from [TE] and an unknown individual." (Pros. Ex. 12.)

The Prosecution's Case

At trial, the prosecution presented testimony from: Ms. TC, another alleged victim of an uncharged sexual assault by Appellant[2]; the two victims; their friend group; the sexual assault nurse examiner; the investigating OSI agent; and the USACIL forensic biologist.

Ms. TC testified that one night in Appellant's dormitory room, she woke up on her stomach with Appellant "penetrating from behind." (R. at 164.) She recalled that Appellant told her to "relax" and penetrated her for less than 15 minutes. (R. at 165.)

TE and SA both testified about their respective sexual assaults. They also testified that at some point prior to the sexual assaults, Appellant showed them a list of names

[2] Ms. TC's testimony was ruled admissible under Mil. R. Evid. 413.

that he kept in the Notes application on his iPhone. (R. at 209-10, 259.) According to Appellant, it was a list of the people he had had sex with. (R. at 210.) Appellant claimed that "they all finished," which TE assumed meant that the women were "sexually satisfied." (R. at 260.) The list was introduced into evidence as Prosecution Exhibit 1.

DP and EN testified about their observations of Appellant and the two victims. DP testified that Appellant expressed sexual interested in SA, and recalled Appellant asking him about getting oral sex from SA. (R. at 411-12.) When questioned about the night of TE's assault, DP testified to hearing a noise "like someone just bumped the wall." (R. at 435.) DP recalled that he thought it was "unusual because… [TE] would've been asleep." (R. at 436.) DP recalled that TE was crying when she came to his room the next morning and told him what happened to her the night before. (R. at 416.) Similarly, EN recalled that when TE told him what happened, she was "in tears" and "crying." (R. at 453.)

The sexual assault nurse examiner, OSI agent, and forensic biologist testified about their respective roles in the investigation. Their testimony was accompanied by the documentary evidence that they produced or collected, including the SANE report, CCTV footage from the dorms, extractions from Appellant's phone, and the USACIL DNA testing report.

ARGUMENT

I.

APPELLANT'S CONVICTION FOR SPECIFICATION 4 OF CHARGE I—ABUSIVE SEXUAL CONTACT OF SA—IS LEGALLY AND FACTUALLY SUFFICIENT.

Additional Facts

Specification 4 of Charge I, as stated on the charge sheet at trial, read as follows:

> In that AIRMAN JAMIESON T. HENDERSON, United States Air Force, 60th Aerial Port Squadron, Travis Air Force Base, California, did, at or near Travis Air Force Base, California, on or about 13 February 2020, touch the buttocks of [SA] with his hand, with an intent to gratify or arouse the sexual desire of AIRMAN JAMIESON T. HENDERSON, without the consent of [SA].

(*Charge Sheet,* ROT, Vol. 1.)

Standard of Review

Issues of factual and legal sufficiency are reviewed de novo. Article 66(d), U.C.M.J., 10 U.S.C. § 866(d); United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law & Analysis

The test for a factual sufficiency is whether, "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [this Court is] convinced of appellant's guilt beyond a reasonable doubt." United States v. Rosario, 76 M.J. 114, 117 (C.A.A.F. 2017).

The test for legal sufficiency is whether, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Robinson, 77 M.J. 294, 297-298 (C.A.A.F. 2018). The legal sufficiency assessment "draw[s] *every* reasonable inference from the evidence of record in favor of the prosecution." Id. (emphasis added) (quoting United States v.

Plant, 74 M.J. 297, 301 (C.A.A.F. 2015)). Thus, "the standard for legal sufficiency involves a very low threshold to sustain a conviction." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (citation omitted). An assessment of legal and factual sufficiency is limited to the evidence produced at trial. United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993).

Appellant, who alleges that his conviction for abusive sexual contact is legally and factually insufficient, asserts that "the touching was consensual" and that there was no evidence that Appellant "intended the contact to be sexual." (App. Br. at 19.) In so contending, Appellant relies on a skewed interpretation of the evidence that this Court should decline to adopt, as appellate courts are not required to accept an appellant's view of the record of trial or the inferences which might be reasonably drawn therefrom. United States v. Rounds, 30 M.J. 76, 80 (C.M.A. 1990). As discussed below, "the evidence produced at trial" is both legally and factually sufficient to affirm Appellant's conviction for abusive sexual contact. See id.

A. The evidence establishes that Appellant's touching of SA's buttocks was nonconsensual.

Contrary to Appellant's suggestion that the "starting point" of this Court's analysis should be Appellant's hearsay claim that SA "placed [Appellant's] hand on her butt," (App. Br. at 19), this Court should start with the sworn testimony that SA provided at trial. SA testified *under oath* that the touching was nonconsensual—that when Appellant touched her, she pushed his hand away and asked what he was doing. (R. at 223-26.) There is no *evidence* that SA gave Appellant *any* indication that he was welcome to touch her.

Appellant, for his part, contends that SA "injected her butt into their workout-related discourse" as support for the idea the touching was "consensual and at SA's invitation." (App. Br. at 20.) This betrays a fundamental misunderstanding of consent. Consent is "a freely given agreement to the conduct at issue by a competent person." 10 U.S.C. § 920(g)(7)(A). Even

though SA mentioned her "glutes," that was not—by any stretch of the imagination—an invitation for Appellant to touch her buttocks. For mistake of fact as to consent to be a defense, it must be *reasonable*—it would be patently *unreasonable* for Appellant to assume that SA's discussion of muscle loss in her glutes somehow equated to consent.

Of course, Appellant also contends that SA placed his hand on her butt (App. Br. at 19)—something he told DP around the time of the incident. (R. at 242.) Appellant would have this Court believe his claim—over SA's sworn testimony—because he had no "underlying motive…to defend himself from any allegation when he stated it." (App. Br. at 19.) Unfortunately for Appellant, he is not entitled to having inferences drawn in his favor in legal sufficiency review—the Government is. *See* Robinson, 77 M.J. at 297-298. As "[a]ll the surrounding circumstances are to be considered in determining whether a person gave consent," 10 U.S.C. § 920(g)(7)(c), this Court can and should infer that Appellant (1) recognized SA's pushing him out of her room as a sign that the touching was unwelcome and unconsented to, (2) anticipated that SA might share what happened with her friend group, and (3) attempted to preempt any suspicion by claiming that Amn SA initiated the touching. Accordingly, Appellant's claim to DP should be viewed not so much as unadulterated truth but as consciousness of guilt.

B. The prosecution presented sufficient evidence of Appellant's subjective intent and therefore established his intent to gratify sexual desire beyond a reasonable doubt.

Next, Appellant contends that his conviction is factually and legally insufficient because "[Appellant's] statement about what happened did not offer any evidence from which to infer that [Appellant] intended the contact to be sexual." (App. Br. at 19.) Besides being fatally flawed for its reliance on Appellant's self-serving, out of court claim, this argument lacks merit because it ignores (1) DP's testimony about Appellant expressing sexual interest in

SA prior to the charged incident, and (2) SA's testimony about what Appellant did and said while he was violating her dignity.

First, DP's testimony established that Appellant was sexually interested in SA prior to the charged incident. DP testified that Appellant asked him if he could "get with [SA]," and that "this was *before* the incident that was reported to OSI." (R. at 425.) As Appellant concedes, he also expressed an interest to DP in receiving oral sex from SA. (R. at 411-412.)

Second, SA's testimony established that Appellant was touching her with a sexual purpose in mind. In contending that there was no evidence he intended for the contact to be sexual, Appellant ignores the most damaging part of SA's account—her testimony that after she pushed Appellant's hand away the first time, he said "shh" and then ran his fingers across the front of her waistband and *put his hand inside*. (R. at 225.) Here, the factfinder's common sense is key. Appellant is a grown man who kept a list of his sexual partners on his phone. (Pros. Ex. 1.) There can be no doubt that he knows exactly what is in the front of a woman's pelvic area. That he would run his fingers cross SA's waistband and put his hand inside betrays the sexual intent that he asks this Court to ignore.

