IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 1
MICHAEL B. KIGHT, Senior Airman (E-4) United States Air Force *Appellant*	)	No. ACM 40337 4 November 2022

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 60 days, which will end on **13 January 2023**. The record of trial was docketed with this Court on 15 September 2022. From the date of docketing to the present date, 50 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 4 November 2022.

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force
[redacted]

7 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MICHAEL B. KIGHT, USAF, *Appellant.*	))))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40337 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 7 November 2022.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

NOTICE OF APPEARANCE

UNITED STATES v. MICHAEL B. KIGHT ACM: 40337

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.

11/7/2022
Date

Bradley Simon
Digitally signed by Bradley Simon
Date: 2022.11.07 12:58:54 -06'00'
Signature

Bradley W. Simon [redacted]
Print Name Bar Number

[redacted]
Address

[redacted]
City State Zip Code

[redacted]
Phone Number [redacted]
E-Mail

Print Reset

United States Air Force
Court of Criminal Appeals

Be it known that

Bradley W. Simon

having fulfilled the requirements of the Uniform Code of Military Justice and the Rules of this Court to qualify for practice at the Bar of the Court, is duly admitted as an Attorney and Counselor of the United States Air Force Court of Criminal Appeals.

In witness whereof, as Clerk of said Court, I hereunto subscribe my name and affix the seal of the Court this 26th day of July two thousand twenty-two.

[redacted]

Carol K. Joyce
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. 1
MICHAEL B. KIGHT, Senior Airman (E-4) United States Air Force *Appellant*	)	No. ACM 40337
	)	6 January 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **12 February 2023**. The record of trial was docketed with this Court on 15 September 2022. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

Appellant was tried by a general court-martial composed of officer and enlisted members at Sheppard Air Force Base, Texas. (Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1.) On 29 April 2022, contrary to Appellant's pleas, the members found Appellant guilty of: Specification 1 and 2 of Charge I and Charge I, sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ). Consistent with Appellant's pleas, the members found Appellant not guilty of: Specification 3 of Charge I, sexual assault, in violation of Article 120, UCMJ; and Charge II and its Specification, assault consummated by a battery, in violation of Article 128, UCMJ. (*Id*. at 1-2; Record (R.) at 1006.) On 29 April 2022, the military judge sentenced Appellant to be reprimanded; reduced to the grade of E-1; confined for 30 months for Specification 1 of Charge I and 36 months for Specification 2 of Charge I, with all sentences to confinement to run

consecutively; and to be dishonorably discharged from the service. (ROT, Vol. 1, Statement of Trial Results at 1-3; R. at 1068.) On 6 June 2022, the convening authority took no action on the findings and sentence. (ROT, Vol. 1, Convening Authority Decision on Action at 1.) On 20 June 2022, the military judge entered the previously adjudged sentence. (ROT, Vol. 1, EOJ at 1-4.) The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 36 appellate exhibits, and 1 court exhibit. The transcript is 1068 pages. Appellant is currently in confinement.

Through no fault of Appellant, undersigned counsel have been working on other assigned matters and have yet to complete their review of Appellant's case. Appellant was informed of his right to a timely appeal and concurs with this request for an enlargement of time. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

//SIGNED//
BRADLEY W. SIMON, Esq.
Appellate Defense Counsel
[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 6 January 2023.

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

9 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MICHAEL B. KIGHT, USAF *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40337 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 9 January 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 1
MICHAEL B. KIGHT, Senior Airman (E-4) United States Air Force *Appellant*	)	No. ACM 40337 2 February 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a third enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **14 March 2023**. The record of trial was docketed with this Court on 15 September 2022. From the date of docketing to the present date, 140 days have elapsed. On the date requested, 180 days will have elapsed.

Appellant was tried by a general court-martial composed of officer and enlisted members at Sheppard Air Force Base, Texas. (Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1.) On 29 April 2022, contrary to Appellant's pleas, the members found Appellant guilty of: Specification 1 and 2 of Charge I and Charge I, sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ). Consistent with Appellant's pleas, the members found Appellant not guilty of: Specification 3 of Charge I, sexual assault, in violation of Article 120, UCMJ; and Charge II and its Specification, assault consummated by a battery, in violation of Article 128, UCMJ. (*Id*. at 1-2; Record (R.) at 1006.) On 29 April 2022, the military judge sentenced Appellant to be reprimanded; reduced to the grade of E-1; confined for 30 months for Specification 1 of Charge I

and 36 months for Specification 2 of Charge I, with all sentences to confinement to run consecutively; and to be dishonorably discharged from the service. (ROT, Vol. 1, Statement of Trial Results at 1-3; R. at 1068.) On 6 June 2022, the convening authority took no action on the findings and sentence. (ROT, Vol. 1, Convening Authority Decision on Action at 1.) On 20 June 2022, the military judge entered the previously adjudged sentence. (ROT, Vol. 1, EOJ at 1-4.) The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 36 appellate exhibits, and 1 court exhibit. The transcript is 1068 pages. Appellant is currently in confinement.

Through no fault of Appellant, undersigned counsel have been working on other assigned matters and have yet to complete their review of Appellant's case. Appellant was informed of his right to a timely appeal and concurs with this request for an enlargement of time. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

//SIGNED//
BRADLEY W. SIMON, Esq.
Appellate Defense Counsel
[redacted]

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

2 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MICHAEL B. KIGHT, USAF *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40337 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 2 February 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Senior Airman (E-4) **MICHAEL B. KIGHT** United States Air Force *Appellant*	)	**CONSENT MOTION TO EXAMINE AND TRANSMIT SEALED MATERIALS** Before Panel No. 1 No. ACM 40337 1 March 2023

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and Rules 3.1, 23.1(b) and 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves this Court to examine Appellate Exhibits IV, V, VI, X, XI, XII, XIII, XV, XX, XXXIII, XXXV, and pages 72-193 and 211-236 of the verbatim transcript, and transmit each to Appellant's civilian appellate defense counsel, Mr. Bradley Simon. Undersigned counsel withdraws the previously filed motion, filed on 1 March 2023, because it omitted Appellant's civilian appellate defense counsel's name and location. Undersigned counsel also moves for appellate counsel for the Government to be allowed to view these sealed materials as necessary to respond to Appellant's brief.

Facts

On 25-29 April 2022, Appellant was tried at a general court-martial composed of officer and enlisted members at Sheppard Air Force Base, Texas. Record of Trial (ROT), Vol. 1, Entry of Judgment, dated 20 June 2022; Record (R.) at 1. Contrary to his pleas, Appellant was convicted of Specifications 1 and 2 of Charge I, and Charge I, sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920, for penetrating CT's vulva with his

penis, without her consent.[1] R. at 1006. He was acquitted of Specification 3 of Charge I, which alleged Appellant committed sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920, by penetrating AD with his finger; and Charge II and its Specification, which alleged Appellant committed assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928, by unlawfully grabbing the arm of CT with his hands. *Id*. The military judge sentenced Appellant to be reprimanded; reduced to the grade of E-1; confined for 30 months for Specification 1 of Charge I and 36 months for Specification 2 of Charge I, with all sentences to confinement to run consecutively; and to be dishonorably discharged from the service. ROT, Vol. 1, Statement of Trial Results at 1-3; R. at 1068. The convening authority took no action on the findings and sentence. ROT, Vol. 1, Convening Authority Decision on Action, dated 6 June 2022.

During the proceedings, CT was represented by Victims' Counsel, Capt Aneisha Bell (R. at 3), and the military judge sealed the following materials:

1) Appellate Exhibit IV, Defense Motion to Admit Evidence under Mil. R. Evid. 412, 1 of 2, dated 28 February 2022, 19 pages (R. at 13-14);
2) Appellate Exhibit V, Government Response to Defense Motion to Admit Evidence under Mil. R. Evid. 412, 1 of 2, dated 7 March 2022, 5 pages (R. at 14);
3) Appellate Exhibit VI, Victims' Counsel's Response to Defense Motion to Admit Evidence under Mil. R. Evid. 412, 1 of 2 (R. at 15, 40);
4) Appellate Exhibit X, Defense Motion to Admit Evidence and Compel Production of Records pursuant to Mil. R. Evid. 513, 107 pages (R. at 16-17);

[1] All references to the UCMJ, the R.C.M., and the Military Rules of Evidence (Mil. R. Evid.) are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

5) Appellate Exhibit XI, Government Response to Defense Motion to Admit Evidence and Compel Production of Records under Mil. R. Evid. 513, dated 19 April 2022, 5 pages (R. at 17);

6) Appellate Exhibit XII, Victims' Counsel's Response to Defense Motion to Admit Evidence and Compel Production of Records under Mil. R. Evid. 513 (R. at 17, 40-41);

7) Appellate Exhibit XIII, one disc containing one video of CT, depicting a conversation, which is approximately 2 minutes and 30 seconds in length (R. at 18-19);

8) Appellate Exhibit XV, Air Force Office of Special Investigations Interview of CT, one disc containing three files, which is approximately 2 hours and 45 minutes in length (R. at 19-20);

9) Appellate Exhibit XX, Portion of Report of Investigation, which appears to contain text messages between CT and JM (the alleged victim named in the withdrawn and dismissed Charge III) (R. at 198-99; *see* ROT, Vol. 6, Court Reporter's Exhibit Index);

10) Appellate Exhibit XXXIII, Exhibit Ruling on Defense Motion to Compel Evidence under Mil. R. Evid. 513 (Appellate Exhibit XXXIV);

11) Appellate Exhibit XXXV, Ruling on Defense Request for Mil. R. Evid. 412 Evidence for CT (Appellate Exhibit XXXVI).

The military judge also ordered the following portions of the transcript sealed: pages 72-193 and 211-236, wherein the court was closed to discuss the defense's Mil. R. Evid. 404(a), 412, and 513 motions with respect to CT. R. at 70-71, 194, 210.

Law

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

Air Force regulations governing professional duties and conduct of appellate defense counsel impose upon counsel, *inter alia*, a duty to provide "competent representation,"[2] perform "reasonable diligence,"[3] and to "give a client his or her best professional evaluation of the questions that might be presented on appeal…[to] consider all issues that might affect the validity of the judgment of conviction and sentence…[to] advise on the probable outcome of a challenge to the conviction or sentence...[and to] endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance."[4] These requirements are consistent with those imposed by the state bars to which counsel belong.[5]

This Court may grant relief "on the basis of the entire record" of trial. Article 66, UCMJ, 10 U.S.C. § 866. Appellate defense counsel so detailed by the Judge Advocate General shall represent accused servicemembers before this Court. Article 70, UCMJ, 10 U.S.C. § 870. This Court's "broad mandate to review the record unconstrained by appellant's assignments of error" does not reduce "the importance of adequate representation" by counsel; "independent review is

[2] Air Force Instruction (AFI) 51-110, *Professional Responsibility Program*, Attachment 2: Air Force Rules of Professional Conduct, Rule 1.1 (11 Dec. 2018).
[3] *Id*. at Rule 1.3.
[4] AFI 51-110, Attachment 7: Air Force Standards for Criminal Justice, Standard 4-8.3(b).
[5] Counsel of record are licensed to practice law in California and Massachusetts.

not the same as competent appellate representation." *United States v. May,* 47 M.J. 478, 481 (C.A.A.F. 1998).

The contents of a record of trial shall include a substantially verbatim recording of the court-martial proceedings except sessions closed for deliberation and voting. R.C.M. 1112(b)(1). A record of trial is substantially incomplete if it does not include a substantially verbatim recording of the court-martial proceedings. *United States v. Valentin-Andino*, ___ M.J. ___, No. ACM 40185, 2023 CCA LEXIS 45, at *8 (A.F. Ct. Crim. App. 30 Jan. 2023).

Analysis

Each of the sealed exhibits identified in paragraphs (1) through (11) in the facts section above pertain to CT. They are motions filed by the defense, responses filed by the Government and CT's Counsel, rulings issued by the military judge, or evidence presented by the defense in support of its motions. R. at 13-20, 40-41, 198-99; Appellate Exhibits XXXIV and XXXVI. Moreover, all parties would have been present for the closed sessions contained within the requested transcript pages. Thus, it is evident the parties "presented" and "reviewed" them at trial.

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

Appellant is represented by undersigned counsel as well as Mr. Bradley Simon. Mr. Simon is based in San Antonio, Texas, and has no ability to come to the Court in person to review the sealed materials within a reasonable time frame. Appellant therefore further requests this Court's permission for undersigned counsel to create and transmit digital copies of Appellate Exhibits IV, V, VI, X, XI, XII, XIII, XV, XX, XXXIII, XXXV, and pages 72-193 and 211-236 of the verbatim transcript to Mr. Simon to facilitate counsel's preparation of Appellant's Assignments of Error.

If this Court grants Appellant's request to transmit the sealed materials to Mr. Simon, undersigned counsel proposes the following procedure for effecting the Court's order, subject to any directive by this Court. Undersigned counsel will scan and create an electronic file containing the sealed material. Undersigned counsel will then electronically transmit that file to undersigned counsel's official, encrypted email account. Undersigned counsel will retain a copy of that electronic file—with clear markings to indicate it contains sealed material—exclusively on the Air Force Appellate Defense Division's secure electronic drive. Undersigned counsel will securely transmit a copy of the electronic file to Mr. Simon via DoD SAFE, who will securely store the file with clear markings to indicate it contains sealed materials.

The Government consents to both parties viewing the sealed materials detailed above and undersigned counsel transmitting the sealed material via secure means to Mr. Simon.

WHEREFORE, counsel respectfully requests that this Honorable Court grant this consent motion.

Respectfully submitted,

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 1 March 2023.

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40337**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Michael B. KIGHT	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 1 March 2023, counsel for Appellant moved this court to permit appellate military defense counsel and appellate civilian counsel, as well as appellate counsel for the Government, to examine the following sealed materials in Appellant's case: Appellate Exhibits IV, V, VI, X, XI, XII, XIII, XV, XX, XXXIII, and XXXV, and transcript pages 72–193 and 211–236 of the verbatim transcript.

In the motion, appellate military defense counsel also requests permission to transmit those sealed materials to civilian appellate defense counsel, Mr. Bradley Simon, who is currently located in San Antonio, Texas. Counsel avers that they will "scan and create an electronic file containing the sealed material" then "securely transmit a copy of the electronic file to Mr. Simon via DoD SAFE."

The motion states the materials were reviewed by counsel at trial and that examination of these sealed materials is reasonably necessary to fulfill appellate counsel's responsibilities. The motion also states that the Government consents to both parties viewing the sealed materials and Appellant's military counsel transmitting the sealed material via secure means to Mr. Simon.

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

The court has considered Appellant's motion, the Government's response, case law, and this court's Rules of Practice and Procedure. The court has reviewed the requested material. The court also finds that appellate defense counsel has made a colorable showing that review of the material is reasonably necessary to a proper fulfillment of appellate defense counsel's responsibilities.

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

ORDERED:

Appellant's Consent Motion to Examine and Transmit Sealed Materials to civilian counsel, Mr. Bradley Simon, is **GRANTED.** Appellate defense counsel and government appellate counsel are authorized to examine **Appellate Exhibits IV, V, VI, X, XI, XII, XIII, XV, XX, XXXIII, and XXXV, and transcript pages 72–193 and 211–236 of the verbatim transcript**. To examine these materials, counsel will coordinate with the court.

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

Except as outlined in this order, no counsel will photocopy, photograph, or otherwise reproduce this material and will not disclose or make available its contents to any other individual without this court's prior written authorization.

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

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. **MICHAEL B. KIGHT,** Senior Airman (E-4) United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)** Before Panel No. 1 No. ACM 40337 6 March 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fourth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **13 April 2023**. The record of trial was docketed with this Court on 15 September 2022. From the date of docketing to the present date, 172 days have elapsed. On the date requested, 210 days will have elapsed.

On 25-29 April 2022, Appellant was tried at a general court-martial composed of officer and enlisted members at Sheppard Air Force Base, Texas. Record of Trial (ROT), Vol. 1, Entry of Judgment, dated 20 June 2022; Record (R.) at 1. Contrary to his pleas, Appellant was convicted of Specifications 1 and 2 of Charge I, and Charge I, sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920, for penetrating CT's vulva with his penis, without her consent.[1] R. at 1006. He was acquitted of Specification 3 of Charge I, which alleged Appellant committed sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920, by penetrating AD with his finger; and Charge II and its Specification, which alleged Appellant

[1] All references to the UCMJ, the R.C.M., and the Military Rules of Evidence (Mil. R. Evid.) are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

committed assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928, by unlawfully grabbing the arm of CT with his hands. *Id*. The military judge sentenced Appellant to be reprimanded; reduced to the grade of E-1; confined for 30 months for Specification 1 of Charge I and 36 months for Specification 2 of Charge I, with all sentences to confinement to run consecutively; and to be dishonorably discharged from the service. ROT, Vol. 1, Statement of Trial Results at 1-3; R. at 1068. The convening authority took no action on the findings and sentence. ROT, Vol. 1, Convening Authority Decision on Action, dated 6 June 2022. On 20 June 2022, the military judge entered the previously adjudged findings and sentence. (ROT, Vol. 1, EOJ at 1-4.) The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 36 appellate exhibits, and 1 court exhibit. The transcript is 1068 pages. Appellant is currently in confinement.

Through no fault of Appellant, undersigned counsel have been working on other assigned matters and have yet to complete their review of Appellant's case. Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel provides the following information:

(1) Capt Samantha Golseth currently represents 14 clients and is presently assigned 12 cases pending brief before this Court. Nine cases pending brief before this Court currently have priority over the present case:

a. *United States v. Johnson*, No. ACM 40291 – The record of trial consists of 28 prosecution exhibits, 4 defense exhibits, and 23 appellate exhibits. The transcript is 395 pages. Appellant is confined. Capt Golseth is currently reviewing this record of trial and beginning to draft the Appellant's Assignments of Error.

b. *United States v. Ross*, No. ACM 40289 – The record of trial consists of 11 prosecution exhibits, 1 defense exhibit, 2 court exhibits, and 4 appellate exhibits.

The transcript is 130 pages. Appellant is not confined. Capt Golseth has begun review of this record of trial.

c. *United States v. Hernandez*, No. ACM 40287 – The record of trial consists of 7 prosecution exhibits, 27 defense exhibits, and 10 appellate exhibits. The transcript is 226 pages. Appellant is confined.

d. *United States v. Gammage*, No. ACM S32731 – The record of trial consists of 3 prosecution exhibits, 4 defense exhibits, and 5 appellate exhibits. The transcript is 105 pages. Appellant is not confined.

e. *United States v. Portillos*, No. ACM 40305 – The record of trial consists of 4 prosecution exhibits, 8 defense exhibits, 17 appellate exhibits, and 1 court exhibit. The transcript is 124 pages. Appellant is not confined.

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

g. *United States v. Manzano-Tarin*, No. ACM S32734 – The record of trial consists of four prosecution exhibits, seven defense exhibits, and four appellate exhibits. The transcript is 75 pages. Appellant is not confined. Capt Golseth has begun review of this record of trial and is supervising the review of this record by Mr. Jacob Frankson, a law student extern assigned to the Air Force Appellate Defense Division.

h. *United States v. Bickford*, No. ACM 40326 – The record of trial consists of 42 appellate exhibits, 16 prosecution exhibits, and 1 defense exhibit. The transcript is 744 pages. Appellant is confined.

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

(2) Mr. Bradley Simon currently represents 54 clients and is presently assigned two cases pending brief before this Court. Appellant's case is Mr. Simon's number one priority before this court. In accordance with this Court's order on 2 March 2023, Capt Golseth is coordinating to scan and transmit certain sealed materials to Mr. Simon to facilitate his review of Appellant's case.

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

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

Respectfully submitted,

//SIGNED//
BRADLEY W. SIMON, Esq.
Appellate Defense Counsel
[redacted]

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 6 March 2023.

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

6 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MICHAEL B. KIGHT, USAF *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40337 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

NOTICE OF APPEARANCE

UNITED STATES v. MICHAEL B. KIGHT ACM: 40337

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.

3/7/2023
Date

Scott Hockenberry
Signature

Digitally signed by Scott Hockenberry
Date: 2023.03.07 14:31:02 -05'00'

Scott Hockenberry [redacted]
Print Name Bar Number

[redacted]
Address

[redacted]
City State Zip Code

[redacted]
Phone Number E-Mail

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 1
MICHAEL B. KIGHT, Senior Airman (E-4) United States Air Force *Appellant*	)	No. ACM 40337 3 April 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fifth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **13 May 2023**. The record of trial was docketed with this Court on 15 September 2022. From the date of docketing to the present date, 200 days have elapsed. On the date requested, 240 days will have elapsed.

On 25-29 April 2022, Appellant was tried at a general court-martial composed of officer and enlisted members at Sheppard Air Force Base, Texas. Record of Trial (ROT), Vol. 1, Entry of Judgment, dated 20 June 2022; Record (R.) at 1. Contrary to his pleas, Appellant was convicted of Specifications 1 and 2 of Charge I, and Charge I, sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920, for penetrating CT's vulva with his penis, without her consent.[1] R. at 1006. He was acquitted of Specification 3 of Charge I, which alleged Appellant committed sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920, by penetrating AD with his finger; and Charge II and its Specification, which alleged Appellant

[1] All references to the UCMJ, the R.C.M., and the Military Rules of Evidence (Mil. R. Evid.) are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

committed assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928, by unlawfully grabbing the arm of CT with his hands. *Id*. The military judge sentenced Appellant to be reprimanded; reduced to the grade of E-1; confined for 30 months for Specification 1 of Charge I and 36 months for Specification 2 of Charge I, with all sentences to confinement to run consecutively; and to be dishonorably discharged from the service. ROT, Vol. 1, Statement of Trial Results at 1-3; R. at 1068. The convening authority took no action on the findings and sentence. ROT, Vol. 1, Convening Authority Decision on Action, dated 6 June 2022. On 20 June 2022, the military judge entered the previously adjudged findings and sentence. (ROT, Vol. 1, EOJ at 1-4.) The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 36 appellate exhibits, and 1 court exhibit. The transcript is 1068 pages. Appellant is currently in confinement.

Through no fault of Appellant, undersigned counsel have been working on other assigned matters and have yet to complete their review of Appellant's case. Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel provides the following information:

(1) Mr. Scott Hockenberry represents eight appellate clients and is presently assigned to four cases pending before this Court. Appellant's case is Mr. Hockenberry's first priority before this Court. Mr. Hockenberry is currently reviewing Appellant's record of trial.

(2) Mr. Bradley Simon currently represents two appellate clients and is presently assigned two cases pending brief before this Court. Appellant's case is Mr. Simon's first priority before this Court.

(3) Capt Samantha Golseth currently represents 14 clients and is presently assigned 11 cases pending brief before this Court. Eight cases pending brief before this Court currently have priority over the present case:

a. *United States v. Ross*, No. ACM 40289 – The record of trial consists of 11 prosecution exhibits, 1 defense exhibit, 2 court exhibits, and 4 appellate exhibits. The transcript is 130 pages. Appellant is not confined. Capt Golseth has reviewed this record of trial and is discussing potential assignments of error with the Appellant.

b. *United States v. Johnson*, No. ACM 40291 – The record of trial consists of 28 prosecution exhibits, 4 defense exhibits, and 23 appellate exhibits. The transcript is 395 pages. Appellant is confined. Capt Golseth has reviewed the transcript, is drafting a request to view sealed materials, and has begun to draft the Appellant's assignments of error.

c. *United States v. Gammage*, No. ACM S32731 – The record of trial consists of 3 prosecution exhibits, 4 defense exhibits, and 5 appellate exhibits. The transcript is 105 pages. Appellant is not confined. Capt Golseth has begun review of this record of trial.

d. *United States v. Portillos*, No. ACM 40305 – The record of trial consists of 4 prosecution exhibits, 8 defense exhibits, 17 appellate exhibits, and 1 court exhibit. The transcript is 124 pages. Appellant is not confined. Capt Golseth has begun review of this record of trial with her co-counsel, Major David L. Bosner.

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

f. *United States v. Manzano-Tarin*, No. ACM S32734 – The record of trial consists of four prosecution exhibits, seven defense exhibits, and four appellate exhibits.

The transcript is 75 pages. Appellant is not confined. Capt Golseth has reviewed this record of trial and is supervising the drafting of an issue by Mr. Jacob Frankson, a law student extern assigned to the Air Force Appellate Defense Division.

g. *United States v. Bickford*, No. ACM 40326 – The record of trial consists of 42 appellate exhibits, 16 prosecution exhibits, and 1 defense exhibit. The transcript is 744 pages. Appellant is confined.

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

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

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

Respectfully submitted,

//SIGNED//
SCOTT HOCKENBERRY, Esq.
Appellate Defense Counsel
[redacted]

//SIGNED//
BRADLEY W. SIMON, Esq.
Appellate Defense Counsel
[redacted]

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 3 April 2023.

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

4 April 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MICHAEL B. KIGHT, USAF *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40337 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40337**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Michael B. KIGHT	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 3 April 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth), requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 4th day of April, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant's brief will be due **13 May 2023**.

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

FOR THE COURT

[redacted]

FLEMING E. KEEFE, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 1
MICHAEL B. KIGHT, Senior Airman (E-4) United States Air Force *Appellant*	)	No. ACM 40337 3 May 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a sixth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **12 June 2023**. The record of trial was docketed with this Court on 15 September 2022. From the date of docketing to the present date, 230 days have elapsed. On the date requested, 270 days will have elapsed.

