UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

NOTICE OF APPEARANCE

UNITED STATES v. Hunt ACM: 40563

To the Clerk of this Court and all parties of record, the undersigned hereby enters an appearance as the appellate counsel for the appellant in the above-captioned case, pursuant to Rule 13 of the Rules of Practice and Procedure of the United States Air Force Court of Criminal Appeals.

I hereby certify that I am admitted to practice before this court.

3/14/2024
Date

Scott Hockenberry
Signature

Digitally signed by Scott Hockenberry
Date: 2024.03.14 08:39:11 -04'00'

Scott Hockenberry — P72357 (MI)
Print Name — Bar Number

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (FIRST)**
v.	)	
	)	Before Panel No. 2
Senior Airman (E-4),	)	
BRANDON B. HUNT,	)	No. ACM 40563
United States Air Force,	)	
Appellant.	)	15 March 2024

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 60 days, which will end on **1 June 2024**. The record of trial was docketed with this Court on 2 February 2024. From the date of docketing to the present date, 42 days have elapsed.[1] 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,

[redacted]
SCOTT HOCKENBERRY
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[1] This request for an enlargement of time is being filed well in advance to avoid any issues since undersigned military appellate defense counsel is on leave from 20-25 March 2024.

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 Air Force Government Trial and Appellate Operations Division on 15 March 2024.

SAMANTHA M. CASTANIEN, Capt, USAF
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18 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) BRANDON B. HUNT, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME No. ACM 40563 Panel No. 2

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

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

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

[redacted]

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel
Government Trial and
Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, civilian defense counsel, and to the Air Force Appellate Defense Division on 18 March 2024.

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel
Government Trial and
Appellate Operations Division
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40563**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Brandon B. HUNT	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 6 May 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Second) 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 10th day of May, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Second) is **GRANTED**. Appellant shall file any assignments of error not later than **1 July 2024**.

Counsel should not rely on any subsequent requests for enlargement of time being granted. Each request will be considered on its merits. Counsel may request, and the court may order *sua sponte*, a status conference to facilitate timely processing of this appeal.

Appellant's counsel is advised that any subsequent motions for enlargement of time, shall include, in addition to matters required under this court's Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time. Counsel is not required to re-address item (1) in each subsequent motion for enlargement of time.

Appellant's counsel is further advised that any future requests for enlargements of time that, if granted, would expire more than 360 days after docketing, will not be granted absent exceptional circumstances.

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	
	)	Before Panel No. 2
Senior Airman (E-4), **BRANDON B. HUNT,** United States Air Force, *Appellant.*	)	No. ACM 40563
	)	6 May 2024

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 an enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **1 July 2024**. The record of trial was docketed with this Court on 2 February 2024. From the date of docketing to the present date, 94 days have elapsed.[1] On the date requested, 150 days will have elapsed.

On 20 July 2023, at Seymour-Johnson Air Force Base, North Carolina, a general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one charge and one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920. R. at 1, 6-8, 394, 423. On the same day, the military judge sentenced Appellant to be reprimanded, reduced to the grade of E-1, confined for nine months, and dishonorably discharged. R. at 423. The convening authority took no action on the findings but

[1] This request for an enlargement of time would typically be filed during the week of 20 May 2024 in accordance with A.F. CT. CRIM. APP. R. 23.3(m)(1). However, undersigned military appellate defense counsel is on leave out of the country during this week and the preceding week. Therefore, this request for an enlargement of time is being filed well in advance to avoid any issues while undersigned military appellate defense counsel is on leave from 10 to 28 May 2024.

disapproved the adjudged reprimand. Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action* – United States v. SrA Brandon B. Hunt, dated 4 August 2023. The convening authority denied Appellant's request to defer the reduction in grade until the entry of judgment. *Id.*

The record of trial is three volumes consisting of six Prosecution Exhibits, two Defense Exhibits, and 18 Appellate Exhibits. The transcript is 423 pages. Appellant is not currently confined.

Through no fault of Appellant, undersigned counsel have been unable complete their review of Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise him regarding potential errors.

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

Respectfully submitted,

[redacted]

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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 Air Force Government Trial and Appellate Operations Division on 6 May 2024.

SAMANTHA M. CASTANIEN, Capt, USAF
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8 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) BRANDON B. HUNT, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40563 Panel No. 3

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.

[redacted]

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 May 2024.

J. PETE FERRELL, Lt Col, USAF
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Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
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(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	
	)	Before Panel No. 2
Senior Airman (E-4) **BRANDON B. HUNT,** United States Air Force, *Appellant.*	)	No. ACM 40563
	)	17 June 2024

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 an enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **31 July 2024**. The record of trial was docketed with this Court on 2 February 2024. From the date of docketing to the present date, 136 days have elapsed. On the date requested, 180 days will have elapsed.

On 20 July 2023, at Seymour-Johnson Air Force Base, North Carolina, a general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one charge and one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920. R. at 1, 6-8, 394, 423. On the same day, the military judge sentenced Appellant to be reprimanded, reduced to the grade of E-1, confined for nine months, and dishonorably discharged. R. at 423. The convening authority took no action on the findings but disapproved the adjudged reprimand. Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action* – United States v. SrA Brandon B. Hunt, dated 4 August 2023. The convening authority denied Appellant's request to defer the reduction in grade until the entry of judgment. *Id.*

The record of trial is three volumes consisting of six Prosecution Exhibits, two Defense Exhibits, and 18 Appellate Exhibits. The transcript is 423 pages. Appellant is not currently confined.

Appellant was advised of his right to a timely appeal. Appellant has been provided an update of the status of undersigned counsels' progress on his case. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

Through no fault of Appellant, undersigned counsel have been unable complete their review of Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise him regarding potential errors.

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

Respectfully submitted,

[redacted]
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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 Air Force Government Trial and Appellate Operations Division on 17 June 2024.

SAMANTHA M. CASTANIEN, Capt, USAF
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21 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) BRANDON B. HUNT, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40563 Panel No. 2

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

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

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

[redacted]

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 21 June 2024.

J. PETE FERRELL, Lt Col, USAF
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Government Trial and Appellate Operations Division
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	
	)	Before Panel No. 2
Senior Airman (E-4) **BRANDON B. HUNT,** United States Air Force, *Appellant.*	)	No. ACM 40563
	)	19 July 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 an Assignments of Error (AOE) brief. Appellant requests an enlargement for a period of 30 days, which will end on **30 August 2024**. The record of trial was docketed with this Court on 2 February 2024. From the date of docketing to the present date, 168 days have elapsed. On the date requested, 210 days will have elapsed.

On 20 July 2023, at Seymour-Johnson Air Force Base, North Carolina, a general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one charge and one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920. R. at 1, 6-8, 394, 423. On the same day, the military judge sentenced Appellant to be reprimanded, reduced to the grade of E-1, confined for nine months, and dishonorably discharged. R. at 423. The convening authority took no action on the findings but disapproved the adjudged reprimand. Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action* – United States v. SrA Brandon B. Hunt, dated 4 August 2023. The convening authority denied Appellant's request to defer the reduction in grade until the entry of judgment. *Id*.

The record of trial is three volumes consisting of six Prosecution Exhibits, two Defense Exhibits, and 18 Appellate Exhibits. The transcript is 423 pages. Appellant is not 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 twelve appellate clients. Appellant's appeal is Mr. Hockenberry's only case pending before this Court in which an AOE brief has not yet been filed, and this case is his first priority before this Court. Mr. Hockenberry has completed his review of the record of trial and is currently researching and outlining for the AOE brief.

Appellate defense counsel is currently assigned 40 cases;[1] 31 cases are pending before this Court (23 cases are pending AOEs) and nine cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). To date, eight cases have priority over the present case:

1. *United States v. Clark*, No. ACM 40461 – This appellant has requested to withdraw from appellate review; however, as of the date and time of this filing, this motion is still pending. Unless and until the motion to withdraw is granted, this appellant's case remains military appellate defense counsel's highest priority at this Court.

2. *United States v. Giles*, No. ACM 40482 – The trial transcript is 791 pages long and the record of trial is comprised of seven volumes containing seven Prosecution Exhibits, 14 Defense Exhibits, and 49 Appellate Exhibits. Appellant is not currently confined. Military appellate defense counsel has not yet completed her review of this appellant's record.

3. *United States v. Baumgartner*, No. ACM 40413 – This appellant's AOE was submitted on 3 June 2024. This Court ordered affidavits from trial defense counsel in this case, due to the

[1] When two new military appellate defense counsel arrive in the office, this caseload will likely be reduced, but only as to the number of cases currently assigned to counsel pending before this Court.

Court no later than 26 July 2024. The Government's Answer is expected within 14 days after, upon which military appellate defense counsel will work on any Reply Brief.

4. *United States v. Casillas*, No. 24-0089/AF – Military appellate defense counsel was assigned to take over this case from an appellate defense counsel who is changing assignments. This case was granted at the CAAF, and undersigned counsel assisted with the Grant Brief (submitted today, 19 July 2024) and will be handling the Reply Brief and any oral argument.

5. *United States v. Baker*, No. ACM 40521 – Military appellate defense counsel has requested to withdraw as counsel from this case so a more available military appellate defense counsel can review the case. This motion is pending, and unless and until it is granted, this case remains prioritized above Appellant's.

6. *United States v. Santiago Roldan*, No. ACM S32761 – Military appellate defense counsel has requested to withdraw as counsel from this case so a more available military appellate defense counsel can review the case. This motion is pending, and unless and until it is granted, this case remains prioritized above Appellant's.

7. *United States v. Singleton*, No. ACM 40535 – The trial transcript is 1,738 pages long and the record of trial is comprised of twelve volumes containing six Prosecution Exhibits, 17 Defense Exhibits, one Court Exhibit, and 89 Appellate Exhibits. Appellant is currently confined. Military appellate defense counsel has not yet completed her review of this appellant's record.

8. *United States v. Kim*, No. ACM 24007 – The record of trial is five volumes consisting of five Prosecution Exhibits, three Defense Exhibits, 27 Appellate Exhibits, and one court exhibit. The transcript is 421 pages. Appellant is not currently confined. Military appellate defense counsel has not yet completed her review of this appellant's record.

Additionally, military appellate defense counsel has two direct appeal clients that were docketed prior to Appellant's case. However, neither this Court nor counsel have received the complete records of trial yet. Depending on when those records are provided, those direct appeal cases may be prioritized over Appellant's. Furthermore, military appellate defense counsel took on eight additional cases from departing military appellate defense counsel. Half of these cases are awaiting a decision from this Court and the remaining half are awaiting a decision at the CAAF. Depending on timing and next steps, these cases may be prioritized over Appellant's case.

Appellant was advised of his right to a timely appeal. Appellant has been provided an update of the status of undersigned counsels' progress on his case. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

Through no fault of Appellant, undersigned counsel have been unable complete their review of Appellant's case so as to brief Appellant on the issues. An enlargement of time is necessary to allow counsel to fully review Appellant's case, advise him regarding potential errors, and prepare the AOE.

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

Respectfully submitted,

[redacted]

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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 Air Force Government Trial and Appellate Operations Division on 19 July 2024.

SAMANTHA M. CASTANIEN, Capt, USAF
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22 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) BRANDON B. HUNT, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40563 Panel No. 2

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

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

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 22 July 2024.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
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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. 2
Senior Airman (E-4) **BRANDON B. HUNT,** United States Air Force, *Appellant.*	)	No. ACM 40563
	)	19 August 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 (EOT) to file an Assignments of Error (AOE) brief. Appellant requests an enlargement for a period of 30 days, which will end on **29 September 2024**. The record of trial was docketed with this Court on 2 February 2024. From the date of docketing to the present date, 199 days have elapsed. On the date requested, 240 days will have elapsed.

On 20 July 2023, at Seymour-Johnson Air Force Base, North Carolina, a general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one charge and one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920. R. at 1, 6-8, 394, 423. On the same day, the military judge sentenced Appellant to be reprimanded, reduced to the grade of E-1, confined for nine months, and dishonorably discharged. R. at 423. The convening authority took no action on the findings but disapproved the adjudged reprimand. Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action* – United States v. SrA Brandon B. Hunt, dated 4 August 2023. The convening authority denied Appellant's request to defer the reduction in grade until the entry of judgment. *Id*.

The record of trial is three volumes consisting of six Prosecution Exhibits, two Defense Exhibits, and 18 Appellate Exhibits. The transcript is 423 pages. Appellant is not 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 twelve appellate clients. Appellant's appeal is Mr. Hockenberry's only case pending before this Court in which an AOE brief has not yet been filed, and this case is his first priority before this Court. Mr. Hockenberry has completed his review of the record of trial and is currently researching and outlining for the AOE brief. However, he is still waiting to confer with military appellate defense counsel after her review of the record.

Military appellate defense counsel is currently assigned 33 cases; 22 cases are pending before this Court (13 cases are pending AOEs) and eleven 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. Giles*, No. ACM 40482 – Undersigned counsel has completed her review of the record and is drafting the AOE. This AOE is expected to be submitted early September, after completing the two anticipated Reply Briefs below.

2. *United States v. Baumgartner*, No. ACM 40413 – The Reply Brief for this case is due 22 August 2024. Undersigned counsel has drafted her portion of the reply and is awaiting civilian counsel's additions and review.

3. *United States v. Casillas*, No. 24-0089/AF – Undersigned counsel was recently assigned to take over this case from an appellate defense counsel who is changing assignments. The Grant Brief was filed 22 July 2024. The Government's Answer is expected on or before 21 August 2024. Upon receipt, undersigned counsel will begin the Reply Brief.

4. *United States v. Leipart*, No. 23-0163/AF – The CAAF issued a decision in this case on 1 August 2024. Undersigned counsel anticipates filing a petition of certiorari to the United States Supreme Court within 90 days, barring any extensions.

5. *United States v. Singleton*, No. ACM 40535 – The trial transcript is 1,738 pages long and the record of trial is comprised of twelve volumes containing six Prosecution Exhibits, 17 Defense Exhibits, one Court Exhibit, and 89 Appellate Exhibits. Appellant is currently confined. Military appellate defense counsel has not yet completed her review of this appellant's record. This appellant's case is at EOT 7.

6. *United States v. Kim*, No. ACM 24007 – The record of trial for this direct appeal is five volumes consisting of five Prosecution Exhibits, three Defense Exhibits, 27 Appellate Exhibits, and one court exhibit. The transcript is 421 pages. Appellant is not currently confined. Military appellate defense counsel has not yet completed her review of this appellant's record. This appellant's case is at EOT 4.

Additionally, military appellate defense counsel took on eight cases from departing military appellate defense counsel. Two of these cases are now pending petitions and supplements to the CAAF; their timing may impact Appellant's case. The remaining cases are awaiting a decision from this Court and the CAAF. Depending on timing and next steps, these other cases may be prioritized over Appellant's case.

Appellant was advised of his right to a timely appeal. Appellant has been provided an update of the status of undersigned counsels' progress on his case. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

Through no fault of Appellant, undersigned counsel have been unable complete their review of Appellant's case so as to brief Appellant on the issues. An enlargement of time is necessary to allow counsel to fully review Appellant's case, advise him regarding potential errors, and prepare the AOE.

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

Respectfully submitted,

[redacted]

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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 Air Force Government Trial and Appellate Operations Division on 19 August 2024.

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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20 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) BRANDON B. HUNT, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40563 Panel No. 2

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

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

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

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
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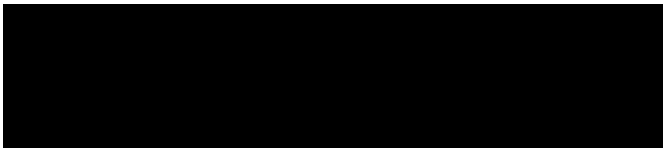
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 20 August 2024.



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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	
	)	Before Panel No. 2
Senior Airman (E-4) **BRANDON B. HUNT,** United States Air Force, *Appellant.*	)	No. ACM 40563
	)	19 September 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 (EOT) to file an Assignments of Error (AOE) brief. Appellant requests an enlargement for a period of 30 days, which will end on **29 October 2024**. The record of trial was docketed with this Court on 2 February 2024. From the date of docketing to the present date, 230 days have elapsed. On the date requested, 270 days will have elapsed.

On 20 July 2023, at Seymour-Johnson Air Force Base, North Carolina, a general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one charge and one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920. R. at 1, 6-8, 394, 423. On the same day, the military judge sentenced Appellant to be reprimanded, reduced to the grade of E-1, confined for nine months, and dishonorably discharged. R. at 423. The convening authority took no action on the findings but disapproved the adjudged reprimand. Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action* – United States v. SrA Brandon B. Hunt, dated 4 August 2023. The convening authority denied Appellant's request to defer the reduction in grade until the entry of judgment. *Id*.

The record of trial is three volumes consisting of six Prosecution Exhibits, two Defense Exhibits, and 18 Appellate Exhibits. The transcript is 423 pages. Appellant is not 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 twelve appellate clients. Appellant's appeal is Mr. Hockenberry's only case pending before this Court in which an AOE brief has not yet been filed, and this case is his first priority before this Court. Mr. Hockenberry has completed his review of the record of trial and is currently researching and outlining for the AOE brief. However, he is still waiting to confer with military appellate defense counsel after her review of the record.

Military appellate defense counsel is currently assigned 34 cases; 21 cases are pending before this Court (15 cases are pending AOEs) and 12 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. Folts*, No. ACM 40322 – On 26 August 2024, this Court issued an opinion in this appellant's case. Military appellate defense counsel is working with another civilian appellate defense counsel on next steps, including drafting a petition and supplement to the CAAF.

2. *United States v. Leipart*, No. 23-0163/AF – The CAAF issued a decision in this case on 1 August 2024. Military appellate defense counsel anticipates filing a petition of certiorari to the United States Supreme Court within 90 days, barring any extensions.

3. *United States v. Giles*, No. ACM 40482 – This AOE was submitted on 5 September 2024. Upon receipt of the Government's Answer Brief, military appellate defense counsel will assess whether a Reply Brief is warranted and then draft any such Reply.

4. *United States v. Casillas*, No. 24-0089/AF – Military appellate defense counsel filed the Reply Brief on 16 September 2024. Military appellate defense counsel anticipates oral argument for this case will be later this year, which will likely impact her ability to review Appellant's case.

5. *United States v. Singleton*, No. ACM 40535 (EOT 8) – The trial transcript is 1,738 pages long and the record of trial is comprised of twelve volumes containing six Prosecution Exhibits, 17 Defense Exhibits, one Court Exhibit, and 89 Appellate Exhibits. This appellant is not currently confined. Military appellate defense counsel has not yet completed her review of the record of trial. This appellant's case is at EOT 8.

6. *United States v. Kim*, No. ACM 24007 – The record of trial for this direct appeal is five volumes consisting of five Prosecution Exhibits, three Defense Exhibits, 27 Appellate Exhibits, and one court exhibit. The transcript is 421 pages. Appellant is not currently confined. Military appellate defense counsel has not yet completed her review of this appellant's record. This appellant's case is at EOT 5.

Additionally, military appellate defense counsel took on eleven cases from departing military appellate defense counsel. Three of these cases are now pending petitions and supplements to the CAAF; their timing may impact Appellant's case. The remaining cases are awaiting a decision from this Court and the CAAF. Depending on timing and next steps, these other cases may be prioritized over Appellant's case.

Appellant was advised of his right to a timely appeal. Appellant has been provided an update of the status of undersigned counsels' progress on his case. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

Through no fault of Appellant, undersigned counsel have been unable complete their review of Appellant's case so as to brief Appellant on the issues. An enlargement of time is necessary to allow counsel to fully review Appellant's case, advise him regarding potential errors, and prepare the AOE.

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

Respectfully submitted,

[redacted]
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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 Air Force Government Trial and Appellate Operations Division on 19 September 2024.

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23 September 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) BRANDON B. HUNT, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40563 Panel No. 2

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

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

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

[redacted]

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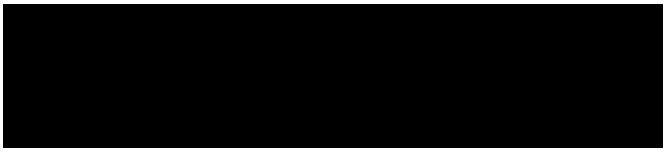
CERTIFICATE OF FILING AND SERVICE

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



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IN THE UNITED STATES AIR FORCE OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

Senior Airman (E-4)
BRANDON B. HUNT,
United States Air Force,
Appellant

BRIEF ON BEHALF OF APPELLANT

Before Panel No. 2

No. ACM 40563

23 October 2024

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

ASSIGNMENTS OF ERROR

I. WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S REPEATED REQUESTS FOR SPECIFIC INSTRUCTIONS ON HOW TO EVALUATE POST-PENETRATION WITHDRAWAL OF CONSENT.