C. Conclusion

Based on SA's testimony, DP's testimony, and the supporting circumstantial evidence, this Court should be convinced of Appellant's guilt beyond a reasonable doubt. Rosario, 76 M.J. at 117. Similarly, "any rational trier of fact" could have found all the elements of the crime beyond a reasonable doubt. Robinson, 77 M.J. at 297-298. Appellant's conviction for Specification 4 of Charge I is legally and factually sufficient, and he is not entitled to relief.

II.

APPELLANT'S CONVICTIONS FOR SEXUAL ASSAULT AND ABUSIVE SEXUAL CONTACT OF TE—ASPECIFICATIONS 1-3 OF CHARGE I—ARE FACTUALLY SUFFICIENT.

Standard of Review

Issues of factual sufficiency are reviewed de novo. Washington, 57 M.J. at 399.

Law & Analysis

Here, in challenging the factual sufficiency of his convictions related to TE, Appellant contests the prosecution's evidence regarding lack of consent and implies that TE was motivated to falsely characterize a consensual encounter as nonconsensual. (App. Br. at 24-27.) This Court should be unpersuaded. TE's testimony that the sex was nonconsensual was uncontroverted and supported by other circumstantial evidence that lent to the credibility of her account. After weighing such evidence, and "making allowances for not having personally observed the witnesses," this Court should be convinced of Appellant's guilt beyond a reasonable doubt. Rosario, 76 M.J. at 117.

TE's testimony at trial presented a straightforward account of what happened in her room—no less than three clear "expression[s] of lack of consent through words or conduct." 10 U.S.C. § 920(g)(7)(A). She described how, when Appellant groped her buttocks, she immediately pushed his arm away and told him, "don't do that." (R. at 277.) She testified how she then tried to get away from Appellant, at which point he "stuck his hands inside [her] pants," "down [her] butt," and "into [her] vagina." (R. at 278, 282.) TE described resisting a third time by trying to escape from the bed, at which point Appellant picked her up, bent her over, pulled down her pants, and penetrated her. (R. at 285.) Though TE stopped resisting after this, "[l]ack of verbal or physical resistance does not constitute consent," nor does "submission

resulting from the use of force." 10 U.S.C. § 920(g)(7)(A). Based on this evidence, this Court should be convinced beyond a reasonable doubt that TE did not consent to any of the charged conduct.

Further cementing this conclusion is the fact that Appellant, for the duration of the assault, told TE to "be quiet," "shh," or "it's okay"—a modus operandi that permeated Appellant's sexual assaults of not only TE and SA, but also of Ms. TC. (R. at 165, 225, 278, 283.) If an encounter was truly consensual, it would obviate the need for one partner to tell the other to "be quiet" or insist that "it's okay."

Appellant, for his part, attacks TE's account as a "bare-bones account of events." (App. Br. at 26.) What Appellant fails to recognize is that this is due, in no small part, to the relative brevity of the sexual assault itself. (App. Br. at 26.) TE testified that Appellant penetrated her for "about 5, 10" minutes. (R. at 286.) This is supported by CCTV footage of the dormitory, which showed that Appellant entered TE's room at 1217 hours and returned to his friend's room shortly thereafter at 1228 hours. (Pros. Ex. 8.) As trial counsel aptly put it in his closing argument: "10 minutes. That is not indicative of a consensual sexual encounter. That is indicative of a rushed and forced encounter without consent." (R. at 542.)

Further supporting TE's account is the fact that she immediately texted DP about what happened—that Appellant "pick[ed] [her] up and fuck[ed] [her]." (R. at 305-306.) Appellant, on the other hand, claims that this text message (1) contains "the notion of consent" and (2) is proof of TE's motive to "mischaracterize." (App. Br. at 26-27.) The first argument neglects the obvious—*nowhere* in TE's message did she indicated that she consented to the sexual conduct. (R. at 305-306.) Second, in theorizing that TE misrepresented a consensual sexual encounter to protect her reputation, Appellant focuses on the

part of TE's message where she said, "I hate myself." (App. Br. at 26.) According to Appellant, this statement is evidence of "embarrassment," which he contends there would be "no basis for," if TE had been sexually assaulted. (App. Br. at 26.) Appellant could not be more wrong. Sexual assault is a complete violation of not only a person's body, but their dignity as well. Not only would that be a basis for embarrassment, but it would also be reasonable for this Court to infer that is precisely why TE said she hated herself.

Appellant also contends that Prosecution Exhibit 1—Appellant's list of women he had sex with— "supports that what happened was consensual." (App. Br. at 24.) In explaining this unconvincing extrapolation, Appellant claims that "the notion that each partner was 'satisfied' evinced [Appellant's] understanding that whatever did happen was consensual." (App. Br. at 24.) But the list in no way documents whether any of Appellant's alleged sexual partners, much less A1C TE, consented to sexual activity. This Court should recognize this argument for what it is—a unilateral, unverified claim by Appellant that holds no water.

Finally, it is worth noting that TE's account is not plagued by the usual problems that accompany many sexual assault allegations, such as delayed reporting or lack of forensic evidence. Here, TE immediately told her friends what happened, went to the hospital for a sexual assault examination, and reported the incident to OSI—all in the same day. These are not the actions of someone who simply regrets a consensual sexual encounter—these are the actions of a sexual assault victim who wants accountability.

Considering the above, this Court should be convinced of Appellant's guilty beyond a reasonable doubt. Rosario, 76 M.J. at 117. Appellant's convictions are factually sufficient, and he is not entitled to relief.

III.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE RULED THAT EVIDENCE OF APPELLANT'S STATEMENTS WOULD BE ADMISSIBLE UNDER MIL. R. EVID. 304 AND 403.[3]

Additional Facts

Prior to trial, the prosecution provided notice to the defense of statements by Appellant that the prosecution intended to introduce as evidence, including several that he made to DP between January 2020 and February 2020: (1) "There goes a SARC case" or words to that effect, and (2) repeated statements that Appellant avoided relationships or sexual encounters with white females because "they got you in trouble." (App. Ex. V; R. at 63.) The defense moved *in limine* to exclude these two statements on the grounds that they were irrelevant and prejudicial, and the prosecution filed a written response. (App. Ex. V, VI; R. at 57-58.)

At the motions hearing, the prosecution proffered that "a central theme" in its case was Appellant's attempts to undermine the relationships between TE, SA, EN, and DP. (R. at 61.) In arguing that the two contested statements were relevant, the prosecution asserted that they tended to show "the accused communicating to [EN] and [DP]…they should have a lack of confidence in their relationship with the named victims." (R. at 62.)

After hearing argument from counsel for both sides, the military judge denied the defense's motion. (App. Ex. XXXII.) Noting that "[t]rial counsel expects to argue that the evidence will show that [Appellant] engaged in this behavior for the purpose of isolating SA," the military judge found that "both statements are probative to the Government's theory that [Appellant] intentionally acted in a manner so as to discourage a relationship between SA and

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[3] Appellant raises this issue pursuant to Grostefon, 12 M.J. at 431.

[DP]." (App. Ex. XXXII at 2-3.) The military judge conducted a Mil. R. Evid. 403 balancing test and found that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice "or any other concern that might be raised under that rule." (Id.) The military judge concluded by ruling that "[t]rial counsel may elicit from appropriate witnesses that the accused made these statements and may argue these statements for the purposes articulated by the Government during the hearing on this motion." (App. Ex. XXXII at 3.)

Subsequently, the prosecution referenced both statements during its opening. (R. at 144.) However, the statements were never elicited during the prosecution case-in-chief. (*See generally* R. 152-498.)

Standard of Review

This Court reviews a military judge's ruling on a motion to suppress for an abuse of discretion and "considers the evidence in the light most favorable to the party that prevailed at trial." United States v. Nelson, 82 M.J. 251, 255 (C.A.A.F. 2022) (citation omitted). A military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect. Id. (citation omitted).

Law & Analysis

Mil. R. Evid. 304(d) requires the prosecution to disclose to the defense "the contents of all statements, oral or written, made by the accused that are relevant to the case…that the prosecution intends to offer against the accused." (emphasis added). Evidence is relevant if it tends to make a fact of consequence more or less probable than it would be without the evidence. Mil. R. Evid. 401. Relevant evidence may be excluded if its probative value is substantially

outweighed by a danger of unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needless presentation of cumulative evidence. Mil. R. Evid. 403.