On 25-29 April 2022, Appellant was tried at a general court-martial composed of officer and enlisted members at Sheppard Air Force Base, Texas. Record of Trial (ROT), Vol. 1, Entry of Judgment, dated 20 June 2022; Record (R.) at 1. Contrary to his pleas, Appellant was convicted of Specifications 1 and 2 of Charge I, and Charge I, sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920, for penetrating CT's vulva with his penis, without her consent.[1] R. at 1006. He was acquitted of Specification 3 of Charge I, which alleged Appellant committed sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920, by penetrating AD with his finger; and Charge II and its Specification, which alleged Appellant

[1] All references to the UCMJ, the R.C.M., and the Military Rules of Evidence (Mil. R. Evid.) are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

committed assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928, by unlawfully grabbing the arm of CT with his hands. *Id*. The military judge sentenced Appellant to be reprimanded; reduced to the grade of E-1; confined for 30 months for Specification 1 of Charge I and 36 months for Specification 2 of Charge I, with all sentences to confinement to run consecutively; and to be dishonorably discharged from the service. ROT, Vol. 1, Statement of Trial Results at 1-3; R. at 1068. The convening authority took no action on the findings and sentence. ROT, Vol. 1, Convening Authority Decision on Action, dated 6 June 2022. On 20 June 2022, the military judge entered the previously adjudged findings and sentence. (ROT, Vol. 1, EOJ at 1-4.) The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 36 appellate exhibits, and 1 court exhibit. The transcript is 1068 pages. Appellant is currently in confinement.

Through no fault of Appellant, undersigned counsel have been working on other assigned matters and have yet to complete their review of Appellant's case. Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel provides the following information:

(1) Mr. Scott Hockenberry represents ten appellate clients and is presently assigned to four cases pending before this Court. Appellant's case is Mr. Hockenberry's first priority before this Court. Mr. Hockenberry is currently reviewing Appellant's record of trial.

(2) Mr. Bradley Simon currently represents two appellate clients and is presently assigned two cases pending brief before this Court. Appellant's case is Mr. Simon's first priority before this Court.

(3) Capt Samantha Golseth currently represents 14 clients and is presently assigned 9 cases pending brief before this Court. The following five cases pending brief before this Court currently have priority over the present case, however, given that Mr. Hockenberry is

lead counsel and has already begun review of Appellant's case, Capt Golseth will begin her review of Appellant's case as soon as possible:

a. *United States v. Gammage*, No. ACM S32731 – The record of trial consists of 3 prosecution exhibits, 4 defense exhibits, and 5 appellate exhibits. The transcript is 105 pages. Appellant is not confined. Undersigned counsel anticipates filing the brief on behalf of this appellant within the week.

b. *United States v. Manzano-Tarin*, No. ACM S32734 – The record of trial consists of four prosecution exhibits, seven defense exhibits, and four appellate exhibits. The transcript is 75 pages. Appellant is not confined. Undersigned counsel anticipates filing this brief on behalf of the appellant by or before 9 May 2023.

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

d. *United States v. Bickford*, No. ACM 40326 – The record of trial consists of 42 appellate exhibits, 16 prosecution exhibits, and 1 defense exhibit. The transcript is 744 pages. Appellant is confined.

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

f. In addition, before the United States Court of Appeals for the Armed Forces, undersigned counsel has one case pending supplement to the petition for grant of review, *United States v. Lopez*, USCA Dkt. No. 23-0164/AF, No. ACM 40161, which is due no later than 22 May 2023.

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

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

Respectfully submitted,

//SIGNED//
SCOTT HOCKENBERRY, Esq.
Appellate Defense Counsel
[redacted]

//SIGNED//
BRADLEY W. SIMON, Esq.
Appellate Defense Counsel
[redacted]

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 3 May 2023.

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

4 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MICHAEL B. KIGHT, USAF *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40337 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. **MICHAEL B. KIGHT,** Senior Airman (E-4) United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)** Before Panel No. 1 No. ACM 40337 5 June 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a seventh enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **12 July 2023**. The record of trial was docketed with this Court on 15 September 2022. From the date of docketing to the present date, 263 days have elapsed. On the date requested, 300 days will have elapsed.

On 25-29 April 2022, Appellant was tried at a general court-martial composed of officer and enlisted members at Sheppard Air Force Base, Texas. Record of Trial (ROT), Vol. 1, Entry of Judgment, dated 20 June 2022; Record (R.) at 1. Contrary to his pleas, Appellant was convicted of Specifications 1 and 2 of Charge I, and Charge I, sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920, for penetrating CT's vulva with his penis, without her consent.[1] R. at 1006. He was acquitted of Specification 3 of Charge I, which alleged Appellant committed sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920, by

[1] All references to the UCMJ, the R.C.M., and the Military Rules of Evidence (Mil. R. Evid.) are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

penetrating AD with his finger; and Charge II and its Specification, which alleged Appellant committed assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928, by unlawfully grabbing the arm of CT with his hands. *Id*. The military judge sentenced Appellant to be reprimanded; reduced to the grade of E-1; confined for 30 months for Specification 1 of Charge I and 36 months for Specification 2 of Charge I, with all sentences to confinement to run consecutively; and to be dishonorably discharged from the service. ROT, Vol. 1, Statement of Trial Results at 1-3; R. at 1068. The convening authority took no action on the findings and sentence. ROT, Vol. 1, Convening Authority Decision on Action, dated 6 June 2022. On 20 June 2022, the military judge entered the previously adjudged findings and sentence. (ROT, Vol. 1, EOJ at 1-4.) The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 36 appellate exhibits, and 1 court exhibit. The transcript is 1068 pages. Appellant is currently in confinement.

Through no fault of Appellant, undersigned counsel have been working on other assigned matters and have yet to complete their review of Appellant's case. Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel provides the following information:

(1) Mr. Scott Hockenberry represents ten appellate clients and is presently assigned to four cases pending before this Court. Appellant's case is Mr. Hockenberry's first priority before this Court. Mr. Hockenberry is currently reviewing Appellant's record of trial.

(2) Mr. Bradley Simon currently represents two appellate clients and is presently assigned two cases pending brief before this Court. Appellant's case is Mr. Simon's first priority before this Court.

(3) Capt Samantha Golseth currently represents 18 clients and is presently assigned 10 cases pending brief before this Court. The following two cases pending brief before this Court currently have priority over the present case, however, given that Mr. Hockenberry is

lead counsel and has already begun review of Appellant's case, Capt Golseth will begin her review of Appellant's case as soon as possible:

a. *United States v. Bickford*, No. ACM 40326 – The record of trial consists of 42 appellate exhibits, 16 prosecution exhibits, and 1 defense exhibit. The transcript is 744 pages. Appellant is confined. Undersigned counsel is currently reviewing this record of trial.

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

c. Since moving for a sixth enlargement of time, Capt Golseth has filed two briefs before this Court in *United States v. Gammage* (No. ACM S32731) and *United States v. Manzano-Tarin* (No. ACM S32734). She has also filed one answer brief before the United States Court of Appeals for the Armed Forces (C.A.A.F.) in *United States v. Rocha* (Dkt. No. 23-0134/AF, No. ACM 40134) and two supplements to petitions for grant of review in *United States v. Lopez* (USCA Dkt. No. 23-0164/AF, No. ACM 40161) and *United States v. Rodriguez* (USCA Dkt. No. 23-0166/AF, No. ACM 40218). She was also out of the office for four duty days (attending a two-day C.A.A.F. Continuing Legal Education Program and taking leave for two days).

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

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

Respectfully submitted,

//SIGNED//
SCOTT HOCKENBERRY, Esq.
Appellate Defense Counsel
[redacted]

//SIGNED//
BRADLEY W. SIMON, Esq.
Appellate Defense Counsel
[redacted]

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

5 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MICHAEL B. KIGHT, USAF *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40337 Panel No. 1

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

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 5 June 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. **MICHAEL B. KIGHT,** Senior Airman (E-4) United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)** Before Panel No. 1 No. ACM 40337 5 July 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an eighth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **11 August 2023**. The record of trial was docketed with this Court on 15 September 2022. From the date of docketing to the present date, 293 days have elapsed. On the date requested, 330 days will have elapsed.

On 25-29 April 2022, Appellant was tried at a general court-martial composed of officer and enlisted members at Sheppard Air Force Base, Texas. Record of Trial (ROT), Vol. 1, Entry of Judgment, dated 20 June 2022; Record (R.) at 1. Contrary to his pleas, Appellant was convicted of Specifications 1 and 2 of Charge I, and Charge I, sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920, for penetrating CT's vulva with his penis, without her consent.[1] R. at 1006. He was acquitted of Specification 3 of Charge I, which alleged Appellant committed sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920, by

[1] All references to the UCMJ, the R.C.M., and the Military Rules of Evidence (Mil. R. Evid.) are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

penetrating AD with his finger; and Charge II and its Specification, which alleged Appellant committed assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928, by unlawfully grabbing the arm of CT with his hands. *Id*. The military judge sentenced Appellant to be reprimanded; reduced to the grade of E-1; confined for 30 months for Specification 1 of Charge I and 36 months for Specification 2 of Charge I, with all sentences to confinement to run consecutively; and to be dishonorably discharged from the service. ROT, Vol. 1, Statement of Trial Results at 1-3; R. at 1068. The convening authority took no action on the findings and sentence. ROT, Vol. 1, Convening Authority Decision on Action, dated 6 June 2022. On 20 June 2022, the military judge entered the previously adjudged findings and sentence. ROT, Vol. 1, EOJ at 1-4. The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 36 appellate exhibits, and 1 court exhibit. The transcript is 1068 pages. Appellant is currently in confinement.

Through no fault of Appellant, undersigned counsel have been working on other assigned matters and have yet to complete their review of Appellant's case. Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel provides the following information:

(1) Mr. Scott Hockenberry represents ten appellate clients and is presently assigned to four cases pending before this Court. Appellant's case is Mr. Hockenberry's first priority before this Court. Mr. Hockenberry is currently reviewing Appellant's record of trial.

(2) Mr. Bradley Simon currently represents two appellate clients and is presently assigned two cases pending brief before this Court. Appellant's case is Mr. Simon's first priority before this Court.

(3) Capt Samantha Golseth currently represents 18 clients and is presently assigned 10 cases pending brief before this Court. The following two cases pending brief before this Court currently have priority over the present case:

a. *United States v. Bickford*, No. ACM 40326 – The record of trial consists of 42 appellate exhibits, 16 prosecution exhibits, and 1 defense exhibit. The transcript is 744 pages. Appellant is confined. Undersigned counsel reviewed the entire record of trial and is drafting Appellant's assignments of error. Appellant's brief will be filed no later than 14 July 2023.

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

c. Since moving for a seventh enlargement of time, Capt Golseth has also reviewed four records of trial and advised the members regarding their opportunity to appeal directly to the Air Force Court of Criminal Appeals.

d. In addition to the above priorities, the United States Court of Appeals for the Armed Forces (C.A.A.F) granted review in *United States v. Cole*, USCA Dkt. No. 23-0162/AF, and Capt Golseth has been detailed to represent the Appellant. Appellant's brief and the joint appendix are due on 23 July 2023.

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

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

Respectfully submitted,

//SIGNED//
SCOTT HOCKENBERRY, Esq.
Appellate Defense Counsel
[redacted]

//SIGNED//
BRADLEY W. SIMON, Esq.
Appellate Defense Counsel
[redacted]

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

5 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MICHAEL B. KIGHT, USAF *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40337 Panel No. 1

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

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 5 July 2023.

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40337**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Michael B. KIGHT	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 5 July 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 6th day of July, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than **11 August 2023**.

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

FOR THE COURT

[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 (NINTH)**
v.	)	Before Panel No. 1
MICHAEL B. KIGHT, Senior Airman (E-4) United States Air Force *Appellant*	)	No. ACM 40337 4 August 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a ninth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **10 September 2023**. The record of trial was docketed with this Court on 15 September 2022. From the date of docketing to the present date, 323 days have elapsed. On the date requested, 360 days will have elapsed.

On 25-29 April 2022, Appellant was tried at a general court-martial composed of officer and enlisted members at Sheppard Air Force Base, Texas. Record of Trial (ROT), Vol. 1, Entry of Judgment, dated 20 June 2022; Record (R.) at 1. Contrary to his pleas, Appellant was convicted of Specifications 1 and 2 of Charge I, and Charge I, sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920, for penetrating CT's vulva with his penis, without her consent.[1] R. at 1006. He was acquitted of Specification 3 of Charge I, which alleged Appellant committed sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920, by

[1] All references to the UCMJ, the R.C.M., and the Military Rules of Evidence (Mil. R. Evid.) are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

penetrating AD with his finger; and Charge II and its Specification, which alleged Appellant committed assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928, by unlawfully grabbing the arm of CT with his hands. *Id*. The military judge sentenced Appellant to be reprimanded; reduced to the grade of E-1; confined for 30 months for Specification 1 of Charge I and 36 months for Specification 2 of Charge I, with all sentences to confinement to run consecutively; and to be dishonorably discharged from the service. ROT, Vol. 1, Statement of Trial Results at 1-3; R. at 1068. The convening authority took no action on the findings and sentence. ROT, Vol. 1, *Convening Authority Decision on Action*, dated 6 June 2022. On 20 June 2022, the military judge entered the previously adjudged findings and sentence. ROT, Vol. 1, EOJ at 1-4. The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 36 appellate exhibits, and 1 court exhibit. The transcript is 1068 pages. Appellant is currently in confinement.

Through no fault of Appellant, undersigned counsel have been working on other assigned matters and have yet to complete their review of Appellant's case. Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel provides the following information:

(1) Mr. Scott Hockenberry represents ten appellate clients and is presently assigned to four cases pending before this Court. Appellant's case is Mr. Hockenberry's first priority before this Court. Mr. Hockenberry is currently reviewing Appellant's record of trial.

(2) Mr. Bradley Simon currently represents two appellate clients and is presently assigned two cases pending brief before this Court. Appellant's case is Mr. Simon's first priority before this Court.

(3) Capt Samantha Golseth currently represents 23 clients and is presently assigned 13 cases pending brief before this Court.

a. The following case pending brief before this Court currently has priority over the present case: *United States v. Stanford*, No. ACM 40327 – The record of trial consists of 29 prosecution exhibits, 13 defense exhibits, and 59 appellate exhibits. The transcript is 753 pages. Appellant is not confined. Undersigned counsel is reviewing Appellant's record of trial.

b. In addition to the above, Capt Golseth anticipates, pending the content of the Government's answers, she may file reply briefs in *United States v. Blackburn*, No. ACM 40303, and *United States v. Bickford*, No. ACM 40326.

c. Since moving for an eighth enlargement of time, Capt Golseth filed the Appellant's brief before this Court in *United States v. Bickford*, No. ACM 40326, and before the United States Court of Appeals for the Armed Forces (C.A.A.F), for the granted issue in *United States v. Cole*, USCA Dkt. No. 23-0162/AF.

d. In addition to the above priorities, Capt Golseth has (1) two cases pending filing petition for writ of certiorari before the U.S. Supreme Court (*United States v. Anderson,* No. ACM 39969, and *United States v. Lopez*, No. ACM 40161), and (2) one case pending filing a petition for grant of review before C.A.A.F. (*United States v. Hernandez*, No. ACM 40287).

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

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

Respectfully submitted,

//SIGNED//
SCOTT HOCKENBERRY, Esq.
Appellate Defense Counsel
[redacted]

//SIGNED//
BRADLEY W. SIMON, Esq.
Appellate Defense Counsel
[redacted]

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

7 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MICHAEL B. KIGHT, USAF *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40337 Panel No. 1

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

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. **MICHAEL B. KIGHT,** Senior Airman (E-4) United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TENTH)** Before Panel No. 1 No. ACM 40337 30 August 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a tenth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **10 October 2023**. The record of trial was docketed with this Court on 15 September 2022. From the date of docketing to the present date, 349 days have elapsed. On the date requested, 390 days will have elapsed.

On 25-29 April 2022, Appellant was tried at a general court-martial composed of officer and enlisted members at Sheppard Air Force Base, Texas. Record of Trial (ROT), Vol. 1, Entry of Judgment, dated 20 June 2022. Contrary to his pleas, Appellant was convicted of Specifications 1 and 2 of Charge I, and Charge I, sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920, for penetrating CT's vulva with his penis, without her consent.[1] R. at 1006. He was acquitted of Specification 3 of Charge I, which alleged Appellant committed sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920, by penetrating AD

[1] All references to the UCMJ, the R.C.M., and the Military Rules of Evidence (Mil. R. Evid.) are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

with his finger; and Charge II and its Specification, which alleged Appellant committed assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928, by unlawfully grabbing the arm of CT with his hands. *Id*. The military judge sentenced Appellant to be reprimanded; reduced to the grade of E-1; confined for 30 months for Specification 1 of Charge I and 36 months for Specification 2 of Charge I, with all sentences to confinement to run consecutively; and to be dishonorably discharged from the service. ROT, Vol. 1, Statement of Trial Results at 1-3; R. at 1068. The convening authority took no action on the findings and sentence. ROT, Vol. 1, *Convening Authority Decision on Action*, dated 6 June 2022. On 20 June 2022, the military judge entered the previously adjudged findings and sentence. ROT, Vol. 1, EOJ at 1-4. The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 36 appellate exhibits, and 1 court exhibit. The transcript is 1068 pages. Appellant is currently in confinement.

Through no fault of Appellant, undersigned counsel have been working on other assigned matters and have yet to complete their review of Appellant's case. Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel provides the following information:

(1) Mr. Scott Hockenberry represents ten appellate clients and is presently assigned to four cases pending before this Court. Appellant's case is Mr. Hockenberry's first priority before this Court. Mr. Hockenberry has reviewed Appellant's record of trial and started researching and drafting an Assignments of Error brief.

(2) Mr. Bradley Simon currently represents two appellate clients and is presently assigned two cases pending brief before this Court. Appellant's case is Mr. Simon's first priority before this Court.

(3) Capt Samantha Golseth currently represents 29 clients and is presently assigned 15 cases pending brief before this Court.

a. The following case pending brief before this Court currently has priority over the present case: *United States v. Stanford*, No. ACM 40327 – The record of trial consists of 29 prosecution exhibits, 13 defense exhibits, and 59 appellate exhibits. The transcript is 753 pages. Appellant is not confined. Undersigned counsel is reviewing Appellant's record of trial and at the time of this filing, she has reviewed approximately 20% of the transcript.

b. In addition to the above, Capt Golseth anticipates, pending the content of the Government's answer, she may file a reply brief in *United States v. Gammage*, No. ACM S32731 (f rev).

c. Since moving for a ninth enlargement of time, Capt Golseth filed the Appellant's brief before this Court in *United States v. Gammage*, No. ACM S32731 (f rev) and Appellant's reply brief in *United States v. Blackburn*, No. ACM 40303. She was also required to attend plan and attend training on 9-10 & 24-25 August 2023.

d. In addition to the above priorities, Capt Golseth has (1) six cases pending filing petition for writ of certiorari before the U.S. Supreme Court, which are being drafted with civilian counsel, (2) one case pending filing a petition for grant of review before C.A.A.F. (*United States v. Hernandez*, No. ACM 40287)[2], and (3) anticipates, pending the content of the Government's answer which is due on 5 September 2023, she will file a reply brief before C.A.A.F. in *United States v. Cole*, USCA Dkt. No. 23-0162/AF.

[2] Capt Golseth anticipates completing this petition for grant of review within the week.

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

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

Respectfully submitted,

//SIGNED//
SCOTT HOCKENBERRY, Esq.
Appellate Defense Counsel
[redacted]

//SIGNED//
BRADLEY W. SIMON, Esq.
Appellate Defense Counsel
[redacted]

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 30 August 2023.

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

31 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MICHAEL B. KIGHT, USAF *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40337 Panel No. 1

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

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 31 August 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (ELEVENTH)**
v.	)	
	)	Before Panel No. 1
Senior Airman (E-4) **MICHAEL B. KIGHT,** United States Air Force,	)	No. ACM 40337
Appellant.	)	20 September 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an eleventh enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **9 November 2023**. The record of trial was docketed with this Court on 15 September 2022. From the date of docketing to the present date, 370 days have elapsed. On the date requested, 420 days will have elapsed.

On 25-29 April 2022, Appellant was tried at a general court-martial composed of officer and enlisted members at Sheppard Air Force Base, Texas. Entry of Judgment, dated 20 June 2022. Contrary to his pleas, Appellant was convicted of Specifications 1 and 2 of Charge I, and Charge I, sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920, for penetrating CT's vulva with his penis, without her consent.[1] R. at 1006. He was acquitted of Specification 3 of Charge I, which alleged Appellant committed sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920, by penetrating AD with his finger; and Charge II and its

[1] All references to the UCMJ, the R.C.M., and the Military Rules of Evidence (Mil. R. Evid.) are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

Specification, which alleged Appellant committed assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928, by unlawfully grabbing the arm of CT with his hands. *Id*. The military judge sentenced Appellant to be reprimanded; reduced to the grade of E-1; confined for 30 months for Specification 1 of Charge I and 36 months for Specification 2 of Charge I, with all sentences to confinement to run consecutively; and to be dishonorably discharged from the service. Statement of Trial Results at 1-3; R. at 1068. The convening authority took no action on the findings and sentence. *Convening Authority Decision on Action*, dated 6 June 2022. On 20 June 2022, the military judge entered the previously adjudged findings and sentence. EOJ at 1-4. The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 36 appellate exhibits, and 1 court exhibit. The transcript is 1068 pages. Appellant is currently in confinement.

Through no fault of Appellant, undersigned counsel have been working on other assigned matters and have yet to complete their review of Appellant's case. Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel provides the following information:

(1) Mr. Scott Hockenberry represents ten appellate clients and is presently assigned to four cases pending before this Court. Appellant's case is Mr. Hockenberry's first priority before this Court. Mr. Hockenberry has reviewed Appellant's record of trial and is drafting an Assignments of Error brief. For the Court's awareness, Mr. Hockenberry is also lead counsel for a recently granted case before the Court of Appeals for the Armed Forces (C.A.A.F.), *United States v. Smith* (USCA Dkt. No. 23-0227/AF, No. ACM 40202) and the Appellant's brief is due on 6 October 2023.

(2) Mr. Bradley Simon currently represents two appellate clients and is presently assigned two cases pending brief before this Court. Appellant's case is Mr. Simon's first priority before this Court.

(3) Maj Samantha Golseth currently represents 28 clients and is presently assigned 13 cases pending brief before this Court.

a. The following case pending brief before this Court currently has priority over the present case: *United States v. Stanford*, No. ACM 40327 – The record of trial consists of 29 prosecution exhibits, 13 defense exhibits, and 59 appellate exhibits. The transcript is 753 pages. Appellant is not confined. Undersigned counsel is reviewing Appellant's record of trial and at the time of this filing, she has reviewed approximately 30% of the transcript.

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

c. Since moving for an eleventh enlargement of time in this case, Maj Golseth filed a petition and supplement before the C.A.A.F. in *United States v. Hernandez*, No. ACM 40287; filed a reply brief before the C.A.A.F. in *United States v. Cole*, USCA Dkt. No. 23-0162/AF; and assisted in the drafting of the petition for a writ of certiorari in *Martinez, et. al., v. United States*[2] in the U.S. Supreme Court.

[2] Petitioners include, *inter alia*, *Martinez*, *McCameron*, *Tarnowski*, *Veerathanongdech*, and *Lopez* (No. ACMs 39973, 40005, 40089, 40110, 40161).

Finally, for the Court's awareness, Maj Golseth is filing this request for an enlargement of time early because she will be on leave OCONUS with her family from 21 September-5 October 2023.

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

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

Respectfully submitted,

//SIGNED//
SCOTT HOCKENBERRY, Esq.
Appellate Defense Counsel
[redacted]

//SIGNED//
BRADLEY W. SIMON, Esq.
Appellate Defense Counsel
[redacted]

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 20 September 2023.

[redacted]

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

21 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MICHAEL B. KIGHT, USAF *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40337 Panel No. 1

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

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TWELFTH)**
v.	)	
	)	Before Panel No. 1
Senior Airman (E-4) **MICHAEL B. KIGHT,** United States Air Force,	)	No. ACM 40337
Appellant.	)	2 November 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Senior Airman (SrA) Michael B. Kight, Appellant, hereby moves for a twelfth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **9 December 2023**. The record of trial was docketed with this Court on 15 September 2022. From the date of docketing to the present date, 413 days have elapsed. On the date requested, 450 days will have elapsed.

On 25-29 April 2022, Appellant was tried at a general court-martial composed of officer and enlisted members at Sheppard Air Force Base, Texas. Entry of Judgment (EOJ), 20 June 2022. Contrary to his pleas, Appellant was convicted of Specifications 1 and 2 of Charge I, and Charge I, sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920, for penetrating CT's vulva with his penis, without her consent.[1] R. at 1006. He was acquitted of Specification 3 of Charge I, which alleged Appellant committed sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920, by penetrating AD with his finger; and Charge II and its

[1] All references to the UCMJ, the R.C.M., and the Military Rules of Evidence (Mil. R. Evid.) are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

Specification, which alleged Appellant committed assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928, by unlawfully grabbing the arm of CT with his hands. *Id*. The military judge sentenced Appellant to be reprimanded; reduced to the grade of E-1; confined for 30 months for Specification 1 of Charge I and 36 months for Specification 2 of Charge I, with all sentences to confinement to run consecutively; and to be dishonorably discharged from the service. R. at 1068. The convening authority took no action on the findings and sentence. *Convening Authority Decision on Action*, 6 June 2022. On 20 June 2022, the military judge entered the previously adjudged findings and sentence. EOJ at 1-4. The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 36 appellate exhibits, and 1 court exhibit. The transcript is 1068 pages. Appellant is currently in confinement.

