IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**NOTICE OF DIRECT APPEAL PURSUANT TO ARTICLE 66(b)(1)(A), UCMJ**
v.	)	
Airman First Class (E-3), **WON KIM,** United States Air Force, *Appellant.*	)	No. ACM SXXXXX
	)	2 February 2024

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

From 14-16 August 2023, Appellant, Airman First Class (A1C) Won Kim, was tried by a special court-martial comprised of officer and enlisted members at Osan Air Base, Republic of Korea. R. at 1, 11, 421. Contrary to his pleas, Appellant was convicted of one charge and two specifications of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920, and one charge and one specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 10, 376-77. Consistent with his pleas, the panel members acquitted Appellant of one specification of Article 128, UCMJ, 10 U.S.C. § 928, and one charge and one specification of sexual harassment in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 10, 376-77. The panel members sentenced Appellant to be reprimanded, reduced to the grade of E-1, restricted to the limits of Osan Air Base for 30 days, to perform hard labor without confinement for 30 days, and to forfeit $500 of his pay for four months. R. at 419.

On 5 January 2024, the Government mailed Appellant the required notice of his right to appeal within 90 days. Pursuant to Article 66(b)(1)(A), UCMJ, 10 U.S.C. § 866(b)(1)(A),

Appellant files his notice of direct appeal with this Court.

Respectfully submitted,

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
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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 Air Force Appellate Government Division on 2 February 2024.

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM _____**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Won KIM	)	**DOCKETING**
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	

On 2 February 2024, this court received a notice of direct appeal from Appellant in the above-styled case, pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A).

As of the date of this notice, the court has not yet received a record of trial in Appellant's case.

Accordingly, it is by the court on this 2d day of February, 2024,

ORDERED:

The case in the above-styled matter is referred to Panel 3.

It is further ordered:

The Government will forward a copy of the record of trial to the court forthwith.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24007**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Won KIM	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 2 February 2024, Appellant filed with this court a notice of direct appeal pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A). While Appellant's filing was not accompanied by a record of trial, the court docketed Appellant's case the same day. In this court's notice of docketing, it further ordered the Government to "forward a copy of the record of trial to the court forthwith."

On 27 February 2024, the Government forwarded the completed record of trial to this court and Appellant's counsel.

15 April 2024 (48 days after Appellant's counsel received the completed record of trial), counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 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 19th day of April, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **26 June 2024.**

Counsel should not rely on any subsequent requests for enlargement of time being granted. Each request will be considered on its merits.

Appellant's counsel is advised that any subsequent motions for enlargement of time, shall include, in addition to matters required under this court's Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3)

whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time.

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

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (FIRST)**
v.	)	
	)	Before Panel No. 3
Airman First Class (E-3)	)	
WON KIM,	)	No. ACM 24007
United States Air Force,	)	
Appellant.	)	15 April 2024

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 60 days, which will end on **26 June 2024**.[1]

Appellant's direct appeal was docketed with this Court on 2 February 2024. At the time of docketing, the Court had not received the record of trial and ordered it delivered forthwith. Notice of Docketing, dated 2 February 2024. The Government forwarded Appellant's record of trial to this Court on 27 February 2024. From the date of docketing to the present date, 73 days have elapsed. From the date this Court received the record of trial to the present date, 48 days have elapsed. On the date requested, 120 days will have elapsed from the date the Court received the record of trial and 145 days will have elapsed since docketing.

[1] This date was calculated by taking the date the Court received the record of trial, 27 February 2024, and adding 60 days. *See* A.F. CT. CRIM. APP. R. 18(d) (dictating a brief will be filed within 60 days of appellate counsel being notified the record was referred to the Court).

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

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 15 April 2024.

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
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16 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) WON KIM, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24007 Panel No. 3

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 16 April 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (SECOND)**
v.	)	
	)	Before Panel No. 3
Airman First Class (E-3)	)	
WON KIM,	)	No. ACM 24007
United States Air Force,	)	
Appellant.	)	14 June 2024

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **26 July 2024**.

Appellant's direct appeal was docketed with this Court on 2 February 2024. At the time of docketing, the Court had not received the record of trial and ordered it delivered forthwith. Notice of Docketing, dated 2 February 2024. The Government forwarded Appellant's record of trial to this Court on 27 February 2024. From the date of docketing (2 Feb. 2024) to the present date, 133 days have elapsed. From the date this Court received the record of trial (27 Feb. 2024) to the present date, 108 days have elapsed. On the date requested, 150 days will have elapsed from the date the Court received the record of trial and 175 days will have elapsed since docketing.

On 16 August 2023, at Osan Air Base, Republic of Korea, a special court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one charge and two specifications of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ); and one charge and one specification of assault consummated by battery in violation of Article 128, UCMJ. R. at 1, 10, 11, 58, 376-377. Consistent with his pleas, Appellant was found not guilty of one specification of assault consummated by battery in violation of Article

128, UCMJ, and one charge and one specification of sexual harassment in violation of Article 134, UCMJ. R. at 10, 58, 376-377.

The members sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit $500.00 of his pay per month of four months, to be restricted to the limits of Osan Air Base, Republic of Korea, for 30 days, and to perform hard labor without confinement for 30 days. R. at 419. The convening authority took no action on the findings but reduced the adjudged forfeiture of $500.00 pay per month for four months to two months. Record of Trial (ROT) Vol. 1, Convening Authority Decision on Action – United States v. A1C Won Kim, dated 6 October 2023.

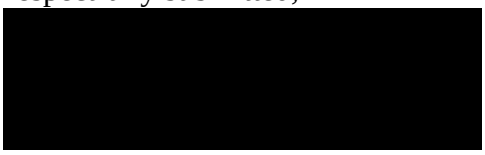
The record of trial is five volumes consisting of five Prosecution Exhibits, three Defense Exhibits, 27 Appellate Exhibits, and one court exhibit. The transcript is 421 pages. Appellant is not currently confined.

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

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

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

Respectfully submitted,



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I certify that the original and copies of the foregoing was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 14 June 2024.

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17 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) WON KIM, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24007 Panel No. 3

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 17 June 2024.

J. PETE FERRELL, Lt Col, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (THIRD)**
v.	)	
	)	Before Panel No. 3
Airman First Class (E-3)	)	
WON KIM,	)	No. ACM 24007
United States Air Force,	)	
Appellant.	)	15 July 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **25 August 2024**.

Appellant's direct appeal was docketed with this Court on 2 February 2024. At the time of docketing, the Court had not received the record of trial and ordered it delivered forthwith. *Notice of Docketing*, dated 2 February 2024. The Government forwarded Appellant's record of trial to this Court on 27 February 2024. From the date of docketing (2 Feb. 2024) to the present date, 164 days have elapsed. From the date this Court received the record of trial (27 Feb. 2024) to the present date, 139 days have elapsed. On the date requested, 180 days will have elapsed from the date the Court received the record of trial and 205 days will have elapsed since docketing.