A. The purported error was not preserved because the evidence was never introduced at trial.

Appellant asserts that the evidence challenged by his trial defense counsel was "irrelevant, and even if relevant, should not have been admitted based on Mil. R. Evid. 403." (App. Br., Appendix A at 2.) However, as Appellant concedes in his brief, the statements at issue were never introduced at trial. (App. Br., Appendix A at 2.) As this Court has noted, there is "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." United States v. Napoleon, 44 M.J. 537, 540 (A.F. Ct. Crim. App. 1996); *see also* United States v. Gee, 39 M.J. 311 (C.A.A.F. 1994).

Though the statements were mentioned in the prosecution's opening statement, "opening statements are not evidence." Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook*, para. 2-5-5 (29 February 2020.) Thus, the mere mention of the comments during the prosecution's opening does not constitute "present[ation] to the factfinder," such that the purported error would be preserved. Napoleon, 44 M.J. at 540. Moreover, Appellant's case was tried by a military judge alone, who is presumed capable of filtering evidence and applying the law correctly. United States v. Erickson, 65 M.J. 221, 225 (C.A.A.F. 2007). Thus, any danger that the factfinder in this case—the military judge—would have viewed the passing references in the prosecution's opening statement as "evidence" is practically nonexistent.

Because the contested statements were never actually admitted into evidence, any alleged error related to those statements is not preserved. Accordingly, Appellant's claim fails, and the analysis should end here.

B. Even if the error had been preserved, Appellant is not entitled to relief because the military judge did not abuse his discretion.

Even if, assuming *arguendo*, the error was preserved, Appellant's claim still fails because the military judge did not abuse his discretion—none of his findings of fact or conclusions of law were clearly erroneous. Appellant, for his part, appears to suggest that the military judge's conclusion regarding the relevance of the statements was error. (App. Br., Appendix A at 2.) But "[t]he relevance standard is a low threshold." United States v. White, 69 M.J. 236, 239 (C.A.A.F. 2010). Moreover, for this Court to find an abuse of discretion, there "must be more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." United States v. Shields, 83 M.J. 226, 230 (C.A.A.F. 2023). That is because "the abuse of discretion standard of review recognizes that a judge has *a range of choice*s and will not be reversed so long as the decision remains within that range." United States v. Smith, 83 M.J. 350, 355 (C.A.A.F. 2023) (citation omitted).

Here, the military judge's decision was well within the "range of choices" arising from the facts and law. Id. The prosecution's intended use of the statements was to show that Appellant attempted undermine the romantic relationships between (1) EN and TE, and (2) DP and SA—thereby isolating TE and SA, the two named victims in this case. Based on these facts, and considering that relevance is a low bar, it was not an abuse of discretion for the military judge conclude that the statements were relevant for their tendency to show that Appellant "intentionally acted in a manner so as to discourage a relationship between SA and [DP]." (App. Ex. XXXII at 3.) That Appellant was attempting to isolate the two victims from their romantic interests is a fact of consequence because it speaks to both Appellant's own sexual interest in the victims, as well as his modus operandi. The statements were not so inflammatory that their probative value was substantially outweighed by a danger of

unfair prejudice. Further, because the statements were directly related to one of the victims, they were not likely to mislead the members or confuse the issues, nor were they cumulative of other evidence such that their introduction would result in undue delay or a waste of time. *See* Mil. R. Evid. 403. Accordingly, it was not "arbitrary, fanciful, clearly unreasonable, or clearly erroneous" for the military judge to find that the statements would be relevant and admissible, if elicited at trial. Shields, 83 M.J. at 330. Accordingly, even if this purported error had been preserved, Appellant would not be entitled to relief.

WHEREFORE, the United States respectfully requests that this Honorable Court affirm the convictions and sentence.

IV.

APPELLANT WAS NOT DENIED A SPEEDY TRIAL, AND THERE WAS NO VIOLATION OF RULE FOR COURTS-MARTIAL 707.[4]

Additional Facts

On 22 September 2022, Appellant's commander preferred charges against him. (R. at Vol. 1, Charge Sheet.) The same day, the prosecuting legal office requested Appellant's trial defense counsel's availability for an Article 32 hearing. (R. at Vol. 3, Exclusion of Time.) Trial defense counsel indicated that her earliest availability was 7 April 2021. (Id.)

On 24 May 2021, prior to referral, the convening authority excluded the period from 22 September 2020 through 6 April 2021—a total of 196 days—from the R.C.M. 707 speedy trial computation "based on the military defense counsel's unavailability." (Id.)

Following referral, the Air Force Trial Judiciary docketed the case for 25 April 2022, "by agreement of the parties." (R. at Vol. 4, Confirmation of Initial Trial Date.) The prosecution's

[4] Appellant raises this issue pursuant to Grostefon, 12 M.J. at 431.

ready date at the time of docketing was 26 July 2021, while the defense ready date was 6 December 2021. (Id.) The Chief Circuit Military Judge (CCMJ) subsequently excluded the period from 26 July 2021 through 24 April 2022—a total of 273 days. (Id.)

On 25 April 2022, the 111th day of the R.C.M. 707 speedy trial clock, Appellant was arraigned. (R. at 21-22.) During the ensuing motions hearing, the defense did not raise any motions predicted on lack of a speedy trial. (R. at 23.)

A detailed speedy trial chronology is below.

Date	**Event(s)**	**Days Elapsed**	**Days Accountable**
22 Sep 20	Preferral of charges; trial defense counsel provides earliest availability as 7 Apr 21; first day of convening authority exclusion of time (22 Sep 20 – 6 Apr 21).	0	0
6 Apr 21	Last day of convening authority exclusion of time (22 Sep 20 – 6 Apr 21).	196	0
7 Apr 21	Article 32 hearing held.	197	1
27 May 21	Charges referred to general court-martial.	247	51
26 Jul 21	Prosecution ready date; first day of CCMJ's exclusion of time (26 Jul 21 – 24 Apr 22).	307	110
6 Dec 21	Defense ready date.	440	110
24 Apr 22	Last day of CCMJ's exclusion of time (26 Jul 21 – 24 Apr 22).	579	110
25 Apr 22	Arraignment and trial.	580	**111**

Standard of Review

Speedy trial claims are reviewed de novo. United States v. Guyton, 82 M.J. 146, 151 (C.A.A.F. 2022).

Law

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial…" U.S. CONST. amend. VI. However, "[t]he right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances." Barker v. Wingo, 407

U.S. 514, 522 (1972).

In the military justice system, the speedy trial right is codified in part by R.C.M. 707, which requires that an accused "be brought to trial" within 120 days of the earlier of preferral of charges or imposition of pretrial restraint. "Arraignment 'stops' the speedy trial clock for purposes of R.C.M. 707." United States v. Wilder, 75 M.J. 135, 138 (C.A.A.F. 2016).

When a violation of the R.C.M. 707 speedy trial right is alleged, the analysis examines whether an accused was arraigned within 120 days of the triggering event, not counting delays of time properly excluded under the rule. Under R.C.M. 707(c), a convening authority may approve pretrial delays prior to referral, while a military judge may approve such delay post-referral—in both scenarios, such delays will be excluded from speedy trial computation under the rule. "The decision to grant or deny a reasonable delay is a matter within the sole discretion of the convening authority or a military judge." R.C.M. 707(c)(1), Discussion. Reasons to grant a delay could include, among other things, "time requested by the defense." Id.

Analysis

Appellant asserts that his right to a speedy trial was "denied through the excessive delay between preferral of charges and arraignment"—a period that amounted to 580 calendar days. (App. Br., Appendix A at 3.) However, Appellant's claim fails because 469 of those 580 days were properly excluded by the convening authority and military judge.

It is unchallenged that "because the attorney is the [defendant's] agent when acting, or failing to act, in furtherance of the litigation, delay caused by the defendant's counsel is also charged against the defendant." Vermont v. Brillon, 556 U.S. 81, 90-91 (2009) (quotations omitted). Here, 329 days of the 580-day period between preferral and arraignment were directly attributable to the unavailability of Appellant's trial defense counsel—first for the Article 32

hearing, then for trial itself.[5] A further 140 days of delay beyond the defense ready date were *agreed to* by Appellant and his counsel.[6] Appellant cannot represent that he was willing to go to trial 273 days[7] later than what the prosecution suggested and, in the same breath, fault the prosecution for not taking him to trial sooner.