Through no fault of Appellant, undersigned counsel have been working on other assigned matters and have yet to complete Appellant's Assignments of Error brief. Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel provides the following information:

(1) Mr. Scott Hockenberry represents ten appellate clients and is presently assigned to four cases pending before this Court. Appellant's case is Mr. Hockenberry's first priority before this Court. Mr. Hockenberry has reviewed Appellant's record of trial and is drafting an Assignments of Error brief.

(2) Mr. Bradley Simon currently represents two appellate clients and is presently assigned two cases pending brief before this Court. Appellant's case is Mr. Simon's first priority before this Court.

(3) Maj Samantha Golseth currently represents 28 clients and is presently assigned 14 cases pending brief before this Court.

a. The following case pending brief before this Court currently has priority over the present case: *United States v. Stanford*, No. ACM 40327 – The record of trial consists of 29 prosecution exhibits, 13 defense exhibits, and 59 appellate exhibits. The transcript is 753 pages. The appellant is not confined. Undersigned counsel has drafted the appellant's assignments of error, incorporated edits from a peer review, and is awaiting review by her leadership team. Unfortunately, her Chief, Deputy Chief, and Senior Appellate Defense Counsel have all unexpectedly been out of the office for various reasons. No further enlargements will be requested and the appellant's brief will be filed as soon as possible. In the meantime, Maj Golseth is reviewing SrA Kight's record of trial and anticipates completing her review next week.

b. Since moving for an eleventh enlargement of time in this case, Maj Golseth was on leave from 21 September through 5 October 2023 and out of the office for a family day and federal holiday from 6 October through 9 October 2023. She completed her review and drafted the appellant's brief in *United States v. Stanford*, detailed above; completed review of two cases returned for further review (*United States v. Gammage*, No. ACM S32731 (f rev), and *United States v. Blackburn*, No. ACM 40303 (f rev)); advised the appellant of his opportunity to appeal in *United States v. Vidrine*, No. ACM _____; and prepared for and participated in six moot arguments for four cases, in addition to sitting second chair as counsel in *United States v. Rocha*, USCA Dkt. No. 23-0134/AF, No. ACM 40134, before the C.A.A.F. on 25 October 2023.

c. For the Court's awareness, in addition to the above priorities, Maj Golseth will be preparing to give two moot arguments between now and 30 November 2023, in preparation for her argument at the C.A.A.F. on 6 December 2023 in *United States v. Cole*, USCA Dkt. No. 23-0162/AF, No. ACM 40189. Additionally, she will be preparing for and participating in six moot arguments for four of her colleague's cases between 3 November and 30 November 2023.

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

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

Respectfully submitted,

//SIGNED//
SCOTT HOCKENBERRY, Esq.
Appellate Defense Counsel
[redacted]

//SIGNED//
BRADLEY W. SIMON, Esq.
Appellate Defense Counsel
[redacted]

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

7 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MICHAEL B. KIGHT, USAF *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40337 Panel No. 1

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 450 days in length. Appellant's a year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed over two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 3 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's military counsel has not completed review of the record of trial at this late stage of the appellate process.

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRTEENTH)**
v.	)	
	)	Before Panel No. 1
Senior Airman (E-4) **MICHAEL B. KIGHT,** United States Air Force, *Appellant.*	)	No. ACM 40337
	)	29 November 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Senior Airman (SrA) Michael B. Kight, Appellant, hereby moves for a thirteenth and final enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **8 January 2024**. The record of trial was docketed with this Court on 15 September 2022. From the date of docketing to the present date, 440 days have elapsed. On the date requested, 480 days will have elapsed. SrA Kight fully expects this will be the final request for enlargement and asks for the full 30-day enlargement in an abundance of caution to ensure SrA Kight's brief can be finalized and thoroughly reviewed by all counsel and with SrA Kight before filing, while also accounting for the holiday period which may temporarily impact undersigned counsel's ability to speak with SrA Kight at the military brig.

On 25-29 April 2022, Senior Airman (SrA) Michael B. Kight, Appellant, was tried at a general court-martial composed of officer and enlisted members at Sheppard Air Force Base, Texas. R. at 1, 11. Contrary to his pleas, SrA Kight was convicted of Specifications 1 and 2 of Charge I, and Charge I, sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ),

10 U.S.C. § 920.[1] R. at 1006. Specification 1 of Charge I alleged SrA Kight "did, at or near Barksdale Air Force Base, Louisiana, between on or about 1 June 2020 and on or about 30 June 2020, commit a sexual act upon [CT], by penetrating her vulva with his penis, without her consent." Charge Sheet. Specification 2 of Charge I alleged SrA Kight "did, at or near Barksdale Air Force Base, Louisiana, between on or about 8 June 2020 and on or about 31 July 2020, commit a sexual act upon [CT], by penetrating her vulva with his penis, without her consent." *Id*. SrA Kight was acquitted of Specification 3 of Charge I, which alleged he committed sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920, by penetrating AD with his finger; and Charge II and its Specification[2], which alleged he committed assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928, by unlawfully grabbing the arm of CT with his hands. R. at 1006.

The military judge sentenced SrA Kight to a reprimand; reduction to the grade of E-1; 66 months' confinement (30 months' confinement for Specification 1 of Charge I and 36 months' confinement for Specification 2 of Charge I, with all sentences to confinement to run consecutively); and a dishonorable discharge. R. at 1068. The convening authority took no action on the findings and sentence. Convening Authority Decision on Action, 6 June 2022. The military judge entered the findings and sentence in an Entry of Judgment. Entry of Judgment, 20 June 2022.

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[1] All references to the UCMJ, the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence (Mil. R. Evid.) are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

[2] The General Court-Martial Convening Authority referred other charges and specifications which were withdrawn and dismissed on 3 November 2021 and 25 April 2022, which were not presented to the members. *Compare* Charge Sheet *with* R. at 262 (announcement of the general nature of the charges to the members), *and* AE XXIII (flyer containing the charges and specifications before the members).

The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 36 appellate exhibits, and 1 court exhibit. The transcript is 1068 pages. SrA Kight is confined.

Through no fault of SrA Kight, undersigned counsel are drafting but have not completed his assignments of error brief. SrA Kight's case is the first priority for each of SrA Kight's appellate defense counsel. SrA Kight's record of trial has been fully reviewed and his counsel have decided on the issues they believe need to be raised. As of the filing of this motion, Mr. Scott Hockenberry, lead civilian appellate counsel, has drafted two issues and Maj Golseth has drafted a third issue. This EOT is needed to allow undersigned counsel to complete drafting the remaining issues, other counsel to provide substantive feedback, and for all counsel to discuss the finalized brief with SrA Kight, which is dependent upon scheduling at the military brig.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel provides the following information:

(1) Mr. Scott Hockenberry represents 10 appellate clients and is presently assigned to 4 cases pending before this Court. In addition to SrA Kight's case, Mr. Hockenberry is currently finalizing a reply brief (due Friday, 1 December 2023).

(2) Mr. Bradley Simon currently represents two appellate clients and is presently assigned two cases pending brief before this Court. Appellant's case is Mr. Simon's first priority before this Court.

(3) Maj Samantha Golseth currently represents 27 clients and is presently assigned 13 cases pending brief before this Court. In addition to SrA Kight's case, Maj Golseth is preparing to give a moot argument on 30 November 2023, and argument before the United States Court of Appeals for the Armed Forces (C.A.A.F.) on 6 December 2023, in *United States v. Cole*, USCA Dkt. No. 23-0162/AF, No. ACM 40189. Additionally, she is preparing

to sit as a moot judge in two moot arguments on 30 November 2023 and will attend C.A.A.F. arguments on 5 December 2023 in preparation for her argument the following day. Lastly, during the requested enlargement of time, Maj Golseth will be on preapproved leave from 20-25 December 2023.

SrA Kight was informed of his right to a timely appeal and this request for an enlargement of time, and agrees with this request for an enlargement of time. This enlargement of time is necessary to allow undersigned counsel to fully brief SrA Kight's case.

WHEREFORE, SrA Kight respectfully requests this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

//SIGNED//
SCOTT HOCKENBERRY, Esq.
Appellate Defense Counsel
[redacted]

//SIGNED//
BRADLEY W. SIMON, Esq.
Appellate Defense Counsel
[redacted]

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 29 November 2023.

[redacted]

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

29 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MICHAEL B. KIGHT, USAF *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40337 Panel No. 1

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 480 days in length. Appellant's over one year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed over two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 2 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 29 November 2023.

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40337**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Michael B. KIGHT	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 29 November 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Thirteenth) 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 1st day of December, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (thirteenth) is **GRANTED**. Appellant shall file any assignments of error not later than **8 January 2024**.

Appellant's counsel is advised that this decision was based on Appellant's assertion that this would be the "thirteenth and final enlargement of time." Given the nature of this case and the number of enlargements granted thus far, absent exceptional circumstances, no further enlargements of time will be granted.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 1
Senior Airman (E-4) **MICHAEL B. KIGHT,** United States Air Force, *Appellant.*	)	No. ACM 40337
	)	27 December 2023

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

BRAD W. SIMON
Lead Civilian Appellate Defense Counsel
Daniel Conway and Associates
[redacted]

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

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
[redacted]

Assignments of Error

I. WHETHER APPELLANT'S SUBSTANTIAL RIGHTS WERE PREJUDICED WHERE HE WAS CONVICTED OF TWO SPECIFICATIONS OF SEXUAL ASSAULT ALLEGING OVERLAPPING DATE RANGES AND OTHERWISE IDENTICAL LANGUAGE, AND THE PANEL WAS NEVER ORIENTED AS TO WHICH ALLEGATION CORRESPONDED TO WHICH SPECIFICATION.

II. WHETHER APPELLANT IS ENTITLED TO RELIEF FOR PERVASIVE IMPROPER EVIDENCE AND ARGUMENT.

III. WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL PERFECTED AN OTHERWISE MISSING ELEMENT ON CROSS-EXAMINATION, AND FAILED TO OBJECT TO VOLUMINOUS IMPROPER EVIDENCE AND ERROR.

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

Statement of the Case

On 25-29 April 2022, Senior Airman (SrA) Michael B. Kight (Appellant) was tried by officer and enlisted members at a general court-martial at Sheppard Air Force Base, Texas. Appellant pleaded not guilty to all charges and specifications; the members returned a mixed verdict. (Record (R.) at 251; R. at 1006).

Appellant was convicted, contrary to his pleas, of two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920. [1] (R. at

[1] All references to the UCMJ, the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence (Mil. R. Evid.) are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

1006; Statement of Trial Results.) Appellant was acquitted of one specification of sexual assault in violation of Article 120, UCMJ and one specification of assault in violation of Article 128, UCMJ, 10 U.S.C. § 928. (R. at 1006; Statement of Trial Results.) A number of other specifications were withdrawn and dismissed after arraignment but prior to trial. (Statement of Trial Results).

The military judge sentenced Appellant to 66 months of confinement,[2] reduction to the grade of E-1, forfeiture of all pay and allowances, a reprimand, and a dishonorable discharge. (R. at 1068). The convening authority did not take action on the findings or the sentence. (Convening Authority Decision on Action).

Statement of Facts[3]

1. Background Facts

Appellant and CT met in technical school in early 2018, began dating, and quickly became engaged. (R. at 475-77). After technical school they were assigned to different duty stations but remained within driving distance. (R. at 478-79). In the summer of 2019, CT broke up with Appellant after discovering he was cheating by tracking the location of his iPhone. (R. at 484-85). Despite breaking up, they continued to talk, and Appellant came to visit CT "towards the end of spring of 2020 into the summer of 2020." (R. at 485-88). CT accused Appellant of physically assaulting her during a visit. (R. at 493-98). Appellant was acquitted of this allegation. (R. at 1006; Statement of Trial Results).

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[2] 30 months for Specification 1 of Charge I and 36 months for Specification 2 of Charge I, to run consecutively.

[3] Unless otherwise relevant to this Court's review, this statement of facts omits discussion of offenses of which appellant was acquitted.

On "an occasion during this same time period in the summer of 2020," Appellant visited CT. (R. at 498). CT didn't "know what date it was, but it was prior to the Fourth of July." (R. at 498). On this day, Appellant and CT went fishing and kayaking and then returned to her dorm room. (R. at 498-99). CT alleged that after they returned to her dorm room, Appellant sexually assaulted her. (R. at 499-505). CT alleged Appellant got into her bed, climbed on top of her, and caged her in. (R. at 500). CT told Appellant she wasn't ready and didn't want to have sex and tried to push Appellant off. (R. at 500-01). Rather than stopping, however, Appellant proceeded to remove CT's clothing, put on a condom, and engage in sexual intercourse with her over her protests. (R. at 501-03). CT did not report the incident at the time. (R. at 505).

CT further testified that there was "another occasion similar to this one" that happened "that same summer". (R. at 505). When asked whether this "similar" occasion occurred "before or after the incident you just described," CT stated "I *believe* it was after." (R. at 505) (emphasis added). She stated that "[i]t was *perhaps* his next visit, so *maybe* like those two weeks later." (R. at 505) (emphasis added). Trial counsel asked CT how similar the two incidents were. (R. at 506) (". . . how similar are they in your head?"). CT replied: "They're very similar." (R. at 506). CT testified that this additional occasion was also "before the Fourth of July". (R. at 506). CT testified again that this occasion was "very similar" to the first-described occasion:

> It was very similar. We went kayaking and fishing, and the events are pretty similar as well. I'm on the bed, and he approaches me. He takes off my pants again.

(R. at 506). CT added that, during this additional assault, Appellant put a pillow over her head. (R. at 507). Subsequently, "before August of 2020," CT told Appellant she didn't want to talk to him anymore. (R. at 511).

On cross examination, the ambiguity as to the dates of all three of CT's allegations was reinforced. (R. at 540-41, 545-46, 560). CT testified, *inter alia*: "I can't provide a more specific

date to when the assaults occurred." (R. at 540). CT initially agreed with trial defense counsel that she was alleging "the first instance of sexual assault was right before the Fourth of July?" (R. at 545). In seeming contradiction to this answer, CT immediately thereafter disagreed that it was "a few days before the Fourth of July," stating that it was sometime in the month of June. (R. at 545-46). CT testified the "first" sexual allegation took place in the month of June, but she could not testify as to the "specific week" in June. (R. at 546). CT later testified that she also could not say "what week in the month of June" the "second" sexual allegation took place, stating only it "was in the summer." (R. at 560). On both direct and cross, CT described the "second" sexual assault using very similar temporal anchoring to the "first," stating that it occurred "before the Fourth of July." (R. at 506; 546).

2. Pretextual Contacts with Appellant

Agents from the Office of Special Investigations (OSI) coordinated with CT to engage in a series of pretextual contexts with Appellant over a 48-hour period. (R. at 666-84). These contacts started with text messages, progressed to a phone call, and culminated with a FaceTime video call. (R. at 674). The FaceTime call was conducted in CT's bedroom, where OSI agents had installed a hidden camera in a wicker basket on her nightstand. (R. at 686). Three OSI agents were positioned outside CT's door, with two watching a real-time audio-video feed while the third had her ear physically against the door to listen. (R. at 687). The government admitted the FaceTime call, which was approximately one hour long, as Prosecution Exhibit 4. (R. at 683).

In the call, apparently motivated by the possibility of rekindling the relationship, Appellant repeatedly apologized for how he treated CT in the past. (R. at 685-717; Prox. Ex. 4). CT, meanwhile, repeatedly rejected his "blanket apologies" and asked him to specify "what you're sorry for." *See, e.g.*, (R. at 694, 704). Appellant felt CT was manipulating him. *See, e.g.*, (R. at

704) ("I've been manipulated, and I feel like that is exactly what's happening now, although it may not be. I feel like I'm being manipulated."). Appellant made several statements to the effect that he knew or suspected the call was being monitored. *See, e.g.*, (R. at 697) (" . . . if you want to record me, CT, just record me.") (" . . . if you want to record me and you want to go to OSI . . . do what you need to do . . . ."). Despite apparent knowledge/suspicion he was being recorded, Appellant made numerous, though largely non-specific, admissions and apologies. (R. at 685-717; Pros. Ex. 4). In these apologies, Appellant did not admit to sexually assaulting CT on two occasions, as was charged, and did not state he penetrated her vagina. *See id*. The prosecution in closing also framed Appellant's failure to deny various allegations by CT as "adopted admissions." *See* (R. at 947-48, 991).

3. Credibility Evidence

A defense expert in forensic psychology, Dr. RF, testified about the characteristics of borderline personality disorder. (R. at 866-95). Dr. RF testified that the disorder features pervasive fear of abandonment which often manifests in accusations within relationships. (R. at 875-77). If an individual with borderline personality disorder feels betrayed, Dr. RF testified they tend to engage in retribution, vengeance, and "anything that punishes the other person." (R. at 877.) CT had diagnosed borderline personality disorder (R. at 582), and had made abuse accusations against three *consecutive* boyfriends.

In the aftermath of her relationship with Appellant, CT stated she wanted to "get him kicked out of the military" and "ruin . . . his life and what he had going." (R. at 837). CT denied making these statements but they were confirmed by CT's prior boyfriend, who was testifying under a grant of immunity (because CT had also accused him of abuse). (R. at 587, 837). In the fall of 2019, CT started a relationship with another Airman, DP. (R. at 486). After the relationship with

DP ended, CT reported him to law enforcement for allegations of abuse. (R. at 488-89). In February of 2021, CT started a relationship with a third airman, TC. (R. at 833). After the relationship with TC ended, CT also reported him to law enforcement for allegations of abuse. (R. at 833).

CT also made statements to the effect of wanting to get a medical retirement. (Def. Ex. B). CT stated "I'm going to get out and get that hundo" – in reference to obtaining a 100% Veterans Affairs disability rating. (Def. Ex. B). CT denied making the latter statement, but her statement was documented well in advance of trial and the documentation of her statement was admitted as evidence. (R. at 590; Def. Ex. B.).

CT did not want to deploy. (R. at 835). When CT had accused DP, she learned she was placed on a mental health profile which made her ineligible to deploy worldwide. (R. at 578). At the time CT reported Appellant to OSI, she was tasked to deploy to Kuwait. (R. at 578). CT had worried she would be separated and "lose her GI Bill and benefits if she didn't deploy," but this didn't happen because before that deployment, she was placed on a profile. (R. at 835). CT did not deploy. (R. at 578). CT testified the reason she did not go was because "they reduced the size of the deployment" and that it "had nothing to do with this case." (R. at 578-79, 594). In direct contradiction to CT's testimony, her squadron commander testified that she had *not* been removed from the Kuwait deployment due to a change in manning requirements, but rather because CT was placed on a mental health profile. (R. at 813-15). Approximately five or six months after reporting Appellant, CT was again tasked to deploy, this time to Niger, West Africa. (R. at 580-81). CT, again, did not deploy. (R. at 581). This time, CT was removed from the tasking after she informed her mental health provider of the OSI investigation. (R. at 595).

The defense introduced testimony from CT's commander, flight commander, and prior

boyfriend that they held a poor opinion of CT's character for truthfulness and that she had a poor reputation for truthfulness. (R. at 818, 826-28) (Lt Col JR); (R. at 834, 837-38) (SrA TC); (R. at 848-49) (Capt JF). The government, meanwhile, introduced testimony from two witnesses that CT had a good character for truthfulness. (R. at 769-77) (SrA JS); (R. at 778-93) (MSgt DT).

4. The Charging Scheme

The two Article 120 specifications Appellant was convicted of alleged overlapping date ranges. *See* (Charge Sheet). Specification 1 of Charge I alleged a date range of "between on or about ***1 June 2020 and 30 June 2020***." (Charge Sheet) (emphasis added). Specification 2 of Charge I alleged a date range of "between on or about ***8 June 2020 and 31 July 2020***." (Charge Sheet) (emphasis added).

> Apart from the date ranges, the two specifications used identical, generic language:
>
> Specification I: In that SENIOR AIRMAN MICHAEL B. KIGHT, United States Air Force, 80th Operations Support Squadron, Sheppard Air Force Base, Texas, did, at or near Barksdale Air Force Base, Louisiana, ***between on or about 1 June 2020 and on or about 30 June 2020***, commit a sexual act upon [CT], by penetrating her vulva with his penis, without her consent.
>
> Specification 2: In that SENIOR AIRMAN MICHAEL B. KIGHT, United States Air Force, 80th Operations Support Squadron, Sheppard Air Force Base, Texas, did, at or near Barksdale Air Force Base, Louisiana, ***between on or about 8 June 2020 and on or about 31 July 2020***, commit a sexual act upon [CT], by penetrating her vulva with his penis, without her consent.

(Charge Sheet) (emphasis added).

Trial counsel made no orienting statements in opening or closing as to which alleged assault related to Specification 1 and which related to Specification 2. (R. at 460-67) (GOV opening); (R. at 925-54) (GOV closing); (R. at 986-94) (GOV rebuttal). To the contrary, trial counsel largely combined the elemental analysis during argument. *See* (R. at 926) ("With respect to the three specifications of Charge I. The Government has to prove in each instance that a sexual

act occurred."); ("Did the accused commit a sexual act? Did he penetrate Airman C.T.'s vagina with his penis?"). The government did not list the elements, either orally or via a slideshow. (R. at 925-54, 986-94; *see also* R. at 902) (stating the government would not use a slideshow). The government did not attempt to reconcile the ambiguity in dates or orient the panel to which of the overlapping summer 2020 dates alleged in Specifications 1 and 2 related to which testimony. *See* (R. at 954) ("The Government has proved beyond a reasonable doubt that *in the summer of 2020*, not only did the accused put his ex-girlfriend in an arm lock, twist her arm and hurt her, but that *he sexually assaulted her two times without her consent*.") (emphasis added).

The Specifications of Charge I were not charged in chronological order. *See* (Charge Sheet) (alleging dates for Specification 3 of Charge I preceding the date-ranges alleged in Specifications 1 and 2). The military judge gave the standard instruction that the panel could decide which order in which to consider the various charged offenses. (R. at 996) ("The order in which the charges and specifications are to be voted on will be determined by the president subject to an objection by the majority of the members.").

Argument

I. APPELLANT'S SUBSTANTIAL RIGHTS WERE PREJUDICED WHERE HE WAS CONVICTED OF TWO SPECIFICATIONS OF SEXUAL ASSAULT ALLEGING OVERLAPPING DATE RANGES AND OTHERWISE IDENTICAL LANGUAGE, AND THE PANEL WAS NEVER ORIENTED AS TO WHICH ALLEGATION CORRESPONDED TO WHICH SPECIFICATION.

Standard of Review

Whether there is any ambiguity in the findings that prevents factual sufficiency review under Article 66, UCMJ, is a question of law appellate courts review de novo. *See United States v. Rodriguez,* 66 M.J. 201, 203 (C.A.A.F.2008); *United States v. Brown,* 65 M.J. 356, 358–59

(C.A.A.F. 2007). In order to reliably review a case for factual sufficiency, the reviewing court must know, beyond a reasonable doubt, which conduct formed the basis for each specification. *United States v. Dow*, No. ARMY 20200462, 2022 CCA LEXIS 361, *6-7 (A. Ct. Crim. App. 14 June 2022); *United States v. Ross*, 68 M.J. 415, 418 (C.A.A.F. 2010).

Law

An "ambiguous verdict" is one which prevents the reviewing courts from conducting their Article 66, UCMJ, review. *United States v. Walters*, 58 M.J. 391, 397 (C.A.A.F. 2003). This occurs when the fact finder clearly returns a finding of guilty, but it is unclear (or ambiguous) what the precise underlying conduct is. *Id.* An ambiguous verdict creates a circumstance where Article 66, UCMJ, review cannot be properly conducted, "because the findings of guilty do not disclose the conduct upon which each of them was based." *Id*. "[T]he remedy for a *Walters* violation is to set aside the finding of guilty to the affected specification and dismiss it with prejudice." *United States v. Scheurer*, 62 M.J. 100, 112 (C.A.A.F. 2005) (footnote omitted).

Even in situations where reviewing courts might make an educated guess as to the fact-finder's intentions, the Court of Appeals for the Armed Forces (CAAF) has held findings ambiguous in the absence of clarity as to what underlying conduct formed the basis for the findings. *United States v. Ross*, 68 M.J. 415, 417-18 (C.A.A.F. 2010) (reversing the lower court's conclusion that the fact-finder likely excepted "divers occasions" in order to indicate a continuing course of conduct in the absence of any explanation on the record to that effect). To that end, the Army Court of Criminal Appeals recently stated, "in order to reliably review Appellant's case for factual sufficiency, we must know, beyond a reasonable doubt, which [conduct] formed the basis for the variant guilty finding in Specification 1, and which [conduct] formed the basis for the variant guilty finding in Specification 3." *Dow*, 2022 CCA LEXIS at *6-7.