II. WHETHER RELIEF IS WARRANTED WHERE THE MILITARY JUDGE GAVE AN INCORRECT PRIOR INCONSISTENT STATEMENT INSTRUCTION AND DEFENSE COUNSEL FAILED TO OBJECT.

III. WHETHER, IN THIS POST-PENETRATION SEXUAL ASSAULT CASE, APPELLANT'S CONVICTION IS LEGALLY AND FACTUALLY INSUFFICIENT WHERE HE WAS CHARGED

WITH "PENETRATING" THE VICTIM WITHOUT CONSENT BUT THE VICTIM EXPLICITLY ACKNOWLEDGED CONSENTING TO PENETRATION.

IV. WHETHER APPELLANT'S CONVICTION IS FURTHER FACTUALLY INSUFFICIENT DUE TO CREDIBILITY ISSUES WITH THE GOVERNMENT EVIDENCE.

V.[1] WHETHER TRIAL COUNSEL IMPROPERLY ARGUED SIMILARITIES BETWEEN THE CHARGED CONDUCT AND UNCHARGED CONDUCT.

VI. WHETHER RELIEF IS WARRANTED FOR PRE-DOCKETING POST-TRIAL DELAY.

Statement of the Case

On 17-20 July 2023, Senior Airman Brandon B. Hunt (appellant) was tried by a general court-martial composed of officer and enlisted members at Seymour-Johnson Air Force Base, North Carolina. Appellant was convicted, contrary to his pleas, of one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920. (R. at 394). The military judge sentenced appellant to be reprimanded, reduced to the grade of E-1, confined for nine months, and dishonorably discharged.

[1] Appellant personally raises assignment of error (AOE) V and VI in the attached appendix, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

(R. at 423). The convening authority took no action on the findings and disapproved the adjudged reprimand. (Convening Authority Decision on Action, 4 August 2023).

Statement of Facts

1. Background Facts

Appellant and MM matched via the dating application Tinder in April 2022. (R. at 184). After exchanging text messages for some time, MM invited appellant to visit her (about a two-hour drive) for a double date with another couple. (R. at 185). Appellant arrived at MM's apartment in the afternoon on 22 April 2022. (R. at 185-86). MM had to go to work for about two hours that evening but invited appellant to stay at her apartment while she was gone. (R. at 186). At MM's invitation, appellant – who had brought his dog – stayed at MM's apartment with his dog and MM's dog while MM went to work. (R. at 186).

When MM returned from work, her friend NW came over, and the group went out drinking. (R. at 186). NW was accompanied by her boyfriend (identified only as "Tony"). (R. at 185-87). The group went to three bars and bought some beer to bring back to MM's apartment. (R. at 186-87). At the bars, MM and appellant were very "flirty" and "cuddly," kissed, and "seemed really into each other." (R. at 261).

Upon returning the apartment, MM and appellant went into MM's bedroom where they consensually kissed, consensually removed their clothing, and

consensually started having sexual intercourse. (R. at 187-88). MM removed her own clothing and had no problem with engaging in sexual activity with appellant. (R. at 188). After consensual vaginal intercourse in various positions, MM testified that appellant asked for consent to engage in anal intercourse. (R. at 189). MM initially expressed hesitation but then agreed to try it. (R. at 189). MM reported giving consent by saying "Okay, but if I say stop, then we stop." (R. at 189). MM testified that, "right after" after the anal intercourse began consensually, she said stop but appellant continued, and used his hand to cover her mouth. (R. at 189-90, 317). MM testified that appellant continued for "a few minutes" though she could not remember how long exactly. (R. at 189). MM testified that she then made two attempts to pull herself out from underneath appellant, after which he got off her, and she then sat on the side of the bed. (R. at 191). MM acknowledged but did not adopt a prior inconsistent statement to the responding officer that she "said 'Stop, Stop, Stop,' pushed him off, and the sex ended[.]" (R. at 250).

In tension with her trial testimony that she told appellant to stop "right after" beginning the charged act, MM reported to the responding police officer that the anal sex continued for "a few minutes" before it became painful, and she asked appellant to stop. (R. at 302) ("after a few minutes, it began to hurt her, so she asked him to stop[.]"). When confronted with this seeming inconsistency from her testimony,

MM did not deny telling the police officer that the consensual anal sex continued for "a few minutes," but maintained that it did not actually last for a few minutes, it was shorter than that. (R. at 317). On re-direct, MM repeated that she asked for the anal sex to stop "right after" it started. (R. at 317).

MM reported to the responding officer that she had to tell appellant to stop three times. (R. at 302-03). MM did not explain how far apart these three times were. (R. at 303). The responding officer tried to get MM to provide a timeframe for her withdrawal of consent and the subsequent cessation of the act, but MM "wouldn't" give him one. (R. at 303).

After the sexual encounter stopped, MM got dressed and asked appellant to leave. (R. at 192). She then walked into the living room where NW and Tony were on the couch. (R. at 193). MM and appellant were alone in MM's bedroom for approximately 45 minutes before MM went back into the living room. (R. at 262). MM testified she asked NW to come into the bathroom with her. (R. at 193). Once in the bathroom, MM told NW that appellant had assaulted her and said she wanted appellant gone. (R. at 193; 263-64). MM did not reveal to NW that she had initially agreed to engage in consensual anal sex with appellant. (R. at 273).

NW left the bathroom and confronted appellant, telling him that "she said to stop, and he didn't stop" and "that he needed to leave." (R. at 264). Appellant

disputed the accusation, saying that MM was crazy and that MM "had agreed to it[.]"). (R. at 254). On cross, NW acknowledged that she told OSI that appellant even more specifically denied the accusation, saying "I did stop." (R. at 273). When appellant did not leave, MM first called a friend (who was unable to come over) and then the police. (R. at 194). It appears appellant's refusal to leave stemmed from not wanting to drive while impaired. *See* (R. at 296) ("I am impaired. I can't drive nowhere.").

In contradiction to her trial testimony, MM told the 911 operator that she did not acquiesce to appellant's request for consent to try anal intercourse. (Pros. Ex. 3; R. at 216). She further reported that she had "said, yes, to sex, like regular sex, not anal." (Pros. Ex. 3; R. at 218). MM later acknowledged this statement was not true. (R. at 256). MM later told OSI appellant never asked for consent to engage in anal intercourse and she had never told him he could perform anal. (R. at 238). MM admitted on cross that her statement to OSI also "was not the truth[.]" (R. at 238). On recross, MM reiterated that she "did not tell the truth" to either the 911 operator or OSI. (R. at 256-57).

The next morning, appellant initiated a text conversation with MM. (R. at 247). After some back and forth, MM confronted appellant stating: "Thanks for not stopping when I asked you to. I really appreciate it." (R. at 247). Appellant denied

the accusation, replying that he did stop when she asked him to ("I did. I fucking did."). (R. at 247).

There was nothing interfering with sound transmission in the apartment. (R. at 249). During the charged sexual assault, NW and Tony were on the couch in the living room, which was adjacent to the bedroom wall. (R. at 249; 266). MM acknowledged she had not yelled for them to help, despite being in the adjacent room. (R. at 249). NW did not hear any shouting or any sounds of a struggle, despite being "just one wall away" from the charged assault. (R. at 266).

2. Discussion of Instructions on Post-Penetration Withdrawal of Consent

During an initial discussion of instructions, the military judge and defense agreed the standard mistake of fact as to consent instruction was not particularly applicable to the facts as alleged. *See* (R. at 329). As defense counsel pointed out: "I think that it doesn't address the key issue in this case which is withdrawal of consent and whether that was responded to with a stopping of the intercourse." (R. at 329).

To better capture the post-penetration withdrawal of consent scenario presented by the allegations, defense counsel proposed several potential instructions. *See* (R. at 333-34, 340-43; App. Ex. XIII, XIV). In the alternative, defense counsel

requested the Court craft its own instruction to capture the unique issues presented. *See* (R. at 345). Defense counsel's first suggested instruction read:

> **Withdrawal of consent. Although a sexual encounter may begin consensually, either party has the right to stop. A person can use words, gestures, or actions to communicate to the other person that they no longer wish to participate in intercourse. If the government alleges that [MM] withdrew her consent, the government must prove that [MM] reasonably communicate[d] her withdrawal of consent to the Accused before or during intercourse. The government must also prove that the Accused did not stop**; and in doing so, acted with reckless disregard for consent after [MM] communicated withdrawal of consent.

(App. Ex. XIII; R. at 334-35) (emphasis added). After additional discussion of the *mens rea* language at the end this proposed instruction, defense counsel withdrew the request for the later part of the instruction (the non-bolded language in the above block quote). (R. at 340).

Thereafter, defense counsel suggested an alternate instruction, attempting to tailor the mistake of fact as to consent instruction to better capture the post-penetration withdrawal of consent scenario. *See* (App. Ex. XIV; R. at 342-43).

Alternatively, if the court declined to adopt the defense-proposed language, defense counsel requested the military judge craft appropriate language, as long as the issue was addressed by the instructions. *See* (R. at 345).

The government opposed all defense requests for tailored instructions regarding post-penetration withdrawal of consent. *See* (R. at 334-35, 343-44).

The military judge denied the defense requests for specific instructions. *See* (R. at 337-38, 347). The military judge further declined the defense request to craft the court's own instruction to capture the unique issues presented, instead giving only the standard consent and mistake of fact as to consent instructions. *See* (R. at 361-63).

I. WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S REPEATED REQUESTS FOR SPECIFIC INSTRUCTIONS ON HOW TO EVALUATE POST-PENETRATION WITHDRAWAL OF CONSENT.

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).

A military judge's denial of a specific proposed instruction is reviewed for an abuse of discretion. *United States v. Harrington*, 83 M.J. 408, 416 (C.A.A.F. 2023) (citations omitted). In the context of a military judge's denial of a requested instruction, an abuse of discretion will occur if: (1) the requested instruction was correct; (2) the instruction was not substantially covered by the main instruction; and (3) the instruction was on such a vital point in the case that the failure to give it deprived the accused of a defense or seriously impaired its presentation. *Id.* (*citing United States v. Carruthers*, 64 M.J. 340, 346 (C.A.A.F. 2007)).

Law

Military judges have an independent, *sua sponte* duty to provide appropriate instructions. *See, e.g.*, *United States v. Andrews*, 77 M.J. 393, 403–04 (C.A.A.F. 2018); *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008).[2]

Instructional error as to the elements of a crime is tested for prejudice under the standard of harmless beyond a reasonable doubt. *United States v. Upham,* 66 M.J. 83, 86 (C.A.A.F. 2008) (citing *Neder v. United States,* 527 U.S. 1, 13–15 (1999)). "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." *United States v. Wolford,* 62 M.J. 418, 420 (C.A.A.F. 2006) (internal quotation marks and citations omitted). "When an erroneous instruction raises constitutional error, *Neder* requires a reviewing court to assess two factors: (1) whether the matter was contested, and (2) whether the element at issue was established by overwhelming evidence." *Upham,* 66 M.J. at 87.

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[2] In the aftermath of *United States v. Davis*, much of the appellate litigation around instructional error has focused on waiver. 79 M.J. 329, 332 (C.A.A.F. 2020), cert. denied, 141 S. Ct. 355, 208 L. Ed. 2d 85 (2020). This is not an issue in the present case as the defense consistently objected to the omission of any instruction orienting the panel to the proper standards for evaluating the alleged post-penetration sexual assault.

Argument

The central issue in this case was the withdrawal of consent and its aftermath. It was essential that the panel be instructed on how to evaluate this issue. The defense made multiple requests for such instructions, either as drafted by defense counsel, or as crafted by the military judge, but the military judge refused to give any. *See* (R. at 333-34, 337-38, 340-43; 347, 361-33, App. Ex. XIII, XIV, XV).

As the facts played out at trial, it was largely undisputed that (1) the anal sex began consensually, (2) post-penetration, MM withdrew consent, and (3) at some point thereafter appellant stopped. The controversy revolved around the specific timeline: how long the consensual act lasted before the withdrawal of consent – and how long after the withdraw of consent appellant stopped. The evidence was mixed in both regards. MM testified she withdrew consent very soon after penetration (R. at 189-90, 317), but she told the responding officer that she withdrew consent "after a few minutes" of anal sex (R. at 302).[3] The responding officer tried to get MM to give a timeframe for her withdrawal of consent and the subsequent cessation of the act, but MM "wouldn't" give him one. (R. at 303). Appellant, meanwhile,

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[3] Of note, while the military judge erroneously informed the panel this inconsistent statement could not be considered substantively, it is black letter law that prior inconsistent statements omitted without objection – such as this one – are admitted substantively. *See* A.E. IV.

consistently maintained that he stopped when asked. *See* (R. at 247) (appellant's statements to MM via text that he did stop); (R. at 247, 273) (appellant's statements to NW that MM had agreed to sex and he did stop).

The parties made their respective arguments based on these disputed facts. The panel, however, was given no legal framework by which to evaluate this pivotal issue. (*See* App. Ex. XV (where the panel was given only the standard mistake of fact as to consent instruction). The standard instructions simply do not address how to evaluate *the sufficiency of compliance* when a withdrawal of consent happens mid-act.

Worse yet, in such a circumstance, the standard instructions are inaccurate and/or confusing. The military judge instructed the panel: "An expression of lack of consent through words or conduct means there is no consent." (R. at 361). In a normal case, this is a straightforward statement of the law. If an individual expresses a lack of consent, there is no consent, and *beginning* an act under these circumstances constitutes a crime. However, where consent has already been given, and the act has already commenced, this instruction is inaccurate and/or confusing in the absence of more tailored clarifying instructions on the withdrawal of consent. It could be interpreted to mean that the post-hoc expression of lack of consent means there was never consent which, of course, would be wholly inaccurate. It could alternatively

be interpreted to mean that an initially consensual act becomes nonconsensual upon an expressed lack of consent which, in the absence of any temporal orientation, and in conjunction with the surrounding instructions, would mean that the innocent conduct would *immediately* become criminal. This cannot be right either.[4] On the facts of the present case, the instructions as given could easily be read to criminalize even the defense's theory of the case.

Indeed, the parties and the military judge agreed, at least in part, that the standard instructions did not capture the facts as presented. The military judge directly stated as much regarding the standard mistake of fact as to consent instruction. *See* (R. at 329). Nevertheless, rather than formulate a more appropriate instruction, the military judge gave only the standard instructions.[5]

The Kansas Supreme Court faced a similar issue in *State v. Flynn*, holding that:

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[4] The *instantaneous* transition of innocent to criminal conduct would deprive the actor of any ability to avoid criminality and enable any sexual participant to instantly transform their partner into a sex offender by a sudden withdrawal of consent.

[5] To be clear, appellate defense counsel empathize with the position of the military judge: faced with an unusual factual allegation that clearly was not contemplated by the standard instructions. Despite the difficulty, however, this is exactly the type of scenario where the military judge's responsibility to ensure the panel is properly instructed is most crucial. The pre-scripted standard instructions cannot cover every possible scenario.

> [W]hen evidence is presented involving post-penetration withdrawal of consent, *the trial court must do more than simply instruct the jury on the statutory elements* of rape. Instead, in such cases, in addition to the rape elements instruction, the trial court must instruct the jury that rape may occur even though consent was given to the initial penetration, but only if the consent is withdrawn, that withdrawal is communicated to the defendant, and the sexual intercourse continues when the victim is overcome by force or fear.[6]

329 P.3d 429, 438 (Kan. 2014) (emphasis added). The same dynamic is present here; by only instructing the panel on the standard elements of the offense, the military judge gave no framework by which the panel could evaluate the central issue in this case: appellant's response to the withdrawal of consent.

These issues could have been addressed though the framework of the defenses proposed instructions,[7] as further refined if necessary, or by the court's own instruction. The military judge, however, took neither option, and erred by giving only the standard instructions, which clearly did not fit the facts as alleged and left the panel with inaccurate and/or confusing guidance.

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[6] The ultimate language about being overcome by force or fear was applicable in *Flynn* due to the elements as charged. While that issue is not present here, the dynamic that the victim must communicate the withdrawal of consent but the sexual intercourse nonetheless continues is applicable to the present case.

[7] After defense counsel agreed to remove the *mens rea* language, the initial defense-proposed withdrawal of consent instruction mirrored very closely the instruction the Kansas Supreme Court found was mandatory in *Flynn*.

This error was highly prejudicial and undermined a central defense: that appellant stopped with appropriate diligence when asked. This Court, like the Kansas Supreme Court, should clarify for the field that appropriate tailored instructions are necessary in cases alleging a post-penetration withdrawal of consent.

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

II. WHETHER RELIEF IS WARRANTED WHERE THE MILITARY JUDGE GAVE AN INCORRECT PRIOR INCONSISTENT STATEMENT INSTRUCTION AND DEFENSE COUNSEL FAILED TO OBJECT.

Standard of Review

Adopted from A.E. I with the following additions:

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

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

Prior inconsistent statements are generally only admissible for impeachment purposes but "may be considered [as substantive evidence] for any relevant purpose" when, *inter alia*, they are "admitted without objection . . . ." *See* Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 4-1 note 3 (29 Feb. 2020) [Benchbook]; *see also Diaz v. United States*, 223 U.S. 442, 450 (1912) ("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."); *United States v. Powell*, No. 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); 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).

Argument

Here, the military judge made the same error the Army Court reversed for in *Powell*, failing to recognize that prior inconsistent statements omitted without

objection come into evidence substantively. *Powell*, 2022 WL 702904. As the parties and the military judge seemingly agreed, there was evidence that MM and other witnesses made prior inconsistent statements. *See* (R. at 364) (prior inconsistent instruction). Evidence on many of these prior inconsistent statements was admitted without objection, and therefore should have come in substantively, but the military judge erroneously instructed the panel that they came in for impeachment only and specifically forbade the panel from considering them substantively. (App. Ex. XV at 4; R. at 364).

1. Prior inconsistent statements admitted without objection.

Of particular importance, while MM testified that, "right after" after the charged act began consensually, she said stop but appellant continued, evidence was admitted without objection that MM made a prior inconsistent statement indicating the charged act continued consensually for "a few minutes" before it became painful and she asked appellant to stop. *Compare* (R. at 189-90, 317 to R. at 302). This is a crucial point going directly to the heart of the controversy: the timeline of the consensual act, subsequent withdrawal of consent, and appellant's cessation. It was important the members be allowed to consider it substantively.

Similarly, without objection from the government, MM acknowledged but did not adopt a prior inconsistent statement to the responding officer that she "said 'Stop,

Stop, Stop,' pushed him off, and the sex ended[.]" (R. at 250). It was important for the panel to know they could consider this statement substantively, as it arguably presented a complete defense. Substantive consideration of this version of the story, suggesting a much more contemporaneous cessation than MM's trial testimony, would have given the panel a reasonable hypothesis besides guilt.

2. Prejudice

Appellant was prejudiced. The Army Court of Criminal Appeals found prejudice was established in *Powell* when there were numerous prior inconsistent statements from the victim in that case—related to the central issues of her incapacitation, her interest in the appellant, and whether she communicated any non-consent to the charged conduct—and the panel was advised none of them could be considered substantively. 2022 WL 702904. The erroneous instructions left the panel without an "accurate, complete and intelligible statement of the law," and deprived appellant of fair consideration of the evidence in this case. As pointed out above, the military judge directly – and completely erroneously – told the panel they could not consider these vitally important prior inconsistent statements as substantive evidence and those statements went to the very heart of the controversy. The panel should have been able to consider as substantive evidence that the

consensual anal sex continued for a few minutes, and that once MM said stop, she moved from under him and the sex stopped.

The prejudice is enhanced when viewed together with above-discussed absence of instruction on withdrawal of consent. Not only did the military judge give the panel no framework on how to evaluate the circumstances surrounding the withdrawal of consent and its aftermath, but improperly forbade the panel from substantively considering important aspects of the controversy including how long the consensual act continued before the withdrawal of consent, and the crucial events that transpired between the withdrawal of consent and appellant stopping.

3. Ineffective Assistance of Counsel

To the extent this Court finds waiver, it should find ineffective assistance of counsel. *See Harrington v. Richter*, 562 U.S. 86, 105 (2011) ("An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture . . ."); *Everett v. Beard*, 290 F.3d 500, 514 (3d Cir. 2002) (noting counsel may be ineffective for failing to object to or propose instructions.). Defense counsel allowed the military judge to give objectively erroneous instructions. There was no apparent tactical reason for not wanting the defense-favorable instruction at issue.

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

III. WHETHER, IN THIS POST-PENETRATION SEXUAL ASSAULT CASE, APPELLANT'S CONVICTION IS LEGALLY AND FACTUALLY INSUFFICIENT WHERE HE WAS CHARGED WITH "PENETRATING" THE VICTIM WITHOUT CONSENT BUT THE VICTIM EXPLICITLY ACKNOWLEDGED CONSENTING TO HIM PENETRATING HER.