Because the above delays in this case could be attributed to time requested and agreed-to by the defense, the time in question was properly excluded. R.C.M., 707(c)(1), Discussion. Not counting such excludable delays, Appellant was arraigned on day 111 of the speedy trial clock. In other words, Appellant was "brought to trial" within 120 days of preferral. Accordingly, there is no R.C.M. 707 speedy trial violation, and Appellant is not entitled to relief.

WHEREFORE, the United States respectfully requests that this Honorable Court affirm the convictions and sentence.

V.

TRIAL DEFENSE COUNSEL AND THE MILITARY JUDGE PROPERLY ADVISED APPELLANT THAT CONVICTION BY COURT-MARTIAL REQUIRED A THREE-FOURTHS VOTE BY THE PANEL MEMBERS PURSUANT TO ARTICLE 52, UCMJ.

Additional Facts

Prior to trial, Appellant's trial defense counsel filed a motion for appropriate relief requesting a unanimous verdict. (App. Ex. IV.) However, trial defense counsel advised Appellant that—based on the status of the law—they "had little reason to think [they] would

[5] This was calculated by adding the first exclusion (22 September 2020 – 6 April 2021) and the period between the prosecution and defense ready dates (26 July 2021 – 5 December 2021).
[6] This was calculated by counting the defense ready date (6 December 2021) through the last day before the agreed-upon trial date (24 April 2022).
[7] This was calculated by counting the prosecution ready date (26 July 2021) through the last day before the agreed-upon trial date (24 April 2022).

prevail." (Declaration of Capt D S , dated 28 December 2023.) Trial defense counsel thus advised Appellant that he could be found guilty if three-fourths of a panel voted to convict. (Declaration of Maj T B , dated 29 December 2023.)

At trial, the military judge advised Appellant that "three-fourths of the members must agree before [he] could be found guilty of any offense." (R. at 18.) After indicating that he understood his forum rights, Appellant elected to be tried by military judge alone. (R. at 19.) The decision was "[b]ased on the facts and circumstances of the case, including the fact that the case involves two complaining witnesses, as well as two potential Military Rule of Evidence (M.R.E.) 413 witnesses." (Maj B Declaration.) Based on Appellant's forum choice, trial defense counsel and the military judge agreed the motion for a unanimous verdict was moot, and a ruling was never issued. (R. at 24.)

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)).[8]

Law & Analysis

"Nonunanimous verdicts have been a feature of American courts-martial since the founding of our nation's military justice system." United States v. Anderson, 83 M.J. 291, 294 (C.A.A.F. 2023). To find an accused guilty of an offense under the Code, only three-fourths of the panel members must vote to convict. Article 52, UCMJ. By contrast, unanimous verdicts are required for convictions in *civilian* criminal proceedings. Ramos v. Louisiana, 140 S. Ct. 1390

[8] Though this issue, as framed by Appellant, appears to allege a combination of error by the military judge and ineffective assistance of counsel, it is ultimately a veiled challenge to the constitutionality of Article 52, UCMJ, and is addressed as such.

(2020). In Ramos, the Supreme Court held that the Sixth Amendment right to a jury trial included the right to a unanimous verdict in both federal and state criminal proceedings. 140 S. Ct. at 1396-97.

The Supreme Court did not, however, state that the unanimity requirement extended to military courts-martial—no doubt because its own cases dictate that the Sixth Amendment right to a jury trial does not apply to courts-martial. *See* Ex parte Milligan, 71 U.S. 2, 107 (1866); Ex parte Quirin, 317 U.S. 1, 40 (1942); Whelchel v. McDonald, 340 U.S. 122, 127 (1950). In line with the cases, the Court of Appeals for the Armed Forces recently held that there was no right to a unanimous verdict in courts-martial. Anderson, 83 M.J. at 302.

In nevertheless claiming error, Appellant points to two pending petitions for writs of certiorari asking for review of nonunanimous verdicts in courts-martial and asserts that:

> [I]f the Supreme Court "grants review and determines that the Constitution requires unanimous verdicts to convict in trials by courts-martial, then [Appellant]'s choice of forum in reliance on what would have been constitutionally defective advice from trial defense counsel and the military judge was not knowing and voluntary, and thereby warrants correction.

(App. Supp. Br. at 4.)

This Court need look no further than the first word—"if"—to find that Appellant is not entitled to relief on this issue. While "[a]n appellant gets the benefit of changes to the law between the time of trial and the time of his appeal," United States v. Tovarchavez, 78 M.J. 458, 462 (C.A.A.F. 2019), that benefit cannot be extended to the mere possibility that a pending petition in another case *might* result in a change to the law. Yet that is effectively what Appellant is asking this Court to do. Appellant's position is premised on a nebulous future possibility that the Supreme Court could depart from a "century of [its own] consistent

guidance…about the applicability of the Sixth Amendment to military trials." Anderson, 83 M.J. at 296.

However, as Appellant concedes, Anderson controls in the absence of Supreme Court action on this issue. (App. Supp. Br. at 4.) As of this filing, Anderson remains good law and Article 52, UCMJ, remains constitutional. By extension, there is no merit to Appellant's claim that he received constitutionally defective advice from either his trial defense counsel or the military judge, such that his forum selection was not knowing and voluntary—he was properly advised based on the state of the law at the time, which remains unchanged. Appellant was not—and still is not—entitled to a unanimous verdict. Accordingly, Appellant is not entitled to relief.

WHEREFORE, the United States respectfully requests that this Honorable Court affirm the convictions and sentence.

VI.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY ADMITTING EVIDENCE UNDER MIL. R. EVID. 413.[9]

Additional Facts

Prior to trial, the prosecution notified the defense that it intended to introduce evidence that Appellant sexually assaulted Ms. TC pursuant to Mil. R. Evid. 413. (App. Ex. IX at 14.) Specifically, that on or about 12 January 2019, Appellant sexually assaulted Ms. TC by "penetrating [her] vulva with his penis without her consent" and "by penetrating [her] vulva with his fingers without her consent." (Id.) The defense moved to exclude the evidence, citing Ms.

[9] Appellant raises this issue pursuant to Grostefon, 12 M.J. at 431.

TC's "credibility issues" as cause to doubt that her allegation would "actually meet the preponderance of the evidence standard required for the admission of her testimony to the factfinder." (App. Ex. IX; R. at 114, 118-21)

After reviewing the parties' written filings, receiving evidence (Ms. TC's expected testimony as captured in her recorded interview with OSI), and hearing argument, the military judge denied the defense's motion to exclude Ms. TC's testimony. (App. Ex. XXXII.) In concluding that a reasonable factfinder could find that Appellant sexually assaulted TC, the military judge recognized the credibility issues raised by the defense but noted that "nothing directly contradicts TC's account that she fell asleep in [Appellant's] bed and woke up to him performing sexual acts upon her." (App. Ex. XXXII at 6.) The military judge conducted a Mil. R. Evid. 403 balancing test and found that the probative value of the evidence was not substantially outweighed by any of the concerns that would warrant its exclusion. (Id.) The military judge further noted that:

> [I]f the Government is successful in establishing before the finder of fact that the accused did sexually assault T.C., it will have presented evidence that the accused engaged in the sexual assault of a female, military acquaintance only 13 months prior to the charged time frame of the Art 120 offenses charged in this case. As the accused currently faces charges that he sexually assaulted two other enlisted women in the dormitories, this evidence could be argued as relevant to the accused's propensity to engaged in non-consensual acts to gratify his own sexual desires whenever he was able to arrange to be alone with female acquaintances in the dormitory.

(App. Ex. XXXII at 7.)

During the ensuing trial on the merits, Ms. TC testified during the prosecution's case-in-chief. (R. at 164.)

Standard of Review

A military judge's decision to admit evidence is reviewed for an abuse of discretion. United States v. Hamilton, 78 M.J. 335, 340 (C.A.A.F. 2019).

