IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 1
DENNIS A. GEORGE JR., Senior Airman (E-4) United States Air Force *Appellant*	)	No. ACM 40397 24 February 2023

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 60 days, which will end on **3 May 2023**. The record of trial was docketed with this Court on 3 January 2023. From the date of docketing to the present date, 52 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,

SAMANTHA P. GOLSETH, Capt, 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 was sent via email to the Court and served on the Appellate Government Division on 24 February 2023.

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

27 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DENNIS A. GEORGE JR., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40397 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 27 February 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. **DENNIS A. GEORGE JR.,** Senior Airman (E-4) United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)** Before Panel No. 1 No. ACM 40397 24 April 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a second enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **2 June 2023.** The record of trial was docketed with this Court on 3 January 2023. From the date of docketing to the present date, 111 days have elapsed. On the date requested, 150 days will have elapsed.

Appellant was tried by a general court-martial composed of officer and enlisted members at Joint Base Langley-Eustis, Virginia. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1; Record (R.) at 262. Two specifications were litigated. ROT, Vol. 1, EOJ at 1. On 19 August 2022, contrary to Appellant's pleas, members found Appellant guilty of Charge I and its Specification, attempted sexual assault, in violation of Article 80, Uniform Code of Military Justice (UCMJ). *Id*.; R. at 631. Consistent with Appellant's pleas, the members found Appellant not guilty of Charge II and its Specification. *Id*. On 19 August 2022, the military judge sentenced Appellant to be reprimanded, reduced to the grade of E-1, confined for five months, and discharged with a dishonorable discharge. ROT, Vol. 1, Statement of Trial Results at 6; R. at 779. The convening authority took no action on the findings. ROT, Vol. 1, Convening Authority Decision on Action at

9. The convening authority disapproved the adjudged reprimand and approved the remainder of sentence, noting Appellant requested deferment of confinement for one month and that was denied. *Id*. On 17 October 2022, the military judge entered the above findings and sentence in the entry of judgment. ROT, Vol. 1, EOJ. The record of trial consists of three prosecution exhibits, 12 defense exhibits, one court exhibit and 22 appellate exhibits. The transcript is 779 pages. Appellant is not confined.

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. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

SAMANTHA P. GOLSETH, Capt, 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 was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 24 April 2023.

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

24 April 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DENNIS A. GEORGE JR., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40397 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 1
DENNIS A. GEORGE JR., Senior Airman (E-4) United States Air Force *Appellant*	)	No. ACM 40397 24 May 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a third enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **2 July 2023.** The record of trial was docketed with this Court on 3 January 2023. From the date of docketing to the present date, 141 days have elapsed. On the date requested, 180 days will have elapsed.

Appellant was tried by a general court-martial composed of officer and enlisted members at Joint Base Langley-Eustis, Virginia. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1; Record (R.) at 262. Two specifications were litigated. ROT, Vol. 1, EOJ at 1. On 19 August 2022, contrary to Appellant's pleas, members found Appellant guilty of Charge I and its Specification, attempted sexual assault, in violation of Article 80, Uniform Code of Military Justice (UCMJ). *Id*.; R. at 631. Consistent with Appellant's pleas, the members found Appellant not guilty of Charge II and its Specification. *Id*. On 19 August 2022, the military judge sentenced Appellant to be reprimanded, reduced to the grade of E-1, confined for five months, and discharged with a dishonorable discharge. ROT, Vol. 1, Statement of Trial Results at 6; R. at 779. The convening authority took no action on the findings. ROT, Vol. 1, Convening Authority Decision on Action at

9. The convening authority disapproved the adjudged reprimand and approved the remainder of sentence, noting Appellant requested deferment of confinement for one month and that was denied. *Id*. On 17 October 2022, the military judge entered the above findings and sentence in the entry of judgment. ROT, Vol. 1, EOJ. The record of trial consists of three prosecution exhibits, 12 defense exhibits, one court exhibit and 22 appellate exhibits. The transcript is 779 pages. Appellant is not confined.

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. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and agrees with this request for an enlargement of time. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

SAMANTHA P. GOLSETH, Capt, 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 was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 24 May 2023.

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

24 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DENNIS A. GEORGE JR., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40397 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. **DENNIS A. GEORGE JR.,** Senior Airman (E-4) United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)** Before Panel No. 1 No. ACM 40397 23 June 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fourth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **1 August 2023.** The record of trial was docketed with this Court on 3 January 2023. From the date of docketing to the present date, 171 days have elapsed. On the date requested, 210 days will have elapsed.

Appellant was tried by a general court-martial composed of officer and enlisted members at Joint Base Langley-Eustis, Virginia. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1; Record (R.) at 262. Two specifications were litigated. ROT, Vol. 1, EOJ at 1. On 19 August 2022, contrary to Appellant's pleas, members found Appellant guilty of Charge I and its Specification, attempted sexual assault, in violation of Article 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880. *Id.*; R. at 631. Consistent with Appellant's pleas, the members found Appellant not guilty of Charge II and its Specification. *Id.* On 19 August 2022, the military judge sentenced Appellant to be reprimanded, reduced to the grade of E-1, confined for five months, and discharged with a dishonorable discharge. ROT, Vol. 1, Statement of Trial Results at 6; R. at 779. The

convening authority took no action on the findings. ROT, Vol. 1, Convening Authority Decision on Action, dated 29 September 2022. The convening authority disapproved the adjudged reprimand and approved the remainder of sentence, noting Appellant requested deferment of confinement for one month and that was denied. *Id*. On 17 October 2022, the military judge entered the above findings and sentence in the entry of judgment. ROT, Vol. 1, EOJ. The record of trial consists of 3 prosecution exhibits, 12 defense exhibits, 1 court exhibit, and 22 appellate exhibits. The transcript is 779 pages. Appellant is not confined.

(1) Undersigned counsel currently represents twenty clients and is presently assigned nine cases pending brief before this Court. Five cases pending brief before this Court currently have priority over the present case:

a. *United States v. Bickford*, No. ACM 40326 – The record of trial consists of 16 prosecution exhibits, 1 defense exhibit, and 42 appellate exhibits. The transcript is 744 pages. Appellant is not confined. Undersigned counsel has reviewed all pre-trial, post-trial, and allied papers included in the record of trial, as well as all sealed materials. She has reviewed the motions hearing testimony and argument and is reviewing findings portion of the transcript.

b. *United States v. Stanford*, No. ACM 40327 – The record of trial consists of 29 prosecution exhibits, 13 defense exhibits, and 59 appellate exhibits. The transcript is 753 pages. Appellant is not confined.

c. *United States v. Kight*, No. ACM 40337 – The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 1 court exhibit, and 36 appellate exhibits. The transcript is 1068 pages. Appellant is confined. Lead civilian appellate

defense counsel, Mr. Scott Hockenberry, is completing his review of Appellant's record of trial and undersigned counsel will begin her review as soon as possible.

d. *United States v. Donley*, No. ACM 40350 – The record of trial consists of 7 prosecution exhibits, 4 defense exhibits, 1 court exhibit, and 66 appellate exhibits. The transcript is 1233 pages. Appellant is currently in confinement.

e. *United States v. Goodwater*, No. ACM 40304 (f rev.) – The record of trial consists of 18 prosecution exhibits, 5 defense exhibits, and 26 appellate exhibits. The transcript is 413 pages. Appellant is confined.

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. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and agrees with this request for an enlargement of time. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

SAMANTHA P. GOLSETH, Capt, 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 was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 23 June 2023.

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

23 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DENNIS A. GEORGE JR., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40397 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 1
DENNIS A. GEORGE JR., Senior Airman (E-4) United States Air Force *Appellant*	)	No. ACM 40397 24 July 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fifth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **31 August 2023.** The record of trial was docketed with this Court on 3 January 2023. From the date of docketing to the present date, 202 days have elapsed. On the date requested, 240 days will have elapsed.

Appellant was tried by a general court-martial composed of officer and enlisted members at Joint Base Langley-Eustis, Virginia. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1; Record (R.) at 262. Two specifications were litigated. ROT, Vol. 1, EOJ at 1. On 19 August 2022, contrary to Appellant's pleas, members found Appellant guilty of Charge I and its Specification, attempted sexual assault, in violation of Article 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880. *Id.*; R. at 631. Consistent with Appellant's pleas, the members found Appellant not guilty of Charge II and its Specification. *Id.* On 19 August 2022, the military judge sentenced Appellant to be reprimanded, reduced to the grade of E-1, confined for five months, and discharged with a dishonorable discharge. R. at 779. The convening authority took no action on the findings.

ROT, Vol. 1, *Convening Authority Decision on Action*, dated 29 September 2022. The convening authority disapproved the adjudged reprimand and approved the remainder of sentence, noting Appellant requested deferment of confinement for one month and that was denied. *Id*. On 17 October 2022, the military judge entered the above findings and sentence in the entry of judgment. ROT, Vol. 1, EOJ. The record of trial consists of 3 prosecution exhibits, 12 defense exhibits, 1 court exhibit, and 22 appellate exhibits. The transcript is 779 pages. Appellant is not confined.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 23 clients and is presently assigned 11 cases pending brief before this Court. Five cases pending brief before this Court currently have priority over the present case:

(1) *United States v. Stanford*, No. ACM 40327 – The record of trial consists of 29 prosecution exhibits, 13 defense exhibits, and 59 appellate exhibits. The transcript is 753 pages. Appellant is not confined and undersigned counsel is reviewing Appellant's record of trial.

(2) *United States v. Kight*, No. ACM 40337 – The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 1 court exhibit, and 36 appellate exhibits. The transcript is 1068 pages. Appellant is confined. Lead civilian appellate defense counsel, Mr. Scott Hockenberry, is completing his review of Appellant's record of trial and undersigned counsel will begin her review as soon as possible.

(3) *United States v. Donley*, No. ACM 40350 – The record of trial consists of 7 prosecution exhibits, 4 defense exhibits, 1 court exhibit, and 66 appellate exhibits. The transcript is 1233 pages. Appellant is confined.

(4) *United States v. Goodwater*, No. ACM 40304 (f. rev.) – The record of trial consists of 18 prosecution exhibits, 5 defense exhibits, and 26 appellate exhibits. The transcript is 413 pages. Appellant is confined.

(5) *United States v. Johnson*, No. ACM 40291 (f. rev.) – The record of trial consists of 23 appellate exhibits, 28 prosecution exhibits, and 4 defense exhibits. The transcript is 395 pages. Appellant is not confined.

In addition to the above priority, undersigned counsel was detailed to represent the Appellant in *United States v. Cole*, USCA Dkt. No. 23-0162/AF, a matter in which the United States Court of Appeals for the Armed Forces (C.A.A.F) has granted review. Appellant's brief and the joint appendix are due in accordance with C.A.A.F.'s order on 26 July 2023, however, a consent motion for a short extension is currently pending before C.A.A.F.. Undersigned counsel did not represent this Appellant before this Court or for his petition to C.A.A.F. and needed to familiarize herself with the record and granted issue. She is now finalizing her draft of Appellant's brief and the joint appendix.

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. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and agrees with this request for an enlargement of time. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

SAMANTHA P. GOLSETH, Capt, 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 was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 24 July 2023.

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

24 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DENNIS A. GEORGE JR., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40397 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

THOMAS J. ALFORD, Lt Col, USAFR
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 40397**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Dennis A. GEORGE Jr.	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 24 July 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 25th day of July, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **31 August 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
Acting Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 1
DENNIS A. GEORGE JR., Senior Airman (E-4) United States Air Force *Appellant*	)	No. ACM 40397 23 August 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a sixth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **30 September 2023.** The record of trial was docketed with this Court on 3 January 2023. From the date of docketing to the present date, 232 days have elapsed. On the date requested, 270 days will have elapsed.

Appellant was tried by a general court-martial composed of officer and enlisted members at Joint Base Langley-Eustis, Virginia. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1; Record (R.) at 262. Two specifications were litigated. ROT, Vol. 1, EOJ at 1. On 19 August 2022, contrary to Appellant's pleas, members found Appellant guilty of Charge I and its Specification, attempted sexual assault, in violation of Article 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880. *Id*.; R. at 631. Consistent with Appellant's pleas, the members found Appellant not guilty of Charge II and its Specification. *Id*. On 19 August 2022, the military judge sentenced Appellant to be reprimanded, reduced to the grade of E-1, confined for five months, and discharged with a dishonorable discharge. R. at 779. The convening authority took no action on the findings.

ROT, Vol. 1, *Convening Authority Decision on Action*, dated 29 September 2022. The convening authority disapproved the adjudged reprimand and approved the remainder of sentence, noting Appellant requested deferment of confinement for one month and that was denied. *Id*. On 17 October 2022, the military judge entered the above findings and sentence in the entry of judgment. ROT, Vol. 1, EOJ. The record of trial consists of 3 prosecution exhibits, 12 defense exhibits, 1 court exhibit, and 22 appellate exhibits. The transcript is 779 pages. Appellant is not confined.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 29 clients and is presently assigned 15 cases pending brief before this Court. Five cases pending before this Court, two cases pending before the Court of Appeals for the Armed Forces (C.A.A.F.), and two cases pending before the U.S. Supreme Court currently have priority over the present case:

1. *United States v. Hernandez*, No. ACM 40287 – Appellant's petition and supplement are due to C.A.A.F. on 14 September 2023.
2. *United States v. Cole*, USCA Dkt. No. 23-0162/AF, No. ACM 40189– The Government's answer brief is due to C.A.A.F. on 5 September 2023. Undersigned counsel anticipates she will need to reply and Appellant's reply brief will be due on 15 September 2023.
3. *United States v. Anderson*, No. ACM 39969 – Undersigned counsel has been detailed as Appellant's military defense counsel and is assisting in his petition for writ of certiorari to the U.S. Supreme Court, due 27 September 2023.
4. *United States v. Lopez*, No. ACM 40161 – Undersigned counsel is assisting in the drafting of a joint petition for writ of certiorari before the U.S. Supreme Court, which is due 15 October 2023.

5. *United States v. Stanford*, No. ACM 40327 – The record of trial consists of 29 prosecution exhibits, 13 defense exhibits, and 59 appellate exhibits. The transcript is 753 pages. Appellant is not confined and undersigned counsel is reviewing Appellant's record of trial.
6. *United States v. Kight*, No. ACM 40337 – The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 1 court exhibit, and 36 appellate exhibits. The transcript is 1068 pages. Appellant is confined. Lead civilian appellate defense counsel, Mr. Scott Hockenberry, is completing his review of Appellant's record of trial and undersigned counsel will begin her review as soon as possible.
7. *United States v. Donley*, No. ACM 40350 – The record of trial consists of 7 prosecution exhibits, 4 defense exhibits, 1 court exhibit, and 66 appellate exhibits. The transcript is 1233 pages. Appellant is confined.
8. *United States v. Goodwater*, No. ACM 40304 (f. rev.) – The record of trial consists of 18 prosecution exhibits, 5 defense exhibits, and 26 appellate exhibits. The transcript is 413 pages. Appellant is confined.
9. *United States v. Johnson*, No. ACM 40291 (f. rev.) – The record of trial consists of 23 appellate exhibits, 28 prosecution exhibits, and 4 defense exhibits. The transcript is 395 pages. Appellant is not confined.

In addition to the above priorities, undersigned counsel has been co-chairing the planning for the 2023 Joint Appellate Advocacy Training and is required to attend this training on 2023. Additionally, she will be on preauthorized leave OCONUS with her family from .

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. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and agrees with this request for an enlargement of time. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

SAMANTHA P. GOLSETH, Capt, 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 was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 23 August 2023.

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

24 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DENNIS A. GEORGE JR., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40397 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	
	)	Before Panel No. 1
Senior Airman (E-4) **DENNIS A. GEORGE JR.,** United States Air Force,	)	No. ACM 40397
Appellant.	)	20 September 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a seventh enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **30 October 2023.** The record of trial was docketed with this Court on 3 January 2023. From the date of docketing to the present date, 260 days have elapsed. On the date requested, 300 days will have elapsed.

Appellant was tried by a general court-martial composed of officer and enlisted members at Joint Base Langley-Eustis, Virginia. Entry of Judgment (EOJ) at 1; R. at 262. Two specifications were litigated. EOJ at 1. On 19 August 2022, contrary to Appellant's pleas, members found Appellant guilty of Charge I and its Specification, attempted sexual assault, in violation of Article 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880. *Id*.; R. at 631. Consistent with Appellant's pleas, the members found Appellant not guilty of Charge II and its Specification. *Id*. On 19 August 2022, the military judge sentenced Appellant to be reprimanded, reduced to the grade of E-1, confined for five months, and discharged with a dishonorable discharge. R. at 779. The convening authority took no action on the findings. *Convening Authority Decision on Action*, dated

29 September 2022. The convening authority disapproved the adjudged reprimand and approved the remainder of sentence, noting Appellant requested deferment of confinement for one month and that was denied. *Id*. On 17 October 2022, the military judge entered the above findings and sentence in the entry of judgment. EOJ. The record of trial consists of 3 prosecution exhibits, 12 defense exhibits, 1 court exhibit, and 22 appellate exhibits. The transcript is 779 pages. Appellant is not confined.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 28 clients and is presently assigned 13 cases pending brief before this Court. Five cases pending before this Court currently have priority over the present case:

1. *United States v. Stanford*, No. ACM 40327 – The record of trial consists of 29 prosecution exhibits, 13 defense exhibits, and 59 appellate exhibits. The transcript is 753 pages. Appellant is not confined. Undersigned counsel is reviewing Appellant's record of trial and at the time of this filing, she has reviewed approximately 30% of the transcript.
2. *United States v. Kight*, No. ACM 40337 – The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 1 court exhibit, and 36 appellate exhibits. The transcript is 1068 pages. Appellant is confined. Lead civilian appellate defense counsel, Mr. Scott Hockenberry, has begun drafting Appellant's assignments of error and undersigned counsel will begin her review as soon as possible.
3. *United States v. Donley*, No. ACM 40350 – The record of trial consists of 7 prosecution exhibits, 4 defense exhibits, 1 court exhibit, and 66 appellate exhibits. The transcript is 1233 pages. Appellant is confined.

4. *United States v. Goodwater*, No. ACM 40304 (f rev) – The record of trial consists of 18 prosecution exhibits, 5 defense exhibits, and 26 appellate exhibits. The transcript is 413 pages. Appellant is confined.
5. *United States v. Johnson*, No. ACM 40291 (f rev) – The record of trial consists of 23 appellate exhibits, 28 prosecution exhibits, and 4 defense exhibits. The transcript is 395 pages. Appellant is not confined.

In addition to the above, Maj Golseth anticipates, pending the content of the Government's answer, she may file a reply brief in *United States v. Gammage*, No. ACM S32731 (f rev). She will also be assisting in the preparation of a petition for writ of certiorari before the U.S. Supreme Court in *United States v. Anderson*, USCA Dkt. No. 22-0193/AF, No. ACM 39969, which is currently due on 30 October 2023. Finally, for this Court's awareness, undersigned counsel will be on preauthorized leave OCONUS with her family from .

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. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and agrees with this request for an enlargement of time. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

SAMANTHA P. GOLSETH, 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 was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 20 September 2023.

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

21 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DENNIS A. GEORGE JR., USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40397 Panel No. 1

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 21 September 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	
	)	Before Panel No. 1
Senior Airman (E-4) **DENNIS A. GEORGE JR.,** United States Air Force,	)	No. ACM 40397
Appellant.	)	20 October 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an eighth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **29 November 2023.** The record of trial was docketed with this Court on 3 January 2023. From the date of docketing to the present date, 290 days have elapsed. On the date requested, 330 days will have elapsed.

Appellant was tried by a general court-martial composed of officer and enlisted members at Joint Base Langley-Eustis, Virginia. R. at 262. Two specifications were litigated. On 19 August 2022, contrary to Appellant's pleas, members found Appellant guilty of Charge I and its Specification, attempted sexual assault, in violation of Article 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880. R. at 631. Consistent with Appellant's pleas, the members found Appellant not guilty of Charge II and its Specification. *Id*. On 19 August 2022, the military judge sentenced Appellant to a reprimand, reduction to E-1, five months' confinement, and a dishonorable discharge. R. at 779. The convening authority took no action on the findings. *Convening Authority Decision on Action*, 29 September 2022. The convening authority disapproved the adjudged

reprimand and approved the remainder of sentence, noting Appellant requested deferment of confinement for one month and that was denied. *Id*. On 17 October 2022, the military judge entered the above findings and sentence in the Entry of Judgment. Entry of Judgment, 17 October 2022. The record of trial consists of 3 prosecution exhibits, 12 defense exhibits, 1 court exhibit, and 22 appellate exhibits. The transcript is 779 pages. Appellant is not confined.

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. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and agrees with this request for an enlargement of time. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 26 clients and is presently assigned 15 cases pending brief before this Court. Three cases pending before this Court currently have priority over the present case:

1. *United States v. Stanford*, No. ACM 40327 – The record of trial consists of 29 prosecution exhibits, 13 defense exhibits, and 59 appellate exhibits. The transcript is 753 pages. Appellant is not confined. Undersigned counsel has reviewed the entire record and is currently completing her draft of Appellant's assignments of error.
2. *United States v. Kight*, No. ACM 40337 – The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 1 court exhibit, and 36 appellate exhibits. The transcript is 1068 pages. Appellant is confined. Lead civilian appellate defense counsel, Mr. Scott Hockenberry, has begun drafting Appellant's assignments of error and undersigned counsel will begin her review as soon as possible.

3. *United States v. Donley*, No. ACM 40350 – The record of trial consists of 7 prosecution exhibits, 4 defense exhibits, 1 court exhibit, and 66 appellate exhibits. The transcript is 1233 pages. Appellant is confined.

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

Respectfully submitted,

SAMANTHA P. GOLSETH, 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 was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 20 October 2023.

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

24 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DENNIS A. GEORGE JR., USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40397 Panel No. 1

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 330 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 7 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not 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 and to the Air Force Appellate Defense Division on 24 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,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Panel No. 1
Senior Airman (E-4) **DENNIS A. GEORGE JR.,** United States Air Force, *Appellant.*	)	No. ACM 40397
	)	20 November 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a ninth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **29 December 2023**. The record of trial was docketed with this Court on 3 January 2023. From the date of docketing to the present date, 321 days have elapsed. On the date requested, 360 days will have elapsed.

Appellant was tried by a general court-martial composed of officer and enlisted members at Joint Base Langley-Eustis, Virginia. R. at 262. Two specifications were litigated. On 19 August 2022, contrary to Appellant's pleas, members found Appellant guilty of Charge I and its Specification, attempted sexual assault, in violation of Article 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880. R. at 631. Consistent with Appellant's pleas, the members found Appellant not guilty of Charge II and its Specification. *Id*. On 19 August 2022, the military judge sentenced Appellant to a reprimand, reduction to E-1, five months' confinement, and a dishonorable discharge. R. at 779. The convening authority took no action on the findings. *Convening Authority Decision on Action*, 29 September 2022. The convening authority disapproved the adjudged

reprimand and approved the remainder of sentence, noting Appellant requested deferment of confinement for one month and that was denied. *Id*. On 17 October 2022, the military judge entered the above findings and sentence in the Entry of Judgment. Entry of Judgment, 17 October 2022. The record of trial consists of 3 prosecution exhibits, 12 defense exhibits, 1 court exhibit, and 22 appellate exhibits. The transcript is 779 pages. Appellant is not confined.

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. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and agrees with this request for an enlargement of time. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 27 clients and is presently assigned 13 cases pending brief before this Court. Two cases pending before this Court currently have priority over the present case:

1. *United States v. Kight*, No. ACM 40337 – The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 1 court exhibit, and 36 appellate exhibits. The transcript is 1068 pages. Appellant is confined. Undersigned counsel has completed her review and is discussing potential issues for drafting with lead civilian appellate defense counsel, Mr. Scott Hockenberry.
2. *United States v. Donley*, No. ACM 40350 – The record of trial consists of 7 prosecution exhibits, 4 defense exhibits, 1 court exhibit, and 66 appellate exhibits. The transcript is 1233 pages. Appellant is confined. Undersigned counsel will complete her review as soon as possible.

In addition to the above, undersigned counsel anticipates, pending the content of the Government's answer (due 9 December 2023), she may file a reply brief in *United States v. Stanford*, No. ACM 40327. Undersigned counsel will also be preparing to give argument at the United States Court of Appeals for the Armed Forces in *United States v. Cole*, USCA Dkt. No. 23-0162/AF, No. ACM 40189, on 6 December 2023. Between 21 November 2023 and 30 November 2023, she will be practicing her argument in at least two moot arguments and will be participating in four other moot arguments. Additionally, she will be on preauthorized leave from .

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

Respectfully submitted,

SAMANTHA P. GOLSETH, 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 was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 20 November 2023.

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

22 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DENNIS A. GEORGE JR., USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40397 Panel No. 1

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TENTH)**
v.	)	
	)	Before Panel No. 1
Senior Airman (E-4) **DENNIS A. GEORGE JR.,** United States Air Force,	)	No. ACM 40397
Appellant.	)	18 December 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a tenth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **28 January 2024**. The record of trial was docketed with this Court on 3 January 2023. From the date of docketing to the present date, 349 days have elapsed. On the date requested, 390 days will have elapsed.