Argument

The failure to connect CT's respective allegations to specific specifications means this Court cannot know that the members properly convicted Appellant of either specification. The respective allegations could both fall within the language of either specification and no attempt was made to define which conduct constituted which specification. Under these circumstances, there is no way to tell whether Appellant was properly convicted.

1. The Charged Date-Ranges Overlapped

The two Article 120 specifications Appellant was convicted of alleged overlapping date ranges. *See* (Charge Sheet). Specification 1 of Charge I alleged a date range of "between on or about ***1 June 2020 and 30 June 2020***." (Charge Sheet) (emphasis added). Specification 2 of Charge I alleged a date range of "between on or about ***8 June 2020 and 31 July 2020***." (Charge Sheet) (emphasis added). As such, there is substantial overlap between the specifications. The entire period between 8-30 June 2020 is included within each date range. Given the use of "on or about" in both specifications, the legal overlap is even broader.

2. The Testimony was Uncertain as to Dates

With respect to the "first" alleged sexual assault, CT provided very few specifics with respect to dates. On direct, she testified that it was "the summer of 2020" and "prior to the Fourth of July." (R. at 498). On cross, she testified that it was in the month of June, but she could not testify as to the "specific week" in June. (R. at 546).

CT was similarly vague with regard to the date of the "second" alleged sexual assault, specifying that it occurred "that same summer." (R. at 505). Using almost identical language to her temporal anchoring of the "first" allegation, CT again testified that it was "before the Fourth of July." (R. at 506, 546). CT testified that she also could not say "what week in the month of

June" the "second" sexual allegation took place, stating only it "was in the summer." (R. at 560).

Indeed, while counsel referred to these two allegations as the "first" and "second" assaults throughout their questioning, CT was not even clear as to which happened first. When asked whether the so-called "second" alleged "similar" assault occurred "before or after the incident you just described" CT stated, "I *believe* it was after." (R. at 505) (emphasis added).

3. The Testimony as to Both Allegations Fit within the Overlapping Date Ranges Alleged

The most precise temporal anchoring for both allegations was that they occurred in June of 2020, prior to the Fourth of July. Both specifications expressly covered the period between 8 and 30 June 2020. (Charge Sheet). Both allegations would fit squarely within these overlapping date ranges. Additionally, both specifications use "on or about," which "connotes a range of days to weeks." *United States v. Simmons*, 82 M.J. 134, 139 (C.A.A.F. 2022) (citations omitted). As such, conduct occurring anywhere within the month of June 2020 would fall well within the "on or about window" with respect to both specifications. *See id.* (quotation omitted). Therefore, either allegation could equally fit within either alleged specification.

4. The Testimony as to Both Allegations was Factually Similar

In addition to the similar testimony regarding the dates, CT described the facts of both allegations in strikingly similar terms. Indeed, CT frequently described the "second" allegation by reference to being "similar" to the "first." *See* (R. at 505) (CT testimony that there was "another occasion similar to this one".); (R. at 506) ("They're very similar."); (R. at 506) ("It was very similar."); (R. at 506) (". . . the events are pretty similar as well."). Indeed, even the events leading up to the "very similar" allegations seemed similar, with both being preceded by kayaking and/or fishing outings. *See* (R. at 498-99, 506); *see also* (R. at 566) (endorsing that the "second" sexual assault was "almost identical to the first sexual assault."). Given these substantial factual

similarities, it would not be difficult for panel members to confuse the two, especially when they were never oriented as to which was which.

5. The Evidence Could Have Led to a Mixed Verdict

Despite the factual similarities between the two allegations, the evidence very plausibly could have led some members to a mixed verdict. This was not an "all or nothing" scenario, where the panel had to either accept or reject CT's allegations wholesale. Indeed, as demonstrated by Appellant's acquittal on Charge II (CT's physical assault allegation), the panel clearly concluded CT's various allegations had divergent degrees of merit.

With respect to the Article 120 specifications at issue, there were numerous reasons why the panel may have believed one but not the other. For example, CT continued to associate with Appellant after the "first" alleged sexual assault but seems to have dissociated with him after the "second" alleged sexual assault. *See, e.g.*, (R. at 570) (CT continued to call Appellant after the first assault). On the other hand, CT provided more detail about the "first" allegation than the "second," which could have led the panel to conclude the government had met its burden of proof with respect to the former but not the latter.

6. The Panel was Never Oriented as to Which Allegation Corresponded to Which Specification

Trial counsel made no orienting statements in opening or closing arguments, that would orient the members as to which of the two alleged assaults related to Specification 1 and which related to Specification 2. (R. at 460-67) (GOV opening); (R. at 925-54) (GOV closing); (R. at 986-94) (GOV rebuttal). To the contrary, trial counsel largely combined the elemental analysis during argument. *See* (R. at 926) ("With respect to the three specifications of Charge I. The Government has to prove in each instance that a sexual act occurred."); ("Did the accused commit a sexual act? Did he penetrate Airman C.T.'s vagina with his penis?"). The government did not

list the elements, either orally or via a slideshow. (R. at 925-54, 986-94); *see also* (R. at 902) (stating the government would not use a slideshow). The government did not attempt to reconcile the ambiguity in dates or orient the panel to which of the overlapping summer 2020 dates alleged in specifications 1 and 2 related to which testimony. *See* (R. at 954) ("The Government has proved beyond a reasonable doubt that *in the summer of 2020*, not only did the accused put his ex-girlfriend in an arm lock, twist her arm and hurt her, but that *he sexually assaulted her two times without her consent*.") (emphasis added).

The specifications were not charged in chronological order. *See* (Charge Sheet) (alleging dates for Specification 3 of Charge I preceding the date-ranges alleged in Specifications 1 and 2). The military judge gave the standard instruction that the panel could decide which order in which to consider the various charged offenses. (R. at 996) ("The order in which the charges and specifications are to be voted on will be determined by the president subject to an objection by the majority of the members.").

7. <u>There is No Way to Tell if the Required Plurality of Members Voted Guilty on Either Allegation</u>

Given the overlapping charging language, the vague and similar testimony about the dates of the two allegations, the factual similarities between the two offenses, and the lack of any orientation as to which allegation corresponded to which specification, there is no way to tell which allegation the members assigned to which specification. More troubling still, there is no way to tell whether the members had divergent assumptions about which allegation corresponded to which specification. As such, it is equally foreseeable that their votes on the two specifications were based on different conduct. For example, when the panel voted on Specification 1, members 1-4 may have been voting on conduct X, while members 5-8 were voting on conduct Y.

In a system requiring panel/jury unanimity, this would be less troubling. In such a system,

given that Appellant was convicted of both specifications, the unanimity of the vote would be accurate, even if the jurors did not all agree on which act should be assigned to which specification. Indeed, the Court of Appeals of Wisconsin dealt with a similar scenario in *State v. Becker*, 767 N.W.2d 585 (Wis.App. 2009). As in the present case, Mr. Becker was charged with – and convicted of – two counts of sexual misconduct using overlapping (and, in fact, identical) language. *Id.* at 587. Neither the charging language, the arguments, nor the instructions oriented the jurors to which count corresponded to which event. *Id.* at 587-90. On appeal, Mr. Becker argued that "the failure of the information, the instructions, and the verdicts to tie a particular act of sexual contact to a particular count" could have resulted in "the possibility that the jury's verdicts would not be unanimous . . . ." *Id.* at 590. Given that Mr. Becker was convicted of both counts, however, and Wisconsin required unanimous verdicts, the court reasoned that: "This eliminates the risk that the jury was not unanimous and, thus, does not give rise to prejudice by offending the unanimous jury requirement. The unanimity of the jury is accurate even if the jurors . . . did not all agree on which act should be assigned to which count." *Id.* at 591-92.

In the military system, however, where convictions based on non-unanimous votes are allowed, this Court cannot have the same assurance. Despite the fact that Appellant was convicted of both specifications 1 and 2, it is very possible that the result would have been materially impacted by divergent views amongst the panel members on "which act should be assigned to which [specification]." For example, eight members may have felt Appellant was guilty of the "first" allegation, but only five felt he was guilty of the "second" allegation. If a single member was operating under a divergent assumption from the rest as to which specification corresponded to which conduct, it would have tipped the balance between acquittal and conviction with respect to the "second" allegation.

Such a possibility is intolerable. In the country's sole system that allows for nonunanimous convictions, due process demands that the government be held strictly to the already reduced plurality to obtain a conviction.

8. Analogous Caselaw

Given the uniqueness of the circumstances of this case, it is understandably difficult to find analogous caselaw. This Court may find parallels in the line of cases dealing with ambiguous verdicts, where "the findings of guilty do not disclose the conduct upon which each of them was based." *See United States v. Walters*, 58 M.J. 391, 397 (C.A.A.F. 2003). Similarly, this Court may find the verdicts impermissibly vague in a more generic sense.

The Supreme Court of Missouri addressed a similar issue in *Hoeber v. State*, the evidence and instruction "failed to identify any specific incident" and thereby "allowed each individual juror to determine which incident he or she would consider in finding Mr. Hoeber guilty on each count . . . ." 488 S.W.3d 648, 655 (Mo. 2016). The Court found that the lack of orienting instructions "created a real risk that the jurors did not unanimously agree on the specific acts of statutory sodomy for which they found Mr. Hoeber guilty. Accordingly, the verdict directors failed to ensure a unanimous jury verdict." *Id.* The court reversed for ineffective assistance of counsel, because defense counsel's "failure to object to the insufficiently specific verdict directors submitted to the jury undermines this Court's confidence in the reliability of the verdicts." *Id.* at 550-54.

In *State v. Marcum*, the Court of Appeals of Wisconsin reached the same result in a case where the government charged three specifications of sexual misconduct using non-specific language. 480 N.W.2d 545, 548-49 (Wis.App. 1992). Appellant was convicted of one and acquitted of the other two. *Id.* This made it impossible to know if all twelve jurors agreed that Marcum committed the same act as the basis for the guilty specification. *Id.* at 551 ("The standard

instruction when applied to unspecific verdicts, as in this case, left the door open to the possibility of a fragmented or patchwork verdict."). The Court of Appeals concluded that "the verdict was so unspecific as to violate Marcum's sixth amendment right to a unanimous verdict and his fifth amendment due process right to verdict specificity." *Id.* at 548. The court reached the issue through finding ineffective assistance of counsel where defense counsel failed to request more specific instructions and/or verdict forms to cure the ambiguity. *Id.* at 550-54.

9. Conclusion

This Court cannot uphold convictions where the record does not clearly demonstrate conviction by the proper plurality.[4] Such a result would be antithetical to Appellant's substantial rights and to the perception of fairness of the military justice system. Policy makers have made a conscious choice to allow for non-unanimous convictions within the military. While the consequences of this framework fall most heavily on accused servicemembers, it also has consequences to the government. In such a system, the government may face unique, unintended

[4] Similarly, this Court cannot perform its own Article 66 functions without clarity as to which facts relate to which specification. *See Ross*, 68 M.J. at 418. The charged dates in this case place it within the "old factual sufficiency" standard. *See* National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(b), 134 Stat. 3611-12. As such, this Court must conduct a factual sufficiency review and must be convinced, beyond a reasonable doubt, of appellant's guilt. While, for the sake of judicial economy, appellant does not separately brief factual sufficiency herein, factual sufficiency is intertwined with this assignment of error and the substantial weaknesses in the evidence are discussed throughout the brief. It is particularly notable that appellant's recorded statements, arguably the most damaging evidence against him, appear focused on a single instance rather than the charged two instances. Given the vague charging scheme, evaluating this evidence is particularly problematic; this Court cannot know which of the two specifications these statements may have related to, which of the specifications the panel members attributed these statements to, or whether the panel member's had divergent assumptions about which of the specifications these statements related to.

issues, such as that presented by this case. Given the ambiguity as to which allegation corresponded to which specification, and the very real possibility that the members voted on specifications 1 and 2 with divergent understandings as to what conduct they were voting on, Appellant's convictions are fatally flawed.

The government unquestionably had options to avoid the situation it now finds itself in. As the Court of Appeals stated in *Becker*: "This entire issue could have been avoided if the State had not put it in play with its sloppy draftsmanship." 767 N.W.2d at 589. Given the uncertainty as to dates, an obvious option would have been to use "divers occasions" to capture both allegations. *See* R.C.M. 307(c)(2), discussion. Voting procedures are in place to ensure that multiple offenses charged on "divers occasions" are considered in a consistent and fair manner. *See* Benchbook, para. 7-25. Whether to increase punitive exposure, or for some other reason, the government chose not to use divers occasions and is now stuck with the consequences of its draftsmanship.

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

Argument

II. APPELLANT IS ENTITLED TO RELIEF FOR PERVASIVE IMPROPER EVIDENCE AND ARGUMENT.

Standard of Review

"Unpreserved evidentiary errors are forfeited in the absence of plain error." *United States v. Smith*, 83 M.J. 350, 355 (C.A.A.F. 2023) (citing *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014)). "Under this standard, the Appellant bears the burden of establishing (1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights." *Id.* (additional citation and internal quotation marks omitted).

Prosecutorial misconduct and improper argument are reviewed de novo and, where no objection is made, this Court reviews for plain error. *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019) (citing *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018)). To prove plain error, Appellant has the burden of establishing (1) there was error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right. *Id.* (citations and quotations omitted).

Law

Mil. R. Evid. 404 provides safeguards for the use of evidence of other bad acts on the part of the accused. Irrelevant evidence is prohibited, particularly when it is unfairly prejudicial. Mil. R. Evid 401, 403. Human lie detector evidence is prohibited. *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014) (citations omitted). Comment on the accused's right to remain silent is prohibited. *See generally United States v. Clark*, 69 M.J. 438, 446 (C.A.A.F. 2011) (finding plain and obvious error and explaining "it is settled that the government may not use a defendant's exercise of his Fifth Amendment rights as substantive evidence against him.").

"Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Hornback*, 73 M.J. 155, 160 (C.A.A.F. 2014) (quotations omitted). Repeated violations of the Rules for Courts–Martial and/or Military Rules of Evidence can constitute prosecutorial misconduct. *Id.* This includes asking improper questions or electing improper testimony. *Id.*[5] Similarly, improper argument can

[5] The improper evidence/testimony in this case could equally be viewed as evidentiary error or prosecutorial misconduct.

constitute prosecutorial misconduct. *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021). "A prosecutor proffers an improper argument amounting to prosecutorial misconduct when the argument oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *Id.* (cleaned up). Trial counsel may not, *inter alia*, inject personal opinions into the panel's deliberations, inflame the members' passions or prejudices, or ask them to convict the accused on the basis of criminal predisposition. *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017).

In assessing prejudice, courts look "at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial." *United States v. Erickson*, 65 M.J. 221, 224 (C.A.A.F. 2007) (citing *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005)). This determination is based on "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence to support the conviction." *Norwood*, 81 M.J. at 19 (citing *Voorhees*, 79 M.J. at 12). Reversal is warranted for nonconstitutional error only when the trial counsel's comments, taken as a whole, were so damaging that the appellate court cannot be confident that the members convicted the Appellant on the basis of the evidence alone. *Sewell*, 76 M.J. at 18 (quotation omitted). For constitutional error, the burden is on the Government to establish that the comments were harmless beyond a reasonable doubt. *United States v. Flores*, 69 M.J.366, 369 (C.A.A.F. 2011) (citations omitted).

Argument

1. <u>Improper testimony</u>

The government elicited a great deal of evidence of prior bad acts of the accused, none of which were noticed under Mil. R. Evid. 404 or subject to the procedural safeguards thereof. CT testified Appellant had started dating her while he was married to someone else (R. at 476), been

dishonest with her about the status of his separation/divorce (R. at 477-77),[6] cheated on her (R. at 481-85), lied about cheating on her (R. at 481, 485), engaged in extreme possessive and isolating behavior (R. at 483, 487-88), "had a lot of difficulties being like honest" (R. at 484), used threats of suicide as a form of manipulation (R. at 488), was explosively angry (R. at 493), would yell and hit things during outbursts (R. at 493),[7] used multiple fake phone numbers to circumvent her phone block of him (R. at 512-513), physically abused her in the past (R. at 597-98),[8] and made racist and derogatory remarks to her (R. at 475). The government filed two Mil. R. Evid. 404(b) notices. (App. Ex. III, attachments 3, 5). None of these prior bad acts were included in either notice.

Trial counsel asked CT numerous irrelevant questions that elicited improper victim impact on the merits. *See* (R. at 519) (asking CT what was going through her mind when she received apology from Appellant); (R. at 520) ("Q: Did you feel, ma'am, that that apology sufficiently addressed what he had actually done to you? A: No."); (R. at 528) (". . . you did not want to continue hearing from him, is that true?"). Along these same lines, trial counsel ended SA RF's examination with questions about CT's emotional state after one of the pretext calls, and the agents' actions to console CT. (R. at 717).

OSI Special Agent (SA) RF testified that the pretextual contacts in this case were intended "to elicit information from Senior Airman Michael Benjerman Kight in an environment and

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[6] The military judge sustained a defense objection to a portion of this questioning. (R. at 476).
[7] Trial counsel referenced this testimony in closing. (R. at 946) ("The accused, she testified, has those rage, that outbursts that he had on that trip. [CT] said he was having outbursts, mad, angry.").
[8] The military judge sustained a defense objection to this questioning. (R. at 598-601). When trial counsel argued the defense had opened the door to the subject, the military judge questioned how that could permit the government "to go into specific instances of uncharged misconduct. . . ." (R. at 600).

atmosphere that he was more likely to provide truthful statements and not withhold information that he would have otherwise withheld from us had we had the opportunity to interview him in person." (R. at 669). This testimony improperly commented on Appellant's right to remain silent, suggested Appellant had denied OSI "the opportunity to interview him," and stated that – if Appellant had submitted to an interview – he would have withheld information from OSI.

SA RF testified based on his training and experience, if an individual is guilty they may apologize during a pretext call – and that the pretext call was hoping to elicit an apology. (R. at 673). This was improper expert human lie detector testimony, and a brazen attempt to bolster Appellant's largely non-specific apologies into a proxy for a confession. SA RF's opinion that appellant's statements were indicative of guilt was improper.

2. Improper argument

Trial counsel made numerous improper arguments. Trial counsel began his closing argument with improper vouching: ". . . the Government has proven this case beyond a reasonable doubt by presenting to you three credible witnesses . . . ." (R. at 925). Thereafter, trial counsel vouched for the credibility of the witnesses continuously throughout his argument. (R. at 926) ("Credible witnesses. . . ."); (R. at 944) (". . . three credible witnesses. . . ."); (R. at 953) (". . . three credible witnesses, that would be enough."); (R. at 986) (. . . three credible witnesses . . . ."). Trial counsel further vouched for the credibility of the SA RF calling him, inter alia, "well-trained." (R. at 944). Trial counsel repeatedly told the panel it was their duty to find Appellant guilty. (R. at 926, 953, 954, 994). Trial counsel improperly personalized the argument, asking the members: "If somebody accuses *you* of rape, under what circumstances, on what planet are *you* just going to ignore that, are *you* just not going to correct that record?" (R. at 947) (emphasis added). Trial counsel directly addressed defense counsel. (R. at 934) ("But you're right, Defense Counsel, it

wasn't a violent struggle."). Trial counsel made improper spillover argument, arguing that the two accusers did not know each other. (R. at 935-36).[9] Trial counsel further vouched for guilt by stating, without reference to the evidence: "The Government has proven beyond a reasonable doubt that in the summer of 2020, not only did the accused put his ex-girlfriend in an arm lock, twist her arm and hurt her, but that he sexually assaulted her two times without her consent." (R. at 954). Trial counsel's last words in rebuttal vouched for guilt, without reference to the evidence: "the right outcome is finding the accused guilty because the Government has met its burden to each and every element of each charged offense beyond a reasonable doubt." (R. at 994).[10]

3. <u>There was Error</u>

The above-listed evidence and argument was erroneous. Defense counsel objected to some, though not nearly enough of this erroneous material. Regardless, the error was plain or obvious even under a plain error standard of review. Indeed, the military judge seems to have recognized at least some of the error, *sua sponte* instructing the panel that counsel's personal opinions were not relevant. (R. at 994-95).

4. <u>Prejudice</u>

Appellant was prejudiced by the cumulative impact of the error. The misconduct was severe, particularly in light of the sheer volume of impropriety, and the fact that it spread

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[9] The military judge sustained a defense objection to this improper argument. To her credit, the military judge gave a curative instruction on spillover at the conclusion of trial counsel's argument. (R. at 954-55).

[10] Again to her credit, the military judge gave an instruction after trial counsel's rebuttal argument, stating that counsel's personal opinions were not relevant, and to follow her instructions if they conflicted with counsel's arguments. (R. at 994-95).

throughout the trial. *See Fletcher*, 62 M.J. at 184 (noting that factors indicating severity are the raw number of errors, and that the errors were spread throughout the trial).

The military judge gave curative instructions for trial counsel's improper spillover argument and, after trial counsel's rebuttal argument, gave a curative instruction indicating counsel's personal opinions were not relevant and the panel follow her instructions if they conflicted with counsel's arguments. (R. at 954-55, 994-95). These curative instructions addressed some, though not all of the error.

With respect to the weight of the evidence, the government's case was far from overwhelming. CT had uniquely significant credibility issues. Indeed, the mixed verdict on CT's accusations show that her veracity was a close call in the eyes of the panel. (R. at 713.)

While prejudice is evaluated cumulatively, Appellant highlights three errors as particularly severe: the comment on his right to silence (R. at 669), the human lie detector evidence that guilty subjects are apt to apologize during pretext calls (R. at 673), and trial counsel's spillover argument in a case with two victims (R. at 935-36). Given the significance of the pretext call evidence – which involved Appellant's profuse though often nonspecific apologies – the OSI agent's testimony that, based on his training and experience, guilty subjects are likely to apologize was particularly tailored to prejudice the panel's deliberation in a key aspect of the case. *See* (R. at 669). Hand-in-hand with this error, the OSI agent invoked their lack of "opportunity to interview" Appellant, but noted that subjects were more likely to be truthful during a pretext call anyway. (R. at 673). Trial counsel's implication in closing that it was unlikely two women who did not know each other would both accuse Appellant of sexual assault, while immediately objected to, could not be "un-rung" and added to this already perilous landscape. At least some of this error is of constitutional dimension, and therefore subject to the harmless beyond a reasonable doubt

prejudice standard.

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

III. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL PERFECTED AN OTHERWISE MISSING ELEMENT ON CROSS-EXAMINATION, AND FAILED TO OBJECT TO VOLUMINOUS IMPROPER EVIDENCE AND ERROR.

Standard of Review

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

Law

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

Argument

During direct examination, CT never testified that Appellant had penetrated her vulva with his penis during either alleged assault. *See* (R. at 500-07). These, of course, were required elements of the Article 120 specifications. On cross examination, however, defense counsel filled

in the missing elements, asking whether Appellant had "penetrate[d] your vagina with his penis." (R. at 558-59). And again: "he then proceeds to penetrate your vagina with his penis?" (R. at 566). CT replied affirmatively in both cases, filling in the missing elements from her direct examination. (R. at 558-59, 566). This information was introduced only through defense counsel's cross-examination and was not contained within the pretext recordings or any other evidence before the court-martial.

There is no strategic or tactical reason for perfecting the government's case by filling in a missing element on cross examination. In the absence of any forensic evidence – or other evidence of the specific act charged – CT's omission of these elements may well have left the government with insufficient evidence to maintain and sustain a conviction. *See, e.g.*, *United States v. Allred*, ARMY 20220141, 2023 CCA LEXIS 366, *2-4 (A. Ct. Crim. App. 25 August 2023) (finding an Article 120, UCMJ, conviction factually insufficient in the absence of any forensic or testimonial evidence specifically establishing penial penetration of the victim's vagina).

While this is no-doubt an unusual fact-pattern, it is axiomatic that proving up an element on cross that the government failed to establish on direct constitutes prejudicially deficient performance. *See People v. Jackson*, 741 N.E.2d 1026, 1031–32 (Ill.App. 1 Dist. 2000) ("For defense counsel to elicit testimony which proves a critical element of the State's case where the State has not done so upsets the balance between defense and prosecution so that defendant's trial is rendered unfair."). In order to sustain a conviction, the government had to establish the charged act. The government failed to do so on direct examination. Defense counsel was deficient in filling in this critical element on cross examination. This deficiency was prejudicial as it corrected an otherwise flawed elemental analysis.

Additionally, defense counsel failed to object to a great deal of improper and prejudicial

evidence and argument. As explored in the prior assignment of error, defense counsel largely sat "like a bump on a log" while this improper evidence and argument was presented. *See United States v. Andrews*, 77 M.J. 393, 404 (C.A.A.F. 2018) ("Nor can a defense counsel sit like a bump on a log—he or she owes a duty to the client to object to improper arguments early and often.") (citations omitted). This level of passivity in the face of such clearly objectionable material cannot be condoned. Again, there is no conceivable strategic or tactical reason for counsel's failure to object. Individually and collectively these deficiencies prejudiced Appellant.

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

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

Additional Facts

Appellant elected trial by officer and enlisted members. (R. at 11). Appellant's panel consisted of eight members, and the military judge instructed them that "[t]he concurrence of at least three-fourths of members present when the vote is taken is required for any finding of guilty." (R. at 996-97). It is unknown whether the members convicted Appellant by a unanimous verdict.

