**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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| **UNITED STATES,** *Appellee,* | ) | **MOTION FOR ENLARGEMENT OF TIME (FIRST)** |
| v. | ) | Before Panel No. 1 |
| Captain (O-3), **ZACHARY R. BRAUM,** United States Air Force, *Appellant.* | ) | No. ACM 40434 |
| | ) | 4 May 2023 |

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **11 July 2023**. The record of trial was docketed with this Court on 13 March 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,

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

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 4 May 2023.

Respectfully submitted,

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

5 May 2023

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Captain (O-3)<br>ZACHARY R. BRAUM, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40434<br><br>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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 5 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**

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| **UNITED STATES,** *Appellee,* | ) | **MOTION FOR ENLARGEMENT OF TIME (SECOND)** |
| v. | ) | Before Panel No. 1 |
| Captain (O-3), **ZACHARY R. BRAUM,** United States Air Force, *Appellant.* | ) | No. ACM 40434 |
| | ) | 4 July 2023 |

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **10 August 2023**. The record of trial was docketed with this Court on 13 March 2023. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

On 21-28 October 2022, contrary to his pleas,[1] Appellant was convicted by a panel of officer members at a general court-martial convened at McConnell Air Force Base, Kansas, of one charge and six specifications of sexual assault[2] and one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one charge and three

[1] Appellant was acquitted of two specifications of sexual assault in violation of Article 120, UCMJ, and two specifications of domestic violence in violation of Article 128b, UCMJ. ROT, Vol. 1, EOJ.

[2] Appellant was found not guilty of having committed sexual assault "on divers occasions" pursuant to a R.C.M. 917 motion for one specification of sexual assault (Specification 7). ROT, Vol. 1, EOJ.

specifications of domestic violence[3,4] in violation of Article 128b, UCMJ, and one charge and one specification of reckless operation of a vehicle in violation of Article 113, UCMJ. Record of Trial (ROT), Vol. 1., Entry of Judgment, dated 6 December 2022. The military judge sentenced Appellant to a reprimand, total forfeitures, confinement for a total of 9 years,[5] and a dismissal. *Id*. The convening authority took no action on the findings or sentence. ROT, Vol.1, Decision on Action, dated 22 November 2022. The convening authority denied Appellant's request to have his automatic forfeitures waived for four months. *Id*.

The record of trial consists of 8 prosecution exhibits, 19 defense exhibits, and 58 appellate exhibits; the transcript is 1284 pages. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and not yet begun her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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[3] Appellant was found guilty of one specification of domestic violence by exceptions, such that he was found not guilty of the words "on divers occasions." ROT, Vol. 1, EOJ.

[4] Appellant was found guilty of one specification of domestic violence by exceptions and substitutions, with the words "arm" and "chest" excepted out. ROT, Vol. 1, EOJ. He was not guilty of the excepted words, and guilty of the substituted words, "arms" and "shoulders." *Id*.

[5] The military judge sentenced Appellant to 2 years confinement (Specification 1 of Charge I), 2 years confinement (Specification 2 of Charge I), 3 years confinement (Specification 3 of Charge I), 6 months confinement (Specification 5 of Charge I), 18 months confinement (Specification 6 of Charge I), 1 year confinement (Specification 7 of Charge I), 1 year confinement (Specification 9 of Charge I), 2 years confinement (Specification 1 of Charge II), 1 year confinement (Specification 2 of Charge II), 3 months confinement (Specification 4 of Charge II), and 3 months confinement. Based on the military judge's segmented sentencing scheme, Appellant's sentence was composed of a 2-year sentence, a 3-year sentence, a 1-year sentence, an 18-month sentence, a 1-year sentence, a 3-month sentence, and a 3-month sentence, totaling 9 years.

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

Respectfully submitted,

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

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 4 July 2023.

Respectfully submitted,

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

5 July 2023

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Captain (O-3)<br>ZACHARY R. BRAUM, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40434<br><br>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. The United States has also become aware that Appellate Exhibits XXI-XXV may not properly sealed in all copies of the Record of Trial and would like to use this opportunity to bring the matter to this Court's attention, if the Court desires to issue corrective action.

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

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

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 5 July 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**

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| **UNITED STATES**<br>*Appellee,* | ) | **APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)** |
| v. | ) | Before Panel No. 1 |
| Captain (O-3)<br>**ZACHARY R. BRAUM,**<br>United States Air Force | ) | No. ACM 40434 |
| *Appellant* | ) | 3 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 (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 **9 September 2023**. The record of trial was docketed with this Court on 13 March 2023. From the date of docketing to the present date, 143 days have elapsed. On the date requested, 180 days will have elapsed.

Between 21-28 October 2022, Appellant was tried by a general court-martial at McConnell Air Force Base, Kansas. Contrary to his pleas, a panel of officer members found Appellant guilty of one charge and six specifications of sexual assault and one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ); one charge and three specifications of domestic violence in violation of Article 128b, UCMJ; and one charge and one specification of reckless operation of a vehicle in violation of Article 113, UCMJ. Record (R.) 1248-49. The panel members acquitted Appellant of two specifications of sexual assault and two specifications of domestic violence. *Id*. at 1249. The military judge sentenced Appellant to a reprimand, to forfeit all pay and allowances, to be confined for a total of 9 years through concurrent

and consecutive sentences, and to be dismissed from the service. R. at 1283-84. The convening authority took no action on the findings or sentence and denied Appellant's request to have his automatic forfeitures waived for four months. Record of Trial, Vol.1, *Convening Authority Decision on Action – United States v. Captain Zachary R. Braum*, dated 22 November 2022.

The record of trial is twelve volumes consisting of eight Prosecution Exhibits, 19 Defense Exhibits, and 58 Appellate Exhibits; the transcript is 1284 pages. Appellant is currently 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. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, 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 3 August 2023.

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

4 August 2023

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Captain (O-3)<br>ZACHARY R. BRAUM, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40434<br><br>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. The United States has also become aware that Appellate Exhibits XXI-XXV may not properly sealed in all copies of the Record of Trial and would like to use this opportunity to bring the matter to this Court's attention, if the Court desires to issue corrective action.

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

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

**CERTIFICATE OF FILING AND SERVICE**

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

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| **UNITED STATES,** *Appellee,* | ) | **APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)** |
| v. | ) | |
| | ) | Before Panel No. 1 |
| Captain (O-3), **ZACHARY R. BRAUM,** United States Air Force, *Appellant*. | ) | No. ACM 40434 |
| | ) | 28 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 an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **9 October 2023**. The record of trial was docketed with this Court on 13 March 2023. From the date of docketing to the present date, 168 days have elapsed. On the date requested, 210 days will have elapsed.

Between 21-28 October 2022, Appellant was tried by a general court-martial at McConnell Air Force Base, Kansas. Contrary to his pleas, a panel of officer members found Appellant guilty of one charge and six specifications of sexual assault and one specification of abusive sexual contact, all in violation of Article 120, Uniform Code of Military Justice (UCMJ); one charge and three specifications of domestic violence in violation of Article 128b, UCMJ; and one charge and one specification of reckless operation of a vehicle in violation of Article 113, UCMJ. R. at 1248-49. The panel members acquitted Appellant of two specifications of sexual assault and two specifications of domestic violence. R. at 1249. The military judge sentenced Appellant to a reprimand, to forfeit all pay and allowances, to be confined for a total of nine years through concurrent and consecutive sentences, and to be dismissed from the service. R. at 1283-84. The

convening authority took no action on the findings or sentence and denied Appellant's request to have his automatic forfeitures waived for four months. Record of Trial, Vol.1, *Convening Authority Decision on Action – United States v. Captain Zachary R. Braum*, dated 22 November 2022.

The record of trial is twelve volumes consisting of eight Prosecution Exhibits, 19 Defense Exhibits, 58 Appellate Exhibits, and one Court Exhibit; the transcript is 1,284 pages. Appellant is currently confined.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provide the following information. Military appellate counsel is currently assigned fifteen cases; nine cases are pending initial AOEs before this Court. Five cases have priority over the present case:

1. *United States v. Trueman,* No. ACM 40404 – The trial transcript is 134 pages long and the record of trial consists of two volumes containing three Prosecution Exhibits, zero Defense Exhibits, two Appellate Exhibits, and one Court Exhibit. Appellant is not currently in confinement. Counsel has not yet completed her review of the record of trial.

2. *United States v. Bak,* No. ACM 40405 – The trial transcript is 95 pages long and the record of trial is comprised of four volumes containing seven Prosecution Exhibits, two Defense Exhibits, nine Appellate Exhibits, and two Court Exhibits. Appellant is currently confined. Counsel has not yet completed her review of the record of trial.

3. *United States v. Baumgartner,* No. ACM 40413 – The trial transcript is 797 pages long and the record of trial contains seven volumes consisting of six Prosecution Exhibits, 17 Defense Exhibits, 44 Appellate Exhibits, and one Court Exhibit. Appellant is currently confined. Counsel has not yet completed her review of the record of trial.

4. *United States v. Folts,* No. ACM 40322 – The trial transcript is 2,141 pages long and the record of trial contains eight volumes consisting of ten Prosecution Exhibits, 40 Defense Exhibits,

66 Appellate Exhibits, and one Court Exhibit. Appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

5. *United States v. Cameron*, No. ACM S32751 – The trial transcript is 135 pages long and the record of trial consists of three volumes. There are seven Prosecution Exhibits, eight Defense Exhibits, and eleven Appellate Exhibits. Appellant is not currently in confinement. Counsel has not yet completed her review of the record of trial.

Civilian appellate counsel, Mr. Scott Hockenberry, represents ten appellate clients and is presently assigned to four cases pending before this Court. Mr. Hockenberry has completed his review of the record of trial and is currently drafting an AOE brief. Appellant's case is Mr. Hockenberry's second priority case behind *United States v. Kight*, No. ACM 40337.

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

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

Respectfully submitted,

SCOTT HOCKENBERRY
Attorney-At-Law
Daniel Conway & Associates

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, 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 28 August 2023.

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

28 August 2023

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Captain (O-3)<br>ZACHARY R. BRAUM, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40434<br><br>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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 28 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**

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| **UNITED STATES,** *Appellee,* | ) | **MOTION FOR WITHDRAWAL OF APPELLATE DEFENSE COUNSEL** |
| v. | ) | Before Panel No. 1 |
| Captain (O-3), **ZACHARY R. BRAUM,** United States Air Force, *Appellant.* | ) | No. ACM 40434 |
| | ) | 28 August 2023 |

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

Pursuant to Rules 12(b), 12.4, and 23.3(h) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel respectfully requests to withdraw as counsel in the above-captioned case. Captain Samantha Castanien has been detailed substitute counsel in undersigned counsel's stead and made her notice of appearance on 3 August 2023. Mr. Scott Hockenberry, civilian appellate counsel, remains on Appellant's case. He provided his notice of appearance to this Court on 17 April 2023. A thorough turnover of the record between counsel has been completed.

The Judge Advocate General has reassigned undersigned counsel from the Air Force Appellate Defense Division to Deputy Staff Judge Advocate position for the Office of Special Investigations – Judge Advocate Directorate. Accordingly, undersigned counsel is no longer detailed under Article 70, Uniform Code of Military Justice (UCMJ) to represent Appellant.

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

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

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Deputy Staff Judge Advocate
Office of Special Investigations,
Judge Advocate Directorate
Department of the Air Force

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 28 August 2023.

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

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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|---|---|---|
| **UNITED STATES,** *Appellee,* | ) | **MOTION TO EXAMINE SEALED MATERIALS** |
| v. | ) | |
| | ) | Before Panel No. 1 |
| Captain (O-3), **ZACHARY R. BRAUM,** United States Air Force, *Appellant.* | ) | No. ACM 40434 |
| | ) | 6 September 2023 |

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

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

1. **Appellate Exhibits XXVI-XXXV**, contained in Volumes (Vol.) 4-5: Military Rule of Evidence 412 motions relating to B.M., the named victim.[1] Despite being ordered sealed by the military judge in Appellate Exhibit XLV, undersigned counsel's copy of the record contains Appellate Exhibits XXVI-XXXV.[2]

2. **Appellate Exhibit XLV**, contained in Vol. 6: The military judge's ruling on the Mil. R. Evid. 412 motions concerning B.M. Within this ruling, the military judge seals Appellate Exhibits XXVI-XXXV and the ruling itself, Appellate Exhibit XLV. Despite being ordered sealed, undersigned counsel's copy of the record contains Appellate Exhibit XLV.

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[1] Specification 1 of Charge I, concerning L.B., was withdrawn and dismissed, making B.M., formerly B.E., the only named victim at trial. Record of Trial, Vol. 2, *Charge Sheet*, dated 24 September 2021.

[2] In counsel's copy of Appellate Exhibit XXXIV, two manila envelopes are present, erroneously noting the sexually explicit materials purported to be within were "not ordered sealed by the Court." They were, per Appellate Exhibit XLV.

3. **Transcript pages 114-172**: A closed session to discuss the filed Mil. R. Evid. 412 motions. Counsel notes that these pages are available in the version of the transcript available on Webdocs but, unlike the appellate exhibits above, they are *not* in counsel's record of trial.

4. **Transcript pages 195-205**: A second closed session to discuss an updated Mil. R. Evid. 412 notice and motion by defense. Counsel notes that these pages are available in the version of the transcript available on Webdocs but they are *not* in counsel's record of trial.

5. **Closed hearing audio**, contained in Vol. 2. As there are already several errors concerning the construction of this record of trial, undersigned counsel requests to examine the closed hearing audio to ensure it is present and complete as alleged.

Additionally, while counsel is *not* requesting to examine the following materials,[3] undersigned counsel wants to raise to the Court's attention that **Appellate Exhibits XXI-XXV**, which are Mil. R. Evid. 412 motions concerning L.B., are in counsel's record of trial, like the other Mil. R. Evid. 412 motions. These exhibits were sealed orally. R. at 39.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examining these materials is reasonably necessary to fulfill appellate counsel's responsibilities, undersigned counsel asserts that viewing the referenced materials is reasonably necessary to assess whether the military judge erred in allowing, or disallowing, evidence under Mil. R. Evid. 412. All parties to the trial had access to the appellate exhibits and were present during the closed sessions.

[3] Specification 1 of Charge I concerning L.B. was withdrawn and dismissed, mooting the motions. R. at 37.

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

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

*United States v. May*, 47 M.J. 478, 481 (C.A.A.F. 1998). Undersigned counsel must review the sealed materials to provide "competent appellate representation." *See id*. Accordingly, good cause exists in this case since undersigned counsel cannot fulfill her duty of representation under Article 70, Uniform Code of Military Justice, 10 U.S.C. § 870, without first reviewing these exhibits and related transcript portions.

Appellant is represented by undersigned counsel as well as civilian appellate defense counsel, Mr. Scott Hockenberry. Appellant, therefore, further requests this Court's permission for undersigned counsel to create and transmit digital copies of Appellate Exhibits XXVI-XXXV and XLV, and transcript pages 114-172 and 195-205 to Appellant's civilian counsel to facilitate counsel's preparation of Appellant's Assignments of Error.

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

Respectfully submitted,

SAMANTHA M. CASTANIEN, 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 were sent via email to the Court and served on the Appellate Government Division on 6 September 2023.

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

8 September 2023

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Captain (O-3)<br>ZACHARY R. BRAUM, USAF<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' RESPONSE<br>TO APPELLANT'S MOTION<br>TO EXAMINE<br>SEALED MATERIAL<br><br>ACM 40434<br><br>Panel No. 1 |

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

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

The United States opposes military appellate defense counsel creating additional digital copies of the sealed materials at Appellate Exhibits XXVI-XXXV and XLV, and transcript pages 114-172 and 195-205, and transmitting them to civilian appellate defense counsel, Mr. Scott Hockenberry. Mr. Hockenberry has a physical office location in the Northern Virginia area and is capable of traveling to Andrews AFB to view the aforementioned sealed materials, either at the Court or with detailed military defense counsel. Appellant's counsel has made no showing as to why Mr. Hockenberry cannot travel to the Court, and in the absence of such a showing, this Court should avoid allowing the creation of unnecessary additional copies of sensitive materials.

WHEREFORE, the United States respectfully responds to Appellant's 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 8 September 2023.

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

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40434** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Zachary R. BRAUM** | ) | |
| **Captain (O-3)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 6 September 2023, Appellant's military defense counsel submitted a Motion to Examine Sealed Materials. Specifically, Appellant's counsel requests to examine Appellate Exhibits XXVI–XXXV and XLV, and transcript pages 114–172 and 195–205, and the closed hearing audio contained in Volume 2 of the record of trial.

Appellant's military counsel notes that the above-mentioned appellate exhibits, along with Appellate Exhibits XXI–XXV, are erroneously attached to his copy of the record of trial. Appellate military counsel also notes that transcript pages 114–172 and 195–205 are erroneously available to all parties electronically on the United States Air Force Judge Advocate General's Corps WebDocs knowledge management system.

According to Appellant's counsel, "All parties at the trial had access to the appellate exhibits and were present during the closed sessions." She further avers that viewing the sealed materials is reasonably necessary to fulfill her duty of representation, and viewing the referenced materials is reasonably necessary to assess whether the military judge erred in allowing or disallowing evidence under Mil. R. Evid. 412.

Additionally, Appellant's military counsel request permission to create and transmit digital copies of Appellate Exhibits XXVI–XXXV and XLV, and transcript pages 114–172 and 195–205, to Appellant's civilian defense counsel to facilitate counsel's preparation of Appellant's assignments of error brief.[1]

On 8 September 2023, the Government responded to Appellant's motion and does not object to Appellant's counsel reviewing sealed materials that were released to both parties at trial, as long as the Government can also review the

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[1] Appellant's civilian defense counsel has two addresses listed in the record of trial: one address is local within the Virginia area; the other address is not local.

sealed portions of the record as necessary to respond to any assignment of error that refers to the sealed materials. The Government opposes Appellant's military counsel creating digital copies of the sealed materials at Appellate Exhibits XXVI–XXXV and XLV, and transcript pages 114–172 and 195–205, and transmitting them to civilian appellate defense counsel.

Upon our review of the record, we discovered that while Appellate Exhibits XXI–XXV, XXVI–XXXV, and XLV, and transcript pages 114–172 and 195–205 were sealed by the military judge at trial, the appellate exhibits were not sealed in the record of trial filed with the court. These exhibits should have been sealed, and the Clerk of Court will ensure Appellate Exhibits XXI–XXV, XXVI–XXXV, and XLV are properly sealed in the record retained by the court.

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities." Rule for Courts-Martial 1113(b)(3)(B)(i), *Manual for Courts-Martial*, *United States* (2019 ed.). The court finds Appellant's counsel has made a colorable showing that review of the attachments is necessary to fulfill counsel's duties of representation to Appellant. Additionally, assuming Appellant's civilian defense counsel is not local, then Appellant's request to create and transmit digital copies of Appellate Exhibits XXI–XXV, XXVI–XXXV, and XLV, and transcript pages 114–172 and 195–205, to send to Appellant's civilian defense counsel is reasonable and will be permitted by this court.

Accordingly, it is by the court on this 18th day of September, 2023,

**ORDERED:**

Appellant's Motion to Examine Sealed Materials is **GRANTED**. Appellate defense counsel and appellate government counsel may view **Appellate Exhibits XXI–XXV,**[2] **XXVI–XXXV, and XLV, transcript pages 114–172, 195–205, and the closed hearing audio in Volume 2 of the record of trial.**

If appellate defense counsel and appellate government counsel possess **Appellate Exhibits XXI–XXV, XXVI–XXXV, and XLV, transcript pages 114–172 and 195–205**, and **the closed hearing audio in Volume 2 of the record of trial**, counsel are authorized to retain copies of the materials in their possession until completion of our Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866, review of Appellant's case, to include the period for reconsideration in accordance with Rule 31 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals. After this period, appellate defense counsel

[2] The court recognizes that Appellant has not asked this court to view Appellate Exhibits XXI–XXV.

and appellate government counsel shall destroy any retained copies in their possession.

Appellant's request to create and transmit digital copies of the sealed exhibits to Appellant's civilian defense counsel is **GRANTED.** Appellant's military counsel is permitted to scan a hardcopy of the requested sealed materials; transfer scanned copies of sealed materials to a password-protected or encrypted DVD; email scanned sealed materials using encryption to the email address provided by civilian appellate defense counsel, Mr. Scott Hockenberry; and transmit files containing sealed materials encrypted or password-protected to Mr. Hockenberry via DoD SAFE. Appellant's military counsel must label any DVD copies with Appellant's name, ACM number, the date, and the language "CUI – sealed materials under R.C.M. 1113" and place it in a sealed envelope containing the same identifying information. Appellant's military counsel is also permitted to send sealed materials to Mr. Hockenberry via U.S. mail, Federal Express, or by similar secure means of shipment.

**It is further ordered:**

The Government will ensure that any government office in possession of the above-mentioned sealed materials not authorized by this court will be retrieved and destroyed.[3]

Further, the Government will ensure that the Air Force Judge Advocate General's Corps WebDocs knowledge management system removes closed-session transcript pages of Appellant's case **not later than 1 October 2023**.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

[3] The base legal office may maintain a sealed copy in accordance with Department of the Air Force Manual 51-203, *Records of Trial*, ¶ 9.3.6 (21 Apr. 2021).

**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 |
| Captain (O-3), **ZACHARY R. BRAUM,** United States Air Force, *Appellant*. | ) | No. ACM 40434 |
| | ) | 29 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 an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **8 November 2023**. The record of trial was docketed with this Court on 13 March 2023. From the date of docketing to the present date, 200 days have elapsed. On the date requested, 240 days will have elapsed.

Between 21-28 October 2022, Appellant was tried by a general court-martial at McConnell Air Force Base, Kansas. Contrary to his pleas, a panel of officer members found Appellant guilty of one charge and six specifications of sexual assault and one specification of abusive sexual contact, all in violation of Article 120, Uniform Code of Military Justice (UCMJ); one charge and three specifications of domestic violence in violation of Article 128b, UCMJ; and one charge and one specification of reckless operation of a vehicle in violation of Article 113, UCMJ. R. at 1248-49. The panel members acquitted Appellant of two specifications of sexual assault and two specifications of domestic violence. R. at 1249. The military judge sentenced Appellant to a reprimand, to forfeit all pay and allowances, to be confined for a total of nine years through concurrent and consecutive sentences, and to be dismissed from the service. R. at 1283-84. The

convening authority took no action on the findings or sentence and denied Appellant's request to have his automatic forfeitures waived for four months. Record of Trial, Vol.1, *Convening Authority Decision on Action – United States v. Captain Zachary R. Braum*, dated 22 November 2022.

The record of trial is twelve volumes consisting of eight Prosecution Exhibits, 19 Defense Exhibits, 58 Appellate Exhibits, and one Court Exhibit; the transcript is 1,284 pages. Appellant is currently confined.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provide the following information. Military appellate counsel is currently assigned fourteen cases; eight cases are pending initial AOEs before this Court and two cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). On 25 September 2023, military appellate counsel filed the Real Party in Interest's brief for *In re HVZ*, USCA Dkt. No. 23-0250/AF, at the CAAF. To date, five cases have priority over the present case:

1. *United States v. Leipart*, USCA Dkt. No. 23-0163/AF – The Government filed its Answer Brief on 20 September 2023. On 21 September 2023, the CAAF granted Appellant's motion to extend time to file the Reply Brief, which is now due on 13 October 2023. Oral argument is anticipated to occur by the end of the year.

2. *United States v. Bak,* ACM 40405 – The trial transcript is 95 pages long and the record of trial is comprised of four volumes containing seven Prosecution Exhibits, two Defense Exhibits, nine Appellate Exhibits, and two Court Exhibits. Appellant is currently confined. Counsel has completed her review of the sealed materials and has almost finished her review of the rest of the record.

3. *United States v. Baumgartner*, No. ACM 40413 – The trial transcript is 797 pages long and the record of trial contains seven volumes consisting of six Prosecution Exhibits, 17 Defense

Exhibits, 44 Appellate Exhibits, and one Court Exhibit. Appellant is currently confined. Counsel has not yet completed her review of the record of trial.

4. *United States v. Folts*, No. ACM 40322 – The trial transcript is 2,141 pages long and the record of trial contains eight volumes consisting of ten Prosecution Exhibits, 40 Defense Exhibits, 66 Appellate Exhibits, and one Court Exhibit. Appellant is not currently confined. Counsel has not yet completed her review of the record of trial but has transmitted the sealed materials to civilian appellate counsel in accordance with this Court's order.

5. *United States v. Cameron*, No. ACM S32751 – The trial transcript is 135 pages long and the record of trial consists of three volumes. There are seven Prosecution Exhibits, eight Defense Exhibits, and eleven Appellate Exhibits. Appellant is not currently in confinement. Counsel has not yet completed her review of the record of trial.

Civilian appellate counsel, Mr. Scott Hockenberry, represents ten appellate clients and is presently assigned to four cases pending before this Court. Mr. Hockenberry has completed his review of the record of trial, is in receipt of all sealed materials in accordance with this Court's order, and is currently drafting an AOE brief. Appellant's case is Mr. Hockenberry's second priority case behind *United States v. Kight*, No. ACM 40337.

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

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

Respectfully submitted,

SCOTT HOCKENBERRY
Attorney-At-Law
Daniel Conway & Associates

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, 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 29 September 2023.

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

2 October 2023

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Captain (O-3)<br>ZACHARY R. BRAUM, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40434<br><br>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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 2 October 2023.

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

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40434** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Zachary R. BRAUM** | ) | |
| **Captain (O-3)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 29 September 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 generally 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 11th day of October, 2023,

**ORDERED:**

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **8 November 2023**.

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

FOR THE COURT

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

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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|---|---|---|
| **UNITED STATES,** *Appellee,* | ) | **APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)** |
| v. | ) | Before Panel No. 1 |
| Captain (O-3), **ZACHARY R. BRAUM,** United States Air Force, *Appellant*. | ) | No. ACM 40434 |
| | ) | 30 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 enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **8 December 2023**. The record of trial was docketed with this Court on 13 March 2023. From the date of docketing to the present date, 231 days have elapsed. On the date requested, 270 days will have elapsed.

From 21-28 October 2022, Appellant was tried by a general court-martial at McConnell Air Force Base, Kansas. Contrary to his pleas, a panel of officer members found Appellant guilty of one charge and six specifications of sexual assault and one specification of abusive sexual contact, all in violation of Article 120, Uniform Code of Military Justice (UCMJ); one charge and three specifications of domestic violence in violation of Article 128b, UCMJ; and one charge and one specification of reckless operation of a vehicle in violation of Article 113, UCMJ. R. at 1248-49. The panel members acquitted Appellant of two specifications of sexual assault and two specifications of domestic violence. R. at 1249. The military judge sentenced Appellant to a reprimand, to forfeit all pay and allowances, to be confined for a total of nine years through concurrent and consecutive sentences, and to be dismissed from the service. R. at 1283-84. The

convening authority took no action on the findings or sentence and denied Appellant's request to have his automatic forfeitures waived for four months. Record of Trial, Vol.1, *Convening Authority Decision on Action* – United States v. Captain Zachary R. Braum, dated 22 November 2022.

The record of trial is twelve volumes consisting of eight Prosecution Exhibits, 19 Defense Exhibits, 58 Appellate Exhibits, and one Court Exhibit; the transcript is 1,284 pages. Appellant is currently confined.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provide the following information. Civilian appellate counsel, Mr. Scott Hockenberry, represents ten appellate clients and is presently assigned to four cases pending before this Court. Mr. Hockenberry has completed his review of the record of trial, is in receipt of all sealed materials in accordance with this Court's order, and is currently drafting an AOE brief. Appellant's case is Mr. Hockenberry's second priority case behind *United States v. Kight*, No. ACM 40337.

Military appellate counsel is currently assigned thirteen cases; nine cases are pending initial AOEs before this Court and three cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). To date, six cases have priority over the present case:

1. *United States v. Wells*, USCA Dkt. No. 23-0219/AF – On 20 October 2023, the CAAF granted review of one issue. Counsel is currently writing the Grant Brief, due 15 December 2023.

2. *In re HVZ*, USCA Dkt. No 23-0250/AF – Oral argument is scheduled for 5 December 2023. While working on *United States v. Wells,* counsel will be preparing to argue on behalf of the real party in interest in this case.

3. *United States v. Leipart*, USCA Dkt. No. 23-0163/AF – The parties are still waiting on the official oral argument date from the CAAF but have been put on notice of the CAAF's intent

to schedule oral argument for 16 January 2023. While working on the cases listed below, counsel will be preparing for oral argument in this case.

4. *United States v. Bak*, No. ACM 40405 – The trial transcript is 95 pages long. The record of trial is comprised of four volumes containing seven Prosecution Exhibits, two Defense Exhibits, nine Appellate Exhibits, and two Court Exhibits. This appellant is currently confined. On 30 October 2023, this Court ruled on this appellant's motion for leave to file motion for remand, deferring any decision on remand until Article 66, UCMJ, review. Counsel is conferring with the appellant and researching final issues in preparation for the AOE.

5. *United States v. Baumgartner*, No. ACM 40413 – The trial transcript is 797 pages long and the record of trial contains seven volumes consisting of six Prosecution Exhibits, 17 Defense Exhibits, 44 Appellate Exhibits, and one Court Exhibit. This appellant is currently confined. Counsel has completed her review of the transcript, but has not yet completed her review of the remaining parts of the record.

6. *United States v. Folts*, No. ACM 40322 – The trial transcript is 2,141 pages long and the record of trial contains eight volumes consisting of ten Prosecution Exhibits, 40 Defense Exhibits, 66 Appellate Exhibits, and one Court Exhibit. This appellant is not currently confined. Counsel has not yet completed her review of the record of trial but has transmitted the sealed materials to civilian appellate counsel in accordance with this Court's order.

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

Appellant was advised of his right to a timely appeal. Appellant was also advised of the

request for this enlargement of time. Appellant agrees with this request for an enlargement of time.

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

Respectfully submitted,

SCOTT HOCKENBERRY
Attorney-At-Law
Daniel Conway & Associates

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, 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 30 October 2023.

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

31 October 2023

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Captain (O-3)<br>ZACHARY R. BRAUM, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40434<br><br>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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 31 October 2023.

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

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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|---|---|---|
| **UNITED STATES,** *Appellee,* | ) | **APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)** |
| v. | ) | |
| | ) | Before Panel No. 1 |
| Captain (O-3), **ZACHARY R. BRAUM,** United States Air Force, *Appellant*. | ) | No. ACM 40434 |
| | ) | 29 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 an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **7 January 2024**. The record of trial was docketed with this Court on 13 March 2023. From the date of docketing to the present date, 261 days have elapsed. On the date requested, 300 days will have elapsed.

From 21-28 October 2022, Appellant was tried by a general court-martial at McConnell Air Force Base, Kansas. Contrary to his pleas, a panel of officer members found Appellant guilty of one charge and six specifications of sexual assault and one specification of abusive sexual contact, all in violation of Article 120, Uniform Code of Military Justice (UCMJ); one charge and three specifications of domestic violence in violation of Article 128b, UCMJ; and one charge and one specification of reckless operation of a vehicle in violation of Article 113, UCMJ. R. at 1248-49. The panel members acquitted Appellant of two specifications of sexual assault and two specifications of domestic violence. R. at 1249. The military judge sentenced Appellant to a reprimand, to forfeit all pay and allowances, to be confined for a total of nine years through concurrent and consecutive sentences, and to be dismissed from the service. R. at 1283-84. The

convening authority took no action on the findings or sentence and denied Appellant's request to have his automatic forfeitures waived for four months. Record of Trial, Vol.1, *Convening Authority Decision on Action* – United States v. Captain Zachary R. Braum, dated 22 November 2022.

The record of trial is twelve volumes consisting of eight Prosecution Exhibits, 19 Defense Exhibits, 58 Appellate Exhibits, and one Court Exhibit; the transcript is 1,284 pages. Appellant is currently confined.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provide the following information. Civilian appellate counsel, Mr. Scott Hockenberry, represents ten appellate clients and is presently assigned to four cases pending before this Court. Mr. Hockenberry has completed his review of the record of trial, is in receipt of all sealed materials in accordance with this Court's order, and is currently drafting an AOE brief. Appellant's case is Mr. Hockenberry's second priority case behind *United States v. Kight*, No. ACM 40337.

Military appellate counsel is currently assigned sixteen cases; thirteen cases are pending AOEs before this Court and three cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). To date, six cases have priority over the present case:

1. *United States v. Wells*, USCA Dkt. No. 23-0219/AF – On 20 October 2023, the CAAF granted review of one issue. Since Appellant's last request for an enlargement of time, military appellate defense counsel has been predominately working on *United States v. Wells*, which she took over from a previous appellate defense counsel. She reviewed the 1093-page transcript, researched the granted issue, and began drafting the Grant Brief. Counsel is currently finishing the Grant Brief and compiling the Joint Appendix, due 15 December 2023.

2. *In re HVZ,* USCA Dkt. No 23-0250/AF – Oral argument is scheduled for 5 December 2023. While working on *United States v. Wells,* counsel has been preparing to argue on behalf of the real party in interest.

3. *United States v. Leipart*, USCA Dkt. No. 23-0163/AF – Oral argument is scheduled for 16 January 2023. While working on the cases listed below, counsel will be preparing for oral argument in this case.

4. *United States v. Bak*, No. ACM 40405 – The trial transcript is 95 pages long and the record of trial is comprised of four volumes containing seven Prosecution Exhibits, two Defense Exhibits, nine Appellate Exhibits, and two Court Exhibits. This appellant is currently confined. Counsel is preparing to write the AOE, which she intends to do while preparing for *United States v. Leipart.*

5. *United States v. Baumgartner*, No. ACM 40413 – The trial transcript is 797 pages long and the record of trial contains seven volumes consisting of six Prosecution Exhibits, 17 Defense Exhibits, 44 Appellate Exhibits, and one Court Exhibit. This appellant is currently confined. Counsel has completed her review of the transcript, and she outlined one issue for the UNC Training she attended from 25-27 October 2023. Counsel has not yet completed her review of the remaining parts of the record.

6. *United States v. Folts*, No. ACM 40322 – The trial transcript is 2,141 pages long and the record of trial contains eight volumes consisting of ten Prosecution Exhibits, 40 Defense Exhibits, 66 Appellate Exhibits, and one Court Exhibit. This appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

Since Appellant's last request for an enlargement of time, military appellate defense counsel has also assisted with five different moot court arguments for five different cases. She assisted by

reading the briefs, doing legal research to ask questions, and participating in a mock oral argument for each case. To forewarn the Court, military appellate defense counsel will be preparing to assist with two more moots over the next month, in addition to her own, and she also has leave scheduled

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

Appellant was advised of his right to a timely appeal. Appellant was also advised of the request for this enlargement of time. Appellant agrees with this request for an enlargement of time.

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

Respectfully submitted,

SCOTT HOCKENBERRY
Attorney-At-Law
Daniel Conway & Associates

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, 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 29 November 2023.

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

29 November 2023

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Captain (O-3)<br>ZACHARY R. BRAUM, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br><br>ACM 40434<br><br>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 Military counsel has not completed review of the record of trial at this late stage of the appellate process.

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

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

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 29 November 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 |
| Captain (O-3), **ZACHARY R. BRAUM,** United States Air Force, *Appellant*. | ) | No. ACM 40434 |
| | ) | 27 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 an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **6 February 2024**. The record of trial was docketed with this Court on 13 March 2023. From the date of docketing to the present date, 289 days have elapsed. On the date requested, 330 days will have elapsed.

From 21-28 October 2022, Appellant was tried by a general court-martial at McConnell Air Force Base, Kansas. Contrary to his pleas, a panel of officer members found Appellant guilty of one charge and six specifications of sexual assault and one specification of abusive sexual contact, all in violation of Article 120, Uniform Code of Military Justice (UCMJ); one charge and three specifications of domestic violence in violation of Article 128b, UCMJ; and one charge and one specification of reckless operation of a vehicle in violation of Article 113, UCMJ. R. at 1248-49. The panel members acquitted Appellant of two specifications of sexual assault and two specifications of domestic violence. R. at 1249. The military judge sentenced Appellant to a reprimand, to forfeit all pay and allowances, to be confined for a total of nine years through concurrent and consecutive sentences, and to be dismissed from the service. R. at 1283-84. The

convening authority took no action on the findings or sentence and denied Appellant's request to have his automatic forfeitures waived for four months. Record of Trial, Vol.1, *Convening Authority Decision on Action* – United States v. Captain Zachary R. Braum, dated 22 November 2022.

The record of trial is twelve volumes consisting of eight Prosecution Exhibits, 19 Defense Exhibits, 58 Appellate Exhibits, and one Court Exhibit; the transcript is 1,284 pages. Appellant is currently confined.

Since Appellant's last request for an enlargement of time, Appellant has provided limited consent to disclose a confidential communication with counsel wherein he has conditionally waived military appellate counsel's review of the record so as to exercise his right to speedy appellate review. Military appellate defense counsel will assist civilian appellate defense counsel, Mr. Scott Hockenberry, in finalizing the AOE and will remain Appellant's detailed Article 70, UCMJ, counsel, but will not sign the brief, as she will not be able to complete her professional and ethical obligations to review the record of trial before the brief is filed. This timing issue is due to civilian and military appellate defense counsel's varying caseload priorities, further described below.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provide the following information. Civilian appellate counsel, Mr. Hockenberry, represents nine appellate clients and is presently assigned to four cases pending before this Court. Mr. Hockenberry has completed his review of the record of trial, is in receipt of all sealed materials in accordance with this Court's order, and is currently drafting an AOE brief. Appellant's case is Mr. Hockenberry's second priority case behind *United States v. Kight*, No. ACM 40337. Mr. Hockenberry has drafted eight issues for Appellant's AOE and is working to finalize the brief. Upon completion, military appellate defense counsel intends to review the brief.

Military appellate counsel is currently assigned fifteen cases; twelve cases are pending AOEs before this Court and three cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). To date, four cases have priority over the present case; however, due to Appellant's request to proceed on civilian appellate defense's counsel review of the record alone, military appellate defense counsel's case priorities at the CAAF will have the most impact on her ability to review Appellant's AOE before it is filed.

1. *United States v. Leipart*, USCA Dkt. No. 23-0163/AF – Oral argument is scheduled for 16 January 2024. Counsel is currently preparing for oral argument while working on the cases listed below.

2. *United States v. Wells*, USCA Dkt. No. 23-0219/AF – On 20 October 2023, the CAAF granted review of one issue. Counsel filed the Grant Brief on 15 December 2023. The Government's Answer Brief is expected no later than 15 January 2024, whereupon military appellate defense counsel will begin working on the Reply Brief.

3. *United States v. Baumgartner*, No. ACM 40413 – The trial transcript is 797 pages long and the record of trial contains seven volumes consisting of six Prosecution Exhibits, 17 Defense Exhibits, 44 Appellate Exhibits, and one Court Exhibit. This appellant is currently confined. Counsel has completed her review of the transcript, and she outlined one issue for the appellate advocacy training she attended from 25-27 October 2023. Counsel has not yet completed her review of the remaining parts of the record.

4. *United States v. Folts*, No. ACM 40322 – The trial transcript is 2,141 pages long and the record of trial contains eight volumes consisting of ten Prosecution Exhibits, 40 Defense Exhibits, 66 Appellate Exhibits, and one Court Exhibit. This appellant is not currently confined. Counsel

has not yet completed her review of the record of trial, but is working with a civilian appellate defense counsel on this appellant's appeal of a sex offense conviction.

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

Appellant was advised of his right to a timely appeal. Appellant was also advised of the request for this enlargement of time. Appellant agrees with this request for an enlargement of time.

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

Respectfully submitted,

SCOTT HOCKENBERRY
Attorney-At-Law
Daniel Conway & Associates

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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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 Appellate Government Division on 27 December 2023.

SAMANTHA M. CASTANIEN, Capt, USAF
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Joint Base Andrews, MD 20762-6604

27 December 2023

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Captain (O-3)<br>ZACHARY R. BRAUM, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40434<br><br>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 Military counsel has not completed review of the record of trial at this late stage of the appellate process.

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

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

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 27 December 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
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 40434** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Zachary R. BRAUM** | ) | |
| **Captain (O-3)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 27 December 2023 counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) 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 28th day of December 2023,

**ORDERED:**

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than **6 February 2024**.

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

FOR THE COURT

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 (NINTH)** |
| v. | ) | |
| | ) | Before Panel No. 1 |
| Captain (O-3), **ZACHARY R. BRAUM,** United States Air Force, *Appellant*. | ) | No. ACM 40434 |
| | ) | 29 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 enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **7 March 2024**. The record of trial was docketed with this Court on 13 March 2023. From the date of docketing to the present date, 322 days have elapsed. On the date requested, 360 days will have elapsed.

From 21-28 October 2022, Appellant was tried by a general court-martial at McConnell Air Force Base, Kansas. Contrary to his pleas, a panel of officer members found Appellant guilty of one charge and six specifications of sexual assault and one specification of abusive sexual contact, all in violation of Article 120, Uniform Code of Military Justice (UCMJ); one charge and three specifications of domestic violence in violation of Article 128b, UCMJ; and one charge and one specification of reckless operation of a vehicle in violation of Article 113, UCMJ. R. at 1248-49. The panel members acquitted Appellant of two specifications of sexual assault and two specifications of domestic violence. R. at 1249. The military judge sentenced Appellant to a reprimand, to forfeit all pay and allowances, to be confined for a total of nine years through concurrent and consecutive sentences, and to be dismissed from the service. R. at 1283-84. The

convening authority took no action on the findings or sentence and denied Appellant's request to have his automatic forfeitures waived for four months. Record of Trial, Vol.1, *Convening Authority Decision on Action* – United States v. Captain Zachary R. Braum, dated 22 November 2022.

The record of trial is twelve volumes consisting of eight Prosecution Exhibits, 19 Defense Exhibits, 58 Appellate Exhibits, and one Court Exhibit; the transcript is 1,284 pages. Appellant is currently confined.

In Appellant's eighth request for an enlargement of time, Appellant provided limited consent to disclose a confidential communication with counsel wherein he has conditionally waived military appellate defense counsel's review of the record so as to exercise his right to speedy appellate review. Military appellate defense counsel will assist civilian appellate defense counsel, Mr. Scott Hockenberry, in finalizing the AOE and will remain Appellant's detailed Article 70, UCMJ, counsel, but will not sign the brief, as she will not be able to complete her professional and ethical obligations to review the record of trial before the brief is filed. This timing issue is due to civilian and military appellate defense counsel's varying caseload priorities.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provide the following information. Civilian appellate counsel, Mr. Hockenberry, represents nine appellate clients and is presently assigned to four cases pending before this Court. Appellant's case is Mr. Hockenberry's first priority. Mr. Hockenberry has finished the draft AOE, which he has provided to military counsel for review. Military appellate defense counsel has begun her review.

Military appellate counsel is currently assigned fifteen cases; twelve cases are pending AOEs before this Court and three cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). Having now received the draft AOE for Appellant's case and begun

review, one case has priority over military appellate defense counsel's ability to complete her review of Appellant's AOE:

1. *United States v. Wells*, USCA Dkt. No. 23-0219/AF – On 20 October 2023, the CAAF granted review of one issue. Military appellate defense counsel is drafting the Reply Brief, currently due 2 February 2024. However, military appellate defense counsel requested an extension until 9 February 2024, as she suddenly became ill with the flu on 25 January 2024. The requested extension is still pending as of this filing.

Through no fault of Appellant, undersigned counsel have been working on other assigned matters and have yet to complete Appellant's AOE. Accordingly, an enlargement of time is necessary to allow undersigned counsel to finalize the AOE.

Appellant was advised of his right to a timely appeal. Appellant was also advised of the request for this enlargement of time. Appellant agrees with this request for an enlargement of time.

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

Respectfully submitted,

SCOTT HOCKENBERRY
Attorney-At-Law
Daniel Conway & Associates

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, 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 29 January 2024.

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

29 January 2024

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Captain (O-3)<br>ZACHARY R. BRAUM, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40434<br><br>Panel No. 1 |

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

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

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

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

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

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 29 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

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40434** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Zachary R. BRAUM** | ) | |
| **Captain (O-3)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 29 January 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Ninth) requesting an additional 30 days to submit Appellant's assignments of error (AOE). The Government opposes the motion.

In Appellant's motion, his counsel informs the court Appellant provided limited consent to disclose a confidential communication, specifically that "he has conditionally waived military appellate defense counsel's review of the record so as to exercise his right to speedy appellate review." Counsel for Appellant further represents that Appellant's case is first priority for his civilian appellate defense counsel Mr. Hockenberry, and that Mr. Hockenberry has finished the draft AOE, which has been provided to military appellate defense counsel for review. Military appellate defense counsel informs the court that she has begun her review and only one case has priority over her ability to complete her review of Appellant's AOE.

In an order by this court, dated 28 December 2023, addressing Appellant's Motion for Enlargement of Time (Eighth), this court advised Appellant's counsel that "given the number of enlargements granted thus far, the court will continue to closely examine any further requests for an enlargement of time." Given the nature of the case, the representations made by counsel for Appellant, and the number of enlargements granted thus far, the court is not willing to grant any further enlargements of time absent exceptional circumstances.

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 31st day of January, 2024,

**ORDERED:**

Appellant's Motion for Enlargement of Time (Ninth) is **GRANTED.** Appellant shall file any assignments of error not later than **7 March 2024**.