On 16 August 2023, at Osan Air Base, Republic of Korea, a special court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one charge and two specifications of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ); and one charge and one specification of assault consummated by battery in violation of Article 128, UCMJ. R. at 1, 10, 11, 58, 376-377. Consistent with his pleas, Appellant was found not guilty of one specification of assault consummated by battery in violation of Article

128, UCMJ, and one charge and one specification of sexual harassment in violation of Article 134, UCMJ. R. at 10, 58, 376-377.

The members sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit $500.00 of his pay per month of four months, to be restricted to the limits of Osan Air Base, Republic of Korea, for 30 days, and to perform hard labor without confinement for 30 days. R. at 419. The convening authority took no action on the findings but reduced the adjudged forfeiture of $500.00 pay per month for four months to two months. Record of Trial (ROT), Vol. 1, *Convening Authority Decision on Action – United States v. A1C Won Kim,* dated 6 October 2023.

The record of trial is five volumes consisting of five Prosecution Exhibits, three Defense Exhibits, 27 Appellate Exhibits, and one court exhibit. The transcript is 421 pages. Appellant is not currently confined.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information. Appellate defense counsel is currently assigned 29 cases; 24 cases are pending before this Court (20 cases are pending AOEs) and five cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). To date, seven cases have priority over the present case:

1. *United States v. Clark*, No. ACM 40461 – The trial transcript is 1,060 pages long and the record of trial is 11 volumes consisting of 19 Prosecution Exhibits, 26 Defense Exhibits, 59 Appellate Exhibits, and one court exhibit. Appellant is not currently confined. Undersigned counsel is currently drafting the AOE, to be submitted on or before 14 August 2024.

2. *United States v. Casillas*, No. 24-0089/AF - Undersigned counsel was recently assigned to take over this case from an appellate defense counsel who is changing assignments. This case was recently granted at the CAAF (14 June 2024), and undersigned counsel is assisting with the

four-issue Grant Brief (to be submitted on or before 22 July 2024) and will be handling the Reply Brief and any oral argument.

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

4. *United States v. Baumgartner*, No. ACM 40413 – Undersigned counsel finalized and submitted this appellant's AOE on 3 June 2024. This Court ordered affidavits from trial defense counsel in this case, due to the Court no later than 26 July 2024. The Government's Answer is expected within 14 days after.

5. *United States v. Baker*, No. ACM 40521 – The trial transcript is 157 pages long and the record of trial is comprised of four volumes containing eight Prosecution Exhibits, one Defense Exhibit with several subparts, and 18 Appellate Exhibits. Appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

6. *United States v. Santiago Roldan*, No. ACM S32761 - The trial transcript is 149 pages long and the record of trial is comprised of three volumes containing nine Prosecution Exhibits, seven Defense Exhibits, and three Appellate Exhibits. Appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

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

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

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

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

Respectfully submitted,

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15 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) WON KIM, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24007 Panel No. 3

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

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

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

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (FOURTH)**
v.	)	
	)	Before Panel No. 3
Airman First Class (E-3)	)	
WON KIM,	)	No. ACM 24007
United States Air Force,	)	
Appellant.	)	12 August 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **24 September 2024**.

Appellant's direct appeal was docketed with this Court on 2 February 2024. At the time of docketing, the Court had not received the record of trial and ordered it delivered forthwith. *Notice of Docketing*, dated 2 February 2024. The Government forwarded Appellant's record of trial to this Court on 27 February 2024. From the date of docketing (2 Feb. 2024) to the present date, 192 days have elapsed. From the date this Court received the record of trial (27 Feb. 2024) to the present date, 167 days have elapsed. On the date requested, 210 days will have elapsed from the date the Court received the record of trial and 235 days will have elapsed since docketing.

On 16 August 2023, at Osan Air Base, Republic of Korea, a special court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one charge and two specifications of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ); and one charge and one specification of assault consummated by battery in violation of Article 128, UCMJ. R. at 1, 10, 11, 58, 376-377. Consistent with his pleas, Appellant was found not guilty of one specification of assault consummated by battery in violation of Article

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The members sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit $500.00 of his pay per month of four months, to be restricted to the limits of Osan Air Base, Republic of Korea, for 30 days, and to perform hard labor without confinement for 30 days. R. at 419. The convening authority took no action on the findings but reduced the adjudged forfeiture of $500.00 pay per month for four months to two months. Record of Trial (ROT), Vol. 1, *Convening Authority Decision on Action – United States v. A1C Won Kim*, dated 6 October 2023.

The record of trial is five volumes consisting of five Prosecution Exhibits, three Defense Exhibits, 27 Appellate Exhibits, and one court exhibit. The transcript is 421 pages. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel also provides the following information. Appellate defense counsel is currently assigned 32 cases; 23 cases are pending before this Court (14 cases are pending AOEs) and nine cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). To date, five cases have priority over the present case:

1. *United States v. Baumgartner*, No. ACM 40413 – Undersigned counsel is currently working the Reply Brief, due, as of today, 15 August 2024, although a seven-day EOT request is pending before this Court based on this appellant's civilian appellate defense counsel's schedule.

2. *United States v. Giles*, No. ACM 40482 – The trial transcript is 791 pages long and the record of trial is comprised of seven volumes containing seven Prosecution Exhibits, 14 Defense Exhibits, and 49 Appellate Exhibits. Since Appellant's last request for an EOT, undersigned

counsel has completed her review of this appellant's record and is conducting research for the AOE. This AOE is expected to be submitted early September.

3. *United States v. Casillas*, No. 24-0089/AF – Undersigned counsel took over this case from an appellate defense counsel who changed assignments. Since Appellant's last EOT, undersigned counsel assisted with the Grant Brief, filed 22 July 2024. The Government's Answer is expected on or before 21 August 2024. Upon receipt, undersigned counsel will begin the Reply Brief.

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

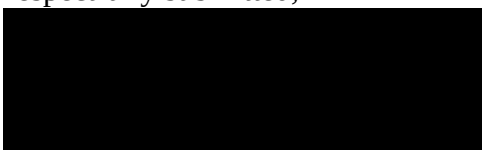
5. *United States v. Singleton*, No. ACM 40535 – The trial transcript is 1,738 pages long and the record of trial is comprised of twelve volumes containing six Prosecution Exhibits, 17 Defense Exhibits, one Court Exhibit, and 89 Appellate Exhibits. Appellant is currently confined. Counsel has not yet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

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

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

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

Respectfully submitted,



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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) WON KIM, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24007 Panel No. 3

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 August 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (FIFTH)**
v.	)	
	)	Before Panel No. 3
Airman First Class (E-3)	)	
WON KIM,	)	No. ACM 24007
United States Air Force,	)	
Appellant.	)	9 September 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **24 October 2024**.

Appellant's direct appeal was docketed with this Court on 2 February 2024. At the time of docketing, the Court had not received the record of trial and ordered it delivered forthwith. *Notice of Docketing*, dated 2 February 2024. The Government forwarded Appellant's record of trial to this Court on 27 February 2024. From the date of docketing (2 Feb. 2024) to the present date, 220 days have elapsed. From the date this Court received the record of trial (27 Feb. 2024) to the present date, 195 days have elapsed. On the date requested, 240 days will have elapsed from the date the Court received the record of trial and 265 days will have elapsed since docketing.