Standard of Review

Issues of legal sufficiency and, historically, factual sufficiency are reviewed de novo. *See United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted); *see also United States v. Harvey*, __ M.J. __, 2024 WL 4128457 (C.A.A.F. 6. Sep. 2024) (discussing new factual sufficiency standard); *United States v. Csiti*, No. ACM 40386, 2024 WL 1856678 (A.F. Ct. Crim. App. 29 Apr. 2024) (same).

Law and Argument

The resolution of this issue hinges on the interpretation of the word "penetrating" as used in the charging language. If, as appellant submits, this word means *entry*, then the evidence is clearly insufficient, and the conviction must be set aside.

Article 120(b), UCMJ, allows the prosecution to plead and prove "sexual act" in a number of ways:

(1) Sexual act.—The term "sexual act" means—

(A) the penetration, however slight, of the penis into the vulva or anus or mouth;

(B) contact between the mouth and the penis, vulva, scrotum, or anus; or

(C) the penetration, however slight, of the vulva or penis or anus of another by any part of the body or any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

Article 120(g)(1), UCMJ, 10 U.S.C. § 920(g)(1). In this case, the government chose to charge a variation on Article 120(g)(1)(A), alleging that appellant "committed a sexual act upon [MM] *by penetrating* [MM's] anus with Senior Airman Brandon Hunt's penis . . . without the consent of [MM]." (charge sheet) (emphasis added).

The problem is that the evidence clearly showed that the penetration was accomplished *with consent*. MM acknowledged giving explicit verbal consent, to anal penetration. (R. at 189). There was no indication in the record that appellant completed a second penetration. *See* (R. at 189-91 (where when MM moved, appellant moved with her and she described continuing pain from penetration). That is because, *post-penetration*, MM alleged she withdrew consent. (R. at 189). That is why these types of withdrawn consent cases are commonly referred to as a "post-penetration" cases. *See, e.g.*, *Flynn*, 329 P.3d 429 (repeatedly referring to such cases as "post-penetration" withdrawal of consent cases).

Appellant submits that the best interpretation of "penetrating" refers to the act of entry. Black's law dictionary defines penetration as: "The *entry* of the penis or some other part of the body or a foreign object into the vagina or other bodily orifice." PENETRATION, Black's Law Dictionary (11th ed. 2019) (emphasis added). Similarly, Ballentine's Law Dictionary defines penetration as: "The *entry* of the private part of the male, at least to some extent, in the private part of the female." PENETRATION, Ballentine's Law Dictionary (3rd ed. 2010) (emphasis added). These definitions also fit common usage. For example, an aircraft is said to penetrate controlled airspace when it enters the airspace. As another example, as pointed out above, the very type of accusation here – withdrawn consent – are commonly referred to as "post-penetration" cases. The charging language further indicates the specific act of entry by modifying the statutory language and specifying that appellant "committed a sexual act upon [MM] by penetrat*ing* [MM's] anus . . ." (Charge sheet) (emphasis added).

If the Court agrees the charging language indicated entry, the evidence is definitionally legally and factually insufficient. As the *entry* in this case was indisputably consensual, the evidence does not satisfy the elements as charged.

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

IV. WHETHER APPELLANT'S CONVICTION IS FURTHER FACTUALLY INSUFFICIENT DUE TO CREDIBILITY ISSUES WITH THE GOVERNMENT EVIDENCE.

Standard of Review

Adopted from A.E. III.

Law and Argument

While the above assignment of error challenges the sufficiency of the evidence based on a question of textual interpretation, this Court should also consider whether the evidence is factually insufficient due to weaknesses in the evidence. As outlined throughout this brief, MM's testimony was inconsistent in numerous ways.

As outlined in A.E. II, MM's prior inconsistent statements indicating the charged act continued consensually for "a few minutes" before it became painful and she asked appellant to stop and that, when she did ask appellant to stop, she "said 'Stop, Stop, Stop,' pushed him off, and the sex ended[.]" These two prior inconsistent statements, individually and collectively, present a reasonable hypothesis that excludes guilt: that after an extended duration of consensually engaging in the charged act, the act ceased promptly upon her withdrawal of consent. Of note, while the military judge erroneously instructed the panel they could not consider this evidence substantively, this Court can and should consider it

substantively in its factual sufficiency review. Additionally, when determining what level of deference to the factfinder is appropriate on this point under the new factual sufficiency standard, this Court should consider that the factfinder was prohibited from considering the point. Under these circumstances, very little if any deference is appropriate. *See Harvey*, 2024 WL 4128457 at *3 (noting that the degree of deference appropriate will depend on the particular item(s) of evidence under consideration).[8] [9] Similarly, given the lack of instructions on this issue, it is difficult to know how much to defer to a panel that was not provided a legal framework to evaluate the unusual issue of a post-penetration withdrawal of consent. Despite the lack of instructions, this Court should state what standard it uses to evaluate this issue in its factual sufficiency review.

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[8] While *Harvey* did not explicitly contemplate a scenario where the factfinder was explicitly – and erroneously – prohibited from considering a piece of evidence, it follows from the logic of *Harvey* that reduced deference would be appropriate under these circumstances. Afterall, how can this Court appropriately defer to a factfinder who is presumed to follow the instructions and was instructed to disregard the correct law in their evaluation of the evidence?

[9] Of course, this Court must evaluate the evidence in furtherance of its factual sufficiency review based on correct legal principles, to include the correct consideration of prior inconsistent statements, regardless of the military judge's erroneous instructions on this point. *See, e.g.*, *United States v. Staggers*, 961 F.3d 745, 756 (5th Cir. 2020) ("Sufficiency is measured against the actual elements of the offense, not the elements stated in the jury instructions.") (citing *Musacchio v. United States*, 136 S. Ct. 709, 715, 193 L.Ed.2d 639 (2016)).

In addition to the presence of a reasonable alternative hypothesis, MM's prior inconsistent statements and acknowledged prior lies also impact her credibility. In this regard, the most concerning fact of all is that MM openly admitted to lying to OSI during its investigation of this case. *See* (R. at 238) (MM admission her statement to OSI "was not the truth[.]"); *see also* (R. at 256-57) (additional MM admission that she "did not tell the truth" to OSI.). This twice admitted lie, presumably under oath, was not a collateral matter: it was about the very heart of the allegation against appellant. *See* (R. at 238) (MM admission she falsely told OSI appellant never asked for consent to engage in anal intercourse and she had never told him he could perform anal.). It should give this Court extreme pause that appellant stands convicted based on the testimony of a witness who admits to lying to OSI about so pivotal an issue as whether consent was sought and obtained.

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

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 23 October 2024.

[redacted]

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APPENDIX

V. WHETHER TRIAL COUNSEL IMPROPERLY ARGUED SIMILARITIES BETWEEN THE CHARGED CONDUCT AND UNCHARGED CONDUCT.

Standard of Review

This Court reviews improper argument de novo and, where no objection is made, it reviews for plain error. *See 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, the 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).

Law and Argument

Trial counsel argued in closing:

> And you'll find throughout that night that the accused just did not listen. He did not listen to [MM] when she told him to stop. He did not listen to [MM] when she told him he must leave. He did not listen to her friend [NW] when she told him the same. He did not listen to the police. And ultimately, he did not listen to the law.

(R. at 368-69). This argument encouraged the panel to consider acts of uncharged misconduct—what amounted to trespass when he failed to comply with requests to leave, and failure to comply with police instructions—and compare their similarities to the charged offense. The government may not use uncharged misconduct to prove that, during the events in question, the accused acted in conformity therewith. *See*

generally Mil. R. Evid. 404(b).[10] But here, that is exactly what the government did. This argument was improper and the error was plain and obvious.

This improper argument was particularly prejudicial because appellant's uncharged activities on the evening in question were, in fact, so unflattering. Appellant belligerently refused to comply with several reasonable requests to leave the premises later in the evening. It would not be hard for laypeople to draw a character inference from this behavior. This instinct had to be suppressed rather than invited. Allowing trial counsel to encourage consideration of this uncharged misconduct to support an inference that appellant similarly refused to comply with MM's request to cease sexual activity played right into this preexisting danger. This created a grave risk the panel would convict based on improper considerations rather than the competent evidence alone.

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[10] Of note, while not included in the record, appellate defense counsel are aware that the government filed a Mil. R. Evid. 404(b) notice to admit evidence of appellant's refusing to leave the apartment and being argumentative with local law enforcement, but the notice specifically provided that the evidence would not be offered to prove character or show appellant acted in conformance with the uncharged acts. Despite so averring, the government's argument suggested just these prohibited purposes. By way of proffer, the stated purpose for both categories of evidence was "to show the Accused's frame of mind and actions directly after the charged offense." Appellate defense counsel are not aware of these being valid Mil. R. Evid. 404(b) purposes but interprets the notice as essentially relating to the presentation of evidence of *res gestae* context evidence directly surrounding the charged timeframe.

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

VI. WHETHER RELIEF IS WARRANTED FOR PRE-DOCKETING POST-TRIAL DELAY.

Standard of Review

Allegations of unreasonable post-trial delay are reviewed de novo. *United States v. Anderson*, 82 M.J. 82, 85 (C.A.A.F: 2022) (citing *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006)).

Law

Prior to the implementation of the Military Justice Act of 2016 (MJA 2016) in January 2019, in pertinent part Article 66(d)(l), UCMJ granted this court the statutory authority to "affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." Since at least 2002, the Court of Appeals for the Armed Forces (CAAF) has recognized that service level courts of appeal have two separate and independent avenues to provide relief for dilatory post-trial processing: (1) the Due Process Clause of the Fifth Amendment; and (2) the statutory basis under Article 66 when there is no showing of "actual prejudice." *See United States v. Grant*, 82 M.J. 814, 819 (Army Ct. Crim. App. 2022) ("Absent a due process violation, we still have authority under Article 66, UCMJ, to grant relief when "appropriate under the circumstances"") (citations omitted).

MJA 2016, applicable in this case, amended Article 66, UCMJ, to remove the "should be approved language" but also added a new section (d)(2), which provides in pertinent part that this court "may provide appropriate relief if the accused demonstrates error or excessive delay in the processing of a court-martial after the judgment was entered into the record . . . ." The Army Court has interpreted the new language as largely a continuation of the prior test for Article 66 relief for post-trial delay. *See United States v. Baylor*, No. ARMY 20210576, 2023 WL 7271147, at *2 n. 3 (A. Ct. Crim. App. Oct. 30, 2023).

Argument

This case involves 197 days of pre-docketing delay.[11] Notably, 137 days of this delay took place after the record was already certified.[12] The processing of this notably short record took significantly longer than the 150-day threshold for facially unreasonable delay to docketing, creating a presumption of unreasonable post-trial delay. *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020).

A presumption of unreasonable post-trial delay triggers the four-factor analysis promulgated in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length

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[11] The sentence was announced on 20 July 2023 and docketing with this Court took place on 2 February 2024.

[12] The transcript was completed on 15 September 2023, the record of trial was certified on 18 September 2023. Record of Trial (ROT) Vol. 2, Court Reporter Chronology; ROT Vol. 2, Certification of the Record of Trial.

of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to a timely review and appeal; and (4) prejudice. *Moreno*, 63 M.J. at 135 (citing *Barker*, 407 U.S. at 530). All four factors must be balanced but no single factor is dispositive. *Id*. at 136 (citations omitted). Balancing of these factors demonstrate relief is warranted.

Regarding the first factor, the length of the delay, at 197 days, the length of the delay is presumptively unreasonable. *See Livak*, 80 M.J. at 633; *see also United States v. Cook*, No. ACM 40333, 2024 CCA LEXIS 276, at *76 (A.F. Ct. Crim. App. 3 Jul. 2024) (the factor resolved in favor of the appellant when the government exceeded the 150-day threshold by 50 days.).

Regarding the second factor, the reasons for the delay are the most aggravating. For no apparent reason, it took 137 days for the case to be docketed with this Court after the record was already certified. This is an excessive amount of time and reflects poorly on the military justice system. The Navy Court recently pointed out that the 1860s Pony Express could transport a package from Missouri to California in eight days. *United States v. Raines*, No. 202400044, 2024 WL 4379737, at *2 (N-M. Ct. Crim. App. 3 Oct. 2024) (citations omitted). It is unacceptable that a century and a half later it took the government seventeen times as long to transmit the record in this case. Delay in the administrative handling and forwarding of the record of trial and related documents to an appellate court is the

least defensible of all and worthy of the least patience. *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990). This stage involves no discretion or judgment and unlike other stages of appeal, it involves no analysis of legal or factual issues. *Id.* Thus, there is no explanation provided here that would justify the need for more than 137 days to carry out the clerical task of forwarding the certified record of trial.

Regarding the third factor, appellant did not demand speedy post-trial processing in the pre-docketing period. However, this factor should not weigh heavily against appellant. The CAAF has found this factor weighs only slightly against an appellant when there is no previous demand for speedy appellate review because ultimately, the government bears the obligation for timely processing. *Moreno*, 63 M.J. at 138. Appellant was confined during the period in which the government was assembling and forwarding his record of trial, and as such, could not contribute to any delay.

Regarding the fourth factor, appellant does not allege specific prejudice. However, even without particularized prejudice, this Court can still find a due process violation when balancing the other three factors, the delay is egregious. *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). The government has consistently failed to meet its post-trial processing obligations. *See United States v. Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *17-19 (A.F. Ct. Crim. App. 7 Jun. 2024) (finding a systemic problem with post-trial processing

errors indicating institutional neglect). The government has also consistently failed to meet the 150-day threshold for getting cases to this Court on appeal.[13] These consistent and unaddressed failures by the government to meet a minimum threshold for post-trial processing that already allows five months for a court-martial record to be transcribed, assembled, and shipped, establish this delay as egregious. Balancing these factors, it is apparent that appellant's due process rights were violated.

Additionally, appellant requests that this Court consider whether Article 66 relief is appropriate given the circumstances, and particularly the extreme and unexplained 137 days of delay between certification and docketing.

This Court has identified a list of factors to consider in evaluating whether relief under Article 66, UCMJ should be granted for post-trial delay. *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F.

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[13] *United States v. Anderson*, 82 M.J. 82, 86 (C.A.A.F. 2022) (481 days); *United States v. Byrne*, No. ACM 40391, 2024 CCA LEXIS 346, *50 (A.F. Ct. Crim. App. 22 Aug. 2024) (290 days); *United States v. Gardner*, No. ACM 39929, 2021 CCA LEXIS 604, *70-74 (A.F. Ct. Crim. App. 16 Nov. 2021) (281 days); *United States v. Dillon*, No. ACM 40463, 2024 CCA LEXIS 322, *2 (A.F. Ct. Crim. App. 2 Aug. 2024) (228 days); *United States v. Cook*, No. ACM 40333, 2024 CCA LEXIS 276, *70 (A.F. Ct. Crim. App. 3 Jul. 2024) (200 days); *United States v. Leipart*, No. ACM 39711, 2023 CCA LEXIS 39, *83 (A.F. Ct. Crim. App. 26 Jan. 2023) (183 days); *United States v. Brown*, No. ACM 40066 (f rev), 2022 CCA LEXIS 710, *65-69 (A.F. Ct. Crim. App. 9 Dec. 2022) (181 days); *United States v. Jackson*, No. ACM 39955, 2022 CCA LEXIS 300, *134-36 (A.F. Ct. Crim. App. 23 May 2022) (176 days); *United States v. Harrington*, No. ACM 39825, 2021 CCA LEXIS 524, *103-04 (A.F. Ct. Crim. App. 14 Oct. 2021) (175 days).

2016)). These factors include how long the delay exceeded appellate review standards, the reasons for the delay, whether the government acted with bad faith or gross indifference, evidence of institutional neglect, harm to the appellant or to the institution, whether relief is consistent with the goals of both justice and good order and discipline, and whether the lower court can provide any meaningful relief. *Id*. No single factor is dispositive, and this Court may consider other appropriate factors. *Id*.

Looking at the first and second factors, the delays have exceeded appellate review standards and the explanations provided within the record show no good cause for such delays. These are outlined *supra* and are not re-articulated here. Both resolve in appellant's favor.

As to the third factor, while there is no evidence the government acted in bad faith, the government's dilatory conduct reveals its indifference. On the issue of institutional neglect, it must be noted the government consistently struggles to timely and accurately complete post-trial processing. *See Valentin-Andino*, 2024 CCA LEXIS 223, at *18 (citations omitted). The lengthy yet non-exhaustive list of cases with delays in post-trial processing should continue to vex this Court. Given the plethora of cases this Court has remanded for the same or similar issues, the Government must be properly incentivized to abide by the law. This Court can and should provide that incentive in this case, wherein the interests of justice and

"appropriateness" weigh in favor of granting appellant relief.

Looking at the fourth factor, this Court has evidence of institutional neglect in post-trial processing. As outlined in footnote 13, supra, the government's inability to timely forward a case for appellant review is established. Moreover, the cases cited by this Court in *Valentin-Andino*, while not focused specifically on pre-docketing delays, show the institutional neglect toward *post-trial processing*, which encompasses all aspects of assembling a complete record and forwarding it for appellate review. The issue of institutional neglect is broader than the specific error seen here, that is, the government shows no diligence in moving a case forward post-conviction. This factor resolves in appellant's favor.

As to the remaining factors, they also resolve in appellant's favor. As outlined *supra*, allowing these delays to continue without meaningful relief harms the military justice system and the Air Force as an institution. The government has repeatedly demonstrated gross indifference to post-trial processing. *Valentin-Andino*, 2024 CCA LEXIS 223, at *18. The government is not "worthy" of this Court's continued "patience." *Dunbar*, 31 M.J. at 73. To the extent providing relief to appellant incentivizes the government to do better, it is consistent with the goals of both justice and good order and discipline. This Court can still provide "meaningful relief" to appellant despite the passage of time. *Gay*, 74 M.J. at 744.

In sum, while none of these factors are dispositive, the "essential inquiry" of the "appropriateness" of relief resolves in appellant's favor. *Toohey*, 63 M.J. at 362.

WHEREFORE, Appellant respectfully requests this Honorable Court provide appropriate relief.

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40563**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Brandon B. HUNT	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 23 October 2024, Appellant submitted his assignments of error brief in which he personally raised an issue claiming his "trial defense counsel improperly argued similarities between the charged conduct and the uncharged conduct."

On 13 November 2024, the Government filed a Motion to Compel Affidavits for Ineffective Assistance of Counsel. The Government requests this court compel Appellant's trial defense counsel, Mr. Chris Pope and Captain Panashe P. Nhekairo, to provide affidavits or declarations in response to the claimed ineffective assistance of counsel within 30 days of our order. According to the Government, Appellant's trial defense counsel both indicated they would not provide a declaration absent an order by this court. Appellant did not respond to this motion.

Also on 13 November 2024, the Government moved for an enlargement of time in which to file its answer brief until 14 days after this court receives trial defense counsel's declarations or affidavits in accordance with this court's anticipated grant of the Government's motion to compel affidavits. Appellant did not respond to this motion.

Accordingly, it is by the court on this 21st day of November 2024,

ORDERED:

The Government's Motion to Compel Affidavits is **GRANTED**. Mr. Chris Pope and Captain Panashe P. Nhekairo are ordered to provide affidavits or declarations to the court with specific and factual responses to Appellant's claim that trial defense counsel were ineffective.

A responsive affidavit or declaration by each counsel will be provided to the court not later than **21 December 2024**. The Government shall also deliver a copy of the responsive documents 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 **4 January 2025**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

13 November 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	ACM 40563
Senior Airman (E-4) BRANDON B. HUNT, USAF *Appellant*.	)	Panel No. 2

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. CP and Capt PN, 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 Court's receipt of Mr. CP's and Capt PN's affidavits in order to properly and completely respond to Appellant's brief. To avoid any confusion, the United States respectfully asks this Court to set specific due dates for both the affidavits/declarations and the brief.

Mr. CP and Capt PN represented Appellant at his trial. Appellant filed his Assignments of Error brief with this Court on 23 October 2024. In it, Appellant alleges as an alternative argument that his defense counsel were ineffective by not objecting to a finding instruction provided by the military judge. The United States requested an affidavit or declaration from each counsel covering the alleged ineffective assistance of counsel claim. Both Mr. CP and Capt

PN responded via email and declined to provide an affidavit or declaration until ordered to do so by this Court.

The United States requires an affidavit from Mr. CP and Capt PN 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 that only Appellant's trial defense counsel can explain.

Accordingly, the United States, in a separate motion, has requested this Court Mr. CP and Capt PN 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 22 November 2024. 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 claim, which cannot be analyzed until Mr. CP's and Capt PN's affidavits are received. Barring unforeseen circumstances, the United States believes fourteen days is sufficient to prepare a proper a 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 2 February 2024. Appellant filed his Assignment of Error brief with this Honorable Court on 23 October 2024, 264 days after docketing. This is the United States' first request for an enlargement of time. As of the date of this request, 285 days have elapsed since docketing.