Standard of Review

"An appellant gets the benefit of changes to the law between the time of trial and the time of his appeal." *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019). "A new rule of criminal procedure applies to cases on *direct* review, even if the defendant's trial has already concluded." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021) (emphasis in original). Thus, as the CAAF has explained, when an appellant fails to object at trial to an error of constitutional dimension that was not yet resolved in his favor at the time of his trial, the "error in the case is

forfeited rather than waived." *See Tovarchavez*, 78 M.J. at 462. In such circumstances, military appellate courts review for plain error, but "the prejudice analysis considers whether the error was harmless beyond a reasonable doubt." *Id*. (internal quotations omitted).

Law and Analysis

In *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), the Supreme Court "repudiated [its] 1972 decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), which had allowed non-unanimous juries in state criminal trials." *Edwards*, 141 S. Ct. at 1551. Following *Ramos*, Appellant was entitled to a unanimous verdict on three bases: (1) under the Sixth Amendment because unanimity is part of the requirement for an impartial jury, and because it is central to the fundamental fairness of a jury verdict: (2) under the Fifth Amendment's Due Process Clause; and, (3) under the Fifth Amendment's Equal Protection Clause.

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

Appellant recognizes that the CAAF's recent decision in *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), binds this Court. However, he continues to raise the issue in

anticipation of further litigation.[11] Appellant also highlights, as explored above, the interplay between the lack of an unanimity requirement and the overlapping and generic charging language specific to this case. *See* Assignment of Error I, above.

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

[redacted]
BRAD W. SIMON
Lead Civilian Appellate Defense Counsel
Daniel Conway and Associates
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[redacted]

[11] Petitions for writ of certiorari have been filed with the Supreme Court on this issue in *Martinez, et. al. v. United States*, *Anderson v. United States*, and *Cunningham v. United States*. *United States v. Martinez*, 2023 CAAF LEXIS 494 (C.A.A.F. Jul. 18, 2023), *petition for cert. filed* (U.S. Sept. 8, 2023) (No. 23-242); *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), *petition for cert. filed* (U.S. Oct. 23, 2023) (No. 23-437); *United States v. Cunningham*, 83 M.J. 367 (C.A.A.F. 2023), *petition for cert. filed* (U.S. Dec. 15, 2023) (No. 23-666).

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 27 December 2023.

[redacted]
SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 1
Senior Airman (E-4) **MICHAEL B. KIGHT** United States Air Force *Appellant.*	)	No. ACM 40337
	)	28 December 2023

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

Pursuant to Rule 23.3(m)(5), the United States respectfully requests that it be given 14 days after this Court's receipt of a declaration or affidavit from trial defense counsel to submit its answer so that it may file the United States' answer brief and incorporate statements provided by Appellant's trial defense counsel in response to the specified ineffective assistance of counsel issues. This case was docketed with the Court on 15 September 2022. Since docketing, Appellant has been granted 13 enlargements of time. This is the United States' first request for an enlargement of time. As of the date of this request, 470 days have elapsed.

There is good cause for the enlargement of time in this case. Appellant has raised one assignment of error with two sub-issues in which he claims his trial defense counsel were ineffective. Specifically, Appellant claims: (1) trial defense counsel perfected the government's case by asking questions about a missing element on cross examination, and (2) trial defense counsel failed to object to improper argument and evidence.

The United States cannot prepare its answer to the allegations of ineffective assistance of counsel without a statement from trial defense counsel. An enlargement of time is necessary to

ensure the United States has sufficient time to incorporate trial defense counsels' statements into its answer. The additional time will permit counsel to incorporate the trial defense counsels' statements and accommodate for the drafting and supervisory review before the United States files its answer. In addition, undersigned counsel will be preparing for oral argument in United States v. Stradtmann at the Court of Appeals for the Armed Forces (CAAF) on 7 February 2023, and the additional time will accommodate that preparation.

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

[redacted]
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Appellate Government Counsel
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MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Operations Division
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United States Air Force
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 28 December 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**UNITED STATES MOTION TO COMPEL DECLARATIONS**
v.	)	Before Panel No. 1
Senior Airman (E-4) **MICHAEL B. KIGHT** United States Air Force *Appellant.*	)	No. ACM 40337
	)	28 December 2023

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

Pursuant to Rule 23.3(e) of this Honorable Court's Rules of Practice and Procedure, the United States hereby requests this Court compel each of Appellant's trial defense counsel, Maj Adam Merzel and Maj Nicholas Aliotta, to provide an affidavit or declaration in response to Appellant's allegations of ineffective assistance of counsel (IAC). In his assignments of error, Appellant claims on cross examination, "defense counsel filled in the missing elements, asking whether Appellant had 'penetrate[d] your vagina with his penis.'" (App. Br at 24-25). Appellant claims this information was not provided anywhere else in the record – only through trial defense counsel's cross examination. (Id.) Appellant also claims, trial defense counsel were ineffective because they failed to object to "improper and prejudicial evidence and argument" throughout trial. (App. Br. at 26-27).

On 27 December 2023, Appellant's trial defense counsel responded to undersigned counsel stating that they would only provide an affidavit or declaration pursuant to an order from this Court. To prepare an answer under the test set out in United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991), the United States requests that this Court compel trial defense counsel to provide

an affidavit or declaration. Only trial defense counsel can explain their strategic decisions during trial.

A statement from Appellant's counsel is necessary because the record is insufficient to determine the strategy trial defense counsel used during cross examination and when presented with allegedly objectionable evidence and argument. Thus, the United States requires statements from both trial defense counsel to adequately respond to Appellant's brief. *See* United States v. Rose, 68 M.J. 236, 236 (C.A.A.F. 2009); United States v. Melson, 66 M.J. 346, 347 (C.A.A.F. 2008). In fact, this Court cannot grant Appellant's ineffective assistance of counsel claim without first obtaining statements from both trial defense counsel. *See* Rose, 68 M.J. at 237; Melson, 66 M.J. at 347.

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

[redacted]
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Military Justice and Discipline Directorate
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MARY ELLEN PAYNE
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United States Air Force
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 28 December 2023.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40337**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Michael B. KIGHT	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 27 December 2023, Appellant, through counsel, submitted an assignments of error brief. In the brief, Appellant alleges, *inter alia*, that he "was denied effective assistance of counsel when his [trial defense] counsel perfected an otherwise missing element on cross-examination, and failed to object to voluminous improper evidence and error."

On 28 December 2023, the Government filed a Motion to Compel Declarations and contemporaneously filed a Motion for Enlargement of Time. The Government requests this court compel Appellant's trial defense counsel, Major Adam Merzel and Major Nicholas Aliotta, to provide affidavits or declarations in response to the claimed ineffective assistance of counsel. According to the Government, Appellant's trial defense counsel indicated they would only provide an affidavit or declaration upon order by this court.

In the motion for enlargement of time, the Government requests 14 days to submit its answer after the court's receipt of trial defense counsel's declarations. Appellant did not file a response to the motions.

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

Accordingly, after considering the Government's motions and the deficiencies alleged by Appellant, it is by the court on this 8th day of January, 2024,

ORDERED:

The Government's Motion to Compel Declarations is **GRANTED**. Major Adam Merzel and Major Nicholas Aliotta are each ordered to provide an affidavit or declaration to the court that is a specific and factual response to Appellant's claim that he "was denied ineffective assistance of counsel when his

[trial defense] counsel perfected an otherwise missing element on cross-examination, and failed to object to voluminous improper evidence and error."

A responsive affidavit or declaration by each counsel will be provided to the court not later than **8 February 2024.** The Government shall deliver a copy of the responsive affidavits or declarations to Appellant's counsel.

It is further ordered:

The Government's Motion for Enlargement of Time is **GRANTED**. The Government's answer to Appellant's assignments of error brief will be filed not later than **22 February 2024**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES MOTION TO ATTACH DOCUMENTS**
v.	)	Before Panel No. 1
Senior Airman (E-4) **MICHAEL B. KIGHT** United States Air Force *Appellant.*	)	No. ACM 40337 6 February 2024

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

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

- Appendix A – Major Adam M. Merzel Declaration, dated 5 February 2024 (6 pages)
- Appendix B – Major Nicholas F. Aliotta Declaration, dated 5 February 2024 (5 pages)

The attached declarations are responsive to this Court's order directing Maj Adam M. Merzel and Maj Nicholas F. Aliotta to provide declarations responsive to Appellant's Assignment of Error concerning whether he received ineffective assistance of counsel. (Court Order, dated 8 January 2024.) Appellant claims his trial defense were ineffective. (App. Br. at 25-27.) These declarations are necessary to resolve these assignments of error.

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

documents are relevant and necessary to address this Court's order and Appellant's Assignment of Error.

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

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United States Air Force
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MARY ELLEN PAYNE
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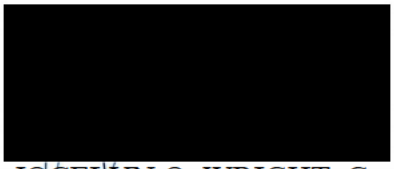
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 6 February 2024.



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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	Before Panel No. 1
Senior Airman (E-4) **MICHAEL B. KIGHT** United States Air Force *Appellant.*	)	No. ACM 40337
	)	22 February 2024

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

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INDEX OF BRIEF

III.

TRIAL DEFENSE COUNSEL WERE EFFECTIVE IN THEIR REPRESENTATION OF APPELLANT.

IV.

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OTHER AUTHORITIES

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	Before Panel No. 1
Senior Airman (E-4) **MICHAEL B. KIGHT** United States Air Force *Appellant.*	)	No. ACM 40337
	)	22 February 2024

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

ISSUES PRESENTED

I.

WHETHER APPELLANT'S SUBSTANTIAL RIGHTS WERE PREJUDICED WHERE HE WAS CONVICTED OF TWO SPECIFICATIONS OF SEXUAL ASSAULT ALLEGING OVERLAPPING DATE RANGES AND OTHERWISE IDENTICAL LANGUAGE, AND THE PANEL WAS NEVER ORIENTED AS TO WHICH ALLEGATION CORRESPONDED TO WHICH SPECIFICATION.

II.

WHETHER APPELLANT IS ENTITLED TO RELIEF FOR PERVASIVE IMPROPER EVIDENCE AND ARGUMENT.

III.

WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL PERFECTED AN OTHERWISE MISSING ELEMENT ON CROSS-EXAMINATION, AND FAILED TO OBJECT TO VOLUMINOUS IMPROPER EVIDENCE AND ERROR.

IV.

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

STATEMENT OF CASE

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

STATEMENT OF FACTS

SrA CTP testified when she first met Appellant at technical school, he made racist and derogatory remarks to her. (R. at 475). Then Appellant started dating SrA CTP while he was married to someone else. (R. at 476). Appellant started dating SrA CTP in technical school. (R. at 476). After becoming engaged they were assigned to different bases – Appellant to Shepperd AFB, Texas, and SrA CTP to Barksdale AFB, Louisiana. (R. at 476, 478).

During their relationship, Appellant lied to SrA CTP about the status of his separation and divorce from his first wife; he cheated on SrA CTP and lied about it (R. at 477-77, 481-85). Appellant was angry, would yell, hit things, abuse SrA CTP, threaten suicide, and engaged in extreme possessive and isolating behavior. (R. at 483-484, 487-488, 493, 597-598). Their romantic relationship continued long distance until Appellant admitted to cheating on SrA CTP in the summer of 2019. (R. at 481). After their breakup, Appellant used multiple fake phone numbers to contact SrA CTP after she blocked him. (R. at 512-513).

Appellant rekindled his friendship with SrA CTP in March 2020 and said he wanted to be a supportive friend after SrA CTP broke up with her boyfriend. (R. at 487-488, 490). And he visited her at Barksdale AFB. (R. at 490-491).

SrA CTP testified that in the summer of 2020, Appellant sexually assaulted her twice. The sexual assaults largely occurred in the same manner on both occasions, with slight

differences. (R. at 506). On both occasions, SrA CTP explained Appellant drove from Shepperd AFB, Texas, to visit her at Barksdale AFB, Louisiana.

The first sexual assault occurred before the Fourth of July after they went kayaking and fishing – which was a common activity for them to do together – and then they returned to SrA CTP's dorm room. (R. at 480, 498, 499, 540). SrA CTP was lying on her bed, and Appellant was sitting on a chair in her dorm room before he went to the restroom. (R. at 499). Appellant went to the bathroom and when he returned SrA CTP stated, "[h]is demeanor kind of changed" and "[h]e just seemed very forward." (R. at 499).

SrA CTP testified, "He said that he had come out all this way to help me and that this was the least I could do for him as he approached me." (R. at 499). Appellant was looking for a sexual reward for being a supportive friend. (R. at 499-500).

Appellant got "onto the bed and climbed on top of [SrA CTP]. He had both of his legs and his arms kind of like caging [SrA CTP] in." (R. at 500). She could not move or get away from him. (Id.) SrA CTP said no, and she explained, "When he was penetrating me, yeah, I kind of tried to push him off." (R. at 501). He took off her elastic biker shorts and underwear. (R. at 501). Then he reached for his wallet and unwrapped a condom. (R. at 502). SrA CTP did not recall whether Appellant put the condom on. (Id.) Then SrA CTP felt Appellant penetrate her vulva. (R. at 502, 559) The penetration hurt because she was not sexually aroused. (R. at 504). Appellant went to shower. (R. at 505).

The second sexual assault also occurred before the Fourth of July but two to three weeks after the first assault. (R. at 505-506). The events leading up to the second sexual assault were much like the second sexual assault. (R. at 506). During the second assault SrA CTP cried, and Appellant told her to stop crying, and he put a pillow over her head so he could not see her face

while she cried. (R. at 507). After the second incident, Appellant told her it was unenjoyable because she cried the entire time. (R. at 507).

Similarities in Specifications	
Appellant drove from Sheppard AFB to Barksdale AFB to visit SrA CTP.	
Appellant and SrA CTP went kayaking and fishing before spending time in SrA CTP's dorm room.	
Appellant went into the bathroom, returned to the dorm room, and got on top of SrA CTP while she was laying on her twin bed.	
Appellant grabbed a condom from his wallet, pulled down her biker shorts, and penetrated her vulva with his penis. Appellant's penetration was painful for SrA CTP.	
Differences in Specifications	
First Sexual Assault	**Second Sexual Assault**
SrA CTP stated the first incident occurred in the summer of 2020 before the Fourth of July.	SrA CTP stated the second incident occurred before the Fourth of July and 2-3 weeks after the first sexual assault.
SrA CTP told Appellant no and pushed his shoulders.	SrA CTP started crying, and Appellant put a pillow over her head covering her face.
Appellant took a shower.	Appellant told SrA CTP the sex was unenjoyable because she cried the entire time.

Months later, in text messages between SrA CTP and Appellant, Appellant said, "I abused you mentally and emotionally and fucked your life up pretty bad. I want to say I'm sorry." (Pros. Ex. 2 at 1). He also texted, "I'm sorry for the emotional and mental torture I put you through." (Id. at 2). Then during a phone call between SrA CTP and Appellant, Appellant said, "I'm sorry for fucking making you cry, for like trying to have sex with you when you didn't want to have sex, for having sex with you." (Pros. Ex. 4, R. at 707). He also said:

> I hit you. Like I took your clothes off. Like I tried to take back my shirt proportionally. Like you told me to stop. Like to not take your shirt off. ***Like I was like laying in bed and I got on to you, and you told me to stop. All these things like you told me to stop and told me not to do.*** And you may not feel like it is genuine.

(R. at 705) (emphasis added). And he added, "You know, your safe beds, your safe place, but then once like I violated that safe place, I violated you, and it didn't become a safe place for you

anymore, and that is when things started really going downhill for you. And I feel like I overthink a lot of things." (R at 712-713).

Both the text messages and phone call were admitted at trial. (R. at 458, 680, 683).

ARGUMENT

I.

THE VERDICT FOR SPECIFICATION 1 AND 2 OF CHARGE I WAS NOT AMBIGUOUS.

Additional Facts

The military judge explained the elements of Specification 1 of Charge I and then the elements of Specification 2 of Charge II to the panel members:

> Specification 1 of Charge: In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt that at or near Barksdale Air Force Base, Louisiana, between on or about 1 June 2020 and on or about 30 June 2020, the accused committed a sexual act upon Senior Airman [CTP], by penetrating her vulva with his penis and that the accused did so without the consent of Senior Airman [CTP].
>
> For Specification 2 of Charge I: In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt that at or near Barksdale Air Force Base, Louisiana, between on or about 8 June 2020 and on or about 31 July 2020, the accused committed a sexual act upon Senior Airman [CTP] by penetrating her vulva with his penis and that the accused did so without the consent of Senior Airman [CTP].

(R. at 913). The military judge instructed the panel members, "Your deliberations should include a ***full and free discussion*** of all the evidence that has been presented." (R. at 996)(emphasis added). The military judge then explained:

> ***After you have completed your discussion***, then voting on your findings must be accomplished by secret, written ballot, and all members of the court are required to vote. The order in which the charges and specifications are to be voted on will be determined by the president subject to an objection by the majority of the members.

(R. at 996)(emphasis added). The military judge also detailed the voting procedures:

> The concurrence of at least three-fourths of the members present when the vote is taken is required for any finding of guilty. Since we have eight members, that means six members must concur in any finding of guilty. If you have at least six votes of guilty for an offense, then that will result in a finding of guilty for that offense. If fewer than six members vote for a finding of guilty, then your ballot resulted in a finding of not guilty.

(R. at 996-997). After the military judge orally explained the procedures, the panel president asked the military judge if they would receive written instructions on the deliberation and voting procedures. (R. at 1001). The military judge confirmed they would receive written instructions as well. (Id.).

The panel members entered deliberations at 0806 hours and provided their findings to the court-martial at 1524 hours the same day. (R. at 1004-1005). The panel deliberated for over seven hours and returned mixed findings. (Id.). The panel determined Appellant was guilty of Specifications 1 and 2 of Charge I (sexual assault of SrA CTP), and not guilty of Specification 3 of Charge I (sexual assault of AD) and the Specification of Charge II (assault consummated by a battery of SrA CTP). (Id.).

Standard of Review

Whether a verdict is ambiguous and thus precludes this Court from performing a factual sufficiency review is a question of law reviewed de novo. United States v. Ross, 68 M.J. 415, 417 (C.A.A.F. 2010).

Law and Analysis

"With minor exceptions for capital cases, a 'court-martial panel, like a civilian jury, returns a general verdict and does not specify how the law applies to the facts, nor does the panel otherwise explain the reasons for its decision to convict or acquit.'" United States v. Brown, 65

M.J. 356, 359 (C.A.A.F. 2007) (quoting United States v. Hardy, 46 M.J. 67, 73 (C.A.A.F. 1997)). Most ambiguous verdict case law arises from one of two situations: (1) "divers occasions" reduced to one occasion, or (2) more than one theory of liability was proposed during the trial. United States v. Walters, 58 M.J. 391, 396 (C.A.A.F. 2003); Brown, 65 M.J. at 359.

Walters *only* applies in those "narrow circumstance[s] involving the conversion of a 'divers occasions' specification to a 'one occasion' specification through exceptions and substitutions." 58 M.J. at 396. In this case, neither Speciation 1 nor Specification 2 of Charge I was charged on divers occasions. (*Charge Sheet*, dated 28 September 2021, ROT, Vol 2) Each specification as charged represented a singular instance of sexual assault. Thus, the narrow scope of Walters does not apply in this case.

And Brown applies when more than one theory of liability arises, but it is unclear which the fact finder chose. "A factfinder may enter a general verdict of guilt even when the charge could have been committed by two or more means, as long as the evidence supports at least one of the means beyond a reasonable doubt." Brown, 65 M.J. at 359. Here multiple theories of liability were not proposed. This was not the case in which a victim's vulva could have been penetrated by a penis or a finger or an object. But even in scenarios of multiple theories of liability a general verdict is not ambiguous. Id. at 358.

In this case, two separate specifications allege two different time periods – though overlapping – and two separate instances of misconduct. The government acknowledges that trial counsel never oriented the panel to which specification applied to which misconduct. But using common sense a rational trier of fact would look at the two date ranges and determine Specification 1 – charged with the earliest start date of 1 June and extending only until 30 June – would be the first incident chronologically. And a rational trier of fact would determine the date

range in Specification 2 that excluded the first week of June and stretched later into the end of July to be the second incident chronologically. It would have been completely illogical for any trier of fact to conclude, based on the date ranges in the specifications, that the conduct alleged in Specification 2, with the later date range, represented the first incident that SrA CTP described chronologically.

SrA CTP also differentiated between the two offenses. She stated Appellant sexually assaulted her in June and then two to three weeks later Appellant sexually assaulted her again. Both offenses occurred before the Fourth of July. During the first assault SrA CTP pushed Appellant and told him no after which he took a shower. During the second assault SrA CTP cried, and Appellant placed a pillow over her face so he would not see her crying. Then he claimed the sex was unenjoyable because she was crying.

Differences in Specifications	
First Sexual Assault	**Second Sexual Assault**
SrA CTP stated the first incident occurred in the summer of 2020 before the Fourth of July.	SrA CTP stated the second incident occurred before the Fourth of July and 2-3 weeks after the first sexual assault.
SrA CTP told Appellant no and pushes his shoulders.	SrA CTP started crying, and Appellant put a pillow over her head covering her face.
Appellant took a shower.	Appellant told SrA CTP the sex was unenjoyable because she cried the entire time.

In addition, the military judge explained the elements of Specification 1 of Charge I and then the elements of Specification 2 of Charge II to the panel members – she did not intermingle the elements, and she provided a correct recitation of the law. (R. at 913). She stated, "Your duty is to determine the facts, apply the law to the facts, and determine whether the accused is guilty or not guilty." (R. at 912).

An appellate court presumes that members follow a military judge's instructions absent evidence to the contrary. United States v. Quezada, 82 M.J. 54 (C.A.A.F. 2021); *see also* United

States v. Hale, 78 M.J. 268 (C.A.A.F. 2018) (An appellate court presumes that the panel followed the instructions given by the military judge.). The panel members listened to the instructions of the military judge, then the panel president ensured they would have the instructions in writing, and they took just over seven hours to deliberate, ultimately deciding Appellant was guilty of only some offenses. There is simply no basis in law to upset the ordinary assumption that members were well suited to assess the evidence given the military judge's instructions. United States v. Piolunek, 74 M.J. 107 (C.A.A.F. 2015).

Appellant cited several state cases in support of his position that the verdict in this case was ambiguous– none of which apply to military law. He cited State v. Becker, 767 N.W.2d 585 (Wis.App. 2009), a case in which an appellant was convicted of two specifications with identical language. The Wisconsin court affirmed because the panel did not provide a mixed verdict and properly found him guilty of two counts. Id. Becker should not be persuasive in this case because the date ranges in this case were different – not identical as in Becker. (*Charge Sheet*, ROT, Vol. 1).

Appellant cited Hober v. State, where the Missouri court decided, "For a jury verdict to be unanimous, the jurors must be in substantial agreement as to the defendant's acts, as a preliminary step to determining guilt." 488 S.W.3d 648, 655 (Mo. 2016). Appellant also cited State v. Marcum, for the proposition that "the verdict was so unspecific as to violate Marcum's Sixth Amendment right to a unanimous verdict and his Fifth Amendment due process right to verdict specificity." 480 N.W.2d 545, 548-49 (Wis.App. 1992). But neither Hober nor Marcum should be persuasive in this case because no servicemember has a Sixth Amendment right to a

unanimous verdict as C.A.A.F. decided in United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2023) cert. denied.[1] And general verdicts are permitted in military law. Brown, 65 M.J. at 359.

Appellant speculates on what occurred in the deliberation room and expects relief without pointing to any evidence the panel could not properly apply the facts to the law. (App. Br. at 14). Appellant claims "there is no way to tell which allegation the members assigned to which specification" and "there is no way to tell whether the members had divergent assumptions about which allegation corresponded to which specification." (Id.) There is no way to tell because deliberations are secret and privileged. R.C.M. 921(c)(1); Mil. R. Evid 509. However, Appellant's argument ignores the military judge's instructions requiring discussion of the offenses before voting and the seven hours of deliberation in this case. (R. at 966, 1004-1005).

This Court can reasonably infer that this was not a hasty decision where the proper plurality was ignored. This was a case of diligent panel members who sifted through SrA CTP's testimony and recordings of Appellant telling SrA CTP: "I'm sorry for fucking making you cry, for like trying to have sex with you when you didn't want to have sex, for having sex with you;" and "Like I was like laying in bed and I got on to you, and you told me to stop. All these things like you told me to stop and told me not to do." (Pros. Ex. 4; R. at 705, 707).

"A finding of guilt is legally sufficient if any rational fact-finder, when viewing the evidence in the light most favorable to the government, could have found all essential elements of the offense beyond a reasonable doubt." United States v. Nicola, 78 M.J. 223, 226 (C.A.A.F. 2019) (citing United States v. Webb, 38 M.J. 62, 69 (C.A.A.F. 1993); Jackson v. Virginia, 443 U.S. 307, 319 (1979)). When applying this test for legal sufficiency, "'this Court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution.'"

[1] https://www.supremecourt.gov/orders/courtorders/022024zor_ggco.pdf

United States v. McGinty, 38 M.J. 131, 132 (C.M.A. 1993) (quoting United States v. Blocker, 32 M.J. 281, 284 (C.M.A. 1991)). This Court has sufficient clarity to perform an Article 66, UCMJ review in this case. This Court will find, like the members in this case, that SrA CTP's testimony and Appellant's recorded phone calls supported all essential elements of both incidents of sexual assault beyond a reasonable doubt. This Court should affirm the findings of guilty.