On 16 August 2023, at Osan Air Base, Republic of Korea, a special court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one charge and two specifications of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ); and one charge and one specification of assault consummated by battery in violation of Article 128, UCMJ. R. at 1, 10, 11, 58, 376-377. Consistent with his pleas, Appellant was found not guilty of one specification of assault consummated by battery in violation of Article

128, UCMJ, and one charge and one specification of sexual harassment in violation of Article 134, UCMJ. R. at 10, 58, 376-377.

The members sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit $500.00 of his pay per month of four months, to be restricted to the limits of Osan Air Base, Republic of Korea, for 30 days, and to perform hard labor without confinement for 30 days. R. at 419. The convening authority took no action on the findings but reduced the adjudged forfeiture of $500.00 pay per month for four months to two months. Record of Trial (ROT), Vol. 1, *Convening Authority Decision on Action – United States v. A1C Won Kim,* dated 6 October 2023.

The record of trial is five volumes consisting of five Prosecution Exhibits, three Defense Exhibits, 27 Appellate Exhibits, and one court exhibit. The transcript is 421 pages. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel also provides the following information. Appellate defense counsel is currently assigned 33 cases; 20 cases are pending before this Court (14 cases are pending AOEs); 12 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF); and one case is pending a petition to the United States Supreme Court. To date, five cases have priority over the present case:

1. *United States v. Casillas*, No. 24-0089/AF – Undersigned counsel is currently researching and drafting the Reply Brief for a four-issue appeal to the CAAF, due 16 September 2024. Undersigned counsel anticipates oral argument for this case will be later this year, which will likely impact her ability to review Appellant's case.

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

3. *United States v. Folts*, No. ACM 40322 – On 26 August 2024, this Court issued an opinion in this appellant's case. Undersigned counsel is working with civilian appellate defense counsel on next steps, including drafting a petition and supplement to the CAAF.

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

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

Additionally, military appellate defense counsel took on eight cases from departing military appellate defense counsel. Three of these cases are now pending petitions and supplements to the CAAF; their timing may impact Appellant's case. The remaining cases are awaiting a decision from this Court and the CAAF. Depending on timing and next steps, these other cases may be prioritized over Appellant's case. Finally, *United States v. Gray*, No. ACM 40648, is a direct appeal case that was docketed with this Court on 4 October 2023 (several months before Appellant's case was docketed). It took the Government 293 days to produce the 399-page verbatim transcript. This case is substantially smaller and has been docketed longer than Appellant's; therefore, it is possible this case will be prioritized over Appellant's case.

Since Appellant's last request for an enlargement of time, undersigned counsel drafted and filed the reply brief for *United States v. Baumgartner*, No. ACM 40413, filed the AOE in *United States v. Giles*, No. ACM 40482, and began prepping for *United States v. Casillas*, No. 24-0089/AF.

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

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

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

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
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Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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CERTIFICATE OF FILING AND SERVICE

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

SAMANTHA M. CASTANIEN, Capt, USAF
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9 September 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) WON KIM, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24007 Panel No. 3

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
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United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (SIXTH)**
v.	)	
	)	Before Panel No. 3
Airman First Class (E-3)	)	
WON KIM,	)	No. ACM 24007
United States Air Force,	)	
Appellant.	)	7 October 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **23 November 2024**.

Appellant's direct appeal was docketed with this Court on 2 February 2024. At the time of docketing, the Court had not received the record of trial and ordered it delivered forthwith. *Notice of Docketing*, dated 2 February 2024. The Government forwarded Appellant's record of trial to this Court on 27 February 2024. From the date of docketing (2 Feb. 2024) to the present date, 248 days have elapsed. From the date this Court received the record of trial (27 Feb. 2024) to the present date, 223 days have elapsed. On the date requested, 270 days will have elapsed from the date the Court received the record of trial and 295 days will have elapsed since docketing.

On 16 August 2023, at Osan Air Base, Republic of Korea, a special court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one charge and two specifications of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ); and one charge and one specification of assault consummated by battery in violation of Article 128, UCMJ. R. at 1, 10, 11, 58, 376-377. Consistent with his pleas, Appellant was found not guilty of one specification of assault consummated by battery in violation of Article

128, UCMJ, and one charge and one specification of sexual harassment in violation of Article 134, UCMJ. R. at 10, 58, 376-377.

The members sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit $500.00 of his pay per month of four months, to be restricted to the limits of Osan Air Base, Republic of Korea, for 30 days, and to perform hard labor without confinement for 30 days. R. at 419. The convening authority took no action on the findings but reduced the adjudged forfeiture of $500.00 pay per month for four months to two months. Record of Trial (ROT), Vol. 1, *Convening Authority Decision on Action – United States v. A1C Won Kim,* dated 6 October 2023.

The record of trial is five volumes consisting of five Prosecution Exhibits, three Defense Exhibits, 27 Appellate Exhibits, and one court exhibit. The transcript is 421 pages. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel also provides the following information. Appellate defense counsel is currently assigned 37 cases; 24 cases are pending before this Court (15 cases are pending AOEs), 11 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF), and two cases are pending petitions to the United States Supreme Court. To date, seven cases have priority over the present case:

1. *United States v. Johnson*, No. 24-0004/SF – On 24 September 2024, the CAAF specified two issues in this case for briefing. Undersigned counsel inherited this case from an appellate defense counsel who changed duty assignments. This appellant's brief, which counsel is currently drafting, is due on 24 October 2024.

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

3. *United States v. Leipart*, No. 23-0163/AF – The CAAF issued a decision in this case on 1 August 2024. Undersigned counsel will file a petition of certiorari to the United States Supreme Court by 29 December 2024.

4. *United States v. Wells*, No. 23-0219/AF - The CAAF issued a decision in this case on 24 September 2024. Undersigned counsel anticipates filing a petition of certiorari to the United States Supreme Court by 23 December 2024, barring any extensions.

5. *United States v. Casillas*, No. 24-0089/AF – Undersigned counsel filed the Reply Brief on 16 September 2024. Oral argument is expected to occur in December 2024.

6. *United States v. Folts*, No. ACM 40322 – On 4 October 2024, this Court denied this appellant's motion for reconsideration. Undersigned counsel is working with civilian appellate defense counsel to draft the petition and supplement to the CAAF.

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

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

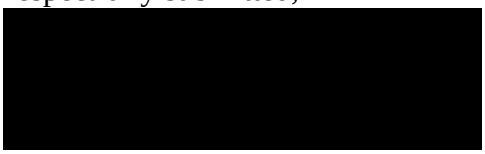
Appellant was advised of his right to a timely appeal. Appellant has been provided an update of the status of undersigned counsel's progress on his case. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a

confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

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

Respectfully submitted,



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Email: samantha.castanien.1@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 7 October 2024.