Law

Mil. R. Evid. 413(a) provides that "[i]n a court-martial proceeding for a sexual offense, the military judge may admit evidence that the accused committed any other sexual offense," and that such evidence "may be considered on any matter to which it is relevant." For purposes of the rule, a "sexual offense" includes "*any* conduct prohibited by Article 120." Mil. R. Evid. 413(d)(1) (emphasis added). Thus, evidence of an uncharged sexual assault can be used "to prove that an accused has a propensity to commit sexual assault." United States v. Hills, 75 M.J. 350, 354 (C.A.A.F. 2016) (citation omitted). "[I]nherent in M.R.E. 413 is a general presumption in favor of admission." United States v. Berry, 61 M.J. 91, 95 (C.A.A.F. 2005) (citing Wright, 53 M.J. at 482).

Prior to admitting evidence under Mil. R. Evid. 413, the military judge must make three threshold findings: (1) the accused is charged with an offense of sexual assault; (2) the evidence proffered is evidence of his commission of another offense of sexual assault; and (3) the evidence is relevant under Mil. R. Evid. 401 and 402. Wright, 53 M.J. at 482.

The military judge must then apply a balancing test under Mil. R. Evid. 403. Id. Some of the factors to be considered during the balancing test are the strength of proof of prior act; the probative weight of evidence; the potential for less prejudicial evidence; distraction of factfinder; time needed for proof of prior conduct; temporal proximity; frequency of the acts; presence or lack of intervening circumstances; and relationship between the parties. Id.

Finally, the Mil. R. Evid. 413 analysis requires a determination that the factfinder "could find by preponderance of the evidence that the offenses occurred." Id. (citing Huddleston v. United States, 485 U.S. 681, 689-90 (1988)).

Analysis

Here, the military judge correctly applied the Wright test: he found that (1) Appellant was charged with four specifications of sexual assault; (2) Ms. TC's expected testimony was evidence of Appellant's commission of another offense of sexual assault; and (3) the evidence was "relevant to the accused's propensity to engaged in non-consensual acts to gratify his own sexual desires whenever he was able to arrange to be alone with female acquaintances in the dormitory." (App. Ex. XXXII at 7.) Appellant does not contest these findings and conclusions. As Appellant concedes, "[n]one can doubt the drafters' intent intended for this sort of propensity to be considered in favor of finding guilt." (App. Supp. Br., Appendix A at 3.)

Where Appellant alleges the military judge erred was in applying the balancing test. (Id.) In asserting that the military judge "disregarded the paucity of proof," Appellant contends that "a single allegation of sexual assault alone does not demonstrate a propensity to commit similar offenses and that Mil. R. Evid. 413 should bar that one prior allegation." (App. Supp. Br., Appendix A at 3.) In other words, Appellant would have this Court read in a quantitative requirement that does not exist in the rule itself. For the reasons discussed below, this Court should decline to do so.

In support of his argument, Appellant offers various dictionary definitions of the word "propensity," which he believes cannot be proved through "a single prior episode." (App. Supp. Br., Appendix A at 4.) This Court should be unpersuaded. None of the definitions offered by Appellant—"a strong tendency toward a behavior or action"; "an intense natural inclination or

preference"; "a natural tendency to behave in a particular way"—contain anything that remotely resembles a quantitative measure of what constitutes "propensity." (Id.)

Appellant also cites to United States v. Tyndale, 56 M.J. 209, 212 (C.A.A.F. 2001), as "useful." (App. Supp. Br., Appendix A at 4.) Appellant asserts that because Tyndale held that "prior use of a controlled substance is not admissible to prove a drug use charged…[t]he same should apply for purposes of Mil. R. Evid. 413." (App. Supp. Br., Appendix A at 4.)

There are two problems with Appellant's reliance on Tyndale, which is misplaced and inapposite. First, Appellant fails to recognize that the analysis in Tyndale focused on Mil. R. Evid. 404(b), under which "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Thus, the prior drug use in Tyndale was inadmissible to prove the charged drug offense—just as any other evidence offered under Mil. R. Evid. 404 would be inadmissible for propensity purposes. Id. at 212. However, the rule at issue in this case is Mil. R. Evid. 413, which is "an exception to Rule 404(b)'s general prohibition against the use of a defendant's propensity to commit crimes." Wright, 53 M.J. at 480. Thus, the "same" principles that necessitated exclusion of propensity evidence in Tyndale do not apply in this case. Second, because Tyndale is not about admissible propensity evidence, it does not and cannot stand for the proposition that more than "a single prior episode" is required for Mil R. Evid. 413 evidence to be admissible.

"[A]s the Supreme Court has recognized, the judiciary is not a rulemaking body." Wright, 53 M.J. at 481. "Thus, unless these Rules are unconstitutional, we are bound by the Rules." Id. Mil. R. Evid. 413 is constitutional, id. at 483, and its plain language, which uses the singular—"any other sexual offense"—does not require more than a "single prior episode." Mil.

R. Evid. 413(a). Thus, it was not an abuse of discretion for the military judge to admit TC's testimony about Appellant sexually assaulting her on a single occasion and Appellant is not entitled to relief.

WHEREFORE, the United States respectfully requests that this Honorable Court affirm the convictions and sentence.

VII.

TRIAL DEFENSE COUNSEL WERE NOT INEFFECTIVE WHEN THEY ADVISED APPELLANT NOT TO TESTIFY AFTER OBSERVING HIS DEMEANOR DURING PRE-TRIAL PRACTICE SESSIONS.[10]

Additional Facts

Prior to trial, Appellant's trial defense counsel advised him of his right to decide whether to testify. (Declaration of Capt S at 1; Declaration of Maj B at 1-2; Declaration of Maj B .) Trial defense counsel explained the costs and benefits of testifying and advised Appellant that "the decision to testify was his regardless of [their] advice or the advice of any other member of the defense trial team." (Declaration of Maj B at 2.)

In the week preceding trial, Appellant met with his trial defense counsel on several occasions and discussed his potential testimony. (Declaration of Maj B) To prepare for the possibility that Appellant might testify, the lead trial defense counsel conducted practice examinations with Appellant. (Declaration of Capt S at 1-2; Declaration of Maj B at 2; Declaration of Maj B .)

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[10] Appellant raises this issue pursuant to Grostefon, 12 M.J. at 431.

The practice sessions revealed that "little of [Appellant]'s potential testimony could be corroborated or supported by any additional witnesses of evidence." (Declaration of Maj B .) When practicing his testimony, Appellant repeatedly told his trial defense counsel that he was not interested in having sex with white women. (Declaration of Capt S at 1; Declaration of Maj B at 2; Declaration of Maj B) Even after trial defense counsel pointed out that this did not make sense, given that both named victims in the case were white women, Appellant continued to make this assertion. (Id.)

As the practice sessions went on, Appellant "had significant issues with maintaining a serious and credible tone about the events." (Declaration of Maj B) Appellant, who had a "flippant way of speaking regarding the offenses," used "slang terms to refer to sexual organs and acts." (Declaration of Capt S at 1.) At one point, Appellant described an event as a "sausage fest" and referenced a sex organ as a "soul pole." (Maj B Declaration at 2; Maj B Declaration.) Nevertheless, trial defense counsel continued to prepare Appellant, while "constantly reiterating to Appellant that those terms were inappropriate given the courtroom setting" and that "he should not make light of the situation." (Maj B Declaration at 2; Maj B Declaration.)

During one of their final practice sessions, Appellant's lead defense counsel asked Appellant to recount the sexual encounter. (Declaration of Capt S at 1-2.) Appellant proceeded to give an "explicitly detailed" description of "the position and appearance of his penis, from its state of arousal, to which side of his groin it was leaning towards, to how it began to move and expand, and the new direction it began to point upon arousal." (Id.) Appellant's other trial defense counsel, who observed this practice session, recalled that Appellant's account

was "delivered in a tone that, while it may have been completely unintentional, sounded comedic." (Id.)

Ultimately, trial defense counsel's "multiple attempts to temper [Appellant's] language and demeanor were not helpful." (Declaration of Capt S at 2.) After observing Appellant's practice sessions, trial defense counsel and their experts "agreed that any potential testimony would be unhelpful beyond what was elicited on cross examination and that the likely damage of [Appellant]'s testimony was high." (Declaration of Maj B .) Appellant's lead defense counsel "feared that his behavior on the stand might increase his sentence from the judge." (Id.) Based on these concerns, all three trial defense counsel advised Appellant not to testify. (Declaration of Capt S at 2; Declaration of Maj B at 2; Declaration of Maj B .) After being so advised, Appellant decided not to testify and documented his decision in writing. (Declaration of Maj B)

At trial, Appellant did not take the stand. At the close of findings, the military judge asked Appellant if it was his personal decision not to testify, and Appellant responded, "Yes, sir. It was." (R. at 534.)