Appellant was tried by a general court-martial composed of officer and enlisted members at Joint Base Langley-Eustis, Virginia. R. at 262. Two specifications were litigated. On 19 August 2022, contrary to Appellant's pleas, members found Appellant guilty of Charge I and its Specification, attempted sexual assault, in violation of Article 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880. R. at 631. Consistent with Appellant's pleas, the members found Appellant not guilty of Charge II and its Specification. *Id*. On 19 August 2022, the military judge sentenced Appellant to a reprimand, reduction to E-1, five months' confinement, and a dishonorable discharge. R. at 779. The convening authority took no action on the findings. *Convening Authority Decision on Action*, 29 September 2022. The convening authority disapproved the adjudged

reprimand and approved the remainder of sentence, noting Appellant requested deferment of confinement for one month and that was denied. *Id*. On 17 October 2022, the military judge entered the above findings and sentence in the Entry of Judgment. Entry of Judgment, 17 October 2022. The record of trial consists of 3 prosecution exhibits, 12 defense exhibits, 1 court exhibit, and 22 appellate exhibits. The transcript is 779 pages. Appellant is not confined.

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. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and agrees with this request for an enlargement of time. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. During the ninth enlargement of time, undersigned counsel prepared for and participated in six moot arguments, prepared for and gave two moot arguments, and argued before the Court of Appeals for the Armed Forces in *United States v. Cole*, USCA Dkt. No. 23-0162/AF, No. ACM 40189. She also drafted assignments of error in *United States v. Kight*, No. ACM 40337.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 27 clients and is presently assigned 13 cases pending brief before this Court. Two cases pending before this Court currently have priority over the present case:

1. *United States v. Kight*, No. ACM 40337 – The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 1 court exhibit, and 36 appellate exhibits. The transcript is

1068 pages. Appellant is confined. Undersigned counsel is finalizing the appellant's brief for filing no later than 8 January 2024.

2. *United States v. Donley*, No. ACM 40350 – The record of trial consists of 7 prosecution exhibits, 4 defense exhibits, 1 court exhibit, and 66 appellate exhibits. The transcript is 1233 pages. Appellant is confined. Undersigned counsel is reviewing the record, has reviewed portions of the sealed materials, and has identified assignments of error. She has requested one final enlargement of time to complete the appellant's assignments of error.

In addition to the above, undersigned counsel represents five petitioners whose petitions have been consolidated before the Supreme Court of the United States in *Jonathan M. Martinez, et. al. Petitioner v. United States*, No. 23-242. The Supreme Court of the United States has ordered the United States Solicitor General to respond to this petition and that response is due on 27 December 2023. Undersigned counsel is coordinating with lead civilian counsel and co-counsel from the U.S. Army and U.S. Marine Corps in preparation for replying to the Solicitor General's answer by 9 January 2024.

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

Respectfully submitted,

SAMANTHA P. GOLSETH, 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 was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 18 December 2023.

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

20 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DENNIS A. GEORGE JR., USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40397 Panel No. 1

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40397**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Dennis A. GEORGE	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 18 December 2023 counsel for Appellant submitted a Motion for Enlargement of Time (Tenth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

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 20th day of December, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Tenth) is **GRANTED**. Appellant shall file any assignments of error not later than **28 January 2024**.

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
Acting Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (ELEVENTH)**
v.	)	
	)	Before Panel No. 1
Senior Airman (E-4) **DENNIS A. GEORGE JR.,** United States Air Force,	)	No. ACM 40397
Appellant.	)	19 January 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an eleventh and final enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **27 February 2024**, and anticipates this will be the final request for an EOT. The record of trial was docketed with this Court on 3 January 2023. From the date of docketing to the present date, 381 days have elapsed. On the date requested, 420 days will have elapsed.

Appellant was tried by a general court-martial composed of officer and enlisted members at Joint Base Langley-Eustis, Virginia. R. at 262. Two specifications were litigated. On 19 August 2022, contrary to Appellant's pleas, members found Appellant guilty of Charge I and its Specification, attempted sexual assault, in violation of Article 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880. R. at 631. Consistent with Appellant's pleas, the members found Appellant not guilty of Charge II and its Specification. *Id*. On 19 August 2022, the military judge sentenced Appellant to a reprimand, reduction to E-1, five months' confinement, and a dishonorable discharge. R. at 779. The convening authority took no action on the findings. *Convening Authority Decision on Action*, 29 September 2022. The convening authority disapproved the adjudged

reprimand and approved the remainder of sentence, noting Appellant requested deferment of confinement for one month and that was denied. *Id*. On 17 October 2022, the military judge entered the above findings and sentence in the Entry of Judgment. Entry of Judgment, 17 October 2022. The record of trial consists of 3 prosecution exhibits, 12 defense exhibits, 1 court exhibit, and 22 appellate exhibits. The transcript is 779 pages. Appellant is not confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and though she is reviewing Appellant's case, she has not yet finished. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and agrees with this request for an enlargement of time. This enlargement of time is necessary to allow undersigned counsel to finish reviewing Appellant's case and advise him regarding potential errors. During the tenth enlargement of time, undersigned counsel prepared for and participated in four moot arguments; drafted assignments of error in *United States v. Donley*, No. ACM 40350 (a case which involved 7 prosecution exhibits, 4 defense exhibits, 1 court exhibit, and 66 appellate exhibits, and 1233 transcript pages) which will be filed on 22 January 2024; and researched, assisted in drafting, and edited the Petitioner's Reply Brief before the U.S. Supreme Court in *Martinez et. al. v. United States*, No. 23-242, filed 9 January 2024.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 34 clients and is presently assigned 15 cases pending brief before this Court. Appellant's case is undersigned counsel's first priority.

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

Respectfully submitted,

SAMANTHA P. GOLSETH, 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 was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 19 January 2024.

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

23 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DENNIS A. GEORGE JR., USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40397 Panel No. 1

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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,*	)	**CONSENT MOTION TO EXAMINE SEALED MATERIALS**
v.	)	Before Panel No. 1
Senior Airman (E-4) **DENNIS A. GEORGE JR.,** United States Air Force, *Appellant.*	)	No. ACM 40397
	)	24 January 2024

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and Rules 3.1(c)(2), 23.1(b), and 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves this Court to permit appellate counsel for Senior Airman (SrA) Dennis A. George Jr., Appellant, and the Government to examine the closed session audio recording, transcript pages 47-85, and Appellate Exhibits III, IV, V, VII, VIII, and XIV.

Facts

SrA George was tried by a general court-martial composed of officer and enlisted members at Joint Base Langley-Eustis, Virginia. R. at 262. Two specifications were litigated. On 19 August 2022, contrary to SrA George's pleas, members found him guilty of Charge I and its Specification, attempted sexual assault, in violation of Article 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880.[1] R. at 631. Consistent with his pleas, the members found him not guilty of Charge II and its Specification. *Id.* On 19 August 2022, the military judge sentenced him to a reprimand, reduction to E-1, five months' confinement, and a dishonorable discharge. R. at 779. The convening authority took no action on the findings. *Convening Authority Decision on Action*, 29 September

[1] References to the punitive articles, Rules for Courts-Martial, and Military Rules of Evidence are to the 2019 *Manual for Courts-Martial, United States* unless otherwise stated.

2022. The convening authority disapproved the adjudged reprimand and approved the remainder of sentence, noting Appellant requested deferment of confinement for one month and that was denied. *Id*. On 17 October 2022, the military judge entered the above findings and sentence in the Entry of Judgment. Entry of Judgment, 17 October 2022.

During the proceedings, the military judge sealed Appellate Exhibits III, IV, V, VII, VIII, and XIV, and held a closed session which is captured in a sealed audio recording and transcribed on transcript pages 47-85. App. Ex. VI; *see* R. at 46.

Law

Appellate counsel may examine materials presented or reviewed at trial and sealed, as well as materials reviewed *in camera*, released to trial or defense counsel, and sealed, upon a colorable showing to the appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities under the UCMJ, the [*Manual for Courts-Martial, United States*], governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional conduct. R.C.M. 1113(b)(3)(B)(i).

Air Force regulations governing professional duties and conduct of appellate defense counsel impose upon counsel, *inter alia*, a duty to provide "competent representation,"[2] perform "reasonable diligence,"[3] and to "give a client his or her best professional evaluation of the questions that might be presented on appeal…[to] consider all issues that might affect the validity of the judgment of conviction and sentence…[to] advise on the probable outcome of a challenge to the conviction or sentence...[and to] endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance."[4] These requirements are consistent with

[2] Air Force Instruction (AFI) 51-110, *Professional Responsibility Program*, Attachment 2: Air Force Rules of Professional Conduct, Rule 1.1 (11 Dec. 2018).
[3] *Id*. at Rule 1.3.
[4] AFI 51-110, Attachment 7: Air Force Standards for Criminal Justice, Standard 4-8.3(b).

those imposed by the state bar to which counsel belongs.[5]

This Court may grant relief "on the basis of the entire record" of trial. Article 66, UCMJ, 10 U.S.C. § 866. Appellate defense counsel so detailed by the Judge Advocate General shall represent accused servicemembers before this Court. Article 70, UCMJ, 10 U.S.C. § 870. This Court's "broad mandate to review the record unconstrained by appellant's assignments of error" does not reduce "the importance of adequate representation" by counsel; "independent review is not the same as competent appellate representation." *United States v. May,* 47 M.J. 478, 481 (C.A.A.F. 1998).

Analysis

Each of the sealed exhibits is an appellate exhibit which was "presented" or "reviewed" by the parties at trial. The trial parties were present during the closed sessions and later reviewed the sealed transcript pages which record the closed sessions. It is reasonably necessary for undersigned counsel to review these sealed materials to competently conduct a professional evaluation of SrA George's case and to uncover all issues which might afford him relief. Because examination of the materials in question is reasonably necessary to the fulfillment of undersigned counsel's Article 70, UCMJ, duties, and because the materials were made available to the parties at trial, SrA George has provided the "colorable showing" required by R.C.M. 1113(b)(3)(B)(i) to permit his counsel's examination of these sealed materials and has shown good cause to grant this motion.

The Government consents to this motion and both parties viewing the sealed materials detailed above.

[5] Counsel of record is licensed to practice law in California.

WHEREFORE, SrA George respectfully requests this Honorable Court grant this motion and permit examination of the aforementioned sealed materials contained within the original record of trial.

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 24 January 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40397**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Dennis A. GEORGE Jr.	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 24 January 2024, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials. Specifically, counsel for Appellant requests she and Government counsel be allowed to examine the closed session audio recording, transcript pages 47–85, and Appellate Exhibits III, IV, V, VII, VIII, and XIV. The Government does not oppose the motion and consents to this request.

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

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

Accordingly, it is by the court on this 1st day of February, 2024,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view **the closed session audio recording, transcript pages 47–85, and Appellate Exhibits III, IV, V, VII, VIII, and XIV**, 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

apt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

Senior Airman (E-4)
DENNIS A. GEORGE JR.,
United States Air Force,
Appellant.

No. ACM 40397

BRIEF ON BEHALF OF APPELLANT

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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Counsel for Appellant

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 1
Senior Airman (E-4) **DENNIS A. GEORGE JR.,** United States Air Force, *Appellant.*	)	No. ACM 40397
	)	27 February 2024

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

Assignments of Error[1]

I.

WHETHER THE EVIDENCE IS LEGALLY AND FACTUALLY SUFFICIENT TO SUPPORT THE FINDING OF GUILTY FOR CHARGE I AND ITS SPECIFICATION.

II.

WHETHER THE MEMBERS WERE IMPROPERLY INSTRUCTED BECAUSE THE INSTRUCTIONS CALL FOR CIRCULAR REASONING.

III.

WHETHER SRA GEORGE WAS DEPRIVED OF HIS RIGHT TO A UNANIMOUS VERDICT.

IV.

WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY DEMONSTRATING THAT ITS APPLICATION IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION WHEN SRA GEORGE WAS CONVICTED OF A NON-VIOLENT OFFENSE AND WHETHER THIS COURT CAN DECIDE THAT QUESTION UNDER *UNITED STATES V. LEMIRE*, 82 M.J. 263 (C.A.A.F. 2022) OR *UNITED STATES V. LEPORE*, 81 M.J. 759 (A.F. CT. CRIM. APP. 2021)?

[1] Appellant raises three issues, contained in Appendix A, under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Statement of the Case

On 15-19 August 2022, at Joint Base Langley-Eustis, Virginia, a general court-martial composed of officer and enlisted members convicted Appellant, Senior Airman Dennis A. George Jr. (SrA George), contrary to his pleas, of one specification of attempted sexual assault without consent in violation of Article 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880.[2, 3] R. at 631. The military judge sentenced SrA George to a reprimand, reduction to the pay grade of E-1, five months' confinement, and a dishonorable discharge. R. at 779. The convening authority took no action on the findings. Convening Authority Decision on Action, 29 September 2022. The convening authority disapproved the adjudged reprimand and approved the remainder of sentence. *Id*.

Statement of Facts

On 3 July 2021, SrA George was at home at his house that he shared with another Airman, BL. R. at 385. SrA George was not planning to go out that night but BL and some of his friends and fellow airmen, WMB, LC, and QG, did. R. at 384, 469. WMB, LC, and QG first met at LC's apartment, where at least WMB and LC began drinking alcohol while LC got ready. R. at 384-85, 469. WMB, LC, and QG then went to SrA George and BL's house. R. at 384, 469. At their house, QG saw SrA George was not dressed like he was going out with them, and he asked SrA George if he was coming. R. at 469. SrA George said, "No, I am not going out." R. at 469. But the group pushed him to join them and WMB offered to pay for his cover fee and drinks so he could join them, which successfully convinced him to join.[4] R. at 403, 442, 469.

---

[2] Unless otherwise noted, all references to the *Manual for Courts-Martial* (*MCM*) are to the 2019 edition.

[3] Members acquitted SrA George of one specification of abusive sexual contact, in violation of Article 120, UCMJ, 10 U.S.C. § 920.

[4] SrA George had other financial obligations because he financially supported his mother and siblings. R. at 674.

At the house, everyone consumed alcohol in the form of alcoholic popsicles and/or other drinks. R. at 385. By the time they were leaving the house to go out, BL was the only option for a designated driver. R. at 432.

SrA George, BL, WMB, LC, and QG left the house and went to a restaurant/club called Keland's. R. at 386. When the group arrived at Keland's, QG bought everyone a round of shots. R. at 471. In addition to these shots, QG remembered seeing SrA George order one drink. R. at 472. WMB bought SrA George two drinks. R. at 387-88. Everyone was drinking and buying drinks for each other, though BL was drinking the least because he was the designated driver. R. at 387-88.

As the designated driver, BL sometimes went outside Keland's and took occasional smoke breaks or just sat down. R. at 427. When inside, however, BL observed SrA George and WMB danced together during the night, such that "her butt was in up against his crotch." R. at 432. BL also overheard WMB say that she planned to go back to their house with SrA George. R. at 433. QG had also heard this. R. at 488. In addition, WMB sat on SrA George's lap when the two of them were sitting alone. R. at 485. However, QG explained that though he could not hear what they were talking about, that it did not seem out of the ordinary because "that is just how she is as a person" and that she had sat on his lap as well. R. at 485, 489. Contrary to these observations, WMB claimed she did not dance with SrA George or sit on his lap. R. at 406-07.

During the time at Keland's, SrA George stood close to WMB while she was sitting and asked, "Are you trying to give me head in the club?" R. at 389. WMB understood "head" to mean oral sex, but she could not tell if SrA George was joking or not and she laughed him off. R. at 389-90. WMB claimed that SrA George asked her a second time and that he touched her when he tried to push her further into the booth where she was sitting (without explaining how he allegedly touched her). R. at 388-89, 406.

LC observed SrA George say to WMB, "Are you trying to suck a dick in the club?" or words to the effect. R. at 452. LC specifically remembered WMB's response to this was "No. You can't wait until we get home?" *Id*. Contrary to WMB's testimony, LC never saw SrA George touch WMB, though this conversation sparked LC's attention, so she asked WMB about it. R. at 453. WMB told LC, "I'm just joking with him." R. at 453.

WMB went to alert QG that SrA George was "getting kind of drunk" and they should probably head out. R. at 390. WMB did not want SrA George to start "embarrassing himself" in the club because he was "kind of like drunk." R. at 416.

Leaving the bar, BL observed everyone else in the group was drunk, tipsy, and rowdy. R. at 428. SrA George told LC to sit up front and he sat in the backseat where he put his arm around WMB. R. at 392, 445. WMB did not have any issue with him putting his right arm around her because "[i]t was more for like a space reason because he would have sat arm to arm with me. It would have been really, really cramped in there." R. at 392-93, 411.

According to WMB, during the car ride SrA George whispered loudly in her ear that he really wanted "head" (referring to oral sex). R. at 392. WMB stated she responded "no," but that he pulled one of her breasts out of her shirt and groped her.[5] R. at 393-94. WMB then alleged that SrA George grabbed the back of her neck with his left hand and pushed her head towards his crotch twice. R. at 395-96. The second time, WMB claimed her cheek touched his crotch and she could feel his zipper. R. at 396. WMB did not know if SrA George had an erection. *Id*.

QG was sitting on the other side of WMB in the backseat of the car. R. at 474. At one point during the car ride, QG heard WMB say in a "joke-ish" tone, "George why is your dick out?" R. at 475. WMB's tone was not serious, and they started laughing about it. R. at 475-76. WMB

[5] SrA George was acquitted of this allegation. R. at 631.

was laughing too. R. at 487. WMB's testimony omitted any mention of this joke, and she did not allege that his penis was ever exposed. *See* R. at 392-96. QG also never saw SrA George's penis exposed. R. at 487.

WMB got QG's attention again when WMB said "get the fuck off me." R. at 476. QG then saw SrA George's hand on the back of her head, and it appeared to him that WMB was resisting. R. at 477. WMB's face was not even halfway down to SrA George's lap. R. at 478. QG compared it to a gas gauge, where WMB was positioned at three-quarters of a tank. *Id*. QG asked what was going on and SrA George took his hand away. R. at 477. WMB responded by making threats towards SrA George and trying to punch him. R. at 478.

BL pulled over at a gas station ("7/11") because LC was pretty drunk and hanging out of the sunroof and there was a lot of commotion in the car. R. at 428. Once he pulled over, BL realized there was arguing in the backseat and WMB was upset. R. at 429-30. SrA George seemed surprised that WMB was upset. R. at 397, 433. SrA George "had no idea" why WMB was acting the way she was. R. at 450. Afterwards, WMB and LC claimed that SrA George's zipper was unzipped and that they could see his underwear, however, despite BL being the most sober and getting out of the car to assess the situation, BL did not remember that. R. at 398, 435, 450. Finally, QG who was in the backseat when this occurred made no mention of whether SrA George's pants were zipped or not. *See* R. at 465-495.

BL took SrA George home and QG told BL that he would get WMB and LC home. R. at 480. SrA George called QG early the next morning and asked QG what happened the night prior. R. at 480. QG told SrA George everything he saw, and QG could hear SrA George was remorseful. *Id*. SrA George asked QG (who was close friends with WMB) to ask WMB if he could apologize, but WMB did not want to hear from SrA George. *Id*.

Before this night, SrA George and WMB's friend, DA, had messaged SrA George and told him that WMB wanted to perform oral sex on SrA George. R. at 504-507.

Argument

I.

THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUPPORT THE FINDING OF GUILTY FOR CHARGE I AND ITS SPECIFICATION.

Standard of Review

This Court reviews issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). The "assessment of legal and factual sufficiency is limited to the evidence produced at trial." *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citation omitted).

Law and Analysis

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (citation omitted). "[T]he term 'reasonable doubt' does not mean that the evidence must be free from any conflict . . . ." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (citation omitted). The evidence supporting a conviction can be direct or circumstantial. *See United States v. Long*, 81 M.J. 362, 368 (C.A.A.F. 2021) (citing Rule for Courts-Martial (R.C.M.) 918(c) (additional citation omitted)). "[A] rational factfinder [ ] could use his 'experience with people and events in weighing the probabilities' to infer beyond a reasonable doubt" that an element was proven. *Id*. at 369 (quoting *Holland v. United States*, 348 U.S. 121, 140 (1954)). The "standard for legal sufficiency involves a very low threshold to sustain a conviction." *King*, 78 M.J. at 221 (internal quotation marks and citation 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, [this Court is] convinced of the [appellant]'s guilt beyond a reasonable doubt.'" *Rodela*, 82 M.J. at 525 (second alteration in original) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). "In conducting this unique appellate role, this Court takes 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (alteration in original) (quoting *Washington*, 57 M.J. at 399), aff'd, 77 M.J. 289 (C.A.A.F. 2018).

A. <u>The Government alleged SrA George committed a specific act—penetrating WMB's mouth with his penis—and failed to prove it.</u>

In the Specification of Charge I, the Government charged that SrA George, "did, at or near Newport News, Virginia, on or about 4 July 2021, attempt to commit a sexual act upon [WMB] ***by*** penetrating her mouth with his penis without her consent." Charge Sheet, 19 November 2021, at 1 (emphasis added). When the word "by" is structured with a "-ing" verb, the structure describes how something is achieved, for example, what act was taken.[6]

Review of other cases involving Article 80, UCMJ, demonstrates this grammar rule in practice. For example, in *Wheeler*, an Article 80, UCMJ, specification alleged:

> In that [appellant] . . . did, . . . attempt to commit a lewd act upon "Gaby," a person [appellant] believed to be a child who had not yet attained the age of 16 years, *by* intentionally communicating to "Gaby" indecent language, to wit: stating the accused liked to "jack his dick," stating "Gaby" "can finally touch a dick" and asking whether "Gaby" likes to masturbate, or words to that effect, with an intent to arouse or gratify the sexual desire of [appellant].

[6] *See* Cambridge Dictionary, https://dictionary.cambridge.org/us/grammar/british-grammar/by (last visited 23 Feb. 2024).

76 M.J. at 567-68 (emphasis added) (alterations in original). Here, the alleged acts which follow "by" were how the appellant allegedly attempted to commit a lewd act: he intentionally communicated indecent language. *See id*. Similarly, in *United States v. Payne*, 73 M.J. 19, 24 (C.A.A.F. 2014), the alleged acts which follow "by" in the alleged Article 80, UCMJ, specification denote how the appellant allegedly attempted to commit the target offense:

> [Did] wrongfully and knowingly attempt to persuade, induce, entice, . . . or coerce "Marley," someone he believed was a female 14 years of age, who was, in fact, Lillian Vedder, an Ulster County New York Sheriff's Office undercover detective, to create child pornography *by* requesting that "Marley" send nude photos of herself to the said STAFF SERGEANT ROBERT M. PAYNE, which conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.

Review of UCMJ sample specifications, such as assault by attempt under Article 128, UCMJ, also demonstrates the use of "by" to denote the act taken to commit the offense: "assault _____ *by* (striking (him) (her) with a _____) (_____)." MCM, pt. IV, ¶ 77.e.(1).

While the Government may have intended otherwise, through its chosen language in the Specification of Charge I, it alleged SrA George attempted to commit the target offense when he committed the act of penetrating WMB's mouth with his penis without her consent. *See* Charge Sheet, 19 November 2021, at 1.

When the Government alleged SrA George penetrated WMB's mouth with his penis without her consent, the Government was required to prove the facts as alleged. *See United States v. English*, 79 M.J. 116, 120 (C.A.A.F. 2019) (when the Government made the charging decision to allege a particular type of force was used, "i.e., that Appellant committed [the] offense 'by grabbing her head with his hands,'" it was required to prove the facts it alleged).

The Government did not prove SrA George penetrated WMB's mouth with his penis because there is no evidence that SrA George penetrated WMB's mouth. WMB alleged her cheek touched his zipper, not that her mouth was penetrated. R. at 396. After viewing the evidence in

the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Moreover, this Court cannot conclude the evidence constitutes proof of each required element beyond a reasonable doubt. It also cannot make exceptions or substitutions at the appellate level to substitute any other act by SrA George. *See English*, 79 M.J. at 121 ("exceptions and substitutions pursuant to R.C.M. 918 may only 'be made by the factfinder at the findings portion of the trial.'") (internal citations omitted). As a result, the evidence is legally and factually insufficient.

B. The evidence does not prove beyond a reasonable doubt that SrA George intended to commit sexual assault without consent.

Article 80, UCMJ, requires proof of "[a]n act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission." 10 U.S.C. § 880, MCM, pt. IV, ¶ 4.a.(a). The President's enumerated elements for this offense are: (1) the accused did a certain overt act; (2) the act was done with the specific intent to commit a certain offense under the UCMJ; (3) the act amounted to more than mere preparation; and (4) the act apparently tended to effect the commission of the intended offense. MCM, pt. IV, ¶ 4.b.(1)-(4).

Under the second element, the Government was required to prove that SrA George intended to commit sexual assault without consent. *Id*.; *See* Charge Sheet, 19 November 2021, at 1. The Government argued in its closing argument that SrA George intended to penetrate her mouth with his penis, that this was not consensual, and that it was not reasonable to believe it was consensual but what is missing is the second element: whether SrA George *intended* to commit this act without consent. *See* App. Ex. XX at 3-4.