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

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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 13 November 2024 via electronic filing.

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13 November 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	MOTION TO COMPEL AFFIDAVITS FOR INEFFECTIVE ASSISTANCE OF COUNSEL
v.	)	
	)	ACM 40563
Senior Airman (E-4) BRANDON B. HUNT, USAF *Appellant*.	)	Panel No. 2

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. CP and Capt PN, to provide an affidavit or declaration in response to Appellant's alleged ineffective assistance of counsel claim.[1]

Mr. CP and Capt PN represented Appellant at his trial. Appellant filed his Assignments of Error brief with this Court on 23 October 2024. In it, Appellant alleges as an alternative argument that his defense counsel were ineffective by not objecting to a finding instruction provided by the military judge. The United States requested an affidavit or declaration from each counsel covering the alleged ineffective assistance of counsel claim. Both Mr. CP and Capt PN responded via email and declined to provide an affidavit or declaration until ordered to do so by this Court.

[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 affidavits or declarations in order to properly and completely respond to Appellant's brief.

The United States requires an affidavit from Mr. CP and Capt PN 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 that only Appellant's trial defense counsel can explain.

Accordingly, the United States respectfully requests this Court order Mr. CP and Capt PN to provide a declaration or 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.

[redacted]

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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 13 November 2024 via electronic filing.

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40563**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Brandon B. HUNT	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 23 October 2024, Appellant submitted his assignments of error brief in which he raised an issue claiming "the military judge gave an incorrect prior inconsistent statement instruction and [trial] defense counsel failed to object."

On 13 November 2024, the Government filed a Motion to Compel Affidavits for Ineffective Assistance of Counsel. The Government requests this court compel Appellant's trial defense counsel, Mr. Chris Pope and Captain Panashe P. Nhekairo, to provide affidavits or declarations in response to the claimed ineffective assistance of counsel within 30 days of our order. According to the Government, Appellant's trial defense counsel both indicated they would not provide a declaration absent an order by this court. Appellant did not respond to this motion.

Also on 13 November 2024, the Government moved for an enlargement of time in which to file its answer brief until 14 days after this court receives trial defense counsel's declarations or affidavits in accordance with this court's anticipated grant of the Government's motion to compel affidavits. Appellant did not respond to this motion.

This court granted the Government's motions in an order dated 21 November 2024. On 26 November 2024, this court learned that the order erroneously identified the issue of ineffective assistance of counsel. Therefore, we rescind our previous order as noted below.

Accordingly, it is by the court on this 27th day of November 2024,

ORDERED:

The court's 21 November 2024 order is **RESCINDED**.

It is further ordered:

The Government's Motion to Compel Affidavits is **GRANTED**. Mr. Chris Pope and Captain Panashe P. Nhekairo are ordered to provide affidavits or

declarations to the court with specific and factual responses to Appellant's claim that trial defense counsel were ineffective.

A responsive affidavit or declaration by each counsel will be provided to the court not later than **24 December 2024**. The Government shall also deliver a copy of the responsive documents to Appellant's counsel.

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 **7 January 2025**.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Acting Clerk of the Court

27 December 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) BRANDON B. Hunt, USAF *Appellant*.	))))))))	MOTION TO ATTACH DOCUMENTS ACM 40563 Panel No. 2

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 27 November 2024:

- Declaration of Mr. KP, 1 page;
- Declaration of Capt PN, dated 23 September 2024, 1 page.

On 13 November 2024, the United States requested this Honorable Court compel Mr. JP and Capt PN to provide affidavits or declarations regarding Appellant's claim of ineffective assistance of counsel against them. On 27 November 2024, this Honorable Court granted that motion and ordered Mr. KP and Capt PN "provide affidavits or declarations to the court with specific and factual responses to Appellant's claim that trial defense counsel were ineffective." The Order stated that the affidavits or declarations "will be provided to the court not later than 24 December 2024"[1] and that the United States' "answer to Appellant's assignments of error brief will be filed not later than 7 January 2025."

[1] This Honorable Court was closed from 24-26 December 2024. Thus, per Rule 15 of this Court's Rules, these declarations are due to the Court on 27 December 2024.

Mr. KP and Capt PN provided their declarations to undersigned counsel on 24 December 2024.

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

[redacted]

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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 27 December 2024 via electronic filing.

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7 January 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	MOTION TO EXCEED PAGE LIMIT
v.	)	
	)	ACM 40563
Senior Airman (E-4) BRANDON B. HUNT, USAF *Appellant*.	)	Panel No. 2

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 page length limitations.[1] This Answer requires slightly exceeding this Honorable Court's page length limitation due to the nature and number of issues raised by Appellant in his Assignments of Error brief.

On 23 October 2024, Appellant filed his Assignments of Error brief. The brief raises a total of six issues, four raised through counsel and two raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982). Appellant raises factual and legal sufficiency claims involving his sexual assault conviction, requiring in-depth discussions of the facts and witness testimonies regarding that conviction. Additionally, within his factual and legal sufficiency claim, Appellant invites this Court do adopt a new standard for the term "penetration," which requires an in-depth analysis of case law spanning federal, state, and military jurisdictions. Appellant also raises issues regarding multiple instruction rulings, requiring in-depth analysis on discussions between the parties and the military judge. Further, while Appellant raises an alternative ineffective assistance of counsel argument that spans just one paragraph in his brief,

[1] While the 58-page filing does exceed 50 pages, it does not exceed 20,000 words. *See* Rule 17.3.

the Government's response to Appellant's alternative claim involves a more thorough response. Finally, Appellant raises a post-trial delay issue, requiring analysis of Appellant's record of trial and post-trial processing.

WHEREFORE, the United States respectfully requests this Court grant this motion to slightly exceed length limitations in its Answer.

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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 7 January 2025 via electronic filing.

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7 January 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	ACM 40563
Senior Airman (E-4) BRANDON B. HUNT, USAF *Appellant*.	)	Panel No. 2

ANSWER TO ASSIGNMENTS OF ERROR

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	
	)	ACM 40563
Senior Airman (E-4) BRANDON B. HUNT, USAF *Appellant*.	)	Panel No. 2

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

ISSUES PRESENTED

I.

WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S REPEATED REQUESTS FOR SPECIFIC INSTRUCTIONS ON HOW TO EVALUATE POST-PENETRATION WITHDRAWAL OF CONSENT?

II.

WHETHER RELIEF IS WARRANTED WHERE THE MILITARY JUDGE GAVE AN INCORRECT PRIOR INCONSISTENT STATEMENT INSTRUCTION AND DEFENSE COUNSEL FAILED TO OBJECT?

III.

WHETHER, IN THIS POST-PENETRATION SEXUAL ASSAULT CASE, APPELLANT'S CONVICTION IS LEGALLY AND FACTUALLY INSUFFICIENT WHERE HE WAS CHARGED WITH "PENETRATING" THE VICTIM WITHOUT CONSENT BUT THE VICTIM EXPLICITLY ACKNOWLEDGED CONSENTING TO PENETRATION?

IV.

WHETHER APPELLANT'S CONVICTION IS FURTHER FACTUALLY INSUFFICIENT DUE TO CREDIBILITY ISSUES WITH THE GOVERNMENT EVIDENCE?

V.[1]

WHETHER TRIAL COUNSEL IMPROPERLY ARGUED SIMILARITIES BETWEEN THE CHARGED CONDUCT AND UNCHARGED CONDUCT.

VI.

WHETHER RELIEF IS WARRANTED FOR PRE-DOCKETING POST-TRIAL DELAY?

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

MM, a certified nurse assistant who lived in Morehead City, North Carolina, met Appellant on the Tinder dating app. (R. at 184.) MM testified the two matched on Tinder, talked for a few days, and then met on 22 April 2022. During those few days, MM testified the two talked on Tinder for a little bit, exchanged phone numbers, and then began texting. (R. at 185.)

On the evening of 22 April, MM's friend Ms. NW was going on a date, and MM asked Appellant if he would like to go out for a few drinks with the other couple. MM and Appellant met up at her house around 1730 or 1800 hours and talked for a bit before MM had to go to work from 1900 to 2100 hours. (R. at 186.) MM testified "we were there long enough to talk for a little bit before I had to leave." (Id.) MM testified everything was fine and Appellant "seemed like a good guy." (Id.) While MM was gone to work, Appellant stayed at her house with his dog and MM's dog.

[1] Issues V and VI are raised in the appendix pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

When MM returned, she began getting ready to go out for the night, and the other couple came over. They then went out drinking. They stopped at one bar and had a beer. After stopping at another bar that was too crowded, the two couples went to a gas station and got beer. (Id.) The two couples then went to another bar where they stayed for 45 minutes to an hour. (R. at 187.) There, they each had a drink and a shot.

After a bit, MM testified she could tell Appellant wanted to leave. She did not want to, but Appellant told her "Let's go. We can leave them here." (Id.) Since MM had driven, she did not want to leave her friends there, so all four eventually ended up leaving. Once back at her house, MM testified she wanted to change into pajamas and that the four were all going to play a card game. MM testified she went to her room and Appellant followed her. The two began kissing, taking their clothes off and began having sex. (R. at 188.) MM testified the two took off their own clothes and testified, "No" when asked if she had any problem with any of that happening.

MM testified the two were in the missionary position having vaginal sex and then changed positions to where she was laying on her stomach and Appellant was on top of her. (R. at 189.) MM described what happened next during her testimony:

> He – we were having vaginal intercourse. He pulled out of me, and he brought up having anal, and I said "I have never done that. I am not into that." He said that he would take it easy and he would take it slow. I said "Okay, but if I say stop, then we stop." As soon as I started to feel it go inside of me, I said "Stop," and I said "Stop, please, stop. I don't like it. It hurts." He said "Shhh, shhh, shhh, it feels good." I kept saying "Stop," and that is when he put his hand over my mouth and he – I could feel him – his head was like beside my shoulder, and he was pushing his body weight down on me.

(Id.) MM testified the anal penetration went on for a few minutes before it stopped. (R. at 189-90.) MM testified she knew she told Appellant to stop multiple times. (R. at 190.) MM testified

she told Appellant to stop "in a loud tone," adding that she was "saying it loud enough to where he could hear me," and that there "was no background noise." (R. at 192.)

When asked if Appellant was fully penetrating her, MM testified "It felt like he was. I don't know how far in he was, but it felt like he was very far in." (Id.) MM testified, "He was just saying 'It feels good. It will feel good.'" (Id.)

MM testified that pain was what was first going through her mind, and that she "was a little scared because I wasn't sure how long it was going to last. Then at one point, I kind of went numb, I stopped thinking. I blanked out. I just felt like I was just there." (R. at 190.) MM continued, "I was scared. I was upset. I wasn't sure – up to this point, everything was okay, so I wasn't really sure what he was capable of doing, so I wasn't sure when he was going to be done." (Id.) MM testified it was "painful to the point where I could feel myself crying but I wasn't, and it made my body go numb from the pain." (R. at 192.)

MM testified as to her efforts to get away from Appellant as well:

> I started to pull myself out from under him using my headboard of my bed, and I – he came with me. Every time I would pull myself, he would pull himself up. After like twice of pulling myself up, he did get off of me. That is when I rolled over and sat on my side of the bed.

(R. at 191.) Once out from underneath Appellant, MM testified she "sat in the fetal position and covered myself up with my blanket, and I started into the bathroom." (Id.) Meanwhile, Appellant was "pulling on my right arm, and he kept saying 'Come snuggle with me, come cuddle with me, come lay with me.'" (Id.) MM testified she told Appellant "No" and to stop touching her.

MM testified she then got up, went to her closet, got dressed, and then told Appellant "I think you should go home." (R. at 192.) Appellant then got angry, saying he had been drinking

and "that I had invited him over to stay the night." (R. at 192-93.) MM testified she responded by going to the living room to get her friend, Ms. NW. MM took Ms. NW to the bathroom and told her everything that happened. MM testified, "I can't remember if I went into detail with her that night, but I know I told her enough to where she wanted him out as well." (R. at 193.)

Ms. NW then went to talk to Appellant. However, Appellant would not leave. (R. at 194.) MM then called a friend, Mr. AM, who was a bouncer at a bar, but he was unable to leave work. The friend recommended MM call the police, so she did. (Id.)

MM testified she called 911 and "told them that I needed the cops to come to my house. I told them that there was a guy there, and that I had been anally raped." (R. at 197.) MM also asked "them to turn their lights off." (Id.)

The 911 call is at Prosecution Exhibit 3. (R. at 213.) During the call, MM says, "I met this guy. We had been talking for a little while, and we went out drinking tonight. I was planning on sleeping with him, whatever. We come back to my house, and he basically raped me. I told him to stop when he tried to do anal, and he would not stop. Now, he is refusing to get out of my house." (R. at 213; *see also* Pros. Ex. 3.) MM also said, "But please tell the cops not to have their lights on because my sister lives in the same complex, and I don't want my family finding out, but now he is yelling at friends who are also here. I just want him to leave, and he won't leave." (R. at 214; *see also* Pros. Ex. 3.) During the call, MM told the 911 operator that Appellant was yelling at her friends. (Id.) When asked during the 911 call if she was strangled or choked, MM responded as follows:

> No. Nothing, like, everything was fine, and he kept saying, like, I am just going to – it is so gross to say on the phone – but he kept saying, like, "I am just going to stick it in your ass," and was, like, "Please don't. I don't do that," and he was like "No, I am going to. It will be fine. I will go easy," and I was, like, "Please don't."

(R. at 215; *see also* Pros. Ex. 3.) Later, MM said on the 911 call, "I said yes, to sex, like regular sex, not anal." (R. at 218; *see also* Pros. Ex. 3.)

MM testified three officers came to her room and that Appellant "wasn't being cooperative with them," adding, "He was arguing with them saying that he doesn't live around here, that he drove 2 hours from here, that I said he could stay the night, and he was being loud with the police officers as well." (R. at 219.) MM also agreed on cross-examination that she told the police officer that night that Appellant said "I am going to stick it in your ass" or words to that effect, that she said "something along the lines of 'No, I have never done that,'" that Appellant said it would be fine and he would take go easy, and that she said, "Okay, but if I say stop, then stop." (R. at 233.)

Eventually, the police got Appellant out of the apartment. According to MM, Appellant slept in his car that night. Once Appellant was out, MM called her mom, asked her to come to her house, and, once at her house, told her mom what happened to her. (R. at 221.)

On cross-examination, MM again stated that she initially consented to anal sex "under the stipulations that if I say, no, stop – that he would stop." (R. at 231.) Also on cross-examination, MM acknowledged that she told Air Force Office of Special Investigations (AFOSI) agents "no" when asked if Appellant had at any point asked her for anal sex of if she had told him he could perform anal sex. (R. at 238.) When asked, "You said to the OSI agents in May, 'He never asked, and I told him I didn't like it when he tried,' correct," MM replied, "Yes." (Id.)

On redirect examination, MM and the trial counsel had the following exchange about whether Appellant ever asked for permission to have anal sex that night:

> TC: Defense counsel also asked you a bunch of questions about whether [Appellant] asked permission to penetrate your anus. I

> believe in the 9-1-1 call, you said – this is what he said "I am going to stick it in your ass." Is that what he said?
>
> MM: Yes.
>
> TC: Would you characterize that as [Appellant] asking permission?
>
> MM: No.
>
> TC: And is that truthfully what he did say?
>
> MM: Yes.
>
> TC: Did he ever at any point ask you "[MM], may I perform anal sex?" or something to that effect?
>
> MM: No.

(R. at 252-53.) MM also again testified that she did not want Appellant to continue to penetrate her anus and that she told him to stop. (R. at 254.)

Ms. NW testified that while MM was in her room with Appellant, she and her date were having intercourse in the living room. (R. at 275.) After MM had been in her room with Appellant for approximately 45 minutes, Ms. NW said MM came out and told Ms. NW that she needed her. (R. at 262.) Ms. NW said MM was "very distraught, shaky," crying, and "was really shaken up." (Id.) Ms. NW testified, "She told me that she had consented to having vaginal sex with him, and then he had flipped her over on her stomach and started having anal intercourse with her, and she kept telling him to stop and he wouldn't stop." (R. at 263.) Ms. NW said MM was crying, hyperventilating, shaking, and "could barely get a word out." (Id.) Ms. NW also said that MM told her that Appellant had "put his hand over her mouth so she couldn't talk." (R. at 264.)

Ms. NW testified that MM asked her to get Appellant out of the apartment. When Ms. NW went to tell Appellant, she said Appellant started yelling, "getting very angry towards me,

and told me that she was crazy and that she had agreed to it and that he wasn't leaving because he had been drinking and she invited him to stay." (Id.)

Mr. AM testified that he was working security at a local bar the night of 22 April 2022 into the morning of 23 April 2022. (R. at 277.) He stated that he saw MM and her friends out that night around 0100 to 0145 hours and later received a call and text messages from MM. (R. at 277-78.) Mr. AM said MM asked him to "go over there and remove [Appellant] from the premises." (R. at 288.) Mr. AM said, "She said basically that they had hooked up; and when he wanted her to do something that she did not, she said no. To which I was basically blunt with her, and told her that you need to call, you know, the local law enforcement. Me going over there is not going to help you with this." (Id.) Mr. AM said MM sounded "very distraught" and "upset." (R. at 289.)

On cross-examination, Mr. AM agreed that MM told him that she and Appellant had consensual sex, that Appellant wanted to try something she did not want to try, that she agreed to have anal sex until she was uncomfortable, and that at some point she wanted Appellant to stop because it hurt. (R. at 291-92.) Mr. AM said that MM told him Appellant did not stop immediately. (R. at 292.)

Officer FN responded to the 911 call that night. (R. at 294.) Officer FN explained what MM told him that night:

> Well, once I got in there, I asked [MM] what was going on, and she told me that she had met [Appellant] and had been out drinking and that during the course of the night they had talked about having sex and that they both went back to her house – or her apartment and was going to have sex, and [Appellant] asked her if he could have anal sex with here, and she said, yes, I would have anal sex with him, but I had never done it before, but I did say we could do it. She said that when he was doing it, it started hurting, so she told him to stop, and did not stop. He kept doing it. She said she told him again

> to stop, and he didn't stop. She said she told him three times to stop, and then she started – she said she started crying, and he eventually did stop.

(R. at 295-96.)

Officer FN then went to talk to Appellant, who was "obviously impaired," "very loud, confrontational," and "not being very cooperative at all." (R. at 296.) Officer FN said Appellant told them they were "not protecting and serving," and that they didn't "know how to do our jobs." (Id.)

On cross-examination, Officer FN and Appellant's civilian defense counsel had the following exchange:

> CDC: With the relationship of the – you just testified that you asked her if she wanted to file charges. The information that you had when you asked that question was that they had agreed to have sex with each other, correct?
>
> Officer FN: Yes, sir.
>
> CDC: That they had agreed to have anal sex even though she had never done that before, correct?
>
> Officer FN: Yes, sir.
>
> CDC: That she allowed Mr. Hunt to begin anal sex, correct?
>
> Officer FN: Yes, sir.
>
> CDC: And that after a few minutes, it began to hurt her, so she asked him to stop, correct?
>
> Officer FN: Yes, sir.
>
> CDC: And he did not stop right away, correct?
>
> Officer FN: Yes, sir.
>
> CDC: She had to ask him two more times, correct?

Officer FN: Yes, sir.

CDC: And in fact, you – when you asked her that question of – or she said that I told him – she said I had [to] say stop three times, correct?

Officer FN: Yes.

(R. at 302-303.)

Ms. DM, MM's mother, testified about receiving a call from MM around 0230 or 0300 hours on the morning of 23 April 2022. (R. at 305.) Ms. DM said MM was "[e]xtremely emotional, just begging for help, and she needed me." (Id.) When she arrived at MM's place, Ms. DM said "you could tell she had been crying," adding that MM was blotchy and red, and "Her breathing, you could tell that she was very upset." (R. at 306.)

At the close of the Government's case, MM was recalled to answer questions by the panel members. On cross-examination, Appellant's civilian defense counsel asked, "Isn't it true that you told [Officer FN] that you allowed [Appellant] to begin the anal sex; and after a few minutes, it began to hurt, so she [sic] asked him to stop?" (R. at 317.) MM responded, "I don't remember exactly what I told the police, but I know that it was not a few minutes, it was shorter than that." (Id.)

On redirect examination, MM was asked, "[W]hen did you tell [Appellant] to stop? How long had he inserted his penis into your anus?" (Id.) MM responded, "It was right after he did." (Id.)

Additional facts necessary to the disposition of this case are discussed in the specific issues below.

ARGUMENT

I.

THE MILITARY JUDGE DID NOT ERR IN DENYING APPELLANT'S PROPOSED INSTRUCTION.