Appellant's assignment of error should be denied.

II.

NEITHER THE ADMISSION OF EVIDENCE NOR TRIAL COUNSEL'S ARGUMENTS WERE IMPROPER OR PREJUDICIAL.[2]

A. Standard of Review: Admission of Evidence

"When an appellant does not raise an objection to the admission of evidence at trial, we first must determine whether the appellant waived or forfeited the objection." United States v. Jones, 78 M.J. 37, 44 (C.A.A.F. 2018). Waiver occurs by operation of law or when there is "intentional relinquishment or abandonment of a known right." Jones, 78 M.J. at 44 (citing United States v. Sweeney, 70 M.J. 296, 303 (C.A.A.F. 2011)). A waived objection may not be reviewed on appeal. *See* United States v. Campos, 67 M.J. 330, 332 (C.A.A.F. 2009).

If an objection is not waived, then "[u]npreserved evidentiary errors are forfeited in the absence of plain error." United States v. Smith, 83 M.J. 350, 355 (C.A.A.F. 2023) (citing United States v. Knapp, 73 M.J. 33, 36 (C.A.A.F. 2014)). "Under this standard, the Appellant bears the burden of establishing (1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights." Id. (additional citation and internal quotation marks omitted).

[2] For ease of argument, the United States will discuss could the alleged improper evidence and argument separately.

B. Law and Analysis: Admission of Evidence

1. Trial defense counsel waived any Mil. R. Evid. 404(b) objection by strategically using the evidence to Appellant's advantage during findings.

Appellant waived any objection to the admission of Mil. R. Evid. 404(b) evidence. Appellant's implies that the government failed to provide notice of the Mil. R. Evid. 404(b) evidence admitted at trial because the uncharged misconduct was not included in the 404(b) notices attached to Appellate Exhibit III. (App. Br. at 14). But only notices relevant to a motion in limine would be attached to a motion. Mil. R. Evid 404(b) does not requires notice be filed with the trial court, and unless the notice is provided as part of a motion it is not typically provided to the trial court. *See* Mil. R. Evid 404(b)(2).

According to trial defense counsel's declarations, they were aware of the Mil. R. Evid. 404(b) evidence in this case months in advance of trial and incorporated it into their trial strategy ahead of trial: "The decisions Maj Merzel and I made were deliberate and in furtherance of a carefully constructed trial strategy that we had ***spent months preparing***." (*Maj Aliotta Declaration* at 5). In addition, trial defense counsel knew they could object to Mil. R. Evid. 404(b) evidence – as shown by their motion in limine to exclude other evidence under Mil. R. Evid. 404(b). (App. Ex. III). But they intentionally allowed the government to admit some Mil. R. Evid. 404(b) evidence and then trial defense counsel strategically wielded the evidence to Appellant's advantage. (*Maj Adam M. Merzel Declaration*, dated 5 February 2024 at 1; *Maj Nicolas F. Aliotta Declaration*, dated 5 February 2024 at 1).

Trial defense counsel strategically leaned into the Mil. R. Evid. 404(b) evidence that showed Appellant was a bad boyfriend. (R. at 571-572, 574-575, 985) By doing so SrA CTP appeared to have a motive to fabricate allegations against Appellant because she wanted revenge for his failure as a romantic partner. Trial defense counsel intentionally allowed the evidence's

admission, used it, and admitted more details. By doing so, trial defense counsel abandoned the right to object to the evidence's admission. Thus, they intentionally waived the right to raise the issue on appeal. Jones, 78 M.J. at 44. This court should decline to review this issue on appeal. *See* Campos, 67 M.J. at 332.

2. If the Court pierces waiver, the admission of Mil. R. Evid. 404(b) evidence was not erroneous.

If this Court decides to pierce waiver, it should consider the unpreserved objection forfeited and use the plain error standard for review. Smith, 83 M.J. at 355. "Appellant bears the burden of establishing (1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights." Id.

The government elicited testimony from SrA CTP that painted Appellant as a bad boyfriend, and trial defense counsel did not object to its admission. SrA CTP explained that upon meeting SrA CTP, Appellant made racist and derogatory remarks to her. (R. at 475). Then Appellant started dating SrA CTP while he was married to someone else. (R. at 476). Appellant lied to SrA CTP about the status of his separation and divorce; he cheated on SrA CTP and lied about it (R. at 477-77, 481-85). Appellant was angry, would yell, hit things, abuse SrA CTP, threaten suicide, and engaged in extreme possessive and isolating behavior. (R. at 483-484, 487-488, 493, 597-598). After their breakup, Appellant used multiple fake phone numbers to contact SrA CTP after she blocked him. (R. at 512-513).

"Generally, evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." Mil. R. Evid. 404(a)(1). "Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character trait." Mil. R. Evid. 404(b)(1).

United States v. Reynolds, 29 M.J. 105, 109 (CMA 1989), and its progeny set forth the three-part test to determine admissibility of evidence under Mil. R. Evid. 404(b): (1) whether the evidence reasonably supports a finding that the accused committed the prior act; (2) what non-character theory of relevance is made more or less probable by the existence of the evidence; and (3) the evidence is admissible only if the probative value of the prior act(s) is not substantially outweighed by the danger of unfair prejudice. For evidence of uncharged acts to be admissible, it must satisfy all three prongs of the Reynolds analysis. United States v. Barnett, 63 M.J. 388, 394 (C.A.A.F. 2006). Trial defense counsel may also agree to admit the evidence by not objecting to its admission, which occurred in this case.

Appellant's deceptive behavior toward SrA CTP, sudden outbursts of anger, previous violence toward SrA CTP, and isolation of SrA CTP would have been admissible under the rule to show Appellant's controlling behavior of SrA CTP. The acts would show the Appellant's motive, intent, and plan to dominate and control his making it more likely that he was physically aggressive with SrA CTP to get her to do what he wanted, and Appellant dominated her to have sex with her. *See* United States v. Moore, 78 M.J. 868, 874 (A.F. Ct. Crim. App. 2019) (A servicemember's controlling behavior was admissible to prove the two sexual assault offenses charged under Article 120 and 128, UCMJ.). *See also* United States v. Humpherys, 57 M.J. 83, 90 (C.A.A.F. 2002) (Mil. R. Evid. 404(b) is a rule of inclusion, not exclusion, and the test is whether the evidence of the misconduct is offered for some purpose other than to demonstrate the accused's predisposition to crime). Thus, the admission of the Mil. R. Evid. 404(b) evidence was not plain error.

Even if this Court disagrees and finds the admission of the evidence constituted plain error, no prejudice occurred. The Mil. R. Evid. 404(b) evidence showed Appellant's violent

nature which would have been relevant to the assault consummated by a battery in Charge II and his poor behavior as a boyfriend would have been relevant to AD's sexual assault allegation. "An obvious error materially prejudices the substantial rights of the accused when it has an unfair prejudicial impact on the court members' deliberations." Knapp, 73 M.J. at 37 (internal citations omitted). But even if it was improper propensity evidence, the panel did not find that he acted in accordance with the character trait (character for violence or for being a bad boyfriend) or else they would have found him guilty of more offenses – such as the physical assault. The panel returned mixed findings. (R. at 1004-1005). Thus, there was no material prejudice to Appellant's substantial rights. Smith, 83 M.J. at 355.

3. Trial counsel asked relevant questions to provide context to Prosecution Exhibit 2, but the questions did not elicit victim impact on the merits.

Appellant claims trial counsel elicited irrelevant victim impact evidence during findings (App. Br. at 21), but trial counsel was providing relevant context to the text message conversation admitted as Prosecution Exhibit 2 – without objection from trial defense counsel.

Relevant evidence is admissible unless the Constitution, federal statute, the rules, or the Manual for Courts-Martial prohibit it. Mil. R. Evid. 402. "Evidence is relevant if: it has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." Mil. R. Evid. 401.

SrA CTP testified that Appellant texted her without warning, even though she blocked his phone number. (R. at 519). Appellant texted SrA CTP: "I'm sorry for everything that I did. The emotional and mental torture I put you through. I have a lot to say, but I don't wanna [sic] waste a lot of your time. I've done enough of that already." (Pros. Ex. 2 at 2). Then trial counsel asked SrA CTP, "What was going through your mind when you received these?" (R. at 519). SrA CTP said, "I was kind of just distraught. I never wanted to speak to him again, and I

just wished he would leave me alone." (R. at 519). SrA CTP's response was evidence that made it more likely that a negative interaction – such as a sexual assault – occurred between her and Appellant, thus making her averse to talking with him.

Still referring to the text messages in Prosecution Exhibit 2, trial counsel asked, "Did you feel, ma'am, that that apology sufficiently addressed what he had actually done to you?" (R. at 520). SrA CTP responded, "No." (Id.). Later trial counsel asked if Appellant's additional apology was sufficient and SrA CTP again said it was not. (R. at 528). Both the questions, that Appellant asserts are improper victim impact in findings, and their answers provided context to the text messages where SrA CTP asked Appellant for an apology for what he had done to her, thus making it more likely that SrA CTP had a negative encounter – such as a sexual assault – with Appellant requiring an apology. (Pros. Ex. 2 at 2.)

Trial counsel asked, "All right. So, after receiving these messages in February that the accused had sent you, it appears -- and like for you to tell the Court that you did not want to continue hearing from him; is that true?" (R. at 528). SrA CTP responded, "That's true." (R. at 528). This question elicited more information about whether SrA CTP would be romantically interested in Appellant, making it less likely that she consented to the later sexual acts constituting the sexual assaults.

Trial counsel ended SA RF's examination by playing a majority of Prosecution Exhibit 4 – the recorded Facetime call between SrA CTP and Appellant. (Pros. Ex. 4). (R. at 688 - 717). Trial counsel did not play the last few minutes of the video where SA RF spoke to SrA CTP and confirmed her consent of the recording. (R. at 717). Trial counsel asked SA RF what happened at the end of the video rather than playing it – likely to avoid inadmissible hearsay evidence which would have been picked up between SrA CTP and OSI agents. SA RF explained what he

observed occurring at the end of the video. Trial counsel asked, "[W]as she emotional as a result of that interaction?" and SA RF responded, "Yes, sir." (R. at 717). SA RF observed SrA CTP's emotion state after talking with Appellant. (R. at 717). Providing that evidence showed it was more likely SrA CTP had a past negative interaction with Appellant making it difficult for her to talk with him. It was not plain error to admit evidence of SrA CTP's emotional state after each interactions with Appellant because the evidence made it more likely SrA CTP was sexually assaulted by Appellant.

Even if this Court disagrees and finds the evidence's admission was plain error, no prejudice occurred. The members heard SrA CTP's voice on the recorded phone call and Facetime call. (Pros. Ex. 3, 4). Based on their understanding of ways of the world, the panel could draw a reasonable inference about SrA CTP's emotional state after speaking with Appellant. Although tone is more difficult to infer from written words, the panel members would have also been able to see SrA CTP's terse text responses to Appellant. (Pros. Ex. 1, 2). Testimony about SrA CTP's emotional state was essentially cumulative with evidence that was already available to the members. Thus, it is unlikely that any error unfairly prejudicial impact on the court members' deliberations. Knapp, 73 M.J. 33, 37. Thus, there was no material prejudice to Appellant's substantial rights because the same information could be inferred even if SrA CTP had not explicitly testified to her emotional state. Smith, 83 M.J. at 355.

4. SA RF's comment on Appellant's opportunity to interview with OSI did not violate Appellant's Fifth Amendment Right against self-incrimination in post apprehension interviews.

Trial counsel asked Special Agent RF, "Can you orient this panel to what the goal was and why a pretext was conducted in this case?" SA RF responded:

> Yes, sir. The goal of the recorded conversations, which occurred over a series of approximately 48 hours from 20 April 2021 to 22

> April 2021, was to elicit information from Senior Airman Michael Benjerman Kight in an environment and atmosphere that he was more likely to provide truthful statements and not withhold information that he would have otherwise withheld from us had we had the opportunity to interview him in person.

(R. at 669). Appellant argues, "[t]his testimony improperly commented on Appellant's right to remain silent, suggested Appellant had denied OSI "the opportunity to interview him," and stated that – if Appellant had submitted to an interview – he would have withheld information from OSI. (App. Br. at 22). SA RF did not make such assertions with his brief statement, and there is no reason to believe the members would have interpreted SA RF's statement to mean that OSI had not had the opportunity to interview Appellant in person because Appellant had invoked his right to remain silent. For all the members knew, there could have been myriad other explanations for why OSI did not have the opportunity to interview Appellant in person, rather than an invocation of rights. And more importantly trial counsel neither asked additional questions about SA RF's statement nor argued it in closing arguments.

Appellant cites United States v. Clark for the proposition that "it is settled that the government may not use a defendant's exercise of his Fifth Amendment rights as substantive evidence against him." 69 M.J. 438, 446 (C.A.A.F. 2011). In Clark, the appellant was subject to post-apprehension questioning, and the prosecution elicited appellant's failure to respond orally. 69 M.J. 438. Trial counsel then commented on appellant's testimony in closing. Id. Ultimately the comments, though erroneous, were harmless beyond a reasonable doubt. Id. at 440.

But Clark does not apply here because according to the Report of Investigation in the Preliminary Hearing Report, OSI never tried to interview Appellant about the sexual assaults, opting to use the pretext phone call instead. (*Preliminary Hearing Report,* ROT Vol 5). Thus, Appellant never had the chance to exercise his Fifth Amendment right against self-incrimination

and the comment was not improper. In addition, during his in-court testimony, SA RF did not reveal whether Appellant was brought in for post-apprehension questioning or if Appellant invoked his rights. And again, trial counsel did not highlight the statement during SA RF's questioning or in closing arguments. The comment by SA RF does not rise to the level of plain error.

Even if this Court disagrees and finds the evidence's admission was plain error, no prejudice occurred. Trial counsel did not highlight SA RF's statement to the panel members by asking follow up questions about whether Appellant interviewed with OSI. Trial counsel did not highlight the issue at all when the statement was made or during his closing argument. In addition, the military judge instructed the members: "The accused has an absolute right to remain silent." (R. at 922). The lack of discussion about OSI's "opportunity to interview him" and the instruction provided by the judge ensured Appellant's right against self-incrimination was not violated. It is unlikely that the error unfairly prejudicial impact on the court members' deliberations because it was not highlighted for them as an important fact. Knapp, 73 M.J. 33, 37. Thus, there was no material prejudice to Appellant's substantial rights. Smith, 83 M.J. at 355.

5. SA RF's testimony based on his training and experience, if an individual is guilty, they may apologize during a pretext call did not constitute human lie detector testimony.

Appellant argues SA RF's testimony that if an individual is guilty, they may apologize during a pretext call was human lie detector testimony. (App. Br. at 22). This is not the case. Trial counsel asked SA RF, "What kind of information was OSI hoping to get [from the pretext phone call]?" (R. at 673). SA RF replied:

> Yes, sir. We were hoping to introduce the topic of the various nights or days that these alleged offenses occurred. And then based on training and experience, typically if we can get an individual talking

> and recounting those events, if they did, in fact, do what the party is alleging that they did, ***in some cases they might apologize about the incident, and that's essentially what we were hoping to get is an apology.***

(Id.) (emphasis added). SA RF's statements about pretext phone calls and the truthfulness of an accused during these calls does not rise to the level of either actual human lie detector testimony or the functional equivalent of lie detector testimony.

Human lie detector testimony is "an opinion as to whether the person was truthful in making a specific statement regarding a fact at issue in the case." United States v. Kasper, 58 M.J. 314, 315 (C.A.A.F. 2003). "If a witness offers human lie detector testimony, the military judge must issue prompt cautionary instructions to ensure that the members do not make improper use of such testimony." Knapp, 73 M.J. at 36.

In Knapp, the special agent testified "that he had been specifically trained to detect nonverbal clues that a suspect was being deceptive and that, using this training, he determined that Appellant's claims that the sexual intercourse with A1C ES was consensual were deceptive." 73 M.J. at 36. This case is different than Knapp. SA RF did not discuss his ability to determine whether Appellant was being deceptive or honest. SA RF testified in generalities about why OSI uses pretext phone call. (R. at 668). He explained "in some cases they ***might*** apologize about the incident, and that's essentially what we were hoping to get is an apology." (R. at 673)(emphasis added).

But SA RF did not say that the phone calls are always truthful or that he had the ability to tell if Appellant was being truthful during these calls. Rather, he said, "So the benefit of doing a pretext or a one-party-consent recorded conversation is that the individual is *typically* more comfortable, their guard is lowered, and as a result, *we typically get information*, 'we' as OSI agents, *otherwise would not have access to*." (R. at 668). And in any event, SA RF was basically

repeating common sense: when confronted by the victim of a crime, a guilty party may apologize.

SA RF did not state whether he thought Appellant specifically was telling the truth or lying during the phone calls with SrA CTP. On one occasion it appeared the testimony could veer into human lie detector testimony:

> [Circuit Trial Counsel:] Yeah. Did you -- in the back of your mind, was it a possibility that the accused may deny or else say it was consensual or that it didn't happen the same way? Was that a possibility that the accused may do that in the third interview?
>
> [SA RF:] Yes, sir.
>
> [Circuit Trial Counsel:] And had he done that, would that have been something that you would have just left out of your report?
>
> [Circuit Defense Counsel:] Objection. Your Honor, at this point we're approaching human lie detector type of inquiry here.
>
> [Military Judge:] Counsel, I'm going to ask you to move on. Objection sustained.

(R. at 755). Human lie detector testimony was never elicited, and the testimony elicited did not constitute plain error.

Even if this Court disagrees and finds the evidence's admission was plain error, no prejudice occurred. Even if SA RF was giving his personal opinion about Appellant's guilt, that paled in comparison to the members being able to hear and evaluate for themselves what Appellant said on the recorded phone calls. (Pros. Ex. 3, 4). Given the strength of that evidence, SA RF's qualified, personal opinion would not have had a substantial impact on the verdict. Thus, there was no material prejudice to Appellant's substantial rights. Smith, 83 M.J. at 355.

C. Standard of Review: Improper Argument

If an objection is made at trial, claims of improper argument are reviewed de novo. United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019). When no objection is made at trial, the error is forfeited and reviewed for plain error. Id. The burden of proof under plain error is on the appellant, who must establish: (1) there is error; (2) that error is plain or obvious; and (3) the error results in material prejudice to a substantial right of the appellant. United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005).

D. Law: Improper Argument

Prosecutorial misconduct "can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard. . .." Vorhees, 79 M.J. at 10. Trial counsel is charged "with being a zealous advocate for the government." United States v. Barrazamartinez, 58 M.J. 173, 176 (C.A.A.F. 2003). Trial counsel may argue the evidence and "all reasonable inferences fairly derived from such evidence." United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000). But it is error for trial counsel to make arguments that unduly inflame the passions or prejudices of the court members. United States v. Marsh, 70 M.J. 101, 102 (C.A.A.F. 2011).

When addressing a claim of improper argument, the inquiry should not be on words in isolation, but focused on the argument in the context of the entire court-martial. Baer, 53 M.J. at 238. It is "improper to 'surgically carve' out a portion of the argument with no regard to its context." Id. But "[i]n cases of improper argument, each case must rest on its own peculiar facts." Baer, 53 M.J. at 239.

Trial counsel is not "prohibited from offering a comment that provides a fair response to claims made by the defense." United States v. Carter, 61 M.J. 30, 33 (C.A.A.F. 2005).

For claims of prosecutorial misconduct, assessing prejudice under the plain error test is accomplished by balancing the Fletcher factors: (1) the severity of the misconduct; (2) the measures adopted to cure the misconduct; and (3) the weight of the evidence supporting the conviction. Fletcher, 62 M.J. at 184. In the context of improper argument, courts balance the Fletcher factors to determine whether trial counsel's comments, taken as a whole, were so damaging that the court cannot be confident the appellant was convicted based on the evidence alone. United States v. Erickson, 65 M.J. 221 (C.A.A.F. 2007). Courts need not weigh all the factors equally when conducting their analysis. United States v. Frey, 73 M.J. 245, 251 (C.A.A.F. 2014). One factor can weigh so heavily in favor of the government it can provide the needed confidence that the appellant was sentenced on the evidence alone. Id. Additionally, in assessing prejudice, the lack of an objection by trial defense counsel is "some measure of the minimal impact" of an improper argument by trial counsel. United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001).

E. Analysis: Improper Argument

Appellant alleges trial counsel's findings and rebuttal arguments contained several instances of prosecutorial misconduct, ranging from personally addressing trial defense counsel, to improper vouching and expressing opinions. (App. Br. 22-23).

1. Trial counsel did not personally vouch for the government witnesses. No error occurred.

Appellant argues trial counsel personally vouched for the credibility of witnesses. (App. Br. at 22). Generally, vouching means "to supply supporting evidence or testimony" or "to give personal assurance" or "to give a guarantee." Vouch, MERRIAM-WEBSTER'S DICTIONARY (2024 online ed.). Trial counsel did not provide personal guarantees or assurances for the credibility of

the government's witnesses. And using the word "credible" throughout his argument did not constitute personal vouching or error.

It is "improper to 'surgically carve' out a portion of the argument with no regard to its context." Baer, 53 M.J. at 238. Here the military judge gave appropriate instructions on credibility before the members heard argument, and then trial counsel tied his credibility arguments to this instruction. (R. at 917-918). The military judge instructed the members, "Only you, the members of the court, determine the credibility of witnesses and what the facts of the case are. (R. at 917). Before discussing the credibility of the government's witnesses in his argument, trial counsel said to the panel members:

> The judge's instruction concerning credibility requires that you consider a witness's intelligence, their ability to perceive and accurately remember, their sincerity, their conduct in court, their friendships, any prejudices, and character for truthfulness. You can also consider the extent to which their testimony is consistent with or contradicted by other evidence in the record. That is your roadmap for how you determine the credibility of a witness. Those are your criteria.

(R. at 929). Trial counsel used the word "credible" throughout his argument. (R. at 930, 931, 938, 939, 941, 942, 945, 953, 956, 958). But witness credibility was central to the entire case, and trial counsel tied the references to "credible witnesses" back to the military judge's instructions on credibility.

When addressing a claim of improper argument, the inquiry should not be on words in isolation, but focused on the argument in the context of the entire court-martial. Baer, 53 M.J. at 238. Throughout the court-martial, trial defense counsel pointed to SrA CTP's and AD's motives to fabricate and attacked their credibility on cross-examination and in the defense's case-in-chief. (R. at 536-591, 605-609, 631-652, 818, 838, 848). Thus, trial defense counsel forced the government to respond by putting on evidence of SrA CTP's and AD's characters for

truthfulness. (R. at 771, 781, 790, 798). Trial counsel is not "prohibited from offering a comment that provides a fair response to claims made by the defense." Carter, 61 M.J. at 33. Trial counsel cannot place the prestige of the government behind a witness through personal assurances of the witness's veracity. Fletcher, 62 M.J. 175. Here, trial counsel neither personally vouched for the witnesses nor placed the government's prestige behind a witness. This is not a situation where the prosecutor told the panel members the witnesses should be believed because the government said they were credible. Trial counsel's arguments about witness credibility were fair responses to trial defense counsel's presentation of motives to fabricate and obvious attacks on the credibility of SrA CTP and AD.

Additionally, in assessing prejudice if this Court determines the statements are improper, the lack of an objection by trial defense counsel is "some measure of the minimal impact" of an improper argument by trial counsel. Gilley, 56 M.J. at 123. Defense counsel did not object to the "credible" descriptor for the witnesses. Instead, trial defense counsel reiterated the military judge's credibility instruction and proceeded to directly attack the credibility of SrA CTP and laid out her motives to fabricate the allegations against Appellant. (R. at 956-980). He then laid out AD's motives to fabricate. (R. at 980-983).

Even if the statement were erroneous, the panel members did not find the witnesses so credible as to believe every statement they made. This is apparent in the mixed findings where the panel did not find AD's testimony credible enough to convict Appellant beyond a reasonable doubt of sexual assault against AD. And the panel did not find SrA CTP's testimony completely credible because Appellant was acquitted of the assault consummated by a battery upon her. Thus, the comments did not permeate the entire proceeding resulting in uncertainty about

whether Appellant was convicted based on the evidence alone or else he would have been convicted of all offenses. Erickson, 65 M.J. 221.

During his argument, trial counsel said, "This agent was well-trained, and he executed an effective pretext phone call, which is giving you the statements that we're going to discuss in just a few minutes." (R. at 944). Appellant takes aim at the phrase "well trained." (App. Br. at 22). But trial counsel's statement did not constitute personal vouching for a witness's credibility. Trial counsel did not provide his opinion that he personally believed SA RF was a well-trained agent thus the panel should believe the same He provided a fair inference based upon the qualifications SA RF provided on the record. (R. at 658); Baer, 53 M.J. at 237.

Even if the "well-trained" statement was erroneous, trial counsel only used the phrase "well-trained" once thus it did not permeate the entire proceeding resulting in uncertainty about whether Appellant was convicted based on the evidence alone. (R. at 944); Erickson, 65 M.J. 221. The evidence was not erroneous and even if it was error, it was not severe. Appellant did not experience any prejudice as a result of the plain error.

2. Trial counsel zealously advocated for the verdict he recommended to the court-martial, but he did not improperly vouch for a verdict. No error occurred.