SAMANTHA M. CASTANIEN, Capt, USAF
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Air Force Appellate Defense Division
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7 October 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) WON KIM, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24007 Panel No. 3

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 7 October 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (SEVENTH)**
v.	)	
	)	Before Panel No. 3
Airman First Class (E-3)	)	
WON KIM,	)	No. ACM 24007
United States Air Force,	)	
Appellant.	)	12 November 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **23 December 2024**.

Appellant's direct appeal was docketed with this Court on 2 February 2024. At the time of docketing, the Court had not received the record of trial and ordered it delivered forthwith. *Notice of Docketing*, dated 2 February 2024. The Government forwarded Appellant's record of trial to this Court on 27 February 2024. From the date of docketing (2 Feb. 2024) to the present date, 284 days have elapsed. From the date this Court received the record of trial (27 Feb. 2024) to the present date, 259 days have elapsed. On the date requested, 300 days will have elapsed from the date the Court received the record of trial and 325 days will have elapsed since docketing.

On 16 August 2023, at Osan Air Base, Republic of Korea, a special court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one charge and two specifications of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ); and one charge and one specification of assault consummated by battery in violation of Article 128, UCMJ. R. at 1, 10, 11, 58, 376-377. Consistent with his pleas, Appellant was found not guilty of one specification of assault consummated by battery in violation of Article

128, UCMJ, and one charge and one specification of sexual harassment in violation of Article 134, UCMJ. R. at 10, 58, 376-377.

The members sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit $500.00 of his pay per month of four months, to be restricted to the limits of Osan Air Base, Republic of Korea, for 30 days, and to perform hard labor without confinement for 30 days. R. at 419. The convening authority took no action on the findings but reduced the adjudged forfeiture of $500.00 pay per month for four months to two months. Record of Trial (ROT), Vol. 1, *Convening Authority Decision on Action – United States v. A1C Won Kim*, dated 6 October 2023.

The record of trial is five volumes consisting of five Prosecution Exhibits, three Defense Exhibits, 27 Appellate Exhibits, and one court exhibit. The transcript is 421 pages. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel also provides the following information. Appellate defense counsel is currently assigned 38 cases; 24 cases are pending before this Court (17 cases are pending AOEs), 14 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF), and two cases are pending petitions to the United States Supreme Court. To date, six cases have priority over the present case:

1. *United States v. Casillas*, No. 24-0089/AF – On 29 October 2024, the CAAF ordered additional briefing in this case. Briefs are currently due 9 December 2024.

2. *United States v. Leipart*, No. 24A288 – The CAAF issued a decision in this case on 1 August 2024. Undersigned counsel will file a petition of certiorari to the United States Supreme Court by 29 December 2024.

3. *United States v. Johnson*, No. 24-0004/SF – Undersigned counsel filed this two-issue Grant Brief on 4 November 2024. Any reply brief will be due after the Government's answer, sometime in early December.

4. *United States v. Wells*, No. 23-0219/AF – The CAAF issued a decision in this case on 24 September 2024. Undersigned counsel anticipates filing a petition of certiorari to the United States Supreme Court by 23 December 2024, barring any extensions.

5. *United States v. Folts*, No. ACM 40322 – On 26 August 2024, this Court issued an opinion in this appellant's case. As this Court denied the motion for reconsideration, undersigned counsel is now working with civilian appellate defense counsel on drafting the petition and supplement to the CAAF, due in early December.

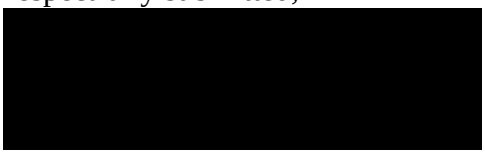
6. *United States v. Singleton*, No. ACM 40535 – Undersigned counsel anticipates withdrawing from this case to allow a more available appellate defense counsel to take over. The new counsel has already made an appearance, and withdrawal is pending client consultation and turnover.

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

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

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

Respectfully submitted,



SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 12 November 2024.

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
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14 November 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) WON KIM, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24007 Panel No. 3

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

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

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 8 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 14 November 2024.

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24007**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Won KIM	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

This case was docketed with the court on 2 February 2024. Thereafter, the record of trial was filed with this court and counsel for both parties on 27 February 2024. On 9 December 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) requesting an additional 30 days to submit Appellant's assignments of error. The court notes that at the conclusion of this enlargement of time, if granted, 355 days would have passed from the date of docketing.[1] The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 10th day of December, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than **22 January 2025**.

As a reminder, per the court's prior order in this case, any future requests for enlargement of time which will expire more than *360 days* after the docketing of Appellant's case with this court will usually only be granted upon a showing of *exceptional circumstances*.[2]

---

[1] While filings should be computed from date of docketing, *see* A.F. CT. CRIM. APP. R. 23.3(m)(4), this court is amendable to considering delays incurred in the actual receipt of the record of trial as potential "good cause shown" to justify an enlargement of time. However, at the expiration of this enlargement of time, more than 300 days will have passed from date of receipt of record of trial.

[2] Given the amount of time elapsed since docketing of Appellant's case, the court will likely require a status conference prior to ruling upon any additional forthcoming enlargements of time for this case. Should a status conference be ordered, Appellant's

It is further ordered:

In order to properly orient the court to the processing of this case and to evaluate the need for any potential status conferences which might be necessary to facilitate the timely processing of this case, in any forthcoming request for an enlargement of time, Appellant's defense counsel will specifically advise the court as to: (1) progress on review of the record of trial (including the number of transcript pages and exhibits reviewed and remaining to be reviewed); and (2) progress on drafting the assignment of errors (including identification of the number of assignments of error identified by counsel, number of pages of the brief drafted, and estimated number of pages and issues remaining to be drafted).[3]

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

counsel should come prepared to discuss, in detail, what, if any, exceptional circumstances constitute "good cause" for further enlargements of time.

[3] This is intended as a "progress check" and not a binding limit on the numbers or types of assignments of error which Appellant counsel may raise before this court. Appellant's ultimate assignments of error may contain all, some, or none of the assignments of error identified to the court in forthcoming "progress checks." The intent of this reporting requirement is not to inhibit the substance of Appellant's forthcoming brief, but to assist the court in docket and case management.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (EIGHTH)**
v.	)	
	)	Before Panel No. 3
Airman First Class (E-3)	)	
WON KIM,	)	No. ACM 24007
United States Air Force,	)	
Appellant.	)	9 December 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **22 January 2025**.

Appellant's direct appeal was docketed with this Court on 2 February 2024. At the time of docketing, the Court had not received the record of trial and ordered it delivered forthwith. *Notice of Docketing*, dated 2 February 2024. The Government forwarded Appellant's record of trial to this Court on 27 February 2024. From the date of docketing (2 Feb. 2024) to the present date, 311 days have elapsed. From the date this Court received the record of trial (27 Feb. 2024) to the present date, 286 days have elapsed. On the date requested, 330 days will have elapsed from the date the Court received the record of trial and 355 days will have elapsed since docketing.[1]

On 16 August 2023, at Osan Air Base, Republic of Korea, a special court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one charge and two specifications of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ); and one charge and one specification of assault consummated by battery in

[1] This motion for an enlargement of time is being submitted well in advance to avoid any issues while detailed appellate defense counsel is on leave from 13-21 December 2024.

violation of Article 128, UCMJ. R. at 1, 10, 11, 58, 376-377. Consistent with his pleas, Appellant was found not guilty of one specification of assault consummated by battery in violation of Article 128, UCMJ, and one charge and one specification of sexual harassment in violation of Article 134, UCMJ. R. at 10, 58, 376-377.