Appellant's counsel is advised that absent exceptional circumstances, no further enlargement of time will be granted.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | |
|---|---|
| **UNITED STATES**,<br>*Appellee* | **BRIEF ON BEHALF OF APPELLANT** |
| v. | Before Panel No. 1 |
| Captain (O-3),<br>**ZACHARY R. BRAUM,**<br>United States Air Force,<br>*Appellant* | No. ACM 40434<br><br>9 February 2024 |

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


BRIAN A. PRISTERA
Lead Civilian Appellate Defense Counsel
Daniel Conway and Associates

SCOTT R. HOCKENBERRY
Assistant Civilian Appellate Defense Counsel
Daniel Conway and Associates

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## Assignments of Error

**I. WHETHER TRIAL COUNSEL'S ARGUMENTS AMOUNTED TO PROSECUTORIAL MISCONDUCT THAT WARRANTS RELIEF.**

**II. WHETHER IT WAS PLAIN ERROR FOR THE MILITARY JUDGE TO GIVE A "360 DEGREE COMPLETELY ERRONEOUS INSTRUCTION" REGARDING THE PERMISSIBLE USE OF PRIOR INCONSISTENT STATEMENTS.**

**III. WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL DEFENSE TEAM FAILED TO RECOGNIZE THE DISTINCTION BETWEEN PRIOR CONSISTENT STATEMENTS ADMISSIBLE AS SUBSTANTIVE EVIDENCE AND PRIOR CONSISTENT STATEMENTS ADMISSIBLE FOR THE LIMITED PURPOSE OF TESTING THE CREDIBILITY OF THE WITNESS.**

**IV. CAN THE GOVERNMENT PROPERLY REFUSE TO DISCLOSE RELEVANT, NON-PRIVILEGED DATA IN ITS POSSESSION, CUSTODY, AND CONTROL ON THE BASIS THAT THE WITNESS WHO PROVIDED THE DATA GAVE LIMITED CONSENT WITH RESPECT TO ITS USE?**

**V. APPELLANT COULD NOT BE GUILTY OF THE ELEMENTS OF SPECIFICATION 1 OF CHARGE 1 WITHOUT ALSO BEING GUILTY OF THE ELEMENTS OF SPECIFICATION 4 OF CHARGE I. NEVERTHELESS, THE PANEL ACQUITTED HIM OF THE FORMER SPECIFICATION BUT CONVICTED HIM OF THE LATTER. CAN THIS COURT AFFIRM THE FINDINGS OF GUILTY AS TO SPECIFICATION 1 OF CHARGE I UNDER THESE CIRCUMSTANCES?**

**VI. WHETHER THE SENTENCES FOR SPECIFICATION 3, 6, AND 9 OF CHARGE I SHOULD RUN CONCURRENTLY BECAUSE THEY INVOLVED THE SAME VICTIM AND THE SAME ACT OR TRANSACTION.**

**VII. WHETHER IT WAS PLAIN ERROR TO ALLOW TRIAL COUNSEL TO ASK A WITNESS WHETHER SHE FELT THE VICTIM HAD MISLED HER OR WHETHER ANOTHER WITNESS HAD EVER LIED TO HER.**

## VIII. WHETHER THE EVIDENCE SUPPORTING APPELLANT'S CONVICTIONS IS FACTUALLY INSUFFICIENT.

### Statement of the Case

On 21-28 October 2022, Captain (Capt) Zachary R. Braum (Appellant) was tried by officer members at a general court-martial at McConnell Air Force Base, Kansas. Appellant pleaded not guilty to all charges and specifications; the members returned a mixed verdict. (Record (R.) at 25; R. at 1248-49). Appellant was convicted, contrary to his pleas, of three specifications of rape, three specifications of sexual assault, and one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920; three specifications of domestic violence in violation of Article 128b, UCMJ, 10 U.S.C. § 928b; and one specification of reckless operation of an aircraft in violation of Article 113, UCMJ, 10 U.S.C. § 913.[1]

The military judge sentenced Appellant to nine years confinement, forfeiture of all pay and allowances, a reprimand, and a dismissal. (R. at 1283-84; Record of Trial (ROT) Vol. 1, Statement of Trial Results). The convening authority took no action on the findings or the sentence. (ROT Vol. 1, Convening Authority Action).

### Statement of Facts

Appellant, an Air Force pilot, and BE[2] met in November of 2019. (R. at 545-46). BE was a single mother with children from two different men. (R. at 546, 600). Over the course of

[1] Unless otherwise noted, all references to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the Manual for Courts-Martial, United States (2019 ed.) (MCM).
[2] The complaining witness' initials were BE during the events in question. At trial, she was often referred to as BM due to a name change.

the next several months, the relationship progressed, BE and Appellant got engaged, and – by all external appearances – BE was extremely happy with the relationship. That changed on 12 July 2020 when Appellant broke off their engagement after an argument about BE's phone. (R. at 903-04). Thereafter, BE launched a barrage of accusations against Appellant (including a Federal Aviation Administration (FAA) complaint), alleging that he had abused her in various ways in the months leading up to their engagement. Those accusations ultimately cumulated in the court-martial proceedings at issue.

Large portions of BE's accusations focused on Appellant's supposedly unilateral introduction of various forms of "BDSM" sex into the relationship. BE portrayed herself as a passive – often non-consenting – participant in these activities. In pretrial interviews with the prosecution, apparently before she became aware that the defense had copies of her text messages with Appellant, BE denied requesting or purchasing "BDSM" items or sex toys in her relationship with Appellant. (R. at 861-62). On cross examination, however, the defense presented multiple explicit text messages BE had sent to Appellant, graphically showing individuals engaged in "BDSM" behavior, and referencing "BDSM," sex toys, and related activities. (R. at 850-53); (Def. Ex. A). BE did not provide these text messages to the prosecution. (R. at 855). BE did not provide these text messages to law enforcement. (R. at 855). OSI gave BE the option to provide text messages and explained doing so could help the investigation. (R. at 856-57). However, BE declined to provide her text messages. (R. at 857).

The defense also introduced evidence that several "BDSM" themed sex toys had been purchased on BE's Amazon.com account on 22 May 2020. (Def. Ex. B) (Amazon.com records

from BE's account).[3] These items included a "Miss Darcy" brand "steel anal hook," a "stuffed leather gag," a 3-pack of steel "butt plug[s]," and rope. (Def. Ex. B). The timing of these purchases (22 May 2020) placed them directly after the beginning of supposedly nonconsensual "BDSM" activities. *See generally* (ROT Vol. 1, Charge Sheet) (listing dates of allegations); *see also* (R. at 893) (noting BE's testimony that ball gag purchased on Amazon.com was a few days after Appellant nonconsensually used a different ball gag on her).

On cross examination, however, BE denied that she had ever used an "anal hook" (R. at 861) and, when asked if she was familiar with the "Miss Darcy anal hook," claimed that this item had only recently been brought to her attention. (R. at 864). When confronted about the Amazon.com purchase of this exact item, BE denied that she had made the purchase or received the item. (R. at 864) ("I do not know because I did not receive it because I did not purchase that."). BE directly stated that she did not realize until recently that these items were on her Amazon.com account. (R. at 868). The Amazon.com records reflect that the purchase was made in the early morning hours of 22 May 2020 (0732 UTC). In contradiction of BE's claims that she only recently learned of the existence of the item, or the purchases on her Amazon.com account, BE texted Appellant a screenshot of the Amazon.com listing for the anal hook the same morning as the purchase was made:

[3] BE did not give these records to the prosecution; the government had to subpoena them. (R. at 868).


(Def. Ex. A, page 4). When the defense confronted BE about the fact that she had texted a screenshot of the exact item in question, on the day it was purchased, BE denied knowledge of whether the screenshot had come from Amazon.com. (R. at 689). Later, however, BE acknowledged that she had purchased a butt plug at an apparently unrelated time. (R. at 892-93).

In June of 2020, Appellant and BE traveled to Tuscaloosa, Alabama, where BE had breast augmentation surgery (the operation occurred on 20 June 2020). (R. at 574, 603). Many of the charged sexual assaults occurred in the immediate aftermath of BE's surgery. (R. at 626-668). BE testified repeatedly that Appellant had pressured her into the breast augmentation surgery, and that it was exclusively his idea. *See* (R. at 570, 603-04, 606). BE specifically testified that she did not like the idea of the breast augmentation but did it because she thought it would help the relationship. (R. at 604, 606); *see also* (R. at 809) ("So, you testified that basically he forced you, or made you feel pressured, to get a breast augmentation? A. Correct."). When asked on cross examination if she had talked about getting a breast augmentation prior to meeting Appellant, BE flatly denied it. (R. at 809). However, the defense called a longtime friend of BE's (Ms. JJ) who testified that BE told JJ she was "very excited" about getting breast

augmentation and that "it was something she had wanted for a long time" – seven years. (R. at 1001-02).

BE testified at length about her physical limitations after the surgery, when she alleged many of the charged assaults occurred, attributing her inability to resist to these restrictions. *See, e.g.*, R. 626). She testified that she was "severely limited" during this recovery period and that was why she was unable to fight off Appellant's assaults. (R. at 846). BE testified that she was not going to the gym during this period. (R. at 846). The defense then confronted BE with a text message where she told Appellant she had gone to the gym on 30 June 2020. (R. at 846; Def Ex. A, page 72). BE acknowledged sending the message but stated she had lied in the message and had not actually gone to the gym. (R. at 846). When confronted with similar messages from 1 and 2 July 2020, BE again stated she had lied in the messages. (R. at 846-47). BE testified that the last incidence of nonconsensual sexual activity occurred on 10 July 2020 and involved Appellant taping her breasts together and handling them roughly, resulting in the incision opening up, severe bleeding, and physical trauma. (R. at 660-68). On cross-examination, the defense confronted BE with a text message from the very next day where she referenced lifting a "very heavy :) :)" case. (R. at 847; Def. Ex. A, page 90). No medical evidence corroborated BE's alleged injuries.

Large portions of BE's allegations of post-surgery sexual abuse involved Appellant using the pretext of massaging BE's breasts to initiate nonconsensual sexual conduct. *See* (R. at 626-68). BE reported that the first nonconsensual incident in this timeframe began when Appellant had forcefully and nonconsensually "massage[d] [her] breasts" resulting in significant pain and trauma and leading up to a particularly violent sexual assault. (R. at 627-39). Thereafter, BE testified there were additional times when Appellant "would come up to me and start massaging

my breasts very roughly, and forcefully again" and use the massaging as a pretext for initiating nonconsensual sex. (R. at 639-40). BE testified that she "caught on" that the massaging of the breasts was just an excuse Appellant would use. (R. at 640) ("Q. The massaging of the breasts was an excuse ---- A. Yeah."). In seemingly direct contradiction to her testimony about *Appellant's* forceful initiation of breast massaging in this period, the defense introduced evidence that BE texted Appellant on 2 July 2020: "Guess you will need to massage my big titties to help me recover ;)". (Def. Ex. A, page 78).

*Prior Inconsistent Statements Instruction About Their Use*

A large volume of evidence regarding prior inconsistent statements was presented at trial. In addition to the above:

BE testified at trial, that nonconsensual sexual acts took place starting in mid-April 2020. *See* (R. at 718-19) (cross examination confirming testimony). Defense counsel confronted BE, *without objection,* about prior inconsistent statements to law enforcement to the effect that nothing she was uncomfortable with had occurred prior to 17 May 2020--only *after* that date. (R. at 719, 731-33, 787-88).

Defense counsel confronted BE, without objection, about prior inconsistent statements made during litigation of a civilian protective order. (R. at 734-37, 789-90). BE acknowledged stating at a 22 September 2020 protective order hearing that "'The first time he raped me was June 24th. It was right after my surgery.'" (R. at 736). This prior statement was sworn. (R. at 736-37). BE seemed to allege the inconsistency was because the protective order proceeding artificially limited her testimony. (R. at 736, 790) ("That's the only part I got to say, and I didn't get to elaborate on that in the court hearing.") ("They wouldn't let me finish my statement in the court. . . .").

BE further acknowledged, without objection, that on 14 September 2022, during the initial phase of seeking the protective order, she had given a written narrative statement where she described some physical abuse but did not mention *any* sexual abuse. (R. at 746-49). When asked to explain this inconsistency, BE alleged that the Office of Special Investigations (OSI) suggested she not mention the sexual abuse during the protective order hearing so Appellant wouldn't be "tipped off". (R. at 747). When confronted with the fact that she had given the narrative statement at issue *before* meeting with OSI, BE seemingly pivoted and now explained that an individual named "B W [phonetic] said that July 12th would be enough to be able to get me my restraining order so I can feel safe." (R. at 747) (brackets and notation in original). Immediately thereafter, BE seemingly gave a third version, stating that a Newton Police Department (NPD) told her she was "not supposed to open up about the whole investigation." (R. at 747). BE then repeated that the individual named "B W [phonetic]," who apparently worked for the "Safe Hope" organization, had "told me that this would be enough to give me my restraining order." (R. at 747-48). The NPD officer who allegedly told BE she was "not supposed to open up about the whole investigation" had passed away prior to trial. (R. at 748). BE then repeated that she didn't want Appellant to be tipped off about the entirety of her allegations. (R. at 749).

On re-direct, trial counsel returned to this subject, asking "why [she] would've said" that ". . . the first incident was . . . June 24th with the sack over your head"? (R. at 902). BE replied that:

> I didn't get to explain in the court but I got cut off but I was trying to start telling them things that I was going through and that was the most extreme part so that's what I started off with, but I didn't get to finish with them.

(R. at 902). BE further stated "I was told not to tip him off about your guys' big giant investigation." (R. at 902). She then stated that she was only allowed to talk about what she had written the protection order narrative. (R. at 902).

Defense counsel confronted BE, without objection, about multiple prior inconsistent statements to law enforcement and defense counsel about the number of alleged sexual assaults. (R. at 720-29). The thrust of this presentation was that, while BE alleged a lesser number of sexual assaults at trial, she had previously told law enforcement that Appellant had sexually assaulted her "50 to 75 times" (R. at 722) and 50 times just in the month after her surgery. (R. at 726).

BE acknowledged, without objection, that she had previously disclosed some "doubts" about Appellant in statements to a friend but had not included her current allegations of assault in those prior statement(s). (R. at 738-39). BE further acknowledged, *without objection*, that she had made prior inconsistent statements to the effect of telling people that she wanted to marry Appellant, that she was very in love with him, and that she was excited about a future with Appellant. (R. at 740). This was contrasted with her testimony at trial that she had declined two proposals in March (R. at 799) and accepted in June out of fear because Appellant threatened to crash the airplane they were flying if she didn't accept (R. at 800-01). BE acknowledged that she had not disclosed the life-threatening proposal in "18 hours" of interviews with law enforcement or in the FAA complaint she had filed against Appellant. (R. at 801).

BE further testified that, at least towards the end of the relationship, she was "essentially counting down the days" "to execute [her] escape plan" of leaving Appellant after he deployed. (R. at 829). BE testified that, after the "plastic bag" assault, she was genuinely scarred, and she needed to find a safe way out of the relationship without Appellant hurting her or her children.

(R. at 900). BE acknowledged that she had never told a friend (JJ who later testified BE had poor character for truthfulness) about any abuse prior to 12 July 2020. (R. at 745). In contrast, BE acknowledged that, prior to that date, she had told JJ how amazing Appellant was. (R. at 745).

BE alleged that during one charged incident, Appellant placed a ball-gag in her mouth and then pinched her nose so she could not breath. (R. at 588-89). BE acknowledged that in all prior statements regarding her allegations, she had never alleged that Appellant had pinched her nose until the weekend before trial. (R. at 871-72).

BE acknowledged saying in a previous statement that she was tired of waiting for Appellant and wanted to try out a "butt plug." (R. at 875).

Despite the lack of objection to these prior inconsistent statements, the military judge instructed the panel that they could only be used to evaluate BE's credibility, and specifically forbade the panel from considering them substantively:

> You may have heard evidence that before this trial,
>
> [BE], [RE], and [KW], and [JJ] may have made statements that may be inconsistent with their testimony here in court.
>
> If you believe that inconsistent statements were made, you may consider the inconsistency in deciding whether to believe that witness' in-court testimony. You may not consider the earlier statements as evidence of the truth of the matters contained in the prior statements. In other words, you may only use them as one way of evaluating the witness' testimony here in court, you cannot use them as proof of anything else.

(R. at 1086).

## Argument

### I. TRIAL COUNSEL'S ARGUMENTS AMOUNTED TO PROSECUTORIAL MISCONDUCT THAT WARRANTS RELIEF.

***Standard of Review***

This Court reviews prosecutorial misconduct and improper argument de novo and where, as here, no objection is made, it reviews for plain error. *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019) (citing *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018)). To prove plain error, Appellant has the burden of establishing (1) there was error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right. *Id.* (quotations omitted). When the error is of constitutional dimensions, after the first two prongs of the plain error test are established, "the burden shifts to the Government to convince [the Court] that this constitutional error was harmless beyond a reasonable doubt." *United States v. Carter*, 61 M.J. 30, 33-35 (C.A.A.F. 2005) (citing *United States v. Powell*, 49 M.J. 460, 463–65, n.* (C.A.A.F. 1998); *United States v. Carpenter*, 51 M.J. 393, 396 (C.A.A.F. 1999)); *see also United States v. Flores*, 69 M.J. 366, 369 (C.A.A.F. 2011) ("Regardless of whether there was an objection or not, in the context of a constitutional error, the burden is on the Government to establish that the comments were harmless beyond a reasonable doubt.") (cleaned up).

***Law***

"A prosecutor proffers an improper argument amounting to prosecutorial misconduct when the argument oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021) (cleaned up). Caselaw has defined several categories of improper argument, to include the following relevant to the present case.[4]

[4] While these categories are helpful to defining and evaluating improper arguments, there is often overlap between categories and some improper arguments implicate more than one category.

*1. Expressing Personal Opinions, Vouching, and Bolstering*

Vouching for the credibility of witnesses is prohibited. *Voorhees*, 79 M.J. at 12; *see also* R.C.M. 919(b), *Discussion* ("Counsel should not express a personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt or innocence of the accused, nor should counsel make arguments calculated to inflame passions or prejudices."); Air Force Instruction (AFI) 51-110, *Professional Responsibility Program*, Attachment 2, Rule 3.4(e) (11 Dec. 2018) ("A lawyer shall not . . . state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.").

> [Vouching] pose[s] two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

*Id.* (quoting *United States v. Young*, 470 U.S. 1, 18-19 (1985) (additional citation omitted).[5]

The Court of Appeals for the Armed Forces (CAAF) recently found "clear and obvious error" in the following vouching arguments in *Voorhees*:

- "That was his perception. That was the truth."

[5] These dangers were perhaps increased in the present case by trial counsel's introductory voir dire question to the panel:

> Now, as you can the accused in this, Captain Braum, is represented by defense counsel whose duty it is to zealously represent him. Do you all agree that myself and Captain P also have a duty to represent our client, the United States Air Force, in zealously seeking justice, along with maintain [sic] good order and discipline?
>
> That's a positive response from all members.

(R. at 242).

- "[T]hat airman is credible. She testified credibly; she told you what happened to her."
- "[That witness is] not lying. It's the truth. It's what happened."
- Appellant is "without a doubt ... guilty."

*Voorhees*, 79 M.J. at 11-12.

Similarly, the CAAF recently found in *United States v. Norwood* that trial counsel "clearly committed misconduct during findings by repeatedly vouching for [the victim]. . . ." 81 M.J. 12, 20 (2021). The arguments the CAAF found "clearly" improper in *Norwood* included:

- "[The victim is an] innocent 15-year-old girl who has absolutely no reason to lie about what happened."
- "[The victim has] no reason to lie about what her uncle did to her"
- "[as soon as you] realize that [E.N.] is telling you the truth, the government will have proven its case to you beyond a reasonable doubt and it will be your duty to find the accused guilty."
- "[The victim is] an innocent child with no reason to lie."
- "[The victim] told you the truth"
- "you got to see the truth"
- "you know [the victim] told you the truth"
- "It's not a fabrication. It's not a lie. It's the truth. You know it's the truth."[6]

Caselaw from the federal circuits also condemns the practice of vouching for witness credibility. *See, e.g.*, *United States v. Starks*, 34 F.4th 1142, 1155, 1169, 1175 (10th Cir. 2022)

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[6] While the *Norwood* opinion does not list all of the objectionable arguments in their entirety, more detail on the arguments the CAAF found erroneous can be found in the parties' briefs, available on the CAAF website: https://www.armfor.uscourts.gov/calendar/202010.htm.

(reversing for, *inter alia*, improper vouching where prosecutor stated a witness "sat there and she told you the absolute truth."); *Hodge v. Hurley*, 426 F.3d 368, 377 (6th Cir. 2005) (finding "particularly egregious" the prosecutor's comment that the victim "is absolutely believable" – particularly given that she was a "key witness[]"); *United States v. Weatherspoon*, 410 F.3d 1142, 1148 (9th Cir. 2005) (noting the government improperly vouched for its witness where the prosecutor stated "three times over in rapid succession that a witness 'told the truth.'"); *United States v. Krebs*, 788 F.2d 1166, 1176 (6th Cir. 1986) (finding impropriety in the arguments: "'But I want to suggest to you that in this trial testimony she was telling the truth . . . .Basically, she had no reason to lie,' and 'she is basically telling the truth in this case because she had no reason to lie. . . .'") (ellipses in original); *Hall v. United States*, 419 F.2d 582, 586 (5th Cir. 1969) ("To permit counsel to express his personal belief in the testimony . . . would afford him a privilege not even accorded to witnesses under oath and subject to cross-examination. Worse, it creates the false issue of the reliability and credibility of counsel. This is peculiarly unfortunate if one of them has the advantage of official backing.").

Under this same category of improper argument, prosecutors are prohibited from expressing personal opinions about the defendant's guilt. *See Voorhees*, 79 M.J. at 11 ("While a prosecutor may argue that the evidence establishes an accused's guilt beyond a reasonable doubt, he is prohibited from expressing his personal opinion that the accused is guilty.") (citing *Young*, 470 U.S. at 7); *see also United States v. Garza*, 608 F.2d 659, 665 (5th Cir. 1979) ("The prosecutor may neither dispense with the presumption of innocence . . . nor sit as a thirteenth juror.") (quotation and citation omitted). "[W]hen a trial counsel offers her personal views of a defendant's guilt or innocence . . . it may confuse the jurors and lead them to believe that the issue is whether or not the prosecutor is truthful instead of whether the evidence is to be

believed." *United States v. Fletcher*, 62 M.J. 175, 181 (C.A.A.F. 2005) (citation omitted). "This is a dangerous practice because when the prosecutor conveys to the jurors his personal view that a witness spoke the truth, it may be difficult for them to ignore his views, however biased and baseless they may in fact be." *Id.* at 181-82 (quotation and citation omitted).

For example, in *Fletcher*, the CAAF found "plain and obvious" error in trial counsel's statement: "He is in fact guilty of divers uses of cocaine." *Id.* In *United States v. Cruz*, the Ninth Circuit found plain error and reversed because the prosecutor concluded his rebuttal argument with: "[Cruz] is guilty of what he is charged with. Find him guilty and *do the right thing* and make him finally take responsibility for what he did." 592 Fed.Appx. 623, 624 (9th Cir. 2015) (emphasis added). "By stating 'do the right thing' the prosecutor improperly expressed his personal opinion to the jury." *Id.* (*citing United States v. McKoy*, 771 F.2d 1207, 1210–11 (9th Cir. 1985)). "Without reference to the evidence or the burden of proof, the 'do the right thing' statement improperly urged the jury to convict on the basis of the prosecutor's subjective belief of what was 'right,' as opposed to the persuasive force of the evidence." *Id.* (citation omitted); *see also United States v. Mandelbaum*, 803 F.2d 42, 43 (1st Cir. 1986) (finding prosecutor's concluding remark--"And I would ask you, therefore, to do your duty and return a verdict of guilty"--was improper.).

2. *Comment on Exercise of Constitutional Rights*

It is constitutional error to comment upon accused's exercise of constitutional rights. *United States v. Moran*, 65 M.J. 178, 181 (C.A.A.F. 2007) (noting that argument mentioning an accused's invocation of constitutional rights "may serve to hinder the free exercise of such rights – rights that carry with them the 'implicit assurance that [their] invocation . . . will carry no penalty.'") (quoting *United States v. Daoud*, 741 F.2d 478, 480 (1st Cir.1984) (alterations in

original)); *see also United States v. Sutton*, 36 C.M.R. 29, 37 (C.M.A. 1965) (holding that when trial counsel comments upon the accused's exercise of a constitutional right it equates to a "penalty imposed by courts for exercising a constitutional privilege" and "cuts down on the privilege by making its assertion costly.") (quotation omitted). This includes the "expression of offense" by the prosecutor at the accused's exercise of constitutional rights is also error. *See Cunningham v. Zant*, 928 F.2d 1006, 1019 (11th Cir. 1991) ("The prosecutor's comments improperly implied that Cunningham had abused our legal system in some way by exercising his Sixth Amendment right to a jury trial."). "This constraint against mentioning the exercise of constitutional rights does not depend on the specific right at issue. There is 'little, if any, valid distinction' between the harm caused by comments regarding an accused's invocation of any protected rights." *Moran*, 65 M.J. at 181. Nonetheless, case law is replete with examples.

This principle prohibits comment on the accused's right to remain silent. *Griffin v. California*, 380 U.S. 609, 614 (1965); *United States v. Clark*, 69 M.J. 438, 443 (C.A.A.F. 2011) (finding plain and obvious error and explaining "it is settled that the government may not use a defendant's exercise of his Fifth Amendment rights as substantive evidence against him."); *Carter*, 61 M.J. at 33 ("'[i]t is black letter law that a trial counsel may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense.'") (quoting *United States v. Mobley*, 31 M.J. 273, 279 (C.M.A.1990)) (alteration in original); *United States v. Toro*, 37 M.J. 313, 318 (C.M.A. 1993) ("It is axiomatic that the prosecution may not comment on the defendant's right to remain silent . . . .") (citations omitted).

As an example, this Court has held that the use of words like "uncontradicted" or "uncontroverted" to characterize evidence that only the accused could rebut may constitute an improper comment on failure to testify. *United States v. Carter*, No. ACM 35027, 2003 WL

22495803, at *3 (A. F. Ct. Crim. App. 17 Oct. 2003) (unpub. op.), aff'd by 61 M.J. 30 (C.A.A.F. 2005) (reversing impacted conviction for plain error); *see also* R.C.M. 919(b), *Discussion* ("Trial counsel may not comment on the accused's exercise of the right against self-incrimination or the right to counsel. *See* Mil. R. Evid. 512. Trial counsel may not argue that the prosecution's evidence is unrebutted if the only rebuttal could come from the accused."); *United States v. Preston*, 873 F.3d 829, 842-43 (9th Cir. 2017) (prosecutor's remarks in closing that no evidence contradicted the victim's allegation was improper where only the defendant and the victim were present when the abused allegedly occurred and, as such, this amounted to a comment on the defendant's failure to testify.); *United States v. Cotnam*, 88 F.3d 487 (7th Cir. 1996) (prosecutor's comments that the government's case was "uncontradicted," "undenied," "unrebutted," "undisputed," and "uncontroverted" amounted to a violation of the defendant's Fifth Amendment rights when the defendant himself was the only person who could have contradicted the government's evidence); *Lent v. Wells*, 861 F.2d 972 (6th Cir. 1988) (reversing for repeated references to the uncontradicted nature of the evidence in violation of the defendant's right to remain silent); *United States v. Sardelli*, 813 F.2d 654 (5th Cir. 1987) (prosecutor's comment in closing about absence of defense evidence was improper where there was only one person who could possibly have had any knowledge, the defendant.).

Similarly, it is error to blame the accused during findings argument for exercising his constitutional right to put on a defense, present witnesses, or cross-examine. For example, in *United States v. Garcia*, the Army Court found constitutional error in government arguments that (1) the Appellant's decision to call his young son as a witness put the child in a difficult position and (2) it was not "fun" for the victim to go through the process of the Court-Martial, and thus the panel should disbelieve the motive(s) to fabricate the defense presented in cross examination.

ARMY 20130660, 2015 WL 4940266, at *7 (A. Ct. Crim. App. 18 Aug. 2015) (mem. op.). The Army Court found the latter argument "invited the panel to convict Appellant because of his exercise of his Sixth Amendment right to confront witnesses against him." *Id.*; *see also United States v. McCann*, 613 F.3d 486, 496 (5th Cir. 2010) (finding error in prosecution's criticism of defense attacks on police-officer-witnesses because "[t]he defense was entitled to challenge the credibility of the officers, just as it was entitled to challenge the credibility of any other witness. . . .").

*3. Burden Shifting*

"An improper implication that the defendant carries the burden of proof on the issue of guilt constitutes a due process violation." *United States v. Lewis*, 69 M.J. 379, 384 (C.A.A.F. 2011) (citing *United States v. Mason*, 59 M.J. 416, 424 (C.A.A.F. 2004)). Burden shifting is error of constitutional dimensions and is therefore subject to the harmless beyond a reasonable doubt standard of prejudice. *Mason*, 59 M.J. at 424. The suggestion that Appellant may be "obligated" to take a certain action, "and therefore obligated to prove his own innocence" constitutes burden shifting. *Id.* (finding it was burden shifting to suggest that Appellant should have requested a retest of forensic evidence); *see also Carter*, 61 M.J. at 34 (finding plain and obvious error of constitutional dimensions where "trial counsel improperly implied that [the accused] had an obligation to produce evidence to contradict the Government's witness. This essentially shifted the burden of proof to [the Appellant] to establish his innocence—a violation of protections of the Fifth Amendment.").

*4. Going Beyond Evidence of Record*

Counsel should limit their findings arguments to the evidence of record, as well as all reasonable inferences fairly derived from such evidence. *United States v. Bodoh*, 78 M.J. 231,

237 (C.A.A.F. 2019) (quotation marks and citations omitted); *see also* AFI 51-110, Attachment 2, Rule 3.4(e) ("A lawyer shall not . . . allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, [or] assert personal knowledge of facts in issue except when testifying as a witness. . . ."). "Therefore, when argument goes 'beyond the facts established in the record' or the reasonable inferences 'drawn from the evidence,'" this 'constitute[s] error.'" *Bodoh*, 78 M.J. at 237-38 (*quoting United States v. Paxton*, 64 M.J. 484, 488 (C.A.A.F. 2007)). An exception to this general rule allows trial counsel to comment during argument on contemporary history or matters of common knowledge within the community. *Id.* at 238 (quotation marks and citations omitted). These matters include routine personnel actions, such as military status and permanent change of station moves, a military branch's "zero tolerance" drug policy, and "any other matter upon which servicemembers in general have a common fund of experience and knowledge, through data notoriously accepted by all." *Id.* If trial counsel were allowed to argue facts not in evidence, the result would be "an accused's right of confrontation would be abridged, and the opportunity to impeach the source denied." *United States v. Clifton*, 15 M.J. 26, 29 (C.M.A. 1983). "When counsel argues facts not in evidence, or when he discusses the facts of other cases, he violates both of these principles." *Id.* at 29-30. Similarly, "[i]t is axiomatic that the prosecution may not . . . mischaracterize the evidence . . . ." *Toro*, 37 M.J. at 318.

Under this same category of improper argument, counsel may not "testify" or "invite[] the members to accept new information as factual, based on his [or her] authority." *Clifton*, 15 M.J. at 30. The Supreme Court recognized that "assertions of personal knowledge [by prosecutors during argument] are apt to carry much weight against the accused when they should properly carry none." *Berger v. United States*, 295 U.S. 78, 88 (1935). This includes providing

expert-like "testimony" about victim-dynamics and other subjects. *Id.* In *Clifton*, the Court of Military Appeals (CMA) reversed when—coupled with other examples of prosecutorial misconduct—trial counsel provided this type of improper expert-like commentary in closing about counter-intuitive victim behavior (e.g., making a date with a rapist and "[c]ommon rape fantasies") and the dynamics of the allegedly abusive relationship. *Id.* at 28-29. The CMA explained: "When trial counsel here discoursed on the practices and fantasies of rapists, and when he described the attitudes of unrelated rape victims, he was not drawing upon legitimate inferences from evidence of record or appealing to the common sense of the court-martial." *Id.* at 31. The CMA strongly condemned these improper arguments, concluding that:

> When trial counsel here discoursed on the practices and fantasies of rapists, and when he described the attitudes of unrelated rape victims, he was not drawing upon legitimate inferences from evidence of record or appealing to the common sense of the court-martial. He was inviting the members to accept new information as factual, *based on his authority*. Such communication was improper and should have been stricken.

*Id.* at 30 (emphasis in original).

Caselaw from the federal circuits also condemns the practice of introducing extra-record propositions about the subjects under consideration. *See, e.g.*, *United States v. Wright*, 625 F.3d 583, 611 (9th Cir. 2010) (prosecutor's comments about other similar cases "improperly introduced evidence outside the record. . . ."); *United States v. Perholtz*, 842 F.2d 343, 360 (D.C. Cir. 1988) (closing remarks about the purpose of bank accounts in the Cayman Islands were improper when not supported by evidence in the record).

*5. Injecting Improper Considerations*

It is inappropriate for counsel to reference "'the jury's societal obligation . . .if it suggests the panel base its decision on the impact of the verdict on society, a victim, and the criminal justice system as a whole, rather than the facts of the case.'" *United States v. Palacios Cueto*,

No. ACM 39815, 2021 WL 1999440, at *17 (A.F. Ct. Crim. App. 18 May 2021) (unpub. op.), aff'd, 82 M.J. 323 (C.A.A.F. 2022) (quoting *United States v. Condon*, No. ACM 38765, 2017 WL 1325643 at *18, 2017 CCA LEXIS 187 at *53 (A.F. Ct. Crim. App. 10 Mar. 2017) (unpub. op.), aff'd, 77 M.J. 244 (C.A.A.F. 2018)) (ellipsis in original). In *Palacios Cueto*, this Court found "obvious error" in "the circuit trial counsel's comment in argument to the court members that their duty was to decide 'whether justice will be served, or whether [Appellant] will be acquitted.'" WL 1999440, at 18. Similarly, "It is improper for a prosecutor to suggest that a jury has a civic duty to convict." *Thornburg v. Mullin*, 422 F.3d 1113, 1134 (10th Cir. 2005).

Such improper considerations are particularly dangerous when they invoke the views of the military command. The CAAF has "condemned references to command policies or views 'which in effect bring[ ] the commander into the deliberation room.'" *United States v. Pope*, 63 M.J. 68, 75 (C.A.A.F. 2006) (*quoting United States v. Grady*, 15 M.J. 275, 276 (C.M.A.1983)); *see also United States. v. Barrazamartinez*, 58 M.J. 173, 175 (C.A.A.F. 2003) ("Reference to departmental or command policies can create the appearance of unlawful command influence.") (quoting *Grady*, 15 M.J. at 276); *United States v. Kropf*, 39 M.J. 107, 109 (C.M.A. 1994) ("The danger of interjecting the command structure into the members' deliberations is ever present.").

*6. Prejudice*

In assessing prejudice, courts look "at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial." *United States v. Erickson*, 65 M.J. 221, 224 (C.A.A.F. 2007) (citing *Fletcher*, 62 M.J. at 184). This determination is based on "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence to support the conviction." *Norwood*, 81 M.J. at 19 (citing *Voorhees*, 79 M.J. at 12). Reversal is warranted for nonconstitutional error only

when the trial counsel's comments, taken as a whole, were so damaging that the appellate court cannot be confident that the members convicted the Appellant on the basis of the evidence alone. *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017) (quotation omitted). In the case of constitutional error, the burden is on the Government to establish that the comments were harmless beyond a reasonable doubt. *Flores*, 69 M.J. at 369 (citations omitted).

***Argument***

1. *Expressing Personal Opinions, Vouching, and Bolstering*

Trial counsel repeatedly and blatantly vouched for BE's credibility and expressed personal opinions about the evidence and Appellant's guilt:

- BE "is in fact a credible victim." (R. at 1097);
- "That she told you the truth." (R. at 1097);
- "That she tried her best to remember everything she could to the best of her ability and that you have no reason to doubt her despite the defense's best efforts to show otherwise." (R. at 1097);
- "That's what happened to [BE]. This is what it looks like, members, to be a victim of domestic violence of sexual assault." (R. at 1111);
- "So absolutely did he do this, did he commit this act on her? Penetrating her vulva with his penis? Yes. Did he do so by first rendering her unconscious with that bullwhip wrapped around her neck? Absolutely. And that is a crime, members." (R. at 116-17);
- "He committed this act, he continued to have sex with her even after she was unconscious." (R. at 1117);
- "He used this unlawful force in order to make her perform oral sex on him. Proving he is guilty of Specification 3 as well." (R. at 1118);
- "She was not consenting. He knew that she wasn't consenting. He knew that she didn't want to do it and he pressured anyway." (R. at 1120);
- "Accordingly, *guilty absolutely* of Charge II, Specification 1." (R. at 1128) (emphasis added);

- "Now she is a credible witness and the judge has instructed you, of course, that you can absolutely find the accused guilty *and should*, based on her testimony alone." (R. at 1131) (emphasis added);

- "*Absolutely yes this happened* in this happened again [inaudible] intimate partner [BE]." (R. at 1138) (emphasis added);

- "[W]hy, would [BE] be traveling back here from England to come into this court and testify to you about what happened?" (R. at 1142);

- "There is no reason why [BE] would get up here and come and lie to you." (R. at 1143);

- "What does she have to gain – what are the benefits of her reporting a sex crime?" (R. at 1144);

- "She has courtroom testimony where she comes up here. Again members, for more than a day. This is not a pleasant experience. Why would she do this? What possible reason does she have to lie? She has none. There is none. She is doing it because it is the truth. It is what happened to her." (R. at 1144).

- "He has committed crimes. And he has to be held accountable. And he is done so, by finding him guilty of all charges and specifications." (R. at 1145);[7]

- "She is not lying. She has no motivation to lie." (R. at 1212);

- "She has a new life. She's moved on. She doesn't need this. She has no motive to lie. She has not lied to you today. Everything she told you is the truth. And so so [sic] again members I ask that you do the right thing in finding Captain Braum accountable and finding him guilty of all charges and specifications." (R. at 1213).[8]

These arguments were erroneous and the error was plain or obvious.

The similarities between these arguments and arguments found in to constitute clear and obvious error in past cases is striking. Trial counsel mirrored nearly verbatim arguments the CAAF found to constitute "clear and obvious error" in *Voorhees*:

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[7] This was the concluding line of trial counsel's closing argument.
[8] This was the concluding line of trial counsel's rebuttal argument.

| ***Voorhees*:** | **This Case:** |
|---|---|
| "[That witness is] not lying. It's the truth. It's what happened." | "She is not lying."<br><br>"She has not lied to you today. Everything she told you is the truth."<br><br>"She is doing it because it is the truth. It is what happened to her." |
| "That was his perception. That was the truth." | "She is doing it because it is the truth. It is what happened to her."<br><br>"That she told you the truth."<br><br>"Everything she told you is the truth." |
| "Because that airman is credible. She testified credibly; she told you what happened to her." | BE "is in fact a credible victim."<br><br>"Now she is a credible witness. . . ." |
| Appellant is "without a doubt ... guilty." | "Accordingly, guilty absolutely of Charge II, Specification 1."<br><br>"Absolutely yes this happened. . . ."<br><br>"So absolutely did he do this, did he commit this act on her? Penetrating her vulva with his penis? Yes. Did he do so by first rendering her unconscious with that bullwhip wrapped around her neck? Absolutely. And that is a crime, members." |

Trial counsel similarly mirrored arguments held clearly erroneous in *Norwood*:

| *Norwood*: | This Case: |
|---|---|
| "[The victim is an] innocent 15-year-old girl who has absolutely no reason to lie about what happened."<br><br>"[The victim has] no reason to lie about what her uncle did to her."<br><br>"[The victim is] an innocent child with no reason to lie." | "There is no reason why [BE] would get up here and come and lie to you."<br><br>"What possible reason does she have to lie? She has none. There is none. She is doing it because it is the truth. It is what happened to her."<br><br>"She is not lying. She has no motivation to lie."<br><br>"She has no motive to lie. She has not lied to you today." |

| | |
|---|---|
| "[The victim] told you the truth" | "That she told you the truth."<br><br>"She is doing it because it is the truth. It is what happened to her."<br><br>"Everything she told you is the truth." |

Continuing the pattern, trial counsel asserted Appellant's guilt in terms comparable to those found to constitute "plain and obvious" error in *Fletcher*:

| *Fletcher*: | This Case: |
|---|---|
| "He is in fact guilty of divers uses of cocaine." | "Accordingly, guilty absolutely of Charge II, Specification 1."<br><br>"Absolutely yes this happened. . . ."<br><br>"So absolutely did he do this, did he commit this act on her? Penetrating her vulva with his penis? Yes. Did he do so by first rendering her unconscious with that bullwhip wrapped around her neck? Absolutely. And that is a crime, members." |

It is disturbing that trial counsel would so uncannily echo arguments that controlling precedent has forcefully and recently emphasized constitute clear and obvious error. Respectfully, it is also concerning that the military judge would fail to immediately identify and rectify these errors. Given that the practitioners at this trial had the benefit of the recent precedent of *Voorhees* and *Norwood*, and *Fletcher*, the error here was even plainer and more obvious than in those prior cases.

Given that controlling precedent holds comparable statements constitute clear and obvious error, Appellant respectfully requests that the Government concede plain and obvious error.

Additionally, while not controlling precedent, trial counsel ended his rebuttal argument with a charge to the panel nearly identical to that the Ninth Circuit reversed for in *Cruz*:

| *Cruz*: | This Case: |
|---|---|
| "[Cruz] is guilty of what he is charged with. Find him guilty and do the right thing and make him finally take responsibility for what he did." | "I ask that you do the right thing in finding Captain Braum accountable and finding him guilty of all charges and specifications." |

Trial counsel further vouched for guilt when he argued: "Captain Braum, members, has committed several crimes." (R. at 1096); "He has to be held accountable and he's held accountable today, members, by you finding him guilty of all charges and specifications." (R. at 1096); and "*He has committed crimes*. *And he has to be held accountable*. And he is done so, by finding him guilty of all charges and specifications." (R. at 1145) (emphasis added). In none of these arguments did trial counsel include any qualifying language, such as "the evidence demonstrates," nor tie these conclusory statements to the evidence. To the contrary, these were stand-alone assertions of guilt by the prosecutor.

Trial counsel further argued:

> Her child is actually witnessing the violence that is happening. And that gets the whole family involved, and that gets a friend reporting this incident involved. And that's what leads to us at this point here today members. That's what happened to [BE]. This is what it looks like, members, to be a victim of domestic violence of sexual assault.

(R. at 1111). This argument vouched for guilt in that trial counsel asserted, with no qualifying language: "That's what happened to [BE]. This is what it looks like, members, to be a victim of domestic violence of sexual assault."[9] A few pages later, trial counsel vouched for guilt when he

[9] This Court may find it additionally improper that trial counsel tied these assertions of guilt to the procedural posture of the case ("what leads to us at this point here today members."). These

argued:

> So absolutely did he do this, did he commit this act on her? Penetrating her vulva with his penis? Yes. Did he do so by first rendering her unconscious with that bullwhip wrapped around her neck? Absolutely. And that is a crime, members.

(R. at 116-17). It is plainly improper for trial counsel, on his own authority, to declare that the accused had committed the charged act(s): "Absolutely." Caselaw talks about prosecutorial declarations of guilt as the equivalent of sitting "as a thirteenth juror." *See, e.g.*, *Garza*, 608 F.2d at 665. The analogy is particularly apt here, where trial counsel posed the very questions the panel was called upon to answer, and then personally answered them as if he were the factfinder.

*2. Comment on Appellant's Exercise of Rights*

Trial counsel argued: "[Appellant] is a man who has some dark and frankly violent sexual appetites. BDSM. He likes BDSM. That's clear -- *it's uncontroverted*." (R. at 1095) (emphasis added). Where, as here, the only rebuttal as to the dynamics of the couple's sex life could come from the accused[10] – who did not testify – such argument is constitutional error. *See Carter*, 2003 WL 22495803, at *3; R.C.M. 919(b). Given that caselaw and the R.C.M. specifically prohibit such argument, the error is plain and obvious.

Trial counsel further commented on Appellant's exercise of his right to engage in cross examination and seek relevant evidence. Trial counsel criticized the defense for asking BE to provide her phone as evidence: "Having her entire public life exposed and then defense want to

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comments together implied that Appellant's guilt led to the court-martial itself, an impermissible comment. *See, e.g.*, (R. at 214) ("The fact that charges have been preferred against the accused and referred to this court for trial does not permit any inference of guilt.").

[10] Trial counsel clearly understood this dynamic, asking in vior dire: "Would you all agree that sometimes the perpetrator and victim are the only two witnesses of a crime?" (R. at 244).

say, 'Oh we should have -- you should have exposed your life more. You should have given over your phone. You should've let us parading the entire contents of your phone in this courtroom.[']". (R. at 1144). This argument suggested the panel should hold Appellant's exercise of his rights to cross examine his accuser and seek relevant evidence against him.[11] Trial counsel's comments "improperly implied that [Appellant] had abused our legal system in some way by exercising his Sixth Amendment right" to cross-examine his accuser. *See Cunningham*, 928 F.2d at 1019. Appellant "was entitled to challenge the credibility" of BE, and attacking Appellant in closing for doing so was improper. *See McCann*, 613 F.3d at 496.

Similarly, trial counsel attempted to rebut Appellant's attacks on BE's credibility by arguing that her in-court testimony was difficult for her: "She has courtroom testimony where she comes up here. Again members, for more than a day. This is not a pleasant experience. Why would she do this? What possible reason does she have to lie? She has none. There is none. She is doing it because it is the truth. It is what happened to her." (R. at 1144). These arguments again criticized Appellant for putting on a defense; the salient question was not whether the trial was pleasant for the witnesses, but whether the government proved its case. Indeed, trial counsel's argument "This is not a pleasant experience" is remarkably similar to the improper argument in *Garcia*, where trial counsel therein argued, "It is not fun to be sexually assaulted and

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[11] It is also notable that BE heavily implied – and indeed outright alleged – the text messages provided by Appellant were altered or incomplete. *See* (R. at 858) (BE alleging the messages were "choppy and incomplete," "things are missing," and they were "misleading".); (R. at 589) ("I felt like there were a lot of deleted messages throughout the whole stack . . . ."); see also (R. at 887-88) (further allegations by BE that the messages provided by the defense were "incomplete and misleading."). It is doubly improper for trial counsel to rebuke the defense for seeking evidence that would confirm or contradict the accuracy of the text messages when the government's primary witness cast doubt on that very question.

then have to be victimized by the process again." *Garcia*, 2015 WL 4940266, at *7. Further criticizing Appellant's exercise of his rights to cross examine, trial counsel blamed the defense for attempting to raise issues with BE's credibility: "The whole theory of the defense case is character assassination of [BE]. They want this to be about U[.]S[.] v. [BE], not U.S. v. Braum. So it's all about her, all about her lies." (R. at 1209).[12]

These arguments were improper and were error of constitutional dimensions. While prejudice is discussed in more depth below, it is notable that these improper arguments went to the same issue as the vouching arguments discussed above: improperly bolstering BE's credibility, while simultaneously blaming Appellant for the audacity to question her credibility. Given that BE's credibility was the primary focus of the litigation, these arguments were particularly prejudicial.

*3. Burden Shifting*

Trial counsel argued:

> They don't want to talk about the charges. It was all about her. And why don't they want to talk about the charges? Because there is no other explanation for them. *The gauntlet was laid down*, I laid it there. *Defense please explain* in this host of lies that you claim there to be, why is she lying about what happened to her? What we're actually here for. Why is she lying about being sexually assaulted when she's defecating on the toilet?