In *United States v. Martinez*, No. ACM 39903 (f rev), 2022 CCA LEXIS 324, *95 (A.F. Ct. Crim. App. May 31, 2022) (unpub. op.), the alleged victim, Ms. E.S., testified her husband, the

appellant, "took off his uniform jacket and hat and then walked over to her, got down on his knees in front of the couch so that his waist was 'probably on level with the couch,' and tried to kiss her despite her saying 'no.'" Ms. E.S. testified "he kept trying to kiss me and he was touching me and I was telling him to stop." *Id*. Ms. E.S. then alleged the appellant "'grabbed [her] arms and held them together with one of his hands' while he 'was touching [her] all over' as she was 'asking him to stop.'" *Id*. Ms. E.S. testified she was "struggling" with the appellant, "but he was able to 'move [her] leg open,' and during the struggle, she could feel his "erect penis on her vagina through their respective clothing." *Id*. "Ms. E.S. kept telling the appellant to stop, at which point [he did and] said "[y]ou're my wife so I can take it if I want to." *Id*. at *95-96. A photograph of a bruise on Ms. E. S. was admitted as evidence of the struggle and Ms. E.S.'s brother testified that the appellant had "admitted grabbing Ms. ES's wrists, holding her down and trying to kiss her and said that '[h]e wanted to have sex with his wife to see if there's anything still there emotionally.'" *Id*. at *96. In *Martinez*, this Court, in considering prejudice resulting from a military judge's erroneous instructions, determined that while the "evidence was strong in terms of proving the appellant struggled with Ms. ES," the "evidence that [he] specifically intended to penetrate her vulva *without her consent* was far from conclusive." *Id*. at *111-12 (emphasis in original).

The same is true here, though WMB alleged she stated no, no other passenger in the vehicle heard WMB say this. *See* R. at 427-29 (BL was driving, everyone was being loud, he had the music on, which was usually "pretty high," and the sunroof was open); 445-48 (LC was seated in the front passenger and allegedly heard WMB state after the fact, "you pulled my [titty] out" and "I told you to stop and you didn't" but LC never reported hearing WMB's protests before this).[7] QG sat directly next to WMB throughout the car ride, and he never reported hearing WMB's

[7] SrA George was acquitted of touching WMB's breast. R. at 631.

protests, though he did hear WMB say in a "joke-ish" tone, "George why is your dick out?" and heard WMB laugh at this joke. R. at 475, 487. Therefore, even if WMB did protest, it is not clear that SrA George heard it.

Further, in *Martinez*, there was a considerable struggle which could evidence a lack of consent and yet, this Court determined that the appellant eventually desisted and the "evidence that [he] specifically intended to penetrate her vulva *without her consent* was far from conclusive." 2022 CCA LEXIS 324, at *112. The same is true here and by comparison, the entire episode between SrA George and WMB was brief; each witness testified it was a short car ride to the 7/11. R. at 397, 429 ("it was like down the street"). Moreover, when WMB did yell at SrA George, he stopped, demonstrating the opposite of intent to commit sexual assault without consent. R. at 477.

Further, there was additional reason to question whether SrA George specifically intended to penetrate WMB's mouth without her consent because according to WMB, she was concerned SrA George was going to start "embarrassing himself" in the club because he was "kind of like drunk." R. at 416. Furthermore, when WMB did become upset with SrA George in the car, SrA George seemed surprised that WMB was upset. R. at 397, 433. SrA George "had no idea" why WMB was acting the way she was. R. at 450. SrA George also called QG early the next morning and asked QG what happened the night prior. R. at 480.

While the Government argued there was no consent—"[a]n expression of lack of consent through words or consent means there is no consent"—and argued that a mistake of fact as to consent was unreasonable, it did not prove that SrA George intended to commit the act without consent. R. at 567-74; App. Ex. XX at 4. As a result, the evidence is legally and factually insufficient.

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

II.

THE MEMBERS WERE IMPROPERLY INSTRUCTED BECAUSE THE INSTRUCTIONS CALL FOR CIRCULAR REASONING.

Additional Facts

The military judge instructed the members, the elements of Charge I and its Specification are:

> That, at or near Newport News, Virginia, on or about 4 July 2021, the accused did a certain overt acts, that is: attempt to commit a sexual act upon [WMB] by penetrating her mouth with his penis without her consent; That the act was done with specific intent to commit the offense of sexual assault without consent; That the act amounted to more than mere preparation, that is, it was substantial, excuse me, it was a substantial step and a direct movement toward the commission of the intended offense; and that such act apparently tended to bring about the commission of the offense of sexual assault without consent, that is, the act apparently would have resulted in the actual commission of the offense of sexual assault without consent except for [WMB]'s physical and or verbal protestation, which prevented completion of that offense.

R. at 553. In defining preparation, the military judge instructed the members:

> Preparation consists of devising or arranging the means or measures necessary for the commission of the attempted offense. To find the accused guilty of this offense, you must find beyond a reasonable doubt that the accused went beyond preparatory steps, and his act amounted to a substantial step and a direct movement toward the commission of the intended offense. A substantial step is one that is strongly corroborative of the accused's criminal intent and is indicative of his resolve to commit the offense.
>
> Proof that the offense of sexual assault without consent actually occurred or was completed by the accused is not required. However, it must be proved beyond a reasonable doubt that, at the time of the act, the accused intended every element of sexual assault without consent.

R. at 553-54.

The military judge provided the parties with a final draft of his findings instructions and asked the parties to review the draft instructions. R. at 546. Before the military judge instructed the members, defense counsel agreed the military judge's instructions were a correct statement of the law to the best of their understanding. R. at 548.

Standard of Review

"An allegation that the members were improperly instructed is an issue [this Court reviews] de novo." *United States v. Behenna*, 71 M.J. 228, 232 (C.A.A.F. 2012) (quoting *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008).

Law and Analysis

"[A] military judge has wide discretion in choosing the instructions to give but has a duty to provide an accurate, complete, and intelligible statement of the law.'" *Id*. (citing *United States v. Wolford*, 62 M.J. 418, 419 (C.A.A.F. 2006) and *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011)). Instructions must be "clear and correctly conveyed." *Medina*, 69 M.J. at 465.

"In reviewing the propriety of an instruction, appellate courts must read each instruction in the context of the entire charge and determine whether the instruction completed its purpose." *Behenna*, 71 M.J. at 232 (citing *Jones v. United States*, 527 U.S. 373, 391, (1999)). Military judges are required to instruct members on the elements of charged offenses. R.C.M. 920(e)(1).

"Where there is instructional error with constitutional dimensions, [this Court] tests for prejudice under the standard of harmless beyond a reasonable doubt." *United States v. Upshaw*, 81 M.J. 71, 74 (C.A.A.F. 2021) (citation omitted). "This standard is met 'where a court is confident that there was no reasonable possibility that the error might have contributed to the conviction.'" *Id*. (citing *United States v. Prasad*, 80 M.J. 23, 29 (C.A.A.F. 2020) (quoting *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019))).

A. <u>This Court should adopt it's reasoning from *United States v. Martinez*, No. ACM 39903 (f rev), 2022 CCA LEXIS 324 (A.F. Ct. Crim. App. May 31, 2022) (unpub. op.) where it found the military judge's instructions were circular and therefore erroneous because nearly identical erroneous instructions were given here.</u>

In *Martinez*, 2022 CCA LEXIS 324, at *5, like SrA George, the appellant was alleged, in part, to have committed abusive sexual contact and attempted sexual assault, arising from a

singular episode.[8] The appellant, also like SrA George, was acquitted of the alleged abusive sexual contact (touching her vulva with his penis through their clothing) but convicted of the attempted sexual assault. *Id*. at *96-97.

In *Martinez*, the military judge's instructions for the alleged attempted sexual assault parallel SrA George's almost exactly:

Instructions in *Martinez. 2022 CCA LEXIS 324, at *103*	**Instructions here R. at 553-54.**
That at or near Spokane, Washington, on or about 18 July 2018, the Accused did a certain act, that is: attempt to commit a sexual act upon [Ms. ES], to wit penetrating her vulva with his penis, by causing bodily harm to her, to wit: penetrating her vulva with his penis without her consent;	That, at or near Newport News, Virginia, on or about 4 July 2021, the accused did a certain overt acts, that is: attempt to commit a sexual act upon [WMB] by penetrating her mouth with his penis without her consent;
That the act was done with specific intent to commit the offense of sexual assault;	That the act was done with specific intent to commit the offense of sexual assault without consent;
That the act amounted to more than mere preparation, that is, it was a substantial step and a direct movement toward the commission of the intended offense;	That the act amounted to more than mere preparation, that is, it was substantial, excuse me, it was a substantial step and a direct movement toward the commission of the intended offense;
That such act apparently tended to bring about the commission of the offense of sexual assault, that is the act apparently would have resulted in the actual commission of the offense of sexual assault except for an unexpected intervening circumstance which prevented completion of that offense.	and that such act apparently tended to bring about the commission of the offense of sexual assault without consent, that is, the act apparently would have resulted in the actual commission of the offense of sexual assault without consent except for [WMB]'s physical and or verbal protestation, which prevented completion of that offense.
To find the Accused guilty of this offense you must find beyond a reasonable doubt that the Accused went beyond preparatory steps and his acts amounted to [a] substantial step [and] a direct movement toward the commission of the intended offense.	Preparation consists of devising or arranging the means or measures necessary for the commission of the attempted offense. To find the accused guilty of this offense, you must find beyond a reasonable doubt that the accused went beyond preparatory steps, and his act amounted to a substantial step and a direct movement toward the commission of the intended offense.
A "substantial step" is one that is strongly	A substantial step is one that is strongly

[8] The facts of this episode are discussed within the first assignment of error on pages 9-10.

corroborative of the Accused['s] criminal intent and is indicative of his resolve to commit the offense. Proof that the offense of sexual assault actually occurred or was completed by the Accused is not required, however it must be proved beyond a reasonable doubt that at the time of the acts the Accused intended every element of sexual assault.	corroborative of the accused's criminal intent and is indicative of his resolve to commit the offense. Proof that the offense of sexual assault without consent actually occurred or was completed by the accused is not required. However, it must be proved beyond a reasonable doubt that, at the time of the act, the accused intended every element of sexual assault without consent.

In *Martinez*, while the appellant argued that the military judge failed to list any overt acts in his instructions, this Court determined the military judge did instruct the members what "certain act" the Appellant did with the specific intent to commit the offense of sexual assault. 2022 CCA LEXIS 324, at *106, 108. This Court found:

> He told [the members] they had to be convinced Appellant did the certain act of "attempt[ing] to commit a sexual act upon [Ms. ES], to wit penetrating her vulva with his penis, by causing bodily harm to her, to wit: penetrating her vulva with his penis without her consent." He further told them that in order to find Appellant guilty, they must be convinced beyond a reasonable doubt that this act "apparently tended to bring about the commission of the offense of sexual assault." Thus, the "certain act" identified by the military judge in the first element was the same as the "target" offense of sexual assault in the fourth element. As a result, the military told the members they had to conclude Appellant committed the act of attempting to sexually assault Ms. ES, and that this attempted sexual assault tended to bring about the commission of the offense of sexual assault. In sum, the instructions set up the paradox of Appellant being convicted of attempting to sexually assault Ms. ES based upon Appellant taking the substantial step of attempting to sexually assault her.

Id. at *108 (alterations in original). This Court therefore reasoned:

> the military judge's instruction called for entirely circular reasoning, instructing the members to determine whether Appellant attempted to sexually assault Ms. ES when he carried out the act of attempting to sexually assault her. Moreover, in light of the requirement to prove Appellant specifically intended to sexually assault Ms. ES in the manner charged, it is entirely unclear how the members could follow the military judge's instruction that they had to be convinced that Appellant attempted to sexually assault Ms. ES with the specific intent to commit sexual assault in the exact same manner he attempted to do so, and that the attempted sexual assault was a substantial step towards committing the same sexual assault. Compounding this issue, by defining the "certain act" as the charged offense, the military judge effectively relieved the members of their obligation to identify a certain act committed by Appellant in furtherance of his alleged intentional attempt to sexually

assault Ms. ES—essentially reading an element entirely out of the offense.

Id. at *109-10.

This error was repeated in SrA George's case when the military judge gave nearly identical instructions. *Compare Martinez*, 2022 CCA LEXIS 324, at *103 *with* R. at 553-54. This Court's analysis in *Martinez* should be adopted here where like *Martinez*, "the military judge's instruction called for entirely circular reasoning." *Martinez*, 2022 CCA LEXIS 324, at *109. Here, like *Martinez*, the military judge instructed the members to determine whether Appellant attempted to sexually assault WMB when he carried out the act of attempting to sexually assault her. R. at 553 ("the accused did a certain overt acts, that is: attempt to commit a sexual act upon [WMB] by penetrating her mouth with his penis without her consent"). Like *Martinez*, it is entirely unclear how the members could follow the military judge's instruction that they had to be convinced that SrA George attempted to sexually assault WMB with the specific intent to commit sexual assault in the exact same manner he attempted to do so, and that the attempted sexual assault was a substantial step towards committing the same sexual assault. R. at 553-54. Moreover, like *Martinez*, the military judge effectively relieved the members of their obligation to identify a certain act committed by SrA George in furtherance of his alleged intentional attempt to sexually assault WMB—essentially reading an element out of the offense. R. at 553.

B. Like *Martinez*, the military judge's instructions were not harmless beyond a reasonable doubt.

This Court determined the military judge's instructions in *Martinez*, which parallel those given to the members at SrA George's court-martial, were erroneous and that this error was not harmless beyond a reasonable doubt. *Martinez*, 2022 CCA LEXIS 324, at *110. The military judge "directed the members to an incorrect evidentiary burden," and "the members were faced with either a tautology or an impossibility" because the military judge "[i]n instructing on the first

element, . . . identified the 'certain act'—the predicate act for the attempt offense—as the ultimate offense" and each of the three remaining elements related back to that certain act." *Id*. at *110-11. Despite the strong evidence that Ms. ES struggled with the appellant (and appellant persisted for some time), this Court determined the evidence that the appellant "specifically intended to penetrate her vulva *without her consent* is far from conclusive." *Id*. at *111-12 (emphasis in original). The same is true here. *See* the first assignment of error on pages 10-11. The Government arguably demonstrated that SrA George was interested in oral sex, but it did not prove that he specifically intended to penetrate WMB's mouth *without her consent.*

Moreover, this Court was mindful in *Martinez*, the appellant was acquitted of committing abusive sexual contact during the same episode, as is also true here. *Martinez*, 2022 CCA LEXIS 324, at *112; R. at 631.

In *Martinez,* this Court presumed "the members followed—or at least attempted to follow—the military judge's instructions" and "if the members concluded Appellant committed the 'certain act' of attempting to sexually assault Ms. ES, as the military judge explained was required for the first element, then the remainder of the elements would simply fall by the wayside as a result of their own internally circular reasoning," paving the way for a finding of guilty without careful analysis of each element. *Id*. at *112 (citing *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000)). This Court concluded in *Martinez*, and should conclude here under the same reasoning, "the military judge's instructions amounted to an erroneous statement of the law, and because [this Court is] not privy to what the members made of the instructions, [it] cannot be confident their verdict was not a product of this error. Therefore, [it] cannot find the error harmless beyond a reasonable doubt." *Id*. This Court respectfully cannot be confident that there is no reasonable possibility that the error might have contributed to the conviction.

C. If this Court finds waiver, it should pierce it under its Article 66(d), UCMJ, authority in the interest of justice because of a lack of binding precedent on this issue, and because it is unjust for the trial court to lessen the burden for the Government, without a knowing and intentional waiver from SrA George.

This Court reviews de novo whether an accused has waived an issue. *United States v. Blackburn*, 80 M.J. 205, 209 (C.A.A.F. 2020) (citation omitted). Waiver is the affirmative "intentional relinquishment or abandonment of a known right." *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). Appellants waive all objections to the instructions, including regarding the elements of the offense, by "expressly and unequivocally acquiescing" to the military judge's instructions. *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020). However, in the absence of binding precedent, this Court has exercised its authority under Article 66, UCMJ, 10 U.S.C. § 866, "to pierce waiver in order to ensure an appellant has not been unfairly prejudiced by a legal error." *See United States v. Anderson*, No. ACM 39969, 2022 CCA LEXIS 181, *28 (A.F. Ct. Crim. App. Mar. 25, 2022) (unpub. op.) (piercing the appellant's affirmative acquiescence to the military judge's definition of the elements to determine whether the military judge's instructions were erroneous). Further, in *United States v. Lee*, No. ACM 39531 (f rev), 2020 CCA LEXIS 61, *17 (A.F. Ct. Crim. App. Feb. 26, 2020) (unpub. op.) (citing *United States v. Hardy*, 77 M.J. 438, 443 (C.A.A.F. 2018)), this Court recognized even where an appellant has waived an issue, it "must determine whether an error exists that merits piercing his waiver."

In the instant case, *Martinez* provides persuasive reasoning for why the military judge's instructions were erroneous—which merits piercing waiver—and further, there is no binding precedent for this issue. Therefore, like *Anderson*, this Court should pierce waiver under its Article 66(d), UCMJ, authority and review the issue de novo to ensure SrA George has not been unfairly prejudiced by a legal error that stemmed from the judiciary. *See id.*

In *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018) (quotation and citation omitted) (emphasis added), the Supreme Court, in assessing an error in calculating the sentencing guidelines by a District Court and choosing to exercise its discretion to correct that error, adopted "what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors *of their own devise* that threaten to require individuals to linger longer in federal prison than the law demands?" Here, where this error arose from the Air Force judiciary mere months after this Court decided *Martinez* (wherein this Court set aside the findings and sentence in that case due to the military judge's error) and where three additional military judges were observing SrA George's court-martial who should have been aware of this Court's decision, although unpublished,[9] it is unjust to deny correction. Moreover, this error deserves correction because the risk here is that SrA George was wrongly convicted because of the military judge's erroneous instructions and the consequences of that error are too great to ignore.[10]

Moreover, lessening the Government's burden of proof is a matter of constitutional magnitude. If the members concluded SrA George committed the "certain act" of attempting to sexually assault WMB, as the military judge explained was required for the first element, "then the remainder of the elements would simply fall by the wayside as a result of their own internally circular reasoning," lessening the Government's burden of proof. *Martinez*, 2022 CCA LEXIS 324, at *112. For example, as this Court explained in *Martinez*, and as is true here, "the military judge told the members they must be convinced that the 'certain act' amounted to a substantial

[9] The trial was being observed by his supervising judge, MM (then Chief, Circuit Military Judge of the Eastern Circuit) as well as two other military judges, TM and JR. R. at 9.

[10] SrA George was an otherwise rising star in the United States Air Force; he now faces life with a criminal conviction for attempted sexual assault, a dishonorable discharge, and the requirement to register as a sexual offender. *See* Entry of Judgment, 17 October 2022, at 2-3; R. at 650- 723; Pros. Ex. 2-3; Def. Ex. A-K.

step towards the commission of the intended offense." *Id*. at *111. "[T]he members here were told the preparatory step was the same as the intended offense, entirely eliminating the notion of a preparatory step." *Id*. "The same is true of the second element, in which the certain act must be accomplished with the specific intent to commit the intended offense, as well as the fourth element, in which the same certain act must tend to bring about the intended offense." *Id*.

When the burden is lessened for the Government, for example, through the admission of a stipulation of fact, there must be an intentional and knowing waiver from the accused. *See United States v. Sweeney*, 70 M.J. 296, 303-04 (C.A.A.F. 2011) (citation omitted) ("for a waiver [of constitutional rights] to be effective it must be clearly established that there was an intentional relinquishment of a known right or privilege"). A plea of guilty which would similarly lessen the Government's burden of proof, for example, requires "[an accused's] consent." *United States v. Riley*, 72 M.J. 115, 120 (C.A.A.F. 2013). As further example, so does a stipulation of fact. *United States v. Watruba*, 35 M.J. 448, 1992 CMA LEXIS 198, at *7 (C.M.A. 1992) (quotations and citation omitted) (alteration in original) ("the military judge is required to expressly communicate to the [accused] before accepting his confessional stipulation . . . it cannot be accepted without his consent," and "by stipulating . . . the accused alleviates [the Government's] burden.") Here, no express waiver was obtained from SrA George, and this Court should pierce any waiver from defense counsel because the result was the alleviation of the Government's burden without express consent from SrA George.

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

III.

SRA GEORGE WAS DEPRIVED OF HIS RIGHT TO A UNANIMOUS VERDICT.

Additional Facts

SrA George elected trial by officer and enlisted members. R. at 14. SrA George's panel consisted of eight members, and the military judge instructed them that "[t]he concurrence of at least three-fourths of members present when the vote is taken is required for any finding of guilty." R. at 615. It is unknown whether the members convicted Appellant by a unanimous verdict.

Standard of Review

"An appellant gets the benefit of changes to the law between the time of trial and the time of his appeal." *Tovarchavez*, 78 M.J. at 462. "A new rule of criminal procedure applies to cases on *direct* review, even if the defendant's trial has already concluded." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021) (emphasis in original). Thus, as the Court of Appeals for the Armed Forces (CAAF) has explained, when an appellant fails to object at trial to an error of constitutional dimension that was not yet resolved in his favor at the time of his trial, the "error in this case is forfeited rather than waived." *See Tovarchavez*, 78 M.J. at 462. In such circumstances, military appellate courts review for plain error, but "the prejudice analysis considers whether the error was harmless beyond a reasonable doubt." *Id*. (internal quotations omitted).

Law and Analysis

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

jury verdict: (2) under the Fifth Amendment's Due Process Clause; and, (3) under the Fifth Amendment's Equal Protection Clause.

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

SrA George recognizes that the CAAF's recent decision in *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), binds this Court. However, he raises this issue in anticipation of further litigation.[11]

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

IV.

THE GOVERNMENT CANNOT PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BECAUSE ITS APPLICATION IS NOT CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION WHEN SRA GEORGE WAS CONVICTED OF A NON-VIOLENT OFFENSE AND THIS COURT CAN DECIDE THAT QUESTION.

Additional Facts

After his conviction, the Government made the determination that SrA George's case met the firearm prohibition under 18 U.S.C. § 922. Entry of Judgment, 17 October 2022, at 3. The

[11] A petition for writ of certiorari is pending before the Supreme Court of the United States on this issue in *United States v. Cunningham*, 83 M.J. 367 (C.A.A.F. 2023), *petition for cert. filed* (U.S. Dec. 15, 2023) (No. 23-666). Petitions for writ of certiorari were denied in *United States v. Martinez*, 2023 CAAF LEXIS 494 (C.A.A.F. Jul. 18, 2023), *cert. denied*; and *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), *cert. denied*.

Government did not specify why, or under which section this case met the requirements of 18 U.S.C. § 922. *Id.*

Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *United States v. Lepore*, 81 M.J. 759, 760-61 (A.F. Ct. Crim. App. 2021).

Law and Analysis

The test for applying the Second Amendment is:

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

N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 142 S. Ct. 2111, 2129-30 (2022), (citation omitted).

In applying this test, the Fifth Circuit recently held that "§ 922(g)(8)'s ban on possession of firearms is an 'outlier[] that our ancestors would never have accepted.' Therefore, the statute is unconstitutional, and Rahimi's conviction under that statute must be vacated." *United States v. Rahimi*, 61 F.4th 443,461 (5th Cir. 2023), *cert granted*, __ U.S.__, 2023 U.S. LEXIS 2830 (30 June 2023) (citation omitted). Notably, Rahimi was "involved in five shootings" and pled guilty to "possessing a firearm while under a domestic violence restraining order." *Id.* at 448. Rahimi agreed to this domestic violence restraining order. *Id.* at 452.

The Fifth Circuit made three broad points. First, "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 461 (quoting *Bruen*, 142 S. Ct. at 2129-30). Therefore, the Government bears the burden of

justifying its regulation "by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id*.

Second, the Fifth Circuit recognized that *D.C. v. Heller*, 554 U.S. 570 (2008) and *Bruen* both contain language that could limit the Second Amendment's application to "law-abiding, responsible citizens." *Id.* at 451. The Fifth Circuit explained that "*Heller*'s reference to 'law-abiding, responsible' citizens meant to exclude from the Court's discussion groups that have historically been stripped of their Second Amendment rights, i.e., groups whose disarmament the Founders 'presumptively' tolerated or would have tolerated." *Id.* at 452. Here the issue is whether the Founders would have "presumptively" tolerated a citizen being stripped of his right to keep and bear arms after being convicted for a non-violent offense. *See id.*

Third, the Fifth Circuit held that "[t]he Government fails to demonstrate that § 922(g)(8)'s restriction of the Second Amendment right fits within our Nation's historical tradition of firearm regulation." *Id*. at 460. If the Government failed to prove that our Nation's historical tradition of firearm regulation did not include a violent offender who pled guilty to possessing a firearm while under an agreed upon domestic violence restraining order, then it likely cannot prove that its firearm prohibition on SrA George for a non-violent offense would be constitutional.

A further problem with the Statement of Trial Results and Entry of Judgment is that the Government did not indicate which specific subsection of § 922 it relied on to find that SrA George fell under the firearm prohibition. Notably, the Court did not convict him of an offense relating to him being "an unlawful user of or addicted to any controlled substance." 18 U.S.C. § 922(g)(3). Thus, SrA George is unable to argue which specific subsection of § 922 is unconstitutional in his case, although he knows it would not be the domestic violence or drugs section given the facts of his case. Regardless, given *Rahimi*'s holding it appears that the Government would not be able to

meet its burden of proving a historical analog that barred non-violent offenders from possessing firearms.