Trial counsel did not personally vouch for a verdict, no error occurred. Appellant objects to trial counsel's statement in closing that "[t]he Government has proven beyond a reasonable doubt that in the summer of 2020, not only did the accused put his ex-girlfriend in an arm lock, twist her arm and hurt her, but that he sexually assaulted her two times without her consent." (App. Br. at 23; R. at 954).

But "a prosecutor may argue that the evidence establishes an accused's guilt beyond a reasonable doubt;" in contrast, "he is prohibited from expressing his personal opinion that the accused is guilty." Voorhees, 79 M.J. at 11. Here trial counsel did not even provide his opinion

on Appellant's guilt. He stated the *government* reached its burden, but he did not use personal pronouns or his personal credibility as a prosecutor to convince the panel of Appellant's guilt. What is more, this was a conclusory statement used to wrap up trial counsel's argument after he marched through the evidence of Appellant's guilt. If trial counsel is not allowed make assertions that the government met its burden, it is unclear why trial counsel is allowed to make a closing argument at all. Appellant offers no authority for his proposition, and no plain error occurred.

In rebuttal, trial counsel said, "the right outcome is finding the accused guilty because the Government has met its burden to each and every element of each charged offense beyond a reasonable doubt." (R. at 994). But discussing the appropriate outcome or justice is not improper if it is properly tied to the reasonable double standard. In United States v. Palacios Cueto, this Court said:

> A prosecutor may argue that justice is required. However, a prosecutor should be careful not to confuse the jury by conflating "justice" and "criminal conviction." "Justice" ***must be tethered to the evidence and the burden of proof*** lest it be confused with justice for the victim or society or the military justice system.

2021 CCA LEXIS 239, *54 (A.F. Ct. Crim. App. 18 May 2021) (unpub.op.) (emphasis added). Trial counsel directly referred to the beyond a reasonable doubt standard in the same sentence as his "right outcome" comment. The argument was not improper, and no plain error occurred.

3. Trial counsel did not malign trial defense counsel by addressing them in closing arguments. No error occurred.

Trial counsel did not commit error when he addressed defense counsel. Although, trial counsel directly addressed defense counsel by saying, "But you're right, Defense Counsel, it wasn't a violent struggle," the statement did not amount to "maligning defense counsel." (R. at 934); Voorhees, 79 M.J. at 10. The statement was not "a personal attack[] on another" thus

creating "potential for a trial to turn into a popularity contest." Fletcher, 62 M.J. at 181. Trial counsel's quote with full context was "But you're right, Defense Counsel, it wasn't a violent struggle. She didn't claw his eyes and scratch his arms. We don't have that. She had every reason to be afraid." (R. at 934). But the statement did not disparage trial defense counsel, it simply countered trial defense counsel's questions about whether SrA CTP resisted Appellant. (R. at 933). The brief statement was not clearly erroneous, and it did not amount to improper argument.

4. Trial counsel did not make a spillover argument. No error occurred.

Trial counsel did not commit error in finds argument when he said, "All right. I want to talk now about [AD], and I want to highlight one very important thing: [AD] is a stranger to [SrA CTP]. These two women do not know each other. They are not from the same –" (R. at 935). Trial counsel may have been walking up to the line of a spillover argument when he said SrA CTP and AD did not know each other. (R. at 935). But he never argued the connection between SrA CTP and AD's lack of a relationship and the validity of the allegations because trial defense counsel immediately objected thus heading off trial counsel's argument. (R. at 935-936). The military judge sustained the objection before trial counsel could argue beyond the fact in evidence that the two women did not know each other. (R. at 571, 936). No error occurred because the panel members never heard the spillover argument – trial defense counsel prevented them from hearing it.

5. Trial counsel comments to the panel members were not improper "Golden Rule" argument. No error occurred.

Appellant argues trial counsel improperly personalized his argument when he stated: "If somebody accuses you of rape, under what circumstances, on what planet are you just going to ignore that, are you just not going to correct that record?" (App. Br. at 22; R. at 947). Appellant

argues this is improper without citing to any applicable case law articulating why this argument would be improper. Appellant seems to be alluding to "Golden Rule" arguments that ask the court members to place themselves in the position of a victim or close relative of a victim. These have been held by this Court to be improper. *See* United States v. Shamberger, 1 M.J. 377, 379 (C.M.A. 1976) (trial counsel asked members to place themselves in the position of rape victim's husband, who was restrained and watched as his wife was repeatedly raped). Trial counsel did not put the panel members in the shoes of the victims in this case. It is not improper for trial counsel to use a rhetorical device to emphasize that most people would correct the record if they were accused of a crime. This does not rise to the level of plain error.

6. Trial counsel's references to the panel members' duty to find Appellant guilty were properly tied to the military judge's instructions. No error occurred.

Appellant argues trial counsel repeatedly told the panel it was their duty to find Appellant guilty. (App. Br. at 22; R. at 926, 953, 954, 994). But trial counsel properly tied the reference to the military judge's instructions. Trial counsel said in the first few minutes of his closing argument:

> It's now time to walk through some of that evidence, apply the judge's instructions in combination with your conscience, your common sense, your judgment, and exercise your duty to find that the accused committed those charged acts.

(R. at 926). The first reference to the panel members' duty to find Appellant guilty was directly linked to the military judge's instructions. The relevant instruction provided: "If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of the offenses charged, you must find him guilty." *See* United States v. McClour, 76 M.J. 23, 26 (C.A.A.F. 2017) (An instruction stating a panel *must* find an accused guilty if based on their consideration

of the evidence, they are firmly convinced that the accused is guilty of the offense charged, was proper).

After pointing to Appellant's damaging recorded statements, trial counsel said, "But you have the accused's own words. There's no avoiding them. There's no way around it. However unpleasant as it may be to find that this conduct occurred, it is now your duty." (R. at 953). At the end of trial counsel's closing argument he said, "It is now time to consider that evidence. It is now time to exercise that duty and find the accused guilty." (R. at 954). Again, he tied the duty to the evidence harkening to the "consideration of evidence" required in the military judge's instruction. (R. at 926).

Then in rebuttal, trial counsel said:

> So at the end of this case, members, is now time. Once more, it may not be pleasant, maybe not what you had wanted to do, but there's not sometimes in the course of our duties an easy out. Sometimes your duties lead you to a fork in the road, where you have a choice between doing what's expedient and doing what's right.

(R. at 994). The reference to duty was immediately followed by a reiteration of the government's burden of proof. Again, trial counsel tied the argument to the instruction and that if the government met its burden, then the panel members would be required to find Appellant guilty. (R. at 926). No error occurred because trial counsel properly referenced the military judge's instructions when discussing the panel's duty to convict Appellant.

Even if this court determines the references to the panel's duty was erroneous, no prejudice occurred. The misconduct was not severe because the statements were a small portion of the almost hour-long closing argument. Fletcher, 62 M.J. at 184. It is apparent the panel members were unconvinced by trial counsel's references to their duty to find Appellant guilty because they acquitted Appellant of some specifications. (*Entry of Judgment,* dated 29 April

2022, ROT, Vol 1). The remaining specifications had the weight of Appellant's own words supporting the conviction. Fletcher, 62 M.J. at 184; (Pros. Ex. 1, 2, 3, 4). Appellant did not experience prejudice to a substantial right because of trial counsel's statements.

7. Even if error occurred, Appellant did not experience prejudice to a substantial right because of the weight of the evidence against him, specifically his own recorded statements.

Even if trial counsel's comments were improper, Appellant did not suffer prejudice to a substantial right because of any of trial counsel's remarks. For claims of prosecutorial misconduct, assessing prejudice under the plain error test is accomplished by balancing the Fletcher factors: (1) the severity of the misconduct; (2) the measures adopted to cure the misconduct; and (3) the weight of the evidence supporting the conviction. Fletcher, 62 M.J. at 184.

First, the conduct was not severe. If this Court determines trial counsel's statements constitute improper argument, the conduct was not severe enough to require relief. This is not the case of Voorhees where trial counsel insulted trial defense counsel and bolstered his own credibility. 79 M.J. 5. Here, trial counsel was trying to defend the government's case against defense's attack on both victims' credibility. Trial counsel was trying to connect the facts in evidence such as the victims' characters for truthfulness to the credibility instruction without personally vouching for the witnesses. Even if trial counsel's arguments were inartful, they are not so pervasive that this Court should be concerned that Appellant was convicted on trial counsel's statements alone. Erickson, 65 M.J. 221.

Second, the military judge oriented the panel members on the purpose of argument twice. Before the government's argument the military judge instructed the panel members:

> At this time, you will hear argument by counsel. You will hear an exposition of the facts by counsel for both sides as they view them.

> Bear in mind that the arguments of counsel are not evidence. Argument is made by counsel to assist you in understanding and evaluating the evidence, but you must base the determination of the issues in the case on the evidence as you remember it and apply the law as I instruct you. Counsel may refer to the instructions I have given you. If there is any inconsistency between what counsel have said and the instructions that I gave you, you must accept my statement as being correct.

(R. at 924-925). Then after the government's rebuttal argument, the military judge instructed the members:

> Members of the court, if you believe you heard either counsel express their personal opinion about a witness's character or the strength of the evidence, you may not consider it for that purpose. Counsel are not permitted to offer their personal opinions. This was merely argument. Neither counsel's personal opinions, qualifications, or personal conduct in court are matters relevant for your consideration in resolving the matters before you. You and you alone determine the credibility of witnesses and whether the Government has proven the element of any offense beyond a reasonable doubt.

(R. at 994). We presume the panel members follow the instructions of the military judge unless evidence to the contrary is provided. Quezada, 82 M.J. 54.

Here, we do not have any indication the panel members refused to follow the instructions they were give. On the contrary, we do have evidence that the panel president asked for printed copies of the military judge's instructions. (R. at 1001). This Court can infer it was important to the panel president to follow the instructions of the military judge.

Third, and finally, the weight of the evidence – specifically Appellant's own statements – supporting the conviction was significant. Based on the mixed verdict, Appellant's recorded and written statements corroborating SrA CTP's account of the sexual assaults weigh in favor of the government's case. Appellant was only convicted of offenses that were corroborated by either a phone call with SrA CTP or text messages with her. (Pros. Ex. 1, 2, 3, 4). Ultimately, the panel

members determined Appellant was not guilty of the sexual assault upon AD where her testimony was the only evidence of a crime or the physical assault on SrA CTP where her testimony was not clearly corroborated by Appellant's own words.

Taken as a whole, trial counsel's arguments were not so damaging that this Court "cannot be confident the appellant was convicted on the basis of the evidence alone." Erickson, 65 M.J. 221. This Court can be confident that Appellant's own statements caused the conviction.

Courts need not weigh all the factors equally when conducting their analysis. One factor can weigh so heavily in favor of the government it can provide the needed confidence that the appellant was sentenced on the evidence alone. Frey, 73 M.J. at 251. The third Fletcher factor leans so heavily in favor of the government, this Court should find no prejudice on it alone.

Trial counsel's argument was not improper. Appellant has not established plain error and, even if this Court determines that an argument of trial counsel was improper, Appellant did not suffer substantial prejudice as result. No remedy is thus warranted.

This Court should deny this assignment of error.

III.

TRIAL DEFENSE COUNSEL WERE EFFECTIVE IN THEIR REPRESENTATION OF APPELLANT.

Additional Facts

Defense Cross-Examination of SrA CTP

The government presented evidence that Appellant penetrated SrA CTP during direct examination. Trial counsel asked SrA CTP:

> [Circuit Trial Counsel:] Did you fight him off or push him or in any way struggle?
>
> [SrA CTP:] When he -- when he -- when he was penetrating me, yeah, I kind of tried to push him off.

(R. at 500-501)

> [Circuit Trial Counsel:] You said that you struggled when he penetrated you; is that correct?
>
> [SrA CTP:] Yes.
>
> [Circuit Trial Counsel:] When did he actually penetrate you? How soon after putting the condom on?
>
> [SrA CTP:] It was pretty fast.
>
> [Circuit Trial Counsel:] Did he ask you for permission if he could penetrate you?
>
> [SrA CTP:] No.
>
> [Circuit Trial Counsel:] Before he penetrated you, had you continued to protest?
>
> [SrA CTP:] Yes.

(R. at 502-503).

> [Circuit Trial Counsel:] Was it painful?
>
> [SrA CTP:] Yes.
>
> [Circuit Trial Counsel:] Where did it hurt?
>
> [SrA CTP:] It hurt where he penetrated me.

(R. at 504).

> [Circuit Trial Counsel:] Did he kiss you or try to?
>
> [SrA CTP:] He tried to.
>
> [Circuit Trial Counsel:] When?
>
> [SrA CTP:] When he was having -- when he was on . . .
>
> [Circuit Trial Counsel:] Was it after he had put himself inside of you, ma'am?

> [SrA CTP:] Yeah.

(R. at 504).

> [Circuit Trial Counsel:] When he got on top of you in the bed in your dorm room and inserted himself into you after you told him no and you weren't ready, did any part of you consent to that?
>
> A. No.
>
> [Circuit Trial Counsel:] When he did it again two weeks later and he put a pillow over your head as you cried, was that consensual?
>
> A. No.

(R. at 535).

During a pretext phone call between SrA CTP and Appellant, Appellant said, "I'm sorry for fucking making you cry, for like trying to have sex with you when you didn't want to have sex, for having sex with you." (Pros. Ex. 4, R. at 707). He also said:

> I hit you. Like I took your clothes off. Like I tried to take back my shirt proportionally. Like you told me to stop. Like to not take your shirt off. ***Like I was like laying in bed and I got on to you, and you told me to stop. All these things like you told me to stop and told me not to do.*** And you may not feel like it is genuine.

(R. at 705) (emphasis added). And he added, "You know, your safe beds, your safe place, but then once like I violated that safe place, I violated you, and it didn't become a safe place for you anymore, and that is when things started really going downhill for you. And I feel like I overthink a lot of things." (R at 712-713).

On cross-examination, Maj NA asked SrA CTP, "All right. So regardless if he puts it on or he just opened it to open it, he then proceeds to penetrate your vagina with his penis?" (R. at 566). SrA CTP answered, "Yes." (Id.). Maj NA explained how this question fit into the trial defense strategy in his declaration to this Court:

> As referenced in the Appellant's Brief, the Government admitted as evidence several recorded pretext FaceTime calls that all contained ample evidence that SrA Kight penetrated C.T.'s vulva with his penis .
>
> …
>
> Therefore, we believed, especially in this case, that the most promising path to an acquittal for SrA Kight was not to argue "C.T. and SrA Kight never had sex," but rather, to argue that if they did have sex, C.T. was now lying about it being non-consensual since claiming to be a victim of sexual assault would allow her – and in fact did allow her – to get out of her upcoming deployment to the Middle East or West Africa.

(*Maj Aliotta Declaration* at 3). Trial defense counsel explained the outcome if they did not ask about the penetration during cross examination:

> … there was ample evidence of penetration already in evidence—especially in the light most favorable to the Government—so a motion under RCM 917 would have failed. Furthermore, had the Defense made such a motion, the Government would have simply re-opened its case, recalled CTP, and asked her additional questions that would have reinforced that SrA Kight penetrated her vulva with his penis. To the extent that CTP never specifically said "SrA Kight penetrated my vulva with his penis without my consent," arguing that point during the Defense's closing to insinuate that the Government had not proved penetration of CTP's vulva with SrA Kight's penis beyond a reasonable doubt would have eviscerated the Defense's credibility given the substance of the pretext.

(*Maj Merzel Declaration* at 5). Trial defense counsel explained "the most promising path to acquittal was not to argue 'CTP and SrA Kight never had sex.' Rather, we implied if they did have sex, CTP regretted it…" (*Maj Merzel Declaration* at 5). "Based on the substance of the pretext phone call, asserting that the Government had not proven penetration beyond a reasonable doubt would have caused the Defense to lose credibility with the panel." (Id.)

Admission of Mil. R. Evid. 404(b) Evidence

Trial defense counsel explained in their declarations to this Court that they needed the Mil. R. Evid. 404(b) evidence admitted so that their trial strategy could "maximize the chances of SrA Kight being fully acquitted at trial." (*Maj Aliotta Declaration* at 3). Maj NA explained the trial defense strategy for SrA CTP in his declaration to this Court:

> a. C.T., in accordance with her common plan or scheme, utilized the military justice system and the attendant benefits that attach to alleged victims of sexual assault to get out of deployments to unfavorable locations. Here, C.T. capitalized on the fortuitous timing of OSI reaching out to her about her past relationship with SrA Kight to allege, for the first time ever, that she had been sexually and physically assaulted by him. This subsequently led her to being removed from a deployment to the Middle East or Africa.
>
> b. At the time of her participation in OSI's investigation against SrA Kight, and while trial occurred in April of 2022, C.T. was facing Administrative Discharge (vice Medical Retirement) for her service disqualifying mental health condition. By participating in both OSI's investigation into SrA Kight and his subsequent General Court-Martial, she was ensuring that she would be provided with life-long financial benefits courtesy of the Veteran's Administration.
>
> c. C.T.'s mental health diagnosis of Borderline Personality Disorder caused her to act in vindictive and manipulative ways towards several boyfriends – including SrA Kight. Her diagnosis also further contributed to a misperception of what actually occurred during the entirety of her relationship with SrA Kight and the charged timeframe.
>
> d. C.T. was a scorned ex-lover of SrA Kight, whose relationship with him was tumultuous and toxic. This history directly contributed to C.T.'s motive to participate in OSI's investigation and subsequent Court-Martial, since she had "an axe to grind."

(*Maj Aliotta Declaration* at 3).

To execute this strategy, trial defense counsel called three witnesses who testified that SrA CTP had a character for untruthfulness, including an ex-boyfriend who was also accused of

sexually assaulting SrA CTP. (R. at 812, 831, 845). Then trial defense counsel called their forensic psychologist to provide educational testimony on borderline personality disorder and its effect on a patient's perception of events and potential manifestations of vengeful and manipulative behaviors. (R. at 866). As trial defense counsel explained:

> In my experience as a defense counsel, I have found the greatest success in defending my clients by providing a concrete alternative theory to the Government's contention. I have witnessed the "kitchen sink" approach fail because it creates the appearance that the Defense Counsel doesn't actually believe any of the competing theories it is advancing and is grasping at straws for any argument that might save a guilty client. These defense strategies fail because they look desperate and can sometimes even undercut various alternatives the Defense desires to present. In this case, we chose a concrete alternative theory that maximized the benefit our client.

(*Maj Merzel Declaration* at 5). "The decisions Maj Merzel and I made were deliberate and in furtherance of a carefully constructed trial strategy that we had spent months preparing." (*Maj Merzel Declaration* at 5).

Objections to Argument

Trial defense counsel explained, he did not object to most of trial counsel's closing because the references to Mil. R. Evid. 404(b) evidence or to witness credibility because the comments made by trial counsel fell in line with trial defense's trial strategy. "With respect to Appellant's claim that we failed to object to improper argument, the analysis largely mirrors the discussion of the 404(b) issue above." (*Maj Merzel Declaration* at 3-4).

> Furthermore, the assertion that the "[M]ilitary judge seems to have recognized at least some of the error, sua sponte instructing the panel that counsel's personal opinions were not relevant" because the "Defense counsel objected to some, though not nearly enough of this erroneous material" is inaccurate. The Defense immediately objected to trial counsel's comment "they didn't know each other" which prompted the military judge to instruct on spillover. At the tail end of the instruction, she said that "personal opinions of counsel

> are irrelevant." The military judge gave that instruction because of, rather in spite of, the sustained objection to the spillover argument.

(*Maj Merzel Declaration* at 4).

Trial Defense Counsel Findings Argument

Then, trial defense counsel argued in closing, "[SrA CTP] is a jealous ex-girlfriend with untruthful character, who saw the opportunity to kill two birds with one stone by making a false allegation that got her out of a deployment and it got her revenge against Airman Kight." (R. at 984). Trial defense counsel then argued, "It's a real possibility that Senior Airman Kight was a terrible boyfriend and terrible fiancé, that he was unfaithful, and that he disrespected them, but that he didn't sexually assault them. Those things do not have to overlap." (R. at 985).

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. United States v. Datavs, 71 M.J. 420, 424 (C.A.A.F. 2012) (citing United States v. Gutierrez, 66 M.J. 329, 330-31 (C.A.A.F. 2008)).

Law

The Sixth Amendment guarantees an accused the right to effective assistance of counsel. U.S. CONST. AMEND. VI; United States v. Gilley, 56 M.J. at 124. In assessing the effectiveness of counsel, courts apply the standard from Strickland v. Washington, 466 U.S. 668, 687 (1984), and begin with the presumption of competence announced in United States v. Cronic, 466 U.S. 648, 658 (1984).

"In order to prevail on a claim of 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, 466 U.S. at 698). The Strickland standard is "stringent." United States v. Rose, 71 M.J. 138, 144 (C.A.A.F. 2012).

Military courts apply the following three-part test in assessing whether the presumption of competence has been overcome: (1) are Appellant's allegations true, and if so, "is there a reasonable explanation for counsel's actions;" (2) if the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance…[ordinarily expected] of fallible lawyers;" and (3) if defense counsel were 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) (alteration and omission in original) (quoting United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)). The burden is on Appellant to show both deficient performance and prejudice. Datavs, 71 M.J. at 424.

To establish the element of deficiency, the appellant must first overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. In cases involving attacks on defense counsel's trial tactics, an appellant must show specific defects in counsel's performance that were "unreasonable under prevailing professional norms." United States v. Mazza, 67 M.J. 470, 475 (C.A.A.F. 2009)).

"Disaffected clients seeking to assign blame for their predicament often blame their lawyers for their predicament rather than themselves. For this reason, the law presumes that counsel is effective, and places upon an appellant the burden of establishing ineffectiveness." United States v. Thompson, ACM 32630, 1998 CCA LEXIS 163, at *7 (A.F. Ct. Crim. App. 5 February 1998) (unpub. op.).

An appellant who claims ineffective assistance of counsel "must surmount a very high hurdle." United States v. Alves, 53 M.J. 286, 289 (C.A.A.F. 2000) (citations and quotation marks omitted). Judicial scrutiny of a defense counsel's performance must be "highly deferential and should not be colored by the distorting effects of hindsight." Id. (citing Strickland, 466 U.S. at 689). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." United States v. Dewrell, 55 M.J. 131, 133 (C.A.A.F. 2001) (quoting Strickland, 466 U.S. at 690).

Analysis

Appellant is a "[d]isaffected clients seeking to assign blame" for his predicament by blaming his lawyers. Thompson, ACM 32630, 1998 CCA LEXIS 163, at *7. But the law presumes trial defense counsel were effective in this case, and their declarations lay out the strategic decisions they made throughout the trial to provide Appellant the best opportunity for an acquittal.

Defense Cross-Examination of SrA CTP

First, Appellant's allegations are true. Gooch, 69 M.J. at 362. Trial defense counsel asked if Appellant penetrated SrA CTP's vulva with his penis. (R. at 566). And they did not object to most evidence of Appellant's crimes, wrongs, or other acts – which may have been admissible under Mil. R. Evid. 404(b) anyway had the question been litigated. But trial defense counsel provided "a reasonable explanation for [their] actions." Id.

Trial defense counsel understood they could not deny Appellant's own words that he had sex with SrA CTP: "I'm sorry for fucking making you cry, for like trying to have sex with you when you didn't want to have sex, ***for having sex with you***." (Pros. Ex. 4, R. at 707) (emphasis added). Not acknowledging their client's admission that he had sex with SrA CTP when she did

not want to would undermine their credibility with the members. (*Maj Merzel Declaration* at 5; *Maj Aliotta Declaration* at 2). Thus, they focused on explaining why SrA CTP made false allegations against Appellant: (1) she wanted to avoid deployments; (2) she wanted 100% disability pay from the Veterans' Administration; (3) she was vengeful and manipulative because of her borderline personality disorder; and (4) she wanted revenge because Appellant was a bad boyfriend to her. Trial defense counsel strategically leaned into the evidence that Appellant was a bad boyfriend to provide context for SrA CTP's allegations.

Second, the allegations are true, but defense counsel's level of advocacy did not "fall measurably below the performance…[ordinarily expected] of fallible lawyers." Gooch, 69 M.J. at 362. Trial defense counsel understood the strengths of the government's case – their own client's statements, and that an R.C.M. 917 motion would be unsuccessful.[3] (*Maj Merzel Declaration* at 5; *Maj Aliotta Declaration* at 2). They focused their limited bandwidth on their viable trial strategy. To combat Appellant's statements, trial defense counsel created an overarching strategy that permeated each cross-examination, direct examination, and argument made – SrA CTP's allegations were false, and she wanted revenge on Appellant.

A similarly situated defense attorney may not have asked whether SrA CTP's vagina was penetrated by Appellant's penis, and a different attorney may have not conceded sex occurred between Appellant and SrA CTP. But choosing to accept a bad fact and employ a strategy to explain it "falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. And "[s]trategic choices made after thorough investigation of law and facts relevant

[3] "When a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion…, an appellant must show that there is a reasonable probability that such a motion would have been meritorious." United States v. McConnell, 55 M.J. 479, 482 (C.A.A.F. 2001) (quoting United States v. Napoleon, 46 M.J. 279, 284 (C.A.A.F. 1997)). Appellant's motion under R.C.M. 917 would not have been meritorious.

to plausible options are virtually unchallengeable." Dewrell, 55 M.J. at 133 (quoting Strickland, 466 U.S. at 690). Trial defense counsel's strategic decision to build credibility with the panel by agreeing sex occurred – but combat non consent – is virtually unchallengeable here.