Standard of Review

This Court reviews a military judge's denial of a proposed instruction for an abuse of discretion. United States v. Harrington, 83 M.J. 408, 416 (C.A.A.F. 2023) (*citing* United States v. Carruthers, 64 M.J. 340, 345-46 (C.A.A.F. 2007); United States v. Damatta-Olivera, 37 M.J. 474, 478 (C.M.A. 1993); and United States v. Rasnick, 58 M.J. 9, 10 (C.A.A.F. 2003)).

Law

Generally, a military judge "has substantial discretionary power in deciding on the instructions to give" in response to requests by counsel. Harrington, 83 M.J. at 416 (*citing* Damatta-Olivera, 37 M.J. at 478). In the specific context of a military judge's denial of a requested instruction, an abuse of discretion will occur if: (1) the requested instruction was correct; (2) the instruction was not substantially covered by the main instruction; and (3) the instruction was on such a vital point in the case that the failure to give it deprived the accused of a defense or seriously impaired its presentation. Harrington, 83 M.J. at 416 (*citing* Carruthers, 64 M.J. at 346).

Additional Facts

During discussion between the parties on findings instructions, Appellant's counsel requested a special instruction. (R. at 333.) Appellant's counsel stated, "We believe that the issue in this case – the central issue in this case is the withdrawal of consent and whether [Appellant] reasonably complied with that withdrawal of consent – excuse me – withdrawal of

consent and whether he complied and the period of time in which it took him to comply or not." (Id.) Appellant's counsel argued that the proposed instruction was "an attempt to capture that and give instruction to the panel of this key issue." (Id.) The specific language of the instruction was as follows:

> Withdrawal of consent. Although a sexual encounter may begin consensually, either party has the right to stop. A person can use words, gestures, or actions to communicate to the other person that they no longer wish to participate in intercourse. If the government alleges that [MM] withdrew her consent, the government must prove that [MM] reasonably communicated her withdrawal of consent to the accused before or during intercourse. The government must also prove that [Appellant] did not stop; and in doing so, acted with reckless disregard for consent after [MM] communicated withdrawal of consent."

(Id.)

The Government opposed the instruction by first noting that the "first initial preface of the defense instruction seems to largely just be addressing consent, and then what consent is talking about how it can be given or not given. That is already included in the definition of consent." (R. at 334.) The Government then noted that the defense's proposed instruction "creates two new elements for the offense," namely: (1) "some reasonableness standard on [MM] and how she must have acted;" and (2) "created a *mens rea* requirement [by] saying that [Appellant] must have acted with reckless disregard for consent." (Id.) The Government argued, "We have to look to Congress for the elements, and Congress has clearly detailed that Article 120 –our sexual assault specification here is a general intent crime, and that we should not be creating a *mens rea* element in addition to those elements that are already provided." (R. at 334-35.)

The military judge denied Appellant's proposed instruction, stating as follows regarding the standard consent definition and instruction:

> This case is about consent. In this particular case, the evidence that was parsed out was that she did give consent initially; and at some point, she did withdraw it. The Court does believe that the instruction as is regarding – or I should say that the definition that is listed in all of the instructions that go along with the definition of consent, which states that consent means a freely-given agreement to the conduct at issue by a competent person. The[n] further on down in the instructions that the defense did not have a problem with, it says all the surrounding circumstances are to be considered in determining whether a person gave consent or not. In this particular issue, we have evidence that may be contradictory and that is your job as the defense counsel to make the argument [] based off all of the circumstances – surrounding circumstances, potentially there was consent, that he did exactly what she told him to do, and you have that before you today.

(R. at 337-38.)

Later, Appellant's counsel amended the proposed instruction, stating that "we acknowledge that the *mens rea* request in the requested instruction goes to reasonableness on behalf of the alleged victim and the request for reckless disregard on behalf of [Appellant]. We agree that those should not be a part of it, and we believe that the remainder of the instruction should be tailored to drop those and then complete an analysis of the withdrawal." (R. at 340.) The military judge told Appellant's counsel that she would consider a different version of the instruction if proposed. (R. at 341.)

Appellant's counsel proposed another special instruction, which modified the standard mistake of fact instruction. (App. Ex. XIV.) The instruction included the following language:

> There has been evidence tending to show that, at the time of the alleged offense, [MM] consented to anal sex with [Appellant] and, at some point during the anal sex act, [MM] withdrew her consent to anal sex, and [Appellant] stopped performing the act of anal sex. There is evidence tending to show [Appellant] mistakenly believed

> that [MM's] consent continued until the moment he heard her withdraw consent, and he stopped.
>
> . . .
>
> You should consider the inherent probability or improbability of the evidence presented on this matter. You should consider [Appellant's] age, education, experience, along with the other evidence in this case including, but not limited to that [MM] was engaged in consensual anal sex for some period of time before withdrawing consent.

(Id.)

In summarizing an R.C.M. 802 meeting with the parties, the military judge noted the defense had sent out a proposed instruction, that she "asked the defense if they had any case law," and that the defense "said no." (R. at 342.) During an Article 39(a) session, the military judge opened discussion on the now second proposed instruction by the defense, stating, "After reviewing it, it looks like it is sort of a tailored instruction of the mistake of fact." (Id.) Appellant's counsel responded, "Yes, Your Honor," and then explained how Appellant had, when confronted with the accusation on two occasions, stated that he did stop. (R. at 342-43.)

The Government opposed the proposed instruction. Notably, the Government had no issue with the standard mistake of fact instruction being given to the members. However, the Government objected to the defense's proposed instruction as follows:

> [T]he government absolutely does have objections to all of the various facts that the defense has included in here in what would seem to be, from an outside perspective, certainly from the prosecution perspective, attempting to get the court to adopt the defense's theory of this case, specifically starting in the second paragraph where the defense requests in their instruction that the judge instruct that [MM] consented to anal sex with [Appellant] and at some point during the anal sex act, [MM] withdrew her consent to anal sex, and [Appellant] stopped performing the act of anal sex. I mean, this is the entire defense theory they seemed to be wanting the judge to say, yes, this is how it happened.

> They then go on to say there's evidence tending to show that [Appellant] mistakenly believed that [MM's] consent is continued until the moment he heard her withdraw consent and he stopped. Your Honor, I'm just confused about what that is really saying, that he has a mistaken belief that consent continued until he heard it. Again, Your Honor, this seems to broadly be just the defense theory that they're requesting the court to adopt.
>
> . . .
>
> They do the same thing, Your Honor, in paragraph 5. The last portion there says that they should consider all these different factors, and then one of the factors is that [MM] was engaged in consensual anal sex for some period of time before withdrawing consent. Again, we'd certainly disagree those are the facts in evidence, and the defense is asking that you adopt this position as a matter of fact, the court is saying that you should consider that she was having consensual anal sex for a period of time before she withdrew, whereas she said she withdrew it immediately, right away, it was painful, and she told him to stop, stop, all of that.

(R. at 343-44.) The Government continued, "So all of those factual portions where the defense is just trying to have the court adopt their position, yes, we object. That is not the purpose of an instruction." (R. at 344.) When asked by the military judge if the Government was "okay with the mistake of fact instruction, just not as a tailored version," the trial counsel responded, "Correct, Your Honor. We would not object as Your Honor had it originally in the provided instructions." (R. at 345.)

The military judge denied the second proposed instruction as well stating as follows:

> The facts that are presented in this case are literally meant for the fact finder to determine. I don't think that it is in -- I am in the position to tell the members what the facts are. The facts have been put out there, and the facts that are listed, the members could themselves say that none of that occurred. And what I don't want them to believe is that the court is saying that it did occur. Additionally, you stated -- you made a statement that this stuff is common knowledge to the panel, and if that's the case, then there's no need for an instruction, a proposed instruction.

(R. at 347.) The judge noted that the generalized mistake of fact instruction would be provided to the members. (R. at 348.)

The military judge provided the following instructions on the definition of "consent" and the issue of mistake of fact:

> "Consent" means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.
>
> . . .
>
> All the surrounding circumstances are to be considered in determining whether a person gave consent. The evidence has raised the issue of whether [MM] consented to the sexual conduct listed in the Specification of the Charge. All of the evidence concerning consent to the sexual conduct is relevant and must be considered in determining whether the government has proven the elements of the offense beyond a reasonable doubt. Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven every element of the offense.
>
> The evidence has raised the issue of mistake of fact as to consent. There has been evidence tending to show that, at the time of the alleged offense, the accused mistakenly believed that [MM] consented to the sexual conduct alleged concerning the offense.
>
> Mistake of fact is a defense to the charged offense. "Mistake of fact" means [Appellant] held, as a result of ignorance or mistake, an incorrect belief that [MM] consented to the sexual conduct. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person

that [MM] consented to the sexual conduct.

(R. at 361-62.)

Analysis

Appellant has failed to show the military judge abused her discretion in denying his two proposed instructions at trial. Appellant's proposed instructions were based on no applicable law or precedent and only sought to have the trial court adopt his view of the facts of the case. Further, although it is the burden of Appellant to meet all three of the Carruthers prongs, Appellant fails to analyze each prong individually, let alone meet his burden of proving all three prongs. The military judge properly denied the instructions, and this Court should find no error.

Before this Court, Appellant cites to no military or federal case or precedent to support his claim. Instead, Appellant relies solely on a Kansas Supreme Court holding from 2014 that dealt with the offense of rape by force. (App. Br. at 13-14, *citing* State v. Flynn, 329 P.3d 429, 438 (Kan. 2014).) Appellant's complete reliance on this case is flawed for multiple reasons.

To start, in the decade since Flynn, no other state, federal, or military court has cited to Flynn's instruction requirement, let alone adopted the Kansas Supreme Court holding.[2] Worse still for Appellant, the Flynn Court specifically highlighted their "decision requiring an additional jury instruction is limited to those cases in which rape is alleged to have occurred before July 1, 2011," due to a change in Kansas's rape statute that year. Flynn, 329 P.3d at 438.[3]

[2] While the Army Court of Criminal Appeals has cited to Flynn, the cite was to the Flynn Court's holding that held "the crime of rape was established when consent is withdrawn as to an initially consensual sexual act and one party nevertheless continues the sexual act 'by use of force or fear.'" United States v. Rouse, 78 M.J. 793, 797 (A. Ct. Crim. App. 2019) (*citing* Flynn, 329 at 438. Rouse did not discuss Flynn's finding instruction holding.

[3] The Kansas Supreme Court left "for another day" whether the instruction "would remain appropriate" in cases arising under the new Kansas rape statute. Flynn, 329 at 438. Notably, the

Additionally, as Appellant acknowledges in his brief, Flynn dealt with the offense of rape, which included the added element of fear and/or force. Here, the additional instruction required by the Kansas Supreme Court focused specifically on "sexual intercourse continu[ing] when the victim is overcome by force or fear." Yet, as the military judge noted in her discussions with Appellant's counsel on the proposed instruction, "this case is not in any way, shape, or form about force. This case is about consent." (R. at 337.)

Further, the entire reason for the Flynn Court's holding was because the trial court did nothing "more than simply instruct the jury on the statutory elements of rape." Flynn, 329 P.3d at 438.[4] Yet here, the panel received instructions on much more than just the statutory elements of sexual assault, including receiving extensive instructions on the definitions of "sexual act," "consent," "mistake of fact," and various other terms.

The Army's holding in Rouse is particularly intriguing, as our sister court dealt with a "withdrawal of consent" case where a victim, like in this case, initially consented to engaging in anal sex with the appellant, but then withdrew her consent. Yet, even though the Army Court specifically cited to Flynn, and discussed whether that accused continued the sexual act by the use of force after consent was withdrawn, the Army Court never mentioned, let alone held, that a special "withdrawal" finding instruction was required in that case.

Kansas Supreme Court has not cited Flynn in any case since 2014 and has never addressed this issue further.

[4] Notably, in State v. Bunyard (the case which gave rise to the additional instruction requirement cited in Flynn), the Kansas Supreme Court noted that the instructions in that case did not even define the "overcome by force or fear" element of rape. *See* State v. Bunyard, 133 O.3d 14, 25 (Kan. 2006).

Appellant's reliance on Flynn aside, Appellant's contention that the standard instructions provided to the members in this case were "inaccurate and/or confusing" is flawed. (*See* App. Br. at 12.) Appellant first states the phrase "[a]n expression of lack of consent through words or conducts means there is no consent," is confusing in this case because it "could be interpreted to mean that the post-hoc expression of lack of consent means there was never consent which, of course, would be wholly inaccurate," or "could alternatively be interpreted to mean that an initially consensual act becomes nonconsensual upon an expressed lack of consent." (App. Br. at 12-13.) Appellant claims that would mean that "innocent conduct would immediately become criminal." (App. Br. at 13.) Appellant claims that such an "*instantaneous* transition of innocent to criminal conduct would deprive the actor of any ability to avoid criminality and enable any sexual participant to instantly transform their partner into a sex offender by a sudden withdrawal of consent." (Id.) (emphasis in original.)

Appellant's conjecture here is flawed. A plain reading of the consent definition, which in part states, "An expression of lack of consent through words or conduct means there is no consent," shows that once an expression of lack of consent is made, there is no more consent. *See* Article 120(g)(7)(A), UCMJ. In contrast to Appellant's contentions, the definition in no way implies that an expression of lack of consent somehow invalidates consent obtained up to that point. It also does not imply that consensual acts performed prior to the expression of lack of consent would be transformed into non-consensual acts because of that later expression of lack of consent. Instead, the plain reading of the definition means that once an expression of a lack of consent is given, consent has ceased at that point and moving forward.

Additionally, Appellant's contention that a withdrawal of consent would result in an "instantaneous transition of innocent to criminal conduct" and that he would be "deprive[d] . . .

of any ability to avoid criminality" is similarly flawed, especially in this case. Here, MM's expression of lack of consent was her firmly telling Appellant to stop. At that point, Appellant had the clear ability to avoid criminality by simply doing what MM said – stopping his sexual act and removing himself from her body. Appellant's attempt to contort the well-established definition of consent into a supposedly confusing concept as it relates to withdrawal of consent bases is not persuasive and should be disregarded by this Court.

Finally, Appellant makes two additional claims that are not supported by the record. As noted above, MM's testimony at trial was clear that she told Appellant to stop "[a]s soon as I started to feel it go inside of me." (R. at 189.) But, within the Statement of Facts section of his brief, Appellant claims the following:

> In tension with her trial testimony that she told appellant to stop "right after" beginning the charged act, MM reported to the responding police officer that the anal sex continued for "a few minutes" before it became painful, and she asked appellant to stop. (R. at 302) ("after a few minutes, it began to hurt her, so she asked him to stop[.]").

(App. Br. at 4.) Then, within this issue, Appellant claims MM "told the responding officer that she withdrew consent 'after a few minutes' of anal sex." (App. Br. at 11, *citing* R. at 302.) Appellant's contention that these were MM's words are incorrect.

In fact, neither MM nor the "responding police officer" (Officer FN) ever said the words quoted by Appellant in his brief. Instead, those words – "after a few minutes, it began to hurt her, so she asked him to stop" – were the words of Appellant's own trial defense counsel that were said in a question to Officer FN during recross-examination. Notably, prior to this question, Officer FN had provided no testimony that MM had told him that the anal sex had been

going on for a "few minutes" before she told him to stop. Instead, Officer FN had testified on direct examination as follows as to what MM told him:

> She said that when he was doing it, it started hurting, so she told him to stop, and did not stop. He kept doing it. She said she told him again to stop, and he didn't stop. She said she told him three times to stop, and then she started – she said she started crying, and he eventually did stop.

(R. at 296.) Moreover, Officer FN would later testify that he tried to get MM to "give me like a timeframe" for how far apart her three "no's" were, but that she would not. (R. at 303.)

Here, the record shows Officer FN openly testified that MM never provided any "timeframe" testimony. Yet, Appellant now insinuates the opposite. But his claim that the "after a few minutes" phrase was spoken by either MM or Officer FN at trial is incorrect. Instead, Appellant's own counsel inserted the "after a few minutes" phrase into a leading question asked to Officer FN on recross-examination.

Next, Appellant claims that "the parties and the military judge agreed, at least in part, that the standard instructions did not capture the facts as presented," and that the "military judge directly stated as much regarding the standard mistake of fact as to consent instruction." (App. Br. at 13, *citing* R. at 329.) However, a review of the transcript shows the Government never agreed that the standard instructions in this case did not capture the facts as presented. In fact, as noted above, the Government continually stated that the standard instructions provided by the military judge were sufficient.

Additionally, page 329 provides no indication that the military judge thought that the standard instructions or the standard mistake of fact as to consent instruction did not capture the facts as presented. In fact, on that very page, the military judge stated she did not think the mistake of fact instruction was even in play for the case, stating, "I don't think that the evidence

presented throughout this particular Court brought up anything that would reasonably raise the use of a mistake of fact as to consent instruction." While the military judge did eventually agree to give the standard mistake of fact instruction, the military judge on page 329 of the transcript was certainly not conceding or agreeing that the standard instructions did not "capture the facts as presented" as Appellant now alleges.

As noted above, while Appellant cites to Carruthers and its three-prong test once in his brief, Appellant then fails to analyze each prong individually or even attempt to meet all three of the Carruthers prongs, which is a burden he alone bears. Yet, as detailed above, he meets none of the prongs. For instance, as shown above, Appellant's proposed instruction was based on a Kansas Supreme Court case that has been adopted by (1) none of the other 49 states; (2) no federal court; (3) no military court; (4) and that only applies to Kansas rape cases occurring prior to 2011. As opposed to Appellant's proposed instruction based on unsettled law, the clear alternative was to simply provide the members with the well-established definition of "consent" by way of the standard Benchbook instruction, which is exactly what the military judge did. Further, as to the second prong, the requested instruction was already "substantially covered" by the instructions already provided by the military judge to the members, namely the standard instructions for "consent" and "mistake of fact as to consent."

In sum, Appellant before this Court has failed to address any of the three Carruthers prongs, let alone meet his burden in proving them, and has likewise failed to show the military judge abused her "substantial discretionary power in deciding on the instructions to give" when she denied Appellant's requested instruction. As a result, Appellant's claim should be denied.

II.

APPELLANT WAIVED THIS ISSUE AND APPELLANT HAS FAILED TO SHOW HIS COUNSEL WERE INEFFECTIVE.

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) ([By] affirmatively declin[ing] to object to the military judge's instructions and offer[ing] no additional instructions[,] . . . [a]ppellant waived all objections to the instructions, including in regard[ ] to the elements of the offense." (Citations omitted)); *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 found 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).

Moreover, based on the changes to Article 66(d)(1)(A), UCMJ, 10 U.S.C. § 866(d)(1)(A), in which Congress removed the phrase "should be approved," and because the

offense in this case occurred after 1 January 2021, this Court no longer has the ability to pierce waiver with regard to findings. *See* United States v. George, ACM 40397, 2024 CCA LEXIS 224 (A.F. Ct. Crim. App. 7 June 2024) (*citing* United States v. Chin, 75 M.J. 220, 223 (C.A.A.F. 2016); United States v. Coley, ARMY 20220231, 2024 CCA LEXIS 127, at *8-9 (A. Ct. Crim. App. 13 Mar. 2024).

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).

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. 77 788 (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).

Additional Facts

At the close of the case, the parties discussed proposed instructions with the military judge. (R. at 325.) The discussion involved the proposed prior inconsistent statement instruction that was ultimately given to the members. (R. at 330.) Appellant's trial defense counsel expressed no objection to the proposed instruction. (R. at 330-31.) Later, the military judge asked the parties, "Anything else regarding the closing instructions and findings in the draft that we already have?" (R. at 331.) After conferring with co-counsel, Appellant's trial defense counsel responded, "No objection with the remainder, Your Honor." (R. at 332.)

The parties then discussed the proposed instruction at issue in Issue I above. Later, the military judge sent out a final draft of the instructions. (R. at 349.) Other than preserving the prior objection about the proposed instruction at issue in Issue I above (which did not involve the prior inconsistent statement instruction), Appellant's defense counsel voiced no objection to the final

instructions. Finally, after reading all the instructions to the members, the military judge asked counsel, "Do counsel object to the instructions given or request any additional instructions?" (R. at 385.) Appellant's counsel responded, "No, Your Honor." (Id.)

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 and offered no additional instructions. 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. Thus, Appellant waived this issue.

Though Appellant waived this issue, his two examples of supposed prior inconsistent statements deserve clarification. Appellant's first example is the "a few minutes" controversy which, as discussed in Issue I above, was wholly created by his own defense counsel during the cross-examination of Officer FN. There, those words – "after a few minutes, it began to hurt her, so she asked him to stop" – were the words of Appellant's own trial defense counsel that were said in a question to Officer FN during recross-examination as shown in the following exchange:

> CDC: And that after a few minutes, it began to hurt her, so she asked him to stop, correct?
>
> Officer FN: Yes, sir.
>
> CDC: And he did not stop right away, correct?
>
> Officer FN: Yes, sir.
>
> CDC: She had to ask him two more times, correct?
>
> Officer FN: Yes, sir.