(R. at 1212) (emphasis added). Trial counsel's suggestion that the defense had the obligation to explain Appellant's innocence distorted the burden of proof. Trials are not about the government

[12] While perhaps falling into more of a gray area, trial counsel twice stated defense was engaging in "smoke and mirrors." (R. at 1135, 1136). *See United States v. Vaccaro*, 115 F.3d 1211, 1218 (5th Cir. 1997) ("The prosecutor's statement that defense lawyers 'muddle the issues' was clearly improper.").

laying down a gauntlet[13] for the defense to pick up, or issuing challenges for the defense to step-up to and "please explain." To the contrary, the only issue was whether the government had met its burden, not whether the defense had adequately explained why the accusations were false. The government also argued earlier in closing that the defense was using "smoke and mirrors" but the panel should not buy it because: "How do you explain this? She is saying in real-time, what is happening." (R. at 1135). This again, suggested the defense had the obligation to explain Appellant's innocence or explain away the evidence – this is burden shifting.

This was plain error of constitutional dimensions. Once again, this argument went to the primary issue in the case: BE's credibility.

*4.* *Going Beyond Evidence of Record*

Trial counsel repeatedly invited the panel to accept expert-like "testimony" – not presented in evidence – about domestic violence and victim dynamics on his own authority:

> If you are a victim of domestic violence and yet you continue beyond the first red flag, beyond the first act of any kind of violence against you, then you are not actually a victim of domestic violence. This is essentially the argument that is being brought forward by defense. But members if this were the case, this is untenable. There would be no victims of domestic violence if everyone left at the first red flag that they saw.[14] That's not how domestic violence works. It's dirtier than that, it's uglier than that. It's a mixture of this love and hate relationship that could go on and keeps people these relationships for extended periods of time.

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[13] This phrase implies issuing a challenge for one's opponent, thereby placing the onus on them to step-up to the challenge.

[14] In addition to the problem with arguing facts not in evidence, trial counsel's reference to how Appellant's defense would impact other cases of domestic violence was improper. *See, e.g.*, *United States v. Johnson*, 968 F.2d 768, 771 (8th Cir. 1992) (a prosecutor may not "encumber certain defendants with responsibility for the larger societal problem in addition to their own misdeeds.").

(R. at 1210-11). No experts testified at the trial. Nevertheless, trial counsel "invit[ed] the members to accept [this] new information as factual," as if trial counsel were an expert witness. *Clifton*, 15 M.J. at 31. Unlike a proper expert witness, however, trial counsel was not subject to cross-examination. As a result, Appellant's "right of confrontation [was] abridged, and the opportunity to impeach the source denied." *Id.* Indeed, the content of the improper argument here is strikingly similar to that condemned in *Clifton*: the dynamics of abusive relationships.

This was not the only incidence in which trial counsel gave expert-like testimony about the dynamics of domestic violence. He also told the members that, "absolutely, for *any victim* of domestic violence or sexual assault [the abuse being witnessed by a child] is a game changer." (R. at 1111) (emphasis added). Trial counsel then averred, on his own authority: "This is what it looks like, members, to be a victim of domestic violence of sexual assault." (R. at 1111). Trial counsel later gave another long discourse on victim-perpetrator dynamics and reasons why other victims make false accusations:

> And to be clear, the prosecution is not going to say that every single victim tells the truth. False allegations are a real thing. But think about motivations to make false allegations. There's a number of reasons. It could be because there is a marriage and there is a benefit to make an allegation. Perhaps there is an attempt to get alimony. Perhaps an opportunity to get spousal support. Maybe there's an ugly fight over child custody. That doesn't apply in this case. Maybe, you know, it's because of a dorm room hook up and somebody's embarrassed about what happened to the dorm rooms. They didn't want to hook up with that person, they were drunk, so later they want to explain, "You know what, I was sexually assaulted." That's not what happened here. It could be that you were cheating on a spouse. You consensually cheated on your spouse or a boyfriend, you get caught, then you want to say that that was a sexual assault. That's not what happened here.

(R. at 1142-43).

Trial counsel similarly gave expert-like testimony about the dynamics of BDSM relationships:

> Now what is BDSM? It's about bondage. It's about domination. It's about being sexually aroused by this idea of restraining someone. Preventing someone from stopping you, from consenting, from doing what they want to do. You want to be the one that dominates and controls. He is sexually stimulated by that. Again, huge part of BDSM, right, is this whole idea. Being gagged, being bound, you cannot resist. In fact, resistance is part of the thrill. It's part of the fun. That sounds an awful lot like you can't consent. Right? For that very reason, it is so important -- it is a fundamental tenet of BDSM that there has to be some ground rules laid. There has to be an in-depth conversation about how this is going to work out. What are the left and right limits of what is allowed in the bedroom? What is the safety word? Right? You can use your common sense and knowledge of the ways the world. We hear about safety words in these kinds of environments, why does there have to be a safety word? Because apparently for people who like BDSM, saying "no" isn't the safety word. Saying, "no, stop it," is a further rush. So there has to be that safety word to actually indicate, "No this is over."

(R. at 1095).

Trial counsel also appeared to diagnosis Appellant with "alcoholism," referring seven times to Appellant as suffering from alcoholism. *See* (R. at 1092, 1093, 1096, 1106, 1109). Trial counsel then discoursed in expert-like fashion on the dynamics of alcoholism:

> I would also ask you, panel members, to think about why someone gets to that point where they understand they need to go to Alcoholics Anonymous. When they hit that rock bottom and they need help. It's not just because they drink a lot. People don't go to Alcoholics Anonymous because they say, "Hey, I'm drinking too much." There is something more to it. It is affecting their life in some way. It is affecting their family relationships. It is causing them to do things they might not ordinarily do and that makes the problem where they say, "Hey, I get it now. I really need to go get help." His alcoholism has ruined the best relationship he ever had.

(R. 1092-93).

None of these expert-like dissertations were supported by evidence of record. Presumably, the Government could have had expert(s) testify on similar topics, subject to confrontation and impeachment, but the Government choose not to do so. The Government could not forgo the presentation of expert testimony and then serve as a surrogate expert in closing argument by proffering extra-record conclusions about the dynamics of domestic violence (or other subjects), placing the assumed authority of the Government behind these

assertions, and depriving the accused of the right to confront them. *See e.g.*, *Plymail v. Mirandy*, 8 F.4th 308, 318 (4th Cir. 2021) (finding impropriety of prosecutor's invocation of "outside-the-record 'statistics'" about the dynamics of rape reports); *United States v. Klebig*, 600 F.3d 700, 721-22 (7th Cir. 2009) (finding prosecutor's demonstration during closing constituted reversable error where defendant had no "opportunity to test that theory through cross-examination, and to present his own evidence on the subject").

Trial counsel further argued, "He likes suffocation. He likes strangulation. He likes *people* not being able to breathe, that is sexually stimulating." (R. at 1107) (emphasis added). There was no evidence introduced about Appellant's sexual activities with other "people." Were such evidence at issue, it would have to go through the safeguards of Mil. R. Evid 404(b) before the government could use it, which it did not. It was improper for counsel to go beyond the evidence of record to imply that Appellant's supposed activities with other people should factor into the member's deliberations.

*5. Injecting Improper Considerations*

As discussed above, trial counsel concluded his rebuttal argument with the charge: "Members I ask that you *do the right thing* in finding Captain Braum accountable and finding him guilty of all charges and specifications." (R. at 1213) (emphasis added). In addition to vouching for guilt, this argument suggested the panel had a duty to convict, rather than to weigh the evidence. *See generally Palacios Cueto*, 2021 WL 1999440, at *17.

The Government further argued that, if the defense theory were to be accepted, there could be no victims of domestic violence: "If every person who had any inconsistency couldn't be a victim, then we would have no victim's members." (R. at 1211). How the defense theory would or would not impact other cases was not a valid consideration. The only consideration

before the panel was whether the government had proven this accused guilty of charges at bar. Even more blatantly, the Government argued that if Appellant's defense attacking BE's credibility were accepted, no victim would ever get a conviction:

> If [BE] doesn't perfectly recall text messages that she hasn't seen or social media posts in the last two and half years, that must be a lie. Again members if that's the case *no victim* ever gets their day in court properly heard. *No victim* gets a conviction.[15] *Everyone walks free* if that's the way it works.

(R. at 1212). As this Court has stated: "referencing the jury's societal obligation is inappropriate if it suggests the panel base its decision on the impact of the verdict on society, *a victim*, and the *criminal justice system* as a whole, rather than the facts of the case." *Condon*, 2017 WL 1325643, at *18. The invocation of the impact of the verdict on *other victims* in *other cases* was plain and obvious error. Perhaps even more troubling, the idea that every other perpetrator would "walk[] free" if the defense's attacks on BE's credibility were accepted encumbered Appellant, and the panel, with consequences for completely unrelated crimes. These considerations were improper and inflammatory. *See United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007) ("An accused is supposed to be tried and sentenced as an individual on the basis of the offense(s) charged and the legally and logically relevant evidence presented.").

Perhaps most blatantly of all, trial counsel urged the panel to convict on the Article 113, UCMJ, specification (Reckless Operation of an Aircraft) on the basis that: "This is not the kind of flying that can be approved of by the Air Force. A pilot in the Air Force. That is reckless operation." (R. at 1139). The question at bar was not whether the Air Force approved of

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[15] The reference the idea that a "victim gets a conviction" is additionally improper: convictions are not obtained by victims but by the Government.

Appellant's actions, but whether the Government had proven the elements beyond a reasonable doubt. Trial counsel's argument "interject[ed] the command structure into the members' deliberations" and introduced improper considerations of unlawful command influence. *Kropf*, 39 M.J. at 109; *Barrazamartinez*, 58 M.J. at 175. This was error and the error was plain and obvious.

*6. Prejudice*

Prior to addressing the three prejudice factors, Appellant respectfully submits the following broad considerations with respect to prejudice.

It is axiomatic that the credibility of a complaining witness is of central importance – particularly in the absence of substantial corroborating evidence. *See United States v. Warda*, __ M.J. __, 2023 WL 6454017, at *10 (C.A.A.F. 2023) ("In cases such as this one, where there is no substantial evidence supporting the complaining witness's allegation of domestic abuse, the credibility of the complaining witness is of central importance.") (citing *United States v. Jaspe*r, 72 M.J. 276, 281 (C.A.A.F. 2013) (concluding where the victim's testimony was critical to the government's case, "the credibility of the putative victim [wa]s of paramount importance. . . .")). In the present case, BE's credibility was *the* critical issue under consideration. All the charges rested on the panel's assessment of her veracity. This subject was even more important because the evidence raised legitimate questions about BE's veracity, given her prior actions and statements (and omissions from statements).[16] If any further confirmation is needed that victim

[16] The defense also presented a character witness who testified BE had poor character for truthfulness. (R. at 998-1004).

credibility was *the most central issue* in this case, it can be found in trial counsel's own words, when he asserted it was the "most important[]" part of his closing statement:

> . . . most importantly is the credibility of the victim. Because this is the defense case. This is the defense, you know, tactics, strategy, and these sexual assaults in here specifically. Take down the credibility of the victim. That is aim. That is the goal. And the defense has tried their best to do that.

(R. at 1140).

Several of trial counsel's improper arguments went directly to this issue, which trial counsel personally confirmed was the "most important[.]" Trial counsel repeatedly vouched for BE's credibility. Trial counsel's attacks on Appellant's cross-examination of BE improperly sought to bolster her credibility, while simultaneously blaming Appellant for the audacity to question her credibility. Trial counsel's suggestion that defense had the obligation to pick up the gauntlet and "please explain" why BE might be lying distorted the burden of proof with respect to the issue of BE's credibility. Trial counsel's improper expert-like discourses on the dynamics of domestic violence were aimed at bolstering BE's credibility by explaining why she continued to pursue a relationship with her alleged abuser. Finally, trial counsel's argument that if the panel accepted the defense's arguments attacking BE's credibility "no victim ever gets their day in court", "[n]o victim gets a conviction", and "[e]veryone walks free" improperly tied the panel's assessment of BE's credibility to wider societal implications involving other cases, victims, and perpetrators.

Where, as here, improper arguments go directly to an issue of critical importance, the prejudice is increased. *See, e.g.*, *Fletcher*, 62 M.J. at 185 (reversal warranted, *inter alia*, because improper arguments were "aimed directly" at the subject of Appellant's defense); *United States v. Smith*, 962 F.2d 923, 935 (9th Cir. 1992) (reversing for plain error, emphasizing the importance of the witness who the government improperly vouched for: "the jury's acceptance

of [the witness's] testimony as true was of critical importance."); *see also Deck v. Jenkins*, 814 F.3d 954, 980 (9th Cir. 2016) (finding prejudice in improper argument because the subject of the argument "was not a side issue in his trial; it went to the heart of [the defendant's] defense. . . ."); *Garza*, 608 F.2d at 665-66 (finding prejudice because "perhaps the most important problem facing the jury was its decision whether to credit the testimony of . . . the government witnesses" and the "prosecutor's comments that we have considered were expressly intended to influence this critical credibility choice."). Prejudice is evaluated cumulatively. *Erickson*, 65 M.J. at 224 (citing *Fletcher*, 62 M.J. at 184). Here, this consideration includes the cumulative impact of a concerning volume and variety of improper arguments – some of constitutional dimensions – many of which converged to bolster a single issue: BE's credibility, *the* critical issue in the case.

Additionally, many of the improper arguments, including the improper concluding line, happened in rebuttal. Improper argument in rebuttal has been held to be more prejudicial because there is no opportunity for the defense to reply. *See United States v. Certified Envtl. Servs., Inc.*, 753 F.3d 72, 94 (2d Cir. 2014) ("Such improprieties, arising [in rebuttal] when defense counsel no longer has an opportunity to reply, are particularly egregious.").

Finally, while obviously pertaining to a far less serious specification, it cannot escape comment that the argument that the Government's suggestion that the panel should consider the expectations or standards of the Air Force with respect to the Article 113, UCMJ, specification was particularly egregious.[17]

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[17] Additionally, the fact that the panel convicted on this specification but apparently did not accept BE's full version of the underlying events suggests a greater likelihood that this improper argument swayed the result with respect to that specification.

Turning to the three prejudice factors, they all favor prejudice given (1) the severity of the misconduct, (2) the lack of any specific curative measures, and (3) the closeness of the case.

*a. Severity of the Misconduct*

The misconduct was severe and pervasive. *See, e.g., Voorhees*, 19 M.J. at 12 (finding similar – albeit less voluminous – arguments were severe). The sheer volume of improper arguments is notable. Similarly, the blatantly improper nature of the comments – many of which seem nearly cut-and-pasted from recent controlling precedent on improper argument – is notable and concerning.

In *Cruz*, the Ninth Circuit reversed a conviction for a single improper argument: "[Cruz] is guilty of what he is charged with. Find him guilty and do the right thing and make him finally take responsibility for what he did." 592 Fed.Appx. at 624. In doing so, the court emphasized this comment was "the last thing the jury heard before beginning deliberation; this timing increased the risk that the prosecutor's improper statement influenced the jurors." 592 Fed.Appx. at 624. Here, the Government made a nearly identical improper argument, also as the closing line in rebuttal. Above and beyond the facts of *Cruz*, however, the argument here was preceded by a plethora of other improper arguments. The severity of the misconduct clearly favors a finding of prejudice.

*b. Curative Measures*

No specific curative measures were taken, with the military judge giving only generic instructions prior to sending the panel into deliberations. *See Andrews*, 77 M.J. at 403 (finding "the military judge's failure to offer any specific, timely curative instructions also weighs in favor of finding prejudice."); *Fletcher*, 62 M.J. at 185 (finding the military judge's curative efforts to be "minimal and insufficient" where he gave only a generic limiting instruction,

chastised trial counsel on a single occasion, and failed to *sua sponte* interrupt trial counsel). Here, as in *Norwood*, "the defense counsel could have done more to meet their duty to their clients to object to improper arguments early and often, as could have the military judge to fulfill his *sua sponte* duty to ensure that an accused receives a fair trial but because they did not, there was a total lack of curative measures to redress this misconduct." *Norwood*, 81 M.J. at 21 (cleaned up). This factor clearly favors a finding of prejudice.

*c. Weight of the Evidence*

The weight of the evidence was far from overwhelming. Additionally, the Government's improper arguments prejudiced the panel's deliberations on precisely the areas most in controversy and most significant to the result.

BE's credibility was, of course, the most important issue, as the accusations rested on her veracity. Given her inconsistent statements and behavior, lack of candor with investigators, clearly evasive – and at times completely incredible (e.g., Amazon.com issue) – testimony, and the character for untruthfulness evidence, it cannot be said that the Government presented overwhelming evidence of her credibility. Far from it. As noted above, many of the improper arguments went directly to this critical issue where the Government's case was already subject to attack.

Apart from BE's assertions, the accusations of non-consent were largely uncorroborated. Indeed, the only real corroboration of the Article 120, UCMJ, specifications was that "BDSM" activities were part of the relationship, based on the text messages, albeit largely *from* BE (Def. Ex. A), and the sex toys seized by OSI (Pros. Ex. 3). This evidence corroborated the likelihood of some of the alleged acts, but did little, if anything, to corroborate non-consent. Indeed, this evidence largely suggested BE's participation in this aspect of the relationship, with the defense

presenting multiple explicit text messages BE had sent to Appellant, graphically showing individuals engaged in "BDSM" behavior, and referencing "BDSM," sex toys, and related activities that BE failed to disclosed to the authorities. (R. at 850-53, 855-57); (Def. Ex. A).

With respect to the sex toys purchased on BE's Amazon.com account, BE was clearly evasive when she attempted to deny any prior knowledge of these purchases despite texting Appellant a picture of one of the exact items in question on the same day the purchases were made. The Government's argument tying Appellant's right to remain silent to the BDSM-issue is particularly prejudicial, as it attempted to use Appellant's silence to shape the significance of the corroboration of BDSM-activities into a proxy for corroboration of non-consent. (R. at 1095) ("[Appellant] is a man who has some dark and frankly violent sexual appetites. BDSM. He likes BDSM. That's clear -- *it's uncontroverted*.") (emphasis added). Similarly, trial counsel's expert-like discourse in closing about the dynamics of BDSM – particularly in tying it to non-consent – is prejudicial for similar reasons. These improper arguments attempted to leverage the evidence of "BDSM" activities into evidence of non-consent, and thus were particularly prejudicial given the nature of the evidence.

This case involved mixed verdicts. While military courts have sometimes looked to mixed verdicts as evidence that the panel was able to look past improper government arguments, on the facts of this case, the mixed verdicts show the line between conviction and acquittal was thin. *See Sewell*, 76 M.J. at 19 (noting that, despite trial counsel's improper arguments, the panel convicted of all corroborated specifications but acquitted of all uncorroborated specifications). Unlike in *Sewell*, there does not seem to be any discernable pattern in the acquittals versus the convictions here. The not-guilty specifications do not, as a group, have any obvious evidentiary

weaknesses not shared by the guilty specifications. This would suggest that the deliberations were close.

Furthermore, this is not a situation like *Sewell* where the panel convicted of all corroborated specifications but acquitted of all uncorroborated specifications. 76 M.J. at 19. To the contrary, some of the acquittals in the present case involved *more* corroboration than some of the convictions. For example, there was at least a degree of corroboration for Specification 3 of Charge II (ripping tape off incision) of which Appellant was acquitted. BE provided a photo allegedly showing injuries from this event. (Pros. Ex. 4). While this corroboration is hardly conclusive, and could have been explained by BE's acknowledged post-surgery injuries unrelated to Appellant, it is more corroboration than was offered for other specifications of which Appellant was convicted. Additionally, it is notable that Appellant was convicted of some sexual accusations but acquitted of corresponding physical accusations that BE alleged happened *at the very same time*. For example, Appellant was convicted of Specification 9 of Charge I, but acquitted of the aforementioned Specification of 3 of Charge II, despite the fact that BE described these events as happening together. (R. at 660-62). Similarly, Appellant was acquitted of Specification 5 of Charge II (slaps) despite the fact that BE described these events has happening together with sexual allegations Appellant was convicted of. (R. at 626-27, 634-39). It is difficult to decern any difference in the weight of the evidence separating these intertwined allegations. This would suggest that the line between conviction and acquittal was razor-thin, with the panel even splitting on what would seem to be largely conjoined allegations.

Indeed, the deliberations were apparently *so close* that the panel requested instructions on reconsideration one or more findings. (R. at 1234-40). This certainly indicates that the panel found at some or all of the specifications to be particularly close calls. While the deliberations of

the panel cannot be pierced, the only conclusion from the record is that this was exactly the kind of case where little things could tip the scales between conviction and acquittal. These are exactly the circumstances where the danger of improper argument pushing a case over the line to conviction is particularly high. *See Plymail*, 8 F.4th at 319 (pointing to fact that "jury reported after some deliberation that they could not reach a unanimous verdict" and only reached a verdict after additional deliberations as evidence case was a close call). This is doubly so in a system that does not require unanimity to convict: swaying of a single member could mean the difference between conviction or acquittal. The weight of the evidence clearly favors a finding of prejudice.

**WHEREFORE**, Appellant respectfully requests this Honorable Court set aside the findings and sentence.

## II. IT WAS PLAIN ERROR FOR THE MILITARY JUDGE TO GIVE A "360 DEGREE COMPLETELY ERRONEOUS INSTRUCTION"[18] REGARDING THE PERMISSIBLE USE OF PRIOR INCONSISTENT STATEMENTS.

### *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). In the absence of a defense objection to the omission of an instruction, appellate courts review for plain error. *United States v. Davis*, 79

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[18] *United States v. Powell*, ARMY 20200006, 2022 WL 702904, at *2 (A. Ct. Crim. App. 9 Mar. 2022) (mem. op.) ("[W]e find the military judge committed plain error by providing, in contrast to a correct legal instruction, a 360 degree completely erroneous instruction—that all the witnesses' prior inconsistent statements were limited in purpose to only determining witness credibility and "could not be use[d] as proof of anything else.").

M.J. 329, 331 (C.A.A.F. 2020). Under a plain error analysis, the accused has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused. *United States v. Payne*, 73 M.J. 19, 23-24 (C.A.A.F. 2014).

***Law***

Prior inconsistent statements are generally only admissible for impeachment purposes but "may be considered [as substantive evidence] for any relevant purpose" when, *inter alia*, "made by the witness under oath subject to perjury" or "admitted without objection . . . ." *See* Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 7-11-1, n.2 (29 Feb. 2020) [Benchbook]; *see also United States v. Powell*, ARMY 20200006, 2022 WL 702904, at *2 (A. Ct. Crim. App. 9 Mar. 2022) (mem. op.) (finding plain error and setting aside findings where military judge erroneously instructed that prior inconsistent statements offered without objection could only be used for impeachment); *United States v. Littlewood*, No. ACM32763, 1999 WL 219746, at *2 (A.F. Ct. Crim. App. 11 Mar. 1999) (unpub. op.), aff'd, 53 M.J. 349 (C.A.A.F. 2000) (noting that "the admission of hearsay will not be error in the absence of timely objections.") (citations omitted*); United States v. Cox*, 42 M.J. 647, 652 (A.F. Ct. Crim. App. 1995) ("Hearsay is inadmissible, but may be considered by the court if admitted without objection, unless there is plain error.") (citation omitted); *United States v. Trisler*, 25 M.J. 611 (A.C.M.R. 1987) (holding hearsay admitted without objection allows the factfinder to give full probative value to the testimony); *see also* Mil. R. Evid. 105 ("If the military judge admits evidence that is admissible against a party or for a purpose - but not against another party or for another purpose - the military judge, *on timely request*, must restrict the evidence to its proper scope and instruct the members accordingly.") (emphasis added).

The Benchbook's treatment of this issue is consistent with over a century of Supreme Court precedent which holds, "When evidence of that character [hearsay] is admitted without objection, it is to be considered and given its natural probative effect as if it were in law admissible." *Diaz v. United States*, 223 U.S. 442, 450 (1912). The Federal Circuit Courts of Appeals have consistently applied this holding to the Federal Rules of Evidence. *See, e.g.*, *United States v. Ariza-Ibarra*, 605 F.2d 1216, n.8 (1st Cir. 1979) ("Defendants' failure to object when this information came in initially left the jury free to consider it. . . .") (citations omitted); *Gronowski v. Spencer*, 424 F.3d 285, n.1 (2d Cir. 2005) (noting that certain statements "fall outside the hearsay rule" because "defendants did not object on this ground at trial . . . .") (citations omitted); *NLRB v. B.A. Mullican Lumber and Mfg. Co.*, 535 F.3d 271, 281 (4th Cir. 2008) (noting defendant's failure to object to hearsay evidence at trial); *United States v. Gresham*, 585 F.2d 103, 106 (5th Cir. 1978) ("Since this evidence, though hearsay, came in without objection, it is to be considered and given its natural probative effect as if it were in law admissible.") (quotation omitted); *Glenn v. United States*, 271 F.2d 880, 883 (6th Cir. 1959) ("Ordinarily, where no objection is taken to the reception of hearsay testimony it may properly be considered, and given its natural probative effect as if it were in law admissible.") (citation omitted); *United States v. Dunn*, 299 F.2d 548, 554 (6th Cir. 1962); *Gibson v. Elgin, J.&.E.R. Co.*, 246 F.2d 834, 836 (7th Cir. 1957) (hearsay evidence admitted without objection is considered substantively) (citations omitted); *Burgess v. King*, 130 F.2d 761, 762-63 (8th Cir. 1942); *Hayden v. Chalfant Press, Inc.*, 281 F.2d 543, 548 (9th Cir. 1960) ("It is well settled that hearsay evidence which is admitted without objection and without a motion to strike may be considered by the trier of fact.") (citations omitted); *Crawford v. United States*, 198 F.2d 976, n.2 (D.C. Cir. 1952).

Prior inconsistent statements may include directly contradictory statements, prior omissions of important facts, or other forms of inconsistency. *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993) ("[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."); *see also United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007).

***Argument***

As the prior inconsistent statements at issue were "admitted without objection," it is black letter law that they could be considered substantively.[19] The military judge's instructions, however, erroneously forbade this proper use. (R. at 1086). It is apparent that the military judge simply did not recognize the distinction, despite the Benchbook's explicit explanation in para. 7-11-1, n.2. The instruction the military judge should have given reads:

> You have heard evidence that before this trial (state the name of the witness(es)) made (a) statement(s) that may be inconsistent with his/her/their testimony here in court. I have admitted into evidence (testimony concerning) the prior statements(s) of (state the name of the witness(es)). You may consider (that statement) (these statements in deciding whether to believe (that witness's) (these witnesses') in-court testimony.
>
> You may also consider (that statement) (these statements) along with all the other evidence in this case.
>
> (For example if a witness testified in court that the traffic light was green and you heard evidence that the witness made a prior statement that the traffic light was red, you may consider the prior statement as evidence that the light was, in fact, red, as well as to determine what weight to give the witness's in-court testimony.)

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[19] Some of the prior inconsistent statements at issue – specifically those made in the course of the protective order hearing – were also "made by the witness under oath subject to perjury." *See* (R. at 736-37).

*Id.* Instead, the military judge omitted this, giving rise a "360 degree completely erroneous instruction." (R. at 1086) ("You may not, however, use the prior statement as proof that the light was red.")

As the CAAF has noted: "A military judge is obligated to assure that the accused receives a fair trial," which "includes the duty to provide appropriate legal guidelines to assist the jury in its deliberations." *United States v. Wolford*, 62 M.J. 418, 419 (C.A.A.F. 2006). As the CAAF stated in *United States v. Bailey*, 77 M.J. 11, 13 (C.A.A.F. 2017), a military judge is required to provide instructions that "fairly and adequately cover the issues presented," and should include "such other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, *sua sponte*, should be given." R.C.M. 920(e). And while the military judge has "wide discretion in choosing the instructions to give," he also "has a duty to provide an accurate, complete and intelligible statement of the law." *United States v. Behanna*, 71 M.J. 228, 232 (C.A.A.F. 2012). The military judge failed in those duties and the error was plain and obvious. Indeed, all the military judge had to do was give the instruction explicitly provided for in the Benchbook.

Appellant was prejudiced. The erroneous instructions left the panel without the "accurate, complete and intelligible statement of the law," and deprived Appellant of fair consideration of the evidence in this case. The error deprived Appellant of substantive evidence directly relevant to charges. For example, if the panel had substantively accepted BE's acknowledged 14 September 2020 statement, omitting any mention of sexual abuse, it would have eliminated *all* the Article 120 allegations. *See* (R. at 746-49). If the panel had substantively accepted BE's acknowledged 22 September 2020 statement that the first time Appellant had raped her was 24 June 2020, it would have eliminated the majority of the Article

120 allegations. *See* (R. at 736). Additionally, if the panel had substantively accepted BE's acknowledged inconsistent statements about being happy with Appellant and how amazing he was – during the period she now alleges he was repeatedly assaulting her – it would have eliminated *all the charges*, except for the final 12 July 2020 fight. If the panel had substantively accepted BE's prior inconsistent statements expressing interest in "BDSM" or Appellant "massag[ing] my big titties" – the very modalities of sexual assault she later alleged were violently forced upon her – it clearly would have drastically impacted their deliberations. *See, e.g.*, (R. at 850-53); (Def. Ex. A).

Under substantively identical circumstances, the Army Court of Appeals recently found plain error and reversed in *Powell*: "[T]he military judge committed plain error by providing, in contrast to a correct legal instruction, a 360 degree completely erroneous instruction—that all the witnesses' prior inconsistent statements were limited in purpose to only determining witness credibility and 'could not be use[d] as proof of anything else.'" 2022 WL 702904, at *2 (alteration in original). Here, the military judge equally gave a "360 degree completely erroneous instruction" on a critical issue. This was plain error.

As a final note on prejudice, under the cumulative error doctrine, prejudice from this erroneous instruction may be viewed cumulatively with the prejudice from other errors: including trial counsel's improper arguments discussed in the preceding assignment of error.[20]

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[20] "Under the cumulative error doctrine, 'a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding.'" *United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011) (quoting *United States v. Banks*, 36 M.J. 150, 170-71 (C.M.A. 1992)). While not necessitating a separate assignment of error, Appellant respectfully requests consideration of the cumulative error doctrine with respect to all errors this Court finds.

**WHEREFORE**, Appellant respectfully requests this Honorable Court set aside the findings and sentence.

## III. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL DEFENSE TEAM FAILED TO RECOGNIZE THE DISTINCTION BETWEEN PRIOR CONSISTENT STATEMENTS ADMISSIBLE AS SUBSTANTIVE EVIDENCE AND PRIOR CONSISTENT STATEMENTS ADMISSIBLE FOR THE LIMITED PURPOSE OF TESTING THE CREDIBILITY OF THE WITNESS.

### *Standard of Review*

Claims of ineffective assistance of counsel are reviewed de novo. *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012).

### *Law*

The Sixth Amendment guarantees not only the right to counsel, but the "right to effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To establish ineffective assistance of counsel, "an Appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *Datavs*, 71 M.J. at 424 (citing *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing *Strickland*, 466 U.S. at 687)). To prevail on a claim of ineffective assistance of counsel, counsel's performance must be "unreasonable under prevailing professional norms." *United States v. Mazza*, 67 M.J. 470, 475 (C.A.A.F. 2009) (quoting *United States v. Perez*, 64 M.J. 239, 343 (C.A.A.F. 2006)). The Court will not "not second-guess the strategic or tactical decisions made at trial by defense counsel." *Id.* (quoting *United States v. Anderson*, 55 M.J. 198, 202 (C.A.A.F. 2001)).

### *Argument*

Counsel's performance in this case was deficient under the first *Strickland* prong. It appears that the defense counsel was unaware that the Military Rules of Evidence permitted

admission of some prior inconsistent statements as substantive evidence. In a case like Appellant's, where the sole issue was BE's credibility, there was discernable "sound trial strategy" in preventing the members from considering substantively prior statements that implicitly or explicitly contracted BE and excluded many of the charged acts. *See Mazza*, 67 M.J. at 475. Rather, this was clearly an oversight.

With respect to prejudice, the second prong of the *Strickland* test requires Appellant to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability in this context is "a probability sufficient to undermine confidence in the outcome." *Id.*

Since the panel had been instructed that they could consider this testimony "for no other purpose," defense counsel's deficient performance deprived the panel of substantive evidence that Appellant did not sexually abuse BE, that there was no sexual abuse prior to 24 June 2020, that BE was happy with Appellant and he was amazing during the charged time period, and that BE wanted to engage in the very acts she alleged were forced upon her. Had the panel been instructed that they could have considered these things as substantive evidence in addition to weighing's credibility, there is a reasonable probability that Appellant would have been acquitted, particularly with respect to the Article 120 specifications.[21]

**WHEREFORE**, Appellant respectfully requests this Honorable Court set aside the findings and sentence.

## IV. THE GOVERNMENT CANNOT PROPERLY REFUSE TO DISCLOSE RELEVANT, NON-PRIVILEGED DATA IN ITS POSSESSION, CUSTODY, AND CONTROL ON THE

[21] Most of all with respect to the Article 120 allegations pre-dating 24 June 2020.

**BASIS THAT THE WITNESS WHO PROVIDED THE DATA GAVE LIMITED CONSENT WITH RESPECT TO ITS USE.**

***Standard of Review***

The interpretation of provisions of the R.C.M are questions of law that military appellate courts review de novo. *United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008) (citing *United States v. Tate*, 64 M.J. 269, 271 (C.A.A.F. 2007)). Ordinary rules of statutory construction apply in interpreting the R.C.M. *Id.* (citing *United States v. Clark*, 62 M.J. 195, 198 (C.A.A.F. 2005)).

Issues of prejudice from erroneous evidentiary rulings are reviewed de novo. *United States v. Cano*, 61 M.J. 74, 75 (C.A.A.F. 2005) (*citing United States v. Diaz*, 45 M.J. 494, 496 (C.A.A.F. 1997))

***Law***

R.C.M. 701(a)(2) provides:

> (A) After service of charges, upon request of the defense, the Government shall permit the defense to inspect any books, papers, documents, *data*, photographs, tangible objects, buildings, or places, or copies of portions of these items, if the item is *within the possession, custody, or control of military authorities* and—
>
> (i) the item is relevant to defense preparation;
> (ii) the government intends to use the item in the case-in-chief at trial;
> (iii) the government anticipates using the item in rebuttal; or
> (iv) the item was obtained from or belongs to the accused.

(emphasis added). R.C.M. 701(f), addresses "Information not subject to disclosure," and provides that: "Nothing in this rule shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence. Nothing in this rule shall require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants and representatives." *Id.*

"Where an Appellant demonstrates that the government failed to disclose discoverable evidence in response to a specific request the Appellant will be entitled to relief unless the government can show that nondisclosure was harmless beyond a reasonable doubt." *Cano*, 61

M.J. at 75 (citing *United States v. Roberts*, 59 M.J. 323, 327 (C.A.A.F. 2004)) (additional citation omitted).[22]

Two overarching principles are also relevant to this issue. First, discovery in the military justice system is broad by design. *See United States v. Stellato*, 74 M.J. 473, 481 (C.A.A.F. 2015) (citing *United States v. Jackson*, 59 M.J. 330, 333 (C.A.A.F. 2004)) (additional citations and quotation marks omitted). Second, "Because privileges 'run contrary to a court's truth-seeking function,' they are narrowly construed." *See Jasper*, 72 M.J. at 280 (quoting *United States v. Custis*, 65 M.J. 366, 369 (C.A.A.F. 2007)).

***Additional Facts***

The pertinent facts of the collection and custody of the forensic extraction of BE's phone are, Appellant believes, largely uncontested. On 29 July 2020, BE participated in an interview with OSI with the participation of an NPD officer. (App. Ex. XXXVII, page 2). BE referenced her phone multiple times in answering questions during this interview. (App. Ex. XXXVII, page 2). The NPD officer asked the OSI agent if OSI would like assistance in seeking consent to download information from BE's phone, and the OSI agent agreed. (App. Ex. XXXVII, page 2). BE consented to location-related information being downloaded from her phone and signed a consent form to that effect. (App. Ex. XXXVII, page 2). The NPD officer explained that the entire contents of the phone would be downloaded but that the search would be limited to the location-related information, in accordance with BE's consent. (App. Ex. XXXVII, page 2).

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[22] This prejudice standard applies equally to scenarios, such as the present one, where the defense made a specific request for discovery, but the military judge declined to order disclosure. For example, in *Cano*, the CAAF was evaluating prejudice from "the military judge's erroneous decision to deny him the opportunity to review the withheld documents." 61 M.J. at 76.

Another NPD officer downloaded information from BE's phone and returned the phone to BE. (App. Ex. XXXVII, page 2). The downloaded information was placed on a flash drive that NPD kept as evidence. (App. Ex. XXXVII, page 2). An OSI agent informed an NPD officer the flash drive was not needed at that point (apparently 30 July 2020) and that OSI would contact NPD if it was needed. (App. Ex. XXXVII, page 2-3). Eventually, the flash drive came into the possession of OSI.

Upon learning of the existence of the forensic extraction, the defense moved to compel its discovery. (App. Ex. XXXVI); *see also* (App. Ex. XXXIX) (Supplement to defense motion). The government opposed the motion. (App. Ex. XXXVII). The military judge ultimately denied the motion. (App. Ex. XXXVII).

***Argument***

1. *Under the Plain Meaning of the Rule, the Data was Within the Government's Possession, Custody, or Control.*

Precedent is clear that military courts' interpretation of the R.C.M. "must be" rooted in their text and interpreted in accordance with the "plain meaning" thereof. *United States v. Vargas*, 83 M.J. 150, 154 (C.A.A.F. 2023) (interpreting R.C.M. 701: "This Court 'adhere[s] to the plain meaning of any text—statutory, regulatory, or otherwise.") (quoting *United States v. Bergdahl*, 80 M.J. 230, 235 (C.A.A.F. 2020) (alteration in original)); *see also United States v. James*, 63 M.J. 217, 221 (C.A.A.F. 2006) ("A fundamental rule of statutory interpretation is that 'courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'") (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54, (1992)). Only in "very limited circumstances," in which the result is "so gross as to shock the general moral or common sense," may courts "refuse to apply the literal text of a statute [as]

doing so would produce an absurd result." *United States v. McPherson*, 81 M.J. 372, 380 (C.A.A.F. 2021).

It seems almost beyond dispute that, under the plain meaning of the rule, the data in question was "within the possession, custody, or control of military authorities."[23] The data was *in the OSI office*. The military judge even stated that the data was within the "physical possession, custody, or control" of military authorities. (App. Ex. XXXVII, page 11). Nevertheless, as explored below, the military judge expressly went beyond the plain meaning of the rule to add in a nonexistent additional requirement.

2. *The Military Judge Expressly went Beyond Plain Meaning, adding a Nonexistent Requirement to the Rule.*

Despite the obvious conclusion that the data – which was in the OSI office – fell within the plain meaning of R.C.M. 701(a)(2)'s "possession, custody, or control" requirement," the military judge re-wrote the rule, to require "'legal' possession, custody, or control":

> The defense's primary argument in this regard is that the full version of the digital copy of BE's cell phone is within the possession, custody, or control of military authorities and is relevant to defense preparation. The issue turns on whether physical possession, custody, or control suffices or if "legal" possession, custody, or control, *though not stated* in RCM 701(a)(2)(A), is necessarily implied. I find that it is, that the evidence the defense seeks is not legally in the possession, custody, or control of military authorities, and, therefore, that the defense is not entitled to inspect this evidence pursuant to RCM 701. As explained *Lutcza*, a person's waiver of privacy interests in a cell phone turned over to law enforcement to copy is limited by the terms of the consent given. In this case, BE specifically and explicitly limited the consent she gave to location data. She did not thereby waive any privacy interests or lose legal protections regarding the remaining data in the phone. As such, the remaining data copied from her phone is not legally in

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[23] For example, on 1 June 2022, trial counsel emailed defense counsel about the extraction, stating "[T]he USB . . . (BE Phone Extraction) is now in the Govt's possession." (App. Ex. XXXVI, attachment 12) (parenthetical comment in the original).

> the possession, custody, or control of military authorities and is not discoverable under RCM 701(a)(2)(A).

(App. Ex. XXXVII, page 11) (emphasis added). The military judge expressly noted that his newly invented "'legal' possession, custody, or control" requirement was "not stated" in the R.C.M. The military judges is not empowered to add language to the R.C.M. If the President wishes to add the "legal" caveat to the rule, along with appropriate definitions and other safeguards, the President is free to do so.

*3. The President has Delineated Exceptions to the Rule, but None are Applicable.*

The President has delineated specific, clearly defined exceptions to the general rules on discoverability. R.C.M. 701(f), addresses, "Information not subject to disclosure," and provides that: "Nothing in this rule shall be construed to require the disclosure of information protected *from disclosure* by the Military Rules of Evidence. Nothing in this rule shall require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants and representatives." *Id.* (emphasis added). Relatedly, Section V of the Military Rules of Evidence delineates categories of evidence protected from disclosure or presentation at trial. *See Manual for Courts-Martial*, United States (2019 ed.) (MCM), pt. III, § V. None of the listed privileges are relevant here.[24]

[24] The listed privileges include the following: Lawyer-Client Privilege (Mil. R. Evid. 502); Communications to Clergy (Mil. R. Evid. 503); Martial Privilege (Mil. R. Evid. 504); Classified Information (Mil. R. Evid. 505); Government Information (Mil. R. Evid. 506); Identity of Informants (Mil. R. Evid. 507); Political Vote (Mil. R. Evid. 508); Deliberations of Courts and Juries (Mil. R. Evid. 509); Psychotherapist Privilege (Mil. R. Evid 513); and Victim Advocate-Victim Privilege (Mil. R. Evid. 514).

The military judge pointed to Mil. R. Evid. 314(e)(3), which allows for consent searches to be limited: "Consent may be limited in any way by the person granting consent, including limitations in terms of time, place, or property, and may be withdrawn at any time." *See* (App. Ex. XXXVII, page 6). While this is true, Mil. R. Evid. 314 is not about "disclosure." Rather, it is about procurement by the government and, if a suppression issue is raised, admissibility. *See* Mil. R. Evid. 314(a) ("General Rule. Evidence obtained from reasonable searches not requiring probable cause is *admissible* at trial. . . .") (emphasis added). R.C.M. 701(f) provides that it should not "be construed to require the disclosure of information protected *from disclosure* by the Military Rules of Evidence." (emphasis added). To include Mil. R. Evid 314 – which is not a rule about "disclosure" – within the scope of this provision would be to nullify the words "from disclosure." This violates the canon against surplusage, which specifies "if possible, every word and every provision" of a statute "is to be given effect and that no word should be ignored or needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017). Indeed, it is clear that evidence in the possession, custody, or control of military authorities would have to be disclosed under R.C.M. 701, regardless of whether it was obtained via an illegal search. Such circumstances may give rise to a meritorious suppression motion but would not impact discoverability. *See* Mil. R. Evid. 311.

*4. <u>This Court Should Find that Disclosure was Required.</u>*

This Court should find that, under the plain meaning of the rules, and consistent with the dual principles of broad discovery and narrow privileges, the Government cannot take relevant non-privileged information into its possession, custody, and control, but nevertheless refuse to disclose it because the witness who provided it gave limited consent with respect to its use.

To hold otherwise would allow the government to re-write its own discovery obligations via ex-parte agreement with witnesses. *See generally Stellato,* 74 M.J. at 487 ("[A] trial counsel cannot avoid discovery obligations by remaining willfully ignorant of evidence that reasonably tends to be exculpatory, even if that evidence is in the hands of a Government witness instead of the Government.").

While this appears to be an issue of first impression, the simplest answer here is correct: if the government takes relevant, non-privileged information into its possession, it cannot simultaneously shelter it from disclosure. While Appellant appreciates that there may be policy concerns with the framework of discovery provided by the R.C.M., particularly in the context of forensic extractions, it is not this Court's place to engage in activism to achieve policy goals. As this Court has stated "The service courts of criminal appeals have not been given the authority to define new privileges as may the federal courts under Fed. R. Evid 501. Instead, we interpret and apply the Mil. R. Evid. as they exist and do not have the liberty to promulgate new ones." *United States v. Stevens,* No. ACM32733, 1999 WL 453948, at *3 (A.F. Ct. Crim. App. 4 Jun 1999) (unpub. op.). If the policy making branches of government want to edit the rules, they are free to do so. This Court is not. Nor was the military judge.

5. *The Government Bears the Burden to Prove the Nondisclosure Harmless Beyond a Reasonable Doubt.*

The burden is on the Government to show a lack of prejudice beyond a reasonable doubt. This is a high standard. Appellant is not in a position to comment in detail until the Government puts forth its case for a lack of prejudice. However, Appellant does point out that the limited

electronic data the defense at trial did have proved highly contradictory to BE's allegations.[25] And, of course, Appellant had a vital interest in having access to information in government files that might undermine the credibility of his accuser. *See Warda*, 2023 WL 6454017, at *12 ("[S]ervicemembers who are accused of domestic violence have a vital interest in ensuring that they have access to information in government files that may significantly undermine the credibility of the complaining witness in the eyes of the trier of fact.") (Ohlson, C.J., concurring).

Finally, interplay with other aspects of this case bears highlighting. At trial BE, alleged the text messages provided by Appellant were altered or incomplete. *See* (R. at 858) (BE alleging the messages were "choppy and incomplete," "things are missing," and they were "misleading"); (R. at 589) ("I felt like there were a lot of deleted messages throughout the whole stack . . . ."); *see also* (R. at 887-88) (further allegations by BE that the messages provided by the defense were "incomplete and misleading"). When defense counsel asked BE in cross-examination if she was willing to provide her phone data, she declined, even when defense counsel specifically pointed out that the phone data could confirm her accusation that the text messages presented by the defense were misleading. (R. at 876-78). As discussed in above in Appellant's first assignment of error, trial counsel criticized the defense in closing for asking BE to provide her phone data as evidence: "Having her entire public life exposed and then defense want to say, 'Oh we should have -- you should have exposed your life more. You should have given over your phone. You should've let us parading the entire contents of your phone in this

[25] As explored in the "Statement of Facts" above, the defense at trial repeatedly impeached BE's allegations with the limited electronic evidence it had (primarily text messages that Appellant provided).

courtroom.[']" (R. at 1144). It is doubly unfair – or perhaps triply unfair – to withhold relevant, non-privileged data from the defense, then allow a Government witness to accuse the defense of manipulating evidence, and then criticize the defense in closing arguments for seeking confirmation of the evidence's authenticity.

**WHEREFORE**, unless the Government can meet its high burden to show harmlessness beyond a reasonable doubt, Appellant requests this Honorable Court set aside the findings and sentence.