The members sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit $500.00 of his pay per month of four months, to be restricted to the limits of Osan Air Base, Republic of Korea, for 30 days, and to perform hard labor without confinement for 30 days. R. at 419. The convening authority took no action on the findings but reduced the adjudged forfeiture of $500.00 pay per month for four months to two months. Record of Trial (ROT), Vol. 1, *Convening Authority Decision on Action – United States v. A1C Won Kim*, dated 6 October 2023.

The record of trial is five volumes consisting of five Prosecution Exhibits, three Defense Exhibits, 27 Appellate Exhibits, and one Court Exhibit. The transcript is 421 pages. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel provides the following information. Appellate defense counsel is currently assigned 38 cases; 21 cases are pending before this Court (16 cases are pending AOEs), 15 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF), and two cases are pending petitions to the United States Supreme Court. To date, five cases have priority over the present case, four of which will be complete by mid-January:

1. *United States v. Casillas*, No. 24-0089/AF – On 29 October 2024, the CAAF ordered additional briefing in this case. Briefs are due today, 9 December 2024. Oral argument is scheduled for 14 January 2025, which undersigned counsel will begin preparing for following completion of the next two priorities listed below.

2. *United States v. Leipart*, No. 24A288 – The CAAF issued a decision in this case on 1 August 2024. Since Appellant's last enlargement of time, undersigned counsel drafted the petition of certiorari to the United States Supreme Court. The filing is undergoing final review and editing before being sent to the printer. It will be filed by 29 December 2024.

3. *United States v. Folts*, No. 25-0043/AF – On 26 August 2024, this Court issued an opinion in this appellant's case. Since Appellant's last enlargement of time, undersigned counsel drafted two issues for the supplement to the petition for grant of review and is working with civilian appellate defense counsel to finalize the filing, due to the CAAF on 26 December 2024. Undersigned counsel will be working this case while on leave.

4. *United States v. Johnson*, No. 24-0004/SF – Undersigned counsel filed this two-issue Grant Brief on 4 November 2024. Any reply brief will be due after the Government's Answer, which is due 20 December 2024. Undersigned counsel will be working this case upon return from leave and over the federal holiday.

5. *United States v. Wells*, No. 24A520 – The CAAF issued a decision in this case on 24 September 2024. Undersigned counsel will file a petition of certiorari to the United States Supreme Court by 21 February 2025. Undersigned counsel intends to work this case simultaneously with Appellant's.

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

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

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

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
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CERTIFICATE OF FILING AND SERVICE

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

SAMANTHA M. CASTANIEN, Capt, USAF
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9 December 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) WON KIM, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24007 Panel No. 3

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

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

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 7 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 9 December 2024.

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
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United States Air Force
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24007**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Won KIM	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 10 January 2025, counsel for Appellant submitted a Motion for Enlargement of Time (Ninth) requesting an additional 30 days to submit Appellant's assignments of error, and requesting a status conference. The Government opposes the motion.

On 15 January 2025, the court held a status conference to discuss the progress of this case. Appellant was represented by Captain Samantha M. Castanien; Mr. Dwight H. Sullivan from the Appellate Defense Division was also present. Major Jocelyn Q. Wright represented the Government.

Captain Castanien provided additional detail regarding how other obligations had impacted and were impacting her ability to review Appellant's case and prepare his assignments of error. Among other information, she indicated she was not presently conducting peer reviews of her colleagues' briefs due to her current volume of work. Captain Castanien anticipated the Defense would likely submit a tenth motion for enlargement of time, and estimated she might be able to file Appellant's assignments of error in March 2025. Major Wright stated the Government generally opposed the motion for enlargement of time, but did not specifically challenge any written or oral representation by the Defense.

The court has considered Appellant's motion, the Government's opposition, prior filings and orders in this case, case law, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 16th day of January, 2025,

ORDERED:

Appellant's Motion for Enlargement of Time (Ninth) is **GRANTED**. Appellant shall file any assignments of error not later than **21 February 2025**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (NINTH)**
v.	)	
	)	Before Panel No. 3
Airman First Class (E-3)	)	
WON KIM,	)	No. ACM 24007
United States Air Force,	)	
Appellant.	)	10 January 2025

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **21 February 2025**. In light of the Court's previous orders, Appellant also requests a status conference. Undersigned counsel is available on 15 or 16 January 2025 for such a conference.

Appellant's direct appeal was docketed with this Court on 2 February 2024. At the time of docketing, the Court had not received the record of trial and ordered it delivered forthwith. *Notice of Docketing*, dated 2 February 2024. Twenty-five (25) days later, the Government forwarded Appellant's record of trial to this Court on 27 February 2024. Rule 18(d)(2) of the Joint Rules of Appellate Procedure direct that "an appellant's brief shall be filed no later than 60 days" after the Government provides the Court a complete record, including a verbatim transcript, to the Court and the defense. From the date this Court received the record of trial on 27 February 2024 to the present date, 318 days have elapsed. On the date requested, 360 days will have elapsed from the date the Court received the record of trial. From the date this Court docketed Appellant's case without the complete record of trial to the present date, 343 days have elapsed and on the requested date, 385 days will have elapsed.

On 16 August 2023, at Osan Air Base, Republic of Korea, a special court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one charge and two specifications of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ); and one charge and one specification of assault consummated by battery in violation of Article 128, UCMJ. R. at 1, 10, 11, 58, 376-377. Consistent with his pleas, Appellant was found not guilty of one specification of assault consummated by battery in violation of Article 128, UCMJ, and one charge and one specification of sexual harassment in violation of Article 134, UCMJ. R. at 10, 58, 376-377.

The members sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit $500.00 of his pay per month of four months, to be restricted to the limits of Osan Air Base, Republic of Korea, for 30 days, and to perform hard labor without confinement for 30 days. R. at 419. The convening authority took no action on the findings but reduced the adjudged forfeiture of $500.00 pay per month for four months to two months. *Convening Authority Decision on Action – United States v. A1C Won Kim* (Oct. 6, 2023).

The record of trial is five volumes consisting of five Prosecution Exhibits, three Defense Exhibits, 27 Appellate Exhibits, and one Court Exhibit. The transcript is 421 pages. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel provides the following information. Appellate defense counsel is currently assigned 38 cases; 19 cases are pending before this Court (16 cases are pending AOEs), 17 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF), and two cases are pending before the United States Supreme Court (one is pending a petition).