> CDC: And in fact, you – when you asked her that question of – or she said that I told him – she said I had [to] say stop three times, correct?
>
> Officer FN: Yes.

(R. at 302-303.)

As explained above, Officer FN, prior to this leading cross-examination question, had provided no testimony that MM had told him that the anal sex had been going on for a "few minutes" before she told him to stop, and would ultimately testify that MM never give him a timeframe for how far apart her three "no's" were. (R. at 303.)

Here, the record shows Officer FN openly testified that MM never provided any "timeframe" testimony. Yet, Appellant now insinuates the opposite by claiming that the "after a few minutes" phrase was spoken by either MM or Officer FN at trial, which is incorrect. Instead, Appellant's own counsel inserted the "after a few minutes" phrase into a leading question asked to Officer FN on recross-examination.

Appellant's second example of a supposed prior inconsistent statement again contorts the transcript. This time, Appellant claims that "MM acknowledged" that she told the "responding officer that she 'said 'Stop, Stop, Stop,' pushed him off, and the sex ended[.]'" (App. Br. at 17-18, *citing* R. at 250.) But yet again, the quoted words here are not the words of MM. Instead, yet again, they are the words of Appellant's own trial defense counsel, as the quoted words are from a question Appellant's counsel asked MM during cross-examination.

Yet, even looking at Appellant's counsel's question and MM's answer, there is no inconsistent statement there. Appellant's counsel asked, "you told the police that – that night just a few minutes later, you told the police you said "Stop, stop, stop," pushed him, and the sex ended, correct. (R. at 250.) MM responded, "Yes." (Id.) Yet, earlier in her testimony, MM said

exactly this when she detailed how she told Appellant to stop multiple times, how she struggled to get how from under Appellant, and that the sex ended when she got away from him. (R. at 189-91.) Her "Yes" answer to Appellant's counsel's question also matched Officer FN's testimony about what MM told him that night. He stated as follows:

> She said that when he was doing it, it started hurting, so she told him to stop, and did not stop. He kept doing it. She said she told him again to stop, and he didn't stop. She said she told him three times to stop, and then she started – she said she started crying, and he eventually did stop.

(R. at 295-96.)

Here, Appellant's attempts to extrapolate MM's "yes" answer into some type of admission that there was a "much more contemporaneous cessation than [MM's] testimony" is not supported by the record. (App. Br. at 18.) Instead, the context of this question, when squared with both MM's overall testimony and Officer FN's testimony, shows there was no inconsistency between her testimony and what she told Officer FN on the night in question. MM made it quite clear to Officer FN on the night in question and quite clear to the members at Appellant's trial that Appellant did not "cease[] promptly" when she told him "No," but instead continued to penetrate her anally (1) long enough for Appellant to tell MM "Shhh, shhh, shhh, it feels good;" (2) long enough for him to place his hand over her mouth; (3) long enough for MM to tell Appellant to stop at least two more times; and (4) long enough to cause MM to struggle to free herself from Appellant's assault. There is no inconsistent statement here.

Appellant's entire issue here revolves around these two supposed prior inconsistent statements.[5] Thus, even if Appellant did not waive this issue and this Court reviews the issue

[5] While Appellant claims there were "many of these prior inconsistent statements," Appellant only mentions these two. (*See* App. Br. at 17-19.)

under a plain error analysis, Appellant would still fail as there was no clear or obvious error concerning these two examples because the prior statements were not inconsistent statements at all.[6] Further, even if there was plain error, the error did not materially prejudice Appellant's substantial rights, as explained below. United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019).

Yet, Appellant did waive this issue, which is why he also alleges ineffective assistance of counsel against his trial counsel. (App. Br. at 15, 19.) However, Appellant has failed to show his counsel were ineffective. While Mr. KP states in his declaration that there was no tactical reason for not objecting to the military judge's instruction as given, the reasons why defense team would not want MM's prior statements considered substantively are clear – the statements would have lent further credibility to MM's claim that Appellant sexually assaulted her.

Indeed, Appellant's defense team certainly had to be mindful that MM never denied being sexually assaulted in any of her statements. Thus, if MM's prior statements were considered substantively, the members of the panel would have been instructed by the military judge that MM's prior statements, which included her statements to multiple witnesses that Appellant sexually assaulted her, could be considered for their truth. Such an instruction would have significantly strengthened the Government's case against Appellant, as these prior statements would have corroborated that the sexual assault occurred.

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[6] As noted above, while Officer FN did say "yes" to Appellant counsel's leading cross-examination question about "a few minutes," Officer FN's testimony, both on direct and redirect examination, made it clear that MM never provided Officer FN any "timeframe" testimony and never told Officer FN "a few minutes." Instead, the entire "after a few minutes" controversy was created by Appellant's own counsel by inserting the phrase into a leading question asked to Officer FN on recross-examination.

Here, the overwhelming majority of MM's prior statements and allegations were extremely prejudicial against Appellant. Thus, while Appellant claims error because he wanted to use his two cherry-picked supposed prior inconsistent statements substantively, he fails to recognize this would have opened the door for the Government to use many other prior statements to negatively impact Appellant's case in a substantial fashion. Appellant's defense team, however, likely recognized these pitfalls and realized that asking the military judge to instruct the members that MM's prior statements could be used as substantive evidence would fatally undo the defense's overall attempts to undermine MM's credibility. Appellant's counsel likely realized that the best way to avoid any appearance or hint that there might be truth to MM's overall claims, especially those regarding sexual assault, was to not have them considered substantively.

Appellant notably fails to recognize any of these pitfalls within his brief. Instead, Appellant only addresses alleged benefits of using two supposed prior inconsistent statements substantively, therein failing to account for the numerous negative consequences he would have faced when all of her prior statements could have been considered substantively.

Moreover, even if the members could have considered the "few minutes" testimony substantively, Appellant has failed to show how it could have changed the outcome of the trial. In that case, the members would just have had two different accounts to choose from, and it is far more likely that the members would have chosen Officer FN's and MM's trial testimony, rather than Officer FN's recollection of what was said – which was, again, notably colored by the trial defense counsel's phrasing of the "a few minutes" question.

And finally to this point, whether MM said "no" three times soon after the anal sex began or after "a few minutes," the fact remains that it took MM saying "no" three times, and to even

begin crying, before Appellant finally ceased his attack on her. Thus, any supposed inconsistencies in the timing of when MM said her three "no's" is irrelevant.

In his brief, Appellant does not address any Strickland factors in making his ineffective assistance claim against his counsel, particularly the third factor, which, assuming defense counsel were ineffective, asks whether there "a reasonable probability that, absent the errors," there would have been a different result? *See* Gooch, 69 M.J. at 362. Yet, for the reasons detailed above, Appellant fails to meet his prejudice burden.

Here, there were a number of negative consequences Appellant faced if the military judge had instructed the members that MM's prior statements could be used as substantive evidence, none of which 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 prejudice Appellant would have faced if the military judge had provided that instruction and how such an instruction would have significantly strengthened the Government's case against Appellant.

Overall, 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. While Appellant only addresses the benefits of using two supposed prior inconsistent statements substantively, he fails to account for the numerous consequences his defense team would have faced when all of MM's prior statements could have been considered substantively. Considering MM never denied being sexually assaulted, the members of the panel would have been instructed by the military judge that MM's prior statements-which included her repeated statements to witnesses that Appellant sexually assaulted her-could be considered for their truth. Such an instruction would have been disastrous for Appellant.

In sum, Appellant waived this issue at trial. However, even if the Court finds the issue was not waived due to the defense counsels' failure to object to the instruction, and even assuming plain error on the part of the military judge, Appellant's claim still fails as he has shown no prejudice, either under a plain error analysis or under a Strickland analysis for ineffective assistance of counsel. As detailed above, Appellant's two examples of supposed prior inconsistent statements were not inconsistent statements at all. Instead, the "a few minutes" controversy regarding Officer' FN's testimony was manufactured by trial defense counsel's question phrasing during cross-examination. Further, the context of MM's testimony shows the "yes" answer she provided trial defense counsel, again during cross-examination, squared with both MM's overall testimony and Officer FN's testimony, and, thus, created no inconsistency between her testimony and what she told Officer FN on the night in question. Further, even if these statements are seen as prior inconsistent statements, an instruction to the members on using prior statements as substantive evidence would have been extremely prejudicial to Appellant's defense as the use of prior statements as substantive evidence would have backfired on Appellant's theory of the case – namely that MM was not credible. There is no material prejudice here, and Appellant has failed to show a reasonable probability that, absent errors, the result of his trial would have been different. Thus, Appellant's claim must fail.

III.

APPELLANT'S CONVICTION IS FACTUALLY AND LEGALLY SUFFICIENT BECAUSE APPELLANT PENETRATED MM AFTER SHE REVOKED CONSENT.

Standard of Review and Law

While this Court has not yet determined a clear standard of review for issues of factual sufficiency under the amended Article 66(d)(1), UCMJ, this Court has agreed that Congress

intended this new statutory standard to "make [] it more difficult to [an appellant] to prevail on appeal."[7] *See* United States v. Csiti, ACM 40386, 2024 CCA LEXIS 160 (A.F. Ct. Crim. App. 29 April 2024) (*quoting* United States v. Scott, 83 M.J. 778, 780 (A. Ct. Crim. App. 27 Oct. 2023). This Court reviews issues of legal sufficiency de novo. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002). Applying this test, this Court draws every reasonable inference from the evidence in the record of trial in favor of the prosecution. United States v. McGinty, 38 M.J. 131, 132 (C.M.A. 1993).

The test of factual sufficiency is governed by the following amendment to Article 66(d)(1), UCMJ:

> (B) Factual sufficiency review
>
> > (i) [T]he Court may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.
> >
> > (ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—
> >
> > > (I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
> > >
> > > (II) appropriate deference to findings of fact entered into the record by the military judge.
> >
> > (iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight

[7] All specifications in this case occurred after 1 January 2021.

> of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, Section 542(b), 134 Stat. 3611-12.

The requirement of 'appropriate deference" when a Court of Criminal Appeals weighs the evidence and determines controverted questions of fact "depend[s] on the nature of the evidence at issue." United States v. Harvey, __ M.J. __, No. 23-0239, 2024 CAAF LEXIS 502, at *8 (C.A.A.F. 6 September 2024). This Court has discretion to determine what level of deference is appropriate. Id. "[T]he quantum of proof necessary to sustain a finding of guilty during a factual sufficiency review is proof beyond a reasonable doubt, the same as the quantum of proof necessary to find an accused guilty at trial." Id. at *10. For this Court "to be clearly convinced that the finding of guilty was against the weight of the evidence, two requirements must be met." Id. at *12. First, this Court must decide that the evidence, as it weighs it, "does not prove that the appellant is guilty beyond a reasonable doubt." Id. Second, this Court "must be clearly convinced of the correctness of this decision." Id.

The military judge instructed the members as to the elements of the sexual assault, pursuant to Article 120, UCMJ, as follows:

> (1) on or about 22 April 2022 and on or about 23 April 2022, at or near Morehead City, North Carolina, [Appellant] committed a sexual act upon [MM] by penetrating [MM's] anus with [Appellant's] penis; and that
>
> (2) [Appellant] did so without the consent of [MM].

(R. at 360.) The military judge defined "sexual act" as "the penetration, however slight, of the penis into the vulva or anus or mouth." (Id.)

Analysis

The panel at Appellant's court-martial correctly found Appellant guilty of sexual assault, 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.

Under the new factual sufficiency standard, Appellant has failed to make a specific showing of a deficiency of proof. Yet even if he had, after making the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the finding of guilty was against the weight of the evidence.

Notably, Appellant does not claim that he did not penetrate MM's anus with his penis. Instead, Appellant argues that the word "penetrating" only means "entry," and that MM only withdrew her consent "post-penetration." (App. Br. at 20-21.) Essentially, Appellant argues Appellant committed the act of penetration when he first penetrated MM's anus while he still had her consent and that the of penetration was complete before MM withdrew her consent. Appellant provides this Court multiple definitions of the word "penetration" and "submits that the best interpretation of 'penetrating' refers to the act of entry." (Id. at 22.) Appellant then concludes, "As the entry in this case was indisputably consensual, the evidence does not satisfy the elements as charged." (Id.)

Appellant is mistaken. Noticeably absent from Appellant's argument is any case law or precedent supporting his position. In contrast, multiple courts, including the Army Court of Criminal Appeals, have rejected Appellant's claim. While the Court of Appeals for the Armed Forces has not yet definitively addressed the issue of whether withdrawal of consent during a

sexual act may constitute the lack of consent necessary to support a conviction for sexual assault, the Army Court has reviewed the question and found that "[c]learly, there is an absolute right to withdraw consent to a sexual act—even in the middle of the very same sexual act – that is not subject to reasonable debate." Rouse, 78 M.J. at 796. In Rouse, a victim, like in this case, initially consented to engaging in anal sex with the appellant, but then withdrew her consent. The Army Court concluded that "[c]onsent to a sexual act may be withdrawn at any time, including after the sexual act has begun." Id. at 794, 796. The Army Court further held that an accused could be convicted of forcible sodomy, even if the initial anal penetration had begun with consent, if the consent was removed during the act and the sexual act continued.

In coming to this conclusion, the Army Court reviewed several state court decisions, and noted that the "majority of the jurisdictions we have surveyed agree that consent to a sexual act may be withdrawn at any time, including after the sexual act has begun." Id. at 796-797, *citing* State v. Flynn, 299 Kan. 1052 (Kan. 2014); In re John Z., 29 Cal. 4th 756 (Cal. 2003); State v. Baby, 404 Md. 220 (Md. 2008); McGill v. State, 18 P.3d 77 (Alaska Ct. App. 2001); State v. Siering, 35 Conn. App. 173, (Conn. App. Ct. 1994); State v. Robinson, 496 A.2d 1067, 1071 (Me. 1985).

The Army Court then turned to the statutory language of the UCMJ, stating, "The plain language of the UCMJ is consistent with those civilian cases that have concluded 'penetration,' in the legal sense, continues so long as the penetrative sexual act continues." Id. at 797-98. The Army Court, drawing on the Robinson and Siering, concluded that "'penetration' includes *but is not limited to* the initial, 'slight' breach of a bodily opening," that "'Penetration' is a noun describing the arrangement wherein one object breaches the plane of another," and that "Penetration exists so long as the breach exists." Id. at 798.

Notably, the Army Court stated its holding applied to the offense of forcible sodomy under Article 125, UCMJ, as it existed prior to 16 January 2014. Id. at fn 8. However, the Army Court further stated that it saw no reason to distinguish between the offense of forcible sodomy or the offense of rape by force, and also noted that "an analogous principle applies to the offense of sexual assault by bodily harm." Id. The Army Court reasoned, "Both common sense and the law dictate that once consent to a sexual act is withdrawn, the sexual act must cease."

In United States v. Jones, ACM 39543, 2020 CCA LEXIS 207 (A.F. Ct. Crim. App. 22 June 2020), this Court agreed with the Army Court's extensively researched opinion, stating, "Although this court has not previously had occasion to decide the issue, we doubt Appellant's assertion that a person cannot effectively withdraw consent to sexual intercourse after penetration has occurred." There, the appellant made the same argument as Appellant does here – namely that because the Government charged him with penetrating the victim's vulva with his penis without her consent, it was required to prove the absence of consent at the moment of penetration. While this Court's statement in Jones was *dicta*,[8] this Court's reasoning and reliance on Rouse, which itself relied on a multitude of other jurisdictions' holdings, should certainly be persuasive authority for this Court to reject Appellant's claim.

Here, Appellant has shown no legal precedent or authority to support his claim. In contrast, multiple courts within numerous jurisdictions, including our sister court, have held that penetration is not limited to the initial breach of a body's opening, but is instead an ongoing act. As the Army Court held, "Penetration exists as long as the breach exists." *See* Rouse, 78 M.J. at

[8] This Court stopped short of deciding the issue in Jones because the evidence in that case showed the victim never consented to the initial penetration. Id. at *19-20 ("we need not decide the issue now, because the evidence demonstrates [the victim] did not consent to the initial penetration either . . . .").

798. While this Court stopped short of concurring with the Rouse holding in Jones because the issue was not ripe in that case, the issue is now squarely before this Court. This Court should adopt the Army Court's reasoning that "[p]enetration exists as long as the breach exists," and that "[c]onsent to a sexual act may be withdrawn at any time, including after the sexual act has begun." *See* Rouse, 78 M.J. 794, 796.

Considering all of these facts and circumstances, the Government provided the panel ample evidence of Appellant's guilt beyond a reasonable doubt. Here, Appellant has failed to make a specific showing of a deficiency of proof as to his sexual assault conviction. Yet even if he had, after giving the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the finding of guilty was against the weight of the evidence. Accordingly, Appellant's factual sufficiency claim must fail.

The same holds true for his legal sufficiency claim. Here, the record shows the specification is legally sufficient and that a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. In drawing every reasonable inference from the evidence in the record of trial in favor of the prosecution, the Court should deny Appellant's claim.

IV.

APPELLANT'S CONVICTION IS FACTUALLY SUFFICIENT DESPITE APPELLANT'S UNSUPPORTED CLAIMS OF CREDIBILITY ISSUES WITH THE GOVERNMENT'S EVIDENCE.

Standard of Review and Law

The standard of review and law for this issue is the same as in Issue III above.

Analysis

As noted above, the panel at Appellant's court-martial correctly found Appellant guilty of sexual assault, 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.

As in Issue III above, Appellant again fails to make a specific showing of a deficiency of proof. And even if he had, after making the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the finding of guilty was against the weight of the evidence.

As detailed above, the record is clear that Appellant sexually assaulted MM by penetrating her anus without her consent. Though she initially consented to vaginal and anal sex, MM's consent to anal sex was conditioned on the fact that Appellant would stop if she said stop. The problem, though, is Appellant did not. Moments after Appellant inserted his penis into her anus, MM repeatedly told Appellant in a loud tone to "stop" and "please stop," telling him she did not like it and that it hurt. (R. at 189, 192.) These words were a clear indication to Appellant that MM was no longer consenting to the anal sex and that Appellant needed to stop. As MM said, "I kept saying 'Stop.'" (Id.)

But Appellant did not stop. Instead, he told MM, "Shhh, shhh, shhh, it feels good," and then placed his hand over her mouth. (Id.) Even as MM struggled to get away from Appellant continued anally penetrating against MM's will for a "few minutes." (R. at 189.) Here, the evidence is clear Appellant committed the act of penetrating MM's anus with his penis without MM's consent.

Still, Appellant finds fault. Notably, like in Issue III above, Appellant does not claim that he did not penetrate MM's anus with his penis. Instead, Appellant claims MM's testimony was "inconsistent in numerous ways." (App. Br. at 23.) Appellant is mistaken.

Appellant first takes issue with MM's testimony that she told Appellant to "stop" moments after the anal sex began and that Appellant continued anally penetrating MM without her consent for a "few minutes" *after* MM told him to stop. Appellant contends this testimony was inconsistent with "MM's prior inconsistent statements indicating the charged act continued consensually for 'a few minutes' *before* it became painful." (App. Br. at 23.) (emphasis added.) Appellant's argument, however, is based in an incorrect reading of the transcript.

As noted above, MM's testimony at trial was clear that she told Appellant to stop "[a]s soon as I started to feel it go inside of me." (R. at 189.) But, within the Statement of Facts section of his brief, Appellant claims the following:

> In tension with her trial testimony that she told appellant to stop "right after" beginning the charged act, MM reported to the responding police officer that the anal sex continued for "a few minutes" before it became painful, and she asked appellant to stop. (R. at 302) ("after a few minutes, it began to hurt her, so she asked him to stop[.]").

(App. Br. at 4.)

The issue, however, is that neither MM nor the "responding police officer" (Officer FN) ever said the words quoted by Appellant in his brief. Instead, those words – "after a few minutes, it began to hurt her, so she asked him to stop" – were the words of Appellant's own trial defense counsel that were said in a question to Officer FN during recross-examination. Notably, prior to this question, Officer FN had provided no testimony that MM had told him that the anal

sex had been going on for a "few minutes" before she told him to stop. Instead, Officer FN's had testified on direct examination as follows as to what MM told him:

> She said that when he was doing it, it started hurting, so she told him to stop, and did not stop. He kept doing it. She said she told him again to stop, and he didn't stop. She said she told him three times to stop, and then she started – she said she started crying, and he eventually did stop.

(R. at 296.) Moreover, Officer FN would later testify that he tried to get MM to "give me like a timeframe" for how far apart her three "no's" were, but that she would not. (R. at 303.)