In *Lepore*, citing to the 2016 edition of the Rules for Courts-Martial, this Court held, "the mere fact that a firearms prohibition annotation, not required by the Rules for Courts-Martial, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within our limited authority under Article 66, UCMJ." 81 M.J. at 763. Despite the court-martial order erroneously identifying that A1C Lepore fell under the firearms prohibition, this Court did not act because the "correction relates to a collateral matter and is beyond the scope of our authority under Article 66." *Id.* at 760. However, this Court emphasized, "To be clear, we do not hold that this court lacks authority to direct correction of errors in a promulgating order with respect to the findings, sentence, or action of the convening authority." *Id.*

Six months after this Court's decision in *Lepore*, the CAAF decided *United States v. Lemire*. In that decision, CAAF granted Sergeant Lemire's petition, affirmed the Army Court of Criminal Appeals decision, and "directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex offender." 82 M.J. 263, at n* (C.A.A.F. 2022). CAAF's direction that the Army Court of Criminal Appeals fix—or order the Government to fix—the promulgating order, is at odds with this Court's holding in *Lepore*.

CAAF's decision in *Lemire* reveals three things: First, the CAAF has the power to order the correction of administrative errors in promulgating orders—even via unpublished decisions regardless of whether the initial requirement was a collateral consequence. Second, CAAF believes that Courts of Criminal Appeals have the power to address collateral consequences under Article 66 as well since it "directed" the Army Court of Criminal Appeals to fix—or have fixed—the erroneous requirement that Sergeant Lemire register as a sex offender. Third, if CAAF and

the Courts of Criminal Appeals have the power to fix administrative errors under Article 66 as they relate to collateral consequences, then perforce, they also have the power to address constitutional errors in promulgating orders even if the court deems them to be a collateral consequence.

Additionally, *Lepore* is distinguishable from this case. In *Lepore*, this Court made clear that "[a]ll references in this opinion to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2016 ed.)." 81 M.J. at 760 n.1. This Court then emphasized "the mere fact that a firearms prohibition annotation, *not required by the Rules for Courts-Martial*, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within our limited authority under Article 66, UCMJ." *Id.* at 763 (emphasis added). The 2019 rules, however, contain language that both the Statement of Trial Results and the Entry of Judgment contain "[a]ny additional information . . . required under regulations prescribed by the Secretary concerned." R.C.M. 1101(a)(6); 1111(b)(3)(F). At the time SrA George's Statement of Trial Results was signed, paragraph 13.3 of the Department of the Air Force Instruction 51-201, *Administration of Military Justice*, dated 8 April 2022, required the Statement of Trial results to include "whether the following criteria are met . . . firearm prohibitions." As such, this Court's analysis in *Lepore* is no longer controlling since the R.C.M. now requires—by incorporation—a determination on whether the firearm prohibition is triggered. Even if this Court does not find this argument persuasive, it still should consider the issue under *Lepore* since this issue is not an administrative fixing of paperwork, but an issue of constitutional magnitude.

WHEREFORE, SrA George requests this Court find the Government's firearm prohibition is unconstitutional, overrule *Lepore* in light of *Lemire*, and order that the Government correct the Statement of Trial Results.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 27 February 2024.

Respectfully submitted,

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APPENDIX A

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), SrA George, through Appellate Defense Counsel, personally requests that this Court consider the following matter:

WHETHER THE MILITARY JUDGE ERRED IN DENYING A DEFENSE CHALLENGE FOR CAUSE AGAINST A MEMBER.

Additional Facts

During general voir dire, defense counsel asked, "Do you believe that an alleged victim is entitled to the presumption that he or she is telling the truth?" and every member agreed. R. at 145. The military judge addressed this question with the members, explaining: (1) "I have instructed you that the accused is presumed to be innocent. So if you are presuming the victim to be correct, you are now going against my instruction that the accused is presumed to be innocent"; and (2) that the members have the duty of determining the believability of the witness. R. at 148-49. After having re-oriented the members to the instructions, the military judge asked if anyone still believed that the alleged victim was entitled to the presumption that he or she is telling the truth. R. at 149. Senior Master Sergeant (SMSgt) ME responded positively. *Id*.

SMSgt ME was recalled in individual voir dire, where the military judge asked SMSgt ME to elaborate. R. at 206-07. SMSgt ME stated:

> I would always make the assumption that the first thing someone is telling me is the truth. Whether it be the victim or whether it be somebody denying an allegation. I think in general, the first response should be to assume that someone is telling the truth, *until otherwise proven wrong*.

R. at 207 (emphasis added). The military judge then reminded SMSgt ME he "must presume that the accused is innocent until proven guilty," and that "none of the of the instructions that [he] gave [SMSgt ME] regarding witness testimony have the presumption of truth in [them]." *Id*. SMSgt ME explained that even when the military judge "re-cage[d] the instructions," he did not

see these things to be mutually exclusive." R. at 208. SMSgt ME stated he could follow the military judge's instructions, presume the accused to be innocent, and view the victim's testimony through the lens of the instructions the military judge gave him. *Id*. The military judge followed up further to ask, "are you telling me you would still presume her to be true or would it be part of the factors you would weigh in deciding whether or not it was truthful?" *Id*. SMSgt ME responded, "I believe I would take whatever testimony that was given regardless of who gave it into consideration." *Id*.

SrA George challenged SMSgt ME on the basis of implied bias for three reasons. R. at 249. First, SMSgt ME was an Inspector General investigator, which "cast a clout of potential bias over him." *Id*.; *see* R. at 213-16. Second, SMSgt ME previously sat as a member on a sexual assault trial. R. at 250; *see* R. at 123, 138-39, 209-10, 216-17. Third, SMSgt ME believed an alleged victim is entitled to the presumption that he or she is telling the truth. R. at 250; *see* R. at 145, 149, 206-09.

The military judge denied the defense's challenge of SMSgt ME, after applying the liberal grant mandate and finding his decision was not "terribly close." R. at 253-55.

Standard of Review

This Court reviews the military judge's ruling on a claim of implied bias "pursuant to a standard that is 'less deferential than abuse of discretion, but more deferential than de novo review.'" *United States v. Dockery*, 76 M.J. 91, 96 (C.A.A.F. 2017) (quoting *United States v. Peters*, 74 M.J. 31, 33 (C.A.A.F. 2015)). This standard is appropriate "in light of the fact that resolving claims of implied bias involves questions of fact and demeanor, not just law." *United States v. Woods*, 74 M.J. 238, 243 n.1 (C.A.A.F. 2015). Appellate courts afford greater deference to a military judge's ruling on a challenge for implied bias where the military judge puts his

analysis on the record and provides a "clear signal" he applied the correct law. *United States v. Rogers*, 75 M.J. 270, 273 (C.A.A.F. 2016) (citations omitted). "In cases where less deference is accorded, the analysis logically moves more towards a de novo standard of review." *Id*. Military judges who squarely address the liberal grant mandate on the record are given greater deference on appeal than those who do not. *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007).

Law and Analysis

An accused has "the right to an impartial and unbiased panel." *United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2012) (citation omitted). A person detailed to a court-martial shall be excused whenever it appears they "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N). "'Substantial doubt' exists where the presence of a member on the panel would cause the public to think 'that the accused received something less than a court of fair, impartial members,' injuring the public's perception of the fairness of the military justice system." *United States v. Commisso*, 76 M.J. 315, 323 (C.A.A.F. 2017) (citation omitted). "The burden of establishing that grounds for a challenge exist is upon the party making the challenge." R.C.M. 912(f)(3).

Potential court-martial members are subject to challenges for cause under actual bias and implied bias theories. *United States v. Hennis*, 79 M.J. 370, 384 (C.A.A.F. 2020). Under the former, the question is whether the member personally holds a bias "which will not yield to the military judge's instructions and the evidence presented at trial." *Nash*, 71 M.J. at 88 (citation omitted). Claims that a military judge erred with respect to challenges alleging actual bias are reviewed for an abuse of discretion. *Hennis*, 79 M.J. at 384.

Implied bias is measured by an objective standard. *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2010) (citation omitted). "Implied bias exists when, 'regardless of an individual

member's disclaimer of bias, most people in the same position would be prejudiced [that is, biased].'" *United States v. Briggs*, 64 M.J. 285, 286 (C.A.A.F. 2007) (quoting *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000) (alteration in original)). This Court assesses implied bias based on the "totality of the factual circumstances." *Bagstad*, 68 M.J. at 462 (citations omitted).

"The military judge is [ ] mandated to err on the side of granting a challenge[; t]his is what is meant by the liberal grant mandate." *Peters*, 74 M.J. at 34 (citation omitted). That is, "if after weighing the arguments for the implied bias challenge the military judge finds it a close question, the challenge should be granted." *Id*.

SrA George's challenge of SMSgt ME should have been granted because he believed an alleged victim is entitled to the presumption that he or she is telling the truth and struggled to understand how this was in opposition to the military judge's instructions. R. at 145, 149, 206-09. Ultimately, the military judge denied the defense's challenge, finding "his presumption generally is when somebody talks to him that he presumes that person is telling the truth, and saw that question as mutually exclusive as to the process here in the court." R. at 254. However, SMSgt ME merely parroted agreement to apply the instructions as provided by the military judge and in doing so, his explanation that he "would take whatever testimony that was given regardless of who gave it into consideration" still left open a question of whether he would believe the alleged victim "*until otherwise proven wrong*." R. at 206-09. Moreover, SMSgt ME was a senior ranking member of the United States Air Force who had previously sat on a court-martial. R. at 123, 138-39, 209. His position on this issue, despite experience with the military justice system, demonstrates this was a close question and the military judge erred in denying the defense's challenge.

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

WHETHER THE MILITARY JUDGE ERRED IN REFUSING TO INSTRUCT THE MEMBERS AS TO A GOVERNMENT WITNESS'S PRIOR INCONSISTENT STATEMENT.

Additional Facts

QG testified that after he saw SrA George's hand on WMB's head and WMB was upset with SrA George, someone asked "what is going on." R. at 478. In response, WMB responded "George is trying to make me suck his dick." *Id*. On cross-examination, QG agreed that when he spoke to the Office of Special Investigations (OSI), he never told them about WMB "making a statement that [SrA] George was trying to make me suck his dick in the car." R. at 482. QG further clarified he "probably said it to OSI but probably just never wrote it down."[12] R. at 491. QG was "a hundred percent sure" he did not write this statement down, however. R. at 492. QG stated he did not leave this statement out on purpose but that it "probably just slipped [his] mind at the time." R. at 493-94. QG agreed it was "an important aspect of the story," but "all of it is important." R. at 494.

The defense requested a prior inconsistent statement instruction for QG. R. at 531, 533. The military judge denied this request. R. at 547. While the military judge agreed with defense counsel that QG "indicated that he had left out" the alleged statement by WMB in the car when he wrote his statement for OSI, the military judge found, QG clarified "he didn't put everything he told OSI into the statement," and everything he put in his statement was important. *Id*.; *see* R. at 494.

[12] *But see* 1st Indorsement, DD Form 458, Charge Sheet, 19 November 2021, Attachment 2, Report of Investigation, 1 Oct 21, paragraph 2-13 (OSI's recitation of QG's sworn statement).

Standard of Review

Whether a panel was properly instructed is a question of law reviewed de novo. *United States v. Hale*, 78 M.J. 268, 274 (C.A.A.F. 2019). This Court reviews "the military judge's refusal to give the defense-requested instruction on prior inconsistent statements under an abuse-of-discretion standard of review." *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993) (internal citations omitted).

Law and Analysis

"The impeachment power of a prior-inconsistent-statement rule of evidence arises from the conflict between a witness' statements." *Id*. at 477 (citing *United States v. Hale*, 422 U.S. 171, (1975)). For a statement to be inconsistent, an inconsistency is required. *Id*. at 478 (internal quotation and citation omitted). "[W]hether testimony is inconsistent with a prior statement is not limited to diametrically opposed answers but may be found as well in evasive answers, inability to recall, silence, or changes of position." *Id*. (internal citations omitted). "The military judge has considerable discretion to determine if trial testimony is inconsistent with earlier assertions and to determine both admissibility and use of prior statements." *Id*. (internal citations omitted). Further, "while counsel may request specific instructions from the military judge, the judge has substantial discretionary power in deciding on the instructions to give." *Id*. (internal citations omitted).

The test to determine if denial of a requested instruction constitutes error is whether "(1) the charge is correct; (2) 'it is not substantially covered in the main charge'; and (3) 'it is on such a vital point in the case that the failure to give it deprived defendant of a defense or seriously impaired its effective presentation.'" *Id*. (internal citation omitted).

QG's prior statement was silent on the alleged statement by WMB and therefore inconsistent with his trial testimony. This testimony was on a vital point: WMB's immediate

allegation that SrA George was trying to make her perform oral sex and the failure to give this instruction impaired the defense's argument that QG was not consistent, when his testimony was critical to the Government's case.

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

WHETHER THE VICTIM'S WRITTEN UNSWORN STATEMENT CONTAINED IMPERMISSIBLE CONTENT.

Additional Facts

SrA George's conviction for attempted sexual assault without consent was against WMB. At the conclusion of the Government's presentencing case, WMB offered a written unsworn statement and read that document orally into the record. R. at 645-46; Court Exhibit (Ct. Ex.) A. Before admitting Ct. Ex. A, the military judge reviewed a working copy of the exhibit. R. at 644. The unsigned unsworn statement is on the Air Force Trial Judiciary's document reserved for the formal pleadings of the parties:

DEPARTMENT OF THE AIR FORCE
UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES	)	
	)	VICTIM IMPACT
v.	)	STATEMENT (W.B.)
	)	
SRA DENNIS A. GEORGE, JR. 1st Maintenance Squadron (ACC) Joint Base Langley-Eustis, VA	)	18 August 2022

COMES NOW W.B., and submits the following Victim Impact Statement, in accordance with Rules for Courts-Martial 1001(c)(5)(B):

Ct. Ex. A; *see also* Uniform Rules of Practice Before Air Force Courts-Martial. The defense counsel did not object to the document and the military judge admitted it. R. at 644, 646.

Standard of Review

A military judge's interpretation of R.C.M. 1001(c) is a question of law this Court reviews de novo, while a military judge's decision to admit an unsworn statement is reviewed for an abuse of discretion. *United States v. Edwards*, 82 M.J. 239, 243 (C.A.A.F. 2022) (citations omitted).

Law and Analysis

A victim has a right to be reasonably heard at a sentencing hearing. Article 6b(a)(4)(B), UCMJ, 10 U.S.C. § 806b(a)(4)(B). The President has determined it is reasonable to offer an unsworn statement during the sentencing proceedings in a non-capital case. R.C.M. 1001(c)(2)(D)(ii). The unsworn statement can be oral, written, or both. R.C.M. 1001(c)(5)(A). It may only contain matters of victim impact or mitigation. R.C.M. 1001(c)(3). A victim's statement should not exceed what is permitted under R.C.M. 1001(c)(3). R.C.M. 1001, *Discussion*. Victim impact includes any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty. R.C.M. 1001(c)(2)(B).

This Court has held an affirmative non-objection to the consideration of a victim unsworn statement waives the issue for appeal. *United States v. Andersen*, 82 M.J. 543, 547 (A.F. Ct. Crim. App. 2022). Pursuant to Article 66(d), UCMJ, however, this Court maintains the "unique statutory responsibility" to affirm only such findings of guilty and so much of the sentence that is correct and should be approved and, thus, retains "authority to address errors raised for the first time on appeal despite waiver of those errors at trial." *Id*. (citing *Hardy*, 77 M.J. at 442-43).

A. <u>This Court should not find waiver, or alternatively, pierce waiver to review the issue.</u>

If this Court finds waiver under the circumstances, there are compelling reasons to pierce waiver. Erroneous victim unsworn statements have been the subject of repeated litigation at this

Court and the CAAF over the last number of years.[13] One of the purposes of appellate law, beyond resolving this case, is to provide "guidance to the field." *United States v. Nieto*, 66 M.J. 146, 151 (C.A.A.F. 2008) (Baker, J., concurring in the result). To simply conclude this issue was waived by trial defense counsel's non-objection does not provide further guidance to the field about the scope and contours of proper victim unsworn statements. The only guidance it would provide is that defense counsel must make a timely objection or run the risk of waiving the issue for appellate review. But if trial defense counsel have not learned that lesson before now, this case will not be the one that turns the tides. What this case *can* do is provide very clear and specific guidance to military judges and trial practitioners in Air Force courts-martial of what to do and not to do with victim unsworn statements. That is what is needed at this moment in military appellate practice. Deciding unsworn statement issues, one at a time, case by case, will develop useful data points for trial practitioners. For these reasons, if this Court concludes this issue has been waived, it should pierce waiver and review the merits of the issue. And, regardless of whether Appellant is entitled to relief, this Court can provide necessary and clear guidance to the field.

B. The military judge erred.

The military judge erred in admitting Court Exhibit A because the unsworn statement was presented on the Air Force Judiciary's pleading document. *See* Ct. Ex. A. This is error because the content of these words is neither victim impact nor mitigation, thus, it is prohibited. R.C.M.

[13] *See e.g., United States v. Cunningham*, 83 M.J. 367 (C.A.A.F. 2023), *petition for cert. filed* (U.S. Dec. 15, 2023) (No. 23-666); *United States v. Harrington*, 83 M.J. 408 (C.A.A.F. 2023); *United States v. Edwards*, 82 M.J. 239 (C.A.A.F. 2022); *United States v. Tyler*, 81 M.J. 108 (C.A.A.F. 2021); *United States v. Hamilton*, 78 M.J. 335 (C.A.A.F. 2019); *United States v. Barker*, 77 M.J. 377 (C.A.A.F. 2018); *United States v. Andersen*, 82 M.J. 543, 547 (A.F. Ct. Crim. App. 2022); *United States v. Bailey*, No. ACM 39935, 2021 CCA LEXIS 380 (A.F. Ct. Crim. App. July 30, 2021) (unpub. op.); *United States v. Berry*, No. ACM. 40170, 2022 CCA LEXIS 716 (A.F. Ct. Crim. App. Dec. 15, 2022) (unpub. op.).

1001(c)(3). Moreover, placing the unsworn statement on this type of document engenders several problems. It makes it look as if the Air Force Judiciary endorses the content. It also demonstrates the victim counsels' ownership of the document as WMB herself would never possess such a document template on which she could author a statement of her own. The statement must be personal to the victim, and this at least raises the concern WMB's counsel had a heavy influence on the document which depersonalizes it from WMB herself. It is clear and obvious error to permit the document to be presented with this heading.

Prejudice assessments by an appellate court are much more difficult to apply in sentencing contexts than in findings. *Edwards*, 82 M.J. at 247. This is, in part, because there is a "broad spectrum of lawful punishments" that may be adjudged, as compared to the "binary" decision on guilt. *Id.* If additional punishment was adjudged, SrA George has been materially prejudiced. *See Cunningham*, 83 M.J. at 377 (Maggs, J., dissenting) ("Even if the PowerPoint presentation only added several months to his confinement [when the Appellant was sentenced to confinement for eighteen years], that would still be material prejudice to Appellant."). Further, the Supreme Court of the United States observed "any amount of actual jail time is significant, and ha[s] exceptionally severe consequences for the incarcerated individual [and] for society which bears the direct and indirect costs of incarceration." *Rosales-Mireles*, 138 S. Ct. at 1907 (internal citations and quotations omitted) (alterations in original).

Like most cases, the record of this case does not reveal the actual extent to which the impermissible content influenced SrA George's sentence, but the military judge considered and admitted Ct. Ex. A after having reviewed a working copy, a time when he should have recognized the obvious impermissible content. R. at 644. SrA George presented a significant sentencing case involving eight letters in support and testimony from seven witnesses, to include testimony

from a forensic psychologist regarding extenuating and mitigating facts of the offense. Def. Ex. B-I; R. at 650-758. In comparison, the Government offered a minimal sentencing case which included only mitigating information in the form of SrA George's personal data sheet and enlisted performance reports. Pros. Ex. 2-3. Nevertheless, SrA George was sentenced to five months' confinement.

WHEREFORE, SrA George respectfully requests this Honorable Court reassess his sentence.

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee, v. Senior Airman (E-4) **DENNIS A. GEORGE JR.,** USAF Appellant.	))))))))))	**UNITED STATES ANSWER TO ASSIGNMENTS OF ERROR** Before Panel No. 1 No. ACM 40397 27 March 2024

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

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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee,	)	**UNITED STATES ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	
	)	Before Panel No. 1
Senior Airman (E-4) **DENNIS A. GEORGE JR.,** USAF Appellant.	)	No. ACM 40397
	)	27 March 2024

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

ISSUES PRESENTED

I.

WHETHER THE EVIDENCE IS LEGALLY AND FACTUALLY SUFFICIENT TO SUPPORT THE FINDINGS OF GUILTY FOR CHARGE I AND ITS SPECIFICATION.

II.

WHETHER THE MEMBERS WERE IMPROPERLY INSTRUCTED BECAUSE THE INSTRUCTIONS CALLED FOR CIRCULAR REASONING.

III.

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

IV.

WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY DEMONSTRATING THAT

ITS APPLICATION IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION WHEN APPELLANT WAS CONVICTED OF A NON-VIOLENT OFFENSE AND WHETHER THIS COURT CAN DECIDE THAT QUESTION UNDER UNITED STATES V. LEMIRE, 82 M.J. 263 (C.A.A.F. 2022) OR UNITED STATES V. LEPORE, 81 M.J. 759 (A.F. CT. CRIM. APP. 2021).

V. [1]

WHETHER THE MILITARY JUDGE ERRED IN DENYING A DEFENSE CHALLENGE FOR CAUSE AGAINST A MEMBER.

VI.

WHETHER THE MILITARY JUDGE ERRED IN REFUSING TO INSTRUCT THE MEMBERS AS TO A GOVERNMENT WITNESS'S PRIOR INCONSISTENT STATEMENT.

VII.

WHETHER THE VICTIM'S UNSWORN STATEMENT CONTAINED IMPERMISSIBLE CONTENT.

STATEMENT OF CASE

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

STATEMENT OF FACTS

Appellant and WMB were co-workers stationed at Joint Base Langley-Eustis in 2021. (R. at 381.) While they would frequently see each other at work, they had few individual interactions at work or outside of work. (Id.) When they were together it was normally in group setting. (Id.)

[1] Issues V though VII are raised in accordance with United States v. Grostefon, 12 M.J. 431 (C.M.A. 1992).

On the evening of 3 July 2021, WMB, Appellant and co-workers LC, QG, and BL went out to a bar. (R. at 384.) The group met at LC's apartment before going out and then moved over to BL's house where they had a couple of alcoholic drinks. (R. at 385.) Nobody was drinking excessively at the time. (Id.) Appellant was resistant to go out that night but the group, including WMB, encouraged him to go out, and Appellant eventually agreed to join the group. (R.at 442, 469.) Once the group was together, BL drove the group to Keland's, a restaurant/bar in Newport News, Virginia. (R. at 386 422.) On the way to Keland's WMB, LC, and QG were in the backseat and Appellant was in the front passenger seat. (R. at 386, 471.) Appellant is approximately 6'4'. (R. at 426.)

When the group arrived at Keland's, everyone was drinking. (R. at 387.) WMB bought Appellant a couple of drinks because he had previously complained about not having any money. (R. at 387.)

At one point in the evening Appellant walked up to where WMB was sitting in a horseshoe-shaped booth, and Appellant indicated that he wanted WMB to give him "head." (R. at 388, 443.) WMB understood the term "head" to mean oral sex. (R. at 389.) WMB was seated at the booth and Appellant was standing right in front of her so that she was eye-level with Appellant's crotch. (R. at 389.) WMB tried to laugh it off to defuse the situation and said no. (R. at 389, 444.) At one point a little later in the evening Appellant again asked for oral sex from WMB and pushed her further into the booth; WMB put her hand up to stop Appellant from advancing and told him, "no." (R. at 389-390.) While at Keland's, BL remembers seeing Appellant and WMB dancing/grinding on the dance floor. (R. at 432.)

WMB was not sure if Appellant was joking when he asked her for oral sex and did not want to escalate the situation by being aggressive back toward Appellant; as a result, she

discussed the situation with QG and suggested that they leave because Appellant was "getting kind of drunk." (R. at 390.) However, at no point during the evening did Appellant appear that he was stumbling or having difficulty walking. (R. at 472.) The group planned to leave Keland's to return to BL's house where everyone would take an Uber to get home. (R. at 391.)

Appellant instruct LC to sit in the front seat so that he could sit in the backseat. (R. at 445.) WMB sat in the middle backseat with Appellant to her left and QG to her right; BL again drove, and LC was in the front passenger seat. (R. at 391-392.) On the way back to BL's house everyone was "rowdy," and there was music playing in the car. (R. at 428.) During the car ride, Appellant put his right arm around WMB and was whispering in her ear that she needed to give him head. (R. at 392.) Appellant stated that he was "being dead ass." (Id.) WMB understood this term to mean that Appellant was serious about the request. (Id.) WMB was not sure if other passengers in the car could hear Appellant because it was "pretty loud in the car." (Id.) WMB responded "no" to Appellant's requests. (R. at 393.)

Appellant was wearing a V-neck crop top and at some point, during the ride Appellant pulled WMB's shirt to the side to expose her breast and started groping her. (R. at 393-394) WMB stated "no" when Appellant started touching her breast and did not consent to the touching. (R. at 394.) When LC turned around and looked at WMB, she noticed that WMB's breast was exposed and that WMB appeared upset and yelling at Appellant. (R. at 446.) However, LC did not see Appellant actually touching WMB's breast. (R. at 459.)