## V. THIS COURT CANNOT AFFIRM THE FINDINGS OF GUILTY TO SPECIFICATION 1 OF CHARGE I.

### *Standard of Review*

Whether a finding of not guilty precludes a reviewing military court from performing a factual sufficiency review is a question of law reviewed de novo. *United States v. Ross*, 68 M.J. 415, 417 (C.A.A.F. 2010) (citation omitted).

### *Law*

Under the version of Article 66(c), UCMJ, applicable to this case:

> (c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may 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 entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

10 U.S.C. § 866(c), (2018).[26]

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[26] Appellant recognizes that Article 66, UCMJ, was amended by the National Defense Authorization Act for Fiscal Year 2021 to alter the framework of factual sufficiency review, but as the amendment applies only to a courts-martial in which every finding of guilty in the Entry of

Under this structure, this Court may only affirm a finding of guilty after finding it "correct in . . . fact . . . ." *Id.* However, the service courts "cannot find as fact any allegation in a specification for which the fact-finder below has found the accused not guilty." *United States v. Bennitt*, 74 M.J. 125, 129 (C.A.A.F. 2015) (quoting *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003)); *see also United States v. Smith*, 39 M.J. 448, 451-52 (C.M.A. 1994).

Similarly, the Double-Jeopardy Clause "'prohibit[s] a reviewing court from rehearing any incidents for which the accused was found not guilty.'" *United States v. Stewart*, 71 M.J. 38, 42 (C.A.A.F. 2012) (quoting *United States v. Wilson*, 67 M.J. 423, 428 (C.A.A.F. 2009)) (alteration in original). When the government's charging scheme results in findings of guilty and not guilty to specifications with overlapping elements, it can create a "framework for a potential double jeopardy violation." *Id.* If the fact-finder acquits of one specification, but convicts on another with overlapping elements, it can become "impossible for the [CCA] to conduct a factual sufficiency review of [the relevant specification] without finding as fact the same facts the members" acquitted on. *Id.* at 43. While, as the CAAF recognized in *Stewart*, "generally consistency in a verdict is not necessary," this is distinguishable from the ability of the CCA to find convictions correct in fact when doing so would necessarily require finding as fact element(s) upon which the members acquitted. *Id.* at 43 n.8 (citations omitted).

Nevertheless, evidence may well be relevant to multiple specifications. The CAAF has held that "the members are permitted to independently consider evidence supporting a charge of which an Appellant is acquitted while deliberating on other charges." *United States v. Rosario*,

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Judgment is for an offense that occurred on or after 1 January 2021, the amended language is not applicable to Appellant's case. *See* Pub. L. No. 116-283, § 542(b), 134 Stat. 3612.

76 M.J. 114, 117 (C.A.A.F. 2017) (citing *United States v. Gutierrez*, 73 M.J. 172, 176 (C.A.A.F. 2014)). Similarly, a reviewing court may consider facts underlying an acquitted charge in considering whether the facts support a separate charge. *Id.* As such,

> When the same evidence is offered at trial to support two different offenses, a Court of Criminal Appeals is not necessarily precluded from considering the evidence that was introduced in support of the charge for which the Appellant was acquitted when conducting its Article 66(c), UCMJ, legal and factual sufficiency review of the charge for which the Appellant was convicted.

*Id.* at 117-18 (finding that the panel's conviction for sexual harassment but acquittal for abusive sexual contact and assault consummated by battery did not prohibit Article 66, UCMJ, review because "[t]hough there may have been overlap in the facts the members considered, the elements were different. . . .").

***Argument***

The specifications at issue contain the following elements:

| | | | | |
|---|---|---|---|---|
| Specification 1, Charge I | On divers occasions between on or about 17 May 2020 and on or about 25 May 2020 | Appellant committed a sexual act upon BE by penetrating her vulva with his penis | Appellant did so by using unlawful force against | (Found Guilty) |
| Specification 4, Charge I | On divers occasions between on or about 17 April 2020 and on or about 4 July 2020 | Appellant committed a sexual act upon BE by penetrating her vulva with his penis | Appellant did so without BE's consent | (Found Not Guilty) |

*See* (R. at 1063-65) (findings instructions). Appellant *could not* be guilty of the elements of Specification 1 without also being guilty of the each and every element of Specification 4. The alleged sexual acts are identical. The modality alleged in Specification 4 (non-consent) is a subset-of the modality alleged in Specification 1 (unlawful force). *See United States v. Leach*,

No. ACM 39563, 2020 WL 3866913, at *19 (A. F. Ct. Crim. App. 8 Jul. 2020) (unpub. op.) ("[H]ad the Government successfully proven sufficient force to amount to the unlawful force needed for a rape conviction, such evidence would, by definition, be sufficient to support a conviction for the lesser-included offense of sexual assault committed by causing bodily harm.") (citations omitted).[27] Finally, the date-range charged in Specification 1 is a subset of the date-range alleged in Specification 4. As the factfinder affirmatively found Appellant not guilty of at least one element of Specification 4, and this Court cannot affirm any conviction that would require a finding of guilty an element the factfinder acquitted on.

It seems the Government intended these specifications to deal with separate sub-sets of allegations. In closing, the Government argued that Specification 1 of Charge I addressed "the incidents with the bullwhip and the ball gags," even while acknowledging that "this happened a lot . . . occasions when he used unlawful force in having this vaginal penetration." (R. at 1113). Conversely, trial counsel argued that Specification 4 of Charge I was "specifically referring to the flying incidents." (R. at 1120). However, there is nothing in the charging language nor the military judges' instructions that would distinguish the elements at issue. If the panel followed the military judge's instructions, as they are presumed to do, the acquittal with respect to Specification 4 of Charge I necessarily means the panel acquitted on at least one element necessary to guilt for Specification 1 of Charge I. The Government controls the charging language and was free to use more specific language to differentiate between allegations. The

[27] While *Leach* dealt with the prior version of Article 120, Appellant believes it is uncontroversial that a sexual act accomplished by "unlawful force" would, by definition, be perpetrated "without consent." In the event the Government takes a contrary position in its answer, Appellant will willingly brief this issue further in reply.

Government cannot, however, secure the benefits of using broad charging language, while simultaneously securing the advantages of more specific language merely by ex-parte decree in closing argument.

This is not a case like *Rosario*, where similar evidence was relevant to multiple specifications containing distinct elements. 76 M.J. at 117-18. In this case, there is no way to find Appellant guilty of the elements of Specification 1 of Charge I that would not result in him also being guilty of Specification 4 of Charge I. Similarly, there is no way Appellant could be not guilty of any element of Specification 4, but simultaneously be guilty of the elements of Specification 1. As the panel acquitted Appellant of at least one element of the former specification, this Court cannot re-animate that element to affirm the conviction on the latter specification.

**WHEREFORE**, Appellant requests this Honorable Court set aside the finding of guilty as to Specification 1 of Charge I.

## VI. THE SENTENCES FOR SPECIFICATION 3, 6, AND 9 OF CHARGE I SHOULD RUN CONCURRENTLY BECAUSE THEY INVOLVED THE SAME VICTIM AND THE SAME ACT OR TRANSACTION.

### *Standard of Review*

Questions of sentence appropriateness are reviewed de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006).

### *Law*

This Court "may 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 entire record, should be approved." Article 66, UCMJ, 10 U.S.C.A. § 866 (2020). "'[S]entence appropriateness involves the judicial function of assuring that justice is done' and that an

Appellant 'gets the punishment he deserves.'" *United States v. Souders*, No. ACM 40145, 2023 WL 2493272, at *10 (A.F. Ct. Crim. App. 9 Mar. 2023) (unpub. op.) (quoting *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988)). This analysis requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180–81 (C.M.A. 1959)).

"The Military Justice Act of 2016 created many significant changes within military justice. One of them was to implement the practice of 'segmented' sentencing." *United States v. Alkazahg*, 81 M.J. 764, 785 (N.M. Ct. Crim. App. 2021); *see also* R.C.M. 1002. "If a sentence includes more than one term of confinement, the military judge shall determine whether the terms of confinement will run concurrently or consecutively." R.C.M. 1002(d)(2)(B) ("Concurrent or consecutive terms of confinement."). "A military judge may exercise broad discretion in determining whether terms of confinement will run concurrently or consecutively consistent with R.C.M. 1002(f)." R.C.M. (d)(2)(B), *Discussion*.

"The terms of confinement for two or more specifications *shall* run concurrently— (i) when each specification involves the same victim and the same act or transaction . . . ." R.C.M. (d)(2)(B) (emphasis added). This language closely tracks that of the Federal Sentencing Guidelines which reads: "All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule: (a) When counts involve the same victim and the same act or transaction." United States Sentencing Guidelines (U.S.S.G.) § 3D1.2 ("Groups of Closely Related Counts.").

***Argument***

In Specification 3 of Charge I, Appellant was convicted of penetrating BE's mouth with his penis by using unlawful force on divers occasions between 17 April 2020 and 10 July 2020.

In Specification 6 of Charge I, Appellant was convicted of penetrating BE's anus with an enema injector on divers occasions on 5 July 2020.[28]

In Specification 9 of Charge I, Appellant was convicted of contacting BE's breasts with his penis on divers occasions between 25 June 2020 and 10 July 2020.

On the date in question for Specification 6 of Charge I, BE testified that Appellant performed numerous nonconsensual acts on her in quick succession. (R. at 653-58). BE testified that she was constipated on that day after her surgery. (R. at 653). The acts in question began "later in the day" when "the day was winding down" and BE "thought we were going to bed." Then, "just right after [BE had] just started," Appellant came into the bathroom and forced BE to perform oral sex with him while she was sitting on the toilet. (R. at 653-54). Thereafter, BE finished in the bathroom and came back out, and Appellant "did the exact same thing again." (R. at 653). After the second enema initiated a second bowel movement, BE rushed into the shower, but Appellant followed her into the shower "real shortly after." (R. at 656-57). At that juncture, Appellant grabbed BE's "breast and put his erect penis between them, and then he would also force oral . . . ." (R. at 658).

This continuous chain of events encompassed the entirety of the conduct alleged Specification 6, two of the "divers" occasions alleged in Specification 3, and at least one of the "divers" occasions alleged in Specification 9. Unquestionably, these events involved the "same victim:" BE. This Court should find it also involved "the same transaction." BE described these

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[28] All specifications qualified the dates with "on or about" language. (Charge Sheet). However, the testimony was clear that the "divers" occasions charged in Specification 6 of Charge I occurred on the same day.

events as happening in quick succession during the late evening of a single day. *See United States v. Sneezer*, 983 F.2d 920, 924–25 (9th Cir.1992) (two counts of rape against the same victim in a short span of time should be grouped); *United States v. Martin*, 528 F.3d 746, 755 (10th Cir. 2008) (finding two counts of rape and two counts of assault were sufficiently connected to warrant grouping them together at sentencing where the beatings and rapes happened over the course of a few hours with little break as part of one prolonged brutal attack); *see also* U.S.S.G. § 3D1.3 cmt. 4 ("For example, if the defendant commits forcible criminal sexual abuse (rape), aggravated assault, and robbery, all against the same victim on a single occasion, all of the counts are grouped together under § 3D1.2.").

To be clear, it seems the military judge attempted to properly group all offenses that occurred on overlapping occasions into concurrent sentence groupings. *See* (ROT Vol. 1, *Statement of Trial Results*). For example, the military judge grouped Specification 3 of Charge I to run concurrently with Specification 1 of Charge III, because some of the divers occasions alleged in each specification overlapped with the other. *See* (ROT Vol. 1, *Statement of Trial Results*). That said, identifying all the overlapping charges in this case was not an easy task, particularly on-the-spot without the benefit of the transcribed record. Given the convoluted charging scheme (frequently involving overlapping dates and divers occasions) and the often-confusing testimony, it is hardly surprising the military judge seems to have missed some overlap. In any event, with the benefit of time and a transcribed record, this Court can and should remedy these oversights by grouping all overlapping charges.

**WHEREFORE**, Appellant respectfully requests this Honorable Court modify the sentence to reflect Specifications 3, 6, and 9 running concurrently.

## VII. IT WAS PLAIN ERROR TO ALLOW TRIAL COUNSEL TO ASK A WITNESS WHETHER SHE FELT THE VICTIM

**HAD MISLED HER OR WHETHER ANOTHER WITNESS HAD EVER LIED TO HER.**

***Standard of Review***

Where the defense did not object to evidence at trial, this Court reviews for plain error. *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014) (citations omitted). Appellant has the burden of establishing (1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights. *Id.* (citation omitted).

***Law and Argument***

When questioning RE, BE's mother, trial counsel asked RE: "So, do you ever feel like [KM – the victim's daughter] has lied to you?" (R. at 914). RE responded in the negative. (R. at 914). Moments later, trial counsel asked RE about a trip that BE took: "Did you ever feel that [BE] was misleading you about this trip?" (R. at 914). RE again responded in the negative. These questions clearly fall outside any permissible form of character evidence.

With respect to KM, the Government was apparently trying to bolster her credibility generally. Asking a witness whether they ever "felt" another witness had lied to them falls outside any permissible form of character evidence. If the Government disagrees, Appellant respectfully requests it point to a rule of evidence that would allow this form of evidence.

With respect to BE, the Government was apparently trying to extrinsically rebut a question the defense asked BE under Mil. R. Evid 608(b). *See* (R. at 71). Of course, while inquiry into specific acts of dishonesty is permitted under that rule, extrinsic evidence is not permitted, either to prove up the acts or to rebut them. *See* Mil. R. Evid. 608(b) ("[E]xtrinsic evidence is not admissible to prove specific instances of a witness' conduct in order to attack or support the witness' character for truthfulness."). Additionally, even if the subject matter had

been proper, asking a witness if they "felt" they were being misled would be clearly improper. Allowing this evidence was error and the error was plain and obvious.

With respect to prejudice, this improper bolstering compounds the prejudice from the improper arguments, discussed above in Appellant's first assignment of error.[29]

**WHEREFORE**, Appellant requests this Honorable Court set aside the findings and sentence.

## VIII. THE EVIDENCE SUPPORTING APPELLANT'S CONVICTIONS IS FACTUALLY INSUFFICIENT.

### *Standard of Review*

Issues of factual sufficiency are reviewed de novo. *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citation omitted).

### *Law*

The test for factual sufficiency is, "whether after weighing the evidence in the record of trial, and making allowances for not having personally observed the witnesses, [this Court is] convinced of [Appellant's] guilt beyond a reasonable doubt." *Walters*, 58 M.J. at 396 (citation omitted). "In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make

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[29] Caselaw often discuss error from improper evidence and improper argument jointly and collectively. *See, e.g.*, *United States v. Silva*, 380 F.3d 1018 (7th Cir. 2004) (reversing for a combination of improper evidence and argument); *Boyle v. Million*, 201 F.3d 711, 717 (6th Cir. 2000) (finding prejudice in a mix of improper evidence and argument: "[T]he improprieties on the part of the prosecutor were not isolated, but rather infected all aspects of the trial."); *United States v. Combs*, 379 F.3d 564 (9th Cir. 2004) (reversing for combination of improper examination and argument). For clarity's sake, they are divided into separate assignments of error herein, but the prejudice analysis overlaps.

[our] 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 *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002)). Further, "[a]n appellate tribunal must independently evaluate the evidence to determine whether or not an accused has been deprived of his right to have the court-martial consider all reasonable alternatives of guilt." *United States v. Clark*, 48 C.M.R. 83, 87 (C.M.A. 1973). "As an evidentiary standard, proof beyond a reasonable doubt does not require more than one witness to *credibly* testify." *United States v. Lopez*, No. ACM 40161, 2023 WL 2401185, at *6 (A.F. Ct. Crim. App. Mar. 7, 2023) (unpub. op.) (emphasis added) (citing *United States v. Rodriguez-Rivera,* 63 M.J. 372, 383 (C.A.A.F. 2006)).

***Argument***

The crucial points of BE's allegations were uncorroborated. Appellant realizes, and this Court recently reiterated, credible testimony from a single witness may satisfy the government's burden of proof, even in the absence of corroboration. *See Lopez*, 2023 WL 2401185, at *6. BE's testimony, however, was beset by issues that prevent it from raising to the level of proof beyond a reasonable doubt.

BE continued in a relationship with Appellant for months despite her later allegations that he was viciously abusing her during this period. No credible explanation for this seemingly contradictory behavior was offered: the relationship was relatively new; they did not share children or a residence; and BE denied financial reliance on Appellant.[30] Not only did BE

[30] Indeed, BE testified that she had given Appellant "checks for thousands of dollars throughout the course of our relationship." (R. at 814).

continue in the relationship, but she forcefully rejected Appellant's mother's suggestion to slow things down, despite alleging at trial that she was being abused and looking for a way out at this same juncture. (R. at 828-32). It was only after the fight over BE's phone – at which point Appellant cut off the engagement – that BE launched her barrage of accusations.

Once BE did make her accusations, she made a great deal of inconsistent statements. (R. at 718-19, 731-37, 787-90, 902) (inconsistent statements about dates abuse began); (R. at 720-29, 746-49, 871-72) (inconsistent statements about the nature and volume of the abuse); (R. at 720-29, 740, 745, 799-801, 829) (inconsistent statements about her relationship with Appellant). BE's testimony throughout was also notably evasive.

BE's testimony about the purchases on her Amazon.com account was completely incredible. The idea that – by sheer coincidence – she texted Appellant a screenshot of the exact item that was purchased on her Amazon.com account (and on the exact same day), but she had no knowledge of the purchase itself defies belief. This deceptive testimony on the very subject under consideration (BDSM practices within the relationship) should give this Court great pause. Similarly, BE's text messages, which she did not reveal to Government, painted a very different picture of her involvement in BDSM practices than her statements and testimony would have suggested.

The defense presented a long-time friend of BE who testified to BE's poor character for truthfulness. (R. at 998-1004). The Government, meanwhile, presented no proper character for truthfulness evidence.

BE's accusations were internally incredible, internally inconsistent, inconsistent with her actions, and contradicted by other evidence. BE's testimony was evasive and deceptive.

Corroboration, meanwhile, was extremely limited. This Court should not be convinced beyond a reasonable doubt of Appellant's guilt based on this record.

**WHEREFORE**, Appellant requests this Honorable Court set aside the findings and sentence.

## Conclusion

**WHEREFORE**, Appellant respectfully requests this Honorable Court set aside the findings of guilty and the sentence.[31]

BRIAN A. PRISTERA
Lead Civilian Appellate Defense Counsel
Daniel Conway and Associates

SCOTT R. HOCKENBERRY
Assistant Civilian Appellate Defense Counsel
Daniel Conway and Associates

[31] Appellant has provided limited consent to disclose a confidential communication with counsel wherein he has conditionally waived military appellate counsel's review of the record so as to exercise his right to speedy appellate review. Military appellate defense counsel remains Appellant's detailed Article 70, UCMJ, counsel, but cannot sign the brief, as she has not been able to complete her professional and ethical obligations to review the record of trial before filing. This timing issue is due to civilian and military appellate defense counsel's varying caseload priorities, of which appellant has been informed. Appellant has consented to this course of action.

**Certificate of Filing and Service**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 9 February 2024.

Respectfully submitted,

SCOTT R. HOCKENBERRY
Assistant Civilian Appellate Defense Counsel
Daniel Conway and Associates
12235 Arabian Place,
Woodbridge, VA 22192

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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|---|---|
| **UNITED STATES**,<br>*Appellee* | **APPELLANT'S MOTION TO EXCEED PAGE LIMIT** |
| v. | Before Panel No. 1 |
| Captain (O-3),<br>**ZACHARY R. BRAUM,**<br>United States Air Force,<br>*Appellant* | No. ACM 40434<br><br>9 February 2024 |

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

Pursuant to Rules 17.3 and 23.3(q) of this Honorable Court's Rules of Practice and Procedure, Appellant moves to file his brief in excess of this Court's 50-page limit. Appellant respectfully requests 70 pages for his opening brief. Good cause exists for this motion because of the length and complexity of the case. The record of trial is twelve volumes consisting of eight Prosecution Exhibits, 19 Defense Exhibits, 58 Appellate Exhibits, and one Court Exhibit; the transcript is 1,284 pages. In addition, the case contains many legal issues relevant to this Court's review. Appellate defense counsel identified, and are submitting, eight assignments of error. Additional length is required to thoroughly brief these issues.

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

SCOTT R. HOCKENBERRY
Assistant Civilian Appellate Defense Counsel
Daniel Conway and Associates

**Certificate of Filing and Service**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 9 February 2024.

Respectfully submitted,

SCOTT R. HOCKENBERRY
Assistant Civilian Appellate Defense Counsel
Daniel Conway and Associates

25 February 2024

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee*, | ) | MOTION FOR<br>ENLARGEMENT OF TIME |
| v. | ) | |
| | ) | ACM 40434 |
| Captain (O-3)<br>ZACHARY R. BRAUM, USAF<br>*Appellant*. | ) | Panel No. 1 |

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

Pursuant to Rule 23.3(m) of this Court's Rules of Practice and Procedure, the United States hereby requests an enlargement of time in order to adequately respond to Appellant's Assignment of Error in which he alleges ineffective assistance of counsel against his trial defense counsel. Filed in conjunction with this motion, the United States filed a Motion to Compel Affidavits and asked this Court to order Appellant's trial defense counsel, Mr. BH,[1] Maj KM, and Maj AF, to provide an affidavit or declaration in response to Appellant's alleged ineffective assistance of counsel claims. The United States seeks a fourteen-day enlargement of time following the submission of Mr. BH's, Maj KM's, and Maj AF's affidavits in order to properly and completely respond to Appellant's brief.

Mr. BH, Maj KM, and Maj AF represented Appellant at his trial. Appellant filed his Assignments of Error brief with this Court on 10 February 2024. The United States requested an affidavit or declaration from each counsel covering the alleged ineffective assistance of counsel claim. All have responded via email and declined to provide an affidavit or declaration until ordered to do so by this Court.

[1] At the time of Appellant's court-martial, Mr. BH was Maj BH. Mr. BH has since separated from active duty.

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

Accordingly, the United States, in a separate motion, has requested this Court order Mr. BH, Maj KM, and Maj AF to provide an affidavit with specific, factual responses to Appellant's claim of ineffective assistance of counsel within 30 days of the Court's order.

Additionally, the government's answer to Appellant's brief is currently due to the Court on 15 March 2024.[2] Undersigned counsel will require a short amount of time after the submission of affidavits in order to properly address Appellant's ineffective assistance of counsel claim. Good cause exists to grant this request. Undersigned counsel needs this additional time in order to properly address Appellant's ineffective assistance of counsel claims, which cannot be analyzed until Mr. BH's, Maj KM's, and Maj AF's affidavits are received. Barring unforeseen circumstances, the United States believes fourteen days is sufficient to prepare a proper and responsive brief for this Honorable Court on this issue once the ordered affidavits are filed with the Court.

This case was docketed with the Court on 13 March 2023. Appellant filed his Assignments of Error brief with this Honorable Court on 10 February 2024, 334 days after

[2] Though Appellant's brief was filed on 10 February 2024, this Court granted Appellant's Motion to Exceed Page Limit on 14 February 2024. Pursuant to this Court's Rules, the Government's response is due 30 days after the granting of this motion.

docketing. This is the United States' first request for an enlargement of time. As of the date of this request, 349 days have elapsed since docketing.

WHEREFORE, the United States requests this Court grant this Motion for Enlargement of Time.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, civilian and military appellate defense counsel, and the Air Force Appellate Defense Division on 25 February 2024 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force

25 February 2024

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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|---|---|---|
| UNITED STATES,<br>*Appellee*, | ) | MOTION TO COMPEL AFFIDAVITS FOR INEFFECTIVE ASSISTANCE OF COUNSEL |
| v. | ) | ACM 40434 |
| Captain (O-3)<br>ZACHARY R. BRAUM, USAF<br>*Appellant*. | ) | Panel No. 1 |

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

Pursuant to Rule 23.3(e) of this Court's Rules of Practice and Procedure, the United States hereby requests this Court order Appellant's trial defense counsel, Mr. BH,[1] Maj KM, and Maj AF, to provide an affidavit or declaration in response to Appellant's alleged ineffective assistance of counsel claims.[2]

Mr. BH, Maj KM, and Maj AF represented Appellant at his trial. Appellant filed his Assignments of Error brief with this Court on 10 February 2024 alleging his trial defense counsel were ineffective for not understanding the law regarding prior consistent statements. The United States requested an affidavit or declaration from each counsel covering the alleged ineffective assistance of counsel claim. All have responded via email and declined to provide an affidavit or declaration until ordered to do so by this Court.

[1] At the time of Appellant's court-martial, Mr. BH was Maj BH. Mr. BH has since separated from active duty.

[2] Filed in conjunction with this motion, the United States has also moved this Court for an enlargement of time in order to adequately respond to Appellant's Assignment of Error in which he alleges ineffective assistance of counsel against his trial defense counsel. The United States seeks an enlargement of time following the submission of the affidavits or declarations in order to properly and completely respond to Appellant's brief.

The United States requires an affidavit from Mr. BH, Maj KM, and Maj AF to adequately respond to Appellant's brief and to Appellant's ineffective assistance of counsel claim. *See* United States v. Rose, 68 M.J. 236, 236 (C.A.A.F. 2009); United States v. Melson, 66 M.J. 346, 347 (C.A.A.F. 2008). In fact, this Court cannot grant Appellant's ineffective assistance of counsel claim without first obtaining an affidavit from trial defense counsel. *See* Rose, 68 M.J. at 237; Melson, 66 M.J. at 347. Affidavits or declarations are necessary in this case because the allegations of ineffective assistance of counsel involve strategic decisions and counsel's understanding of prior consistent statements that only Appellant's trial defense counsel can explain.

Accordingly, the United States respectfully requests this Court order Mr. BH, Maj KM, and Maj AF to provide an affidavit with specific, factual responses to Appellant's claim of ineffective assistance of counsel within 30 days of the Court's order.

WHEREFORE, the United States requests this Court grant this Motion to Compel Affidavits.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, civilian and military appellate defense counsel, and the Air Force Appellate Defense Division on 25 February 2024 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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| **UNITED STATES** | ) | **No. ACM 40434** |
| **Appellee** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Zachary R. BRAUM** | ) | |
| **Captain (O-3)** | ) | |
| **U.S. Air Force** | ) | |
| **Appellant** | ) | **Panel 1** |

On 10 February 2024, Appellant, through counsel, submitted an assignments of error brief. In the brief, Appellant alleges, *inter alia*, that trial defense counsel were ineffective in that they did not understand the law regarding prior consistent statements. Specific to this issue, Appellant's assignments of error brief states "whether Appellant was denied effective assistance of counsel when his trial defense team failed to recognize the distinction between prior consistent statements admissible as substantive evidence and prior consistent statements admissible for the limited purpose of testing the credibility of the witness."

On 25 February 2024, the Government filed a Motion to Compel Affidavits and contemporaneously filed a Motion for Enlargement of Time. The Government requests this court compel Appellant's trial defense counsel, Mr. B H ,* Major K M , and Major A F to provide affidavits or declarations in response to the claimed ineffective assistance of counsel. According to the Government, Appellant's trial defense counsel indicated they would only provide an affidavit or declaration upon order by this court. In the motion for enlargement of time, the Government requests 14 days to submit its answer after the court's receipt of declarations or affidavits. Appellant did not file a response to the motions.

The court has examined the claimed deficiencies and finds good cause to compel a response. The court cannot fully resolve Appellant's claims without piercing the privileged communications between Appellant and trial defense

* At the time of Appellant's court-martial, Mr. H was Major H but has since separated from active duty.

counsel. Moreover, in light of the court's order, it finds the Government's requested enlargement of time is appropriate.

Accordingly, after considering the Government's motions and the deficiencies alleged by Appellant, it is by the court on this 6th day of March, 2024,

**ORDERED:**

The Government's Motion to Compel Affidavits for Ineffective Assistance of Counsel is **GRANTED**. Mr. B H , Major K M and Major A F are each ordered to provide an affidavit or declaration to the court that is a specific and factual response to Appellant's claim provided *supra.*

A responsive affidavit or declaration by each counsel will be provided to the court not later than **4 April 2024.** The Government shall deliver a copy of the responsive affidavits or declarations to Appellant's counsel.

**It is further ordered:**

The Government's Motion for Enlargement of Time is **GRANTED**. The Government's answer to Appellant's assignments of error brief will be filed not later than **18 April 2024.**

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

5 April 2024

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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| UNITED STATES,<br>*Appellee*, | ) | MOTION FOR SECOND<br>ENLARGEMENT OF TIME |
| v. | ) | |
| | ) | ACM 40434 |
| Captain (O-3)<br>ZACHARY R. BRAUM, USAF<br>*Appellant*. | ) | Panel No. 1 |

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

Pursuant to Rule 23.3(m) of this Court's Rules of Practice and Procedure, the United States hereby requests an enlargement of time in order to adequately respond to Appellant's Assignment of Error in which he alleges ineffective assistance of counsel against his trial defense counsel. Filed in conjunction with this motion, the United States filed a Motion to Compel Additional Affidavits and asked this Court to order Appellant's trial defense counsel, Mr. BH, Maj KM, and Maj AF, to provide additional affidavits or declarations in response to Appellant's alleged ineffective assistance of counsel claims. The United States seeks a fourteen-day enlargement of time following the submission of Mr. BH's, Maj KM's, and Maj AF's additional affidavits in order to properly and completely respond to Appellant's brief.

The United States previously requested affidavits or declarations from Appellant's trial defense counsel to respond to Appellant's alleged ineffective assistance of counsel claim. This Court granted that request, ordered declarations from Appellant's trial defense counsel, and granted the United States an enlargement of time following the submission of the declarations to this Court. However, contradictory language contained in Appellant's Assignments of Error brief calls into question what Appellant is actually alleging against his counsel, namely whether

Appellant is complaining about his counsel's understanding of prior *consistent* statements versus prior *inconsistent* statements.

In his brief, Appellant titled Issue III as follows:

> WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL DEFENSE TEAM FAILED TO RECOGNIZE THE DISTINCTION BETWEEN *PRIOR CONSISTENT STATEMENTS* ADMISSIBLE AS SUBSTANTIVE EVIDENCE AND *PRIOR CONSISTENT STATEMENTS* ADMISSIBLE FOR THE LIMITED PURPOSE OF TESTING THE CREDIBILITY OF THE WITNESS.

(App. Br. at 1, 48.) (emphasis added.) However, in the argument section of Issue III, Appellant states, "It appears that the defense counsel was unaware that the Military Rules of Evidence permitted admission of some *prior inconsistent statements* as substantive evidence." (App. Br. at 48-49.) (emphasis added.) Considering Appellant raised a separate issue related to use of prior inconsistent statements in Issue II of his brief, Appellant likely erred in titling his ineffective assistance of counsel claims as relating to prior *consistent* statements versus prior *inconsistent* statements.[1]

However, both this Court's Order, as well as the United States' original Motion to Compel Affidavits, focused solely on the language used in Appellant's title to his Issue III. (*See* Order, dated 6 March 2024, stating, "In the brief, Appellant alleges, *inter alia*, that trial defense counsel were ineffective in that they did not understand the law regarding prior consistent statements.")

Because this Court's Order only addressed claims involving prior consistent statements, and not prior inconsistent statements, the declarations of Mr. BH, Maj KM, and Maj AF only

[1] To alleviate any doubt as to his exact claim against his trial defense counsel, Appellant has the ability to file a Motion to Amend Pleading pursuant to this Court's Rule 23.3(n).

address their understanding of the law related to prior consistent statements and what role prior consistent statements played in Appellant's court-martial. None of the declarations address the counsel's understanding of prior inconsistent statements or for what purpose any prior inconsistent statements could have been used in Appellant's court-martial.

In his declaration to this Court, Maj KM highlighted the inconsistent nature between Appellant's stated issue and the later argument, and stated, "In keeping with my obligations to both the United States Air Force Court of Criminal Appeals and the State Bar of Texas, I will only address the issue identified in the Court's order regarding prior consistent statements." (*See* Dec. of Maj KM.) Similarly, Maj AF stated in an email to undersigned counsel that she would be unable to address issues involving prior inconsistent statements until ordered to do so by this Court.

Assuming Appellant's Issue III involves ineffective assistance claims regarding prior inconsistent statements, the United States requires additional affidavits or declarations from Mr. BH, Maj KM, and Maj AF to adequately respond to Appellant's brief and to Appellant's ineffective assistance of counsel claim. *See* United States v. Rose, 68 M.J. 236, 236 (C.A.A.F. 2009); United States v. Melson, 66 M.J. 346, 347 (C.A.A.F. 2008). In fact, this Court cannot grant Appellant's ineffective assistance of counsel claim without first obtaining an affidavit from trial defense counsel. *See* Rose, 68 M.J. at 237; Melson, 66 M.J. at 347. Additional affidavits or declarations are necessary in this case as Appellant's claim relates to prior inconsistent statements because the counsels' initial declarations focused solely on prior consistent statements and the actual allegations of ineffective assistance of counsel raised by Appellant involve strategic decisions and counsels' understanding of prior inconsistent statements that only Appellant's trial defense counsel can explain.

Accordingly, the United States, in a separate motion, has requested this Court order Mr. BH, Maj KM, and Maj AF to provide additional affidavits or declarations with specific, factual responses to Appellant's claim of ineffective assistance of counsel within 30 days of the Court's order.

Additionally, the government's answer to Appellant's brief is currently due to the Court on 18 April 2024. Undersigned counsel will require a short amount of time after the submission of the additional affidavits in order to properly address Appellant's ineffective assistance of counsel claim. Good cause exists to grant this request. Undersigned counsel needs this additional time in order to properly address Appellant's ineffective assistance of counsel claims, which cannot be analyzed until Mr. BH's, Maj KM's, and Maj AF's affidavits are received. Barring unforeseen circumstances, the United States believes fourteen days is sufficient to prepare a proper and responsive brief for this Honorable Court on this issue once the ordered affidavits are filed with the Court.

This case was docketed with the Court on 13 March 2023. Appellant filed his Assignments of Error brief with this Honorable Court on 10 February 2024, 334 days after docketing. This is the United States' second request for an enlargement of time. As of the date of this request, 389 days have elapsed since docketing.

WHEREFORE, the United States requests this Court grant this Motion for Enlargement of Time.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, civilian and military appellate defense counsel, and the Air Force Appellate Defense Division on 5 April 2024 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force

4 April 2024

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Captain (O-3)<br>ZACHARY R. BRAUM, USAF<br>*Appellant*. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | MOTION TO ATTACH<br>DOCUMENTS<br><br>ACM 40434<br><br>Panel No. 1 |

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States submits the following documents previously ordered by this Honorable Court on 6 March 2024:

- Declaration of Mr. BH, dated 29 March 2024, 1 page;
- Declaration of Maj AF, dated 29 March 2024, 1 page; and
- Declaration of Maj KM, dated 29 March 2024, 1 page.

On 25 February 2024, the United States requested this Honorable Court compel Mr. BH, Maj AF, and Maj KM to provide affidavits or declarations regarding Appellant's claim of ineffective assistance of counsel against them. On 6 March 2024, this Honorable Court granted that motion and ordered Mr. BH, Maj AF, and Maj KM to "provide an affidavit or declaration to the court that is a specific and factual response to Appellant's claim provided ***supra***." The Order stated that the affidavits or declarations "will be provided to the court not later than 4 April 2024" and that the United States' "answer to Appellant's assignments of error brief will be filed not later than 18 April 2024."

Mr. BH, Maj AF, and Maj KM have each provided their declarations to undersigned counsel.

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

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate defense counsel, and the Air Force Appellate Defense Division on 4 April 2024 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40434** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Zachary R. BRAUM** | ) | |
| **Captain (O-3)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 4 April 2024, the Government submitted a motion to attach the following document(s) to the record:

Declaration of Mr. BH, dated 29 March 2024 (1 page);

Declaration of Major AF, dated 29 March 2024 (1 page); and

Declaration of Major KM, dated 29 March 2024 (1 page).

Appellant did not oppose the motion.

The court has considered the Government's motion, this court's Rules of Practice and Procedure, and the applicable law. The court grants the Government's motion; however, it specifically defers consideration of the applicability of *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020), and related case law, to the attachment(s) until it completes its Article 66, UCMJ, 10 U.S.C. § 866, review of Appellant's entire case.

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

**ORDERED:**

The Government's Motion to Attach Documents is **GRANTED**.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40434** |
| **Appellee** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Zachary R. BRAUM** | ) | |
| **Captain (O-3)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 10 February 2024, Appellant, through counsel, submitted an assignments of error brief. In the brief, Appellant alleges, *inter alia*, that trial defense counsel were ineffective in that they did not understand the law regarding prior consistent statements. Specifically, Appellant's issue is "whether Appellant was denied effective assistance of counsel when his trial defense team failed to recognize the distinction between prior consistent statements admissible as substantive evidence and *prior consistent* statements admissible for the limited purpose of testing the credibility of the witness." (Emphasis added).

Thereafter, on 25 February 2024, the Government filed a Motion to Compel Affidavits and contemporaneously filed a Motion for Enlargement of Time. Specifically, the Government requested this court compel Appellant's trial defense counsel, Mr. B H ,* Major K M and Major A F , to provide affidavits or declarations in response to Appellant's ineffective assistance of counsel claim. On 6 March 2024, this court granted the Government's motions and ordered Appellant's trial defense counsel to provide a responsive affidavit or declaration not later than 4 April 2024.

On 4 April 2024, the Government moved this court to attach the three declarations by Appellant's trial defense counsel, in which the Appellant did not oppose. The court granted this motion.

On 5 April 2024, the Government filed a Motion to Compel Additional Affidavits for Ineffective Assistance of Counsel, and contemporaneously filed a Motion for Second Enlargement of Time. The Government requests this court compel Appellant's trial defense counsel, identified above, to again provide affidavits or declarations in response to Appellant's claim of ineffective assistance of

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* At the time of Appellant's court-martial, Mr. H was Major H , but has since separated from active duty.

counsel because it appears "Appellant likely erred in titling his ineffective assistance claims as relating to prior *consistent* statements versus prior *inconsistent* statements." The Government further states that "[b]ecause this [c]ourt's [o]rder only addressed claims involving prior consistent statements, and not prior inconsistent statements," the declarations by Appellant's trial defense counsel only addressed the former and not the latter. Therefore, the Government moved this motion to compel additional statements by Appellant's trial defense counsel. Appellant does not oppose the Government's motion "as the previously filed declaration are nonresponsive to the issue at hand . . . ."

Further, should the court grant the Government's motion to compel affidavits, the Government requests 14 days to submit its answer after the court's receipt of declarations or affidavits. The Appellant did not respond to this request.

The court has examined the claimed deficiencies and finds good cause to compel a response. The court cannot fully resolve Appellant's claims without piercing the privileged communications between Appellant and trial defense counsel. Moreover, in light of the court's order, it finds the Government's requested enlargement of time is appropriate.

Accordingly, after considering the Government's motions, Appellant's response, and applicable case law, it is by the court on this 12th day of April, 2024,

**ORDERED:**

The Government's Motion to Compel Affidavits For Ineffective Assistance of Counsel is **GRANTED**. Mr. B H Major K M , and Major A F are each ordered to provide an affidavit or declaration to the court that is a specific and factual response to Appellant's claim provided *supra.*

A responsive affidavit or declaration by each counsel will be provided to the court not later than **2 May 2024.** The Government shall deliver a copy of the responsive affidavits or declarations to Appellant's counsel.

**It is further ordered:**

The Government's Motion for Second Enlargement of Time is **GRANTED**.

The Government's answer to Appellant's assignments of error brief will be filed not later than **16 May 2024.**

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

5 April 2024

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee*, | ) | MOTION TO COMPEL ADDITIONAL AFFIDAVITS FOR INEFFECTIVE ASSISTANCE OF COUNSEL |
| v. | ) | |
| | ) | ACM 40434 |
| Captain (O-3)<br>ZACHARY R. BRAUM, USAF<br>*Appellant*. | ) | Panel No. 1 |

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

Pursuant to Rule 23.3(e) of this Court's Rules of Practice and Procedure, the United States hereby requests this Court order Appellant's trial defense counsel, Mr. BH, Maj KM, and Maj AF, to provide additional affidavits or declarations in response to Appellant's alleged ineffective assistance of counsel claim.[1]

The United States previously requested affidavits or declarations from Appellant's trial defense counsel to respond to Appellant's alleged ineffective assistance of counsel claim. This Court granted that request and ordered declarations from Appellant's trial defense counsel. However, contradictory language contained in Appellant's Assignments of Error brief calls into question what Appellant is actually alleging against his counsel, namely whether Appellant is complaining about his counsel's understanding of prior *consistent* statements versus prior *inconsistent* statements.

[1] Filed in conjunction with this motion, the United States has also moved this Court for an enlargement of time in order to adequately respond to Appellant's Assignment of Error in which he alleges ineffective assistance of counsel against his trial defense counsel. The United States seeks an enlargement of time following the submission of the additional affidavits or declarations in order to properly and completely respond to Appellant's brief.

In his brief, Appellant titled Issue III as follows:

> WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL DEFENSE TEAM FAILED TO RECOGNIZE THE DISTINCTION BETWEEN *PRIOR CONSISTENT STATEMENTS* ADMISSIBLE AS SUBSTANTIVE EVIDENCE AND *PRIOR CONSISTENT STATEMENTS* ADMISSIBLE FOR THE LIMITED PURPOSE OF TESTING THE CREDIBILITY OF THE WITNESS.

(App. Br. at 1, 48.) (emphasis added.) However, in the argument section of Issue III, Appellant states, "It appears that the defense counsel was unaware that the Military Rules of Evidence permitted admission of some *prior inconsistent statements* as substantive evidence." (App. Br. at 48-49.) (emphasis added.) Considering Appellant raised a separate issue related to use of prior inconsistent statements in Issue II of his brief, Appellant likely erred in titling his ineffective assistance of counsel claims as relating to prior *consistent* statements versus prior *inconsistent* statements.[2]

However, both this Court's Order, as well as the United States' original Motion to Compel Affidavits, focused solely on the language used in Appellant's title to his Issue III. (*See* Order, dated 6 March 2024, stating, "In the brief, Appellant alleges, *inter alia*, that trial defense counsel were ineffective in that they did not understand the law regarding prior consistent statements.")

Because this Court's Order only addressed claims involving prior consistent statements, and not prior inconsistent statements, the declarations of Mr. BH, Maj KM, and Maj AF only address their understanding of the law related to prior consistent statements and what role prior consistent statements played in Appellant's court-martial. None of the declarations address the

[2] To alleviate any doubt as to his exact claim against his trial defense counsel, Appellant has the ability to file a Motion to Amend Pleading pursuant to this Court's Rule 23.3(n).

counsel's understanding of prior inconsistent statements or for what purpose any prior inconsistent statements could have been used in Appellant's court-martial.

In his declaration to this Court, Maj KM highlighted the inconsistent nature between Appellant's stated issue and the later argument, and stated, "In keeping with my obligations to both the United States Air Force Court of Criminal Appeals and the State Bar of Texas, I will only address the issue identified in the Court's order regarding prior consistent statements." (*See* Dec. of Maj KM.) Similarly, Maj AF stated in an email to undersigned counsel that she would be unable to address issues involving prior inconsistent statements until ordered to do so by this Court.

Assuming Appellant's Issue III involves ineffective assistance claims regarding prior inconsistent statements, the United States requires additional affidavits or declarations from Mr. BH, Maj KM, and Maj AF to adequately respond to Appellant's brief and to Appellant's ineffective assistance of counsel claim. *See* United States v. Rose, 68 M.J. 236, 236 (C.A.A.F. 2009); United States v. Melson, 66 M.J. 346, 347 (C.A.A.F. 2008). In fact, this Court cannot grant Appellant's ineffective assistance of counsel claim without first obtaining an affidavit from trial defense counsel. *See* Rose, 68 M.J. at 237; Melson, 66 M.J. at 347. Additional affidavits or declarations are necessary in this case as Appellant's claim relates to prior inconsistent statements because the counsels' initial declarations focused solely on prior consistent statements and the actual allegations of ineffective assistance of counsel raised by Appellant involve strategic decisions and counsels' understanding of prior inconsistent statements that only Appellant's trial defense counsel can explain.

Accordingly, the United States respectfully requests this Court order Mr. BH, Maj KM, and Maj AF to provide an additional affidavit or declaration with specific, factual responses to

Appellant's claim of ineffective assistance of counsel within a timeframe this Court deems appropriate.

WHEREFORE, the United States requests this Court grant this Motion to Compel Additional Affidavits.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, civilian and military appellate defense counsel, and the Air Force Appellate Defense Division on 5 April 2024 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | |
|---|---|
| **UNITED STATES**,<br>*Appellee* | **NON-OPPOSITION TO MOTION TO COMPEL ADDITIONAL AFFIDAVITS** |
| v. | Before Panel No. 1 |
| Captain (O-3),<br>**ZACHARY R. BRAUM,**<br>United States Air Force,<br>*Appellant* | No. ACM 40434<br><br>5 April 2024 |

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

Appellant does not oppose the government's 5 April 2024 motion to compel additional affidavits from Mr. BH,1 Maj KM, and Maj AF as the previously filed declaration are nonresponsive to the issue at hand add nothing to this Court's analysis. Thus, additional affidavits are appropriate.

**Background**

Appellant filed his assignment of error brief with this Court on 10 February 2024. A.E. II alleged plain error by the military judge in instructing that certain prior inconsistent statements could *not* be considered substantively, even though they were admitted without objection and/or made under oath subject to perjury. A.E. III alleged ineffective assistance of counsel because trial defense counsel failed to object to the erroneous prior inconsistent statement instruction. However, the heading of A.E. III contained a typographical error – referencing "prior consistent statements" where it should have said "prior INconsistent statements."

On 25 February 2024, appellate government counsel filed an unopposed motion to compel affidavits from trial defense counsel, stating that "specific, factual responses to Appellant's claim of ineffective assistance of counsel" were necessary to the government's answer and this Court's

analysis. On 6 March 2024, this Court granted the motion and ordered affidavits. Despite the typo, as explicitly recognized by Maj KM in his declaration, it was clear that appellant's argument involved the prior inconsistent statement instruction.

On 4 April 2024, the government moved to attach trial defense counsels' declarations. All three trial defense counsel addressed only the prior *consistent* statement instruction, which is not at issue. None of the declarations addressed the prior inconsistent statement instruction, which is at issue. Maj KM, appellant's lead trial defense counsel, recognized that "Appellant's stated issue addresses prior consistent statements, but Appellant's argument addresses prior inconsistent statements."

The government also recognized that the declarations did not address the intended issue and filed a motion to compel additional affidavits on 5 April 2024.