Here, the record shows Officer FN openly testified that MM never provided any "timeframe" testimony. Yet, Appellant now insinuates the opposite, but his claim that the "after a few minutes" phrase was spoken by either MM or Officer FN at trial is incorrect. Instead, Appellant's own counsel inserted the "after a few minutes" phrase into a leading question asked to Officer FN on recross-examination. Considering the context in which the question was asked, Officer FN answer of "yes" to this leading question should be given very little weight by this Court, especially given Officer FN's resolute testimony that MM never gave him a timeframe for the incident and when she said her three "No's," and considering MM's clear testimony as to when she told Appellant to stop. There, when specifically asked by Appellant's civilian defense counsel, "Isn't it true that you told [Officer FN] that you allowed [Appellant] to begin the anal sex; and after a few minutes, it began to hurt, so she asked him to stop," MM responded, "I don't remember exactly what I told the police, but I know that it was not a few minutes, it was shorter than that." (R. at 317.) Instead, MM maintained that that she told Appellant to stop "right after" the anal sex began. (Id.)

Yet, even if this Court presumes that MM did tell Officer FN that the anal sex had been going on for "a few minutes" before she told him to stop, Officer FN's testimony still

corroborates the main point of MM's testimony – namely that at some points during the encounter, MM repeatedly told Appellant to stop and Appellant continued on anyway. In either case (that is she told Appellant to stop immediately or she told him to stop after "a few minutes"), the fact remains MM repeatedly told Appellant to stop penetrating her anus, therein plainly revoking her consent to the activity. Yet, once MM plainly revoked her consent when she said stop the first time, Appellant continued to anally penetrate MM for a duration (1) long enough for him to tell MM "Shhh, shhh, shhh, it feels good;" (2) long enough for him to place his hand over her mouth; and (3) long enough for MM to tell Appellant to stop at least two more times.

Thus, no matter how long the consensual anal sex lasted, the overwhelming evidence shows Appellant continued to anally penetrate MM well after she withdrew her consent. Appellant's contention here that he "ceased promptly upon her withdrawal of consent"[9] is simply not supported by the evidence.

Appellant next contorts the transcript again by claiming MM "asked appellant to stop and that, when she did ask appellant to stop, she 'said 'Stop, Stop, Stop,' pushed him off, and the sex ended[.]'" (App. Br. at 23, *citing* R. at 250.) But yet again, the quoted words here are not the words of MM. Instead, yet again, they are the words of Appellant's own trial defense counsel as the quoted words are from a question Appellant's counsel asked MM during cross-examination.

Yet, even looking at Appellant's counsel's question and MM's answer, there is no inconsistent statement there. Appellant's counsel asked, "you told the police that – that night just a few minutes later, you told the police you said "Stop, stop, stop," pushed him, and the sex

[9] *See* App. Br. at 23.

ended, correct." (R. at 250.) MM responded, "Yes." (R. at 250.) Yet, earlier in her testimony, MM said exactly this when she detailed how she told Appellant to stop multiple times, how she struggled to get how from under Appellant, and that the sex ended when she got away from him. (R. at 189-91.) Her "Yes" answer to Appellant's counsel's question also matched Officer FN's testimony about what MM told him that night. He stated as follows:

> She said that when he was doing it, it started hurting, so she told him to stop, and did not stop. He kept doing it. She said she told him again to stop, and he didn't stop. She said she told him three times to stop, and then she started – she said she started crying, and he eventually did stop.

(R. at 295-96.)

Here, Appellant's attempts to extrapolate MM's "yes" answer into some type of admission that Appellant "ceased promptly upon her withdrawal of consent." (App. Br. at 23.) However, the context of this question, when squared with both MM's overall testimony and Officer FN's testimony, shows there was no inconsistency between her testimony and what she told Officer FN on the night in question. MM made it quite clear to Officer FN on the night in question and quite clear to the members at Appellant's trial that Appellant did not "cease[] promptly" when she told him "No," but instead continued to penetrate her anally (1) long enough for Appellant to tell MM "Shhh, shhh, shhh, it feels good;" (2) long enough for him to place his hand over her mouth; (3) long enough for MM to tell Appellant to stop at least two more times; and (4) long enough to cause MM to struggle to free herself from Appellant's assault. Simply put, there is no inconsistent statement here.

Next, Appellant takes aim at MM's credibility by claiming that she "openly admitted to lying to OSI during its investigation of this case." (App. Br. at 25, *citing* R. at 238, 256-57.) Appellant's claim is based on a portion of MM's testimony where she agreed that she told

AFOSI agents, "No," when they asked her if "there was any point that [Appellant] asked you for anal or that you told him he could perform anal." (R. at 238.) MM also agreed that she told AFOSI agents, "[Appellant] never asked, and I told him I didn't like it when he tried." (Id.)

However, as detailed above, MM explained on redirect examination why she felt Appellant "never asked" for her permission to perform anal sex that night. She agreed that Appellant telling her, "I am going to stick it in your ass" did not seem to her to be Appellant asking for permission to perform the act. (R. at 252.) Notably, MM denied Appellant ever said something to the effect of "MM, may I perform anal sex?" (Id.) Considering these circumstances, it is perfectly understandable for MM to then tell AFOSI that Appellant "never asked" her to perform the act.

Yet, even if one were to construe MM's statement to AFOSI as a lie, this issue was raised on multiple occasions throughout the trial by Appellant's defense counsel at trial and put squarely before the panel to consider in reaching its verdict. Yet, the panel, who had the opportunity to see MM's testimony in person, still found MM's testimony regarding the incident proved beyond a reasonable doubt that Appellant sexually assaulted MM.

To this greater point, there is no evidence in this case of any motivation on the part of MM to lie about what happened between her and Appellant. Indeed, she had no motivation to lie. MM and Appellant had no prior relationship, and there is no indication that MM. a civilian, had anything to gain from her testimony or by fabricating the entire encounter. Thus, even if MM's statement to AFOSI is seen as a "lie," a reasonable factfinder could have simply believed that MM lied out of embarrassment or fear that she would not be believed because she had initially consented to the anal intercourse – not because she was fabricating the entire encounter.

All told, considering all of these facts and circumstances, the Government provided the panel ample evidence of Appellant's guilt beyond a reasonable doubt. Here, Appellant has failed to make a specific showing of a deficiency of proof as to his sexual assault conviction. Yet even if he had, after giving the appropriate deference to the trial court hearing the witnesses at trial, particularly MM, the Court should not be clearly convinced that the finding of guilty was against the weight of the evidence. Accordingly, Appellant's factual sufficiency claim must fail.

V.[10]

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

[10] This issue is raised pursuant to Grostefon.

(*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

Appellant claims the trial counsel engaged in improper argument when stating the following:

> And you'll find throughout that night that [Appellant] just did not listen. He did not listen to [MM] when she told him to stop. He did not listen to [MM] when she told him he must leave. He did not listen to her friend [Ms. NW] when she told him the same. He did not listen to the police. And ultimately, he did not listen to the law.

(App. Grostefon Br. at 1, *citing* R. at 368-69.) Appellant claims the trial counsel "encouraged the panel to consider acts of uncharged misconduct—what amounted to trespass when he failed to comply with requests to leave, and failure to comply with police instructions—and compare their similarities to the charged offense." (Id.) Appellant is wrong.

To start, Appellant's counsel seemingly recognized no error in the trial counsel's closing argument because he did not object.[11] Further, when reviewed in the context of the entire findings argument, or even in just this snippet itself, there is no plain error.

Still, Appellant takes issue with the trial counsel's "did not listen" theme by essentially claiming the trial counsel made an improper spillover or propensity argument. Yet, Appellant fails to explain how or where the trial counsel invited the panel to convicted Appellant of sexual assault simply for not listening to the police or refusing to leave that night. At no point did the trial counsel argue or insinuate that the panel members should find Appellant guilty merely because he was not listening to either Ms. NW or the police that night.

[11] While Appellant has claimed ineffective assistance of counsel against his trial defense counsel, he had made such a claim as it relates to this issue.

Notably, Appellant's snippet of the trial counsel's argument accounts for just one paragraph of an overall closing argument spanning 29 paragraphs, with the overwhelming majority of the argument focused on the facts of the case (R. at 367-68), the two elements of the offense (R. at 369), consent and MM's revocation of consent (R. at 369-70), witness credibility (R. at 370-71), a playing of the 911 call (Id.), the military judge's instructions (R. at 372), and the Government's burden of proof (Id.)

Overall, no improper spillover or propensity occurred since the trial counsel never invited the members to convict Appellant based on anything other than the evidence at hand of the charged offense. Appellant has failed to show any error, let alone plain error, in his brief and has not offered any proof that he was convicted based on anything other than the evidence.

Yet, even if this Court were to assume error, Appellant fails to show how this one portion of the trial counsel's argument resulted in prejudice against him. Notably, Appellant fails to cite Fletcher and its prejudice test, and his prejudice argument is filled with conjecture and unsupported, generalized statements such as "It would not be hard for laypeople to draw a character inference from this behavior," and "This created a grave risk the panel would convict based on improper considerations rather than the competent evidence alone." (App. Grostefon Br. at 2.) Appellant's statements here amount to pure speculation, far below his required burden of showing that he was actually prejudiced.

Looking at the Fletcher 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 Appellant's newfound complaint in his brief. 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 above, Appellant's complaints account for one paragraph of a 29-paragraph argument. Thus, this factor should weigh in the Government's favor.

Finally, as shown in the factual and legal sufficiency issues within this brief, the "weight of the evidence supporting" Appellant's conviction was very strong. Notably, in this issue, Appellant does not attempt to argue that the weight of the evidence in this case was lacking. For the same reasons discussed in Issue III and IV above, Appellant fails to show prejudice here. Accordingly, even if the trial counsel's arguments were plain error, Appellant has shown no prejudice. Therefore, this claim must fail.

VI.[12]

APPELLANT IS ENTITLED TO NO RELIEF FOR ANY POST-TRIAL DELAY IN THIS CASE.

Additional Facts

Appellant was sentenced at his court-martial on 20 July 2023. Appellant's case was docketed with this Honorable Court on 2 February 2024, 197 days later. Appellant never asserted a right to speedy post-trial processing during this time.

In the next eight months, Appellant's counsel submitted six enlargement of time motions. In the sixth motion, Appellant's counsel wrote, "Appellant was informed of his right to a timely appeal," Appellant was advised of the request for enlargement of time," and that Appellant "consented to the request for this enlargement of time." (App. Mot., dated 19 September 2024.) Appellant never asserted a right to speedy post-trial processing during this time.

On 23 October 2024, 264 days after docketing, Appellant filed his Assignments of Error

[12] This issue is raised pursuant to Grostefon.

brief with this Court. In it, Appellant admits he "did not demand speedy post-trial processing in the pre-docketing period." Appellant's brief never specifically asserts a right to speedy post-trial processing in his brief.

Standard of Review

This Court reviews de novo an appellant's entitlement to relief for post-trial delay. United States v. Livak, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020) (citing United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)).

Law

When evaluating post-trial constitutional due process complaints of delay, our superior Court has adopted the Supreme Court's analysis in Barker v. Wingo, 407 U.S. 514 (1972). Moreno, 63 M.J. at 135. The four factors set forth in Barker are: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. Moreno, 63 M.J. at 135 (*citing* Barker, 407 U.S. at 530). All of these factors are to be considered together with the relevant circumstances in the case. Id. at 136.

In Moreno, our superior Court established thresholds for facially unreasonable delay, including docketing with the Court of Criminal Appeals more than 30 days after the convening authority's action or when a Court of Criminal Appeals completes appellate review and renders its decision over 18 months after the case is docketed with the court. 63 M.J. at 142-143. Post-trial processing of courts-martial has changed significantly since Moreno, including the requirement to issue an Entry of Judgment before appellate proceedings begin. *See* Livak, 80 M.J. at 633.

This Court now applies an aggregate standard threshold of 150 days from the day the appellant was sentenced to docketing with this Court. Id.

Absent a showing of prejudice, a due process violation warranting relief only occurs when, "in balancing the other three factors [for analyzing post-trial delays], the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006).

In United States v. Tardif, 57 M.J. 219 (C.A.A.F. 2002), our superior Court determined that an appellant may be entitled to relief pursuant to a Court of Criminal Appeals Article 66(d) power "to grant relief for excessive post-trial delay without a showing of 'actual prejudice' . . . if it deems relief appropriate under the circumstances." Tardif, 57 M.J. at 224. Post-trial delay does not require that relief be given under these circumstances; rather, appellate courts are cautioned to "tailor an appropriate remedy, if any is warranted, to the circumstances of this case." Id. at 225. Additionally, this Court is guided by the following factors, with no single factor being dispositive:

> (1) How long the delay exceeded the standards set forth in Moreno;
>
> (2) What reasons, if any, the Government set forth for the delay, and whether there is any evidence of bad faith or gross indifference to the overall post-trial processing of this case;
>
> (3) Keeping in mind that our goal under Tardif is not to analyze for prejudice, whether there is nonetheless some evidence of harm (either to the appellant or institutionally) caused by the delay;
>
> (4) Whether the delay has lessened the disciplinary effect of any particular aspect of the sentence, and is relief consistent with the dual goals of justice and good order and discipline;
>
> (5) Whether there is any evidence of institutional neglect concerning timely post-trial processing, either across the service or at a particular installation; and

(6) Given the passage of time, whether this court can provide meaningful relief in this particular situation.

United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015). Relief under Article 66(d), UCMJ, "should be viewed as the last recourse to vindicate, where appropriate, an appellant's right to timely post-trial processing and appellate review." Tardif, 57 M.J. at 225.

Analysis

The circumstances of this case do not warrant relief. For the reasons set forth below, Appellant's claim should be denied.

a. Moreno Analysis

The first factor, the length of delay, weighs slightly in Appellant's favor since this case exceeded the Livak standard of sentence to action by 47 days. While considered facially unreasonable, the circumstances of this case do not warrant relief. Additionally, our superior Court has not awarded relief even when the Government has taken over three times the presumptively reasonable amount of time to docket an appellant's case. *See generally* United States v. Anderson, 82 M.J. 82, 86 (C.A.A.F. 2022) (holding 481 days of Government delay between sentencing and convening authority action would not "caus[e] the public to doubt the entire military justice system's fairness and integrity.")

The second factor, the reasons for delay, also weighs slightly in the Appellant's favor. Yet, a review of the timeline of Appellant's post-trial processing shows both the both the base (Seymour-Johnson) and Numbered Air Force (15 AF) legal offices processed Appellant's record of trial on a consistent basis, and the delay in this case arose from confusion about the second JAJM record of trial being forwarded to JAJM.

As Appellant acknowledges, the record of trial was certified on 18 September 2023, just 60 days after Appellant was sentenced. Additionally, 15 AF/JA's review of the ROT was completed on 16 November 2023 (Day 119) and JAJM received the original record and one of two JAJM copies on or about 27 November 2023 (Day 130), 20 days prior to the Livak standard. (*See* Dec. of TSgt DJ.)

However, JAJM highlighted that the second JAJM copy needed corrections, which were made on 7 December 2023 (Day 140). (Id.) Due to confusion, however, the case paralegal did not forward the second JAJM copy to JAJM, but instead filed it with the base office's copy of the record of trial in the legal office's file room. (id.) This mistake was caught in early January 2024 and the second JAJM copy was sent to JAJM on 18 January 2024 (Day 182). JAJM received the copy on 24 January 2024 (Day 188) and the case was ultimately docketed with this Court on 2 February 2024 (Day 197). (Id.)

As shown, both the base legal office and 15 AF diligently worked to complete Appellant's ROT and send it to JAJM within 140 days of Appellant's sentence. However, due to miscommunication regarding sending the second copy of the record of trial to JAJM, JAJM could not complete its review and forward the case to this Court for docketing until 2 February 2024. Simply put, post-trial processing of Appellant's case did not languish after his trial. Instead, as shown by TSgt DJ's and SrA DG's declarations, Appellant's case was worked on a consistent basis throughout the timeframe from Appellant's sentencing to this Court's docketing and would have met the Livak standard but for a miscommunication in sending JAJM's second copy of the record to JAJM.

The third Barker "factor calls upon [this Court] to examine an aspect of [Appellant's] role in this delay." Moreno, 63 M.J. at 138. Specifically, whether Appellant "object[ed] to any delay

or assert[ed] his right to timely review and appeal prior to his arrival at this court." Id. While failing to demand timely review and appeal does not waive that right, only if Appellant actually "asserted his speedy trial right, [is he] 'entitled to strong evidentiary weight'" in his favor. Id. (*quoting* Barker, 407 U.S. at 528).

As he concedes in his brief, Appellant never asserted his right to timely appellate review prior to his case being docketed with this Court. Moreover, Appellant never asserted it during the 264 days in which his counsel was preparing to file his brief to this Court, while at the same time specifically agreeing to six enlargements of time. Finally, Appellant never explicitly asserts his right to timely appellate review in his brief. This factor weighs heavily against Appellant.

Regarding prejudice because of this delay, our superior Court has recognized three interests that should be considered when determining prejudice due to post-trial delay: (1) prevention of oppressive incarceration pending appeal; (2) undue anxiety and concern; and (3) limiting the possibility that a convicted person's grounds for appeal and defenses, in case of retrial, might be impaired. Barker, 407 U.S. at 532. "Of those, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Id.

Notably, Appellant provided this Court no declaration addressing any alleged prejudice he has faced. In fact, in his brief, he explicitly concedes there is no prejudice by stating that he "does not allege specific prejudice." (App. Grostefon Br. at 6.) All told, Appellant has faced no prejudice due to the delay between his sentencing and docketing with this Court. Thus, Appellant's Moreno claim for relief should be denied.

As to relief pursuant to Toohey, our superior Court held that a delay of 481 days between sentencing and convening authority action was "not severe enough to taint public perception of

the military justice system," adding that it did not involve the years of post-trial delay seen in Moreno and Toohey.[13] *See* Anderson, 82 M.J. at 86. The reasons for delay in that case included delays in "creating the transcript or authenticating the record of trial." Id. at 86-87. Notably in Anderson, the appellant made three speedy trial requests to the Chief of Justice, but "there was no indication that [the Chief of Justice] took any steps to speed the process beyond confirming that the military judge had the record." Additionally, the military judge in that case took 298 days to authenticate the record. Id.

Despite the appellant's repeated assertion of his speedy trial rights and the 481-day delay, our superior Court still granted no Toohey relief because there "is no indication of bad faith on the part of any of the Government actors," and "no indication of prejudice." Id. at 88. The Court continued, "Though we cannot condone the military judge's unsubstantiated delay in authenticating a fairly straightforward trial record, we find it difficult to imagine these circumstances causing the public to doubt the entire military justice system's fairness and integrity." Id.

The same can be said in this case. Here, there is no indication of bad faith on the part of any Government actor and there is no indication of prejudice. Further, the time between sentencing is docketing in this case, 196 total days, is 285 days less than the delay in Anderson. Using our superior Court's reasoning and basis for not granting Toohey relief in Anderson, this Court should likewise grant Appellant no relief in this case.

[13] Toohey involved a six-year delay from the end of the appellant's trial to the lower court issuing a decision. Toohey, 63 M.J. at 362.

b. Tardif Analysis

Appellant's case does not warrant relief under Tardif either. As discussed above, the only reason this case exceeded the Livak standards was over the base legal office's confusion about sending a second copy of the record to JAJM. Notably, the original record and the first JAJM copy of the record arrived to JAJM 20 days before the Livak 150-day standard. Here, neither the base legal office nor 15 AF/JA exhibit any indifference or a lackadaisical approach to this case. Instead, the record shows both legal offices worked expeditiously to complete post-trial processing in this case as quickly as possible. There is no showing in this case of either bad faith or gross indifference in the overall post-trial processing of this case.

Moreover, Appellant's brief fails to present any evidence of harm, either to Appellant or institutionally, caused by the delay in this case. Indeed, there is none. Further, there is no evidence that the delay has lessened the disciplinary effect of any particular aspect of Appellant's sentence, and any granted relief would be inconsistent with the dual goals of justice and good order and discipline. Finally, Appellant has failed to show any "gross indifference" or "systemic institutional neglect" on the part of either the Seymour Johnson legal office or 15 AF/JA.

Finally, while this Court recently granted sentence relief pursuant to Tardif and Gay in United States v. Cassaberry-Folks, ACM 40444, 2024 CCA LEXIS 500 (A.F. Ct. Crim. App. 22 November 2024), that case involved a sentence-to-docketing timeline of 412 days, more than two times the 197-day timeframe in this case. This Court should deny this assignment of error.

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 7 January 2025 via electronic filing.

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7 January 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) BRANDON B. HUNT, USAF *Appellant*.	))))))))	MOTION TO ATTACH DOCUMENTS ACM 40563 Panel No. 2

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 in support of the government's Answer to Appellant's Assignment of Error brief in the above referenced case:

- Declaration of TSgt DJ, dated 11 November 2024, 2 pages;
- Declaration of SrA DG, dated 12 November 2024, 1 page.