Appellant continued repeating that WMB should give him "head" to which WMB continually responded "no." (R. at 395.) Appellant then grabbed the back of WMB's neck and pushed her head toward his crotch. (R. at 395, 477.) WMB was able to resist and pushed herself away, but before she could say anything to him to stop, Appellant grabbed her again with more

force, and it was a lot harder for her to push back. (Id.) WMB's cheek contacted Appellant's crotch, and she could feel his zipper. (R. at 396.)

WMB used her hand to alert QG to the situation, who was leaning over the front seat. (Id.) QG noticed the situation and was able to pull Appellant off WMB. (Id.) Appellant pretty much stopped holding WMB's head once QG had been alerted and asked what was going on. (R. at 477.) QG described the position of WMB's head to Appellant's crotch as three quarters of a tank – comparing it to a gas gauge. (R. at 478.) After QG intervened, WMB started yelling at Appellant and swinging at him. (R. at 397.) At around that time the car stopped at a 7/11, and Appellant started taunting WMB; he was laughing and calling her crazy; he was acting like he did not know why WMB was reacting. (R. at 397-398, 450.)

When Appellant exited the vehicle, WMB and LC noticed that his pants were unzipped, and his underwear was visible. (R. at 398, 449-450.) BL then took Appellant home and left WMB, QG, and LC at 7/11. (Id.) LC's boyfriend later arrived at 7/11 to bring WMG, QG, and LC home that evening. (R. at 398.)

After that night Appellant sought to apologize to WMB after QG explained to him what he had seen. (R. at 480.) However, WMB refused to speak with Appellant. (Id.) As a result, WMB has had no communication or contact with Appellant since that evening. (R. at 398.)

ARGUMENT

I.

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

Standard of Review

The standard of review for factual and legal sufficiency is de novo. United States v. McAlhaney, 83 M.J. 164, 166 (C.A.A.F. 2023) (citing United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006).

Law

Attempt in violation of Article 80, UCMJ requires these elements: (1) that the accused did a certain overt act; (2) that the act was done with the specific intent to commit a certain offense under the UCMJ; (3) that the act amounted to more than mere preparation; and (4) that the act apparently tended to effect the commission of the intended act. Manual for Courts-Martial, pt. IV, para. 4.b (2019 ed.) (MCM)[2]. The sample specification for violation of Article 80 provides:

> In that _____ (personal jurisdiction data) did, (at/on board-location), (subject-matter jurisdiction data, if required), on or about ____20__, attempt to (describe offense with sufficient detail to include expressly or by necessary implication every element).

Id. at para. 4.e.

In order to state the elements of an inchoate offense under Articles 80 and 81, UCMJ, a specification is not required to expressly allege each element of the predicate offense. United States v. Norwood, 71 M.J. 204, 205 (C.A.A.F. 2012). Instead, a charge and specification are sufficient if they, first contain the elements of the offense charged and fairly inform a defendant

[2] All references to the Manual for Courts-Martial (MCM) are to the 2019 edition.

of the charge against which he must defend, and second, enable him to plead an acquittal or conviction in bar of future prosecutions for the same offense. Id. at 206 citing Hamling v. United States, 418 U.S. 87, 117, (1974).

In addition to not requiring the elements of the predicate offense, military case law has long accepted the pleading of attempts under Article 80, UCMJ without alleging the overt act. United States v. Mobley, 31 M.J. 273, 278 (C.M.A. 1990) citing United States v. Marshall, 40 C.M.R. 138, 142-43 (C.M.A. 1969). Nothing in the Manual for Courts-Martial requires -- either implicitly or expressly -- that the overt act must be pleaded as part of the specification in an attempt. Id.

The test for legal sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019). (internal citations omitted). This test does not require a court to ask whether it believes the evidence established guilt beyond a reasonable doubt, but rather whether any rational factfinder could do so. United States v. Acevedo, 77 M.J. 185, 187 (C.A.A.F. 2017). The term reasonable doubt, however, does not mean that the evidence must be free from conflict. United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017), aff'd, 77 M.J. 289 (C.A.A.F. 2018). In resolving questions of legal sufficiency, the Court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution. United States v. Plant, 74 M.J. 297, 301 (C.A.A.F. 2015). The test for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F.

2011) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1973)). As a result, the standard for legal sufficiency involves a very low threshold to sustain a conviction. King, 78 M.J. at 221.

The factual sufficiency standard in the revised Article 66 statute has altered this Court's review from taking a fresh, impartial look at the evidence requiring this Court to be convinced of guilt beyond a reasonable doubt, to a standard where an appellant has the burden to both raise a specific factual issue, and to show that his or her conviction is against the weight of the evidence admitted at trial. United States v. Harvey, 83 M.J. 685, 693 (N.M. Ct. Crim. App. 2023). Thus, Congress has implicitly created a rebuttable presumption that in reviewing a conviction, a court of criminal appeals presumes that an appellant is, in fact, guilty. Id.

This Court must first determine if an appellant has made a specific showing of a deficiency in proof. Article 66(d)(1)(B)(i). If an appellant makes this showing, this Court should weigh the evidence in a deferential manner to the result at trial; and if this Court is clearly convinced that, when weighed, the evidence (including the testimony) does not support a conviction, it may set it aside. Harvey, 83 M.J. at 693. This Court should not apply a "beyond a reasonable doubt" standard because to do so would be inconsistent with a plain reading of the statue. See Id. It would also be inconsistent with the required deference to the fact that the trial court saw and heard the witnesses and other evidence; and deference to the findings of fact entered into the record by the military judge. Article 66(d)(1)(B)(ii).

Accordingly, this Court should not apply a beyond a reasonable doubt standard; and this Court should affirm the finding of guilt unless it is clearly convinced that it was against the weight of the evidence.

Analysis

A. Appellant's conviction for Attempted Sexual Assault is legally sufficient and did not require that the Government provide proof that Appellant penetrated WMB's mouth with his penis; such language was included in the specification to provide notice to Appellant of the underlying attempt offense.

Appellant asserts that the Charge and its Specification required that the Government prove a specific act, that Appellant penetrated WMB's mouth with his penis. (App. Br. at 7.) It did not. The Charge and its Specification provided that Appellant:

> Did, at or near Newport News, Virginia, on or about 4 July 2021, attempt to commit a sexual act upon [WMB] by penetrating her mouth with his penis without her consent.

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

Although the language in the specification cited by Appellant identified a specific act, it did not obligate the Government to prove this act. Instead, this language was designed to put Appellant on notice of the underlying/predicate offense, so that he knew what he had to defend against and to prevent double jeopardy.

The Charge and its specification were based on the sample specification listed in the MCM. After the jurisdictional information, the sample specification instructed the drafter to describe the predicate offense with sufficient detail to include expressly or by necessary implication every element. MCM, pt. IV, para. 4.e.

Consistent with this mandate to "include expressly or by necessary implication every element" of the offense, in Norwood, CAAF held that "in order to state the elements of an inchoate offense under Article 80 UCMJ, a specification is not required to expressly allege each element of the predicate offense," "sufficient specificity is required so that an accused is aware of the nature of the underlying target or predicate offense." Turner, 79 M.J. at 404 citing Norwood, 71 M.J. 204, 205, 207 (C.A.A.F. 2012) (citing United States v. Resendiz-Ponce, 549

U.S. 102 (2007); Wong Tai v. United States, 273 U.S. 77 (1927)). As a result, the language "attempt to commit a sexual act upon WMB by penetrating her mouth with his penis without her consent" did exactly that. It provided sufficient specificity to Appellant so that he was aware of the nature of the underlying target or predicate offense: commission of a sexual act *by* penetration without consent. The inclusion of this language was therefore consistent with the sample specification in the MCM.

Had this language been absent from the Charge and its Specification, Appellant would be in a position to argue the specification was vague and failed to put him on notice of the specific conduct at issue. Appellant would have been left wondering whether the attempted sexual assault was related to his alleged fondling of WMB's breast, when he approached her at booth in the club, or some other unidentified sexual contact throughout the night. (R. at 393, 406.) In short, the Government did not have to list every element of the underlying offense. Norwood, 71 M.J. at 204. But the Government did have to provide sufficient information about the underlying offense. Id. at 206. And this is exactly what the Government did when it drafted the subject specification.

Appellant further asserts that the specific wording of the specification required to Government to prove Appellant penetrated WMB's mouth with his penis. (App. Br. at 7.) Appellant states that the position of the prepositional phrase "by penetrating" describes how the attempted sexual assault was executed. (Id.) However, the correct reading of the specification is that the prepositional phrase modified how the sexual assault was to be committed – not the attempt. A prepositional phrase with an adverbial or adjectival function should be as close as possible to the word it modifies to avoid awkwardness, ambiguity, or unintended meanings. United States v. Nader, 542 F.3d 713, 717-718 (9th Cir. 2008) (citing William Strunk, Jr. & E. B.

White, The Elements of Style 30 (4th ed. 2000)) ("Modifiers should come, if possible, next to the words they modify."). In this case the prepositional phrase "by penetrating" is closest to "commit a sexual assault" rather than the word "attempt." The prepositional phrase is therefore designed to modify the way in which the sexual assault was committed and not the attempt.

In sum, the Government did not have to prove that Appellant penetrated WMB's mouth with his penis as alleged by Appellant. Rather, the Government had to prove an overt act that was done with the specific intent to commit the offense of sexual assault under the UCMJ. The Government did so through the use of WMB's testimony where she testified that Appellant kept "repeating stuff" about how she should perform oral sex on him and then grabbed the back of her neck and pushed her head into his crotch with pants unzipped. (R. at 395.) This testimony alone satisfied the Government's requirement to establish an overt act. And viewing this testimony 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. Appellant has also failed to make a specific showing of a deficiency in proof such that this Court should be clearly convinced that the evidence does not support a conviction. Accordingly, this Court should deny this assignment of error.

B. Appellant's conviction for sexual assault is factually and legally sufficient because the Government provided sufficient direct and circumstantial evidence of Appellant's specific intent to commit a sexual assault.

Appellant argues that the Government failed to prove that he specifically intended to commit a sexual assault upon WMB without her consent. (App. Br. at 9.) In support of this assertion, Appellant relies on United States v. Martinez, No. ACM 39903 (f rev), 2022 CCA LEXIS 324 (A.F. Ct. Crim. App. 2022) (unpub. op.). (Id.) Appellant's reliance on this case is misplaced because the facts are distinguishable from Appellant's situation. The Government

provided substantial circumstantial evidence of Appellant's specific intent to sexually assault WMB.

Both direct and circumstantial evidence support a find that Appellant had the specific intent to sexually assault WMB. Acevedo, 77 M.J. at 189. ("Intent can be shown by circumstantial evidence." (citing United States v. Vela, 71 M.J. 283, 286 (C.A.A.F. 2012))); see also United States v. Kearns, 73 M.J. 177, 182 (C.A.A.F. 2014) ("[T]he Government was free to prove Appellant's intent by circumstantial evidence." (citing Brooks v. United States, 309 F.2d 580, 583 (10th Cir. 1962) ("The conduct of the parties within a reasonable time before and after [an act] are circumstances which a jury may consider in determining such intent, motive or purpose."))).

The direct evidence Appellant intended to sexually assault WMB was the numerous times throughout the evening that Appellant stated that he wanted "head" [oral sex] from WMB including several times at the bar, while seated in a booth, and on the ride back to BL's house. (R. at 388, 389, 443, 392) Appellant also stated that he was being "dead ass" about the request to which WMB understood to mean that he was being serious. (R. at 392.) While these statements alone do not mean that Appellant had the intent to sexually assault WMB, they do support a finding that Appellant wanted oral sex from WMB. The evidence also supports a finding that WMB was not interested in having oral sex with Appellant at that time and therefore did not consent, because she either dismissed the request, laughed it off, or said no on each occasion. (R. at 389-390, 395.) Appellant argues that no one else in the car heard the WMB's protests, but acknowledges that the music was loud, and the sunroof was open. (App. Br. at 10.) Appellant thereby acknowledged that WMB may have said no, but it was too loud for the other occupants to hear. Appellant also concedes that LC heard WMB state, "I told you to stop but

you didn't," in relation to WMB's exposed breast. (Id.) Such a protest by WMB was consistent with her past denials related to oral sex and makes it more likely that she did in fact deny Appellant's request for oral sex.

Circumstantial evidence supported a finding that Appellant intended to sexually assault WMB. He sat in the backseat of the car, despite the fact that he is 6'4", unzipped his pants, and on two occasions grabbed WMB by the back of the head and forced her head to his lap. (R. at 426, 445, 395-396, 477.) This intent is underscored by the fact that when WMB tried to push him away he doubled down and applied more force to her head. (R. at 395.396.) Appellant's escalation of his conduct after WMB manifested her nonconsent shows that Appellant specifically intended to penetrate her mouth with his penis without her consent. Appellant only stopped when QG was alerted to the situation and asked what was going on. (R. at 477.) While Appellant may not have stated that he intended to sexually assault WMB by forcing his penis into her mouth, there is no other reasonable explanation for his actions. As a result, there is sufficient evidence to support a finding Appellant specifically intended to sexually assault WMB.

While Appellant relies on Martinez and its dicta stating that the evidence appellant "specifically intended to penetrate her vulva without her consent was far from conclusive," 2022 CCA LEXIS 324, at *112, Appellant ignores one key difference. In Martinez, the appellant relented of his own accord. Id. at *95-96. There was no one else present to stop appellant from sexually assaulting his wife, and he had positioned her so that she could feel his erect penis on her vagina through their respective clothing. Id. This evidence supports a finding that in Martinez the appellant had overcome his victim's physical resistance and could have continued.

Accordingly, the fact that the appellant in Martinez stopped with no external intervention was significant in determining his specific intent and what distinguishes it from the current situation.

By contract, Appellant only relented when QG turned to him and asked what was going on. (R. at 477.) There is no evidence Appellant would have stopped on his own accord, and had no other individuals been present, he may have been successful in consummating the sexual assault. This is especially true given that when WMB physically resisted, he responded by applying more force. (R. at 395.)

Appellant asserts that he "had no idea" why WMB was acting the way she was and that he had no memory of what happened the night before. (App. Br. at 11.) These facts do not help Appellant's case. Common sense suggests that he was unlikely to admit that he knew why WMB was upset because, in doing so, he would be incriminating himself. And the fact that he did not remember what happened the following morning – even if true – is irrelevant to Appellant's specific intent in the car. What is more relevant and indicative of his specific intent at the time of the event is that Appellant sought to apologize to WMB after QG explained to him what they saw. (R. at 480.) The fact that he sought to apologize is indicative of remorse and some evidence that he was aware of what transpired.

In sum, substantial direct and circumstantial evidence supports a finding that Appellant had the specific intent to sexually assault WMB. He repeatedly voiced his desire that he receive oral sex from her, unzipped his pants and forcibly held her head to his lap. And when she resisted, he applied even more force. There is no other reasonable explanation for his actions other than he intended to sexually assault WMB. Viewing this 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. Appellant has also failed to make a specific showing of a

deficiency in proof such that this Court should be clearly convinced that the evidence does not support a conviction. Accordingly, this Court should deny this assignment of error.

II.

THE MEMBERS WERE PROPERLY INSTRUCTED WITH REGARD TO THE CHARGE AND ITS SPECIFICATION.

Additional Facts

At the conclusion of trial, the military judge provided the following instructions with regard to Charge I and its Specification, Attempted Sexual Assault:

> Charge I, Attempt, Sexual Assault without Consent. That, at or near Newport News, Virginia, on or about 4 July 2021, the accused did a certain overt act, that is: attempt to commit a sexual act upon [WMB] by penetrating her mouth with his penis without her consent;
>
> That the act was done with specific intent to commit the offense of sexual assault without consent; That the act amounted to more than mere preparation, that is, it was substantial, excuse me, it was a substantial step and a direct movement toward the commission of the intended offense; and that such act apparently tended to bring about the commission of the offense of sexual assault without consent, that is, the act apparently would have resulted in the actual commission of the offense of sexual assault without consent except for [WMB'S] physical and or verbal protestation, which prevented completion of that offense.

(R. at 553.)

The military judge instructed on preparation as follows:

> Preparation consists of devising or arranging the means or measures necessary for the commission of the attempted offense. To find the accused guilty of this offense, you must find beyond a reasonable doubt that the accused went beyond preparatory steps, and his act amounted to a substantial step and a direct movement toward the commission of the intended offense. A substantial step is one that is strongly corroborative of the accused's criminal intent and is indicative of his resolve to commit the offense.

(R. at 553-554.)

The military judge provided the elements of the attempted offense as follows:

> That at or near Newport News, Virginia, on or about 4 July 2021, the accused committed a sexual act upon [WMB], by penetrating her mouth with his penis; and that the accused did so without the consent of [WMB].
>
> The definitions of the attempted offense are: Sexual act means the penetration, however slight, of the penis into the vulva or anus or mouth.
>
> Consent means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent…

(R. at 554.)

The military judge found that the evidence raised the issue of involuntary intoxication. (R. at 555-556.) The following voluntary intoxication instruction was provided:

> Voluntary Intoxication: The evidence has raised the issue of voluntary intoxication in relation to the Specification of Charge I, attempted sexual assault. I advised you earlier that one of the elements of the offense of attempted sexual assault without consent is that the accused had the specific intent to commit the offense of sexual assault without consent.
>
> In deciding whether the accused had such a specific intent at the time you should consider the evidence of voluntary intoxication. The law recognizes that a person's ordinary thought process may be materially affected when he is under the influence of intoxicants. Thus, evidence that the accused was intoxicated may, either alone, or together with other evidence in the case cause you to have a reasonable doubt that the accused had the specific intent to commit the offense of sexual assault without consent.
>
> On the other hand; the fact that a person may have been intoxicated at the time of the offense does not necessarily indicate that he was unable to have the specific intent to commit the offense of sexual assault without consent because a person may be drunk yet still be aware at that time of his actions and their probable results.

(Id.)

Before the military judge provided the instructions to the members, the military judge asked both trial and defense counsel if they "specifically affirm that the instructions are correct

statement of the law to the best of your understanding." (R. at 548.) Both counsel affirmatively responded. (Id.) The military judge specifically asked if there were any objections to the findings instructions to which both counsel answered, "no." (Id.)

During findings argument trial counsel identified the overt act associated with the attempted sexual assault with the accused "[H]olding her head down toward his lap. Undoing his pants prior to that. Those are all the overt acts underlying this attempt." (R. at 573.) Trial counsel also argued that intent was established when the accused told her what his intent was. (Id.) The accused told WMB that he wanted "head" on several occasions and that WMB understood this term to mean oral sex. (Id.) The accused also said that he was "dead ass" which WMB understood to mean as serious. (Id.)

Trial counsel stated that the act had to be more than "mere preparation" and that such preparation might be Appellant verbalizing his intent or unzipping his pants. (R. at 574.) Trial counsel continued that grabbing WMB's head and forcing it into his lap and increasing the force when she resisted was more than "mere preparation." (Id.)

Standard of Review

Whether an appellant has waived an issue is a legal question that this Court reviews de novo. United States v. Davis, 79 M.J. 329, 331 (C.A.A.F. 2020). Waiver is the intentional relinquishment or abandonment of a known right. United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009) (quoting United States v. Olano, 507 U.S. 725, 733 (1993)). Consequently, while this Court reviews forfeited issues for plain error, this Court cannot review waived issues at all because a valid waiver leaves no error for the Court to correct on appeal. United States v. Campos, 67 M.J. 330, 332 (C.A.A.F. 2009).

Whether a military judge properly instructed the court members is a question of law this Court reviews de novo. United States v. Shadricks, 78 M.J. 720, 723 (C.A.A.F. 2019) citing United States v. McClour, 76 M.J. 23, 25 (C.A.A.F. 2017) (citation omitted).

Instructions must be evaluated "in the context of the overall message conveyed to the jury." Id. citing United States v. Prather, 69 M.J. 338, 344 (C.A.A.F. 2011) (quoting Humanik v. Beyer, 871 F.2d 432, 441 (3d Cir. 1989)).

Law and Analysis

A. Appellant affirmatively stated that he had no objection to the military judge's findings instructions and therefore waived any objection to them on appeal.

Appellant argues that the instructions provided by the military judge in this case are similar to those provided in Martinez, No. ACM 39903 (f rev), 2022 CCA LEXIS 324 in that they called for "circular" reasoning and that the overt act identified by the military judge, attempted sexual assault, was the same as the underlying charge. (App. Br. at 16.) Appellant argues that these instructions relieved the members of their obligation to identify a certain overt act committed by Appellant in furtherance of his intentional attempt to sexual assault WMB. (Id.) However, trial defense counsel said he had no objection to the instructions when asked by the military judge, and also affirmed that the instructions were a correct statement of the law. (R. at 548.) Appellant, therefore, waived any objection to the instructions on appeal. Davis, 79 M.J. at 331. Appellant did not just fail to object and thereby merely forfeited his claim. He affirmatively declined to object to the military judge's instructions and offered no additional instructions. By "expressly and unequivocally acquiescing" to the military judge's instructions, Appellant waived all objections to the instructions, including in regard to the elements of the offense. Id. citing United States v. Smith, 9 C.M.R. 70, 72 (C.M.A. 1953); see also United States v. Wall, 349 F.3d 18, 24 (1st Cir. 2003) ("[C]ounsel twice confirmed upon inquiry from

the judge that he had 'no objection and no additional requests [regarding the instructions].' Having directly bypassed an offered opportunity to challenge and perhaps modify the instructions, appellant waived any right to object to them on appeal.") Since Appellant has affirmatively waived any objection to the military judge's findings instructions, there is nothing left to appeal and this Court should deny this assignment of error.

Notwithstanding this waiver, this Court has discretion to exercise its statutory responsibility under Article 66 UCMJ to affirm only such findings of guilty and the sentence or such part or amount of the sentence as it finds correct in law and fact and determines, on the basis of the record, should be approved. United States v. Hardy, 77 M.J. 438, 443 (C.A.A.F. 2018). This Court should not pierce waiver in this case, because doing so disincentivizes trial defense counsel from raising perceived issues at the trial level. The military justice system has an interest in ensuring that perceived errors are addressed and corrected at the trial level, rather than much later on appeal. The more often this Court pierces waiver, the less likely trial defense counsel will be to object to instructions at trial. Piercing waiver here is even more inappropriate, because Appellant has failed to demonstrate any error and suffered no prejudice.

Should this Court choose to pierce the waiver, Appellant's failure to affirmatively object results in a test for plain error. Davis, 76 M.J. at 229. However, there is no plain or obvious error because Appellant's argument fails to consider the military judge's instructions "as a whole" McClour, 76 M.J. at 26, and the overall "message conveyed to the jury" Prather, 69 M.J. at 344 (quoting Hammanik v. Beyer, 871 F.2d 432, 441 (3d Cir. 1989)). Moreover, Appellant suffered no prejudice. *See* Payne, 73 M.J. at 25 (analyzing omission of two elements).

B. The instructions, considered as a whole, eliminate any concern that they are circular or that the members failed to consider or find an overt act.

This Court – with the benefit of time, training, and experience – perceived "circular reasoning" in the military judge's instructions in the Martinez, which Appellant urges this Court to apply to the present instructions. Martinez, 2022 CCA LEXIS at 109. But in this case, given the instructions as a whole, the record does not support a finding that the members were stymied or confused by any perceived circular reasoning in the findings instructions or that they failed to find an overt act It is important to remember that "[j]urors . . . are not logicians and a jury trial is not a scholastic exercise." Johnson v. William C. Ellis & Sons Iron Works, Inc., 604 F.2d 950, 959 (5th Cir. 1979). And because "[t]he average juror is not an expert logician," the instructions need only be "couched in such language that the jurors may glean from [them] a fair conception of the law as applied to the facts . . . " Coker v. State, 26 Okla. Crim. 230, 238 (Okla. 1924). A factfinder's verdict should "not be disturbed because the instructions may not have been perfect as interpreted by analytical experts[.]" Id. Appellate courts therefore must "evaluate the instructions 'in the context of the overall message conveyed to the jury.'" Prather, 69 M.J. at 344 (quoting Hammik, 871 F.2d at 441). When evaluating the entire circumstances of this case, Martinez, an unpublished case, is distinguishable and does not make the military judge's instructions plain error.

For the first element of the offense, the members were instructed the government needed to prove that Appellant "attempt[ed] to commit a sexual act upon [WMB] by penetrating her mouth with his penis without her consent." (R. at 553.) That was proper because this Court has opined in past cases that certain overt acts in the first element of attempted sexual assault were the elements of the attempted offense. *See* United States v. Brown, No. ACM 39728, 2021 CCA LEXIS 414, at *12 (A.F. Ct. Crim. App. 16 Aug. 2021) (unpub. op.) (observing the first element

for attempted sexual assault was the appellant "did a certain act, that is, attempted to penetrate [the victim's] vulva with his tongue when [the victim] was incapable of consenting to the sexual act due to impairment by alcohol, and [the victim's] impairment was known or reasonably should have been known by [the a]ppellant."); see also United States v. Little, No. ACM 38338, 2014 CCA LEXIS 689, at *10 (A.F. Ct. Crim. App. 19 Sep. 2014) (unpub. op.) (identifying the first element for attempted wrongful sexual contact as "the appellant did a certain act, that is: attempt to grab the buttocks of [the victim.]"). The elements in this case were no different from the elements endorsed by this Court in Brown and Little, in that the overt act articulated by the military judge overlapped with the elements of the underlying offense and provided a general/holistic overview of the conduct. Had the military judge instead instructed that the overt act was that Appellant unzipped his pants and forcibly push WMB's head toward his penis, such description would have been a distinction without a difference because it describes the same conduct – attempting to commit a sexual assault without consent. In short, that Appellant attempted to penetrate her mouth with his penis without her consent provided a general overview of the overt act and was proper and not plain error despite the fact that there was overlap with the elements of the underlying offense.