Since Appellant's last request for an extension of time, undersigned counsel filed the petition for certiorari for *United States v. Leipart* with the United States Supreme Court, filed with the CAAF the three-issue supplement to the petition for grant of review in *United States v. Folts*, No. 25-0043/AF, filed two additional petitions and supplements to the CAAF (*United States v. Scott* and *United States v. Lawson*), and completed the reply brief, along with two motions and their associated replies, in *United States v. Johnson*, No. 24-0004/SF, also for the CAAF. To date, three cases have priority over the present case:

1. *United States v. Casillas*, No. 24-0089/AF – Undersigned counsel is preparing for oral argument on 14 January 2025. Oral argument preparation typically starts two weeks before the argument and usually entails two to three mock oral arguments. The CAAF will be hearing *Casillas* and *United States v. Valentin-Andino*, No. 24-0208/AF, on the same day. Consequently, undersigned counsel is also assisting with preparation for the *Valentin-Andino* oral argument by being available for these moots and by reading the briefings. Oral argument preparation is undersigned counsel's sole focus at this time, having finished submitting several filings related to firearm cases earlier this week (*Johnson*, *Scott*, *Lawson*).

2. *United States v. Johnson*, No. 24-0004/SF – Undersigned counsel is preparing for oral argument on 29 January 2025. Preparation for oral argument will start immediately after the *Casillas* oral argument on 14 January 2025. Undersigned counsel cancelled leave to accommodate the CAAF's briefing schedule and ensure adequate preparation time for the granted issues in this case.

3. *United States v. Wells*, No. 24A520 – The CAAF issued a decision in this case on 24 September 2024. From the date of decision, this appellant has 90 days to file a petition of certiorari to the United States Supreme Court. 28 U.S.C. § 1259(3); Supreme Court Rule 13(1). As detailed

in this EOT below and in almost every EOT since EOT 5, undersigned counsel has been handling briefing in several other cases before the CAAF, delaying her ability to draft filings for the Supreme Court. This includes for *Leipart*, which undersigned counsel just filed on 23 December 2024. All these deadlines in the fall and winter have delayed her ability to draft this appellant's petition. Due to undersigned counsel's schedule, undersigned counsel requested a 60-day extension to file the petition for *Wells*. Supreme Court Rule 13(5). Thus, undersigned counsel will file a petition of certiorari to the United States Supreme Court by 21 February 2025. Undersigned counsel intends to work this case simultaneously with Appellant's. Undersigned counsel will begin briefing *Wells* following *Johnson*, and then while *Wells* is undergoing review[1] and the two-week funding and printing process,[2] undersigned counsel will turn to Appellant's case.

This Court has stated "any future requests for [EOTs] . . . will usually only be granted upon a showing of exceptional circumstances." Order (Dec. 10, 2024). Per this Court's definition of "exceptional circumstances," "routine workload alone" is insufficient to constitute "exceptional circumstances." Order, *United States v. Evangelista*, slip op. at 2 n.3, No. ACM 40531 (Dec. 6, 2024). Undersigned counsel desires to complete review of Appellant's case as soon as possible but has been unable to do so to her high workload. Whether that high workload constitutes

[1] "Review" is a reference to peer and leadership review, a Division requirement for every substantive filing. Peer review is when another appellate defense counsel reviews the first final draft of the filing and provides feedback and edits. Leadership review is when a member of Division leadership reviews the new version of the final draft and provides feedback and edits. This process can take anywhere between a few days to over a full week depending on the case and the workload of the Division.

[2] Supreme Court petitions have very specific formatting and content requirements. Supreme Court Rule 33. Additionally, much like supplements to the petition for grant of review at the CAAF, petitions for certiorari are not carbon copies of what was submitted to the CAAF; they must be adjusted, often rewritten, and painstakingly reformatted to fit the Court's requirements. Additional drafting time is required to meet these constraints, along with additional time for printing the forty required booklets.

"extraordinary, unusual, or unforeseeable circumstances," *id*., is a question for this Court to resolve. Nevertheless, Appellant desires the assistance of undersigned counsel in his appeal and good cause exists to grant this EOT.

Undersigned counsel took over the bulk of a departing appellate defense counsel's docket, which included the two cases she is arguing this month at the CAAF. *See* Motion for Enlargement of Time (Third) (July 15, 2024) (informing this Court undersigned counsel took over *United States v. Casillas*); Motion for Enlargement of Time (Fifth) (Sept. 9, 2024) (showing undersigned counsel alerted this Court to counsel inheriting eight cases that were ahead of Appellant's). In light of *United States v. Mendoza*[3] and *United States v. Williams*,[4] neither case undersigned counsel is arguing this month was expected to be assigned additional briefing nor scheduled for oral argument, as *Casillas* was, in certain respects, a trailer to *Mendoza* and *Johnson* was a trailer to *Williams*. However, following *Mendoza* and *Williams*, different issues remained unresolved. *United States v. Johnson*, __ M.J. __, No. 24-0004/SF, 2024 CAAF LEXIS 561 (C.A.A.F. Sept. 24, 2024); *United States v. Casillas*, __ M.J. __, No. 24-0089/AF, 2024 CAAF LEXIS 666 (C.A.A.F. Oct. 29, 2024). These cases effectively had back-to-back briefing due to their new grant order dates. The rapid development[5] of both *Casillas* and *Johnson* was unexpected. Regardless, the continuing work on both cases, which will be complete by the end of this month, is good cause to grant this EOT.

[3] *United States v. Mendoza*, __ M.J. __, No. 23-0210, 2024 CAAF LEXIS 590 (C.A.A.F. Oct. 7, 2024).
[4] *United States v. Williams*, __ M.J. __, No. 24-0015, 2024 CAAF LEXIS 501 (C.A.A.F. Sept. 5, 2024).
[5] Once a case is granted, the CAAF issues a briefing schedule via an order. In practice, the CAAF ordinarily only grants one or two extensions during briefing. According to the CAAF's Clerk of Court, oral argument is ordinarily scheduled within approximately 30 days of the reply brief being filed.

Furthermore, undersigned counsel is carrying most of the division's firearm prohibition cases. Division leadership informed undersigned counsel last week that the impact of this increased workload is that undersigned counsel's number of clients requiring advice and advocacy was 41% larger than any other counsel's in the Division. These cases were expected to resolve following *Williams*. However, since *Johnson*'s grant order, all these cases remain viable to date. To meet statutory deadlines, undersigned counsel is required to review the record for these cases and file the petition for grant of review and supplement to the grant. To be clear, a supplement to the petition is not a carbon copy of the AOE filed at this Court. Issues must be framed and presented differently for the CAAF. Failure to present or preserve an issue to the CAAF risks losing the ability to argue a certain way. *See, e.g.*, *United States v. Leipart*, __ M.J. __, No. 23-0163, 2024 CAAF LEXIS 439, at *22 (C.A.A.F. Aug. 1, 2024) (cautioning counsel about how issues are raised and narrowing the scope of the issue to the question specifically articulated to the CAAF). Additionally, if undersigned counsel fails to file a petition on time (within 60 days of this Court's decision or reconsideration), an appellant will lose the right to appeal. *United States v. Rodriguez*, 67 M.J. 110, 111 (C.A.A.F. 2009) (citing *Bowles v. Russell*, 551 U.S. 205 (2007)). This is predominantly why petitions and supplements to the CAAF take priority over cases pending at this Court. There is no one else in the Division to give these cases to and all these circumstances are outside of undersigned counsel's control, to include when this Court issues its decisions, whether a client wants to appeal to the CAAF, and if and when the CAAF grants other issues for consideration. The need to prioritize cases at the CAAF has delayed review of Appellant's case and remains good cause to grant this EOT.