These documents provide additional information and context outside the record but are relevant and necessary for the United States to answer Appellant's brief. Specifically, TSgt DJ's and SrA DG's declarations provide this Court necessary background and context regarding Appellant's claim that he is entitled to relief due to post-trial processing delay. These declarations provide needed context necessary to address Appellant's claims.

Our superior Court has held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court has also concluded that "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442 (*quoting* United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)). Here, Appellant's claim of post-trial delay is directly raised by materials in the record. These

declarations are relevant to address Appellant's claims of prejudice due to post-trial processing delay. Thus, this Court may consider them under Jessie.

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

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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 7 January 2025 via electronic filing.

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IN THE UNITED STATES AIR FORCE OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

Senior Airman (E-4)
BRANDON B. HUNT,
United States Air Force,
Appellant

REPLY BRIEF ON BEHALF OF APPELLANT

Before Panel No. 2

No. ACM 40563

12 January 2025

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

Argument

I. WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S REPEATED REQUESTS FOR SPECIFIC INSTRUCTIONS ON HOW TO EVALUATE POST-PENETRATION WITHDRAWAL OF CONSENT.

1. Stopping was a defense

The government concedes that Appellant had the "ability to avoid criminality by simply doing what MM said – stopping his sexual act and removing himself from her body." (Gov. Br. at 20). But the government points to nothing in the military judge instructions that informed the panel of this ability. Indeed, one version of MM's story presented at trial was her statement to the responding officer that she

"said 'Stop, Stop, Stop,' pushed him off, and the sex ended[.]" (R. at 250). This sounds a lot like what the government describes as Appellant's "ability to avoid criminality by . . . stopping his sexual act and removing himself from her body." (Gov. Br. at 20). Especially given that MM acknowledged omitting to the police (in this same prior statement) any mention of trying to crawl away, using the headboard, or being pinned down for minutes. (R. at 239). Interplaying with the following assignment of error, this is exactly why it was so important that the panel be instructed they could substantively consider this version of events, which was presented through prior inconsistent statements (rather than being explicitly and erroneously forbade from doing so).

It was also crucial that the panel be instructed on how to evaluate the post-penetration withdrawal of consent and the sufficiency of Appellant's response to it. As pointed out in Appellant's original brief, and as uncontested by the government's brief, it was largely undisputed at trial that (1) the anal sex began consensually, (2) post-penetration, MM withdrew consent, and (3) at some point thereafter Appellant stopped.

The government does not dispute Appellant's argument that an initially consensual act cannot *immediately* become criminal upon a post-penetration withdrawal of consent. *See* (Gov. Br. at 19-20). There must be some framework for analyzing the communication of the withdrawal of consent and the sufficiency of

Appellant's cessation. This was the central issue in the case, and the panel was given no framework by which to evaluate it. This was especially prejudicial because there was significant evidence that Appellant stopped when asked. *See, e.g.,* (R. at 239, 250) (prior statements of MM that she "said 'Stop, Stop, Stop,' pushed him off, and the sex ended" and that omitted any mention of resistance, force, or prolonged continuation of the sexual act); (R. at 247) (Appellant's statements to MM via text that he did stop); (R. at 247, 273) (Appellant's statements to NW that MM had agreed to sex and he did stop).

2. Evidentiary Effect of Affirmative Answers to Cross-Examination Questions

The government heavily emphasizes that, on a point in controversy, the substance of the evidence was contained in a cross-examination question rather than the witness' answer. (Gov. Br. at 20-21). Indeed, the government makes this same argument on several important points throughout multiple assignments of error. (Gov. Br. at 20-21, 28, 41-43). The exchange in question here, between defense counsel and the responding police officer, reads:

> Q. And that after a few minutes, it began to hurt her, so she asked him to stop, correct?
>
> A. Yes, sir.

(R. at 302).

The government's objects that the no witness "said the words quoted" by Appellant, but instead they were "inserted" by defense counsel via a leading

question. (Gov. Br. at 20-21). Indeed, the government goes so far as to accuse Appellant defense counsel of misrepresenting the record by claiming that there was evidence that MM "told the responding officer that she withdrew consent 'after a few minutes' of anal sex." *See* (Gov. Br. at 20; Appellant's Br. at 11; R. at 302).

While it is true that the substance came from the question, the affirmative answer from the witness *adopted* the content from the question. This is simply how witness examination works. Appellant is aware of no authority for the government's apparent contention that the witness themselves must repeat the words of a question rather than adopt them via affirmation.

It is difficult to even imagine how government counsel's rule would work in practice. Presumably counsel would have to ask a question ("the light was red?"), secure an answer ("yes, sir."), and then ask the witness to repeat the content ("I don't want a 'yes,' I want you to *say the words*!").

As there seems to be confusion on this fundamental building block of trial evidence, this Court should take the opportunity to clarify for the field that an affirmative answer to a cross-examination question adopts the question's content.

3. Case Law

The government points to the limited body of caselaw on proper instructions for post-penetration withdrawal of consent cases. (Gov. Br. at 16). This is true, but probably not unexpected in that the factual circumstances giving rise to such cases

are quite unusual. The government points to several cases which discuss the viability of a post-penetration withdrawal of consent theory of sexual assault or rape, but most of these cases do not discuss the instructional issue relevant here on way or the other.

With regard to the most on-point case cited by both sides – the Kansas Supreme Court case of *State v. Flynn*, the government interprets the court's admonition that post-penetration withdrawal of consent cases require "more than simply instruct the jury on the statutory elements of rape" to mean the trial judge in that case gave no accompanying instructions, beyond listing the elements. (Gov. Br. citing 329 P.3d 429, 438 (Kan. 2014)). Appellant does not read this language in *Flynn* to mean that the trial judge in that case merely listed the elements, devoid of any definitions or available defenses. Rather, the appellate court was simply saying that the trial judge gave merely the standard instructions, with no additional instructions about how to evaluate the allegation of post-penetration withdrawal of consent. *Flynn* is the best persuasive authority either side has cited on the instructional issue and squarely supports Appellant's argument.

4. <u>The Government Limit's its Analysis to the Defense Proposed Instruction</u>

Both at trial (R. at 345) and on appeal (Appellant's Br. at 8, 14), the defense has stated the military judge was free to craft his own instruction on the post-penetration withdrawal of consent issue.

It is true that the defense proposed an instruction on this issue and the defense proposed instruction closely mirrored the instruction the Kansas Supreme Court found mandatory in *Flynn*. However, if the military judge felt the instruction could have been crafted better, he was free – and in fact obligated – to do so *sua sponte*. A military judge is required to provide instructions that "fairly and adequately cover the issues presented. . . ." *United States v. Bailey*, 77 M.J. 11, 13 (C.A.A.F. 2017); *see also* R.C.M. 920(e). Here, an issue presented – indeed the primary issue presented – was whether Appellant's cessation of sexual activity in response to the withdrawal of consent was sufficient to avoid criminal liability. But the military judge provided no instructions to fairly and adequately cover this issue.

The government focuses only on the standard for giving/denying a defense requested instruction but does not address the military judge's *sua sponte* duty to properly instruct the panel on matters at issue or acknowledge the defense request that the military judge craft an appropriate instruction. The government's framing would limit this Court's review strictly to the defense proposed instruction as framed and secure a more favorable standard of review. However, this Court must also evaluate whether the military judge failed to properly instruct the panel on issues presented by crafting his own instruction(s) on the post-penetration withdrawal of consent issue.

II. WHETHER RELIEF IS WARRANTED WHERE THE MILITARY JUDGE GAVE AN INCORRECT PRIOR INCONSISTENT STATEMENT INSTRUCTION AND DEFENSE COUNSEL FAILED TO OBJECT.

1. Error is Uncontested

As an initial matter, the government does not contest that the military judge's instruction was erroneous – and, in fact, the exact inverse of the correct state of the law. *See* (Gov. Br. at 23-32).

2. Government Appellate Counsel's Tactical Reason for Defense Counsel's Performance

Only a few short weeks ago, appellate government stated: "the allegations of ineffective assistance of counsel involve strategic decisions that *only Appellant's trial defense counsel* can explain. (Gov. Motion to Compel Affidavits (13 NOV 2024) at 2) (emphasis added). After not getting the answer it wanted, appellate government counsel changed his mind and decided he could personally explain trial defense counsel's strategic decisions, even when the vicariously attributed strategy was disclaimed by trial defense counsel themselves. (Gov. Br. 29-31); *see also* (Declarations of Mr. KP and Capt KN). This Court should not entertain appellate government counsel's attempt to substitute his own explanation as to trial defense counsel's thought process for their own.

Additionally, the tactical reasoning advanced by government appellate counsel is unsound. The main point seems to be that portions of MM's prior

statements were consistent with her trial testimony, and therefore would not have been exculpatory. (Gov. Br. at 30-32). Of course, prior *consistent* statements would not fall under the prior *inconsistent* statement instruction at all, so this rationale would not support a tactical decision to allow an erroneous instruction on prior inconsistent instructions.

To the extent government appellate counsel suggests trial defense counsel were somehow afraid the panel would learn that MM had consistently accused Appellant of assault prior to trial, this fact was *abundantly* clear by the mass of evidence that she had immediately accused him to her friends and then to the police on the night in question.

Government appellate counsel also notes that "MM never denied being sexually assaulted . . . ." (R. at 32). Apparently, government appellate counsel feels a legally accurate prior inconsistent statement instruction is only beneficial to the defense when the prior inconsistent statement constitutes a complete recantation or denial of the ultimate crime. This of course is not the only sort of prior inconsistent statement that is important. Especially on the facts of this case, the questions at issue involved the granular details of the withdrawal of consent and Appellant's response to it.

3. Affirmative Answers to Cross-Examination Questions

The government returns to its contention that two of the prior inconsistent statements at issue were not spoken by the witnesses but were adopted on cross-examination. (Gov. Br. at 28-29, 33) (alleging trial defense counsel "manufactured the statements" through cross examination questions). Again, the government cites no authority for the proposition that a witnesses' adoption of a proposition articulated by counsel in cross-examination is somehow unimportant and for the reasons briefed above this Court should not find this government argument persuasive.

4. An Articulatable Explanation Does Not Mean a Statement is Not Inconsistent

The government then tries to explain how one of the prior inconsistent statements could have been reconciled with MM's testimony at trial. (R. at 28-29). While this argument is not particularly convincing, the government was free to make it at trial. But this does not mean Appellant was not entitled to a legally accurate instruction on prior inconsistent statements. The law is clear that "whether testimony is inconsistent with a prior statement is not limited to diametrically opposed answers . . . ." *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993). It is not at all uncommon for testimony to be subject to competing interpretations. Indeed, this is very much the rule rather than the exception. The statement at issue here, that MM "said 'Stop, Stop, Stop,' pushed him off, and the

sex ended" could certainly be read to describe a much more contemporaneous cessation than MM's trial testimony where she described Appellant responding verbally, then covering her mouth, and physically persisting over multiple attempts to physically pull herself out from under him. *Compare* (R. at 190-91) *with* (R. at 250). This is doubly so given that MM acknowledged omitting to the police (in this same prior statement) any mention of trying to crawl away, using the headboard, or being pinned down for minutes. (R. at 239). Appellant was entitled to have the panel consider this version of events substantively.

5. Prejudice Considerations

Regarding prejudice, the government suggests that the proper instruction would "*just* have had two different accounts to choose from . . . ." (Gov. Br. at 31) (emphasis added). But this is exactly the point. Under the proper instructions, the members would have had competing narratives to consider substantively. This is hugely significant. Indeed, a substantive competing narrative is a classic form of reasonable doubt. *See e.g.*, *United States v. O'Neal*, 2 C.M.R. 44, 49 (C.M.A. 1952) (noting that one long-standing formulation of the beyond a reasonable doubt standard, though "often clothed in varying verbiage," is that it requires exclusion of every reasonable alternative hypothesis.). To say that the error "just" deprived Appellant of substantive consideration of an alternate hypothesis is tantamount to saying Appellant was "just" deprived of a path to reasonable doubt and an acquittal.

6. Conclusion

It is undisputed that the military judge erred. Trial defense counsel disclaimed any tactical reason for allowing the error. As a result of the error the panel was expressly forbidden from substantively considering an alternate hypothesis to guilt. This is a textbook case of instructional error warranting relief.

III. WHETHER, IN THIS POST-PENETRATION SEXUAL ASSAULT CASE, APPELLANT'S CONVICTION IS LEGALLY AND FACTUALLY INSUFFICIENT WHERE HE WAS CHARGED WITH "PENETRATING" THE VICTIM WITHOUT CONSENT BUT THE VICTIM EXPLICITLY ACKNOWLEDGED CONSENTING TO HIM PENETRATING HER.

1. If the Charging Language Means Entry, Insufficiency is Uncontested

As an initial matter, the government does not contest the central premise of this issue: that if the charging language is limited to entry, the evidence is insufficient. All sides agreed at trial and on appeal that the entry was accomplished with consent. As such, this Court's resolution of the textual interpretation issue in Appellant's favor would be dispositive.

2. Competing Interpretations

Therefore, the critical question is whether the charging language means entry as Appellant, Black's, and Ballantine's suggest, or whether, as the government posits, it constitutes an ongoing noun. *See* (Gov. Br. at 38).

The government cites *United States v. Rouse* as persuasive authority for the proposition that penetration constitutes an ongoing noun. 78 M.J. 793, 797 (A. Ct. Crim. App. 2019).[1] Unlike the present case, the charging language in *Rouse* was not "penetrating," but rather was "unnatural carnal copulation" – which included penile penetration. *Id.* at n.3. The Army Court reasoned that penetration, and thus the "unnatural carnal copulation" continued because the penetration was ongoing.

Neither *Rouse*, nor the government, attempt to reconcile this conclusion with the fact that Black's and Balentine's legal dictionaries both define Penetration as entry. PENETRATION, Black's Law Dictionary (11th ed. 2019); PENETRATION, Ballentine's Law Dictionary (3rd ed. 2010).

Additionally, as quoted in the government's brief, the Army Court explained its textual rationale thusly: "'Penetration' is *a noun* describing the arrangement wherein one object breaches the plane of another. Penetration exists so long as the breach exists." *Rouse*, 78 M.J. at 798 (emphasis added). However, as argued in Appellant's opening brief, the charging language further indicated the specific act

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[1] The government also cites two state cases, referenced by the Army Court in *Rouse*: *State v. Siering*, 35 Conn. App. 173, 180, 644 A.2d 958, 961 (1994) *State v. Robinson*, 496 A.2d 1067 (Me. 1985). Both of these cases stand for the proposition that continuation of sexual intercourse following a post-penetration withdrawal of consent can be criminalized. Neither, however, are particularly on point with the more specific issue presented here as, *inter alia*, the *actus reus* element in question was "sexual intercourse" rather than "penetrating" as charged in the present case.

of entry by modifying the statutory language and specifying that Appellant "committed a sexual act upon [MM] by penetrat*ing* [MM's] anus . . ." (Charge sheet) (emphasis added). "Penetrat*ing*" is not a noun. It is a verb. As such, even if this Court finds the noun "penetration" is an ongoing thing, it does not follow that the verb "penetrating" is also ongoing. The government did not have to modify the statutory language and perhaps would have a better case if it had charged something along the lines of "committed a sexual act, to wit: the penetration of the anus with his penis." In the more common sexual assault fact-pattern, the "penetrating" phrasing used here would be fine, but it is incumbent on the government to carefully select charging language that matches the facts.

3. Specificity and Precision in Charging Language

When the government wishes to criminalize conduct, it must be clear in its language. This principle is central to the concept of fair notice as safeguarded by the rule of lenity and related doctrines.[2] Such notice concerns are on full display in

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[2] "[T]he rule of lenity's teaching [is] that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). "[M]uch like the vagueness doctrine, it is founded on 'the tenderness of the law for the rights of individuals' to fair notice of the law . . . ." *Id.* (internal citations omitted); *see United States v. Santos*, 553 U.S. 507, 514 (2008) ("This venerable rule . . . vindicates the fundamental principle that no citizen should be held accountable or a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed.").

this case. It is apparent from the R.C.M. 917 motion defense counsel raised after the close of evidence that the defense interpreted the charged conduct to focus on the act of entry and, presumably, tailored its case accordingly. *See* (R. at 319-22) ("The government must prove that there was no consent when the anal intercourse was initiated and began, and that there is absolutely no evidence that that was the case."). On the particular facts of the present case, the potential for confusion as to what Appellant was accused of was even greater because MM told OSI the initial penetration was accomplished without consent. *See* (R. at 238) (MM told OSI Appellant never asked for consent to engage in anal intercourse and she had never told him he could perform anal.).

4. Appellant Does Not Argue that Post-Penetration Sexual Assault Cannot be Criminalized

Large portions of the government's answer and the authorities cited therein address the question of whether post-penetration sexual assault cannot be criminalized at all. *See* (Gov. Br. at 36-38). Appellant does not argue that post-penetration sexual assault cannot be criminalized. Appellant's argument is more nuanced and limited.

The government likely had the opportunity to match the charging language to the facts. Article 120, UCMJ specifically provides multiple definitions, and the government could have chosen one that fit. Appellant will not specifically analyze

the validity of every charging scheme the government could have used. The only issue is that the evidence did not fit the charging scheme the government selected. As the CAAF has stated, even where the "evidence at trial establishes the commission of a criminal offense by the accused," the proof must " conform strictly with the offense alleged in the charge." *United States v. English*, 79 M.J. 116, 121 (C.A.A.F. 2019) (quotation marks and citations omitted).

5. Specific Showing of a Deficiency in Proof

As a threshold matter regarding factual sufficiency, the government twice argues, albeit with minimal elaboration, that Appellant has not specific showing of a deficiency in proof sufficient to trigger further review under the new factual sufficiency standard. (Gov. Br. at 36, 39). Appellant's contention in this assignment of error is that if the word "penetrating" as used in the charging language means *entry*, then the proof is deficient because the *entry* in this case was explicitly acknowledged by the victim to have occurred consensually.

Clearly the victim acknowledging the charged act occurred consensually would constitute a specific showing of a deficiency in proof under the new Article 66, UCMJ. Of course, this issue rests on the resolution of a question of textual interpretation, but Appellant is aware of no authority that this Court's factual sufficiency authority cannot address questions that involve textual interpretation. That said, given the nature of the textual interpretation issue, there is significant

overlap between the legal and factual sufficiency analysis in the present case. If the charging language means "entry," then, as seemingly uncontested by the government, the proof is also legally insufficient.

IV. WHETHER APPELLANT'S CONVICTION IS FURTHER FACTUALLY INSUFFICIENT DUE TO CREDIBILITY ISSUES WITH THE GOVERNMENT EVIDENCE.

Appellant largely rests on his original brief but makes two brief points.

First, the government returns yet again to its argument that various testimony on cross examination is unimportant because the witness did not personally "sa[y] the words" at issue, instead answering affirmatively to questions containing the substantive content. (Gov. Br. at 41-42). For the reasons discussed previously, this Court should not find this argument persuasive.

Second, the government argues that the evidence did *not* establish that MM lied to OSI when she told them Appellant never asked for consent to engage in anal intercourse and she had never told Appellant he could perform this act. (Gov. Br. at 44-45). The government makes a tortured attempt to reconcile MM's statements to OSI with her trial testimony but fails to mention that MM herself admitted her

statement to OSI "was not the truth" (R. at 238) and later again admitted that she "did not tell the truth" to OSI. (R. at 256-57).[3]

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

[redacted]
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[3] This is reminiscent of Issue II where trial defense counsel acknowledged they had no tactical reason for allowing the erroneous instruction, but government appellate counsel insists they did. Similarly, here, MM repeatedly admitted she did not tell the truth to OSI, but government appellate counsel insists she did.

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 12 January 2025.

Respectfully submitted,

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40563**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Brandon B. HUNT	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 7 January 2025, Appellee submitted a motion to attach declarations from TSgt DJ and SrA DG, dated 11 November 2024 and 12 November 2024, respectively, to Appellant's record of trial. Appellee avers that the declarations provide the court necessary background and context regarding Appellant's claim that he is entitled to relief for post-trial processing delay. Appellant did not respond to the motion.

The court has considered the motion, the lack of any opposition, the court's Rules of Practice and Procedure, and the applicable law. The court grants Appellee'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 documents 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 16th day of January, 2025,

ORDERED:

Appellee's Motion to Attach is **GRANTED**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40563**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Brandon B. HUNT	)	**PANEL CHANGE**
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 24th day of February, 2025,

ORDERED:

The record of trial in the above styled matter is withdrawn from Panel 2 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

RICHARDSON, NATALIE D., Colonel, Senior Appellate Military Judge
MASON, BRIAN C., Lieutenant Colonel, Appellate Military Judge
PERCLE, DAYLE P., Lieutenant Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]D, SrA, USAF
Appellate Court Paralegal