Standard of Review

Allegations of ineffective assistance are reviewed de novo. United States v. Palacios-Cueto, 82 M.J. 323, 327 (C.A.A.F. 2022) (citations omitted).

Law & Analysis

The Sixth Amendment guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668, 686 (1984). "In order to prevail on a claim of ineffective assistance of counsel (IAC), an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in

prejudice." United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing Strickland, 466 U.S. at 698). "Appellate courts do not lightly vacate a conviction in the absence of a serious incompetency which falls measurably below the performance . . . of fallible lawyers." United States v. DiCupe, 21 M.J. 440, 442 (C.M.A. 1986) (quotations omitted) (citing United States v. DeCoster, 624 F.2d 196, 208 (D.C.Cir.1979)). If an appellant has made an "insufficient showing" on even one of the elements, this Court need not address the other. Strickland, 466 U.S. at 697.

In assessing the effectiveness of counsel, courts "*must* indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 671 (emphasis added); *see also* Harrington v. Richter, 562 U.S. 86, 105 (2011) ("Even under de novo review, the standard for judging counsel's representation is a most deferential one."). Counsel's performance is not deficient "when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so." United States v. Datavs, 71 M.J. 420, 424 (C.A.A.F. 2012). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." United States v. Dewrell, 55 M.J. 131, 133 (C.A.A.F. 2001) (quoting Strickland, 466 U.S. at 690).

Military courts use a three-part test to determine whether the presumption of competence has been overcome: (1) are Appellant's allegations true, and if so, is there a reasonable explanation for counsel's actions; (2) if the allegations are true, did defense counsel's level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers; and (3) if defense counsel was ineffective, whether there a reasonable probability that, absent the errors,

there would have been a different result. United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)) (quotations omitted).

A. Trial defense counsel's performance was not deficient.

Appellant alleges that he "wanted to testify but did not because of trial defense counsel's deficient preparation and advice." (App. Supp. Br., Appendix A at 8.) The first question, then, is: what does competent preparation look like?

1. Trial defense counsel competently prepared Appellant for potential testimony.

Our superior Court's guidance in United States v. Baker, 58 M.J. 380 (C.A.A.F. 2003), is instructive in this regard:

> The initial actions taken by a competent defense counsel in preparing diligently for trial are relatively non-controversial. At the outset, the attorney will discuss with the client the relative benefits of testifying versus relying on the privilege to remain silent. In the course of such a discussion, the attorney will ascertain from the client the nature of any proposed testimony. The attorney will then conduct a reasonable investigation to identify potential areas of vulnerability to cross-examination or rebuttal. In the course of such trial preparation, the attorney may identify conflicts between the proposed testimony and other evidence, including prior statements to the attorney by the client.

Id. at 385 (citation omitted).

Trial defense counsel in this case took all the steps detailed in Baker. First, trial defense counsel discussed the costs and benefits of testifying with Appellant. (Declaration of Maj B at 2.) Second, over the course of several practice sessions, trial defense counsel "ascertain[ed] from [Appellant] the nature of any proposed testimony," Baker, 58 M.J. at 385, by having him "tell [trial defense counsel] his memory of the events." (Declaration of Maj B .) In so doing, trial defense counsel identified "potential areas of vulnerability to cross-examination or rebuttal," Baker, 58 M.J. at 385, such as Appellant's "flippant" demeanor; use of informal terminology; descriptions involving questionable levels of detail about the

position of his genitalia; and inability to "maintain a serious and credible tone." (Declaration of Capt S at 1-2; Declaration of Maj B .) Critically, trial defense counsel did not just identify the issue—they attempted to correct it by reminding Appellant to use formal terms and "not make light of the situation." (Maj B Declaration.)

But that was not the only Achilles heel identified by trial defense counsel. Another glaring vulnerability was the "conflicts between the proposed testimony and other evidence." Baker, 58 M.J. at 385, that manifested in Appellant's attempts to tell a story that absolved him of responsibility. The conflicting evidence was twofold. First, Appellant repeatedly insisted that he did not want to have sex with white women, which "made little sense" given that the two named sexual offense victims in the case were white women. (Declaration of Capt S at 1; Declaration of Maj B at 2; Declaration of Maj B .) Second, further detracting from the credibility of Appellant's account was his theory that the allegations were "being *fabricated* to cover up the victims' underage drinking," which trial defense counsel did not find compelling. (Declaration of Maj B) (emphasis added).

This should come as no surprise given the prosecution's evidence that Appellant touched SA's buttocks and had sexual intercourse with TE. With respect to SA, the prosecution had not only her testimony, but also testimony from DP that Appellant admitted to touching SA's buttocks—although this was Appellant's self-serving version of events, in which he alleged that SA initiated the touching. Similarly, the prosecution had ample evidence to support that Appellant engaged in sexual intercourse with TE: (1) TE's testimony about the sexual assault; (2) CCTV footage that showed Appellant entering TE's room without knocking; (3) testimony from TE's dorm neighbor, who heard a sound that night; (4) testimony from an airman who saw Appellant later that night, to whom Appellant

declared, "I'm legendary"; (5) digital evidence that Appellant added TE's name to his list of sexual encounters within hours of the sexual assault; and (6) forensic evidence that would be accompanied by expert testimony.

By practicing Appellant's testimony, pointing out contradictions, and attempting to correct his demeanor so that he would present better on the stand, Appellant's trial defense counsel competently prepared Appellant for the possibility that he would testify. In no way did trial defense counsel's preparation fall "measurably below the performance…of fallible lawyers." DiCupe, 21 M.J. at 442. Rather, it was Appellant's *own* performance which moved the needle on trial defense counsel's advice, as discussed below.

2. Trial defense counsel reasonably advised Appellant not to testify.

Having established that trial defense counsel competently prepared Appellant for the possibility of testifying, the next question this Court must address is whether trial defense counsel's advice—that Appellant not testify—was deficient. For the reasons discussed below, it was not.

Considering the prosecution's evidence, the defense strategy was not to contest that the acts happened, "but that it was consensual or reasonably mistaken to have been consensual." (Id.) However, this strategy was incompatible with Appellant's insistence that (1) he was not sexually interested in white women, and (2) the allegations were fabricated. Further compounding the credibility gap was Appellant's inability to maintain a serious demeanor and refrain from using inappropriate slang when discussing the offenses, which trial defense counsel believed presented concerns for both the findings and sentencing phases of trial. With respect to findings, trial defense counsel believed Appellant's testimony and demeanor would "expose [Appellant] to cross-examination he was not self-disciplined enough to face." (Capt S

Declaration at 2.) With respect to sentencing, trial defense counsel "feared that [Appellant's] behavior might increase his sentence from the judge." (Maj B Declaration.)

Considering the above, it was "objectively reasonable" for trial defense counsel to advise Appellant against testifying. Datavs, 71 M.J. at 424. Trial defense counsel reasonably determined from their own practice sessions that Appellant's testimony would be "unhelpful" and that the "likely damage of his testimony was high." (Maj B Declaration; Maj B Declaration at 2.) As evidenced by counsels' consideration of Appellant's contradictory testimony, problematic demeanor, and the implications they might have on Appellant's case, the advice to Appellant against testifying was a "strategic choice[] made after thorough investigation of law and facts relevant to plausible options." Dewrell, 55 M.J. at 133. Accordingly, their decision to so advise is "virtually unchallengeable." Id. It is important to note, however, that trial defense counsel nevertheless advised Appellant that the choice was *his*, "regardless of [their] advice." (Maj B Declaration at 2.) This reflects an understanding of the law expected of a competent defense counsel—that the decision to testify belongs to an accused and the accused alone. Jones v. Barnes, 463 U.S. 745, 751 (1983) ("[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.").