**Analysis**

As recognized by the government, the declarations submitted are unresponsive to the issue, do not serve the purpose the government stated they were necessary to serve, and add nothing to this Court's analysis. The reference to "prior *consistent* statements" in the heading of A.E. III is merely a typographical error. The issue is the military judge's erroneous prior *inconsistent* statement instruction, and trial defense counsel's failure to object thereto. As the government stated, all sides require "specific, factual responses to Appellant's claim of ineffective assistance of counsel" to properly address the issue. In furtherance thereof, appellant joins in the government request for this Court to order additional affidavits addressing the failure to object to the prior inconsistent statement instruction.

As trial defense counsel have already read the brief, are in contact with the government, and doubtless already anticipate a supplemental order will be issued presently, a short suspense is

appropriate. Appellant suggests five days would suffice.

Accordingly, Appellant respectfully joins in the government's motion and requests this Court order Mr. BH, Maj KM, and Maj AF to provide affidavits or declarations addressing the prior inconsistent statement instruction within five (5) days of the Court's order.[1]

**WHEREFORE**, Appellant respectfully requests this Honorable Court grant the Motion to Compel Additional Affidavits.

BRIAN A. PRISTERA
Lead Civilian Appellate Defense Counsel
Daniel Conway and Associates

SCOTT R. HOCKENBERRY
Assistant Civilian Appellate Defense Counsel
Daniel Conway and Associates

[1] The government Motion to Compel Additional Affidavits did not specify a specifically requested timeframe but asked only for "a timeframe this Court deems appropriate." In a simultaneously filed motion requesting an extension of time, the government stated: "the United States, in a separate motion, has requested this Court order Mr. BH, Maj KM, and Maj AF to provide additional affidavits or declarations with specific, factual responses to Appellant's claim of ineffective assistance of counsel within 30 days of the Court's order." This is not accurate, as the motion to compel did not request a 30-day suspense. To the extent the government's filings may be read in conjunction to request a 30-day suspense, that length of time is not warranted.

**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 5 April 2024.

Respectfully submitted,

SCOTT R. HOCKENBERRY
Assistant Civilian Appellate Defense Counsel
Daniel Conway and Associates

2 May 2024

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Captain (O-3)<br>ZACHARY R. BRAUM, USAF<br>*Appellant*. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | MOTION TO ATTACH<br>DOCUMENTS<br><br>ACM 40434<br><br>Panel No. 1 |

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States submits the following documents previously ordered by this Honorable Court on 12 April 2024:

- Declaration of Mr. BH, dated 1 May 2024, 2 pages;
- Declaration of Maj AF, dated 2 May 2024, 1 page; and
- Declaration of Maj KM, dated 2 May 2024, 2 pages.

On 5 April 2024, the United States requested this Honorable Court compel Mr. BH, Maj AF, and Maj KM to provide affidavits or declarations regarding Appellant's claim of ineffective assistance of counsel against them. On 12 April 2024, this Honorable Court granted that motion and ordered Mr. BH, Maj AF, and Maj KM to "provide an affidavit or declaration to the court that is a specific and factual response to Appellant's claim provided ***supra***." The Order stated that the affidavits or declarations "will be provided to the court not later than 2 May 2024" and that the United States' "answer to Appellant's assignments of error brief will be filed not later than 16 May 2024."

Mr. BH, Maj AF, and Maj KM have each provided their declarations to undersigned counsel.

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

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate defense counsel, and the Air Force Appellate Defense Division on 2 May 2024 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(

2 May 2024

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Captain (O-3)<br>ZACHARY R. BRAUM, USAF<br>*Appellant*. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | MOTION TO ATTACH<br>DOCUMENTS<br><br>ACM 40434<br><br>Panel No. 1 |

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States submits the following documents previously ordered by this Honorable Court on 12 April 2024:

- Declaration of Mr. BH, dated 1 May 2024, 2 pages;
- Declaration of Maj AF, dated 2 May 2024, 1 page; and
- Declaration of Maj KM, dated 2 May 2024, 2 pages.

On 5 April 2024, the United States requested this Honorable Court compel Mr. BH, Maj AF, and Maj KM to provide affidavits or declarations regarding Appellant's claim of ineffective assistance of counsel against them. On 12 April 2024, this Honorable Court granted that motion and ordered Mr. BH, Maj AF, and Maj KM to "provide an affidavit or declaration to the court that is a specific and factual response to Appellant's claim provided ***supra***." The Order stated that the affidavits or declarations "will be provided to the court not later than 2 May 2024" and that the United States' "answer to Appellant's assignments of error brief will be filed not later than 16 May 2024."

Mr. BH, Maj AF, and Maj KM have each provided their declarations to undersigned counsel.

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

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate defense counsel, and the Air Force Appellate Defense Division on 2 May 2024 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force

16 May 2024

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee*, | ) | ANSWER TO ASSIGNMENTS OF ERROR |
| v. | ) | |
| | ) | ACM 40434 |
| Captain (O-3)<br>ZACHARY R. BRAUM, USAF<br>*Appellant*. | ) | Panel No. 1 |

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**ANSWER TO ASSIGNMENTS OF ERROR**

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G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force

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

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16 May 2024

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee*, | ) | ANSWER TO ASSIGNMENTS OF ERROR |
| v. | ) | |
| | ) | ACM 40434 |
| Captain (O-3)<br>ZACHARY R. BRAUM, USAF<br>*Appellant*. | ) | Panel No. 1 |

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

## ISSUES PRESENTED

**I.**

**WHETHER TRIAL COUNSEL'S ARGUMENTS AMOUNTED TO PROSECUTORIAL MISCONDUCT THAT WARRANTS RELIEF.**

**II.**

**WHETHER IT WAS PLAIN ERROR FOR THE MILITARY JUDGE TO GIVE A "360 DEGREE COMPLETELY ERRONEOUS INSTRUCTION" REGARDING THE PERMISSIBLE USE OF PRIOR INCONSISTENT STATEMENTS.**

**III.**

**WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL DEFENSE TEAM FAILED TO RECOGNIZE THE DISTINCTION BETWEEN PRIOR CONSISTENT STATEMENTS ADMISSIBLE AS SUBSTANTIVE EVIDENCE AND PRIOR CONSISTENT STATEMENTS ADMISSIBLE FOR THE LIMITED PURPOSE OF TESTING THE CREDIBILITY OF THE WITNESS.**

**IV.**

**CAN THE GOVERNMENT PROPERLY REFUSE TO DISCLOSE RELEVANT, NON-PRIVILEGED DATA IN ITS POSSESSION, CUSTODY, AND CONTROL ON THE BASIS**

**THAT THE WITNESS WHO PROVIDED THE DATA GAVE LIMITED CONSENT WITH RESPECT TO ITS USE?**

**V.**

**APPELLANT COULD NOT BE GUILTY OF THE ELEMENTS OF SPECIFICATION 1 OF CHARGE 1 WITHOUT ALSO BEING GUILTY OF THE ELEMENTS OF SPECIFICATION 4 OF CHARGE I. NEVERTHELESS, THE PANEL ACQUITTED HIM OF THE FORMER SPECIFICATION BUT CONVICTED HIM OF THE LATTER. CAN THIS COURT AFFIRM THE FINDINGS OF GUILTY AS TO SPECIFICATION 1 OF CHARGE I UNDER THESE CIRCUMSTANCES?**

**VI.**

**WHETHER THE SENTENCES FOR SPECIFICATION 3, 6, AND 9 OF CHARGE I SHOULD RUN CONCURRENTLY BECAUSE THEY INVOLVED THE SAME VICTIM AND THE SAME ACT OR TRANSACTION.**

**VII.**

**WHETHER IT WAS PLAIN ERROR TO ALLOW TRIAL COUNSEL TO ASK A WITNESS WHETHER SHE FELT THE VICTIM HAD MISLED HER OR WHETHER ANOTHER WITNESS HAD EVER LIED TO HER.**

**VIII.**

**WHETHER THE EVIDENCE SUPPORTING APPELLANT'S CONVICTIONS IS FACTUALLY INSUFFICIENT.**

**IX.**[1]

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

[1] This issue is raised in the appendix pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

## STATEMENT OF THE CASE

The United States generally accepts Appellant's Statement of the Case.

## STATEMENT OF FACTS

Ms. BE[2] met Appellant the week of Thanksgiving in November 2019 through an online dating application called Bumble. (R. at 545.) Ms. BE was a single mother at the time with two children. (R. at 546.) She had not been in a relationship since 2017.

The two began dating. Ms. BE described their dates as "a lot of fun" and that Appellant complimented her, which "made me feel really good about who I am and everything." (R. at 548.) Ms. BE noted that she had, at one point, weighed 270 pounds but was close to 150 pounds when she met Appellant. Ms. BE agreed that it had been a while since a man had shown any interest in her, calling it "very, very flattering." Ms. BE also said Appellant and her children "hit it off" once they met. (R. at 549.) Her children's reaction to Appellant was very important to Ms. BE, adding that Appellant "was putting a lot of effort into it," which made her very happy. (R. at 551.) Through those first few months, Ms. BE said she "felt really good" and "was really happy." (R. at 552.)

By March 2020, Appellant began talking marriage to Ms. BE. Initially, Ms. BE thought the two had not been together long enough. (R. at 554.) In April, Ms. BE thought she became pregnant and told Appellant. (R. at 554-55.) A month later, however, Ms. BE began her period and there were indications of a miscarriage. (R. at 556.) In June, Appellant proposed to Ms. BE.

[2] At the time of Appellant's court-martial, Ms. BE had married and was now Ms. BM. However, because she is referred to as Ms. BE on Appellant's charge sheet, this brief will continue to refer to her as Ms. BE.

In terms of their sexual relationship, Ms. BE described Appellant as "very romantic, very sensual," adding that he would light candles and the like. (R. at 558.) She said in the first few months of their relationship, there were no signs or discussion of bondage or other similar types of sexual activity. (R. at 558-59.)

However, Ms. BE described an incident in April 2020 when the couple were flying in Appellant's Cessna aircraft, which Appellant was piloting. (R. at 560.) Ms. BE said Appellant pulled her on top of him while he was flying, adding that Appellant had already taken his penis out of his pants. Ms. BE protested and said they were going to crash, but Appellant told her to "stop fighting it" and reminded her not to "hit anything or we'll hit the ground." (Id.) Ms. BE agreed that she verbally said, "No," adding the following:

> He was -- he told me that we were going to so you can join the mile high club and I told him no, I do not want to do this because I was scared, like we will crash and I kept saying over and over, like we're going to -- because I didn't know how close to the ground we were. I don't know how high we were and I didn't want us to like literally crash because I don't want that.
>
> . . .
>
> Well, he just kept telling me to stop fighting it. It will get done faster. And then he's like, "if you keep fighting it, I'm going to hit something in the airplane crashing us to descend."

(R. at 561-62.) Ms. BE said she tried to push away from Appellant back to her seat. However, she eventually stopped resisting because "I knew it [sic] wasn't going to win the situation." (R. at 563.)

Ms. BE said she did not want to have sex because "one, we were on an airplane and I didn't want us to crash. Two, I was uncomfortable and I just didn't want us to crash and die."

(Id.) Ms. BE said there was no conversation about what happened afterwards except for Appellant "bragg[ing] about he'd joined the mile high club finally." (Id.)

Ms. BE described another incident on the airplane when, on a taxiway, Appellant "pulled my head down on top of his erect penis and held my head down and he did it as he was literally taking off with the aircraft." (R. at 564.) Ms. BE said she could not audibly protest because "I could not speak because he already had his penis inside my mouth, but I was pushing on his seat trying to get up off of it and he was just like holding me down harder." (R. at 565.) Ms. BE continued, "I tried to pull my head straight back by pushing off on the chair or his seat, but then, like, obviously, once you start taking off and I felt his arms pulling back, that's when I stopped because I didn't want my head to hit the -- the steering on and knock us off course." (Id.) Because Appellant had told her previously that if she bumped anything that they would crash, Ms. BE said she was "terrified to fight too hard." (Id.) However, Ms. BE said Appellant "could definitely feel me pulling back, because when I would pull back harder, he could push harder." (R. at 566.)

Ms. BE described a third incident that closely mirrored the first, except this time Appellant had Ms. BE face away from him during the sexual intercourse. (R. at 566-67.) Again, Ms. BE protested but, like before, Appellant told her "I'll be done faster if you don't resist." (R. at 568.) Appellant also told her to watch out for planes since "he had me facing outward." (Id.) Ms. BE said unwanted sex happened again in June 2020 while Appellant flew them from Destin, Florida to Tuscaloosa, Alabama. (R. at 569-71.)

Ms. BE testified that Appellant kept track of the sexual activity in the plane by putting a star beside her name in his pilot's log. (R. at 571.) Prosecution Exhibit 1 was Appellant's pilot log. (R. at 572.) Ms. BE said the stars in the log correlate to times when she recalled Appellant

forcing sexual intercourse upon her. (R. at 573.) Ms. BE also stated that Appellant gave her a pin that had wings on it and said "Mile High." (Id.; *see also* Prosecution Exhibit 2.) Ms. BE said Appellant bragged to his friend, Maj JN, about joining the mile high club. (R. at 575-76.)

One evening, on 16 May 2020, while at Maj JN's house, Appellant asked Ms. BE if she "would be willing to make our life in the bedroom more fun, a little more perky, but he never did use the actual words BDSM." (R. at 577.) Instead, Appellant asked if she would be willing to "spice up our life in the bedroom." (R. at 577, 851.) The two exchanged text messages and pictures because Ms. BE was "wanting to know if that's what he was referring to." (R. at 578.) When Appellant's counsel on cross-examination asked if Ms. BE was trying to arouse Appellant by sending him the pictures, Ms. BE responded, "I wasn't try to [arouse] him. I was trying to understand where he was coming from, and he would send them back to me as well." (R. at 852.) However, Ms. BE said there was never an agreement to do anything, stating, "No, we never made anything like, okay, let's go try it." (R. at 578.)

However, once the couple got home, Ms. BE said, "I started to see a different side of him in the bedroom." (Id.) She explained:

> So when we were having sex, it started off like how it always has, you know, come in the room and he always had a candle lit and we were having intercourse and he asked me to get on all fours and I was facing away from him. So I was facing towards the door. And then that's when I saw his hand go in front of my face approximately about six times and had thought - assumed at the moment it was a rope is what I thought it was. It happened so fast and then I started to get really lightheaded and seeing spots and I passed out.

(R. at 579.) Ms. BE said Appellant had to have had the rope, which was also described as a whip, in arm's reach because "he never stopped having intercourse with me to grab anything, so it had been within reach." (Id.)

Ms. BE said it happened so fast that she did not "understand what it was" that was around her neck, only that "I just felt that like my neck was getting tighter and tighter." (R. at 581.) Ms. BE continued:

> I passed out. I don't know how long I was passed out for, but when I did wake up I was in the room by myself and it was just a few seconds later [Appellant] walked in the room and he was wearing his underwear.

(R. at 581.) When she woke up, Ms. BE found dry semen on the inner part of her thigh and around her vagina. (R. at 612.) Ms. BE said she was "really scared and shocked," adding that she had never passed out before or done anything like that. (R. at 582.) She said she was "really terrified" and did not know what to do, adding, "I wanted to leave, but I was scared to try." (Id.)

Ms. BE said she did not consent to Appellant using a bullwhip or wrapping it around his neck and that the two had never discussed using a bullwhip. (R. at 583.) Ms. BE said she did not even know he owned one. She said the next morning Appellant said "that bullwhip was awesome," and that when she looked at him, "he just winked at me and then walked out of the kitchen drinking his coffee." (R. at 584.)

Ms. BE said she was not able to physically resist "because I didn't realize what was going on and the way – because when it was on me it was so tight that I didn't feel like I can grab myself . . . ." (R. at 585.) She said she felt "helpless." (Id.)

A few days later, Ms. BE said Appellant used a ball gag on her. (Id.) She said the sex that night started off normal again, and she did not see a bullwhip so she was not nervous about that happening again. (R. at 586.) However, Appellant the pulled out a ball gag and put it over her head. Ms. BE said there was no discussion about a ball gag beforehand. She said she did not fight the ball gag because "in my thought process was like okay, just don't like fight him, just

like it will get over faster." (R. at 587.) Ms. BE said she could breathe and that the sex "didn't last very long, so it got done pretty quick." (Id.)

A few days later, Appellant brought out the ball gag again. (R. at 588.) Ms. BE said the sex again started consensual but then he put the ball gag on her. She continued:

> It was the last time he put the ball gag on me, but I did notice really quick that I couldn't breathe with it in if I tried breathing out through my mouth. And then there was times during the intercourse when he would grab my nose and pinch it for a few minutes and I would try to sway my head back and forth to get him to let go of my nose because I couldn't breathe and I was trying to gasp for air out the corners of my mouth.

(Id.) Ms. BE said it was different this time because she could not breathe. Ms. BE guessed it was because Appellant put the ball gag in her mouth the wrong way, which would make the breathing holes in the ball not work. (R. at 589.)

Ms. BE said she was terrified because she could not breathe and that she did not want to continue to have sex. (R. at 590.) She testified, "I was swaying my head back and forth, especially more intense when he had grabbed my nose to try and get him to stop grabbing my nose. I was saying 'Nuh-uh' a lot because I couldn't form a word." (Id.) In response though, Appellant did not stop. Instead, Ms. BE said, "I could tell he was getting more excited because he was thrusting me even harder." (R. at 591.)

Once Appellant finished, he took the ball gag off of Ms. BE, who ran into the hallway bathroom. Ms. BE said Appellant came up to her "like he was bragging" and asked her, "Did you notice anything different this time?" (Id.) When Ms. BE told him she could not breathe, Appellant then told her as he chuckled, "Yeah, I put Q-tips in here and I cut the ends off." (Id.) Ms. BE explained further that Appellant put Q-tips "[i]nside those three little holes, he had three

different Q-tips in there to block the airway." (Id.) When Ms. BE told Appellant it was scary, Appellant told her "you'll be fine." (R. at 592.)

The sex toys used by Appellant are at Prosecution Exhibit 3. Ms. BE said Appellant kept the toys in a box under his bed and specifically refused to tell her what all was in the box, adding, "He said that I wasn't going to know until time comes when he could pull something out. Then I would find out." (R. at 595.) Ms. BE said, "That scared me. It scared me because I didn't [sic] not know what else he could have in that box." (Id.)

Ms. BE explained she did not raise Appellant's actions to him at some later point because, "I was scared too because like he didn't care what I said." (R. at 593.) She said that whenever she would tell him no "I could tell he would just get more happy and excited, and it just it made me really uncomfortable and I'm scared I didn't know what he was going to do next." (R. at 594.) She later stated the difference between the consensual and non-consensual acts (ones involving the sex toys) was that Appellant "would be very more forceful," adding, "When I would tell him no, he would get more excited and keep going." (R. at 614.) Ms. BE said that because of this she "just like mentally, emotionally, I just like shut down" because "he wasn't going to listen to me" and it terrified her because "I didn't know what he was capable of doing next." (R. at 616.)

Ms. BE said that outside of the sexual acts, the relationship was "still really really good like we had some really good times, we had some good dates, we has some good adventures," adding that "Like outside of that, he was a really good, genuine sweet guy." (R. at 596.) She said she and Appellant would often times have sex that was normal, that did not include sex toys but instead was "just like at the beginning, nice and romantic candles and just the way he'd just

hold me." When Appellant would get violent, Ms. BE felt Appellant was stressed and that she was the "person he was just taking it out on." (R. at 596-97.)

Ms. BE also said alcohol played a role in Appellant's actions because he would get mean and angry when he drank. (R. at 619.) Ms. BE recounted occasions when Appellant would come home to find the dishes not done and he would "grab me by the throat and he would yell at me." (R. at 620.) Ms. BE said Appellant would lift her up onto her tip toes and say things like "I'm going to make you my domesticated housewife yet." (Id.)

Ms. BE explained further why she stayed with Appellant despite his actions:

> Well, he was really charming, he was sweet, he made me feel like honestly, I kind of felt like a fairy tale to me because he made me feel so good about myself and just how he kept being so good to my kids. And I really wanted to have a marriage with someone that would accept kids as their own, and I wanted someone who wanted to have more kids because I wanted to have more kids. And he was making real good effort. Like I said, he already won my daughter over so well and then he was making such good links with my son and trying and playing video games with him, going to golfing a lot. So I just wanted to have someone to share my life with and I felt like he could be that person.
>
> . . .
>
> I felt really bad if I were to break it off with him that, like my kids, would lose the one great male role model that they were finally getting. And I didn't want to take that from them.

(R. at 599, 601.) Ms. BE said she just kept hoping the sex would go back to the way it was in the beginning. (R. at 600.) Ms. BE said, "At that point I was still trying to keep the family together." (R. at 602.)

However, as Ms. BE put it, "Once we were in Tuscaloosa, it all changed." (Id.) Ms. BE said that Appellant had convinced her to get breast augmentation because she needed to look the "part" by having large breasts, not wear glasses, and have a tight body and hourglass shape. (R.

at 604.) Ms. BE did not want breast augmentation but felt that if she wanted the relationship to work that she "need[ed] to be more of what he wanted." (Id.) On cross-examination, Appellant's trial defense counsel asked Ms. BE if she had ever told her friend, Ms. JJ, that she wanted breast augmentation. (R. at 809.) Ms. BE responded, "No, I did not say the breast augmentation. I had expressed to her where I was at the point where I wanted to get a tummy tuck. There's a difference." (Id.)

On 24 June 2020, Ms. BE had surgery in Tuscaloosa. (R. at 617.) Ms. BE said that after the surgery she was weak and could not get herself out of bed. (R. at 626.) She said Appellant would have to physically take her to the bathroom because she could not lift her arms or turn her body. (Id.) Ms. BE explained what happened next:

> And then at point when I was back in the bed, he -- because I was lying in bed normally where you know, had the head of the bed, and then on his own he -- he came up on top of me and then he was also talking about, like how he has to massage my breasts, because you can't get like those hard pockets from the surgery, and he's being very forceful with it. I told him he's being too rough and that really hurt. And he said it has to be that tough to keep it from building all that stuff up. And then he was already -- had his erect penis and took my breasts and like he would insert his penis in between my breasts and I would to him it was hurt because he pushed my breast together and then he got down off me. He turned my body so my head was off on the side of the bed and he inserted his erect penis in my mouth. And I couldn't wiggle away and he was making me perform oral sex and he was doing it so hard that, like I ended up throwing up all over my face, all over him. It was all over the side of the bed and on the floor. He got really upset with me that I threw up and then so he backhanded me across my face with his right hand.

(R. at 626-27.) Ms. BE said she did not want to have any sexual interaction with Appellant that night and had done nothing to make Appellant think she wanted to engage in that activity.

Ms. BE testified that she "couldn't fight him off" because she "just had surgery" and "was in a lot of pain." (R. at 630.) She said she "couldn't even like hold a fork to my mouth,"

and "was in so much pain." (R. at 630-31.) She said she was shocked when this was happening because "I didn't think, at least that he would ever do it like while I'm coming out of surgery," adding, "I still have the anesthesia in me." (R. at 631.) She said she told Appellant, "no, that starts to hurt," when he was messaging her breasts too hard and told him to stop when he placed his penis between her breasts. However, Ms. BE said, "And he just kept going and just felt like he was getting more excited and more turned on by it, so he wasn't listening to me." (Id.)

Once Appellant placed his penis in her mouth, Ms. BE said, "I just realized I couldn't get myself out of that position because my head was so far over," adding that she "had no sense of balance to like try and save myself onto the bed. So I gave up at that point." (R. at 632.) She said she threw up because "he was thrusting me hard and it was in the back of my throat and . . . with my gag reflex and being just so sick from the surgery, I couldn't stop not throwing up." (Id.) Because of what he had done, her physical condition, and since he had been drinking, Ms. BE did not say anything after it was over. (R. at 633.)

The next morning following the surgery, Ms. BE was sitting in a chair and Appellant placed a plastic grocery sack over her head. (R. at 635.) Because of her physical limitations, Ms. BE could not "full on push him away." (Id.) Ms. BE said she was struggling for breath and that the "sack was literally entering my mouth" and could feel it far back in throat. Then, Appellant took the sack off her head and "he already had his erect penis out of his pants and he inserted [it] in my mouth and held my head and continued with oral sex until I felt his semen going down my throat." (Id.) Ms. BE said when the bag was over her head that she was very light-headed and remembered thinking that she was not going to see her kids again. (R. at 636.) She said, "I thought he was trying to murder me." (R. at 637.)

She said Appellant placed his penis in her mouth as soon as he took off the bag, adding, "He kept holding my head as he was making – forcing me to do oral on him." (R. at 638.) Once he was done, Ms. BE said Appellant backhanded her across the face twice. (Id.) Later that day, Ms. BE said Appellant again began forcefully messaging her breasts before eventually placing his penis between her breasts and ejaculating. (R. at 639-43.) She said this caused "excruciating pain." (R. at 640.) She said she told Appellant to stop and that he was hurting her. (R. at 644.) However, Ms. BE said Appellant just got more excited.

On the day before they left Tuscaloosa, Ms. BE said Appellant "pulled me over on top of him and made me straddle him and he was holding on to me." (R. at 642.) She said he first placed his finger into her anus and "told me that he was going to stick it in there." (Id.) When she told him she did not want him to, Ms. BE said Appellant "inserted himself into my butthole and had sex with me." (R. at 643, 645.) Ms. BE said she did not "want to fight" when Appellant pulled her on top of him because "I didn't want to rip any of my incisions or the muscle and it hurt." (Id.) However, she said she "didn't realized that it was going to get to that extent where he was going to insert himself into my butthole." (Id.)

Once back in Kansas, Ms. BE was much more frightened of Appellant and started to notice him drinking more. (R. at 650.) However, Ms. BE knew Appellant had an upcoming deployment so she planned to wait until "he was gone halfway around the world" and then leave him. (Id.) Ms. BE knew if she tried to leave when he was there that he would either "get really mad and come after me" or "turn on that sweet charm that he had and just sweep me right back in." (Id.) She said, "I was planning on as soon as he was gone I was just going to cut-off communications off with him and just hope that he'll move on before he comes back because he

told me he was going be gone for six months." (R. at 651.) Ms. BE added, "I felt like that was the only safe option that I could use. (R. at 652.)

However, before she could leave, Appellant committed another act against her. (R. at 653.) Ms. BE explained she was having trouble with bowel movements after her surgery. Appellant bought her two boxes of enemas, but when he showed them to her, Ms. BE said she did not want to use them. (Id.) She stated Appellant then "forced me onto the bed and put pillows down and [made] my butt stick in the air because he kept saying that I needed to have these and I couldn't push myself in a push up position to get off and out of the way." (Id.) She continued, "So he ended up giving me an enema and he wouldn't -- I swear I felt like minutes and I felt like it was probably longer than what the box suggested, but like it was burning and I did tell him it hurt and it was burning and I need to go to the bathroom and he said no, you're not, you can't go yet kind of thing." (R. at 653-54.)

When he finally let her go to the bathroom, Ms. BE was sitting on the toilet having a bowel movement when Appellant entered the bathroom, pulled out his erect penis, and forced her to "to give him oral why I'm sitting there having a bowel movement on the toilet." (R. at 654.) She continued, "And he held my head and forced himself -- and forced me to finish giving him oral till he came in my mouth, the semen down my throat." (Id.) Ms. BE said she did not consent to Appellant sticking an enema in her anus and that she physically resisted by pushing back and "I couldn't physically push him off of me." (R. at 655.) She also verbally told him no, stop, and that it was hurting her. (Id.) Ms. BE also said she did not consent to Appellant sticking his penis into her mouth, adding that "it shocked me again because he took something to another different type of extreme that I didn't know if someone would do." (Id.) She said, "I mean I was

sitting there having a bowel movement," adding, "I wasn't expecting someone to shove their penis in my mouth." (Id.)

When she came out of the bathroom, Appellant forcefully placed another enema in her anus and held it in even longer this second time. (R. at 587.) Appellant told Ms. BE he "thought it was hot." (Id.) When he finally let her up, Ms. BE went into the shower, which had a seat, to avoid Appellant doing the same thing he had done to her on the toilet. However, Appellant followed her into the shower and "did what he wanted to do again and took advantage of me." (R. at 656.) Ms. BE then recounted that on multiple occasions since returning from Tuscaloosa, Appellant would follow her into the shower, grab her breasts, place his penis between her breasts, force her to perform oral sex on him, and then perform oral sex on her. (R. at 658.) Ms. BE said she "told him I was uncomfortable with it, but he just did it anyway and I just knew – I'm not going to win." (Id.)

Ms. BE said, "Like I said at that point, with him hurting me so many times, I didn't want to have him do that to me. I didn't want to have sex with him, I didn't want to have him perform an oral on me. I didn't want forced oral on him." (R. at 659.) She said previously in the relationship she had consented to that activity but by this time "I didn't want him to do that at all," adding that she both verbally and physically resisted his advances by telling him no and pushing on his thighs with her hands. (Id.) Ms. BE said, "And then, when I knew I couldn't and hear that he wouldn't verbally listen to me, I just wanted it to get over faster." (R. at 660.)

Appellant committed his last act against Ms. BE on 10 July 2020. After coming back from a date, Appellant asked Ms. BE to perform lap dances on him, to which she refused. (R. at 661.) When she tried to walk away, Appellant grabbed her arms and pulled her down onto his lap. When he continued to refuse to dance, Appellant grabbed Ms. BE's throat, lifted her up, and

said, "What did I say?" (Id.) Ms. BE at that point felt like she had to, so she began dancing over the course of two songs while Appellant undressed her. When the second song ended, Ms. BE tried to go to the bathroom but Appellant forced her to dance to a third song before dragging her to the bedroom, made her get on her knees, and perform oral sex on him. (Id.) Appellant then put his penis between her breasts. She continued:

> And I could tell he was getting really angry because it wasn't going the way he wanted it to and at that point he told me to stay there, don't move. I was scared. I didn't know what he was going to do because with him being out in the living room that the lap dances and being really forcible with it, he was only gone for -- not fast. I think he just literally went to the next room over and came back. And came back with blue painter tape and he wrapped it around my body. So across -- across my back and across my breasts, where my incisions were, across the areola, because he was trying to keep my breasts together. And once he did, that, he inserted his penis again between my breasts and he was getting very angry because it wasn't going the way he was wanting it to go. And so he just ripped it off. And when he did that, it pulled the scab off the left part of my incision on my left breast, clear at the end. That really hurt and then, you know, forced having sex. And then after that, I just went to the bathroom and put stuff on my incision and that was the rest of that night.

(R. at 662.) Prosecution Exhibit 4 is a picture of her left breast where the scab was ripped off. (R. at 663.) The photo was taken within a week of Appellant's acts against her.

Ms. BE said the ripped open incision felt like it was "on fire when he just ripped it off." (R. at 664.) She said that her incision had bled some before when she needed to massage her breasts but this time was different because it was a constant flow of blood that was "going down my side." (R. at 665.)

Ms. BE said that when Appellant grabbed her by the wrist and pulled her to the bedroom, she was trying to pull away from him. (R. at 666.) She said he then "just jerked me down, and

so I just went down to my knees," once they were in the bedroom. (R. at 667.) Ms. BE said she consented to none of Appellant's actions that night. (R. at 668.)

Two days later, on 12 July, the two had been at a family gathering where Appellant interacted with a skunk. (R. at 669.) When they got back home, Appellant said he was going to sleep downstairs because he still smelled like a skunk even after showering. (R. at 671.) Ms. BE refused to give Appellant anything more than a quick peck of a kiss, which angered Appellant. (R. at 673.) Appellant then snatched Ms. BE's phone of out her hand. (R. at 677.) When she reached to get the phone back, Appellant "took his right and pushed my shoulder and I landed on the bed behind me." (Id.) On cross-examination, Ms. BE explained further, "He just shoved me the once and came from behind and pushed me with his body to try to get it, and he did grab my arm, then my wrist and pulled me back to try and get the phone out of my hands." (R. at 837-38.) When he pulled her arm, Ms. BE said the same incision that had been injured by Appellant a few days before was reinjured. (R. at 842.)

Prosecution Exhibit 5 are pictures taken of Ms. BE's bruises that were caused by Appellant pushing her onto the bed. (R. at 690.) The pictures were taken a few days after the incident. (Id.)

At that point, Ms. BE's daughter, who was nine-years-old at the time, came to the doorway and began screaming and crying. (R. at 678.) When her daughter told Appellant to stop hurting her mom, Appellant said, "this is your mom's fault. She chose this . . . ." (R. at 679.) Appellant then tried to break Ms. BE's phone, grabbed a military bag and all the jewelry on a nearby dresser, and went to the garage. (R. at 680-81.)

Meanwhile, Ms. BE went to her daughter's room where Ms. BE's daughter had already called Ms. BE's mother on her own phone. Hearing them on the phone, Appellant yelled, "don't

call 911, you'll ruin my career." (R. at 681.) He then slid Ms. BE's phone to her under the door. Eventually, Ms. BE's brother and mother arrived. Appellant got a ride and left Ms. BE's house. (R. at 688.) Ms. BE said she did not call the police that night because she knew Appellant was deploying soon, and her safety plan was for him to deploy so that she could be done with everything. (Id.) However, when Ms. BE mentioned the events to a friend the next day, the friend reported Appellant. (R. at 689.)

When asked if she would have ever reported Appellant, Ms. BE said, "No," adding the following:

> Because I was going to be safe away from him. He was going to be gone. I was going to move forward. I even had thought about like trying to find out, like move somewhere else where he like, when he would come back, he couldn't find me. Like I just wanted to be done. It was embarrassing. I had a lot of regret. I just -- I just wanted to go separate ways and just be done. Never again.

(R. at 689.) Ms. BE testified she had nothing to gain from the investigation against Appellant and stood to gain no monetary benefit from it. (R. at 692.) At the time of Appellant's court-martial, Ms. BE stated she was now married and living in England. When asked why she did move forward and decide to be part of the court-martial process against Appellant, Ms. BE responded, "It was very scary what I went through and I don't want anybody, any other woman, to have to go through what I went through. Nobody deserve[s] that." (R. at 693.)

On cross-examination, Appellant's counsel highlighted that Ms. BE had previously told law enforcement that Appellant has forced sexual acts onto her 50 to 75 times. (R. at 722.) Ms. BE explained what she included in the number as follows:

> And when I said that, it was based on all the different incidents that he had done from start to finish, every single time. There's multiple stuff that he would do on certain days, certain situations. So I gave him a big approximation based on that.

> . . .
>
> And I was referring to, like every time he forced oral, in the same situation, the next thing I knew he was forcing sex by forcing his erection in my vagina. Like so if you're following what I'm saying, but like all those incidents
>
> . . .
>
> Yeah. If you count like each act, like in one night, like he could have done like seven or so of that, in that -- in that situation another night. So I'm counting like him grabbing me and like forcing oral. So if you understand what I'm saying, if you count all those up, that will make a big approximation.

(R. at 722-23.)

Appellant's trial defense counsel also asked Ms. BE about a protective order she filed against Appellant around 14 July 2020. (R. at 746.) Ms. BE said she was told to "keep it just about the July 12th incident," adding that she was told that "July 12th would be enough to be able to get me my restraining order so I can feel safe." (R. at 747.) When asked why she did not include anything that occurred prior to 12 July, Ms. BE explained as follows:

> I was -- I was told to only keep it to the July 12th incident. And they assured me that it was going to be enough, because I knew this -- that the military already knew about everything, because I was notified on July 13th that they were being told what was going to happen. So I was just trying to keep it strictly on that and just so I can get my protection from abuse from him, and that way it wouldn't -- he wouldn't be tipped off about the investigation.

(R. at 748.)

Appellant's trial defense counsel also asked Ms. BE about an ensuing court hearing that took place in September 2020. (R. at 736.) Ms. BE stated that she recalled testifying at that hearing that "The first time he raped me was June 24th. It was right after my surgery." (R. at 736.) However, Ms. BE later clarified her previous court statement, stating that her testimony at

that hearing was "referring to that part in the [Tuscaloosa] trip," adding, "That's the only part I got to say, and I didn't get to elaborate on that in the court hearing." (R. at 790.) Ms. BE continued, "They wouldn't let me finish my statement in the court, but I was going to be referring to my trip." (Id.)

Ms. BE said she also filed a Federal Aviation Administration (FAA) complaint against Appellant because she "wanted everybody to be safe in the sky," adding, "I did it because he had a private pilot license and he was very dangerous in his own aircraft. (R. at 749-50.)

Appellant's counsel also asked Ms. BE if she had gone to the gym following her surgery. (R. at 846.) Ms. BE said even though she was sending texts to Appellant saying she was going to the gym, she did not actually go. She explained, "I did not feel safe telling him because he was very angry with me not getting my body the way he wanted it as fast as his liking." (Id.) She said she was actually not participating in anything at the gym but told Appellant that she was because "I felt like I had to tell him I was trying my hardest to get my body to where he wanted it to be." (R. at 847.)

Also on cross-examination, Appellant's counsel asked about a Miss Darcy anal hook that was allegedly bought through Ms. BE's Amazon account. (R. at 864.) Ms. BE denied receiving or purchasing the hook. When reviewing the purchase details, Ms. BE stated that Appellant's American Express card was used to purchase the hook and added that Appellant had full access to her account. (R. at 865.) When Appellant's counsel asked about the purchase of a butt plug, Ms. BE said, "It looks like [Appellant] had them mailed to my house," and "Yes, he purchased those." (R. at 866-67.) Ms. BE continued, "I didn't realize [the purchases] was on my account until recently." (R. at 868.) On redirect examination, when asked about the purchase of an anal

hook and a butt plug from Amazon, Ms. BE stated, "The ones that [Appellant] purchased, I did not know about those. I did not purchase them myself." (R. at 893.)

When Appellant's counsel asked if Appellant had "hijacked' her Amazon account to "secretly put his American Express card in," Ms. BE responded as follows:

> No. He had full access to my email address and stuff because he said that we're a couple. We don't keep each other's passwords from each other. So, we knew each other's passwords to multiple different things. He asked to use my Amazon account because he didn't have one. He had access to my email address. He had access to my Snap Chat, but -- I mean, I changed all that after we were no longer in a relationship.

(R. at 870.)

Ms. RE, Ms. BE's mother, testified about receiving a call from both Ms. BE and Ms. BE's daughter, Ms. KW, on the evening of 12 July 2020. (R. at 910.) She said Ms. BE's daughter was "very upset" and "hysterical" on the phone and told her, "[Appellant] is hurting momma" and "No, he's touching her." (R. at 911-12.) When she got to the house, Ms. RE comforted her granddaughter who was "shaking so bad I ended up holding her for a while." (R. at 913.) At one point when Ms. RE and her granddaughter were outside the house, Appellant came outside. Ms. RE said, "I had just got [my granddaughter] calmed down and she got hysterical again," so Ms. RE and her granddaughter left. (R. at 913-14.)

Mr. AE, Ms. BE's brother, testified that on the evening of 12 July 2020 he received a text message from his sister saying, "Come to my house right now." (R. at 921.) Mr. AE said that when he and Ms. RE arrived at the house, Ms. RE grabbed Ms. BE's daughter and left. (R. at 921.) Mr. AE said Ms. BE's daughter was "scared" and "crying." (R. at 922.) Mr. AE stayed to make sure nothing additional happened between Appellant and Ms. BE. He said that Ms. BE was in the living room while Appellant was elsewhere in the house. (Id.) He noted that Ms. BE

was scared. (R. at 924.) Mr. AE said Appellant was "a little angry" and under the influence of alcohol, adding that Appellant was slurring his words, and it did not seem like he was in his normal state. (R. at 923.)

Mr. AE said Appellant went outside to wait for a ride because, to Mr. AE's understanding, Appellant "didn't want to drink and drive." (R. at 928.) Mr. AE said Appellant was "trying to blame [Ms. BE] for, you know, the situation and overreacting in his opinion." (R. at 924.) Mr. AE said Appellant kept calling him "Bud," but that he told Appellant "I'm not friends with anybody that puts their hands on women." (Id.) Mr. AE said Appellant replied, "I didn't push her that hard." (Id.)

Ms. KW, Ms. BE's 9-year-old daughter at the time of the incident, testified that on 12 July 2020 Appellant had gotten sprayed by a skunk and took a shower when they came home. (R. at 936.) She said that Appellant was going to sleep downstairs so he did not stink up the bed. Ms. KW said she was downstairs when she heard a commotion upstairs. (R. at 937.) When she went upstairs, she saw Appellant and her mom in the bedroom, and her mom was trying to get her phone back from Appellant. (R. at 938.) She said she then saw Appellant "push my mom" with one of his hands. (R. at 939.) She didn't remember which should but said it was "one of her shoulders." (Id.) Ms. KW testified she said, "Don't hurt my mom." When Appellant told her, "It's not my fault, it's your mom's fault, but I still love you," Ms. KW replied, "If you love me, you would stop." (Id.) Ms. KW said "Stop" a couple of more times because "I didn't like seeing my mom get hurt." (R. at 940.)

Ms. KW said she called her grandmother and was scared, crying, and nervous. (R. at 941.) She told her grandmother that Appellant was hurting her mom. (R. at 942.) She and her mom went to Ms. KW's room and locked the door. Ms. KW said Appellant came to the door,

slid Ms. BE's phone under the door, and said, "Don't call the cops, it's going to ruin my career." (R. at 943.)

Air Force Office of Special Investigations (AFOSI) Special Agent (SA) NM was the lead investigator on Appellant's case. (R. at 953.) SA NM testified about collecting a whip and gag ball from Appellant's house. (R. at 954.) He said the items were found in a brown box under Appellant's bed. (R. at 956.) SA NM also collected Appellant's flight log when searching his house. (R. at 959-60.)

Ms. JJ testified that she met Ms. BE in high school and had remained close friends. (R. at 999.) She said from 2018 until 2020, the two would interact daily or every other day. (R. at 1000.) She interacted with Ms. BE and Appellant together three or four times. (R. at 1001.) Ms. JJ said, "We hung out all the time, talking on the phone all the time," and stated that the two shopped together, "go out to eat all the time," and that Ms. JJ would watch Ms. BE's kids. (R. at 1000.) Ms. JJ said that Ms. BE was "very excited" about getting breast augmentation, adding it was "something she had wanted for a long time – a long time, ever since she had lost her weight, which was like 7 years ago." (R. at 1002.) Ms. JJ said that after the investigation began, she and Ms. BE had "gotten more distant," and had not spoken since March.[3] (Id.) When asked if Ms. JJ had developed an opinion as to Ms. BE's character for truthfulness, Ms. JJ said, "She untruthful." (R. at 1003.)

On cross-examination, Ms. JJ said she thought that she and Ms. BE had "just drifted apart" and that "life was taking her one way and I'm here." (R. at 1005.) Ms. JJ admitted that she felt like Ms. BE cast her aside, which she did not like. (R. at 1005-06.)

[3] Appellant's court-martial took place in October 2022.

Ms. JJ also admitted that she messaged Appellant on Snapchat the day after the 12 July 2020 incident. (R. at 1006; *see also* Pros. Ex. 6.) She said she was trying to reach out to Appellant and see how she could help. (R. at 1007.) Ms. JJ also thought Appellant had something to tell Ms. BE and that she could be the one to relay that to her. When asked what Appellant wanted to tell her, Ms. JJ said, "That he had a drinking problem and he was going to go to AA." (R. at 1009.)

In those messages, Ms. JJ said, referring to Ms. BE, "I love her to death," and that she was going to talk to Ms. BE to "get her to change her mind" about ending the relationship with Appellant. (Pros. Ex. 6.) When Ms. JJ told Appellant that she had talked to Ms. BE and said that Ms. BE "had a lot of thinking to do," Appellant replied, "I don't want to lose our relationship. It's too important." (Id.)

At another point in the conversation, Ms. JJ said, "She told me this morning she is done with you." (Id.) Appellant replied that he said a lot of things that he cannot take back and that "I'm the one that's sorry, I ruined the best relationship I ever had and there's no hope of fixing it." Appellant added, "You know [Ms. BE]. Once she had her mind made up, it's made up and there's nothing anyone can do to change it." (Id.)

- ***Charged Offenses and the Government's Theory for Each Charge and Specification***

Specifications 1 through 9 of Charge I involved Article 120, UCMJ, offenses against Ms. BE. In Specification 1, Appellant was charged with raping Ms. BE by penetrating her vulva with his penis using unlawful force on divers occasions between 17 May 2020 and 25 May 2020 within the continental United States. (ROT, Vol. I.) The Government's theory for this offense

focused on Appellant's use of the bullwhip and ball gags on Ms. BE. (R. at 1113.) The members convicted Appellant of this specification. (R. at 1248.)

In Specification 2, Appellant was charged with raping Ms. BE by penetrating her vulva with his penis after rendering her unconscious on or about 17 May 2020 at or near Derby, Kansas. (ROT, Vol. I.) The Government's theory for this offense focused on Appellant's use of the bullwhip to render Ms. BE unconscious. (R. at 1116.) The members convicted Appellant of this specification. (R. at 1248.)

In Specification 3, Appellant was charged with raping Ms. BE by penetrating her mouth with his penis using unlawful force on divers occasions between 17 April 2020 and 10 July 2020 within the continental United States. (ROT, Vol. I.) The Government's theory for this offense focused on the number of times Appellant forced Ms. BE to perform oral sex on him. (R. at 1117.) The members convicted Appellant of this specification. (R. at 1248.)

In Specification 4, Appellant was charged with committing a sexual act upon Ms. BE by penetrating her vulva with his penis without Ms. BE's consent on divers occasions between 17 April 2020 and 4 July 2020 within the continental United States. (ROT, Vol. I.) The Government's theory for this offense focused on sexual intercourse that occurred in Appellant's aircraft. (R. at 1119.) The members acquitted Appellant of this specification. (R. at 1248.)

In Specification 5, Appellant was charged with committing a sexual act upon Ms. BE by penetrating her anus with his finger without Ms. BE's consent on or about 26 June 2020 at or near Tuscaloosa, Alabama. (ROT, Vol. I.) The members convicted Appellant of this specification. (R. at 1248.)

In Specification 6, Appellant was charged with committing a sexual act upon Ms. BE by penetrating her anus with an enema injector without Ms. BE's consent on divers occasions on or

about 5 July 2020 at or near Newton, Kansas. (ROT, Vol. I.) The members convicted Appellant of this specification. (R. at 1248.)

In Specification 7, Appellant was charged with committing a sexual act upon Ms. BE by penetrating her anus with his penis without Ms. BE's consent between on or about 26 June 2020 and 5 July 2020 within the continental United States. (ROT, Vol. I.) The Government's theory for this offense focused on Ms. BE's testimony of the anal sex that occurred in Tuscaloosa, Alabama. (R. at 1124.) The members convicted Appellant of this specification. (R. at 1248.)