Our superior Court has also found it was proper to instruct the members that certain overt acts in the first element were the elements of the attempted offense. *See* Payne, 73 M.J. at 22. The specification in Payne alleged the appellant wrongfully and knowingly attempt[ed] to persuade, induce, entice, . . . or coerce 'Marley,' someone he believed was a female 14 years of age . . . to create child pornography by requesting that 'Marley,' send nude photographs of herself . . . " Id. at 24. The underlying offense was modeled on a federal statute that criminalized "[a]ny person who . . . persuades, induces, entices, or coerces any minor to engage

in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct . . . " 18 U.S.C. § 2251(a); *see also* 9th Circuit Manual of Model Criminal Jury Instructions, 8.181 (describing three elements for sexual exploitation of a child, including proof "the defendant knew or had reason to know that the visual depiction would be mailed or transported across state lines or in foreign commerce.")

In Payne, the first element provided by the military judge was: "the accused attempted to persuade, induce, entice, or coerce 'Marley,' someone he believed was a female 14 years of age, to commit the offense of creating child pornography by requesting that she send nude photos of herself to the accused." Payne, 73 M.J. at 22. CAAF concluded the certain overt act in the first element "was covered" by the military judge instructing on the elements identified in the specification. Id. at 24, n.8. In other words, the overt act was covered by language that tracks an attempted commission of the predicate offense. That parallels the instruction on the first element in this case, which required proof that Appellant "attempt[ed] to commit a sexual act upon [WMB] by penetrating her mouth with is penis without her consent. (R. at 553.)

The United States recognizes that a trained lawyer might perceive overlap between overt acts and the elements of the target offense in the military judge's instructions. But "[j]urors do not sit in solitary isolation parsing instructions for subtle shades of meaning in the same way that lawyers might." United States v. Hills, 75 M.J. 350, 358 (C.A.A.F. 2016) (quoting Boyde v. California, 494 U.S. 370, 380 (1990)). Indeed, the "commonsense understanding of the instructions in the light of all that has taken place at the trial [is] likely to prevail over technical hairsplitting." Boyde, 494 U.S. at 381. So while members are "presume[d to] follow the instructions given by the military judge," United States v. Custis, 65 M.J. 336, 372 (C.A.A.F. 2007), they should not be presumed to carry the background of a trained lawyer into the

deliberation room. Given all that took place in this trial, expounded on below, a reasonable panel member would understand the phrase "attempt to commit a sexual act" in the first element as something like an umbrella term, under which any of the potential unpled overt acts could fall.

The remaining instructions on the elements and definitions reinforce this conclusion, because they repeatedly asked the members to consider the overt acts raised by the evidence. For the second element, the members were told the certain act must have been "done with the specific intent to commit the offense of sexual assault without consent[.]" (R. at 553.) Even if one assumes error in how the military judge instructed on the first element, the members still could not find the government met its burden to prove Appellant's specific intent to commit sexual assault without considering overt acts (e.g., Appellant's statements that he wanted WMB to provide him with oral sex, his unzipped pants, and the way he held her head down) that illuminated his intent to commit a sexual offense. Moreover, the instruction about "voluntary intoxication" was particularly important given that the members had to carefully consider whether Appellant had the specific intent to commit the underlying offense. (Id. at 555-556.) Stated another way, even if instruction on the first element created ambiguity about the certain overt acts at play, the members could not have returned a guilty verdict without rejecting the defense of involuntary intoxication. In finding Appellant guilty, the members would have identified certain overt acts as articulated by the trial counsel and that showed Appellant maintained the specific intent, despite his intoxication, to commit the offense. As discussed above, those specific acts showing intent included Appellant unzipping his pants and forcing WMB's head down.

The instruction for the third element reminded the members that Appellant's certain act of attempting to commit a sexual act upon WMB without her consent must have been "more than

mere preparation, that is, it was a substantial step and a direct movement toward the commission of the intended offense[.]" (R. at 554.) These terms of art required the members to consider what overt acts had been proved by the government during findings. For example, based on the military judge's definition of "preparation," the members were bound to consider whether there was evidence of Appellant "devising or arranging the means or measures necessary for the commission of the attempted offense." (Id.) Based on the military judge's definition of "substantial step," the members had to consider what, if any, overt acts by Appellant were "strongly corroborative of [Appellant's] criminal intent and [were] indicative of his resolve to commit the offense." (Id.) Again, far from disregarding the existence of overt acts, the members could not conclude the government met its burden without considering all the evidence and identifying for themselves the overt acts. Such overt acts (e.g., unzipping his pants and forcing her head in his lap) were identified by trial counsel during argument, and they went beyond mere preparation and were a substantial step towards the commission of sexual assault. (R. at 573.)

Fourth, and finally, the members were instructed that Appellant's attempted sexual act must have "tended to bring about the commission of the offense of sexual assault, that is the act apparently would have resulted in the actual commission of the offense of sexual assault except for [WMB's] physical and or verbal protestation, which prevented the completion of that offense." (R. at 554.)

As result, the "overall message conveyed to the jury" Prather, 69 M.J. at 17, was the requirement for the government to prove that: (1) Appellant intended to commit a sexual act against WMB without her consent; (2) he took steps beyond mere preparation; and (3) a sexual assault would have occurred but for some intervening circumstance. The members could not have found proof beyond a reasonable doubt for the three remaining elements without

considering the circumstances and overt acts beyond simply a "sexual act" as defined by the military judge. The members were instructed that they must find each element of the offense beyond a reasonable doubt (R. at 565.) There is no reason to believe they disregarded that instruction. As a result, the records demonstrated that the members were able to "glean from the[se] instructions a fair conception of the law as applied to the facts" even if a reasonable observer would have instructed differently. Coker, 26 Okla. Crim. at 238. This makes this Court's concern in Martinez – that the members would enter a guilty verdict "without careful analysis of each element" – unfounded in this case. *Cf.* 2022 CCA LEXIS at 112.

This Court should also look to what happened before and after the military judge's instructions. *See* Cupp v. Naughten, 414 U.S. 141, 146-47 (1973) (observing "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge" as well as the evidence at trial) (citation omitted). Before instructions, the members heard WMB testify that, among other things, Appellant grabbed her by the back of the head and forced her head in the direction of his lap, and when she resisted, he applied more pressure. (R. at 395.) This testimony was corroborated by QG, who witnessed Appellant's actions and played a role in forcing Appellant to stop. These facts color how the members understood the military judge's instruction on the first element for attempt.

To that end, trial counsel's argument informed the members' understanding of the facts and the law. Trial counsel expressly highlighted how the members needed to find that Appellant committed overt acts that went beyond mere preparation. (R. at 572-573) ("well you have acts to consider of holding her head down toward his lap. Undoing his pants prior to that. Those are the overt acts underlying this attempt.") So even if this Court finds fault with how the military judge defined a certain act in the instruction, a reasonable factfinder would still understand that the law

required proof that Appellant committed at least one act with the intent to commit sexual assault that was more than mere preparation for committing sexual assault. The words from the first element, "did a certain overt acts, that is: attempt to commit a sexual act upon [WMB] by penetrating her mouth with his penis without her consent," were again, an umbrella term, that told the members to consider the overt acts that constituted attempting to commit sexual assault.

"The military judge's instructions are intended to aid the members in the understanding of terms of art, to instruct the members on the elements of each offense, and to explain any available defenses." United States v. Wolford, 62 M.J. 418, 420 (C.A.A.F. 2006) (citations omitted). Here, the military judge's instructions accomplished that goal, defining the elements of the attempted sexual assault, what constituted "preparation," and what constituted a "substantial step" toward completing the crime. The members were also reminded that Appellant was not guilty of attempt if "voluntary intoxication" occurred. These definitions focused the members on the requirement that Appellant "went beyond preparatory steps" and demonstrated his "criminal intent" related to the target offense. As a result, the military judge's instructions – as a whole – did not relieve the members of their obligation to find each elements of the charged offense was established by proof beyond a reasonable doubt. Therefore, the instructions did not constitute plain error.

C. Even if the military judge's instructions constituted error, Appellant suffered no prejudice.

Even if this Court believes the instructions provided were circular or did not capture all the elements such an omission does not constitute structural error; and this Court must also find prejudice. Payne, 73 M.J. at 25. Where required instructional error is preserved, this Court tests for harmlessness. *See*, e.g., Article 59(a), UCMJ; United States v. Killion, 75 M.J. 209, 214 (C.A.A.F. 2016); *see also* Neder v. United States, 527 U.S. 1, 9 (1999) (holding that an objected-

to jury instruction omitting an element of the offense is constitutional error tested for harmlessness beyond a reasonable doubt). However, if the accused fails to preserve the instructional error by an adequate objection or request, this Court tests for plain error. *See*, e.g., R.C.M. 920(f); United States v. Girouard, 70 M.J. 5, 11 (C.A.A.F. 2011); see also Henderson v. United States, 568 U.S. 266, 133 (2013) (reaffirming the principle that any right may be forfeited by failing to timely assert it). Under a plain error analysis, in the case of a constitutional error, the "beneficiary of the error," the Government here, must show that the error was harmless beyond a reasonable doubt, United States v. Tovarchavez, 78 M.J. 458, 462 (C.A.A.F. 2019.)

In Neder v. United States, the appellant raised a timely objection to omission of an element from the jury instructions. (Neder I), 527 U.S.1, 7-8 (1999). The Supreme Court tested that preserved error for harmlessness. Id. at 8. The appellant was denied relief because the Court was satisfied beyond a reasonable doubt the erroneous instruction "did not contribute to the verdict obtained." Id. at 17 (citation omitted). In reaching this conclusion, the Court was confident "the jury verdict would have been the same absent the error" because the omitted element was uncontested and supported by overwhelming evidence. Id. (citation omitted). CAAF reached a similar conclusion when reviewing for plain error the omission of two elements from findings instructions. Payne, 73 M.J. at 25-26 (quoting Neder I, 527 U.S. at 17).

But overwhelming evidence and uncontested elements are not a prerequisite for proving harmlessness beyond a reasonable doubt. See United States v. Neder (Neder II), 197 F.3d 1122, 1129 (11th Cir. 1999), *cert. denied*, 530 U.S. 1261 (2000) (rejecting argument that Neder I required proof that omitted element was both uncontested and supported by overwhelming evidence). Instead, the "correct focus" of a court's inquiry on appeal is whether "the jury verdict would have been the same absent the error" or "whether the record contains evidence that could

rationally lead to a contrary finding with respect to [the omitted element]." Id.; *see also* United States v. Gracidas-Ulibarry, 231 F.3d 1188, 1197 (9th Cir. 2000) (declining to apply "uncontested" literally when the appellant contested element during argument but did not admit supporting evidence); United States v. Cherer, 513 F.3d 1150, 1156 (9th Cir. 2008) (en banc) (finding harmless error even though the defendant contested the omitted element in argument and pointed to supporting evidence); United States v. Boyd, 999 F.3d 171, 179 (3d 2021) (rejecting literal reading of the term "uncontested" for harmless error review of omitted elements) (citation omitted).

Here, this Court should be confident that any error in the first element in the military judge's instructions did not contribute to the verdict. The military judge could have instructed simply that Appellant committed a certain act or went further to identify potential certain acts raised by the evidence. Under either circumstance, the evidence showing that Appellant engaged in overt acts was overwhelming. WMB and QG testified that Appellant was forced WMB's head to his lap and that when she resisted even greater force was applied. (R. at 395, 478.) When she was finally able to exit the vehicle WMB and LC noticed that Appellant's pants had been undone. (R. at 398, 449) Appellant also verbalized his specific intent that WMB provide him with oral sex and that he was serious about it. (R at 369, 389, 392, 412.)

Appellant also failed to meaningfully contest whether Appellant he had solicited oral sex from WMB and whether Appellant held WMB's head to his lap at a 45-degree angle. (R. at 600.) Instead, he dismissed this overt act because it was not all the way down and they would have to "reposition" themselves to go further. (Id.) Nevertheless, this action constituted an overt act or a substantial step towards the commission of sexual assault. Instead, Appellant's argument focused on attacking WMB's credibility and claimed that she was distorting the details to bolster

her case. (R. at 603.) Regardless of any potential error in the instructions, the verdict shows the members rejected the notion that WMB was entirely distorting the events or was not credible as a witness. And the record does not "contain[] evidence that could rationally lead to a contrary finding with respect to [the omitted element]." Neder II, 197 F.3d at 1129 . Quite the opposite. Based on the evidence from multiple witnesses, a rational finding by the members included – at a minimum – that Appellant grabbed WMB's head and held it close to his lap with the intent of receiving oral sex from her; that he had previously unzipped his pants, or that he made numerous statements about wanting to receive oral sex from her. WMB's credible and corroborated testimony provided even more overt acts for the members to consider. Given these facts, it is illogical to believe that the members could have found that Appellant attempted to commit the nonconsensual sexual act without simultaneously finding that at least one of those acts occurred. . Like in Payne, even if the first element was incorrect, the overt acts committed by Appellant were "supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." Payne, 73 M.J. at 25-26 (citing Neder I, 527 U.S. at 17).

On the surface, that Appellant was acquitted of abusive sexual contact invites comparisons to Hills, where an instructional error was not harmless because, among other things, "the members rejected the accuser's other allegations against the Appellant[.]" 75 M.J. at 458. But, unlike Hills, and as discussed above, the government's proof in this case was overwhelming. To the extent the members rejected WMB's allegation of abusive sexual contact, the record does not suggest it was because she lacked credibility. Unlike the attempt offense, Appellant did not make significant admissions relevant to the abusive sexual contact charge in that he did not say that he intended on touching her breast – as opposed to repeatedly expressing a desire for oral sex. These salient differences in evidence corroborating WMB's testimony

show the acquittal for abusive sexual contact turned on the members' careful evaluation of the evidence rather than a general credibility determination about WMB. This Court can therefore be confident "the jury verdict would have been the same absent the [alleged] error." Neder II, 197 F.3d at 1129.

In sum, the evidence showing that Appellant did at least one overt act was overwhelming. And Appellant did not meaningfully contest this element in that Appellant held her head toward his lap, had unzipped his pants, and made comments about wanting oral sex from WMB. This Court should therefore be confident that any instructional error did not "tip[] the balance in the members' ultimate determination." Hills, 75 M.J. at 358. The record shows that any error in the military judge's instructions did not contribute to the verdict and so did not prejudice Appellant. Any error was harmless beyond a reasonable doubt. Accordingly, this Court should deny this assignment of error.

III.

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

Standard of Review

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

Law and Analysis

At the time of Appellant's court-martial, Article 52, UCMJ, required the concurrence of three-fourths of the panel members for a conviction. At trial, the military judge instructed the members as such. (R. at 615.) Appellant argues, in light of the Supreme Court's decision in

Ramos v. Louisiana, 140 S. Ct. 1390 (2020), the Sixth Amendment and the Fifth Amendment rights to due process and equal protection required a unanimous verdict by the court-martial panel. (App. Br. at 21-22.) In Ramos, the Supreme Court held that the Sixth Amendment right to a jury includes the right to a unanimous jury. Ramos, 140 S. Ct. at 1396-97. The Court further held that the Fourteenth Amendment incorporated this right to criminal proceedings at the state level. Id. at 1396-97. The Supreme Court did not state that this interpretation extended to military courts-martial.

Our Superior Court recently addressed the applicability of Ramos to courts-martial in United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2023) *cert. denied,* (2024). It rejected the same claims Appellant raises now. The Sixth Amendment right to a jury trial does not apply to courts-martial and therefore there is no requirement that a verdict be unanimous in courts-martial. Id. at 295. The court found that a non-unanimous verdict did not run afoul of the Due Process Clause's requirement that the government prove the defendant's guilt beyond a reasonable doubt. Id. at 299. The court also concluded that such a verdict was consistent with the protections under the Equal Protection Clause. Id. at 301.

In sum, this Court should apply our Superior Court's guidance under Anderson and deny Appellant's requested relief.

IV.

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

Additional Facts

The maximum punishment for attempted sexual assault in violation of Article 80, UCMJ, is a dishonorable discharge, and confinement for 30 years. MCM, pt. IV, para. 60(d)(2). The entry of judgement in Appellant's case provides: "Firearm Prohibition Triggered Under 18 U.S.C. § 922: Yes." ROT, Vol 1.

Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. United States v. Lepore, 81 M.J. 759, 760-61 (A.F. Ct. Crim. App. 2021).

Law and Analysis

Appellant asserts that 18 U.S.C. § 922 is unconstitutional as applied to him because he was convicted of a non-violent offense. (App. Br. at 24.) Appellant asserts that any prohibitions on the possession of firearms imposed because of a non-violent offense runs afoul of the Second Amendment, U.S. CONST. amend. II, and the Supreme Court's interpretation of that amendment in N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (analyzing New York's concealed carry regime). Appellant's constitutional argument is without merit. *See, e.g.,* United

States v. Denney, No. ACM 40360, 2024 CCA LEXIS 101 (finding no discussion or relief merited for similar arguments by appellant convicted of child pornography distribution) (unpub. op.) (internal citations omitted).

The Gun Control Act of 1968, 18 U.S.C. § 922, makes it unlawful for any person, *inter alia*, "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" to possess a firearm. Id. at § 922(g)(1). Appellant was found guilty of attempted sexual assault in violation of Article 80, UCMJ, which is a crime punishable by imprisonment for a term exceeding one year.[3]

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

This Court lacks jurisdiction under Article 66, UCMJ, to order the correction of the Statement of Trial Results or Entry of Judgment on the grounds requested by Appellant. In United States v. Lepore, 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021), this Court held that it "lacks authority under Article 66, UCMJ, to direct correction of the 18 U.S.C. § 922(g) firearms prohibition" in a court-martial order. Yet Appellant argues here that, because the Court of Appeals for the Armed Forces (CAAF) in United States v. Lemire, 82 M.J. 263, n.* (C.A.A.F. 9 March 2022) (decision without published opinion), ordered the Army to correct a promulgating order that annotated an appellant as a sex offender, this Court now has the authority to modify his Statement of Trial Results and Entry of Judgment. (App. Br. at 25-26). Appellant argues that CAAF's decision in Lemire reveals three things: (1) That CAAF has the authority to correct administrative

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

errors in promulgating orders; (2) by extension, CAAF believes that the service courts of criminal appeal (CCAs) have power to correct administrative errors under Article 66, UCMJ; and (3) CAAF believes both appellate courts have the authority to address constitutional errors in promulgating orders even if they amount to collateral consequences of a conviction. (Id.)

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

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

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

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

evaluation of the constitutionality of firearms prohibitions for convicted Airmen, or the propriety of the Air Force's regulations requiring indexing.

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

Although this Court has the authority to modify errors in an entry of judgment under R.C.M. 1111(c)(2), the authority is limited to modifying errors *in the performance of its duties and responsibilities*, so that authority does not extend to determining the constitutionality of a collateral consequence. Further, the question Appellant asks this Court to determine is fundamentally different from the situations in which our sister courts have corrected errors on promulgating orders. For example, in United States v. Pennington, 2021 CCA LEXIS 101, at *5 (A. Ct. Crim. App. 2 March 2021) (unpub. op.), the Army Court of Criminal Appeals ordered modification of the statement of trial results in that case to correct erroneous dates, the wording in charges, the reflection of pleas the appellant entered, and other such clerical corrections. The errors corrected in Pennington are the types of errors that R.C.M. 1111(c)(2) is in place to correct.

Moreover, both the Navy-Marine Corps and the Air Force Courts of Criminal Appeal have held that matters outside the UCMJ and MCM, such as Defense Incident-Based Reporting System

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

B. The Statement of Trial Results and Entry of Judgment were prepared correctly in accordance with the applicable Air Force Instruction.

Even if this Court has jurisdiction to review this issue, Appellant is not entitled to relief. The SJA followed the appropriate Air Force regulations in signing the first indorsement to the Statement of Trial Results and Entry of Judgment. Appellant received a conviction for a qualifying offense under 18 U.S.C. § 922(g)(1). *See* DAFI 51-201, dated 14 April 2022, paragraph 29.32.

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

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

Paragraph 29.30.1.1.

> Persons who have been discharged from the Armed Forces under dishonorable conditions . . . This condition is memorialized on the

> STR and EoJ, which must be distributed in accordance with the STR/EoJ Distribution List … This prohibition does not take effect until after the discharge is executed.

Paragraph 29.30.5.

Appellant's convictions and sentences qualified him for criminal indexing per 18 U.S.C. § 922(g)(1), and the first indorsements to the Entry of Judgment and Statement of Trial Results properly annotated the prohibition in accordance with DAFI 51-201.[4] Thus, there is no error for this Court to correct.

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

In Bruen, the Supreme Court held the standard for applying the Second Amendment is:

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

142 S. Ct, at 2129-2130. In his concurrence, Justice Kavanaugh noted the Supreme Court established in both District of Columbia v. Heller, 554 U.S. 570 (2008) (finding that the Second Amendment is an individual, not collective, right), and McDonald v. City of Chicago, 561 U.S. 742 (2010) (applying that right to the states), that the Second Amendment "is neither a regulatory straight jacket nor a regulatory blank check." Id. at 2162 (Kavanaugh, J., concurring) (citations omitted). Accordingly, the proper interpretation of the Second Amendment allows for a "variety" of gun regulations. Id. (citing Heller, 554 U.S. at 636).

[4] While the Statement of Trial Results and Entry of Judgment Indorsements indeed annotate the firearm prohibition, they are not what legally mandates the indexing. DAFI 51-201 is the regulation that requires indexing and contains the detailed requirements that mandate notification to relevant law enforcement agencies. Appellant's challenge here is thus misplaced.

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

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

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

Appellant acknowledges that both Bruen and Heller limit the application of the Second Amendment to "law abiding, responsible citizens." (App. Br. at 24.) Even so, Appellant nonetheless cites to United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023), for the proposition that the Government cannot prove that Appellant's firearm prohibition for a non-violent offense is in keeping with the United States' historical tradition of firearm regulation. Id. But this is contrary to what the Fifth Circuit in Rahimi held. That court concluded that the term "law abiding, responsible citizens," was "shorthand in explaining that [Heller's] holding … should not 'be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill[.]" Rahimi, 61 F.4th at 451 (citing Heller, 554 U.S. at 626-627). The Rahimi court went on to assert that Bruen's reference to "ordinary, law abiding" citizens were no different than Heller—it was meant to exclude "from the Court's discussion groups that have historically been stripped of their Second Amendment Rights[.]" Id. The Court determined that defendant Rahimi did not fall into that category of felons prohibited from owning a firearm at the time he was convicted of violating the firearm prohibition under 18 U.S.C. § 922(g)(8), since Rahimi was only subject to an agreed-upon domestic violence restraining order at the time he was convicted. Id. at 452. Thus,

he did not have a felony conviction at the time he was charged with illegal possession of a firearm. Id. The Fifth Circuit thus found that the Government had not shown that 18 U.S.C. § 922(g)(8)'s restriction of his Second Amendment rights "fit [] within our Nation's historical traditional of firearm regulation." Id. at 460.

The appellant in Rahimi was in a fundamentally different position than Appellant here. In this case, Appellant has been convicted of an offense punishable by well over a year of confinement (*i.e.*, a felony). He is thus prohibited from owning a firearm under 18 U.S.C. § 922(g)(1). Both the Supreme Court and the Fifth Circuit acknowledge that felony convictions are part of the United States' longstanding tradition on firearm prohibitions. Moreover, these cases do not distinguish between violent and non-violent felonies—prior to Bruen, the Fifth Circuit opined, "[i]rrespective of whether [an] offense was violent in nature, a felon has shown manifest disregard for the rights of others. He may not justly complain of the limitation on his liberty when his possession of firearms would otherwise threaten the security of his fellow citizens." United States v. Everist, 368 F.3d 517, 519 (5th Cir. 2004). The Court found that limiting a felon's ability to keep and possess firearms was not inconsistent with the "right of Americans generally to individually keep and bear their private arms as historically understood" in the United States. Id.; *accord* Folajtar v. Attorney General of the United States, 980 F.3d 897 (3rd Cir. 2020) (upholding the constitutionality of 18 U.S.C. § 922(g)(1) as applied to felons—including non-violent felons—based upon the Second Amendment's history and tradition). Thus, whether Appellant's crime constituted a violent or non-violent offense would not matter for purposes of restricting Appellant's ability to own a firearm.

Appellant's convictions for attempted sexual assault proves that he falls squarely into the categories of individuals that should be prohibited from possessing a firearm. Thus, the

Indorsements in the Entry of Judgment and Statement of Trial Results correctly annotated that Appellant is subject to 18 U.S.C. 922's prohibitions. Appellant is not entitled to relief.