Undersigned counsel anticipates completing review of Appellant's case following oral argument in *Johnson* (scheduled for Jan. 29, 2025). She will work Appellant's case while working

a petition for the United States Supreme Court, as noted above. To "orient the [C]ourt to the processing of this case," Order (Dec. 10, 2024), undersigned counsel notes the following:

(1) Undersigned counsel has not reviewed Appellant's record of trial, other than to check for sealed materials. It appears all the sealed materials are present in undersigned counsel's copy of the record, to include in the verbatim transcript.

(2) The AOE brief has not been drafted. Undersigned counsel has not identified any AOEs yet because of the limited review to date.

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

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

WHEREFORE, Appellant requests that this Court grant the requested enlargement of time for good cause shown and order a status conference.

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 10 January 2025.

SAMANTHA M. CASTANIEN, Capt, USAF
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13 January 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) WON KIM, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24007 Panel No. 3

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

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

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 6 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 January 2025

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (TENTH)**
v.	)	
	)	Before Panel No. 3
Airman First Class (E-3)	)	
WON KIM,	)	No. ACM 24007
United States Air Force,	)	
Appellant.	)	10 February 2025

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **23 March 2025**.[1] Based on undersigned counsel's current schedule and deadlines, undersigned counsel anticipates this will be the final request for an EOT for Appellant's case, barring any unforeseen circumstances. In light of the Court's previous orders, if the Court intends to deny this request for an EOT, then Appellant also requests a status conference. Undersigned counsel is available on 12 or 13 February 2025 for such a conference.

Appellant's direct appeal was docketed with this Court on 2 February 2024. At the time of docketing, the Court had not received the record of trial and ordered it delivered forthwith. *Notice of Docketing*, dated 2 February 2024. Twenty-five (25) days later, the Government forwarded Appellant's record of trial to this Court on 27 February 2024. Rule 18(d)(2) of the Joint Rules of Appellate Procedure direct that "an appellant's brief shall be filed no later than 60 days" after the

[1] On 15 January 2025, a status conference was held in this case. Order (16 Jan. 2025). During that conference, undersigned counsel anticipated that another EOT would be necessary. *Id*. This has come to fruition.

Government provides a complete record, including a verbatim transcript, to the Court and the defense. From the date this Court received the record of trial on 27 February 2024 to the present date, 349 days have elapsed. On the date requested, 390 days will have elapsed from the date the Court received the record of trial. From the date this Court docketed Appellant's case without the complete record of trial to the present date, 374 days have elapsed and on the requested date, 415 days will have elapsed.

On 16 August 2023, at Osan Air Base, Republic of Korea, a special court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one charge and two specifications of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ); and one charge and one specification of assault consummated by battery in violation of Article 128, UCMJ. R. at 1, 10, 11, 58, 376-377. Consistent with his pleas, Appellant was found not guilty of one specification of assault consummated by battery in violation of Article 128, UCMJ, and one charge and one specification of sexual harassment in violation of Article 134, UCMJ. R. at 10, 58, 376-377.

The members sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit $500.00 of his pay per month of four months, to be restricted to the limits of Osan Air Base, Republic of Korea, for 30 days, and to perform hard labor without confinement for 30 days. R. at 419. The convening authority took no action on the findings but reduced the adjudged forfeiture of $500.00 pay per month for four months to two months. *Convening Authority Decision on Action – United States v. A1C Won Kim* (Oct. 6, 2023).

The record of trial is five volumes consisting of five Prosecution Exhibits, three Defense Exhibits, 27 Appellate Exhibits, and one Court Exhibit. The transcript is 421 pages. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel provides the following information. Appellate defense counsel is currently assigned 37 cases; 18 cases are pending before this Court (16 cases are pending AOEs), 17 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF), and two cases are pending before the United States Supreme Court (one is pending a petition).

Since Appellant's last request for an extension of time, undersigned counsel completed oral argument in *United States v. Casillas*, No. 24-0089/AF (Jan. 14, 2025) and in *United States v. Johnson*, No. 24-0004/SF (Jan. 29, 2025). During this time, undersigned counsel participated in nine moots, six for her own cases and three for another case, and worked solely on preparing for argument—in addition to filing EOTs, coordinating with clients on various appellate leave issues, and providing status updates to clients in accordance with this Court's orders. After completing argument in *Johnson*, undersigned counsel wrote the petition of certiorari for *United States v. Wells*, No. 24A520. The petition was sent to the printer on Friday, 7 February 2024.[2] Filing will be accomplished upon return from the printer, no later than 21 February 2025. Since completing *Wells* on Friday after close of business, undersigned counsel prepared five EOTs for her cases on Saturday (8 Feb. 2025), contacted her clients in accordance with this Court's various orders today (10 Feb. 2025), and participated in one moot today (10 Feb. 2025).

To "orient the [C]ourt to the processing of this case," Order (Dec. 10, 2024), undersigned counsel notes that based on her work load since Appellant's last EOT, she has not been able to make additional progress on Appellant's case. Undersigned counsel has not reviewed Appellant's

[2] Supreme Court petitions have very specific formatting and content requirements. Supreme Court Rule 33. Additionally, much like supplements to the petition for grant of review at the CAAF, petitions for certiorari are not carbon copies of what was submitted to the CAAF; they must be adjusted, often rewritten, and painstakingly reformatted to fit the Court's requirements. Additional drafting time is required to meet these constraints, along with additional time for printing the forty required booklets.

record of trial, other than to check for sealed materials. In the last EOT, undersigned counsel alerted the Court to the fact that all the sealed materials are unsealed in her copy of the record. Additionally, there is no change in status for the AOE; the brief has not been drafted. Undersigned counsel has not identified any AOEs yet because of the limited review to date. Nevertheless, **Appellant's case is now undersigned counsel's first priority.** Undersigned counsel needs additional time to complete her review of the record, advise Appellant on the counsel-identified issues and the issues he has identified, *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), draft the AOE, and then send the filing through review.[3] This need for additional time is due to exceptional and unforeseen circumstances.[4] Order (Dec. 10, 2024).

The exceptional circumstances in this case are based on the overall Division workload at this time, which includes the extraordinary fact that the CAAF has scheduled four back-to-back oral arguments for the Air Force Appellate Defense Division (26 and 27 February 2025).[5] Undersigned counsel will not be able to complete Appellant's AOE by 21 February 2025 because over the next two weeks, undersigned counsel is participating in nine to ten moots for these four cases: *United States v. Csiti*, No. 24-0175/AF, *United States v. Arroyo*, No. 24-0212, *United States v. Navarro Aguirre*, No. 24-0146/AF, and *United States v. Roan*, No. 24-0104. Undersigned counsel did six moots over the course of December and January for her own oral arguments, and she has a responsibility now to assist her peers in their preparation as they assisted her. Preparation includes reading the briefs, preparing questions, and then conducting a mock oral argument with

[3] As discussed in Appellant's EOT 9, there is a Division requirement for peer and leadership review. Peer review is when another appellate defense counsel reviews the first final draft of the filing and provides feedback. Leadership review is when a member of Division leadership reviews the new version of the final draft and provides feedback. This process can take anywhere between a few days to over a full week depending on the case and the workload of the Division.