In Specification 8, Appellant was charged with committing a sexual act upon Ms. BE by penetrating her vulva with his mouth without Ms. BE's consent on or about 1 July 2020 within the continental United States. (ROT, Vol. I.) The Government's theory for this offense focused on Appellant performing oral sex on Ms. BE in the shower after her surgery. (R. at 1125.) The members acquitted Appellant of this specification. (R. at 1248.)

In Specification 9, Appellant was charged with abusive sexual contact upon Ms. BE by causing his penis to touch Ms. BE's breasts without her consent on divers occasions between 25 June 2020 and 10 July 2020 within the continental United States. (ROT, Vol. I.) The Government's theory for this offense focused on Appellant's repeated actions against Ms. BE following her surgery both in Tuscaloosa and after leaving Tuscaloosa. (R. at 1126.) The members convicted Appellant of this specification. (R. at 1248.)

Specifications 1 through 5 of Charge II involved Article 128b, UCMJ, offenses against Ms. BE. In Specification 1, Appellant was charged with assaulting Ms. BE, an intimate partner, by suffocating her on divers occasions between 25 May 2020 and 25 June 2020 within the continental United States. In Specification 2, Appellant was charged with assaulting Ms. BE, an intimate partner, by strangling her on divers occasions between 17 May 2020 and 10 July 2020

within the continental United States. In Specification 3, Appellant was charged with assault consummated by battery against Ms. BE, an intimate partner, by ripping tape off of her healing breast incision on or about 10 July 2020 at or near Derby, Kansas. In Specification 4, Appellant was charged with assault consummated by battery against Ms. BE, an intimate partner, by pulling her arm and pushing her chest on or about 12 July 2020 at or near Newton, Kansas. In Specification 5, Appellant was charged with assault consummated by battery against Ms. BE, an intimate partner, by slapping her face on divers occasions between on or about 1 April 2020 and 12 July 2020 within the continental United States.

The members found Appellant guilty of Specification 1, Specification 2 by excepting out "on divers occasions" and stating the guilty instance occurred on 17 May 2020, and Specification 4 by substituting the words "arm" and "chest" with "arms" and "shoulder." (R. at 1249.) Appellant was acquitted of the other specifications of this charge.

The Specification of Charge III, under Article 113, UCMJ, charged Appellant with the reckless operation of an aircraft by operating an aircraft while engaged in sexual acts on divers occasions between on or about 17 April 2020 and 26 June 2020 within the continental United States. The members found Appellant guilty of this charge and specification.

Additional facts necessary to the disposition of this case are discussed in the specific issues below.

## ARGUMENT

### I.

### APPELLANT HAS NOT DEMONSTRATED PLAIN ERROR IN TRIAL COUNSEL'S FINDINGS ARGUMENT.

#### *Standard of Review and Law*

This Court reviews "prosecutorial misconduct and improper argument de novo and where, as here, no objection is made, [] review[s] for plain error." United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019) (*citing* United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018), where our superior Court stated it will "continue to review unobjected to prosecutorial misconduct and improper argument for plain error.). Id. The burden of proof under a plain error review is on the appellant. Id.

In order to prevail under a plain error analysis, an appellant must demonstrate that: "(1) there was an error; (2) it was clear or obvious; and (3) the error materially prejudiced a substantial right of the accused." Id. (*quoting* United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005). For prejudice, the test is whether there was "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." Voorhees, 79 M.J. at 9 (*quoting* United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017). The comments must be so damaging that this Court "cannot be confident that the members convicted the appellant on the basis of the evidence alone." United States v. Schroder, 65 M.J. 49, 58 (C.A.A.F. 2007) (*quoting* Fletcher, 62 M.J. at 184).

Notably, a plain error review of a failure to object to an argument at the time of trial rule exists "to prevent defense counsel from remaining silent, making no objection, and then raising the issue on appeal for the first time, long after any possibility of curing the problem has

vanished. It is important to encourage all trial participants to seek a fair and accurate trial the first time around." United States v. Reist, 50 M.J. 108, 110 (C.A.A.F. 1999) (internal quotations omitted).

Additionally, trial counsel is "charged with being as zealous an advocate for the government as defense counsel is for the accused." United States v. McPhaul, 22 M.J. 808, 814 (A.C.M.R. 1986), *pet. denied*, 23 M.J. 266 (C.M.A. 1986). It is well established that arguments may be based on the evidence as well as reasonable inferences drawn therefrom. United States v. Nelson, 1 M.J. 235, 239 (C.M.A. 1975). Trial counsel "may strike hard blows but they must be fair." United States v. Doctor, 21 C.M.R. 252, 256 (C.M.A. 1956).

"[A]rgument by a trial counsel must be viewed within the context of the entire court-martial. The focus of [the] inquiry should not be on words in isolation but on the argument as 'viewed in context.'" United States v. Baer, 53 M.J. 235, 238 (C.A.A.F. 2000) (*quoting* United States v. Young, 470 U.S. 1, 16 (1985)). "[I]t is improper to 'surgically carve' out a portion of the argument with no regard to its context." Baer, 53 M.J. at 238. As quoted by our superior Court in Baer, "[i]f every remark made by counsel outside of the testimony were ground for reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation." Baer, 53 M.J. at 238 (*quoting* Dunlop v. United States, 165 U.S. 486, 498 (1897)).

***Analysis***

From a general standpoint, Appellant has picked snippets from the trial counsel's over one-hour closing argument, snippets which garnered no objection at trial, and now declares that the trial counsel "committed prosecutorial misconduct." (App. Br. at 10-42.) Such a tactic is a

classic example of "surgically carving" out a portion of an argument without regard for context, a tactic frowned upon by our superior Court, and should be dismissed by this Court.

When viewed within the context of the entire court-martial, or simply just within the context of the findings argument itself, the trial counsel did not commit prosecutorial misconduct. The trial counsel's closing argument spanned 54 pages of transcript and lasted over one hour.[4] (R. at 1091-1145.) The trial counsel's rebuttal argument spanned another six pages. (R. at 1208-13.) Throughout this expanse of time, Appellant's trial defense counsel did not object to the any of the statements Appellant now claims amounts to prosecutorial misconduct. Further, the overwhelming majority of the trial counsel's closing argument is never cited by Appellant in this issue.

- ***Claimed Credibility Vouching and Personal Opinions***

Appellant first claims the trial counsel "repeatedly and blatantly vouched for [Ms. BE's] credibility and expressed personal opinions" by making statements he believes are comparable to statements made in Voorhees and United States v. Norwood, 81 M.J. 12, 19 (C.A.A.F. 2021). (App. Br. at 22-27). Appellant is mistaken.

First, Appellant, in his brief, takes extreme liberties in stating what he claims "the CAAF found 'clearly' improper in Norwood." (App. Br. at 13.) In fact, Appellant himself is forced to admit in a footnote that his examples of "objectionable arguments" come from the parties' briefs, not CAAF's actual opinion. (App. Br. at 13, fn 7.)

[4] Appellant's court-martial convened at 0837 on 27 October 2022 and the military judge immediately read the findings instructions. (R. at 1061.) The trial counsel's argument began immediately thereafter and continued until it ended at 1026 when the court recessed. (R. at 1146.)

Here, the context of the trial counsel's arguments shows the trial counsel was simply rebuffing an argument Appellant made throughout trial and still to this Court – that Ms. BE is a liar. In his closing argument, Appellant's counsel said, "And the truth is, [Ms. BE], she lied a lot. It was so much it is almost hard to keep track of." (R. at 1152.) Appellant's counsel said Ms. BE "lied about her sexual proclivities," misled law enforcement, that she lied to the trial counsel, that she "didn't have to worry about the truth," and that she lied to Appellant's defense counsel while testifying. (R. at 1153-11455.) Appellant's counsel continued that "She lied about all kinds of stuff," adding, "I mean the list is crazy," before saying she lied about her breast implants and lied about being pregnant. (R. at 1157.) Appellant's counsel continued, "She lied to you. She lied to the prosecutors. She lied to me and she lied to law enforcement." (R. at 1165.) Later, Appellant's counsel again stated, "she lied to law enforcement, one—time, two times, three times, she lied to the prosecution, she lied to everybody." (R. at 1183.) Then, to this Court, Appellant continues his attack on Ms. BE, who he says: (1) had a "lack of candor;" (2) was "clearly evasive;" (3) was "untruthful;" (4) fabricated the allegations only after Appellant supposedly cut off their engagement; (5) "was completely incredible;" and (6) provided "deceptive testimony." (*See* App. Br. at 39, 69.)

Vouching for a witness's credibility occurs when a trial counsel "places the prestige of the government behind a witness through personal assurances of the witness's veracity." Fletcher, 62 M.J. at 182 (*quoting* United States v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1994)). This could occur, for example, by a prosecutor saying that the government would not call a witness to the witness stand who was lying. However, a trial counsel is allowed to argue that a witness should be found to be credible and explain why an appellant's attacks against that witness's credibility are unpersuasive. *See* United States v. Blackburn, 2024 CCA LEXIS 129

(A.F. Ct. Crim. App. 4 April 2024) (finding a trial counsel did not vouch for a victim's credibility when the trial counsel argued in general that the victim was a credible witness, highlighted the evidence and testimony supporting this conclusion, and the argument was in direct response to the trial defense counsel's focused attacks against the victim's credibility).

Here, when reading in context and as a whole, the trial counsel was doing just that. In the opening pages of argument, the trial counsel laid out an outline of their closing argument as follows:

> Now I'm going to go through and talk about these more in detail of why [Appellant] is guilty. And specifically I'm going to focus on three areas.
>
> Number one, we're just going to talk about the timeline. Really go through what happened here and how you know members that this makes sense. That this narrative that has been provided, how these things have progressed -- it logically makes sense when you really break it down and understand the facts.
>
> Number two, we're going to talk about how each of the charges and specifications that you have -- so on your flyer you've been provided and the instructions that the military judge is going to give you -- how those are corroborated by the facts and the evidence to show that each one of those, he is guilty.
>
> And then were going to talk about the credibility of the victim. How [Ms. BE], who came up here and took the stand, is in fact a credible victim. That she told you the truth. That she tried her best to remember everything she could to the best of her ability and that you have no reason to doubt her despite defense's best efforts to show otherwise.

(R. at 1097.) When placed in context, the trial counsel here is telling the panel that his argument would explain why Ms. BE was a credible witness and why her testimony is what actually happened in this case – i.e., the truth.

Though indirectly, the trial counsel also highlighted here that the credibility determination is to be made by the panel by stating that "*you* have no reason to doubt her." (R. at 1097.) (emphasis added.) The military judge had also instructed on this sentiment moments earlier when he instructed the members, "The final determination as to the weight or significance of the evidence and the credibility of the witnesses in this case rests solely upon you." (R .at 1090.)

Appellant also takes issue with the following passage:

> Members you have to judge her credibility and you have that duty to determine her believability. And in doing that members, I ask you to consider this: what does she have to gain — what are the benefits of her reporting a sex crime? Where she has these hours of investigative interviews constantly meeting with law enforcement, as defense brought up. Having her entire public life exposed and then defense want to say, Oh we should have -- you should have exposed your life more. You should have given over your phone. You should've let us parading the entire contents of your phone in this courtroom. She has prosecutor interviews. She has defense interview. She has courtroom testimony where she comes up here. Again members, for more than a day. This is not a pleasant experience. Why would she do this? What possible reason does she have to lie? She has none. There is none. She is doing it because it is the truth. It is what happened to her.

(R. at 1144.)

Notably, again, the trial counsel began this discussion on credibility by stressing that it was the members' duty to judge and determine her credibility. Trial counsel did not say that the prosecution had already determined Ms. BE was credible, so the members should agree. Instead, he made clear that the credibility determination was the members' own decision and duty. Moreover, the trial counsel here was again explaining why Ms. BE had no motive to lie and had nothing to gain from her testimony, which, when read in context, does not vouch for Ms. BE's credibility.

Next, Appellant takes issue with the trial counsel's use of the word "absolutely." (App. Br. at 22-25, 27.) Again, however, context matters as to how the trial counsel used the word. For instance, when he stated, "Accordingly, guilty absolutely of Charge II, Specification 1," the trial counsel had just argued for nearly two pages of transcript about all of the evidence showing why Appellant was guilty of that specification. (R. at 1127-28.) When he said, "So absolutely did he do this, did he commit this act on her?," therein rhetorically asking the members if Appellant had penetrated Ms. BE's vagina while she was unconscious, he did so after arguing for nearly a page about the all the evidence showing Appellant was guilty of Charge I, Specification 2. (R. at 1115-16.) When he said, "Absolutely yes this happened," the trial counsel had just spent a page of transcript detailing all the evidence showing why Appellant was guilty of Charge II, Specification 5. (R. at 1137-38.) Here, the trial counsel's use of the word "absolutely" was always tied to evidence supporting his contention and did not amount to the trial counsel injecting his personal opinions into the findings argument. *See* United States v. Williams, 690 F.3d 70, 76 (2d Cir. 2012) (concluding that characterization of testimony of witnesses as "the truth" or "absolute truth" was proper because it was tied to evidence supporting the contention).

Appellant next takes issue with the trial counsel's summation of his entire closing argument when the trial counsel stated the following:

> Members the judge has instructed you for the instruction on reasonable doubt. What it takes to convict someone. Reasonable doubt is a conscientious doubt based upon reason and common sense and arising from the state of the evidence proof beyond a reasonable doubt is proof that leaves you firmly convinced. That is the requirement. You be firmly convinced of the accused guilt.
>
> And to be clear, there are very few things in this world that we know with absolute certainty. And in criminal cases the law does not require proof that overcomes every possible doubt. Members you may have many doubts about what happened, you may not know

> exactly how this played out. And defense can throw out here possibilities and theories.
>
> The question is, if you are firmly convinced that the accused abused her in these ways, that she did not consent, that he did not have a reasonable mistake of fact as to consent. And members, he did not. *He has committed crimes. And he has to be held accountable. And he is done so, by finding him guilty of all charges and specifications.*

(R.at 1145.) (emphasis on portion cited by Appellant in his brief.)

Here again, when placed in context, the trial counsel was not personally vouching for Ms. KE or inserting his personal opinion. Instead, the trial counsel was providing an overall summation of his nearly 55-page argument, explaining in detail all of the evidence showing why Appellant was guilty of all charges and specifications. Notably too, here again, was the trial counsel's clear emphasis to the members that *they* must be "firmly convinced" of Appellant's guilt and the trial counsel's continual reliance on the military judge's instructions. The trial counsel's argument that Appellant had to be held accountable was simply an extension of the military judge's instruction that if the members were firmly convinced of Appellant's guilt they *must* find him guilty.

Finally, Appellant takes issue with the trial counsel's summation in his rebuttal closing argument. (App. Br at 23.) In the rebuttal, the trial counsel again focused on Appellant's theory that Ms. BE was a liar and closed as follows:

> Defense has the answer for everything, that everything is a lie, but they can't find the one into that matters. What is her motive to fabricate? The only reason she is come back here after all these years, brought her new family, she moved on. Right? To the extent that the whole defense -- to the extent there is any motivation to lie is that she -- she really wanted that father figure and then [Appellant] took that away from her so she is a scorned lover. Which doesn't make sense, right, in the first place because he's asking for her to come back. She could've had him back anytime she wanted, she says, "No, it's over. I'm done."

> She's not angry that they broke up, she's finally free and now she's found that father for her children. *She has a new life. She's moved on. She doesn't need this. She has no motive to lie. She has not lied to you today. Everything she told you is the truth. And so so again members I ask that you do the right thing in finding [Appellant] accountable and finding him guilty of all charges and specifications.*

(R.at 1213.) (emphasis on portion cited by Appellant in his brief.)

Again, when placed in context, the trial counsel here was simply rebutting Appellant's continued attempts to paint Ms. BE as a liar who was scorned, and was again explaining why Ms. BE had no motive to lie and nothing to gain from her testimony. When read in context, trial counsel did not vouch for Ms. BE's credibility.

Appellant seems to want to bar prosecutors from ever arguing that a witness is credible. But such a rule would completely hamstring the prosecution; especially when the defense is free to (and often does) argue that a witness is a liar. While always keeping in mind the duty to seek justice, the prosecutor's job is generally to persuade the members to accept the government's view of the evidence. When witness credibility is a lynchpin of the government's case, as Appellant argues it is here (App. Br. at 29), the prosecutor must explain to the trier of fact why they should judge a government witness to be credible. Thus, it is hardly a revelation that, in a particular case, a prosecutor would argue that the government's primary witness was credible. The impermissible argument is for a prosecutor to convey that the members should believe a witness *because* the prosecutor is saying she is credible. But that is not what trial counsel did in this case. He tied his arguments about Ms. BE's credibility to the evidence and the fact that the evidence revealed no reasons for Ms. BE to lie. And he made clear that it was the members' – not trial counsels' – duty to determine the believability of the witnesses. As a result, there was no plain error.

- ***Appellant's Rights***

Next, Appellant claims the trial counsel commented on Appellant's exercise of rights to not testify when he argued the following:

> With those good things, came this darker side. And that is in regards to [Appellant's] sexual desires. *He is a man who has some dark and frankly violent sexual appetites. BDSM. He likes BDSM. That's clear -- it's uncontroverted.* OSI told you about how they went into his home. Right? They find the whips, the ball gags, the harnesses -- everything. Clearly [Appellant] likes BDSM.

(R. at 1095.) (emphasis on portion of the trial counsel's argument that Appellant now takes issue.)

Appellant claims this statement amounts to a statement by the trial counsel on Appellant's right to not testify because "the only rebuttal as to the dynamics of the couple's sex life could come from [Appellant] – who did not testify." (App. Br. at 27.) Appellant is incorrect.

To start, Appellant bases his entire argument on this Court's unpublished 2003 holding in United States v. Carter, ACM 35027, 2003 CCA LEXIS 257 (A.F. Ct. Crim. App. 17 October 2003). There, in an indecent assault case were the only participants in the incident at issue was the victim and the appellant, and the victim was the only person who testified, the trial counsel stated over a dozen times in closing argument that the facts of the case were either "uncontroverted" and "uncontradicted." Id. at *5-6.

This Court found error because "the trial counsel's argument clearly highlighted the fact that the appellant did not testify by repeatedly calling the government's evidence 'uncontradicted' and 'uncontroverted.'" Id. at *8-9 (*citing* United States v. Mobley, 31 M.J. 273, 279 (C.M.A. 1990) (where our superior court held that "a trial counsel may not comment

directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense"); R.C.M. 919 (which prohibits a trial counsel from arguing that the prosecution's evidence is unrebutted if the only rebuttal could come from the accused). This Court based its determination on the fact that the victim testified she was alone with the appellant when the event occurred, the prosecution did not present any additional evidence of the charge, and, thus, the only person who could have rebutted the victim's testimony was the appellant. Id.

The facts of this case contrast greatly. First, the trial counsel's statement was not specific to "the couple's sex life," as Appellant alleges, or even about the specific instances of sexual assault testified to by Ms. BE. The trial counsel certainly did not say, as what occurred in Carter, that Ms. BE's testimony about the one-on-one sexual interactions that occurred on the plane, in the couple's bedroom, or in Tuscaloosa, was "uncontroverted."

Instead, this was a generalized statement as to Appellant's sexual proclivity for BDSM irrespective of Ms. BE or her allegations. Notably, the trial counsel supported this statement not by Ms. BE's testimony about the incidents involving the sex toys, but by AFOSI testimony about evidence that was found in his home, namely his box of whips, ball gags, and the like. This is much different than Carter where the only evidence in the case was about the sexual incident itself, and the trial counsel's statement was directed squarely on that one-on-one incident between that victim and that appellant. Here, the trial counsel's statement was not even about the incident itself and or an element of any offense, in contrast to Carter, the Government had multiple pieces of evidence showing Appellant's BDSM proclivity – namely the box of sex toys found under his bed by AFOSI - outside any one-on-one interaction testified to by Ms. BE.

Moreover, Appellant's trial defense counsel acknowledged the BDSM items found in Appellant's house when he stated during his closing argument, "[Appellant] already had some

BDSM items in his house I think he also could probably just sent some stuff to his house if he wanted something." (R. at 1183.) Here, Appellant's own counsel acknowledging that Appellant "already has some BDSM items in his house" further shows Appellant's proclivity for BDSM was uncontroverted from both the Government and defense.

Further, Appellant had a litany of possibilities besides testifying to rebut the argument that he had a generalized BDSM proclivity. For example, he could have called witnesses to say the box of sex toys under his bed were not his. In any case, because the generalized statement about his BDSM proclivity was not tied only to Ms. BE's testimony about what happened between them in a one-on-one setting, Appellant was not limited to only his testimony to rebut the Government's evidence about his penchant for bondage.

Finally on this point, the issue of whether Appellant liked or disliked BDSM was never an issue at trial. The issue at trial, and within Appellant's brief to this Court, was whether the bondage activities that occurred between Appellant and Ms. BE were consensual. The trial counsel's "uncontroverted" statement had nothing to do with this sole point at issue. Therefore, this Court's holding in Carter does not apply, and there was no plain error.

Appellant next claims the trial counsel infringed on his right to cross-examine witnesses by stating the following:

> She is happy to finally be free and she now, right, has her own family. She finally has that family. She has a husband, she has a life, a new child in England. And she has set all of that aside to come up here and take the stand and testify to you. What does she have to gain by doing that?
>
> Members you have to judge her credibility and you have that duty to determine her believability. And in doing that members, I ask you to consider this: what does she have to gain — what are the benefits of her reporting a sex crime? Where she has these hours of investigative interviews constantly meeting with law enforcement,

> as defense brought up. *Having her entire public life exposed and then defense want to say, "Oh we should have -- you should have exposed your life more. You should have given over your phone. You should've let us parading the entire contents of your phone in this courtroom.* She has prosecutor interviews. She has defense interview[s]. *She has courtroom testimony where she comes up here. Again members, for more than a day. This is not a pleasant experience. Why would she do this? What possible reason does she have to lie? She has none. There is none. She is doing it because it is the truth. It is what happened to her.*

(R. at 1144.) (emphasis on portions of argument cites by Appellant in his brief.) Appellant says this argument "suggested the panel should hold Appellant's exercise of his rights to cross examine his accuser and seek relevant evidence against him," and "criticized Appellant for putting on a defense." (App. Br. at 28.)

However, a review of the context of the argument shows the trial counsel was in the midst of rebutting Appellant's own argument that Ms. BE was a scorned lover who made up the allegations as revenge against Appellant. The trial counsel here was simply explaining how Ms. BE had moved on from her life with Appellant, including being remarried and living in another country, and why Appellant's "revenge" claim was unsupported based on the overall circumstances of the case. The arguments certainly were not directed or insinuated to be an attack on Appellant's right to cross-examine Ms. BE or put on a defense.

Still, Appellant finds error, citing to Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991) where that court found the "prosecutor's comments improperly implied that Cunningham had abused our legal system in some way by exercising his Sixth Amendment right to a jury trial." (App. Br. at 16, 28.) However, in that case, the prosecutor, during the penalty phase of the trial, said he was "'offended' that Cunningham had exercised his Sixth Amendment right to a trial by jury in the guilt-innocence phase of the trial," and questioned whether the appellant "was even

entitled to his Sixth Amendment rights." Cunningham, 928 F.2d at 1019-20. Nothing the trial counsel said in this case comes remotely close to the clearly improper remarks in Cunningham.

Appellant then turns to United States v. McCann, 613 F.3d 486 (5th Cir. 2010) for the contention that he was "entitled to challenge the credibility of Ms. BE." (App. Br. at 28.) However, in McCann, the prosecutor argued in closing argument that police officers who testified did not "deserve" to be cross-examined in the fashion they were because they "wear bulletproof vests because they have to worry about getting shot at on the street and then they come in here in court and they get shot at again." McCann, 613 F.3d at 493. The Court found error, stating the counsel's "largely emotional appeal to the jury to credit the arresting officers' testimony because they were police officers" was improper. Id. at 496. Here again, the trial counsel in this case was not arguing that Ms. BE should not have been cross-examined or did not "deserve" to be cross-examined, but was instead simply rebutting Appellant's "revenge" theme by arguing that Ms. BE would not go through the entire litigation process, including interviews, testimony, etc., simply to seek revenge on Appellant.

Finally, Appellant turns to an unpublished Army Court of Criminal Appeals case, United States v. Garcia, ARMY 20130660, 2015 CCA LEXIS 335 (A. Ct. Crim. App. 18 August 2015), and claims the trial counsel criticized Appellant for "putting on a defense" and exercising his right to cross-examine Ms. BE. (App. Br. at 28-29.) There, our sister Court found improper argument because the trial counsel (1) stated the victim had been "victimized by the process;" (2) included a rhetorical question about the reason for victims' reluctance to report allegations of sexual assault, which tacitly suggested that the panel believe SSG CC, lest they further victimize her; and (3) invited the panel to convict appellant because he had "revictimized" the victim anew

by asserting his constitutional rights to demand a trial and confront her through cross-examination.

Here, the trial counsel did no such thing. Notably, the trial counsel never insinuated that Appellant had "revictimized" Ms. BE or that she had been "victimized" by the court-martial process. Instead, the trial counsel was simply detailing the different steps in the litigation process that Ms. BE had gone through to argue that Ms. BE would not go this "not a pleasant experience" simply to seek revenge against Appellant. The point was not, as opposed to Garcia, to paint Ms. BE as someone who had been "revictimized" by Appellant or to argue to the panel that they should convict Appellant simply because he had exercised his right to cross-examine Ms. BE.

In contrast, it is a fair inference that someone who had moved on with her life would not want to endure the embarrassment of the intimate details of personal life being exposed just to get revenge on an ex-partner. Thus, Appellant has failed to show plain error on this claim.

- ***Alleged Burden Shifting***

Appellant next claims the trial counsel "distorted the burden of proof" and "suggested the defense had the obligation to explain Appellant's innocence or explain away the evidence"[5] by stating the following:

> She's saying all these things but what defense wants to do is take from that conversation anything and try to pull it out of context and say, "Well that must be a lie." The context doesn't matter. Everything is a lie.
>
> And that goes for everything for we will go to the details of all these things but the idea that [Ms. BE] could be pressured into having a breast augmentation surgery but also agree to do it — that can't possibly be. The idea that she might want to marry [Appellant], but

[5] *See* App. Br. at 29-30.

> she might not like the way that he did it. That can be this is a lie. Everything has to be a lie. There is no room for nuance and understanding of how actual human nature works in the defense arguments.
>
> If [Ms. BE] doesn't perfectly recall text messages that she hasn't seen or social media posts in the last two and half years, that must be a lie. Again members if that's the case no victim ever gets their day in court properly heard. No victim gets a conviction. Everyone walks free if that's the way it works.
>
> But that's not the way it works. That's not what this case is about. It is not U.S. v. [Ms. BE] it is U.S. v. [Appellant]. And defense does not want to talk about that aspect. *They don't want to talk about the charges. It was all about her. And why don't they want to talk about the charges? Because there is no other explanation for them. The gauntlet was laid down, I laid it there. Defense please explain in this host of lies that you claim there to be, why is she lying about what happened to her? What we're actually here for. Why is she lying about being sexually assaulted when she's defecating on the toilet?* Could you come up with a less embarrassing lie than that, if you're going to lie? She is not lying. She has no motivation to lie.
>
> Defense has the answer for everything, that everything is a lie, but they can't find the one into that matters. What is her motive to fabricate?

(R. at 1212-13.) (emphasis on portions of argument cited by Appellant in his brief.)

Here, when read in context, the trial counsel was not "distorting the burden of proof" and suggesting Appellant had an obligation to explain his "innocence." (App. Br. at 29-30.) In fact, the trial counsel never mentioned any elements of any specifications or charges in this passage, the burden of proof, or any insinuation that Appellant carried the burden of proof on the issue of guilt. Instead, the trial counsel was focused solely on the defense's whole theory of the case – that Ms. BE was a liar – and detailing why this theory was not persuasive and how, even though they had continually called her a liar, the defense had not fully fleshed out (or "explained") their theory as to *why* Ms. BE would be lying about every aspect of her testimony. While pointing out

the vast number of holes in Appellant's theory may have highlighted the deficiencies in that theory, the argument here never distorted the ultimate burden of proof as to guilt in this case.

Here, the trial counsel's comment was in the context of "a fair response to the defense's theory of the case." United States v. Roberts, No. ACM 40139, 2023 CCA LEXIS 17, at *26 (A.F. Ct. Crim. App. 20 January 2023). While the defense was entitled to—and did—attack Ms. BE's credibility, trial counsel was similarly entitled to refute the defense's theory by asserting the defense was trying to distract the members by blaming Ms. BE. This unobjected-to argument does not amount to plain error. United States v. Leach, No. ACM 39563, 2020 CCA LEXIS 230, at *67 (A.F. Ct. Crim. App.8 July 2020).

- ***Alleged Evidence Outside the Record***

Appellant next claims the trial counsel provide "expert-like testimony" about domestic violence and BDSM, and that he "appeared to diagnose [sic] Appellant with alcoholism." (App. Br. at 30-32.) Appellant claims this amounted to improper argument that is "strikingly similar to that condemned in" United States v. Clifton, 15 M.J. 26 (C.M.A. 1983). (Id.) In Clifton, the trial counsel, commenting on the victim's decision to play along with the appellant, made statements such as, "These things happen in rapes all the time," "These things happen to people that resist," and referenced a victim from a separate rape case by stating, "This one nurse said in a rape case, a victim, she said, I'm a nurse and I've been in a hospital and I've seen too many rape victims who tried to fight off the rapist, so I submitted." Clifton, 15 M.J. at 29. The trial counsel also theorized that "a lot of rapists believe that there's some kind of irresistibility about their sexual impulse," and that in it was "common rape fantasies" for women to like to be pushed around.

The Court found the argument improper, stating:

> When trial counsel here discoursed on the practices and fantasies of rapists, and when he described the attitudes of unrelated rape victims, he was not drawing upon legitimate inferences from evidence of record or appealing to the common sense of the court-martial. He was inviting the members to accept new information as factual, based on his authority.

Id. at 30.

The trial counsel's statements complained about by Appellant do not rise to the level of "testimony" present in Clifton. Appellant first complains about this passage:

> If you are a victim of domestic violence and yet you continue beyond the first red flag, beyond the first act of any kind of violence against you, then you are not actually a victim of domestic violence. This is essentially the argument that is being brought forward by defense. But members if this were the case, this is untenable. There would be no victims of domestic violence if everyone left at the first red flag that they saw. That's not how domestic violence works. It's dirtier than that, it's uglier than that. It's a mixture of this love and hate relationship that could go on and keeps people these relationships for extended periods of time.

(R. at 1211.) Here, the trial counsel was not presenting "expert-like testimony," but instead was explaining why Appellant's attacks against Ms. BE for staying with Appellant despite his attacks was not logically sound. Trial counsel was appealing to the members common sense about the general nature of domestic violence.

Appellant next takes aim at the portion of the trial counsel's argument where he provided various scenarios where a person might be motivated to make a false accusation. (App. Br. at 31, *citing* R. at 1142-43.) That passage reads as follows:

> *And to be clear, the prosecution is not going to say that every single victim tells the truth. False allegations are a real thing. But think about motivations to make false allegations. There's a number of reasons. It could be because there is a marriage and there is a benefit to make an allegation. Perhaps there is an attempt to get*

> *alimony. Perhaps an opportunity to get spousal support. Maybe there's an ugly fight over child custody. That doesn't apply in this case. Maybe, you know, it's because of a dorm room hook up and somebody's embarrassed about what happened to the dorm rooms. They didn't want to hook up with that person, they were drunk, so later they want to explain, "You know what, I was sexually assaulted."*
>
> *That's not what happened here. It could be that you were cheating on a spouse. You consensually cheated on your spouse or a boyfriend, you get caught, then you want to say that that was a sexual assault. That's not what happened here.*
>
> There are any number of reasons why someone potentially could have a motive to fabricate the sexual assault. Those are real. But the defense cannot point to one legitimate reason here. There is no reason why [Ms. BE] would get up here and come and lie to you. She is not a scorned lover. She has happily left the marriage. You have the text messages. You have her saying, "No, I don't want to talk to him he's the one trying to patch things up." She could have gone back to him in an instant she wanted to.
>
> She is happy to finally be free and she now, right, has her own family. She finally has that family. She has a husband, she has a life, a new child in England. And she has set all of that aside to come up here and take the stand and testify to you. What does she have to gain by doing that?

(R. at 1142-44.) (emphasis on portions of argument cited by Appellant in his brief.)

Here again, the trial counsel in this section was not providing expert testimony, but instead rebutting Appellant's attempts to paint Ms. BE as a liar who has falsely accused Appellant. So, in response, the trial counsel was appealing to the members' common sense to discuss why someone might want to make false accusations and why none of those circumstances are present in this case. Notably, Appellant's quote of this passage in his brief ends right as the trial counsel argued to the members that "the defense cannot point to one legitimate reason here" and then detailed all the reasons why Appellant's attacks against Ms. BE are unfounded.

Appellant's similar complaints about the trial counsel's discussion about bondage and alcohol are equally unpersuasive. Again, in those passages, the trial counsel was not providing expert testimony on these topics, but instead was "appealing to the common sense of the court-martial." *See* Clifton, 15 M.J. at 30. In fact, the trial counsel at one point when talking about bondage specifically says, "You can use your common sense and knowledge of the ways [of] the world." (R at 1095.) These comments were not plain error.

- ***Alleged Improper Considerations***

Next, referencing the same domestic violence passage quoted above, Appellant alleges that the Government argued that "if the defense theory were to be accepted, there could be no victims of domestic violence" and that "no victim would ever get a conviction." (App. Br. at 33-34, *citing* R. at 1211-12.) Appellant contends this "invocation of the impact of the verdict on other victims in other cases was plain and obvious error." (Id. at 34.) However, a review of passages at issue shows the trial counsel was focused on explaining why Appellant's theory against Ms. BE (which boiled down to if Ms. BE was inconsistent in any way, then she was lying) was illogical as it required Ms. BE to "perfectly recall" everything to be believed. The statements were a fair comment on the burden of proof. The government was not required to present evidence that overcame all possible doubt, so the fact that Ms. BE had made inconsistent statements did not prevent the members from convicting Appellant. The trial counsel correctly observed that if every inconsistent statement equated to reasonable doubt, the government would almost never secure a conviction. The passages certainly did not suggest to the members to base their decision "on the impact of the verdict on society, a victim, and the criminal justice system as a whole, rather than the facts of the case" as Appellant claims. (*See* App. Br. at 34, *citing*

United States v. Condon, ACM 38765, 2017 CCA LEXIS 187 (A.F. Ct. Crim. App. 10 March 2017).

Likewise, the trial counsel did not "blatantly" urge the panel to conviction Appellant of the Article 113 offense because the Air Force would not approve of his flying. (App. Br. at 35.) The passage, in context, related to this claim reads as follows:

> Reckless means that the accused manner of operation or control of the aircraft was under all the circumstances of such a heedless nature that made it actually or imminently dangerous to the occupants or to the rights or the safety of others.
>
> Members is this dangerous to the occupants? To be flying a tiny little Cessna 150 while having sex, bumping up against the controls. Is that dangerous? The door popping open at one point? Does this infringe on the rights or safety of others? [Ms. BE] who doesn't want to be a part of this. Absolutely. This is reckless. *This is not the kind of flying that can be approved of by the Air Force. A pilot in the Air Force. That is reckless operation.*
>
> And you have — right — again, the facts that this happened are clear. You have the admission of [Appellant]. He has told his friend Major [N], and [Ms. BE] heard this, he was part of the mile high club. He gave [Ms. BE] her mile high pin. This is clearly a big thing for him, he wanted to be a part of the mile high club. He is excited to be able to do this in the Cessna 150.

(R. at 1139-40.) (emphasis on portions of argument cited by Appellant in his brief.)

Here again, when read in context, Appellant was not attempting to "interject the command structure into the member's deliberations" and introducing "improper considerations of unlawful command influence" as Appellant alleges. (App. Br. at 35.) Instead, when read in context, the trial counsel was highlighting multiple reasons why Appellant's operation of his aircraft was reckless, namely because of him having sexual activity that included bumping against controls and knocking doors ajar. The trial counsel here was in no way implying the members should convict Appellant because the Air Force thought they should.

- ***No Prejudice***

Here, the trial counsel's closing argument was not in plain error. However, if this Court assumes error, Appellant fails to show how any of his complaints resulted in prejudice against him.

To start, the panel's findings show the members where not impacted by any alleged errors by the trial counsel. Notably, even though this case involved only one victim, the panel acquitted Appellant of multiple specifications and excepted one divers occasion specification down to a single instance, showing the panel reviewed each and every offense alleged against Appellant individually and made their determinations independent of the trial counsel's argument that Appellant should be found guilty of *all charges* based on Ms. BE's testimony. The fact that the panel returned a mixed verdict shows the panel was not swayed in any particular fashion, or towards any specific offense, due to the trial counsel's argument.

Further, while he does cite Fletcher and its prejudice test, Appellant's justification that he was actually prejudiced is lacking. Looking at those factors, any severity of the trial counsel's supposed misconduct has been shown above to be very low, especially considering Appellant and his counsel never objected to any of Appellant's numerous newfound complaints in his brief.[6] This lack of a defense objection is "'some measure of the minimal impact' of a prosecutor's improper comment." United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001) (*quoting* United States v. Carpenter, 51 M.J. 393, 397 (C.A.A.F. 1999)). Further, as noted

[6] While Appellant did raise an ineffective assistance of counsel claim against his trial defense counsel, that claim was not based on his counsel not objecting to these specific portions of the trial counsel's closing argument.

above, Appellant's complaints account for a small portion of the 54-page argument and six-page rebuttal. Thus, this factor should weigh in the Government's favor.

Next, while Appellant complains that "[n]o specific curative measures were taken," Appellant is forced to acknowledge neither he nor his trial defense counsel objected to any of the arguments made by the trial counsel to which Appellant now takes issue. Further, as mentioned earlier, the members were told repeatedly that it was their duty, and their duty alone, to determine which witnesses were credible and which witnesses were not. The military judge instructed, "You have the duty to determine the believability of the witnesses," "The final determination as to the weight or significance of the evidence and the credibility of the witnesses in this case rests solely upon you," that "arguments made by counsel are not evidence," and that the members "must base the determination of the issues . . . in this case on the evidence as you remember it and apply the laws I instructed you." (R. at 1085, 1090-91.) The trial counsel then told the members, "Members you have to judge her credibility and you have that duty to determine her believability." (R. at 1144.) Appellant's own trial defense counsel then reenforced this notion, and specifically highlighted the Government's statement of the members' duty to access credibility, by stating the following:

> So let's talk about how to, I guess, walk through this credibility determination. And the government hit on it a little bit at the end when talking about credibility. But this is important. *You have a duty to determine the believability of witnesses.* That means you can't say that this is hard, *you have to analyze the testimony that you heard and make a determination as to who is credible and who is not.* And the instructions are going to give you a lot of information to help you make that determination. The ability to observe or accurately remember their sincerity in court, the amount in which they are supported or contradicted by other evidence. Those are things that *you can be using*.

(R. at 1152.) (emphasis added.)

Then, in rebuttal, the trial counsel highlighted that both his and Appellant's trial defense counsel's argument are just that – an argument – by stating, "And the judge will instruct you on this but to the extent that anything in my argument or the defense counsel's argument does not correlate with the law that he actually provides you or the facts that you've heard, you are to rely on those things and not our argument." (R. at 1209.) Appellant fails to note any of these statements in his brief and also fails to provide any evidence that the court members did not follow the military judge's instruction or the reinforced guidance provided by both the trial counsel and Appellant's own trial defense counsel. In fact, the record shows the members followed those instructions considering their decision to acquit Appellant of multiple specifications involving Ms. BE.

Finally, as shown in the factual sufficiency issue within this brief, the "weight of the evidence supporting" Appellant's convictions involving Ms. BE was very strong. While Appellant claims "weight of the evidence was far from overwhelming," Appellant simply renews the same unpersuasive arguments he raised in Issue VIII below. For the same reasons discussed there, Appellant fails to show prejudice here.

Accordingly, even if the trial counsel's arguments regarding Ms. BE were plain error, Appellant has shown no prejudice. Therefore, this claim must fail.

**II.**

**APPELLANT WAIVED THIS ISSUE OR, IN THE ALTERNATIVE, HAS FAILED TO SHOW PLAIN ERROR IN THE MILITARY JUDGE'S INSTRUCTION.**

***Standard of Review and Law***

The adequacy of a military judge's instructions is reviewed de novo. United States v. Dearing, 63 M.J. 478, 482 (C.A.A.F. 2006) (citations omitted). However, where an appellant

does not just fail to object but rather affirmatively declines to object to the military judge's instructions, and offers no additional instructions, despite counsel's knowledge of applicable precedents, appellant waives all objections to the instructions. *See* United States v. Davis, 79 M.J. 329, 331-32 (C.A.A.F. 2020); *see also* United States v. Cunningham, 83 M.J 367, 374 (C.A.A.F. 2023) (at the conclusion of sentencing arguments, the trial defense counsel answered "no" when the military judge asked if either party had any objections; CAAF held the response constituted an express waiver as the response "did not just fail to object," but "affirmatively declined to object."); United States v. Kitchen, ACM 40155, 2023 CCA LEXIS 58 (A.F. Ct. Crim. App. 3 February 2023) (relying on Davis, this Court did not pierce the waiver where the military judge involved counsel in drafting and tailoring instructions, the military judge solicited objections to and requests for additional instructions, defense counsel did not offer additional instructions, and, when asked by the military judge, counsel did not object to the final instructions provided to the members).

If this Court determines Appellant did not waive this issue, then the issue should be reviewed for plain error. The plain error test is detailed in Issue I above.

***Additional Facts***

At the close of the case, the parties discussed proposed instructions with the military judge. (R. at 1016.) The discussion involved the proposed prior inconsistent statement instruction that was ultimately given to the members. (R. at 1029.) Appellant's trial defense counsel expressed no objection to the proposed instruction. (Id.) Later, the military judge asked the parties if there were any additional instructions being requested. (R. at 1034.) Appellant's trial defense counsel stated that self defense was raised and requested that instruction. (R. at 1034-35.) After further discussion, the military judge asked, "So, Defense Counsel, any other

instructions that you're requesting that we haven't discussed?" (R. at 1044.) Appellant's trial defense counsel responded, "No, Your Honor." (Id.)

After the military judge made edits based on the parties discusses, the parties reconvened with a finalized set of instructions. The military judge asked Appellant's counsel, "do you have any objections or requests for additional instructions?" (R. at 1057.) Appellant's counsel responded, "No, Your Honor." (R. at 1058.)

As discussed more in-depth in Issue III below, Appellant's trial defense counsel, in declarations to this Court, state they understood the difference between prior inconsistent statements being admissible as substantive evidence or being admissible for the limited purpose of a witness's credibility. (*See* Decs. of Mr. BH, Maj AF, and Maj BM.) Understanding these differences, Mr. BH states, "The defense team explicitly did not want these statements admitted as substantive evidence because if [Ms. BE's] prior inconsistent statements were considered for their truth, most of the statements would have been extremely prejudicial to [Appellant's] defense." (Dec. of Mr. BH.) Mr. BH continues, "Such an instruction would have significantly strengthened the government's case against [Appellant]." (Id.) Mr. BH states the "defense reasoned that it was best for the military judge's prior inconsistent statement instruction to only address witness credibility," and that the "military judge's instruction on prior inconsistent statements was in line with the defense's strategic objective to undermine B.E.'s credibility." (Id.)

Maj KM echoes Mr. BH, stating, "The Military Judge's instruction aligned with our strategy" because the "Military Judge's instruction as given prevented evidence that could have been used to bolster [Ms. BE's] credibility and help the Government's case from being argued as substantive evidence." (Dec. of Maj KM.)

### *Analysis*

Consistent with Davis and Cunningham, Appellant waived this issue at trial. Appellant's trial defense counsel affirmatively declined to object to the military judge's instruction on the use of prior inconsistent statements, offered no additional instructions, and, as shown in Issue III below and in the declarations of all three trial defense counsel, Appellant's counsel had knowledge of applicable precedents involving prior inconsistent statements. *See* Davis, 79 M.J. at 331-32. Further, just as in Kitchen, the military judge involved counsel in drafting and tailoring the instructions, including asking what instructions counsel wanted, providing counsel with a draft set of instructions, and soliciting objects to and requests for additional instructions.

In addition to meeting all the prerequisites of waiver present in Davis, this Court also now affirmatively knows Appellant's defense counsel expressly did not want the military judge to give the "substantive evidence" instruction on prior inconsistent statements. Appellant's counsel state the instruction was counter to the entire defense theory of the case and would have, in fact, hurt Appellant's case while strengthening the Governments. As Mr. BH states, "The defense team *explicitly did not want* these statements admitted as substantive evidence because if [Ms. BE's] prior inconsistent statements were considered for their truth, most of the statements would have been *extremely prejudicial* to Capt Braum's defense." (Dec. of Mr. BH) (emphasis added.)

Here, completely understanding the different potential uses of prior inconsistent statements, recognizing the negative consequences Appellant would face if the members were instructed that prior inconsistent statements could be used as substantive evidence, and explicitly not wanting the instruction, Appellant's defense team made the conscious decision to not request this instruction and not object to the instruction as given. As Mr. BH states, "The military

judge's instruction on prior inconsistent statements was in line with the defense's strategic objective" and Maj KM states, "The Military Judge's instruction aligned with our strategy." (*See* Decs. of Mr. BH and Maj KM.) Given these circumstances, Appellant waived this issue at trial.[7]

However, even if this Court finds Appellant did not waive the issue and even assuming plain error on the part of the military judge, Appellant's claim still fails as he has shown no prejudice. As noted above, detailed in Issue III below, and explicitly stated by Appellant's own counsel, an instruction to the members on using prior inconsistent statements as substantive evidence would have been "extremely prejudicial to [Appellant's] defense." (*See* Dec. of Mr. BH.) Each of Appellant's counsel explain how the use of prior inconsistent statements as substantive evidence would have backfired on Appellant's theory of the case – namely that Ms. BE was not credible.