V.[5]

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE PROPERLY DENIED A DEFENSE CHALLENGE FOR CAUSE AGAINST SMSGT ME

Additional Facts

During voir dire trial defense counsel asked the following question: "Do you believe that an alleged victim is entitled to the presumption that he or she is telling the truth." (R. at 145.) All members responded affirmatively to the question. (Id.) Defense counsel next asked "Does anyone believe that a woman's allegation of sexual assault should not be challenged in court?" (R. at 145.) All members responded in the negative. (Id.)

With regard to the first question, the military judge provided the following:

> You've all answered in the affirmative. Now, I want to remind you, at the outset I have instructed you that the accused is presumed to be innocent. So, if you are presuming the victim to be correct, you are now going against my instruction that the accused is presumed to be innocent.
>
> I have also instructed you that when viewing a witness, okay, you have the duty to determine the believability of the witness. In performing this duty you must consider each witness's intelligence, ability to observe and accurately remember. In addition to the witness's sincerity and conduct in court, friendships, prejudices, and character for truthfulness.
>
> Consider also the extent to which each witness is either supported or contradicted by other evidence. Their relationship each witness may have with the either side, and how each witness might be affected by the verdict.

(R. at 148-149.)

[5] Raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

After this instruction, several members including SMSgt ME (ME), still believed that a victim is entitled to the presumption that he or she is telling the truth. (R. 149.) During individual voir dire ME explained:

> I think in general, I would always make the assumption that the first thing someone is telling me is the truth. Whether it be the victim or whether it be somebody denying an allegation. I think in general, the first response should be to assume that someone is telling the truth, until otherwise proven wrong.

(R. at 207)

The military judge stated that the instructions he provided contained no presumption of truth with regard to witness testimony; instead, there were factors that one should consider determining if one is telling the truth. (Id.) ME answered:

> Sir, the way I understood the question that we posed initially, was not necessarily in the format of this courtroom necessarily, but just in general an accused member would - "would you give them the presumption of truth?" And that was the way I made my initial answer yesterday. So, I guess, even when you re-cage the instructions sir, I didn't see those to be mutually exclusive, at least in my estimation. *I do agree with your general statement that in this format or in this forum that there is a presumption of innocence until proven guilty.* And I had to feel like my answer - when it gets to your instructions, but that's just my opinion, sir.

(R. at 207-208) (emphasis added).

The military judge then emphasized that they were in "trial" and not the "outside word." (R. at 208.) He asked ME if he would be able to follow his instructions and presume the accused innocent. (Id.) ME responded, "Yes, absolutely." (Id.) ME agreed that he would view the view's testimony through the lens of instructions provided by the military judge. (Id.)

In response to a question from trial counsel, ME stated that he would not be inclined to believe a victim or an alleged victim of an offense, any more or any less than another witness. (R.

at 212.) ME stated that he would give a victim's testimony no more weight than any other witness. (Id.)

Apart from witness testimony, ME also stated that he had previous court martial service. (R. at 216.) The court marital was approximately 10 years earlier and involved multiple charges, "all having some form of sexual assault, relation." (R. at 216.) The allegations of sexual assault were between "the member" and his ex-wife. (R. at 209.) ME believed that in that case the accused was found guilty of at least one offense. (Id.) ME stated that his participation in this previous court martial would not adversely impact his ability to sit on the court and that he would be able to follow the military judge's instructions. (R. at 209-210.) ME also stated that he would be able to disregard the prior trial as a "data point" for comparison purposes with regard to any sentencing case. (R. at 216.)

Trial defense counsel challenged ME for implied bias based on his duty assignment (inspector general investigator), prior court martial participation, and his initial answer to the question regarding victim testimony. (R. at 249-250.) The military judge found that ME's role as an inspector general investigator had nothing to do with law enforcement or sexual assault and would have no impact on his ability to hear the case. (R. at 253-254.)

The military judge differentiated ME's previous court martial experience that involved a husband and wife from the current case. (R. at 254.) He noted that the case was approximately 10 years ago, and that ME did not seem to remember the specifics of the case or the instructions. (Id.) ME also stated that this previous court marital experience would not adversely impact his ability to sit on the case. (Id.)

With regard to potential victim testimony, the military judge noted that when apprised of the instruction that he would have to presume that the accused to be innocent and would have to

apply his instructions in determining the credibility of the witness, ME seemed to have no difficulty in applying the military judge's instructions. (Id.)

In denying the challenge, the military judge considered the totality of the circumstances, applied the liberal grant mandate, and did not find this to be a close case. (R. at 254-255.)

Standard of Review

A military judge's decision on a challenge for cause based on implied bias is reviewed pursuant to a standard that is "less deferential than abuse of discretion, but more deferential than a de novo review." United States v. Dockery, 76 M.J. 91, 96 (C.A.A.F. 2017) (*quoting* United States v. Peters, 74 M.J. 31, 33 (C.A.A.F. 2015)). Although it is not required for a military judge to place his or her implied bias analysis on the record, doing so is highly favored and warrants increased deference from appellate courts. Dockery at 96.

Law

"An accused enjoys the right to an impartial and unbiased panel." United States v. Nash, 71 M.J. 83, 88 (C.A.A.F. 2012). A court member "shall be excused" when that member "should not sit … in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N). "A military judge's determinations on the issue of member bias, actual or implied, are based on the 'totality of the circumstances.'" United States v. Terry, 64 M.J. 295, 302 (C.A.A.F. 2007) (*citing* United States v. Strand, 59 M.J. 455, 456 (C.A.A.F. 2004)). Courts recognize two forms of bias that subject a juror to a challenge for cause: actual bias and implied bias. United States v. Wood, 299 U.S. 123, 133 (1936).

Actual bias is defined as "bias in fact." United States v. Hennis, 79 M.J. 370, 384 (C.A.A.F. 2020) (*quoting* United States v. Wood, 299 U.S. 123, 133 (1936). "Actual bias is personal bias which will not yield to the military judge's instructions and the evidence presented

at trial." Hennis at 384 *citing* Nash at 88. "Because a challenge based on actual bias involves judgements regarding credibility, and because 'the military judge has an opportunity to observe the demeanor of court members and assess their credibility during voir dire,' a military judge's ruling on actual bias is afforded great discretion. United States v. Clay, 64 M.J. 274, 276 (C.A.A.F. 2007). (*quoting* United States v. Daulton, 45 M.J. 212, 217 (C.A.A.F. 1996)). One of the regulatory bases for finding bias includes when a member has "an inelastic opinion concerning an appropriate sentence for the offenses charged." *Discussion*, R.C.M. 912(f)(1)(N).

Implied bias, on the other hand, is "bias conclusively presumed as [a] matter of law." Hennis at 385 *citing* Wood 299 U.S. at 133. "Implied bias exists when most people in the same position as the court member would be prejudiced." United States v. Elfayoumi, 66 M.J. 354, 356 (C.A.A.F. 2008). It is evaluated objectively under the totality of the circumstances and "through the eyes of the public," reviewing "the perception or appearance of fairness of the military justice system." Id. (*quoting* United States v. Townsend, 65 M.J. 460, 463 (C.A.A.F. 2008)). Where a military judge "recognizes his duty to liberally grant defense challenges, and places his reasoning on the record, instances in which the military judge's exercise of discretion will be reversed will indeed be rare." Clay, 64 M.J. at 277.

"…[I]f after weighing the arguments for the implied bias challenge the military judge finds it is a close question, the challenge should be granted." Peters, 74 M.J. at 34 . Although a military judge is not expected to provide dissertations on his or her decision on implied bias, the military judge does have to apply the right law. Id. "Incantation of the legal test without analysis is rarely sufficient in a close case." Id. A military judge will be afforded less deference if an analysis of the implied bias challenge on the record is not provided." Id.

Analysis

At trial, Appellant challenged M.E. based on his assignment as an investigator for the inspector general, his previous court martial participation, and his comments regarding victim testimony. (R. at 249-250.) In his brief, Appellant only asserts that the challenge to M.E. should have been granted because M.E. believed an alleged victim is entitled to the presumption that he or is telling the truth. (App. Br. at 32.) The military judge properly denied trial defense counsel's challenge for implied bias. The military judge rehabilitated ME and applied the correct law in ruling on trial defense counsel's challenge. Accordingly, this assignment of error should be denied.

When prospective members were initially asked if an alleged victim is entitled to the presumption that he or she is telling the truth, *all members* answered in the affirmative. (R. at 148) (emphasis added). That all members responded affirmatively is not surprising because common sense suggests that when a witness testifies under oath and is subject to prosecution for perjury, that witness may be telling the truth. ME candidly stated that he applied this concept outside the courtroom and in his everyday life. (R. at 207.) He stated that whether it is a victim or someone denying an allegation that he would first assume that they were telling the truth. (Id.)

The military judge rehabilitated ME. when he explained that his instructions would contain no such presumption (regarding a witness's testimony) and that there were instead factors that should be considered to aid in determining when to believe a witness. (R. at 207.) ME did not initially consider his opinion regarding whether someone was telling the truth to be "mutually exclusive" with the military judge's instructions and indicated that it was only his opinion. (R. at 208.) Upon further questioning, ME stated that he would be able to consider

witness testimony through instructions or "lens" provided by the military judge. (Id.) He stated that he would presume the accused was innocent until proven guilty. (Id.) And that he would not be inclined to believe an alleged victim of an offense any more or less than any other witness. (R. at 212.) At the conclusion of individual voir dire, ME gave no indication that he would not follow the military instructions or that he would presume that a witness was telling the truth.

Appellant acknowledges ME agreed that he would follow the military judge instructions but suggests that this statement was insincere in that ME "merely parroted" agreement to apply the instructions provided by the military judge. (App. Br. at 32.) Appellant states that there is still a question as to whether ME would believe the alleged victim until otherwise proven wrong. (Id.) Appellant's argument is unsupported by the evidence. There is nothing in the record to support a finding that ME was insincere or merely parroting a response to the military judge. Appellant points to the fact that ME was a senior ranking member of the panel but provides no details as to why this would cause him to deviate from the military judge's instructions. (App. Br. at 32.) Appellant also points to ME's previous court marital service but again asserts no facts that would as to how this service would disqualify him or cause an outside observer to question the fairness of the process. (Id.) The previous court martial was approximately 10 years earlier and involved a husband and wife. (R. at 209-201, 216.) ME did not have a good recollection of the facts or the instructions and stated it would not impact his ability to hear this case. (Id.) In short, there is no reason to believe ME would not apply the instructions as provided by the military judge or that the public would question the fairness of the trial if ME sat as a member.

Appellant has raised no issue with the law applied by the military judge in deciding this challenge because there was none. The military judge properly applied the standard applicable

to a challenge for implied bias, applied the liberal grant mandate, and found that it was not a close call. (R. at 254-255.) Accordingly, the military properly denied trial defense counsel challenge for implied bias.

In sum, all of the military judge's conclusions were based on his personal observations of ME and his responses to the inquiries from himself, trial counsel and trial defense counsel. The military judge articulated how those findings lead him to the ultimate determination that there was no implied bias. Having applied the proper legal framework, the military judge did not err when he denied the challenge for implied bias and this Court should dismiss Appellant's assignment of error.

VI. [6]

THE MILITARY JUDGE DID NOT ERR WHEN HE REFUSED TO INSTRUCT THE MEMBERS AS TO A GOVERNMENT WITNESS'S PRIOR INCONSISTENT STATEMENT.

Additional Facts

On 29 July 2021 Air Force Office of Special Investigations (AFOSI) interviewed QG regarding Appellant's 4 July 2021 attempted sexual assault of WMB. (ROT Vol. 2 *Report of Investigation*, Ex. 3-1.) As part of this interview, QG provided a one-and-a-half-page handwritten statement in which he described the major events of the evening in question. (Id.) The first half of the first page described who was present on the evening, where they went, who drove, the seating arrangements in the car to and from their destination, and the general facts surrounding the attempted sexual assault. (Id.) The remaining page described QG's efforts to calm WMB, prevent her from physically retaliating against Appellant, and how QG and WMB were able to make it home after they were dropped off before reaching their destination. (Id.)

[6] Raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

During trial, QG testified in detail about the night in question and the attempted sexual assault. (R. at 465-495.) Consistent with his written statement to AFOSI, QG testified that he saw Appellant's hand on the back of WMB's head trying to force her WMB's head down. (R. at 477.) Consistent with QG's statement, he testified that Appellant relented when QG asked Appellant what he was doing. (Id.) During QG's testimony, but not included in his statement, QG likened the position of WMB's head to "…three quarters of a [gas] tank." (R. at 478.) QG also testified that WMB said that "George [Appellant] is trying to make me suck his dick." (R. at 478.)

During cross examination, QG initially stated that he did not tell AFOSI about WMB's statement. (R. at 482.) On re-cross examination QG testified that he said that WMB made with statement but that he did not write it in his statement. (R. at 491.) QG stated that he did not leave the statemen by WMB out of his statement on purpose, but that he had to think about other things at the time. (R. at 493.) QG acknowledged that the statement was important but also that all of his statements were important. (R at 494.)

Trial defense counsel later requested a prior inconsistent statement instruction for QG's testimony. (R. at 531.) Defense counsel argued that it QG testified WMB stated "George tried to make me suck his dick;" however, this statement was not included in QG's statement to AFOSI. (R. at 533.) Defense counsel stated it was an "inconsistency by omission." (Id.)

The military judge initially opined that the statement was not an actual inconsistent statement and allowed defense counsel time to bring any law to the contrary to this attention. (R. at 536.) The military judge later denied the request for instruction. (R. at 547.) The denial was based on the fact that QG testified that he did not tell AFOSI everything, and when questioned

about this statement being important QG stated that everything he wrote in his statement was important. (Id.)

Standard of Review

A military judge's refusal to give a defense-requested instruction on prior inconsistent statements is reviewed under an abuse of discretion standard. United States v. Damatta-Olivera, 37 M.J. 474, 478 (C.M.A. 1993) citing United States v. Dennis, 625 F.2d 782 (8th Cir. 1980); United States v. Rodgers, 549 F.2d 490 (8th Cir.1976).

Law and Analysis

The impeachment power of a prior-inconsistent-statement rule of evidence arises from the conflict between a witness' statements. Id. at 477 citing United States v. Hale, 422 U.S. 171, (1975). Although an inconsistency is logically essential for this method of impeachment, whether testimony is inconsistent with a prior statement is not limited to diametrically opposed answers but may be found as well in evasive answers, inability to recall, silence, or changes of position. Id, at 478.

In the specific context of a military judge's denial of a requested instruction, an abuse of discretion will occur if: (1) the requested instruction was correct; (2) the instruction was not substantially covered by the main instruction; and (3) the instruction was on such a vital point in the case that the failure to give it deprived the accused of a defense or seriously impaired its presentation. United States v. Harrington, 83 M.J. 408, 416 (C.A.A.F. 2023).

Appellant argues that QG's testimony that WMB stated "George [Appellant] is trying to make me suck his dick" is inconsistent with the statement he provided to AFOSI because the statement did not include the quoted language from WMB. (App. Br. at 34.) It is not. In both his statement and in his testimony QG described how he discovered Appellant forcing WMB's

head into his lap and that Appellant only relented when QG objected. (ROT Vol. 2 *Report of Investigation*, Ex. 3-1); (R. at 465-495.) There is no inconsistency or change of position between his testimony and the statement he provided. Moreover, there is no evidence QG was evasive while testifying, silent, or was unable to remember the details of the night of the alleged sexual assault. The only difference is the level of detail he provided between his 30+ pages of testimony and his one-and-a-half-page handwritten statement. Common sense suggests that the level of detail is going to be greater when there are multiple parties asking you questions about an event, i.e. direct and cross examination, as opposed to a one-and-a-half-page handwritten description written in isolation. Accordingly, the additional details provided during trial and the statement are not inconsistent but instead complementary.

The military judge did not abuse his discretion when he denied the request for the instruction because the instruction was not supported by QG's testimony. There was no inconsistent statement. The appropriate instruction, regarding the general credibility of a witness, is more appropriate and exactly what the military judge provided. (R. at 561-562.) Finally, the omission of this instruction was not on such a vital point that it deprived Appellant of a defense or seriously impaired its effective presentation. QG's testimony and written statement both describe the attempted sexual assault. The omission of this instruction did not serve to keep evidence out or limit the questioning of a witness. In other words, the members were fully aware that QG did not include WMB's statement in his written statement to AFOSI. The members were free to weigh this omission when weighing QG's credibility under the instructions provided by the military judge. Instructing on a prior inconsistent statement would have added nothing to Appellant's case simply because the omission of this statement did not make his testimony inconsistent; instead, his testimony merely supplemented the statement.

In sum, QG's testimony was not inconsistent with his prior statement. His position remained the same and his 30+ pages of transcribed testimony provided more details than his written statemen. The military judge did not abuse his discretion because the requested instruction was inappropriate, it was covered by other credibility instructions, and the omission of the instruction did not deprive Appellant of his ability to mount a defense. Appellant's assignment of error on these issues should be denied.

VII. [7]

THE VICTIM'S WRITTEN UNSWORN STATEMENT DID NOT CONTAIN IMPERMISSIBLE CONTENT

Additional Facts

After the members found Appellant guilty of the Charge and its Specification, Appellant elected to be sentenced by a military judge. (R. at 631, 634.)

At the conclusion of the Government's presentencing case, the military judge sought input from the victim. (R. at 643.) Victim's counsel offered Court Exhibit A as a one-page document entitled, "Victim Impact Statement made by [WMB]." (R. at 644.) Victim's counsel provided the military judge with a working copy of the statement. (Id.)

The caption of the exhibit included the following:

> Depart of the Air Force U.S. Air Force Trial Judiciary
>
> United States v. SrA Dennis A. George, Jr.
>
> Joint Base Langley-Eustis, VA
>
> Victim Impact Statement (W.B.)
> 18 August 2022
>
> COMES NOW W.B., and submits the following Victim Impact Statement, in accordance with Rules for Courts-Martial 1001(c)(5)(B)

[7] Raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

(ROT Vol. 6, Court Exhibit A)

When asked by the military judge, trial defense counsel stated that he did not object to the exhibit. (R. at 644.) WMB read the statement to the military judge but did not read the above-identified caption information on the exhibit. (R. at 645.) The military judge admitted the exhibit into evidence. (R. at 646.)

Standard of Review

A military judge's interpretation of R.C.M. 1001(c) is a question of law this Court reviews de novo. United States v. Edwards, 82 M.J. 239, 243 (C.A.A.F. 2022) citing United States v. Barker, 77 M.J. 377, 382 (C.A.A.F. 2018).

Abuse of discretion is the proper standard of review for determining whether a military judge erroneously admitted an unsworn victim statement under R.C.M. 1001(c). Id. A military judge abuses his discretion when his legal findings are erroneous or when he makes a clearly erroneous finding of fact. Id. citing United States v. Eugene, 78 M.J. 132, 134 (C.A.A.F. 2018).

Law and Analysis

For the first time on appeal, Appellant asserts that it was err for the military judge to admit Court Exhibit A, a written victim impact statement, based on its heading. (App. Br. at 37.) The military judge did not error and Appellant has waived this issue.

When questioned by the military judge, Appellant affirmatively stated that he had no objection to the victim impact statement. (R. at 644.) As a result, the issue is waived and Appellant's right to complain on appeal is extinguished. United States v. Andersen, 82 M.J. 543, 547 (C.A.A.F. 2022) citing Davis, 79 M.J.at 331; United States v. Ahern, 76 M.J. 194, 198 (C.A.A.F. 2017) (citing United States v. Campos, 67 M.J. 330, 332-33 (C.A.A.F. 2009)). While this Court retains the authority to address errors raised for the first time on appeal despite waiver

of those errors at trial, *see* Id., Appellant has failed to demonstrate that the military judge erred or a compelling reason for review despite the waiver.

The victim's impact statement was consistent with the Rules of Courts-Martial (R.C.M.) The rules provide that the contents of a victim impact statement "may only include victim impact and matters in mitigation. The statement may not include a recommendation of a specific sentence." R.C.M. 1001(c)(3). The statement may be oral, written, or both. Id. at 1001(c)(5)(A). The procedure for admitting such a statement is as follows:

> After the announcement of findings, a crime victim who elects to present an unsworn statement shall provide a written proffer of the matter that will be addressed in the statement to trial counsel and defense counsel. The military judge may waive this requirement for good cause shown. Upon good cause shown, t*he military judge may permit the crime victim's counsel, if any, to deliver all or part of the crime victim's unsworn statement.*

Id. at 1001(c)(5)(B) (emphasis added).

In this case, the victim impact statement was a one-page typed statement that contained only matters related to victim impact. (ROT Vol. 6, Court Exhibit A). The caption information was designed to identify the document and was not inappropriately included, and Appellant can point to no authority that would preclude such information. The date, the name of the accused, his duty assignment, the fact that it is an Air Force Court, and that the exhibit is a victim impact statement are painstakingly obvious and serve no other purpose than to identify the document. As a result, the admission of this document with this identifying information was not clearly erroneous.

Appellant also argues that the admission of the statement was in error because it demonstrated the victim counsel's ownership of the document. (App. Br. at 38.) That the victim has counsel assigned and available to assist would have been equally apparent had the victim

elected to have her counsel to read the statement into the record under R.C.M. 1001(c)(5)(B). As a result, the fact that the victim's counsel may have provided this identifying information, or some assistance is contemplated by the rules and not categorically excluded from the members or military judge.

Appellant asserts that the admission of this document may have materially prejudiced Appellant. (App. Br. at 38.) Not so. As the sentencing authority, military judges are presumed to know the law and apply it correctly. United States v. Plaster, 2021 CCA LEXIS 564, *10-11(A.F. Ct. Crim. App. 2021) citing United States v. Sanders, 67 M.J. 344, 346 (C.A.A.F. 2009). This presumption holds absent clear evidence to the contrary. Id. Appellant was sentenced by a military judge alone and it is unreasonable to assume that the military judge was somehow swayed to give a greater punishment to Appellant solely based on the administrative details on the caption of the exhibit. There is no evidence the military judge incorrectly applied the law and punished Appellant for the existence of this administrative information. As a result, Appellant was not materially prejudiced.

In sum, Appellant has failed to demonstrate any error, prejudice, or a compelling reason to review this issue. The information on the victim impact statement was designed to identify the document and not in error. There is no evidence to support the finding that the military judge would have increased Appellant's sentence as a result of this information. Accordingly, this Court should deny this assignment of error.

CONCLUSION

The United States respectfully requests this Honorable Court deny Appellant's claims and affirm the sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division via electronic means on 27 March 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Senior Airman (E-4) **DENNIS A. GEORGE JR.,** United States Air Force, *Appellant*.	**APPELLANT'S REPLY BRIEF** Before Panel No. 1 No. ACM 40397 3 April 2024

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

Appellant, Senior Airman (SrA) Dennis A. George Jr., by and through his undersigned counsel pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this reply to the Appellee's answer, dated 27 March 2024 (Ans.). In addition to the arguments in his opening brief, filed on 27 February 2024 (App. Br.), SrA George submits the following arguments for the issues listed below.

I.

THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUPPORT THE FINDING OF GUILTY FOR CHARGE I AND ITS SPECIFICATION.

1. This Court maintains robust factual sufficiency review despite changes to Article 66, UCMJ.

Neither this Court nor the Court of Appeals for the Armed Forces (CAAF) has set forth the standard of review under the revisions to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (effective Jan. 1, 2021), applicable to this case.[1] *But see United States v. Harvey*, No. 23-0239/NA, 2024 CAAF LEXIS 13 (C.A.A.F. Jan. 10, 2024) (granting review of a Navy-

[1] *See* William M. (Mac) Thornberry National Defense Authorization Act (NDAA) for Fiscal Year 2021, Pub. L. 116-283, § 542, 134 Stat. 3388, 3612–13 (2021) (amending the factual sufficiency standard and applying the changed standard to cases where every charged offense occurred after January 1, 2021).

Marine Corps Court of Criminal Appeals decision on this very issue). SrA George asserts the standard of review for factual sufficiency should remain de novo despite these statutory changes. *Cf. United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted).

This Court may consider the factual sufficiency of a conviction "upon request of the accused if the accused makes a specific showing of a deficiency in proof." Article 66(d)(1)(B)(i), UCMJ (2021). SrA George made a requisite showing of deficiency in his opening brief. App. Br. at 7-11. The Government failed to prove that SrA George penetrated WMB's mouth and failed to prove that SrA George intended to commit this act without WMB's consent. *Id*.

Upon such showing, this Court may weigh controverted questions of fact with "appropriate deference" to "the fact that the trial court saw and heard the witnesses and other evidence" and "to findings of fact entered into the record by the military judge." Article 66(d)(1)(B)(ii), UCMJ (2021). This Court may provide relief where it is "clearly convinced that the finding of guilty was against the weight of the evidence." Article 66(d)(1)(B)(iii), UCMJ (2021).

While Article 66, UCMJ, has changed to require affirmative steps from an accused on appeal, the changes do not hollow out factual sufficiency review. However, the statutory changes do raise several questions. The first question relates to the "appropriate deference" to the factfinder. The prior version of factual sufficiency review required CCAs to evaluate the evidence "recognizing that the trial court saw and heard the witnesses." Article 66(d), UCMJ (2018). This is a distinction without a meaningful difference. This Court has always shown deference to the fact that it does not hear the witnesses. The statutory revision adds "and other evidence," but this means little because non-testimonial evidence is fully captured in the record of trial—it is only the nuances of trial testimony that could escape full comprehension on appellate review.