Third, if defense counsel were ineffective, there is no "reasonable probability that, absent the errors," there would have been a different result. Gooch, 69 M.J. at 362. If trial defense counsel chose a different strategy it is unlikely the outcome would have been different – and likely the outcome would have been worse. By not acknowledging sex occurred, trial defense counsel would have lost credibility with the members and thus their powers of persuasion. If they had tried the "kitchen sink" approach providing every possible alternative theory to the members for consideration, then it would have created the appearance that trial defense counsel did not actually believe any of the competing theories they were advancing. Trial defense counsel chose the best available strategy for the benefit of their client, and given the damning evidence against their client, the outcome would not have been different if they chose a different strategy.

Admission of Mil. R. Evid. 404(b) Evidence

First, Appellant's allegations are true. Gooch, 69 M.J. at 362. Trial defense counsel did not object to most evidence of Appellant's crimes, wrongs, or other acts – which may have been admissible under Mil. R. Evid. 404(b) anyway had the question been litigated. But trial defense counsel provided "a reasonable explanation for [their] actions." Id.

Trial defense counsel "consciously chose to allow C.T. to testify about the topics she did in order to further a cohesive theory that maximized the chances of SrA Kight being fully acquitted at trial." (*Maj Aliotta Declaration* at 3). "Specifically, the Defense's theory as it related to C.T.'s allegations against SrA Kight was that she possessed a number of different and

overlapping motives to fabricate the allegations of domestic violence and sexual assault against SrA Kight," (Id.), including that she wanted revenge for the way Appellant treated her during their relationship.

Then, trial defense counsel summarized the theory in closing, "[SrA CTP] is a jealous ex-girlfriend with untruthful character, who saw the opportunity to kill two birds with one stone by making a false allegation that got her out of a deployment and it got her revenge against Airman Kight." (R. at 984). Trial defense counsel then argued, "It's a real possibility that Senior Airman Kight was a terrible boyfriend and terrible fiancé, that he was unfaithful, and that he disrespected them, but that he didn't sexually assault them. Those things do not have to overlap." (R. at 985). Allowing admission of the Mil. R. Evid. 404(b) evidence was a deliberate strategic choice, and trial defense counsel had a reasonable explanation for doing so.

Second, a similarly situated defense attorney may have fought the admission of the Mil. R. Evid. 404(b) evidence, but some of the evidence such as Appellant's sudden outbursts of anger and previous violence toward and isolation of SrA CTP may have still been admissible under the rule to show Appellant's controlling behavior of SrA CTP. The acts would show the Appellant's motive, intent, and plan to dominate and control his girlfriend making it more likely that he was physically aggressive with SrA CTP to get her to do what he wanted, and that Appellant dominated her to have sex with her. *See* Moore, 78 M.J. at 874 (A servicemember's controlling behavior was admissible to prove the two sexual assault offenses charged under Article 120 and 128, UCMJ.). *See also* Humpherys, 57 M.J. at 90 (Mil. R. Evid. 404(b) is a rule of inclusion, not exclusion, and the test is whether the evidence of the misconduct is offered for some purpose other than to demonstrate the accused's predisposition to crime). Here, trial defense counsel needed the full context of Appellant's relationship with SrA CTP so they could

reveal SrA CTP's motive to fabricate during argument. Trial defense counsel's conduct "falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. And because they articulated a strategic reason for the evidence's admission their choice is "virtually unchallengeable" now on appeal. Dewrell, 55 M.J. at 133.

Third and finally, there is no "reasonable probability that, absent the errors," there would have been a different result. Gooch, 69 M.J. at 362. Had trial defense counsel not attacked SrA CTP's credibility and provided motives to fabricate to the panel using Mil. R. Evid. 404(b) evidence, Appellant's own statements would have still corroborated SrA CTP's allegations.

Objections at Trial

Appellant claims trial defense counsel failed to object to a great deal of improper and prejudicial evidence and argument at trial. (App. Br. at 26). But as discussed above in the previous assignment of error neither the evidence nor the arguments were improper or prejudicial. Thus, no objection was required. This allegation fails the first prong of Gooch that the allegations are true. 69 M.J. at 362. It is not true that the evidence and argument were improper. If this Court finds the allegation was true, this claim still because trial defense counsel had a strategic reason for not objecting: to effectuate their trial strategy that SrA CTP was a vengeful ex-girlfriend who wanted to ruin Appellant's life. (*Maj Merzel Declaration; Maj Aliotta Declaration).* But even if trial defense counsel should have objected, Appellant has not shown that with an objection by trial defense counsel then there would have been a different result. Id.

Appellant has not shown specific defects in counsel's performance that were "unreasonable under prevailing professional norms." Mazza, 67 M.J. at 475. Judicial scrutiny of a defense counsel's performance must be "highly deferential and should not be colored by the

distorting effects of hindsight." Id. (citing Strickland, 466 U.S. at 689). Thus, this Court should deny this assignment of error because trial defense counsel's performance was not unreasonable.

Prejudice

To show prejudice, Appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 698; Loving v. United States, 68 M.J. 1, 6-7 (C.A.A.F. 2008). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. As explained above for each allegation of ineffective assistance, Appellant has not met his burden. Trial defense counsel chose the best strategy available to them at the time, considering Appellant's incriminating statements to SrA CTP were a hurdle that corroborated much of SrA CTP's account of the sexual assaults. Even if trial defense counsel chose a different strategy, the outcome would have been the same due to the text messages from Appellant and recordings of Appellant admitting to forcing SrA CTP to have sex with him when she said no. (R. at 707; Pros. Ex. 1, 2, 3, 4). The offenses Appellant was convicted of were those where he corroborated his own misconduct.

Even if trial defense counsel's strategy did not successfully do away with Specifications 1 and 2 of Charge I, this Court does "not look at the success of a criminal defense attorney's trial theory, but rather whether counsel made an objectively reasonable choice in strategy from the alternatives available at the time." Thompson, 1998 CCA LEXIS at *7-8. Trial defense counsel had a reasonable trial strategy, executed it, and the outcome would have been substantially similar had they chose a different strategy. This Court should deny this assignment of error because Appellant's counsel were neither ineffective, nor did he experienced any prejudice.

IV.

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

Standard of Review

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

Law and Analysis

At the time of Appellant's court-martial, Article 52, UCMJ, required the concurrence of three-fourths of the panel members for a conviction. At trial, the military judge instructed the members as such. (R. at 996-997). Appellant made no objection to this at his trial which was completed on 29 April 2022. (R. at 910, 996-997). Appellant now argues, given the Supreme Court's decision in Ramos v. Louisiana, 140 S. Ct. 1390 (2020), the Sixth Amendment and the Fifth Amendment rights to due process and equal protection required a unanimous verdict by the court-martial panel. (App. Br. at 28).

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

C.A.A.F. addressed the applicability of Ramos to courts-martial in Anderson, 83 M.J. 291. Our superior Court reaffirmed that servicemembers do not have a Sixth Amendment right to a jury trial. Id. at 295. C.A.A.F. rejected the same claims Appellant raises now:

> [W]e disagree that [Ramos] further held that [a unanimous verdict] is also an essential element of an impartial factfinder. In the absence of a Sixth Amendment right to a jury trial in the military justice system, Appellant had no Sixth Amendment right to a unanimous verdict in his court-martial.

Id. at 298. C.A.A.F. held that Fifth Amendment due process does not require unanimous verdicts in courts-martial. Id. at 300. Further, our superior Court found that non-unanimous verdicts did not constitute an equal protection violation under the Fifth Amendment. Id. at 302. The Supreme Court denied certiorari in Anderson.[4] This Court should follow C.A.A.F.'s binding precedent and deny Appellant's assignment of error.

CONCLUSION

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

[redacted]

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[4] https://www.supremecourt.gov/orders/courtorders/022024zor_ggco.pdf

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, the Air Force Appellate Defense Division, and civilian defense counsel on 22 February 2023.

[redacted]

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 1
Senior Airman (E-4) **MICHAEL B. KIGHT,** United States Air Force, *Appellant.*	)	No. ACM 40337 29 February 2024

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

COMES NOW Appellant, Senior Airman (SrA) Michael B. Kight, by and through counsel, and, pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this reply to the Appellee's Answer [hereinafter Appellee Br.]. Appellant stands on the arguments in his initial brief [hereinafter Appellant Br.] and, in reply, submits additional arguments for the issues listed below.

Argument

I. APPELLANT'S SUBSTANTIAL RIGHTS WERE PREJUDICED WHERE HE WAS CONVICTED OF TWO SPECIFICATIONS OF SEXUAL ASSAULT ALLEGING OVERLAPPING DATE RANGES AND OTHERWISE IDENTICAL LANGUAGE, AND THE PANEL WAS NEVER ORIENTED AS TO WHICH ALLEGATION CORRESPONDED TO WHICH SPECIFICATION.

The government, to its credit, "acknowledges that trial counsel never oriented the panel to which specification applied to which misconduct." (Appellee's Br. at 7). Nor does the government contest that the testimony as to both allegations fit squarely within the overlapping date ranges and, therefore, either allegation could equally fit within either specification. Indeed, the government acknowledges "[t]here is no way to tell" whether the members had a consistent understanding of which accusation corresponded to which specification. (Appellee's Br. at 10).

Nevertheless, the government urges this Court to infer that the panel "determine[d]" that Specification 1, which had an earlier start and end date, applied to "the first incident chronologically" and Specification 2, which had a later start and end date, applied to the "second incident chronologically." (Appellee's Br. at 7-8.) Given that the testimony as to both allegations fit within the overlapping date ranges alleged, Appellant submits that looking to the extraneous dates before and after the relevant period is hardly a decisive method of knowing how the panel interpreted the specifications. This Court should not adopt the government's suggestion to guess as to what inferences the panel may have made.

The standard is that this Court "must know, beyond a reasonable doubt, which [conduct] formed the basis" for the respective findings of guilt. *United States v. Dow*, No. ARMY 20200462, 2022 CCA LEXIS 361, *6-7 (A. Ct. Crim. App. 14 June 2022) (citing *United States v. Ross*, 68 M.J. 415, 418 (C.A.A.F. 2010)). The government does not even attempt to argue that this Court can have the required assurance. Instead, the government seems to flip the standard 180 degrees – apparently arguing that appellant should bear the burden of proving that the panel divergently interpreted which conduct formed the basis for the respective findings of guilt. (Appellee's Br. at 10) ("Appellant speculates on what occurred in the deliberation room and expects relief without pointing to any evidence the panel could not properly apply the facts to the law."). This is the exact opposite of the actual standard, which is that this Court must be convinced beyond a reasonable doubt which conduct formed the basis for each conviction. *Dow*, 2022 CCA LEXIS 361 at *6-7 (citing *Ross*, 68 M.J. at 418).

The government seems to make much of the fact that: "The military judge instructed the panel members, 'Your deliberations should include a ***full and free discussion*** of all the evidence that has been presented.'" (Appellee's Br. at 5) (citing R. at 996 (emphasis in original)). This

standard instruction in no way oriented the panel to the salient question: which accusation corresponded to which specification. Instructing the panel that they should discuss the evidence is not some sort of panacea for sloppy charging.

Meanwhile, the government urges this Court to ignore the state cases cited by Appellant because they "[do not] apply to military law." (Appellee's Br. at 9). The distinction the government seems to make with respect to *Hoeber v. State* and *State v. Marcum* is that servicemembers, unlike their civilian counterparts, do not enjoy the right to unanimous verdicts. 488 S.W.3d 648 (Mo. 2016); 480 N.W.2d 545 (Wis.App. 1992); (Appellee's Br. at 9). While the government seems to argue that this solves the problem, the lack of an unanimity requirement in the present case is exactly what causes the problem. Given that appellant was convicted of both specifications, in a system requiring panel/jury unanimity, the unanimity of the vote would be accurate, even if the jurors did not all agree on which act should be assigned to which specification. In the military system, however, where convictions based on non-unanimous votes are allowed, this Court cannot have the same assurance. Even though Appellant was convicted of both specifications, it is very possible that the result would have been materially impacted by divergent views amongst the panel members on which act should be assigned to which specification. For example, eight members may have felt Appellant was guilty of the "first" allegation, but only five felt he was guilty of the "second" allegation. If a single member was operating under a divergent assumption as to which specification corresponded to which conduct, it would have tipped the balance between acquittal and conviction with respect to the "second" allegation.

Finally, it is worth repeating that this quandary was eminently avoidable. The government had every opportunity to use "divers occasions" charging to capture both

allegations. *See* R.C.M. 307(c)(2), Discussion. If the government insisted on charging the allegations separately, it had every opportunity to ensure proper orientation of the panel as to which of the two alleged assaults related to Specification 1 and which related to Specification 2. Presumably, the government could also have charged a single specification, and presented both theories of liability for the panel to evaluate. *See United States v. Brown*, 65 M.J. 356 (C.A.A.F. 2007); *United States v. Johnson*, 2023 WL 5112140, 2023 CCA LEXIS 330 (A.F. Ct. Crim. App. 9 Aug. 2023). The government at trial chose not to utilize any of these available courses of action, and the government on appeal is stuck with the problem it created below.

II. APPELLANT IS ENTITLED TO RELIEF FOR PERVASIVE IMPROPER EVIDENCE AND ARGUMENT.

1. *Prior Bad Acts Evidence*

With respect to the plethora of prior bad acts evidence, the government argues, *inter alia*, that it was relevant for non-propensity Mil. R. Evid. 404(b) purposes, such as showing "Appellant's motive, intent, and plan to dominate and control his (sic) making it more likely that he was physically aggressive with SrA CTP to get her to do what he wanted, and Appellant dominated her to have sex with her." (Appellee's Br. at 14). The problem with the government's argument (also discussed in the following assignment of error regarding ineffective assistance) is that the panel received no instructions on how to use this evidence for a non-propensity purpose. Assuming *arguendo* that some or all of this evidence might have been admissible for some proper Mil. R. Evid. 404(b) purpose, the panel was never oriented thereto. In the absence of proper instructions on any such purpose, the panel was merely left with a plethora of evidence that Appellant had poor character.

2. *Victim Impact on the Merits*

Appellant rests on his original brief.

3. OSI Agent's Comment on Lack of "Opportunity" to Interview Appellant

The government urges this Court to consider evidence that was not before the members as relevant to the members' perception of the OSI agent's testimony. (Appellee's Br. at 18-19). The government cites no authority for the proposition that extra-record evidence has any place in this Court's review of an issue such as this. The OSI agent directly referenced law enforcement's supposed lack of "opportunity" to question appellant. Nothing in this statement would suggest to the members that OSI simply chose not to attempt to interview him.

Additionally, the government does not substantively address the second part of the improper testimony: the suggestion that appellant would have lied if OSI had the opportunity to question him. The government quotes the agent's testimony that, on a pretext call, appellant would be "more likely to provide truthful statements and not withhold information that he would have otherwise withheld from us" in an interview. (Appellee's Br. at 18). However, after quoting it, the government provides no defense of this outrageous testimony.

4. Human Lie Detector Testimony

Appellant largely rests on his original brief but highlights that nothing in the government's answer would justify the invocation of "training and experience" to bolster the idea that guilty suspects might apologize on a pretext call. Whether other suspects the OSI agent investigated or studied apologized on pretext calls – and whether they were guilty – had no bearing on Appellant's case. Additionally, this testimony was particularly prejudicial in that it suggested to the members – based on an improper invocation of other cases – that Appellant's largely non-specific apologies were a proxy for a confession.

5. Improper Argument: Vouching for Witnesses

The CAAF recently found clear and obvious error in the argument: "that airman is credible. She testified credibly[.]" *United States v. Voorhees*, 79 M.J. 5, 12 (C.A.A.A.F. 2019). The

government neither engages with this controlling precedent, nor makes any attempt to distinguish the arguments made here. Instead of engaging with controlling precedent, the government cites an online dictionary for a generic definition of "vouch" and argues it does not apply. (Appellee's Br. at 23-24).

Additionally, the government seems to conflate opening the door to rehabilitative *evidence* with opening the door to vouching *arguments*. The government points out that the defense challenged the credibility of SrA CT and thus "forced the government to respond" with evidence supporting her credibility. (Appellee's Br. at 24-25). Of course, *evidence* challenging credibility opens the door to *evidence* supporting credibility. But this has no bearing on the question at issue: improper vouching for credibility during *argument*.

6. *Improper Argument: Vouching for Guilt*

The government makes some legitimate points in this section. *See* (Appellee's Br. at 26-27).

7. *Improper Argument: Directly Addressing Defense Counsel*

Appellant rests on his original brief.

8. *Improper Argument: Spillover*

Trial counsel's implication in "highlighting one very important thing" – namely, that "these two women do not know each other" was not subtle. This argument instantly and powerfully injected a blatantly improper consideration into the panel member's consideration of the evidence: the spillover between a case with two accusers. The government makes the soft concession that: "Trial counsel may have been walking up to the line of a spillover argument when he said SrA CTP and AD did not know each other." (Appellee's Br. at 28). This error was significant and deserving of the military judge's curative instruction.

9. Improper Argument: Personalization of the Argument

Appellant rests on his original brief.

10. Improper Argument: Duty to Convict

In *United States v. Young*, the Supreme Court found that a prosecutor had erred in urging a jury to "do its job." 470 U.S. 1, 18 (1985). The Court said that, "that kind of pressure, whether by the prosecutor or defense counsel, has no place in the administration of criminal justice . . . ." *Id.* In *United States v. Mandelbaum*, the First Circuit applied the logic of *Young* to the argument:

> I suggest to you, that there is ample evidence there for you to find beyond any reasonable doubt that [the accused] did in fact commit the acts that the government charges her with. And I would ask you, therefore, to do your duty and return a verdict of guilty.

803 F.2d 42, 43 (1st Cir. 1986). The court found error, stating: "We see no difference between urging a jury to do its job and urging a jury to do its duty, and we find that the prosecutor erred in making such an exhortation." *Id.* at 44. The court further explained:

> Cases are to be decided by a dispassionate review of the evidence admitted in court. There should be no suggestion that a jury has a duty to decide one way or the other; such an appeal is designed to stir passion and can only distract a jury from its actual duty: impartiality.

Id.

The government attempts to justify trial counsel's repeated invocation of the panel's "duty" to convict by saying that it was tied to references to the evidence and/or the burden of proof. *See* (Appellee's Br. at 29-31). Appellant notes that the directly preceding sentence in *Mandelbaum* referenced the evidence and the burden of proof, but the court still found plain error in invocation of a "duty" to convict. 803 F.2d at 43.

Appellant submits that it is particularly improper, in the rigidly hierarchical system of the military, for the representative of the government (and the command) to repeatedly tell the panel

it is their duty to convict.

III. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL PERFECTED AN OTHERWISE MISSING ELEMENT ON CROSS-EXAMINATION, AND FAILED TO OBJECT TO VOLUMINOUS IMPROPER EVIDENCE AND ERROR.

1. Filling-in Missing Element on Cross-Examination

Trial defense counsel's declarations essentially make two points: (1) they felt there was sufficient evidence to establish the charged act – despite it never being explicitly endorsed and (2) they felt that arguing the act had never occurred was not their best argument.

With respect to the first point, neither trial defense counsel point to anything in the record that would specifically prove the charged act. In the absence of any forensic evidence – or other evidence of the specific act charged – CT's omission of a direct endorsement of the charged act may well have left the government with insufficient evidence to sustain a conviction. *See, e.g.*, *United States v. Allred*, ARMY 20220141, 2023 CCA LEXIS 366, *2-4 (A. Ct. Crim. App. 25 August 2023) (finding an Article 120, UCMJ, conviction factually insufficient in the absence of any forensic or testimonial evidence specifically establishing penial penetration of the victim's vagina).

With respect to the second point, it is a bit of a non sequitur. Appellant does not contend that trial defense counsel must/should have formulated their trial strategy around *denying* the occurrence of the charged act. Rather, Appellant simply contends that trial defense counsel should not have *explicitly filled in the missing element* on cross-examination. (R. at 558-59) (asking whether Appellant had "penetrate[d] your vagina with his penis."); (R. at 566) ("he then proceeds to penetrate your vagina with his penis?"). Forgoing these apparently pre-scripted questions based on the deficiency in the government's direct examination of CT would not

require the defense to refocus their entire case on arguing the charged act did not occur. The arguments of counsel are not evidence and a defense theory based on consent would not somehow concede the evidentiary shortcoming in the government's case. The defense was free to argue its theory without simultaneously perfecting the government's case.

Neither counsel give any justification for asking the specific questions at issue – which perfected the missing element. Neither counsel point to any special importance of these questions and nothing in these two questions seems in any sense essential to the defense theory.

2. Lack of Objection to Evidence

Appellant contended in his original brief that trial defense counsel were ineffective for doing nothing while the government presented voluminous improper evidence.

Among the unobjected to evidence highlighted by Appellant was voluminous prior bad acts evidence. Specifically, CT testified Appellant had started dating her while he was married to someone else (R. at 476), cheated on her (R. at 481-85), lied about cheating on her (R. at 481, 485), engaged in extreme possessive and isolating behavior (R. at 483, 487-88), "had a lot of difficulties being like honest" (R. at 484), used threats of suicide as a form of manipulation (R. at 488), was explosively angry (R. at 493), would yell and hit things during outbursts (R. at 493), used multiple fake phone numbers to circumvent her phone block of him (R. at 512-513), physically abused her in the past (R. at 597-98), and made racist and derogatory remarks to her (R. at 475).

Trial defense counsel's declarations aver that they thought this evidence was favorable to their client. Appellant understands that appellate courts will "not second-guess the strategic or tactical decisions made at trial by defense counsel." *United States v. Mazza*, 67 M.J. 470, 475 (C.A.A.F. 2009) (citations omitted). However, where a tactical decision is informed by an

erroneous view of the law, Appellant submits that it is "unreasonable under prevailing professional norms[.]" *Id.* In the present case, both trial defense counsel state that the only two options were (1) to try to suppress the evidence at issue or (2) to try to use it to support the defense case.[1] This is objectively incorrect: they also had the option to ensure proper limiting instructions were given. Given, as trial defense counsel emphasize, they spent so much time belaboring the proper course of action on this specific point, it seems inexplicable that they would not ensure proper limiting instructions were requested/given. In the absence of proper limiting instructions, the panel was merely left with a plethora of evidence that Appellant had poor character. It is well established that failure to request appropriate instructions – or object to inappropriate instructions – can constitute ineffective assistance of counsel. *See e.g.*, *Tyson v. Superintendent Houtzdale SCI*, 976 F.3d 382 (3rd Cir. 2020); *United States v. Phea*, 953 F.3d 838 (5th Cir. 2020).

While trial defense counsel discuss the lack of objection to the prior bad acts evidence, they do not address the lack of objection to other evidence, such as the OSI agent's comment on appellant's right to silence or statement that guilty people may apologize on a pretext phone call.

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[1] (*Maj Merzel Declaration* at 1) ("the Defense had two options regarding evidence of the prior bad acts that Appellate Defense Counsel raises in its brief: (1) attempt to suppress as much of the 404(b) evidence as we could, with a slim chance of complete success because of the nature of the evidence and because Mil. R. 404(b) is a rule of inclusion, or (2) leverage the uncharged misconduct . . . ."); (*Maj Aliotta Declaration* at 3) ("the Defense had two options regarding evidence of prior bad acts: 1) attempt to suppress as much of the M.R.E. 404(b) evidence as we could, with a low chance of outright success because of the nature of the evidence and the charges actually at issue; or 2) leverage the uncharged misconduct to support each of the Defense's theories . . . .")

3. Lack of Objection to Arguments

Trial defense counsel do not substantively address the bulk of the improper argument highlighted in appellant's brief, or explain why they did not object thereto. Maj Merzel addresses only substantively addresses one improper argument: the spillover argument. (*Maj Merzel Declaration* at 3-4). As Maj Merzel points out, and as appellant noted in his original brief, trial defense counsel *did* object to this improper argument. The issue, which Maj Merzel does not address at all, is why trial defense counsel did not object to the remainder of the improper argument. No explanation is given or even attempted. Additionally, Maj Merzel seems to state that the military judge instructed the panel that the opinions of counsel were not relevant because of the spillover objection. (*Maj Merzel Declaration* at 3-4). Maj Merzel seems to be conflating the spillover issue with the vouching issue. At the conclusion of the government's closing argument, the military judge gave a curative instruction regarding the spillover argument. (R. at 954-55). This is different than the *sua sponte* instruction the military judge gave after at the conclusion of the government's rebuttal argument, which dealt with the counsel's expression of personal opinions about witness credibility and/or the strength of the evidence. (R. at 994-95).

Maj Merzel makes a general statement that "With respect to Appellant's claim that we failed to object to improper argument, the analysis largely mirrors the discussion of the 404(b) issue above." (*Maj Merzel Declaration* at 3). It is unclear what this means. None of the improper arguments raised relate to the prior bad acts evidence. In the absence of any specificity, this statement is simply too vague to be of any use to this Court.

Maj Aliotta does not address the lack of defense objection during argument at all. (*Maj Aliotta Declaration*).

Conclusion

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

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[redacted]

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 29 February 2024.

Respectfully submitted,

[redacted]

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