This Court "must indulge a strong presumption" of competence when evaluating claims of ineffective assistance. Strickland, 466 U.S. at 671. Here, even without the presumption, it is apparent that "counsel's conduct falls within the wide range of reasonable professional assistance." Id. Trial defense counsel advised Appellant that (1) they believed his testimony would be unhelpful, but (2) that the decision was his and his alone. The first was "objectively reasonable" advice designed to further Appellant's defense, and the second was a correct

statement of the law designed to protect Appellant's rights. Jones, 463 U.S. at 751. That is not deficient performance—it is the opposite.

Because Appellant has made an "insufficient showing" on deficient performance, this Court need not address prejudice, and the analysis should end here. Strickland, 466 U.S. at 697. Nevertheless, the Government addresses, *arguendo*, the lack of prejudice.

B. Appellant has not demonstrated a reasonable probability that he would have been acquitted but for trial defense counsel's performance.

To establish prejudice, Appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 698; Loving v. United States, 68 M.J. 1, 6-7 (C.A.A.F. 2008). "A reasonable probability is one sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Here, Appellant claims that "what he would have said on the witness stand had a reasonable probability of generating an acquittal." (App. Supp. Br., Appendix A at 8-9.) According to Appellant, his testimony "would have dramatically changed the landscape of the case and its outcome," in that he would have rebutted Ms. TC's Mil. R. Evid. 413 testimony as well as the allegations that the sexual touching and intercourse were nonconsensual. (App. Supp. Br., Appendix A at 9.) For the reasons discussed below, this Court should be unpersuaded.

Appellant's declaration—in which he details what his testimony would have been—presents a retrospective, self-serving narrative on all fronts, in which he paints the sexual offenses against Ms. TC, SA, and TE as consensual encounters. (App. Declaration.) In Appellant's telling of the story, he is simply a docile, unresisting participant in sexual activity initiated by the victims. (Id.)

First, Appellant tells a completely different story about Ms. TC, who testified at trial that she woke up one night in Appellant's dorm room "on [her] stomach and [Appellant] penetrating

from behind." (R. at 164.) Appellant, for his part, claims that Ms. TC "got on top of [him]" and "started trying to get [his] penis erect," after which she "rode [him]." (App. Declaration at 4.) Given that Ms. TC was providing testimony under Mil. R. Evid. 413—versus being a named victim of an offense in this case—it ultimately matters little that Appellant's testimony contradicted Ms. TC's. Even if the factfinder found Appellant's version credible—or disbelieved Ms. TC—that does not automatically translate into a reasonable probability that Appellant would have been acquitted of the offenses involving the named victims.

With respect to SA, Appellant asserts that "she first put [his] hand on her buttocks the night of the incident." (App. Declaration at 5.) However, this claim is old news—it was presented to the factfinder through SA and DP's testimony. (R. at 301, 425.) Given that the military judge convicted Appellant despite this testimony, this Court should rest assured that Appellant's testimony about the same would not have changed the result.

Similarly, any testimony by Appellant about receiving a "lap dance" from TE would have been repetitive of evidence elicited from another witness, and thus would not have changed the outcome. (R. at 422.) Moreover, even if Appellant had testified that TE flirted with him to support that he made an "honest and reasonable mistake of fact," there is no reasonable probability that this alone could have overcome TE's testimony that the sex was nonconsensual, which was supported by circumstantial evidence that a distraught TE told her friends about the sexual assault the very next morning, then visited a hospital for a sexual assault examination and reported the incident to OSI later that day. (R. at 287-88, 332-333, 351-352; Pros. Ex. 5.)

Appellant is unable to point this Court to *any* other evidence that would support his version of events, such that the factfinder would have taken Appellant's word as immutable fact

rather than opportunistic fiction. Instead, he simply assumes that his unsupported, self-serving tale would have trumped the mountain of evidence against him. As discussed previously, *supra*, the prosecution produced no shortage of evidence regarding the offenses at trial: testimony from multiple witnesses, video evidence, digital evidence from Appellant's own phone, and forensic evidence. Appellant has not established a reasonable probability that the military judge would have acquitted him despite this evidence.

Finally, though Appellant now claims that he would have testified that the encounters were consensual, it bears remembering that at the time the Appellant made the decision not to testify, his account included assertions that (1) he was not sexually interested in white women, and (2) that the victims were fabricating their allegations to hide their underage drinking. (Maj B Declaration.) Had Appellant been allowed to testify to what he told his trial defense counsel during pretrial practice sessions, he very likely would have become cannon fodder for the prosecution. And to be sure, the result could have been different. It could have been worse. In the universe of possibilities, it is not unreasonable to think that if Appellant had testified the way he practiced with his defense counsel—flippantly, while using slang and making self-interested assertions that are unsupported or contradicted by the evidence—the court might have imposed a harsher sentence, as his counsel feared. Appellant has the burden of showing that the opposite is true, and he has failed to do so.

C. Conclusion

Appellant's claim of ineffective assistance of counsel is without merit because it fails both prongs of the Strickland test: (1) his counsel competently prepared him to testify and reasonably advised him against it, therefore their performance was not deficient; and (2) even assuming *arguendo* that counsel's performance was deficient, there is no prejudice because

Appellant has failed to establish a reasonable probability that his testimony would have resulted in an acquittal. Accordingly, Appellant is not entitled to relief.

WHEREFORE, the United States respectfully requests that this Honorable Court affirm the convictions and sentence.

VIII.

TRIAL DEFENSE COUNSEL'S DECISIONS DURING TRIAL DID NOT AMOUNT TO INEFFECTIVE ASSISTANCE OF COUNSEL.[11]

Standard of Review

Allegations of ineffective assistance are reviewed de novo. Palacios-Cueto, 82 M.J. at 327 (citations omitted).

Law

Appellate courts may consider "consider whether defense counsel's conduct of the trial as a whole might have been defective within the meaning of Strickland, even though individual oversights or mistakes standing alone might not satisfy Strickland." United States v. Loving, 41 M.J. 213, 252 (C.A.A.F. 1994). However, finding ineffective assistance through cumulative error is "rare" unless Appellant can point to a "long series of questionable omissions by counsel that were not simply the product of human fallibility, but the result of a lack of conscientious effort." Palacios-Cueto, 82 M.J. at 331 (quotations omitted).

Analysis

Here, Appellant asserts that his trial defense counsel were ineffective based on "numerous instances of deficient performance." (App. Supp. Br., Appendix at 11.) For the

[11] Appellant raises this issue pursuant to Grostefon, 12 M.J. at 431.

reasons discussed below, Appellant's laundry list of complaints lacks merit, both in part and in whole. As a result, his claim of cumulative error fails, and he is not entitled to relief.

A. The individual complaints raised by Appellant all lack merit on their own.

First, Appellant asserts that trial defense counsel were ineffective for advising him that a unanimous verdict was not required. (App. Supp. Br., Appendix A at 12.) This claim lacks merit on its face. As discussed in Issue V, *supra*, the Sixth Amendment right to a unanimous verdict does not apply to military courts-martial. Trial defense counsel correctly advised Appellant based on the state of the law, therefore their performance was not deficient.

Second, Appellant again asserts that his counsel did not adequately prepare him to testify. However, as discussed in Issue VII, *supra*, trial defense counsel *did* competently prepare Appellant to testify through multiple practice sessions. After observing his performance during those sessions, trial defense counsel then advised Appellant against testifying, but reminded him that the decision belonged to him alone. Accordingly, their performance was not deficient.

Third, Appellant takes issue with trial defense counsel's failure to object to SA's testimony that she saw "red flags" in Appellant's personality, which Appellant contends is "impermissible character evidence." (App. Supp. Br., Appendix A at 12.) This Court can dispose of this allegation by examining prejudice, without deciding whether counsel's failure to object constituted deficient performance. Under Strickland, Appellant has the burden of showing both deficient performance and prejudice. If an appellant has made an "insufficient showing" on even one of the elements, this Court need not address the other. Strickland, 466 U.S. at 697. Such is the case here. Appellant has not articulated how an objection from trial counsel to the comment about "red flags" would have resulted in a different outcome at trial.

Fourth, Appellant contends that trial defense counsel should have introduced TE's text message to DP—the entirety of which was read into the record during cross examination (R. at 305)—as an exhibit. (App. Supp. Br., Appendix A at 12.) Given that the content of the message was already in evidence, it was not unreasonable for defense counsel to forego introducing it a second time. Moreover, as with Appellant's third claim, this claim fails for lack of prejudice—Appellant has failed to articulate how having a copy of the message would change its evidentiary value, so much that the outcome of the trial might have been different.