The second question is whether this Court is "clearly convinced" that the finding was against the weight of the evidence." Article 66(d)(1)(B)(iii), UCMJ (2021). The prior version of Article 66(d), UCMJ, empowered the Courts of Criminal Appeals (CCAs) to approve findings that are "correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d), UCMJ (2018). The Court of Military Appeals (CMA) interpreted this language to require that members of a CCA "are themselves convinced of the accused's guilty beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 324–25 (C.M.A. 1987). However, neither the old nor the new statute explicitly requires the CCAs believe the accused's guilt beyond a reasonable doubt. This flows from case law alone. Where the standard is as yet undetermined by the CAAF, this Court should hesitate before interpreting revisions to strip an accused of a key substantive aspect of an appeal. Where this Court is not convinced beyond a reasonable doubt that evidence is sufficient, this should suffice to clearly convince this Court that the finding was against the weight of the evidence.

In short, the statutory revisions should not meaningfully affect the standard of review in this case except for the requirement that SrA George make a specific showing of deficiency, which he has done. But even if this Court interprets the burden on appellants as greater than under the prior version of Article 66, UCMJ, SrA George still prevails because the Government failed to prove that SrA George penetrated WMB's mouth and failed to prove that SrA George intended to commit this act without WMB's consent. App. Br. at 7-11.

2. *The Government was required to prove SrA George penetrated WMB's mouth because that is what it charged.*

The sample specification for Article 80, UCMJ, provides little guidance for how to draft an attempt specification, providing broadly: "the specification should "describe [the] offense with sufficient detail to include expressly or by necessary implication every element." MCM, pt. IV, ¶

4.e." Nevertheless, what the Government charges, it must prove. *See United States v. English*, 79 M.J. 116, 120 (C.A.A.F. 2019) (when the Government made the charging decision to allege a particular type of force was used, it was required to prove the facts it alleged).

The plain language of the Specification of Charge I alleged SrA George attempted to commit the target offense when he committed the act of penetrating WMB's mouth with his penis without her consent: SrA George "did, at or near Newport News, Virginia, on or about 4 July 2021, attempt to commit a sexual act upon [WMB] by penetrating her mouth with his penis without her consent." Charge Sheet, 19 November 2021. The plain meaning of the word "by" in the alleged specification denotes the act he allegedly took—the overt act. App. Br. at 7-9. This interpretation is harmonious with other punitive articles within the UCMJ and other examples of Article 80, UCMJ, charges. App. Br. at 7-8; *see, e.g., United States v. Norwood*, 71 M.J. 204, 206 (C.A.A.F. 2012) (alterations in original) (emphasis added) (Article 80, UCMJ, offense charged: "In that [appellant], U.S. Marine Corps, a married man, on active duty, did, at Okinawa, Japan, on or about 17 April 2009, attempt to commit adultery with [the victim], U.S. Marine Corps, a woman not his wife, *by* trying to place his penis inside of her vagina and have sexual intercourse with her.")

The Government did not dispute in its answer the many examples of UCMJ offenses wherein "by" is used to denote an overt act and instead asks this Court to rely on a book cited within a non-binding civilian case to interpret the plain language of the charged specification. Ans. at 19. However, unlike the source offered by SrA George (App. Br. at 7), neither of the Government's sources interpret the word at issue here: "by"; not within the context of the UCMJ or even generally. *See United States v. Nader*, 542 F.3d 713, 717-718 (9th Cir. 2008) *and* William Strunk, Jr. & E. B. White, The Elements of Style 30 (4th ed. 2000).

Based on the plain language of the charged specification, the Government was required to prove SrA George penetrated WMB's mouth, and it failed to prove this.

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

IV.

THE GOVERNMENT CANNOT PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BECAUSE ITS APPLICATION IS NOT CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION WHEN SRA GEORGE WAS CONVICTED OF A NON-VIOLENT OFFENSE, AND THIS COURT CAN DECIDE THAT QUESTION.

This Court has power to correct the Statement of Trial Results and Entry of Judgment and should find it persuasive that the CAAF has previously directed the correction of a promulgating order to delete the requirement that an appellant register as a sex offender. *United States v. Lemire*, 82 M.J. 263 (C.A.A.F. 2022) (decision without published opinion). The Government would have this Court ignore the CAAF's summary disposition in *Lemire*, citing instead to this Court's Rules of Practice and Procedure regarding published opinions as authority. Ans. at 43. But this Court's rules on publishing do not inform whether summary dispositions bind or, at a minimum, inform the analysis. In *LRM v. Kastenberg,* the CAAF reviewed a summary disposition and noted that it "has profited from guidance offered in prior summary dispositions."[2] This Court and its predecessor cite summary dispositions from the CAAF and the Court of Military Appeals (CMA) as authority as well.[3] Even if *Lemire* was a summary disposition, that does not mean this Court

[2] 72 M.J. 364, 370 (C.A.A.F. 2013) (citing *United States v. Diaz*, 40 M.J. 335, 339–40 (C.M.A. 1994); *Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975) (holding that "lower courts are bound by summary decisions by" the Supreme Court)).

[3] *See, e.g.*, *United States v. Krempel*, No. ACM S30849, 2006 CCA LEXIS 258, at *5 (A.F. Ct. Crim. App. 18 Oct. 2006) (citing the CAAF's summary disposition in *United States v. Holmes*, 61 M.J. 148, 149 (C.A.A.F. 2005) as support for its decision to find instructional error); *United States*

can or should ignore its implications for *United States v. Lepore*, 81 M.J. 759 (A.F. Ct. Crim. App. 2021).

Furthermore, the takeaway from *Lemire* is that it contemplates CCAs correcting the Statement of Trial Results (STR) and Entry of Judgment (EoJ), which is exactly what SrA George seeks here. The Government's attempt to distinguish *Lemire* because it involved sex offender registration, and not firearms restrictions, is thus unpersuasive. Ans. at 43. Also noteworthy is that the Government does not address the argument that revisions to the Rules for Courts-Martial distinguish *Lepore* from this case.[4] *See* App. Br. at 26.

WHEREFORE, SrA George requests this Court find the Government's firearm prohibition is unconstitutional, and order that the Government correct the STR and EoJ.[5]

Respectfully submitted,

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v. Miller, 31 M.J. 798, 801 (A.F.C.M.R. 1990) (citing the CMA's summary disposition in *United States v. Madril*, 26 M.J. 87 (C.M.A. 1988) as authority supporting its holding in the case).

[4] The Government acknowledges that the Department of Air Force Instruction (DAFI) 51-201 requires the annotation of a firearm prohibition on the STR and EoJ. Ans. at 45-46. However, the Government fails to acknowledge that DAFI 51-201 is a service regulation and its requirement for this additional information is within this Court's Article 66, UCMJ, authority pursuant to R.C.M. 1101(a)(6) and R.C.M. 1111(b)(3)(F). *See* App. Br. at 26.

[5] As this Court is likely aware, the CAAF has granted review of the same issue presented here. *See, e.g.*, *United States v. Lampkins*, No. 24-0069/AF, 2024 CAAF LEXIS 105 (C.A.A.F. Feb. 22, 2024) (order granting review).

Certificate of Filing and Service

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Government Trial and Appellate Operations Division on April 3, 2024.

Respectfully submitted,

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40397**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Dennis A. GEORGE, Jr.	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

This court specifies the following issue for briefing in the above-captioned case:

> **WHETHER THE SPECIFICATION OF CHARGE I FAILED TO STATE AN OFFENSE BY OMITTING A NECESSARY ELEMENT OF THE INCHOATE OFFENSE, TO WIT: A CERTAIN OVERT ACT.**

Accordingly, it is by the court on this 18th day of April, 2024,

ORDERED:

Appellant and Appellee shall file briefs on the specified issue with this court. Briefs are due **not later than 8 May 2024**. Reply briefs will not be permitted without leave from the court.

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' BRIEF REGARDING A SPECIFIED ISSUE
v.	)	No. ACM 40397
Senior Airman (E-4) **DENNIS A. GEORGE, JR.**, USAF, *Appellant.*	)	Panel No. 1 8 May 2024

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

SPECIFIED ISSUE

WHETHER THE SPECIFICATION OF CHARGE I FAILED TO STATE AN OFFENSE BY OMITTING A NECESSARY ELEMENT OF THE INCHOATE OFFENSE, TO WIT: A CERTAIN OVERT ACT.

STATEMENT OF THE CASE

On 18 April 2024, this Court directed the parties to provide supplemental briefing on this specified issue no later than 8 May 2024.

STATEMENT OF FACTS

a. Facts related to the attempted sexual assault.

On the evening of 3 July 2021, WMB, Appellant and some co-workers went out to a bar. (R. at 384.) At one point in the evening Appellant indicated that he wanted WMB to give him "head." (R. at 388, 443.) WMB understood the term "head" to mean oral sex. (R. at 389.) WMB tried to laugh it off to defuse the situation and said "no." (R. at 389, 444.) Later in the evening, Appellant again asked for oral sex from WMB; she again told him "No." (R. at 389-390, 444).

During the ride home from the bar, WMB sat in the middle backseat with Appellant to her left and another co-worker to her right. (R. at 391-392.) While in the car, Appellant put his right arm around WMB and was whispering in her ear that she needed to give him head. (R. at 392.) Appellant stated that he was "being dead ass." (Id.) WMB understood this term to mean that Appellant was serious about the request. (Id.) WMB responded "no" to Appellant's requests. (R. at 393.) At one point during the ride, Appellant then grabbed the back of WMB's neck and pushed her head toward his crotch. (R. at 395, 477.) WMB was able to resist and pushed herself away, but before she could say anything to him to stop, Appellant grabbed her again with more force, and it was a lot harder for her to push back. (Id.) WMB's cheek contacted Appellant's crotch, and she could feel his zipper. (R. at 396.) Appellant stopped holding WMB's head once a co-worker had been alerted and asked what was going on. (R. at 477.) When Appellant exited the vehicle, WMB and another co-worker noticed that Appellant's pants were unzipped, and his underwear was visible. (R. at 398, 449-450.)

b. Facts related to charging, military judge's instructions, and trial counsel's argument.

The Specification of Charge I provided that Appellant:

> Did, at or near Newport News, Virginia, on or about 4 July 2021, attempt to commit a sexual act upon WMB by penetrating her mouth with his penis without her consent.

(*Charge Sheet*, ROT, Vo1. 1.)

During findings instructions, the military judge provided the following instructions related to Charge I and its specification:

> Charge I, Attempt, Sexual Assault without Consent. That, at or near Newport News, Virginia, on or about 4 July 2021, the accused did a certain overt act, that is: attempt to commit a sexual act upon [WMB] by penetrating her mouth with his penis without her consent;

> That the act was done with specific intent to commit the offense of sexual assault without consent; That the act amounted to more than mere preparation, that is, it was substantial, excuse me, it was a substantial step and a direct movement toward the commission of the intended offense; and that such act apparently tended to bring about the commission of the offense of sexual assault without consent, that is, the act apparently would have resulted in the actual commission of the offense of sexual assault without consent except for [WMB'S] physical and or verbal protestation, which prevented completion of that offense.

(R. at 553.)

The military judge instructed on preparation as follows:

> Preparation consists of devising or arranging the means or measures necessary for the commission of the attempted offense. To find the accused guilty of this offense, you must find beyond a reasonable doubt that the accused went beyond preparatory steps, and his act amounted to a substantial step and a direct movement toward the commission of the intended offense. A substantial step is one that is strongly corroborative of the accused's criminal intent and is indicative of his resolve to commit the offense.

(R. at 553-554.)

During findings argument trial counsel identified the overt act associated with the attempted sexual assault with the accused "…[H]olding her head down toward his lap. Undoing his pants prior to that. Those are all the overt acts underlying this attempt." (R. at 573.) Trial counsel also argued that intent was established when the accused told her he wanted "head" on several occasions and that WMB understood this term to mean oral sex. (Id.)

Trial counsel stated that the overt act had to be more than "mere preparation" and that such preparation consisted of Appellant verbalizing his intent and unzipping his pants. (R. at 574.) Trial counsel continued that grabbing WMB's head and forcing it into his lap and increasing the force when she resisted was also more than "mere preparation." (Id.)

At no point did trial defense counsel object to the Specification of Charge I. During closing argument, trial defense counsel argued Appellant did not have the intent to sexually assault WMB and that he was merely "joking" or "flirting" with her. (R. at 586.) Appellant also raised inconsistencies in testimony and the small size of the vehicle in which the alleged assault occurred to establish reasonable doubt. (R. at 588.)

ARGUMENT

THE SPECIFICATION OF CHARGE I STATED AN OFFENSE BECAUSE IT ALLEGED EVERY ELEMENT OF THE CHARGED OFFENSE EXPRESSLY OR BY NECESSARY IMPLICATION.

Standard of Review

Whether a specification is defective and the remedy for such error are questions of law, which this Court review de novo. United States v. Norwood, 71 M.J. 204, 206 (C.A.A.F 2012). When a charge and specification are first challenged at trial, the Court will only adopt interpretations that hew closely to the plain text. United States v. Turner, 79 M.J. 401, 403 (C.A.A.F. 2020), (citing United States v. Fosler, 70 M.J. 225, 230 (C.A.A.F. 2011)). Hewing closely to the plain text means the court will consider only the language contained in the specification when deciding whether it properly states the offense in question. Id. citing United States v. Sutton, 68 M.J. 455 (C.A.A.F. 2010). However, "[a] flawed specification first challenged after trial . . . is viewed with greater tolerance than one which was attacked before findings and sentence." Id. citing United States v. Watkins, 21 M.J. 208, 209 (C.M.A. 1986). Under the latter scenario, the specification will be viewed with "maximum liberality." United States v. Bryant, 30 M.J. 72, 73 (C.M.A. 1990). If a specification fails to state an offense, the appropriate remedy is dismissal of that specification unless the Government can demonstrate that this constitutional error was harmless beyond a reasonable doubt. Turner, 79 M.J. at 403.

Law and Analysis

A specification is a plain, concise, and definite statement of the essential facts constituting the offense charge. R.C.M. 307(c)(3). A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication. Id. *See also* United States v. Fosler, 70 M.J. 225, 229 (C.A.A.F. 2011) (the military is a notice pleading jurisdiction specification). The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. United States v. Debrow, 346 U.S. 374, 376 (1953) (citing Cochran and Sayre v. United States, 157 U.S. 286, 290 (1895)).

a. The Specification of Charge I alleged every element of the charged offense expressly or by necessary implication.

Attempt in violation of Article 80, UCMJ requires these elements: (1) that the accused did a certain overt act; (2) that the act was done with the specific intent to commit a certain offense under the UCMJ; (3) that the act amounted to more than mere preparation; and (4) that the act apparently tended to effect the commission of the intended act. Manual for Courts-Martial, pt. IV, para. 4.b (2019 ed.) (MCM)[1]. The model specification for violation of Article 80 provides:

> In that _____ (personal jurisdiction data) did, (at/on board-location), (subject-matter jurisdiction data, if required), on or about ____20__, attempt to (describe offense with sufficient detail to include expressly or by necessary implication every element).

[1] All references to the Manual for Courts-Martial (MCM) are to the 2019 edition.

Id. at para. 4.e.

In this case the government meticulously followed the model specification in the UCMJ by filling in its blanks with the required jurisdictional data, date, and description of the offense. (*Charge Sheet*, ROT. Vol. 1.) There is no dispute with regard to the jurisdiction over Appellant, the date of the offense, and the description of the offense, "a sexual act upon Senior Airman WMB by penetrating her mouth with his penis without her consent," is an accurate description of the attempted sexual assault. Id. While the specification does not include an "overt act," military case law has long accepted the pleading of attempts under Article 80, UCMJ, 10 U.S.C. § 880, without alleging the overt act. *See, e.g.*, United States v. Garner, 28 M.J. 634 (A.F.C.M.R. 1989). Nothing in the Manual for Courts-Martial requires—either implicitly or expressly—that the overt act must be pleaded as part of the specification. *See* United States v. Mobley, 31 M.J. 273, 278 (C.M.A. 1990); Norwood, 71 M.J. at 206-07. Nor is it necessary to include the elements of the underlying predicate, or target, offense, as long as the accused is adequately on notice of the nature of the offense. Turner, 79 M.J. at 404.

In Norwood, appellant was charged with the following specification of attempted adultery:

> In that [Appellant], U.S. Marine Corps, a married man, on active duty, did, at Okinawa, Japan, on or about 17 April 2009, attempt to commit adultery with [the victim], U.S. Marine Corps, a woman not his wife, by trying to place his penis inside of her vagina and have sexual intercourse with her.

Id. at 206.

Appellant argued that the specification was insufficient because it did not allege all elements of the target or predicate offense. Id. CAAF found that the attempted adultery specification expressly alleged the elements of attempted adultery despite the fact that the specification did not

include the elements of the target offense or any overt act. Id. In reaching this conclusion, CAAF relied on United States v. Bryant, in that it is not essential to the validity of an inchoate charge that the offense that is the object of the agreement be described with "technical precision." 30 M.J. 72, 73-74. CAAF also relied on Resendiz-Ponce, in that "an indictment alleging attempted illegal reentry under [the criminal code] need not specifically allege a particular overt act or any other component part of the offense." Id. (citing United States v. Resendiz-Ponce, 549 U.S. 102, 107 (2007)) (finding that the word "attempt" coupled with the specification of the time and place of the alleged illegal entry provided respondent with more than adequate notice than would an indictment describing particular overt acts). The Court in Resendiz-Ponce found:

> Not only does "attempt" as used in common parlance connote action rather than mere intent, but, more importantly, as used in the law for centuries, it encompasses both the overt act and intent elements. Thus, an indictment alleging attempted reentry under § 1326(a) need not specifically allege a particular overt act or any other "component par[t]" of the offense.

Resendiz-Ponce, 549 U.S. at 103.

The specification in Norwood and this case are identical, in that both specifications followed the model specification in the UCMJ and consistent with the model, neither specification included an "overt act." The inclusion of an overt act is unnecessary because the word "attempt," which was included in both specifications, encompassed both the overt act and intent elements. *See* Resendiz-Ponce, 549 U.S. at 103. As a result, the specification included either expressly or by necessary implication every element of the offense of sexual assault, so as to give Appellant notice of the charge against which he must defend and protect him against double jeopardy. *See* Turner, 79 M.J. at 403.

This finding is consistent with the fact that the military is a notice pleading jurisdiction and that it is not essential to the validity of an inchoate charge that the offense be described with "technical precision." *See* Fosler, 70 M.J. at 229; Bryant 30 M.J. at 73-74. This standard is also consistent with that of the federal courts where parroting the language of a federal criminal statute is often sufficient to put an accused on notice of the charge against which he must defend, and, second enable him to plead an acquittal or conviction in bar of future prosecutions for the same offense. Id. at 108-109 (citing Hamling v. United States, 418 U.S. 87, 117 (1974)). However, in certain circumstances, there are crimes that must be charged with greater specificity to achieve these goals. Id. Where guilt depends so crucially upon such a specific identification of fact, an indictment must do more than simply repeat the language of the criminal statute. Hamling, 418 U.S. at 118; *see also* Russell v. United States, 369 U.S. 749 (1962) (statute making it a crime for a witness summoned before a congressional committee to refuse to answer any question "pertinent to the question under inquiry" must allege the subject of the congressional hearing in order to determine whether the defendant's refusal was "pertinent").

Yet, in this situation there was no fact or concept that needed to be pled with such specificity that the failure to do so denied Appellant an opportunity to mount a defense or enable him to plead an acquittal or conviction in bar of future prosecutions for the same offense. Indeed, the location, the date, victim identification, underlying crime (sexual assault), and the theory of sexual assault were all identified in the specification. (*Charge Sheet*, ROT. Vol. 1.) In short, the government had no reason to deviate from the model specification and add additional information. The specification provided notice of what Appellant had to defend against and was specific enough to prevent re-prosecution for the same offense.

There is no indication that Appellant was unaware of what he had to defend against or that he was concerned that he could be re-prosecuted for the same offense. Appellant did not object to the specification at trial or request a bill of particulars. Appellant defended against the charge on factual grounds in that Appellant did not have the intent to sexually assault WMB and that he was merely "joking" or "flirting" with her. (R. at 586.) Appellant also raised inconsistencies in testimony and the small size of the vehicle, to demonstrate that the alleged offense would have been difficult to execute. (R. at 588.) While these arguments were not successful in persuading the members, these arguments are indicative of a finding that Appellant understood the charges he needed to defend against regardless of the omission of an overt act in the specification.

In sum, the Specification of Charge I included all the elements either expressly or by implication such that Appellant was able to mount a defense and enabled him to plead a conviction in bar of future prosecutions. The absence of the overt act in the specification was consistent with the model specification, unnecessary for the specification, and subsumed in the word "attempt." Accordingly, this Court should deny relief on the basis that the Specification of Charge I did not contain an overt act.

b. The military judge's identification of a broad overt act in the instructions was consistent with Charge I and its Specification and did not serve to amend the specification.

The military judge's identification of a broad overt act in the instructions was consistent with the Charge and its Specification and did not cause the Specification to fail for want of an overt act or amend the specification. The military judge, in crafting the instructions, followed the Military Judge Benchbook which provides the following instruction:

> (1) That, (state the time and place alleged), the accused did (a) certain overt act(s), that is: (state the act(s) alleged or raised by the evidence);

> (2) That the act(s) (was) (were) done with specific intent to commit the offense of (state the alleged attempted offense);
>
> (3) That the act(s) amounted to more than mere preparation, that is, (it was) (they were) a substantial step and a direct movement toward the commission of the intended offense; and
>
> (4) That such act(s) apparently tended to bring about the commission of the offense of (state the alleged attempted offense), (that is, the act(s) apparently would have resulted in the actual commission of the offense of (state the alleged attempted offense) except for (a circumstance unknown to the accused) (an unexpected intervening circumstance) (_____) which prevented completion of that offense.

Department of the Army Pamphlet (D.A. Pam.) 27-9, Military Judges' Benchbook, para. 3a-4-1 (12 April 2024).

While not a primary source of law, *see* United States v. Riley, 72 M.J. 115, 122 (C.A.A.F. 2013), the Benchbook indicates that an attempt specification may not always include an overt act because the template instructed the military judge to include overt acts that are "alleged *or raised by the evidence."* D.A. Pam. 27-9, para. 3a-4-1 (emphasis added). Members are to be instructed that they must be convinced beyond a reasonable doubt that an accused did a certain act or acts as either alleged or raised by the evidence. Id. As there were no overt acts alleged in the specification, the military judge properly exercised his discretion and broadly instructed on the overall offense as the overt act. *See* United States v. Allen, 2017 CCA LEXIS 649, *18 (A.F. Ct. Crim. App. 2017)(unpub. op.) (military judge's sua sponte instruction on overt acts not included in the specification was proper and did not amend the specification). The military judge's action in the case was not only in step with the Benchbook guidance but also fulfilled the military judge's responsibility to provide an adequate description of that element for the members. *See* Id.; United States v. Killion, 75 M.J. 209, 213 (C.A.A.F. 2016).

The only remaining issue is whether the overt act described by the military judge was "raised" by the evidence. It was. WMB testified that Appellant was serious about oral sex, that he unzipped his pants, and that he forcibly pushed WMB's head toward his penis such that WMB's cheek was pressed against his zipper, and when she resisted, he applied more force. (R. at 396, 398, 449-450.) The military judge's instruction therefore represented a holistic interpretation of these piecemeal acts in that Appellant "attempt[ed] to commit a sexual act upon Senior Airman WMB by penetrating her mouth with his penis without her consent" (See R. at 553.) The military judge's instruction recited what WMB could have easily testified to had trial counsel started with a more general question. In response to what happened in the backseat of the vehicle on the night in question, WMB could have easily stated that Appellant "attempted to put his penis in my mouth without my consent" because that is the very act that she described with her testimony. Trial counsel and WMB's detailed description of the attempted sexual assault provided the members with a better picture the prosecution's theory of the case and likely bolstered WMB's credibility. And, during closing argument, trial counsel was able to point to the specific overt acts that fell under the umbrella instruction provided by the military judge. (R. at 573.) The military judge, on the other hand, did not have to provide a detailed account of the attempted sexual assault to reiterate the prosecution's theory or bolster WMB's credibility. Indeed, artificially breaking down the overt act into a play-by-play account of WMB's testimony would have made the instructions unnecessarily complex and had zero impact on either the prosecution or defense theory of the case; this is likely why trial defense counsel had no objection to the instruction and agreed that they were a correct statement of the law. (R. at 548.).

In sum, the military judge's instructions were consistent with Charge I and its Specification and did not serve to amend the Specification. The military judge followed the

instructions provided by the Benchbook and identified an umbrella overt act that was raised by the evidence. The military judge's overt act represented a holistic recitation of the WMB's testimony - testimony that WMB could have easily provided had she been asked a general question. Artificially breaking down the military judge's overt act would have made the instructions unnecessarily complex and had no impact on the prosecution or defense theory of the case. Accordingly, this Court should deny Appellant relief on the basis that the military judge's instructions amended the Charge and its Specification.

CONCLUSION

The Charge and its Specification stated an offense despite the omission of a certain overt act. The military judge's instruction did not amend or invalidate the Charge and its Specification. For the above-stated reason and the reasons stated in the answer to assignments of error, the United States respectfully requests this Honorable Court deny Appellant's claims and affirm the sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

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

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