Mr. BH stated that the "defense team was mindful that B.E. did not deny being sexually assaulted in her prior inconsistent," but instead "stated she was sexually assaulted at different times and in different ways." Thus, "If [Ms. BE's] statements were considered substantively, the

[7] While Appellant's ineffective of assistance of counsel (IAC) claim in Issue III below may provide this Court pause in finding this issue is waived, Appellant's IAC claim in Issue III is centered on whether Appellant's counsel understood the difference between using prior inconsistent statements as substantive evidence versus for the limited purpose of credibility – it does not allege Appellant's counsel were ineffective in their overall trial strategy or their sole focus on attacking Ms. BE's credibility. Moreover, as shown in Issue III below, Appellant's counsel readily understood the differences in uses for prior inconsistent statements, as well as the "extremely prejudicial" impact using prior inconsistent statements in this case as substantive evidence would have on Appellant's case. As discussed in Issue III, Appellant's counsel were not ineffective in their understanding of prior inconsistent statements or their strategy in limiting the use of the prior inconsistent statements in this case to credibility only. Thus, if this Court finds Appellant's counsel were not ineffective as to their understanding of the uses of prior inconsistent statements, this Court should then take no pause in finding waiver based on Appellant's counsel's affirmative and explicit steps to not have the military judge instruct on using prior inconsistent statements as substantive evidence.

members of the panel would have been instructed by the military judge that [Ms. BE's] prior inconsistent statements-which included [Ms. BE's] claims that [Appellant] sexually assaulted her-could be considered for their truth." (Dec. of Mr. BH.) Mr. BH states, "Such an instruction would have significantly strengthened the government's case against [Appellant]." (Id.) The defense team knew the Government could have used Ms. BE's prior inconsistent statements "to corroborate the existence of the sexual assaults." (Id.)

Maj KM further noted that the "overwhelming majority of [Ms. BE's] prior statements and allegations were not helpful to Appellant," and the defense "wanted to avoid any appearance or hint there might be truth to her overall claims, especially those regarding sexual abuse." (Dec. of Maj KM.) Thus, the military judge not giving the substantive evidence instruction "prevented evidence that could have been used to bolster [Ms. BE's] credibility and help the Government's case from being argued as substantive evidence." (Dec. of Maj KM.)

Regarding Ms. BE's sworn statement that she was raped on 24 June 2020, the defense team recognized that if they used this statement as substantive evidence that no sexual assaults occurred before that date, then they would implicitly be asking the members to believe Ms. BE as it related to that statement, which undermined the defense team's entire theory that Ms. BE was wholly inconsistent and should not be believed about anything. At the same time, it would also strengthen the Government's case for the post-24 June 2020 allegations and allow the members to use this sworn statement as substantive evidence that a sexual assault actually occurred on 24 June 2020, all of which went against the defense team's ultimate goal of receiving a full acquittal for Appellant – not just an acquittal on the pre-24 June 2020 allegations.

Moreover, as the defense team recognized, "most" of Ms. BE's prior statements were "extremely prejudicial to [Appellant's] defense" and that using a few cherry-picked prior

inconsistent statements substantively would have opened the door for the Government to use many other prior statements to negatively impact Appellant's case. Appellant's defense team, however, recognized these pitfalls and realized that asking the military judge to instruct the members that Ms. BE's prior statements could be used as substantive evidence would undermine their entire theory against Ms. BE.

Appellant notably fails to recognize any of these pitfalls within his brief. Instead, Appellant only addresses alleged benefits of using a few of Ms. BE's prior inconsistent statements substantively, therein failing to account for the numerous negative consequences he would have faced when all of her prior inconsistent statements could have been considered substantively.

Further, while Appellant cites to our sister Court's opinion in United States v. Powell, ARMY 202200006, 2022 CCA LEXIS 144 (9 March 2022), he fails to recognize his case did not have a substantial influence on the members' verdict as that in Powell. There, the victim testified she did a drug called "molly" at a party and began to have blurred vision, weakness, and an inability to move her body. Id. at *2-3. Later, when she and Appellant were alone, the victim said Appellant began penetrating her, she screamed loudly to get help, but fell unconscious and later awoke in a separate sexual position before blacking out again. Id. However, at trial, multiple inconsistent statements arose, including the fact that the victim did not report using drugs or alcohol, or losing unconsciousness to emergency room staff the day after the incident. Id. A friend of the victim testified that the victim was interested in the appellant, the victim and the appellant were heavily making out and attended the party to engage in sexual activity. Another witness testified the victim told her that when the appellant fingered her vagina, she thought to herself that she really did not want sex, but was not sure if she relayed that to the

appellant or if she ever told appellant she wanted to stop the sexual conduct. Id. Based on the nature of the case, which was a one-time incident, the Army Court found this information not being instructed to be used as substantive evidence had a substantial influence on the members' verdict. Id. at *9-10.

Appellant' case is much different as the main prior inconsistent statement by Ms. BE, the September statement, affirmatively stated that Appellant raped her on that date. Notably, the statement never denied raping occurred, but only dealt when the raping began. Appellant's own trial defense counsel recognized the damage this statement would bring if it were used substantively. If used substantively and argued for that purpose by the defense, it would involve Appellant's counsel essentially arguing Ms. BE should be believed in her statement that she was, in fact, raped by Appellant starting in June and moving forward. It would also involve Appellant's counsel asking them members to believe Ms. BE on this statement, which went against their entire theory that Ms. BE could not be believed at all. In contrast to Powell, Appellant's counsel well knew this prior inconsistent statement would not move the needle in Appellant's favor (therein strengthening his case now for prejudice), but instead would move the needle in the opposite direction because the statement was "extremely prejudicial" against him.

As to the 14 September 2020 statement, the Court was provided a full explanation as to why that statement was limited to only the events of 12 July 2020. Considering this and the whole of Ms. BE's testimony, there is no reasonable probability that the members would have substantively accepted the 14 September 2020 statement to mean no sexual abuse had occurred at all. Moreover, the members already had the ability to reject Ms. BE's trial testimony based on the prior inconsistent statement; being told they could consider this prior inconsistent statement substantively would have changed nothing.

Finally, as to Ms. BE's statements about being happy, there is no reason to think that if the members accepted her testimony substantively that she was happy that they would have then acquitted Appellant of anything. Instead, the members could have easily understood that Ms. BE was happy with some aspects of their relationship, but not with others. Importantly on this point, Ms. BE actually testified to this point, stating how she and Appellant had had good times in their relationship and how she wanted the relationship to return to that point. As Appellant's own counsel recognize, Ms. BE "was questioned on cross-examination" about being happy in the relationship, "and this fact was confirmed as evidence that the panel could consider substantively."

Here, Appellant's own counsel detail a number of negative consequences Appellant faced if the military judge had instructed the members that the Ms. BE's prior inconsistent statements could be used as substantive evidence. None of these negative consequences were present in Powell. In stark contrast to Appellant's unsupported claim that he was prejudiced by the military judge not instructing on using the statements as substantive evidence, the record is replete with evidence showing the "extreme[] prejudic[e]" Appellant would have faced if the military judge had provided that instruction and how "[s]uch an instruction would have significantly strengthened the government's case against [Appellant]." (*See* Dec. of Mr. BH.)

In sum, Appellant waived this issue. However, even if this Court does not find waiver, Appellant has failed to show plain error or prejudice. Thus, Appellant's claim must fail.

## III.

## APPELLANT'S TRIAL DEFENSE COUNSEL WERE NOT INEFFECTIVE.

### *Standard of Review*

Ineffective assistance of counsel claims involve mixed questions of law and fact: "[t]his Court reviews factual findings under a clearly erroneous standard, but looks at the questions of deficient performance and prejudice *de novo*." United States v. Gutierrez, 66 M.J. 329, 330-331 (C.A.A.F. 2008).

### *Law*

To show ineffective assistance of counsel, "an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). In reviewing for ineffectiveness of counsel, the Court addresses issues of performance and prejudice *de novo*. *See* Gutierrez, 66 M.J. at 330-331 (discussing the test for claims of ineffective assistance of counsel).

With regard to the first prong of Strickland's two-pronged test, courts give deference to counsel and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. To establish deficient performance, an appellant must establish his counsel's representation "amounted to incompetence under 'prevailing professional norms.'" Harrington v. Richter, 131 S. Ct. 770, 788 (2011) (quoting Strickland, 466 U.S. at 690). Because an ineffective-assistance claim may be used "as a way to escape the rules of waiver and forfeiture and raise issues not presented at trial...the Strickland standard must be applied with scrupulous care, lest 'intrusive post-trial

inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve." Id.

When addressing the second prong, an appellant must demonstrate a "reasonable probability that, but for counsel's [deficient performance] the result of the proceeding would have been different." Strickland, 466 U.S. at 694. That is to say, an appellant has the burden of showing the results of the trial would have been different but for the deficiency. *See* Id., at 694; *see also* Harrington, 131 S. Ct. at 787-88 (noting the error or deficiency must be so serious that a defendant was deprived of a fair trial with reliable results).

In addressing claims of ineffective assistance of counsel, the Court of Appeals for the Armed Forces applies the following three-part test to determine whether or not the presumption of counsel's competence has been overcome:

> 1. Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
>
> 2. If the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance...[ordinarily expected] of fallible lawyers"?
>
> 3. If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result?

United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)).

In reviewing the decisions and actions of trial defense counsel, a reviewing Court does not second-guess strategic or tactical decisions. *See* United States v. Morgan, 37 M.J. 407, 410 (C.M.A. 1993). It is only in those limited circumstances where a purported "strategic" or "deliberate" decision is unreasonable or based on inadequate investigation that it can provide the

foundation for a finding of ineffective assistance. *See* United States v. Davis, 60 M.J. 469, 474 (C.A.A.F. 2005).

In other words, "disagreements as to the strategic or tactical decisions made at the trial level by defense counsel will not support a claim of ineffective assistance of counsel so long as the challenged conduct has some reasoned basis." United States v. Mansfield, 24 M.J. 611, 617 (A.F.C.M.R. 1987). *See also* United States v. McIntosh, 74 M.J. 294, 296 (C.A.A.F. 2015). In assessing claims of ineffective assistance of counsel, appellate courts do not look at the success of a defense attorney's strategy "but rather whether counsel made an objectively reasonable choice in strategy from the alternatives available at the time." United States v. Dewrell, 55 M.J. 131, 136 (C.A.A.F. 2001)(*citing* United States v. Hughes, 48 M.J. 700, 718 (A.F. Ct. Crim. App. 1998).

***Analysis***

In his brief, Appellant claims that his counsel's performance was "deficient under the first Strickland prong" because it "appears that the defense counsel was unaware that the Military Rules of Evidence permitted admission of some prior inconsistent statements as substantive evidence." (App. Br. at 48-49.) Appellant then claims prejudice because his counsel's "deficient performance deprived the panel of substantive evidence that Appellant did not sexually abuse BE, that there was no sexual abuse prior to 24 June 2020, that BE was happy with Appellant and he was amazing during the charged time period, and that BE wanted to engage in the very acts she alleged were forced upon her." (Id. at 49.) Appellant theorizes that "[h]ad the panel been instructed that they could have considered these things as substantive evidence in addition to weighing's credibility, there is a reasonable probability that Appellant would have been acquitted, particularly with respect to the Article 120 specifications." (Id.)

In a response to an Order by this Court, each of Appellant's trial defense counsel provided an affidavit or declaration regarding this allegation. (*See* Dec. of Mr. BH, Maj, AF, and Maj BM.)[8]

Mr. BH stated the cross-examination of Ms. BE was "designed to reveal that she was not a credible witness" and that the "military judge's instruction on prior inconsistent statements was in line with the defense's strategic objective to undermine [Ms. BE's] credibility." (Dec. of Mr. BH.) However, Mr. BH highlights that the inconsistent statements were "extracted by the defense team for the sole purpose of impeaching [Ms. BE's] credibility." Mr. BH states, "I absolutely knew the difference between prior inconsistent statements admissible as substantive evidence and prior inconsistent statements admissible for the limited purpose of testing the credibility of the witness," and that the "defense team explicitly did not want these statements admitted as substantive evidence because if [Ms. BE's] prior inconsistent statements were considered for their truth, most of the statements would have been extremely prejudicial to [Appellant's] defense."

Mr. BH added that the "defense team was mindful that B.E. did not deny being sexually assaulted in her prior inconsistent," but instead "stated she was sexually assaulted at different times and in different ways." Mr. BH says, "If [Ms. BE's] statements were considered substantively, the members of the panel would have been instructed by the military judge that [Ms. BE's] prior inconsistent statements-which included [Ms. BE's] claims that [Appellant] sexually assaulted her-could be considered for their truth." Mr. BH states, "Such an instruction would have significantly strengthened the government's case against [Appellant]." (Id.)

[8] The Government moved to attach these affidavits and declaration on 2 May 2024. This Honorable Court granted that motion on 13 May 2024.

Mr. BH further states that "after debating and discussing the instructions at the close of evidence, the defense team knew we risked a lot by making a futile argument that some cherry-picked inconsistent statements should be admissible as substantive evidence." The defense team knew the Government could then use the prior inconsistent statements "to corroborate the existence of the sexual assaults," which would have "undone all the work the defense team invested in undermining [Ms. BE's] credibility." (Id.)

The defense team also "did not want to highlight that there was one prior inconsistent statement arguably admissible as substantive evidence under M.R.E. 801(d)(l)(A) as it was not hearsay," namely that in a civil protective order provided under penalty of perjury, Ms. BE stated she was raped by Appellant on 24 June. Mr. BH notes the "government did not request a specific instruction to cover the admissibility of this evidence, and the defense did not want to alert the government of the missed opportunity by addressing other individual inconsistent statements on the record." In all, Mr. BH states, "the defense reasoned that it was best for the military judge's prior inconsistent statement instruction to only address witness credibility." (Id.)

Maj AF's and Maj KM's declarations provide similar reasoning. Maj KM highlights the "overall strategy was to highlight how much of [Ms. BE's] testimony was not believable based her previous inconsistent statements or she was making statements under oath during the court-martial that were not credible." (Dec. of Maj KM.) Maj KM explains:

> The overwhelming majority of [Ms. BE's] prior statements and allegations were not helpful to Appellant. She made her allegations to many witnesses, law enforcement agencies, and other government entities. We wanted to avoid any appearance or hint there might be truth to her overall claims, especially those regarding sexual abuse, and we instead focused on inconsistencies or claims that were not credible. We determined the Military Judge's instruction as given prevented evidence that could have been used to bolster [Ms. BE's]

> credibility and help the Government's case from being argued as substantive evidence.

(Dec. of Maj KM.)

Per Maj AF, to then use Ms. BE's statement that she was raped on 24 June 2020 as substantive evidence that she was *not* sexually assaulted prior to that date would have forced the defense to essentially argue this statement by Ms. BE was credible, therein "undermin[ing] the defense's strategy" that all of Ms. BE's prior statements were inconsistent. Moreover, as Maj KM notes, "the defense team worked to get a full acquittal for Appellant," and they were "were not interested in having the Military Judge read an instruction allowing the panel to consider substantively 24 June 2020, as the start date for sexual abuse if they believed [Ms. BE's] allegations." In sum, Maj KM says, "We wanted to show this date provided by [Ms. BE] was a blatant inconsistency from what she previously told law enforcement regarding her sexual abuse allegations without the Military Judge subsequently instructing the panel they could consider this evidence and date provided by her as the truth." Maj KM declares, "The Military Judge's instruction aligned with our strategy."

Here, each of Appellant's trial defense counsel show they well understood the difference uses of prior inconsistent statements and provide reasonable explanations for why Appellant's defense team did not request the military judge to instruct the members that Ms. BE's prior statements could be used substantively. The team recognized the dangers of having these statements used as substantive evidence and made a sound, strategic decision to avoid such a situation. With Ms. BE's sworn statement that she was raped on 24 June 2020, the defense team recognized that if they used this statement as substantive evidence that no sexual assaults occurred before that date, then they would implicitly be asking the members to believe Ms. BE

as it related to that statement, which undermined the defense team's entire theory that Ms. BE was wholly inconsistent and should not be believed. As the defense's entire strategy revolved around Ms. BE being completely inconsistent and unbelievable, the defense team then relying on this one statement by Ms. BE as accurate would have, as Mr. BH put it, "undone all the work the defense invested in undermining [Ms. BE's] credibility." (Dec. of Mr. BH.)

Moreover, it would involve allowing the members to use this sworn statement as substantive evidence that a sexual assault actually occurred on 24 June 2020, which went against the defense team's ultimate goal of receiving a full acquittal for Appellant – not just an acquittal on the pre-24 June 2020 allegations. As Maj BH noted, "While [Ms. BE's] statement at the protective order hearing was inconsistent with the timeline she provided during her trial testimony, it still corroborated [Ms. BE's] overall allegation that [Appellant] sexually assaulted her." (Dec. of Maj BH.)

Further, the defense team recognized that "most" of Ms. BE's prior statements were "extremely prejudicial to [Appellant's] defense" and that using a few cherry-picked prior inconsistent statements substantively would have opened the door for the Government to use many other prior statements to negatively impact Appellant's case. Appellant's defense team, however, recognized these pitfalls and realized that asking the military judge to instruct the members that Ms. BE's prior statements could be used as substantive evidence would undermine their entire theory against Ms. BE.

Appellant notably fails to recognize any of these pitfalls within his brief, let alone explain why his defense team's strategy to avoid these pitfalls was unreasonable or somehow fell measurably below the performance ordinarily expected of fallible lawyers. Instead, Appellant simply asserts that his trial defense counsel "appear[ed]" to be unaware of the ability to use prior

inconsistent statements as substantive evidence, that the team had no "sound trial strategy," and that this was "clearly an oversight." (App. Br. at 48-49.) However, as shown in the counsels' declarations, the defense team was well aware of the rules and their ability to request that the military judge instruct on using prior inconsistent statements as substantive evidence and had a very sound strategy for not pursing the option.

The statements from Appellant's trial defense counsel demonstrate a sound approach to Appellant's defense, and a reasonable, "tactical decision[] made at the trial." Mansfield, 24 M.J. at 617. Thus, Appellant's trial defense counsel did not perform deficiently, and their decision to not request the military judge to provide the substantive evidence instruction for prior inconsistent statements does not overcome the "strong presumption" that their conduct was within the "wide range of reasonable professional performance." Strickland, 466 U.S. at 689. Additionally, because this was a tactical decision and this Court should not second-guess strategic or tactical decisions on review, Appellant's ineffective assistance of counsel claim must fail. Strickland, 466 U.S. at 689; Morgan, 37 M.J. at 410.

Likewise, Appellant has failed to show any prejudice as there is no reasonable probability that, absent any alleged errors, there would have been a different result. To start, as noted by Appellant's counsel in their declarations, some of statements made by Ms. BE, namely that she was "happy" and that she thought Appellant was "amazing," were admitted substantively outside of a prior inconsistent statement instruction. Moreover, while Appellant believes having Ms. BE's civil court statement about first being raped on 24 June 2020 helps his case regarding the pre-24 June 2020 allegations, Appellant's counsel recognized the statement, if used substantively, would strengthen the Government's case for the post-24 June 2020 allegations

while, at the same time, undermining the defense's entire case strategy that Ms. BE should not be believed at all.

Further, while Appellant only addresses the benefits of using a few of Ms. BE's prior inconsistent statements substantively, he again fails to account for the numerous consequences his defense team would have faced when all of her prior inconsistent statements could have been considered substantively. As Mr. BH explained:

> The defense team was mindful that [Ms. BE] did not deny being sexually assaulted in her prior inconsistent statements. Instead, she stated she was sexually assaulted at different times and in different ways. If [Ms. BE's] statements were considered substantively, the members of the panel would have been instructed by the military judge that [Ms. BE's] prior inconsistent statements-which included [Ms. BE's] claims that [Appellant] sexually assaulted her-could be considered for their truth. Such an instruction would have significantly strengthened the government's case against [Appellant].

(Dec. of Mr. BH.)

As discussed above, the declarations from his trial defense counsel show how Appellant's defense team protected their client from this damaging information being used substantively by the panel. His trial defense counsel were not ineffective, and he cannot show a reasonable probability that but for their strategic choices, the result of his trial would have been different. Thus, Appellant's claim must fail.

## IV.

## THE MILITARY JUDGE DID NOT ERR IN DENYING APPELLANT'S DISCOVERY MOTION.

### *Additional Facts*

At trial, Appellant filed a motion to compel an extraction of Ms. BE's cellular phone. (App. Ex. XXXVI.)

The military judge, in his ruling, found the following as fact:

- On 29 July 2020, Newton Police Department (NPD) and Air Force Office of Special Investigation (AFOSI) personnel interviewed Ms. BE
- When Ms. BE referenced her phone multiple times during the interview, the NPD officer asked the AFOSI Special Agent (SA) if he would like assistance in seeking consent to download information from Ms. BE's phone; the OSI SA agreed
- Ms. BE consented to location-related information being downloaded from her phone and signed a consent form; the form crossed out the language "including any and all digital content therein" and the language "location information" was written in
- The NPD officer explained that the entire contents of the phone would be downloaded but that the search would be limited to location-related information based on Ms. BE's consent
- The downloaded information was placed on a flash drive that NPD kept as evidence
- The NPD's investigation report discussed the flash drive in the body of the report and listed the flash drive in a separate section discussing evidence; the NPD's report also discussed the circumstances of gaining consent and downloading the information from the phone, as well as a three-page summary of the extraction report and Ms. BE's consent form
- AFOSI's Report of Investigation (ROI) did not list the flash drive in the section addressing evidence associated with the case
- The defense submitted a discovery request on 16 June 2021 requesting reports of cellphone extractions but did not identify any specific extractions
- On 18 June 2021, the Government provided the defense the full version of the NPD report, which discussed the flash drive multiples times
- In September 2021, the defense submitted an additional discovery request asking for forensic copies that has been made of any cellphones in the investigation and access to the cellphone of any victim in the case
- On 22 October 2021, the Government again provided the full version of the NPD report, which discussed the flash drive multiple times
- "The defense never specifically identified . . . the extraction of [Ms. BE's] phone taken on 29 July 2020 in its requests for discovery, even though [it] was discussed multiple times in the NPD case file"
- Until 1 June 2022, trial counsel apparently was unaware of the cellphone extraction taken by NPD on 129 July 2020

- On 1 June 2022, the Government notified the defense about the cellphone extraction and explained the extraction included more than location data, but that Ms. BE's consent was limited to location data and that the Government's review of the extraction was limited to the location data
- The Government provided the defense thousands of pages of location data

(App. Ex. XXXVIII at 1-5.)

The military judge denied Appellant's motion to compel the entire extraction of Ms. BE's phone. First, the military judge held the "defense has been given equal access to the evidence from [Ms.] BE's phone as the government, that is, only to the location data, in accordance with the limited consent [Ms.] BE provided." (Id. at 11.)

Next, addressing R.C.M. 701, the military judge found that "the evidence the defense seeks is not legally in the possession, custody, or control of military authorities, and, therefore, that the defense is not entitled to inspect this evidence pursuant to RCM 701." Citing this Honorable Court's opinion in United States v. Lutcza, 76 M.J. 698, 703 (A.F. Ct. Crim. App. 2017), the military judge held, "a person's waiver of privacy interests in a cell phone turned over to law enforcement to copy is limited to the terms of the consent given." (App. Ex. XXXVIII at 11.) The military judge noted Ms. BE "specifically and explicitly limited the consent she gave to location data" and "did not thereby waive any privacy interests or lose legal protections regarding the remaining data in the phone." (Id.) The military judge concluded, "As such, the remaining data copied from her phone is not legally in the possession, custody, or control of military authorities and is not discoverable under RCM 701(a)(2)(A).

The military judge also addressed Appellant's request for production under R.C.M. 703 and whether Appellant had shown whether the evidence existed and whether it was relevant and necessary. The military judge first noted the defense provided text exchanges supposedly

between Ms. BE and Appellant and argued the evidence contradicted or undermined Ms. BE's assertions that she never requested sex toys or BDSM activities discussed in those messages. However, the military judge noted, "As evinced by the defense's filing, the defense already has evidence of those pictures and messages, presumably from [Appellant's] phone." (Id.)

The defense then argued access to unconsented parts of Ms. BE's was necessary because the pictures Ms. BE purportedly sent must have come from somewhere on her phone, reasoning that the phone would contain evidence of receipt of, searches for, or downloads of the images. While the military judge stated the defense had established that the phone *might* have these images, "the evidence provided by the defense does not establish that such evidence exists in the copy of [Ms.] BE's phone." (Id.) Additionally, the military judge held the defense had not demonstrated the evidence was necessary, reasoning that Appellant already had evidence that Ms. BE had the pictures, sent them to Appellant, and sent other messages to Appellant. The judge continued, "Evidence that [Ms.] BE sent the pictures carries with it the logical inference, as the defense argues, that she had them on her phone, from which it can be argued that they were sent to her or sought out and downloaded by her." (Id.)

Ultimately, with relation to R.C.M. 703, the military judge held, "The defense has failed to demonstrate (1) that the evidence sought of how the pictures allegedly sent from [Ms.] BE got onto [Ms.] BE's phone exists, (2) that any such evidence is necessary, particularly in light of the evidence already available to the defense, or (3) that the possibility of the existence of such evidence which might be of any assistance to the defense warrants the production of the evidence sought, that is, the entirety of the copy of [Ms.] BE's cell phone NPD made." (Id.)

### *Standard of Review*

This Court reviews a military judge's ruling on requests for discovery or production of evidence for an abuse of discretion. United States v. Jones, 69 M.J. 294, 298 (C.A.A.F 2011); United States v. Rodriguez, 60 M.J. 239, 246 (C.A.A.F. 2004). An abuse of discretion occurs when the military judge's findings of fact are clearly erroneous or when his ruling is influenced by an erroneous view of the law. United States v. Freeman, 65 M.J. 451, 453 (C.A.A.F. 2008).

### *Law*

- *Discovery*

Each party to a court-martial must have an equal opportunity to inspect evidence and to obtain witnesses and other evidence. United States v. Stellato, 74 M.J. 473, 483 (C.A.A.F. 2015) (*citing* R.C.M. 701(e) and Article 46, UCMJ, 10 U.S.C. § 846). Article 46, UCMJ, states, "In a case referred for trial by court-martial, the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe."

"After service of charges, upon request of the defense, the Government shall permit the defense to inspect any . . . papers, documents, [or] data . . . if the item is within the possession, custody, or control of military authorities and . . . the item is relevant to defense preparation." R.C.M. 701(a)(2)(A)(i). Our superior Court has "interpreted RCM 701 and related rules to ensure compliance with the equal-access-to-evidence mandate in Article 46." United States v. Williams, 50 M.J. 436, 440 (C.A.A.F. 1999).

Our superior court has established a two-step analysis for claims of nondisclosure of evidence potentially favorable to the defense. United States v. Roberts, 59 M.J. 323, 325 (C.A.A.F. 2004). First, the court must determine whether the information or evidence at issue

was subject to disclosure or discovery. Id. During this portion of analysis, the court must decide whether the information or evidence was material to the defense in the preparation of their case. Id. at 326.

If the court determines that nondisclosure of the information or evidence was erroneous, the court must then determine the effect of that nondisclosure on the appellant's trial. Id. at 325. At this stage of the analysis, the focus shifts to determining the "materiality of the withheld information to the results of trial." Id. at 326. The test for materiality is if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Behenna, 71 M.J. 228, 237-38 (C.A.A.F. 2012). "[T]he evidence must have made the likelihood of a different result great enough to undermine confidence in the outcome of the trial." Id.

CAAF has developed two separate tests to aid in this determination, depending on whether there was a general or specific discovery request. Id. If an appellant can show that the "Government failed to disclose discoverable evidence in response to a specific request or as a result of prosecutorial misconduct" then the appellant "will be entitled to relief unless the Government can show that nondisclosure was harmless beyond a reasonable doubt." Id. at 327. If the withheld information "might have affected the outcome of the trial" then the nondisclosure is not harmless beyond a reasonable doubt. United States v. Coleman, 72 M.J. 184, 187 (C.A.A.F. 2013).

- *Cellular phones, consent, and the Fourth Amendment*

Data stored within a cell phone falls within the protection of the Fourth Amendment. United States v. Wicks, 73 M.J. 93, 99 (C.A.A.F. 2014). "Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a

wallet, or a purse." Riley v. California, 573 U.S. 373, 393, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014). Cell phones have a "[multiple gigabyte] capacity with the ability to store many different types of information: Even the most basic phones that sell for less than $20[.00] might hold photographs, picture messages, text messages, Internet browsing history, a calendar, a thousand-entry phone book, and so on." Riley, 573 U.S. at 394.

"A search authorization . . . for an electronic device[ ] must adhere to the standards of the Fourth Amendment of the Constitution." United States v. Richards, 76 M.J. 365, 369 (C.A.A.F. 2017). When conduct constitutes a "search" under the Fourth Amendment, the conduct is constitutional only if the officer obtains a warrant or if the conduct falls within certain categories of permissible warrantless searches. Lange v. California, 141 S. Ct. 2011, 2017 (2021). One such category is a consent search where an individual voluntarily consents to the search. Fernandez v. California, 571 U.S. 292, 298 (2014). The scope of a search authorized by consent "is limited by the terms of its authorization." Walter v. United States, 447 U.S. 649, 656 (1980). The scope of a consent search or seizure is limited to the authority granted in the consent. M.R.E. 314(e)(3).

- *Federal Court Interpretation of "In the Possession of the Government"*

The Ninth Circuit has repeatedly held that, in relation to Fed. R. Crim. P. 16 (the federal court equivalent to R.C.M. 701(a)), information is "in the possession of the government" if the prosecutor "has knowledge of and access to the documents sought by the defendant." *See*, for example, United States v. Santiago, 46 F.3d 885, 893 (9th Cir. 1995) (*quoting* United States v. Bryan, 868 F. 2d 1032 (9th Cir. 1989)). While these cases dealt with documents that were not in the physical possession of the prosecutor, the focus of the analysis turned on "the extent to which the prosecutor has knowledge of and access to the documents sought by the defendant in each

case." *See* Bryan, 868 F.2d at 1035-36. This "knowledge of and access to" standard has been referenced both by our superior Court and this Honorable Court. *See* Stellato, 74 M.J. at 485; *see also* United States v. Lyson, ACM 38067, 2013 CCA LEXIS 239 (A.F. Ct. Crim. App. 13 March 2013).

***Analysis***

Here, the record is clear that Ms. BE provided limited consent to the search of her phone to only location-related information. That information was provided to the defense.

No other part of extraction from Ms. BE's phone was ever accessed, searched, other otherwise reviewed by the prosecution, AFOSI, NPD or any other government agency, as such action would have exceeded the clear limited scope of consent granted by Ms. BE to the NPD and, as a result, violated Ms. BE's Fourth Amendment rights. Thus, consistent with Stellato, Article 46, and R.C.M. 701(e), and as the military judge correctly held at trial, the defense received equal access as the Government to the evidence on Ms. BE's phone.

Still, Appellant claims error because the "data in question was 'within the possession, custody, or control of military authorities.'" (App. Br. at 53.) However, Appellant fails to recognize the nuance in this case. Here, while the Government may have had physical possession of a USB drive containing the full extraction of Ms. BE's phone, the Government only had legal authority to access the location-based information within that USB drive since that was the only portion of the phone extraction Ms. BE consented to being searched. The Government could not access the rest of Ms. BE's phone without violating her Fourth Amendment rights. Considering this limitation and the inability to actually access all of the information contained on the USB drive, the Government never had complete "possession, custody, or control" of the full extraction of Ms. BE's phone.

While Appellant takes issue with the military judge's use of the word "legal" when discussing "possession, custody, and control," he misses the military judge's greater point that the Government could not have possession, custody or control of something that they could not fully access themselves. Instead, the only information the Government truly had "possession, custody and control" over was the location data consented to by Ms. BE. Notably, this reasoning falls in line with the string of Ninth Circuit cases that hold information is "in the possession of the government" if the prosecutor "has knowledge of and *access to* the documents sought by the defendant." *See* Santiago, 46 F.3d at 893.

The alternative would go against Article 46, UCMJ, and R.C.M. 701(e) as it would have provided Appellant with unequal access to Ms. BE's phone information. Moreover, if the military judge had mandated the Government to turn over the full extraction, all the while knowing the defense would review the entirety of the phone extraction, the military judge would have forced the Government to unwillingly be complicit in violating R.C.M. 314, as well as Ms. BE's Fourth Amendment and Article 6b privacy rights, as the information Appellant sought was well outside the bounds of Ms. BE's consent.

Here, Ms. BE only consented to the review of the location-based data, nothing more, and this was the only information the Government truly had "possession, control, or custody" over. It is also the information the Government readily turned over the Appellant once it found about the phone extraction. Considering these circumstances, the military judge did not err in finding the Government did not have possession, control or custody over the entirety of the phone extraction for R.C.M. 701(a)(2)(A) purposes.

Considering the Government did not have possession, control or custody of the entire phone extraction because it lacked the legal authority to access that information, Appellant still

had an option for obtaining the full extraction outside of R.C.M. 701(a)(2)(A) – namely through R.C.M. 703. In general, disclosure to the defense of documents in the possession of the prosecution is governed byR.C.M. 701, whereas production to the defense of documents not in the possession, custody, or control of military authorities is governed by R.C.M. 703. *See* United States v. Bishop, 76 M.J. 627, 634 (A.F. Ct. Crim. App. 2017). Though he failed, Appellant made this very argument at trial, which the military judge correctly denied as discussed above. Notably, Appellant abandons his R.C.M. 703 argument before this Honorable Court as he has raised no issue claiming the military judge erred in denying of his motion on that basis.

However, the military judge's basis for denying Appellant's motion based on R.C.M. 703 highlights exactly why Appellant faced no prejudice in not obtaining the full extraction of Ms. BE's phone. Appellant's main contention in his motion to compel was that the phone would show text exchanges between Ms. BE and Appellant which would contradict or undermine Ms. BE's assertions that she never requested sex toys or BDSM activities. Yet, as the military judge noted, Appellant's own motion filing attached multiple pictures and messages between Appellant and Ms. BE showing the same types of messages Appellant hoped to find on Ms. BE's phone. Thus, as the military judge correctly held, "As evinced by the defense's filing, the defense already has evidence of those pictures and messages, presumably from [Appellant's] phone." (App. Ex. XXXVIII.) *See* Bishop, 76 M.J. at 634 ("Trial defense counsel offered no specific information that any particular relevant evidence not already in the possession of the Defense was on the phone.) As this finding was not influenced by an erroneous view of the law, the military judge did not abuse his discretion in coming to this conclusion.

Appellant's next main contention was that the phone extraction would show pictures Ms. BE sent to Appellant must have come from somewhere on her phone and that the phone would

contain evidence of receipt of, searches for, or downloads of the images. However, the military judge reasoned that even if Appellant had established that the phone had those images, Appellant had still failed to demonstrate the evidence was necessary because Appellant already had evidence that Ms. BE had the pictures, sent them to Appellant via text messages on her phone, and had sent other messages to Appellant. Considering this evidence, which Appellant already had possession of, the military judge held, "Evidence that [Ms.] BE sent the pictures carries with it the logical inference, as the defense argues, that she had them on her phone, from which it can be argued that they were sent to her or sought out and downloaded by her." (Id.) In other words, everything that Appellant sought to find on the full extraction of Ms. BE's phone was already evidence in Appellant's possession. *See* Bishop, 76 M.J. at 634. The trial defense counsel could have done more investigation to present to the Court "specific information that any particular relevant evidence not already in the possession of the Defense was on the phone." Id. But it did not. Again, there is no abuse of discretion in this finding.

Further, this type of evidence was raised to the members at Appellant's trial and now to this Honorable Court within his brief. Appellant cross-examined Ms. BE about text messages involving anal hooks and even includes a picture of the anal hook pictured in the text message within his current brief. (*See* App. Br. at 5.) Moreover, Defense Exhibit A includes 91 pages of text messages between Appellant and Ms. BE that involve multiple pictures. All of this information was placed before the members at trial.

As shown, the information Appellant sought from the full extraction of Ms. BE's phone, namely text exchanges and pictures sent between Ms. BE and Appellant, would have mirrored evidence provided by Appellant himself at trial. While Appellant claims to have "limited electronic data" at trial, he provided a 90-plus page exhibit of hundreds of text messages, as well

as photos within those messages, to the members at trial. Thus, what Appellant sought from the full extraction of the phone would have been cumulative to evidence put forward to the members at trial regarding the text exchanges between Ms. BE and Appellant, and had no impact on the panels' ultimate verdict.

In sum, the military judge did not abuse his discretion in finding the Government did not have possession, control, or custody over the full extraction of Ms. BE's phone. Further, Appellant had ample opportunity to attack Ms. BE's credibility by using 90-plus pages of text messages and photos between her and Appellant. Here, there is no "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," and there is no "likelihood of a different result great enough to undermine confidence in the outcome of the trial." *See* Behenna, 71 M.J. at 237-38. As a result, Appellant's claim must fail.

## V.

## APPELLANT'S CONVICTIONS ARE NOT AMBIGUOUS.

### *Standard of Review*

Whether a verdict is ambiguous and thus precludes this Court from performing a factual sufficiency review is a question of law reviewed de novo. United States v. Ross, 68 M.J. 415, 417 (C.A.A.F. 2010).

### *Law*

An "ambiguous verdict" is one which prevents the reviewing court from conducting their Article 66, UCMJ, review. United States v. Walters, 58 M.J. 391, 397 (C.A.A.F. 2003). "[T]he remedy for a Walters violation is to set aside the finding of guilty to the affected specification and dismiss it with prejudice." United States v. Scheurer, 62 M.J. 100, 112 (C.A.A.F. 2005)

(footnote omitted). "With minor exceptions for capital cases, a 'court-martial panel, like a civilian jury, returns a general verdict and does not specify how the law applies to the facts, nor does the panel otherwise explain the reasons for its decision to convict or acquit.'" United States v. Brown, 65 M.J. 356, 359 (C.A.A.F. 2007) (*quoting* United States v. Hardy, 46 M.J. 67, 73 (C.A.A.F. 1997)).

***Analysis***

Here, Appellant argues this Court cannot properly conduct a factual sufficiency review because the conviction for rape in Charge I, Specification 1 is rendered ambiguous by the acquittal of sexual assault in Charge I, Specification 4. (App. Br. at 60.) Therefore, he argues, this Court cannot affirm his conviction for rape as it would potentially be affirming a conviction for conduct of which he was acquitted. Relying on United States v. Stewart, 71 M.J. 38 (C.A.A.F. 2012), Appellant contends that such a factual sufficiency review violates the double jeopardy clause. Appellant is incorrect.

This case is different than what occurred in Stewart, which our superior Court stated was a unique case. In Stewart, the Government initially charged the accused with one specification of aggravated sexual assault for engaging in a sexual act with a person "who was substantially incapacitated or substantially incapable of declining participation in the sexual act." Id. at 39. However, the military judge severed the single specification into two separate specifications that were identical except that the new first specification alleged that the victim was "substantially incapacitated" and the second specification alleged that she was "substantially incapable of declining participation in the sexual act." Id. at 42. The military judge then provided the members the exact same definition for "substantially incapacitated" and "substantially incapable

of declining participation in the sexual act," rendering the two specifications essentially the same. Importantly, both specifications arose from the same facts and same incident.

Adding further confusion to the situation, the military judge in Stewart then instructed the members that they could return a finding of guilty for only one of the two specifications. The members subsequently returned a verdict of guilty to the second specification. Our superior Court held that under the "unique circumstances" of the case, "the principles underpinning the Double Jeopardy Clause . . . made it impossible for the CCA to conduct a factual sufficiency review of Specification 2 without finding as fact the same facts that the members found Stewart not guilty of in Specification 1." Id. at 43.

This case does not include such unique circumstances. Where Stewart's two specifications were based on the same single incident and had the same elements save for one, which was then defined in a way to make that element be the same as well, the two specifications at issue in this case are based on different facts, include different timeframes, different elements, different definitions, and different theories of liability.

As previously discussed, Charge I, Specification I involved a timeframe occurring only in May 2020, alleged rape under Article 120(A), and included the "unlawful force" element. Charge I, Specification 4, however, involved a timeframe ranging from April 2020 to July 2020, alleged sexual assault under Article 120(B), and included the "without consent" element. The military judge properly instructed on these distinct elements for each offense, the instructions were not overlapping, and clearly articulated two distinct offenses.

The Government then provided the members a distinct theory of liability with regards to Charge I, Specification 1, and then provided a different theory of liability with regard to Charge

I, Specification 4, which included separate facts, separate timeframes, separate events, and separate actions by Appellant against Ms. BE.

For Charge I, Specification 1, the trial counsel plainly stated the specification dealt with "the incidents with the bullwhip and the ball gags." (R. at 1113.) The trial counsel detailed how Appellant used "unlawful force" on Ms. BE by "physically restraining her," "wrapping a bullwhip around her neck without her knowing," and "putting a ball gag in her mouth." (Id.)

Additionally, the charged timeframe for this specification made it clear that this specification dealt with the bullwhip and ball gagging incidents. Ms. BE testified that on 16 May, going into 17 May, was the date in which Appellant wrapped the bullwhip around her neck. (R. at 579-585.) Ms. BE then testified that Appellant used the ball gag "a few days later on me." Ms. BE agreed that the first time Appellant used the ball gag on her was around 20 May 2020, and the second time was around 25 May 2020. The beginning and end dates of these incidents, 17 May 2020 and 25 May 2020, directly match the charged timeframe for Charge I, Specification 1.

For Charge I, Specification 4, the members were presented different facts, a different charged timeframe, and a different theory. For this specification, the trial counsel told the members this specification was "specifically referring to the flying incidents." (R at 1119.) In fact, the trial counsel went a step further and highlighted the difference between Specification 1 and Specification 4, stating the following:

> Now the instances that were talking about here before I dive into the definition here of consent, when we talk about that. For this specification which is the penetration of her vulva now no longer rape. Right? The rape referred to those times were forcefully using the whip, forcefully using the ball gag. Now were just talking about times of penetration of her vulva where she didn't consent, and those are specifically referring to the flying incidents.

> That those two times that she talks about there being a vaginal intercourse, one where she was facing away from him, one where she was facing towards him, and on both of those times she clearly indicated that she did not want to do this. She was not consenting to the sexual activity.

(R. at 1119-20.)

Additionally, the charged timeframe for this specification makes it clear that this specification dealt with the flying incidents. Ms. BE testified that the sexual activities that occurred in the aircraft began in "mid-April," which directly coincides with the beginning charged timeframe to Specification 4.

Most ambiguous verdict case law arises from one of two situations: (1) "divers occasions" being reduced to one occasion, or (2) more than one theory of liability was proposed during the trial. Walters, 58 M.J. at 396; Brown, 65 M.J. at 359. However, Walters only applies in those "narrow circumstance[s] involving the conversion of a 'divers occasions' specification to a 'one occasion' specification through exceptions and substitutions." 58 M.J. at 396.

In this case, no specification was converted from divers occasions to a single incident. Thus, Walters does not apply in this case.

Brown applies when more than one theory of liability arises, but it is unclear which the fact finder chose. "A factfinder may enter a general verdict of guilt even when the charge could have been committed by two or more means, as long as the evidence supports at least one of the means beyond a reasonable doubt." Brown, 65 M.J. at 359. Here, however, only one theory of liability was present to the members for each specification (unlawful force or lack of consent), so there is no ambiguity there either.

In this case, Specifications 1 and 4 of Charge I were separate specifications that alleged two different time periods – though overlapping – and two separate instances of misconduct. Further, the trial counsel specifically oriented the panel to which specification applied to which misconduct and specifically highlighted the differences between Specification 1 and Specification 4. Moreover, the evidence at trial, specifically Ms. BE's testimony as to the specific dates each incident occurred, corresponds directly to the charged timeframes for each respective specification.

This Court recently had a similar case in United States v. Kight, ACM 40337, 2024 CCA LEXIS 110 (A.F. Ct. Crim. App. 14 March 2024). Though that case involved two specifications for which Appellant was convicted (as opposed to the mixed verdict here), the appellant there maintained the verdict was ambiguous because "the panel was never orientated as to which allegation corresponded to which specification," which the appellant argued prevented this Corut from conducting its factual sufficiency review. Id. at *10-11. This Court disagreed, finding that: (1) the specifications indicated two distinct sexual assaults; (2) one assault happened before the other; and, ultimately, (3) "the evidence itself clearly provides this court with an adequate indication, beyond a reasonable doubt, as to what conduct formed the basis for each specification, and in no way inhibits our ability to conduct a factual sufficiency review." Id. at *15-16. This Court added that the victim's testimony "clearly supports two distinct sexual assaults," and highlighted how the assaults took place at different times.

Here, though this case involves a specification for which Appellant was acquitted, the result remains the same as that in Kight. Here, the specifications and evidence, as well as the trial counsel's specific arguments on each specification, provides this Court with more than an adequate indication, beyond a reasonable doubt, as to what conduct formed the basis for

Specification 1 and what conducted formed the basis for Specification 4, and in no way inhibits this Court's ability to conduct a factual sufficiency review for Specification 1.

Appellant seemingly had no issue at trial in terms of understanding what theory and what evidence attached to which specification. Neither Appellant nor his counsel ever objected, raised an issue or alleged any confusion to anything related to the Government's theory on each specification or what facts matched with which specification. Moreover, Appellant at no time during his trial raised a due process or notice claims regarding either Specification 1 or Specification 4, and raises no such issue before this Court in his present brief. Simply put, there was never a question at trial as to what evidence went with what specification. Appellant knew, his counsel knew, the military judge knew, and, most importantly, the members knew.

Just as in Kight, this Court should equally be convinced and deny Appellant's ambiguity claim. Likewise, Appellant's double jeopardy claim, which relies heavily on Stewart and its holding that it was "impossible for the CCA to conduct a factual sufficiency review of Specification 2 without finding as fact the same facts the members found Stewart not guilty of in Specification 1," is unpersuasive because this Court does not have to rely on any facts related to Specification 4 (the flying incidents) to conduct his factual sufficiency review of Specification 1 (the bullwhip and ball gag incidents). There is no ambiguity issue or double jeopardy issue present in this case. Therefore, this Court should deny Appellant's claim.

## VI.

## THE MILITARY JUDGE DID NOT ERR IN SENTENCING APPELLANT.

### *Standard of Review*

This Court reviews issues of sentence appropriateness de novo. United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006).

### *Additional Facts*

At trial, the military judge sentenced Appellant as follows:[9]

| Charge/Specification | Confinement Term | Concurrent/Consecutive |
|---|---|---|
| *Charge I, Specification 1* | *2 Years* | *Concurrent with Charge I, Specification 2 and Charge II, Specification 2* |
| *Charge I, Specification 2* | *2 Years* | *Concurrent with Charge I, Specification 1 and Charge II, Specification 2* |
| **Charge I, Specification 3** | **3 Years** | **Concurrent with Charge II, Specification 1** |
| Charge I, Specification 5 | 6 Months | Concurrent with Charge I, Specification 7 |
| Charge I, Specification 6 | 18 Months | |
| Charge I, Specification 7 | 1 Year | Concurrent with Charge I, Specification 5 |
| Charge I, Specification 9 | 1 Year | |
| **Charge II, Specification 1** | **2 Years** | **Concurrent with Charge I, Specification 3** |
| *Charge II, Specification 2* | *1 Year* | *Concurrent with Charge I, Specifications 1 and 2* |
| Charge II, Specification 4 | 3 Months | |
| Charge III and Specification | 3 Months | |

[9] For ease in viewing, all italicized specifications running concurrently with one another, all bolded specifications running concurrently with one another, and all underlined specifications running concurrently with one another.