Fifth, Appellant contends that trial defense counsel failed to "present a full-throated defense against the prosecution's Mil. R. Evid. 413 presentation." (App. Supp. Br., Appendix A at 13.) This Court should not adopt Appellant's view of the record, which skews in his favor. *See* Rounds, 30 M.J. at 80. The record establishes that trial defense counsel conducted a thorough cross examination of TC, in which he repeatedly highlighted the inconsistencies between TC's own statements. (R. at 171-92.) Following the cross-examination, trial defense counsel determined that "in a judge-alone case any further attacks on TC's character were a diversion." (Capt S Declaration at 2.) This was a reasonable strategic decision, given that TC's allegation was not one of the charged offenses. Considering the above, trial defense counsel's performance was not deficient.

Sixth, Appellant alleges that his trial defense counsel "did not seek to introduce any of the Mil. R. Evid. 412 matters to which [Appellant] could testify." (App. Supp. Br., Appendix A at 13.) This claim fails for its falsity—trial defense counsel *did* elicit evidence regarding certain Mil. R. Evid. 412 matters ruled admissible by the military judge, such as the fact that TE gave Appellant a lap dance at a lingerie party. (R. at 422.) Further, as discussed in Issue VII, *supra*, Appellant has not demonstrated a reasonable probability that the matters he would have

testified to could have changed the outcome of trial. Though Appellant claims he would have testified that TE was flirting with him, he has not articulated how evidence of passing flirtatious interactions would have been so compelling as to move the needle when evidence of a lap dance—an unquestionably provocative interaction—could not. Accordingly, Appellant has failed to establish both deficient performance and prejudice.

Seventh, Appellant alleges that trial defense counsel were deficient for failing to cross examine the prosecution's DNA expert. (App. Supp. Br., Appendix A at 13.) This claim fails because there is a strategic reason underlying trial defense counsel's decision. As set forth in trial defense counsel's declarations, "there was no factual issue regarding whether Appellant and TE had sex," (Maj B Declaration at 5), therefore the defense strategy was "not to contest that sex happened, but that it was consensual or reasonably mistaken to have been consensual." (Maj B Declaration.) The defense team thus decided to "quickly dispense of the Government's expert witness without further highlighting the witness' indisputable scientific testimony." (Maj B Declaration at 5.) Trial defense counsel's performance is not deficient because they made a strategic decision to forego cross examination, and it was "objectively reasonable to do so," given the facts of the case. Datavs, 71 M.J. at 424.

Eighth, Appellant asserts that trial defense counsel erred when they did not object to TE's testimony that she thought Appellant's stories about his sexual history evinced a "pattern," which Appellant contends is "textbook character evidence." (App. Supp. Br., Appendix A at 14.) This claim lacks merit for two reasons. First, when read in context, TE's testimony is a description of her thought process, in which she *speculates* that Appellant may have a behavioral "pattern"—speculation is not extrinsic evidence of an otherwise inadmissible character trait. (R. at 317-18.) Moreover, because Appellant was being tried by a military judge

alone, there was little, if any, danger that this evidence would be used for improper purposes. Thus, the lack of defense objection was not deficient performance. Further, although Appellant hypothesizes about how the comment might have been perceived, he fails to articulate what really matters—the likelihood that the military judge would have sustained a defense objection, and how that could have changed the outcome of trial. Appellant has not articulated a basis under which the military judge might have deemed TE's speculation about Appellant's "pattern" inadmissible. Moreover, even assuming the military judge excluded the testimony, Appellant has not explained how the exclusion might have reasonably contributed to an acquittal.

Ninth, Appellant asserts that trial defense counsel failed to object to "impermissible hearsay" when they "permitted the introduction through EN of TE's emotional account of the charged conduct the morning after." (App. Supp. Br., Appendix A at 14.) At trial, EN testimony included a watered-down version of what TE had already testified to regarding the sexual assault, along with EN's personal observations about TE's emotional state—namely, that she was "in tears"; "crying"; and "scared." (R. at 453-54.) Given TE's distressed state, the prosecution would have had a very good argument that she was still "under the stress of excitement" caused by a "startling event," such that her statements to EN would be admissible as an "excited utterance." Mil. R. Evid. 803(2). Thus, the lack of objection was not unreasonable, as trial defense counsel, "in defending their client's interests, need not urge every conceivable objection the law would provide." Hubbard v. Haley, 317 F.3d 1245, 1259 (11th Cir. 2003) (citing Engle v. Isaac, 456 U.S. 107, 133-34 (1982)).

Tenth, Appellant asserts that trial defense counsel "failed to lay a sufficient evidentiary foundation to support their argument that it was physically 'improbable, if not impossible' for TE's claim to occur as described." (App. Supp. Br., Appendix A at 14.) Appellant faults his

counsel for relying on testimony that the bed was a "tall bed" instead of obtaining evidence of the precise height. (Id.) What Appellant fails to realize, however, is that there was a reason for this:

> Photographs of the bed and its setup were in evidence, T.E.'s height was in evidence, and the improbability of the assault from this information was established, as the bed was tall and the Accused was shorter than T.E. The exact height of the bed might have furthered the argument, but might have just as easily been damaging to the argument, since if the bed was actually shorter than it appeared, this would improve the likelihood of T.E.'s account. If in fact Appellant[']s groin was higher than the bed, suddenly our improbability argument is far weaker or completely eliminated.

(Capt S Declaration at 3.)

Trial defense counsel's decision to forego obtaining evidence of the exact height of the bed was a "strategic decision" that was "objectively reasonable" under the circumstances. Datavs, 71 M.J. at 424. Accordingly, their performance in this regard was not deficient.

Eleventh, Appellant asserts that trial defense counsel was ineffective for failing to object to various comments during the prosecution's closing argument. (App. Supp. Br., Appendix A at 15.) Trial defense counsel, for his part, averred that "given the forum of military judge alone and the minor argumentative value of the trial counsel's closing arguments, [he] did not find it helpful to object to the arguments highlighted." (Maj B Declaration.) Given that defense counsel need not lodge "every conceivable objection," Haley, 317 F.3d at 1259, this was not deficient performance. But even if this Court disagrees and believes trial defense counsel should have objected, Appellant's claim nevertheless fails for lack of prejudice, because he was tried by a military judge who is presumed capable of filtering improper argument. Erickson, 65 M.J. at 225.

Finally, Appellant contends that trial defense counsel was ineffective for failing to object to "TE's mother testifying about impermissible hearsay about the charged conduct, including

evidence that TE was hysterically crying and claimed to have been raped by [Appellant]." (App. Supp. Br., Appendix A at 16.) According to Appellant, this was "added unwarranted aggravation evidence about the immediate emotional impact on TE." (Id.) Unfortunately for Appellant, "aggravation evidence about the immediate emotional impact" on a victim is *precisely* the kind of evidence that is contemplated by the rules governing sentencing. Pursuant to Rule for Courts-Martial 1001(b)(4), the prosecution may present evidence in aggravation that includes "evidence of financial, social, psychological, and medical impact or cost to any person or entity who was the victim of an offense committed by the accused." Because testimony that TE was "hysterically crying" was perfectly within the ambit of the Rule, the lack of objection does not constitute deficient performance—it merely reflects an understanding of the law.

B. Because the claims individually lack merit, there is no basis for concluding trial defense counsels' overall performance was cumulative error.

All twelve complaints raised by Appellant in this assignment of error lack merit under the Strickland standard and have reasonable explanations. As Appellant concedes, "[a] collection of acceptable decisions cannot form the basis for an ineffective assistance of counsel claim." (App. Supp. Br., Appendix A at 11.) That is precisely what Appellant's list of complaints amounts to—a collection of acceptable decisions. Accordingly, Appellant's claim of cumulative error is without merit, and he is not entitled to relief.

WHEREFORE, the United States respectfully requests that this Honorable Court affirm the convictions and sentence.

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.

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, the Air Force Appellate Defense Division, and Appellant's civilian appellate defense counsel on 16 January 2024.

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