As a quick recap, in Specification 3, Appellant was charged with raping Ms. BE by penetrating her mouth with his penis using unlawful force on divers occasions between 17 April 2020 and 10 July 2020 within the continental United States. (ROT, Vol. I.) The Government's theory for this offense focused on the number of times Appellant forced Ms. BE to perform oral sex on him. (R. at 1117.) The members convicted Appellant of this specification. (R. at 1248.)

In Specification 6, Appellant was charged with committing a sexual act upon Ms. BE by penetrating her anus with an enema injector without Ms. BE's consent on divers occasions on or about 5 July 2020 at or near Newton, Kansas. (ROT, Vol. I.) The members convicted Appellant of this specification. (R. at 1248.)

In Specification 9, Appellant was charged with abusive sexual contact upon Ms. BE by causing his penis to touch Ms. BE's breasts without her consent on divers occasions between 25 June 2020 and 10 July 2020 within the continental United States. (ROT, Vol. I.) The Government's theory for this offense focused on Appellant's repeated actions against Ms. BE following her surgery both in Tuscaloosa and after leaving Tuscaloosa. (R. at 1126.) The members convicted Appellant of this specification. (R. at 1248.)

***Law***

A military judge is required to determine an exact "term of confinement" for each offense. *See* R.C.M. 1002(d)(2)(A). A military judge is also required to "state whether [each offense's] term of confinement [was] to run concurrently or consecutively with any other [offense's] term ... of confinement." R.C.M. 1002(d)(2)(B). "The terms of confinement for two or more specifications shall run concurrently . . . when each specification involves the same victim and the same act or transaction." R.C.M. 1002(d)(2)(B)(i). "A military judge may

exercise broad discretion in determining whether terms of confinement will run concurrently or consecutively." R.C.M. 1002 (d)(2)(B), Discussion.

***Analysis***

Appellant claims his sentences for Specifications 3, 6, and 9 of Charge I should run concurrently because "they involve the same act or transaction." (App. Br. at 62.)

Undoubtedly, each of these specifications involved the same victim, Ms. BE. However, as detailed above, they do not involve the same act or transaction. Forced oral sex (Specification 3), penetration of Ms. BE's anus with an enema injector (Specification 6), and Appellant's touching Ms. BE's breasts with his penis (Specification 9) are all plainly different acts. Thus, Appellant is ultimately left with arguing this Honorable Court should find these specifications involved "the same transaction." (App. Br. at 64.) Appellant is mistaken.

Appellant highlights that Ms. BE testified that on 5 July 2020, Appellant forced her to perform oral sex, forced two enema injections into her anus, and placed his penis on her breast, all of which occurred on the same evening. (App. Br. at 64.) However, Appellant fails to recognize that while the forced enema injections only occurred on this one evening, he was convicted of forcible oral sex and placing his penis on Ms. BE's breast on divers occasions across a multitude of dates over the course of months that did not involve the enema injections.

For instance, Ms. BE testified that the forced oral sex occurred on numerous occasions between on or about 17 April 2020 and 10 July 2020. She testified that Appellant pulled her head down onto his penis on his airplane. (R. at 564.) On that occasion, Appellant neither placed his penis on her breasts or penetrated her anus with enema injectors. Additionally, the morning after her surgery, while in Tuscaloosa, Alabama, Appellant forced his penis into her

mouth. (R. at 635.) Again, on that occasion, Appellant neither placed his penis on her breasts or penetrated her anus with enema injectors.

On the night after her surgery, Ms. BE testified that Appellant placed his penis between her breasts and eventually ejaculated. (R at 639-43.) On that occasion, Appellant neither forced Ms. BE to perform oral sex or penetrated her anus with enema injectors.

Here, Appellant's acts of forced oral sex and placing his penis on Ms. BE's breast occurred on multiple occasions over the course of several months that were separate and apart from the enema injections. Further, while his acts of forced oral sex and placing his penis on Ms. BE's breast sometimes occurred at the same time, they also occurred separate and apart from one another. Thus, these three specifications were not "the same act or transaction" and the military judge did not err in sentencing Appellant to consecutive confinement sentences for each specification.

Still, Appellant claims error by first citing to United States v. Sneezer, 983 F.2d 920, 924–25 (9th Cir.1992) and its holding that "two counts of rape against the same victim in a short span of time should be grouped." (App. Br. at 65.) However, Appellants fails to note the two rapes "were separated by only a few minutes." Sneezer, 983 F.2d at 925. Moreover, in this case, there are not three specifications of the same offense as in Sneezer (there, two counts of rape), but instead involve three separate offenses. Sneezer is unpersuasive here.

Appellant then turns to United States v. Martin, 528 F.3d 746, 755 (10th Cir. 2008) where a judge grouped two counts of rape and two counts of assault together because they took place over the course of a few hours with little break as one prolonged attack. (App. Br. at 65.) But, yet again, Appellant's acts of forced oral sex and placing his penis on Ms. BE's breast occurred

on multiple occasions over the course of several months that were separate and apart from the enema injections and also took place separate and apart from each other.

Appellant then cites to a comment in the United States Sentencing Guidelines (U.S.S.G.) § 3D1.3 ("Offense Level Applicable to Each Group of Closely-Related Counts"), which states, "For example, if the defendant commits forcible criminal sexual abuse (rape), aggravated assault, and robbery, all against the same victim on a single occasion, all of the counts are grouped together under § 3D1.2." (App. Br. at 65.) Again, however, this case involves two specifications that occurred on divers occasions separate and months apart from the enema injections and also that occurred, on at least one incident for each, separate and apart from each other.

To this point, while Appellant cites to a comment in U.S.S.G. §3D1.3, he fails to note a comment in §3D1.2, which directly addresses grouping, that states where a "defendant is convicted of two counts of assault on a federal officer for shooting at the officer on two separate days," then "The counts are not to be grouped together." *See* U.S.S.G. §3D1.2, comment 3.

In sum, occurrences of Specification 3 took places at times, dates, and locations separate and apart from Specifications 6 and 9 and occurrences of Specification 9 took place at times, dates, and locations separate and apart from Specifications 3 and 6. These specifications did not include the "same acts and transactions," the military judge properly utilized his "broad discretion" in determining these specifications should run consecutively, and this Court should not modify Appellant's sentence.

## VII.

## TRIAL COUNSEL DID NOT COMMIT PLAIN ERROR WHEN QUESTIONING MS. RE.

### *Additional Facts*

During the cross-examination of Ms. BE, Appellant's trial defense counsel asked, "For instance, a few months later, over Christmas break for your children, you traveled to Oregon and Washington to go on a date. You lied to your mom about your whereabouts?" (R. at 715.) Ms.BE answered, "My mom always knows where I travel."

Ms. RE, Ms. BE's mother, testified about what she saw the night of 12 July 2020 as well as her relationships with her daughter and granddaughter. (R. at 908-914.) The trial counsel and Ms. RE had the following exchange:

> ATC: Ma'am, a couple other sort of piece meal questions, first about [Ms. KW]. So, do you ever feel like [Ms. KW] has withheld information from you?
>
> Ms. RE; Not that I'm aware of.
>
> ATC: And then I want to ask you about your daughter, [Ms. BE]. So, going to Christmas time 2020, did she tell you that she was going on any trips around that time?
>
> Ms. RE: Yes.
>
> ATC: Did she tell you where?
>
> Ms. RE: Yes.
>
> ATC: Did she tell you who she was going with?
>
> Ms. RE: Yes.
>
> ATC: Did you ever feel that she was misleading you about this trip?
>
> Ms. RE: No.

ATC: Just a moment, Your Honor.

[Assistant trial counsel conferred with co-counsel.]

ATC: And, so, ma'am, following up to that last question, did she say where she was going on that trip?

Ms. RE: To Washington.

ATC: And then did she say exactly who she was going with?

Ms. RE: No, and I didn't ask.

(R. at 914.)

Later, Appellant's trial defense counsel asked Ms. JJ about Ms. BE going on a trip to Oregon or Washington during Christmas break in 2020. (R. at 1001.) Appellant's trial defense counsel asked, "And to your knowledge, did the knowledge of that trip get relayed to her mother?" (Id.) Ms. JJ responded, "No." (Id.)

***Standard of Review***

A military judge's decision to permit questioning and comment, in the absence of defense objection, is reviewed for plain error. United States v. Lewis, 69 M.J. 379, 383 (C.A.A.F. 2011) (*citing* United States v. Maynard, 66 M.J. 242, 244 (C.A.A.F. 2008)). Under the plain error standard an appellant must demonstrate: "1) an error was committed; 2) the error was plain, clear, or obvious; and 3) the error resulted in material prejudice to substantial rights." Maynard, 66 M.J. at 244 (*quoting* United States v. Hardison, 64 M.J. 279, 281 (C.A.A.F. 2007)).

***Law***

M.R.E. 608(a) permits the credibility of a witness to be attacked or supported by evidence in the form of an opinion, but the evidence may refer only to the witness' character for

truthfulness or untruthfulness. A witness is generally not permitted to opine that another witness is lying or telling the truth. United States v. Birdsall, 47 M.J. 404, 410 (C.A.A.F. 1998); United States v. Marrie, 43 M.J. 35, 41 (C.A.A.F. 1995). The basic premise underlying the exclusion of this type of testimony is, "absent unusual circumstances, opinion testimony on whether or not to believe a particular witness' testimony simply is not deemed helpful to the fact finder, for the fact finders are perfectly capable of observing and assessing a witness' credibility." United States v. Jenkins, 54 M.J. 12, 16 (C.A.A.F. 2000) (*citing* United States v. Cameron, 21 M.J. 59, 63 (C.M.A. 1985)).

In United States v. Hudgins, ACM 38305, 2014 CCA LEXIS 227 (A.F. Ct. Crim. App. 3 April 2014), this Court addressed a similar issue when a trial counsel asked the following questions to a witness about the victim in that case: "Did you ever accuse [the victim] of not telling the truth," and "Did you ever feel that [the victim] was not being honest?" Id. at *44. This Court found no error, "plain or otherwise," in the trial counsel's questions to the witness, stating that the trial counsel "was not attempting to elicit his opinion as to whether [the victim] was truthful in her sexual assault report." Id. at *47. The Court found the question about "not being honest," "was part of a series of questions designed to demonstrate whether [the witness] attempted to coerce [the victim] into filing a sexual assault report," and "was not designed to intrude upon the factfinder's dominion of observing and assessing [the victim's] credibility, and trial counsel did not ask if [the witness] believed [the victim] was telling the truth at trial." Id.

***Analysis***

Here, Appellant claims the trial counsel committed plain error by asking Ms. RE, Ms. BE's mother, if Ms. BE had "misled her" and asking Ms. RE if her granddaughter, Ms. KW, "had ever lied to her." (Ap. Br. at 65-66.) Appellant is incorrect.

First, Appellant misstates the record by stating, "When questioning [Ms.] RE, [Ms.] BE's mother, trial counsel asked [Ms.] RE: 'So, do you ever feel like [KM [sic]] has lied to you?'" (Id., *citing* R. at 914.) However, as shown above, the trial counsel never asked Ms. RE if Ms. KW had ever "lied" to her. Instead, the trial counsel asked if Ms. KW had ever "withheld information from her," a question with entirely different connotations then asking if the 11-year-old had ever "lied" to her. Appellant's error here in citing the record severely hampers his ability to show plain error as he does not address how asking a witness if someone had ever withheld information from them would be plain error.

Yet, even if Appellant had cited the record correctly and argued the question at issue, the outcome remains the same – there is no plain error. Here, trial counsel was not attempting to elicit Ms. RE's opinion as to whether Ms. KW was truthful when Ms. KW told Ms. RE about seeing Appellant assault Ms. BE. Further, the trial counsel did not ask Ms. RE if she believed Ms. KW was telling the truth at trial. Instead, the one question at issue simply asked Ms. RE whether her 11-year-old granddaughter had ever kept things from her, which was designed to highlight the open nature of the relationship between Ms. RE and her granddaughter. Like in Hudgins, this question was not "designed to intrude upon the factfinders dominion of observing and assessing [Ms. KW's] credibility." *See* Hudgins, 2014 CCA LEXIS 227, at *47.

The same holds true for the trial counsel's question to Ms. RE about Ms. BE. Here again, the trial counsel was not attempting to elicit Ms. RE's opinion as to whether Ms. BE was truthful in her sexual assault and assault reports. Instead, the one question, "Did you ever feel that she was misleading you about this trip," was specific as to the circumstances of a trip to Washington that was unrelated to the charges at issue. The question was not designed to intrude upon the factfinder's dominion of observing and assessing Ms. BE's credibility, and trial counsel did not

ask Ms. RE if she believed Ms. BE was telling the truth at trial. Rather, trial counsel asked the question to rebut Appellant's trial defense counsel's previous question to Ms. BE that she had lied to her mother about the trip. In response to this insinuation by the defense that Ms. BE had lied to her mother, the trial counsel simply asked if Ms. Ms. RE whether she felt Ms. BE was being upfront with her mother about traveling to Washington. Notably, the trial counsel would later use this testimony to specifically refute Appellant's argument that Ms. BE had lied to her mother about the trip when he argued, "Her mom took the stand, she said, 'Yeah, I knew she was going to Washington, Oregon, I didn't know or ask about the specifics of what she was doing. I never felt like I was lied to about that. (*See* R. at 1141.) *See* United States v. Carter, 61 M.J 30, 33 (C.A.A.F. 2005) ("Under the 'invited response' or 'invited reply' doctrine, the prosecution is not prohibited from offering a comment that provides a fair response to claims made by the defense."). Again, there is no plain error here.

As to prejudice, Appellant makes no independent prejudice argument here, but instead claims "this improper bolstering compounds the prejudice from the improper arguments" from Issue I above. (App. Br. at 67.) However, Appellant fails to explain how these two questions "compound" any alleged prejudice from the trial counsel's closing argument. The record shows these two questions had no impact on the verdict. The trial counsel never mentioned the question regarding Ms. BW again. While the trial counsel did highlight the question regarding Ms. BE in his closing statement, it was done only to refute Appellant's own argument that Ms. BE had lied to her mother in the past. As discussed in Issue I above, it is not error for the Government to refute the defense's argument that Ms. BE was a liar. Moreover, as noted above, neither of these questions asked directly whether Ms. BW was lying about what she saw on the night of 12 July 2020 or whether Ms. BE was lying about her sexual assault allegations. Instead,

the questions related only to the general nature of the relationship between Ms. RE and Ms. BW and about a trip to Washington that was not the subject of any charges or specifications. As a result, there is no reasonably possibility that these two questions had a substantial influence on the members' verdict. Accordingly, Appellant's claim is lacking and should be denied by this Court.

## VIII.

## APPELLANT'S CONVICTIONS ARE FACTUALLY SUFFICIENT.

### *Standard of Review*

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

### *Law*

The test for factual sufficiency "is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," this Court is "convinced of the accused's guilt beyond a reasonable doubt." United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)). This Court's review of the factual sufficiency of evidence for findings is limited to the evidence admitted at trial. Article 66(d)(1), UCMJ; United States v. Beatty, 64 M.J. 456, 458 (C.A.A.F. 2007) (citations omitted).

In the performance of this review, "the Court of Criminal Appeals applies neither a presumption of innocence nor a presumption of guilt." Washington, 57 M.J. at 399. While this Court must find that the evidence was sufficient beyond a reasonable doubt, it "does not mean

that the evidence must be free of conflict." United States v. Galchick, 52 M.J. 815, 818 (A.F. Ct. Crim. App. 2000) (citation omitted).

***Analysis***

The panel at Appellant's court-martial correctly found Appellant guilty of rape, sexual assault, abusive sexual contact, domestic violence, and the reckless operation of an aircraft and there is no credible basis in the record for this Court to disturb Appellant's just verdict and sentence. Here, the United States presented the panel with ample evidence to convince them of Appellant's guilt beyond a reasonable doubt. This Honorable Court should equally be convinced and affirm Appellant's convictions.

- *Evidence Supporting Each Specification*

With relation to Appellant's conviction for rape in Specification 1 of Charge I, Ms. BE testified that Appellant penetrated her vulva with his penis using unlawful force by using a bullwhip and ball gags on divers occasions within the charged timeframe of 17 May 2020 to 25 May 2020. Ms. BE testified Appellant wrapped a bullwhip around her neck without her knowing and inserted Q-tips into the ball gag, causing her to be unable to breathe. (R. at 580-89.)

As to Appellant's conviction for rape in Specification 2 of Charge I, Ms. BE testified that on 17 May 2020 Appellant penetrated her vulva after rendering her unconscious by using a bullwhip wrapped around her neck. Ms. BE stated that when she regained consciousness, she had Appellant's semen coming out of her vagina and running down her leg. (R. at 580-83.)

As to Appellant's conviction for rape in Specification 3 of Charge I, Ms. BE testified that on divers occasions Appellant placed his penis into her mouth using unlawful force. Ms. BE said Appellant held her head down on his erect penis in Appellant's plane, stuck his penis in her

mouth on multiple occasions right after and in the days following her surgery, and in her bathroom as she was sitting on the toilet trying to use the restroom. (R. at 564, 626-27, 638, 654.)

As to Appellant's conviction for sexual assault in Specification 5 of Charge I, Ms. BE testified Appellant placed his finger into her anus the day before they left Tuscaloosa following her surgery. (R. at 642.)

As to Appellant's conviction for sexual assault in Specification 6 of Charge I, Ms. BE detailed how she was constipated following her surgery and that Appellant inserted an enema injector into her anus multiple times after she told him she did not want to do that. (R. at 653.)

As to Appellant's conviction for sexual assault in Specification 7 of Charge I, Ms. BE testified that after Appellant placed his finger inside her anus, he also inserted his penis into her anus as well. (R. at 642.)

As to Appellant's conviction for abusive sexual contact in Specification 9 of Charge I, Ms. BE testified that Appellant on multiple occasions placed his penis onto or between her breasts following her breast surgery in Tuscaloosa. It happened on the day of her surgery, the day after her surgery, and on multiple occasions once they returned home when Ms. BE would attempt to take showers. (R. at 626-27, 639-43, 658.)

Regarding Appellant's conviction for domestic violence in Specification 1 of Charge II, Ms. BE testified that Appellant suffocated her one night by placing a ball gag in her mouth that was plugged with Q-tops while also pinching her nose, causing her to be unable to breathe. (R at 588-91.) Ms. BE also stated that on another occasions Appellant placed a plastic grocery sack over her head, again causing her to be unable to breathe. (R. at 635-37.)

As to Appellant's conviction for domestic violence in Specification 2 of Charge II, Ms. BE testified that on 17 May 2020, Appellant wrapped a bullwhip around her neck and pulled, causing her to pass out.

As to Appellant's conviction for domestic violence in Specification 4 of Charge II, Ms. BE testified that Appellant pushed her shoulder. (R. at 677.) Ms. KW, Ms. BE's daughter, also witness Appellant pushing "one of [Ms. BE's] shoulders." (R. at 939.)

Finally, as to Appellant's conviction for reckless operation of an aircraft in Charge III, Ms. BE detailed multiple occasions where Appellant had sexual intercourse or engaged in sexual activity with Ms. BE while operating an aircraft, including while taking off and while in flight. (R. at 560-76.)

Additionally, Ms. BE's testimony was corroborated by other evidence. For instance, AFOSI found Appellant's cardboard box full of sex toys exactly where Ms. BE said they would be. (R. at 956.) AFOSI also found Appellant's flight log. (R. at 959-60.) The panel had pictures of Ms. BE's injuries when Appellant shoved her onto the bed. (Pros. Ex. 5.) Additionally, Ms. BW testified to witnessing the fight between Appellant and Appellant shoving Ms. BE. (R. at 939.) Finally, messages sent by Appellant's own witness, Ms. JJ, show that Appellant was the one wanting to reunite with Ms. BE but that Ms. BE had made the decision to end the relationship, telling Ms. JJ that she was "done" with Appellant. (Pros. Ex. 6.)

- *Appellant's Claims*

Here, Appellant generally claims that all of his convictions are factually insufficient. Yet, in doing so, Appellant does not attack any particular specification or any particular element of a specification. Notably, Appellant limits his claim to factual sufficiency and does not allege any of his convictions, or their elements, are legally insufficient.

Instead, Appellant limits his argument to the same generalized attacks on Ms. BE's credibility that proved unpersuasive to the members at trial. These arguments should meet a similar fate before this Honorable Court.

First, Appellant takes issue with Ms. BE staying with Appellant despite her "allegations that he viciously abus[ed] her during this period." (App. Br. at 68.) Appellant claims Ms. BE provided "[n]o credible explanation for this seemingly contradictory behavior." Yet, as detailed above, Ms. BE explained through her testimony exactly why she remained with Appellant despite his acts against her. Ms. BE explained how Appellant got along with her children, how she did not want to take a male role model away from them, how she was trying "to keep the family together," and how that, outside of the sexual acts against her, "he was a really good, genuine sweet guy." (R. at 596, 599-602.) Here, Ms. BE was a single mother who thought she had found a charming, sweet pilot who not only cared for her but treated her children as his own. Considering this circumstances, Ms. BE's internal struggles between the positive attributes she saw in the relationship versus enduring Appellant's abusive attacks against her are understandable, and certainly provides more than a "credible explanation" as to why she tried to stay with Appellant despite his actions.

Next, Appellant claims Ms. BE "launched her barrage of accusations" only after Appellant "cut off the engagement," therein attempting to paint Ms. BE as a scorned and bias woman looking to seek revenge on Appellant. (App. Br. at 3, 69.) However, the record shows the exact opposite. In messages Appellant had with Ms. JJ, Ms. JJ told Appellant that Ms. BE had said she was "done" with Appellant. (Pros. Ex. 6.) In response, Appellant said, "I don't want to lose our relationship. It's too important," "I'm the one that's sorry, I ruined the best relationship I ever had and there's no hope of fixing it," and "You know [Ms. BE]. Once she had

her mind made up, it's made up and there's nothing anyone can do to change it." (Id.) Here, Appellant admitted that he was the one who did not want to lose the relationship, he was the one who ruined their relationship, and, upon finding out that Ms. BE had told Ms. JJ that the couple was "done," said that once Ms. BE's mind was made up, no one could change it. Thus, while Appellant may attempt to paint Ms. BE as someone who invented allegations against Appellant because he broke their relationship off, the record shows Ms. BE ended the relationship, and it was Appellant who sought to get her back. Thus, Appellant's claim is unfounded.

Next, Appellant makes broad accusations about supposed "inconsistent statements" made by Ms. BE about dates when the abuse began, "the nature and volume of the abuse," and "her relationship with Appellant." (App. Br. at 69.) However, Ms. BE provided explanations for each of Appellant's claimed inconsistencies. As to the dates the abuse began, Appellant claims that although Ms. BE testified that the nonconsensual acts began in April 2020, she told law enforcement something "to the effect that nothing she was uncomfortable with had occurred prior to 17 May 2020." (App. Br. at 7, citing R. at 719, 731-33, 787-88.)

However, when confronted by Appellant's trial defense counsel about this supposed inconsistency, Ms. BE explained as follows:

> DC: And so today it's your testimony that it's mid-April the first time that you're your raped, correct? You're sexually assaulted?
>
> Ms. BE: If you're referring to the aircraft, yes.
>
> DC: When you sat down with [the police investigator], he asked you specifically "Umm, and then any point up to that point, and this is before the bullwhip incident, anything before that, umm, that you were uncomfortable with?" And in response you said "No, not at that point. Only after that." Is that what you said?
>
> Ms. BE: I think it's because I already knew he already heard everything else from the other investigation. Because he was in that

> interview as well. So I thought he was asking in addition to what he already heard.

(R. at 719.) Ms. BE further explained she focused on the bullwhip incident with the investigator because "everything got more intense with him, so that was the first very intense thing with a toy that he had used on me," and that she understood the investigator's question "was referring to when it came to that one thing, to that type of intensity in the bedroom." (R. at 731.) Ms. BE continued, "I thought he was wanting to know what was going on in the bedroom with what toys that he had brought out." (R. at 733.) Appellant cites to none of this testimony within his brief. Here, the record does not show an inconsistency in Ms. BE's testimony as to when Appellant's abuse began, but rather shows Ms. BE was confused as to the nature of the investigator's question.

Next, Appellant claims Ms. BE was inconsistent in "the nature and volume of the abuse." (App. Br. at 69, *citing* R. at 720-29, 746-49, 871-72). Appellant first claims that "while [Ms.] BE alleged a lesser number of sexual assaults at trial, she had previously told law enforcement that Appellant has sexually assaulted her '50 to 75 times' . . . and 50 times just in the month after her surgery." (App. Br. at 9, *citing* R. at 720-29.) However, as detailed above, Ms. BE explained that her "50 to 75" estimation was "based on all the different incidents that he had done from start to finish, every single time," adding, "There's multiple stuff that he would do on certain days, certain situations. So I gave him a big approximation based on that." (R. at 722-23.) Considering this context, which Appellant fails to note in this brief, Ms. BE's estimation to law enforcement coincided with her trial testimony. There was no inconsistency here as well.

Appellant also contends Ms. BE's testimony conflicts with a September 2020 protective order that, according to Appellant's description, "described some physical abuse but did not

mention any sexual abuse." (App. Br. at 8, *citing* R. at 746-49.) Yet again, however, Ms. BE explained that she was instructed by officials while filling out the protective order to "only keep it to the July 12th incident" because that would be enough to "get my protection from abuse from him." (R. at 748.) Again, there is no inconsistency here, and Ms. BE provided the members ample reasoning as to why she filed out the protective order as she did.

Finally, Appellant contends Ms. BE provided "inconsistent statements about her relationship with Appellant." (App. Br. at 69, *citing* R. at 720-29, 740, 745, 799-801, 829.) Appellant seemingly bases this claim on Ms. BE's testimony that she had previously told people that she wanted to marry Appellant and how amazing he was, but had also declined two marriage proposals and testified she was "counting down the days" to leave him. (App. Br. at 9-10, *citing* R. at 740, 745, 799, 829.)

However, Appellant fails to note one key piece of Ms. BE's testimony where she stated she told people how much she loved him and how excited she was for their future because "I kept everything happy when I talked to people." (R. at 740.) Plus, as previously discussed, the record overall shows that Ms. BE was very much conflicted as to her relationship with Appellant. Ms. BE's testimony showed she was weighing, the competing interest of trying to continue the relationship (her kids relationship with Appellant, her "wanting to have a marriage with someone that would accepts kids as their own, hoping the couple's sex life would go back to the way it was in the beginning)[10]. However, Ms. BE was also facing the stark reality that Appellant's actions against her were continuing and, worse, escalating. While Ms. BE may have been trying to keep a happy face in public to her family and friends regarding the relationship,

[10] *See* R. at 599-601.

the context of Ms. BE's and Appellant's relationship provides ample reasoning for any supposed "inconsistencies" in Ms. BE's testimony regarding their relationship.

Next, Appellant blindly alleges Ms. BE's "testimony throughout was notably evasive," yet provides no examples or citations to the record. (App. Br. at 69.)

Then, Appellant focuses on Ms. BE's Amazon account and claims she gave "deceptive testimony" about not knowing about the purchases. Yet again, however, Appellant fails to detail Ms. BE's testimony where she explained that Appellant had full access to her Amazon account and that the items were purchased with Appellant's American Express card. (R. at 865, 870, 893.)

Finally, Appellant claims that while the Government "presented no proper character for truthfulness evidence," the defense presented a "long-time friend" who testified to Ms. BE's "poor character for truthfulness." (App. Br. at 69, *citing* R. at 998-1004.) However, Appellant fails to note Ms. JJ admitted in her testimony that she and Ms. BE had "drifted apart," had not spoken in many months, and that she felt cast aside by Ms. BE, which Ms. JJ did not like. (R at 1002, 1005-06.) Further, Ms. JJ's character assessment of Ms. BE is contradicted by Ms. JJ's own statements to Appellant about Ms. BE, where Ms. JJ said about Ms. BE, "I love her to death." (Pros. Ex. 6.) Ms. JJ's credibility assessment is also contradicted by her testimony that the two, when they were closer friends, would talk on the phone, go out to eat, and shop "all the time," which is seemingly odd behavior from Ms. JJ if she genuinely believed Ms. BE was an untruthful person.

In sum, Appellant here simply resurrects the same failed attempts to attack Ms. BE that proved unsuccessful at trial before the members, who had the added privilege of personally observing Ms. BE (as well as Ms. JJ). The evidence adduced at trial, including Ms. BE's

testimony and corroborating evidence to her testimony, shows Appellant raped, sexually assaulted, assaulted and committed abusive sexual contact upon Ms. BE, as well as flew his aircraft in a reckless manner. The record shows that all convicted specifications are factually sufficient. This Court, after weighing the evidence in the record of trial and making allowances for not personally observing the witnesses, should be convinced of Appellant's guilt beyond a reasonable doubt and deny his claim.

## IX.[11]

## 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 adequacy of a military judge's instructions is reviewed de novo. United States v. Dearing, 63 M.J. 478, 482 (C.A.A.F. 2006) (citations omitted). 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*

In United States v. Anderson, No. ACM 39969, 2022 CCA LEXIS 181, at *55-56 (A.F. Ct. Crim. App. Mar. 25, 2022), this Court rejected the same claims Appellant raises now. Then, as Appellant readily admits, our Superior Court affirmed this Court's decision and definitively held that military members do not have a right to a unanimous verdict at court-martial under the Sixth Amendment, Fifth Amendment due process, or Fifth Amendment equal protection. *See*

[11] This issue is raised in the appendix pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2023). Notably, the Supreme Court recently denied certiorari in Anderson. *See* Order List, 601 U.S. __ (Feb. 20, 2024) (available at https://www.supremecourt.gov/orders/courtorders/022024zor_ggco.pdf); *see also* United States v. Cunningham, 83 M.J. 867 (C.A.A.F. 2023), Supreme Court certiorari denied by Cunningham v. United States, 2024 U.S. LEXIS 1430 (U.S., Mar. 25, 2024). Accordingly, the military judge did not err in not providing an instruction for a unanimous verdict, and Appellant's claim must fail.

## CONCLUSION

**WHEREFORE**, this Court should deny Appellant's claims and affirm the findings and sentence.

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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 16 May 2024 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force

16 May 2024

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee*, | ) | MOTION TO EXCEED<br>PAGE LIMIT |
| v. | ) | |
| | ) | ACM 40434 |
| Captain (O-3)<br>ZACHARY R. BRAUM, USAF<br>*Appellant*. | ) | Panel No. 1 |

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

Pursuant to Rules 17.3 and 23.3(q) of the United States Air Force Court of Criminal Appeals Rules of Practice and Procedure, the United States moves to file its Answer to Appellant's Assignments of Error in excess of Rule 17.3's length limitations. This Answer requires exceeding this Honorable Court's length and word limitations due to the nature and number of issues raised by Appellant in his 79-page Assignments of Error brief. Appellant raises a total of nine issues that require in-depth discussion of the facts, motion rulings and witness testimonies.

**WHEREFORE**, the United States respectfully requests this Court grant this motion to exceed length limitations in its Answer.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force

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

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 16 May 2024 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force

(Enclosure: Defense Appellate Exhibit A)

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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| **UNITED STATES,** *Appellee* | **AFFIDAVIT** |
| v. | Before Panel No. 1 |
| Captain (O-3), **ZACHARY R. BRAUM,** United States Air Force, *Appellant* | No. ACM 40434 |

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

**Affidavit of Capt Zachary R. Bruam**

My name is Capt Zachary R. Bruam. I was the accused in this case.

I have read the statements provided by my trial defense counsel regarding the military judge's instructions prior inconsistent statements. Although the wording is unclear, in places my trial defense counsel appear to imply that they discussed whether or not to request the legally accurate prior inconsistent statement instruction but decided not to. I can attest that I was not informed of any such tactical decision. I can further attest that I was very involved in my own defense and I did not witness any discussions on this topic.

To the former point, my counsel never informed me that the prior inconsistent statements could be used substantively, that the military judge's instruction was erroneous, or that they had a tactical reason to omit a request for a different instruction. My counsel never discussed anything related to these subjects with me at all. I notice that none of the affidavits allege that they did inform me of this, so I assume they are acknowledging they did not. While I recognize that attorneys need to make legal decisions, I would have expected to at least be informed if we were giving up a chance for exculpatory substantive evidence. I also note that one of the affidavits states

that the defense strategy was to go for a "full acquittal" and so there was no interest in evidence or instructions that would cut against some but not all of the charges. Of course, a full acquittal was the goal, but at the same time I obviously would have been interested in evidence that would combat some of the charges, even if it would not defeat all the charges. I certainly would have expected to be consulted or at least notified if my counsel were going to pass up evidence that would cut against some of the charges simply because it would not defeat all the charges.

Additionally, throughout my court-martial, I was very involved in the preparation of my own defense. This extended through the court martial itself, including developing the findings instructions in the courtroom and in our defense workspace on breaks. We had significant discussions about findings instructions – but very little of these discussions had to do with the prior inconsistent statement instruction. The only discussion regarding prior inconsistent statement instruction covered the individuals that would be included in the instruction. There was no discussion of a tactical reason to allow the Military Judge to misstate the law, or to gain advantage by excluding substantive consideration of specific statements already on the record. Nothing stated on this topic in any of trial defense counsel affidavits was ever discussed.

I swear under penalty of perjury pursuant to 28 U.S.C. §1746 that the foregoing statement is true to the best of my knowledge and belief.

Signature

13 MAY 2024

Date

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | |
|---|---|
| **UNITED STATES**,<br>*Appellee* | **MOTION FOR ORAL ARGUMENT** |
| v. | Before Panel No. 1 |
| Captain (O-3),<br>**ZACHARY R. BRAUM,**<br>United States Air Force,<br>*Appellant* | No. ACM 40434<br><br>22 May 2024 |

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

Pursuant to Rules 23 and 25 of the Rules of Appellate Procedure, and requests oral argument on behalf of Appellant on the following assignment of error:

**I. WHETHER TRIAL COUNSEL'S ARGUMENTS AMOUNTED TO PROSECUTORIAL MISCONDUCT THAT WARRANTS RELIEF.**

Argument is appropriate given the unique nature of this issue where an unusual volume and variety of improper arguments are at issue. The "vouching" arguments are particularly notable in this case and deserving of more discussion. The government maintains on appeal these arguments were not improper. Controlling precedent, largely unexamined in the government's brief, has found clear and obvious error when examining similar – sometimes nearly verbatim – arguments to those under discussion here. Oral argument will help understand the government's position that there was no error in light of this controlling precedent. A further discussion of prejudice will also be helpful to the Court.

**WHEREFORE**, Appellant respectfully requests this Honorable Court grant this motion for oral argument.

BRIAN A. PRISTERA
Lead Civilian Appellate Defense Counsel
Daniel Conway and Associates

SCOTT R. HOCKENBERRY
Assistant Civilian Appellate Defense Counsel
Daniel Conway and Associates

**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 22 May 2024.

Respectfully submitted,

SCOTT R. HOCKENBERRY
Assistant Civilian Appellate Defense Counsel
Daniel Conway and Associates

22 May 2024

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Captain (O-3)<br>ZACHARY R. BRAUM, USAF<br>*Appellant*. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | OPPOSITION TO MOTION FOR ORAL ARGUMENT<br><br>ACM 40434<br><br>Panel No. 1 |

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

Pursuant to Rules 16, 23(c), and 23.3(a) of this Court's Rules of Practice and Procedure, the United States opposes Appellant's motion for oral argument.

Appellant has now had two opportunities to plead his case to this Court, first by filing his 79-page Assignments of Error brief on 10 February 2024, and second by filing a 40-page reply brief on 22 May 2024. Now, Appellant has moved this Court for oral argument on one of his nine presented issues. (*See* App. Mot. at 1.)

Issue I involves a prosecutorial misconduct issue that this Honorable Court is well-versed and well-equipped to review without the need for oral argument. In his two briefs, Appellant spent nearly 45 pages discussing this issue. This, along with the record and the Government's Answer, which includes a 24-plus page response to this issue, speak for themselves and require no further discussion. Further, Appellant's justification for oral argument is to "help understand the government's position that there is no error." However, the Government submits that its response, over the course of 24 pages, addresses why there is no plain error on this issue. Appellant's also claims that "further discussion of prejudice will also be helpful to the Court," but provides no explanation why his initial and reply briefs, as well as the Government's Answer, all of which discuss prejudice at length, are insufficient discussion on the topic.

As shown, Appellant has been provided sufficient opportunity to make his case before this Court in both his initial and reply briefs. Appellant's motion for a now third opportunity to address this Court is unnecessary, especially considering the extensive briefing from both parties already before this Court.[1]

Finally, this case was docketed with this Court on 13 March 2023. Appellant filed his Assignments of Error brief with this Honorable Court on 10 February 2024, 334 days after docketing. Appellant made his instant motion for oral argument on 22 May 2024, 436 days (or over 14 months) after docketing. Considering this Court's obligations under United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006), partaking in any further delay to schedule and conduct an unwarranted oral argument in this case is unnecessary.

All told, this Court has the record of trial and the written submissions from both parties and Appellant has failed to explain why oral argument is necessary for this Court to decide his case. Here, the positions of each party are clear, and this Court should proceed to issue a decision in due course of its deliberations without the further delay of an unjustified oral argument.

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

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force

[1] Altogether, the two briefs from Appellant and the Government's Answer account for nearly 236 pages of discussion on Appellant's various issues.

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

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court, civilian appellate counsel, and the Air Force Appellate Defense Division on 22 May 2024 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40434** |
| **Appellee** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Zachary R. BRAUM** | ) | |
| **Captain (O-3)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 22 May 2024, Appellant moved for oral argument in the above-styled case. On this same date, the Government opposed the motion.

Oral argument is hereby ordered on the following issue:

> **WHETHER TRIAL COUNSEL'S ARGUMENTS AMOUNTED TO PROSECUTORIAL MISCONDUCT THAT WARRANTS RELIEF.**

Accordingly, it is by the court on this 29th day of May, 2024,

**ORDERED:**

Appellant's Motion for Oral Argument dated 22 May 2024 is **GRANTED**.

Oral argument on this issue will be heard in the courtroom of the United States Air Force Court of Criminal Appeals, located at 1500 West Perimeter Road, Suite 1900, Joint Base Andrews – Naval Air Facility Washington, Maryland, at a time and date to be set by future order of the court.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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|---|---|
| **UNITED STATES**,<br>*Appellee* | **MOTION TO ATTACH DOCUMENTS** |
| v. | Before Panel No. 1 |
| Captain (O-3),<br>**ZACHARY R. BRAUM,**<br>United States Air Force,<br>*Appellant* | No. ACM 40434<br><br>22 May 2024 |

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

Pursuant to Rule 23.3(b) of this Court's rules, appellant moves to attach the following documents: **Def App. Ex. A**: Affidavit of Appellant – 13 May 2024.

Def. App. Ex. A is relevant to Appellant's claim of ineffective assistance of counsel. Appellant explains that his trial defense counsel never informed him of any tactical reason to allow the military judge to give inaccurate instructions and, despite being involved in discussions on findings instructions, he did not hear any discussion of this issue.

**WHEREFORE**, Appellant respectfully requests this Honorable Court grant this Motion to Attach Documents.

BRIAN A. PRISTERA
Lead Civilian Appellate Defense Counsel
Daniel Conway and Associates

SCOTT R. HOCKENBERRY
Assistant Civilian Appellate Defense Counsel
Daniel Conway and Associates

**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 22 May 2024.

Respectfully submitted,

SCOTT R. HOCKENBERRY
Assistant Civilian Appellate Defense Counsel
Daniel Conway and Associates
12235 Arabian Place,
Woodbridge, VA 22192

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| **UNITED STATES**<br>*Appellee* | ) | **NOTICE OF APPEARANCE OF GOVERNMENT COUNSEL** |
| v. | ) | Before Panel No. 1 |
| Captain (O-3)<br>**ZACHARY R. BRAUM.**<br>United States Air Force<br>*Appellant* | ) | No. ACM 40434<br><br>6 June 2024 |

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

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

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

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court, the Appellate Defense Division, and civilian defense counsel on 6 June 2024.

aj, USAF
Appellate Government Counsel
Government Trial & Appellate Operations Division
Military Justice & Discipline Directorate
United States Air Force

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40434** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Zachary R. BRAUM** | ) | |
| **Captain (O-3)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 29 May 2024, this court ordered oral argument in the above-captioned case on the following issue:

> **WHETHER TRIAL COUNSEL'S ARGUMENTS AMOUNTED TO PROSECUTORIAL MISCONDUCT THAT WARRANTS RELIEF.**

Accordingly, it is by the court on this 7th day of June, 2024,

**ORDERED:**

Oral argument in the above-captioned case will be heard at **1000 hours on Tuesday, the 2d day of July 2024**, in the Air Force Court of Criminal Appeals courtroom, 1500 West Perimeter Road, Suite 1900, Joint Base Andrews – Naval Air Facility Washington, Maryland 20762.

FOR THE COURT

V U apt, USAF
Acting Clerk of the Court

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| **UNITED STATES**<br>*Appellee* | ) | **NOTICE OF APPEARANCE OF GOVERNMENT COUNSEL** |
| v. | ) | Before Panel No. 1 |
| Captain (O-3)<br>**ZACHARY R. BRAUM.**<br>United States Air Force<br>*Appellant* | ) | No. ACM 40434<br><br>1 July 2024 |

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

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

MATTHEW D. TALCOTT, Colonel, USAF
Chief
Government Trial & Appellate Operations Division
Military Justice & Discipline Directorate
United States Air Force

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court, the Appellate Defense Division, and civilian defense counsel on 1 July 2024.

aj, USAF
Appellate Government Counsel
Government Trial & Appellate Operations Division
Military Justice & Discipline Directorate
United States Air Force

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40434** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Zachary R. BRAUM** | ) | |
| **Captain (O-3)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 28 October 2022, a general court-martial composed of members convicted Appellant, contrary to his pleas, of three specifications of rape, three specifications of sexual assault, one specification of abusive sexual contact, three specifications of domestic violence, and one specification of reckless operation of an aircraft, in violation of Articles 120, 128, and 113, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920, 928, 913.* The military judge sentenced Appellant to a dismissal, confinement for 9 years, forfeiture of all pay and allowances, and a reprimand.

Upon review of the record of trial, the court noted the following documents were not sealed and should be sealed pursuant to Mil. R. Evid. 412(c)(2): Appellate Exhibits XXI–XXXI, XLV, XLVII, and transcript page 114.

While the trial judge ordered Appellate Exhibits XXI–XXV, XLV, and transcript page 114 be sealed, they were not sealed in the record of trial received by the court.

The court has determined that there is good cause for all the above-mentioned exhibits to be sealed pursuant to Mil. R. Evid. 412(c)(2). *See also* Rule for Courts-Martial 1113(a), Discussion ("Upon request or otherwise for good cause, a military judge may seal matters at his or her discretion."). Therefore, we order the exhibits be sealed. The Clerk of Court will ensure the documents to be sealed are properly sealed in the original record of trial retained by the court, and we order the Government to take the corrective action outlined in the decretal paragraph below.

Accordingly, it is by the court on this 13th day of August, 2024,

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* References in this order to the UCMJ, Military Rules of Evidence (Mil. R. Evid.), and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

**ORDERED:**

The Government shall take all steps necessary to ensure **Appellate Exhibits XXI–XXXI, XLV, XLVII, and transcript page 114** in the possession of any government office, Appellant, counsel for Appellant (trial and appellate), or any other known copy, be retrieved and destroyed if a paper copy, or destroyed if an electronic copy.

However, if appellate government counsel and appellate defense counsel possess any of the documents to be sealed, counsel are authorized to retain copies of same in their possession until completion of this court's Article 66(d), UCMJ, 10 U.S.C. § 866(d), review of Appellant's case, to include the period for reconsideration in accordance with JT. CT. CRIM. APP. R. 31. After this period, appellate government counsel and appellate defense counsel shall destroy any retained copies of the documents to be sealed in their possession.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40434** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **NOTICE OF** |
| **Zachary R. BRAUM** | ) | **PANEL CHANGE** |
| **Captain (O-3)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | |

It is by the court on this 16th day of August, 2024,

**ORDERED:**

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

ANNEXSTAD, WILLIAM J., Colonel, Senior Appellate Military Judge
DOUGLAS, KRISTINE M., Colonel, Appellate Military Judge
MASON, BRIAN C., Lieutenant Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

TANICA S. BAGMON
Appellate Court Paralegal

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40434** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Zachary R. BRAUM** | ) | |
| **Captain (O-3)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 13 August 2024, the court ordered the following materials sealed pursuant to Mil. R. Evid. 412(c)(2): Appellate Exhibits XXI–XXXI, XLV, XLVII, and transcript page 114.

However, upon further review of the record of trial, the court discovered that Appellate Exhibit XXXII was *not* sealed. The court further concludes this document should be sealed pursuant to Mil. R. Evid. 412(c)(2).

The court has determined that there is good cause for Appellate Exhibit XXXII to be sealed pursuant to Mil. R. Evid. 412(c)(2). *See also* Rule for Courts-Martial 1113(a), Discussion ("Upon request or otherwise for good cause, a military judge may seal matters at his or her discretion."). Therefore, we order the exhibit be sealed. The Clerk of Court will ensure the document to be sealed is properly sealed in the original record of trial retained by the court, and we order the Government to take the corrective action outlined in the decretal paragraph below.

Accordingly, it is by the court on this 23d day of August, 2024,

**ORDERED:**

The Government shall take all steps necessary to ensure **Appellate Exhibit XXXII** in the possession of any government office, Appellant, counsel for Appellant (trial and appellate), or any other known copy, be retrieved and destroyed if a paper copy, or destroyed if an electronic copy.

However, if appellate government counsel and appellate defense counsel possess any of the documents to be sealed, counsel are authorized to retain copies of same in their possession until completion of this court's Article 66(d), UCMJ, 10 U.S.C. § 866(d), review of Appellant's case, to include the period for reconsideration in accordance with JT. CT. CRIM. APP. R. 31. After this period, appellate government counsel and appellate defense counsel shall destroy any retained copies of the documents to be sealed in their possession.

FOR THE COURT

OLGA STANFORD, Capt, USAF
Acting Deputy Clerk of Court