[4] This Court has stated "any future requests for [EOTs] . . . will usually only be granted upon a showing of exceptional circumstances." Order (Dec. 10, 2024).

[5] The CAAF's schedule is available here: https://www.armfor.uscourts.gov/calendar/202502.htm.

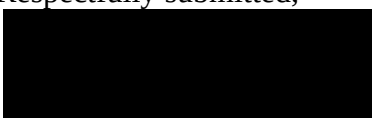
feedback for an hour. Additionally, the amount of time all Division counsel must allot to moots reduces availability for peer and leadership review. The timing and scheduling of these cases is more than "routine workload." Order (Dec. 10, 2024).[6] Rather, the timing and condensed nature of these arguments is a unique and unexpected circumstance that justifies granting this request for what is anticipated to be the last EOT in Appellant's case.

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

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

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

Respectfully submitted,



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[6] Per this Court's definition of "exceptional circumstances," "routine workload alone" is insufficient to constitute "exceptional circumstances." Order, *United States v. Evangelista*, slip op. at 2 n.3, No. ACM 40531 (Dec. 6, 2024).

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 10 February 2025.

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12 February 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) WON KIM, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24007 Panel No. 3

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

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

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 almost two thirds of the 18 month standard for this Court to issue a decision, which only leaves 5 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 12 February 2025

JENNY A. LIABENOW, Lt Col, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	
	)	Before Panel No. 3
Airman First Class (E-3) **WON KIM,** United States Air Force, *Appellant.*	)	No. ACM 24007
	)	19 March 2025

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

ASSIGNMENTS OF ERROR

I.

APPELLANT'S CONVICTION FOR TOUCHING EW'S BREAST ON DIVERS OCCASIONS IS FACTUALLY INSUFFICIENT.

II.

APPELLANT'S CONVICTION FOR TOUCHING EW'S VULVA WITH HIS THIGH WITH AN INTENT TO GRATIFY HIS SEXUAL DESIRE IS LEGALLY AND FACTUALLY INSUFFICIENT.

III.

THE GOVERNMENT'S FAILURE TO INCLUDE POST-TRIAL MOTIONS AND THE ACCOMPANYING RULING RENDERS THE RECORD INCOMPLETE OR ALTERNATIVELY CONSTITUTES AN ERROR AFTER THE ENTRY OF JUDGMENT FOR WHICH THIS COURT SHOULD AWARD APPROPRIATE RELIEF.

IV.

APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN HE WAS CONVICTED OF AN OFFENSE WITH NO REQUIREMENT THAT THE COURT-MARTIAL PANEL (THE FUNCTIONAL EQUIVALENT OF THE JURY) VOTE UNANIMOUSLY THAT HE IS GUILTY.[1]

[1] The defense raises this assignment of error for issue preservation purposes.

STATEMENT OF THE CASE

On August 16, 2023, at Osan Air Base, Republic of Korea, a special court-martial composed of officer and enlisted members convicted Airman First Class (A1C) Won Kim (Appellant), contrary to his pleas, of one charge and two specifications of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ); and one charge and one specification of assault consummated by battery in violation of Article 128, UCMJ. R. at 1, 10, 11, 58, 376-377. Consistent with his pleas, A1C Kim was found not guilty of one specification of assault consummated by battery in violation of Article 128, UCMJ, and one charge and one specification of sexual harassment in violation of Article 134, UCMJ. R. at 10, 58, 376-377.

The members sentenced A1C Kim to be reprimanded, to be reduced to the grade of E-1, to forfeit $500.00 of his pay per month of four months, to be restricted to the limits of Osan Air Base, Republic of Korea, for thirty days, and to perform hard labor without confinement for thirty days. R. at 419. The convening authority took no action on the findings but reduced the adjudged forfeiture of $500.00 pay per month for four months to two months. Convening Authority Decision on Action (Oct. 6, 2023).

On February 2, 2024, A1C Kim exercised his right to seek this Court's review under Article 66(b)(1)(A), UCMJ. Notice of Docketing (Feb. 2, 2024). This Court docketed A1C Kim's appeal the same day. *Id.*

STATEMENT OF FACTS

A1C Kim and EW met during a squadron event and began getting to know each other thereafter. R. at 193-97. Their relationship had "blurred lines." R. at 202, 231, 241. EW was clear about "no sex," R. at 200, but other forms of touching were situation dependent. A1C Kim would cuddle EW, make out with her, and pin her down and kiss her. R. at 197-198, 212, 241. She testified

that he could not touch her "vulva or any area like that," but EW and A1C Kim would make out and A1C Kim would consensually "grind" his leg or hip on her vaginal area. *Compare* R. at 200, *with* R. at 231-32. EW admitted that there were times when EW would not be consistent with the "line" that she set. R. at 231. EW was very religious, and in assessing whether they were compatible, EW and A1C Kim would discuss intimate religious-oriented topics, like abortion. R. at 196, 223-25, 246-47; *see also* R. at 200 (showing EW wore a chastity ring).

During the weeks that their relationship lasted, EW testified A1C Kim touched her breast without her consent multiple times.[2] R. at 198-200. Recounting the first instance, EW said they were cuddling, watching a movie, and A1C Kim moved his hand under her shirt to "cup" her bare breast (she wasn't wearing a bra). *Id*. She took his hand from her breast and told him she was not comfortable with him touching her there. R. at 199. He said that "as a man he needed certain things." *Id*. He put his hand back on her breast and EW did nothing. *Id*. She just "let it go" and "just let him do it," meaning she let him keep his hand on her breast. *Id*. EW said this kind of touching happened two other times a couple of days after. R. at 200. She provided no other details about the other two instances of touching. *Id*.

By May 11, 2022, the relationship between A1C Kim and EW was falling apart. *See* R. at 202 (showing that the day before, EW told A1C Kim she no longer wanted to date him). EW had long been interested in another individual, Staff Sergeant (SSgt) JK. R. at 220-21. A1C Kim knew EW was interested in SSgt JK. R. at 201. A1C Kim made it clear to EW that SSgt JK was not going to be a problem, and that he would get EW to like him (A1C Kim) more. *Id*. He was "confident" in that. *Id*. He was relentless in trying to win EW over, always texting her and buying

[2] This is the conduct underlying Charge I, Specification 1 (abusive sexual conduct).

her things. R. at 205. But around this time in May, SSgt JK became single—and EW decided to break up with A1C Kim. R. at 202, 220-21.

On May 11, A1C Kim went to EW's dorm and entered her room with the door code she had previously given him. R. at 203. He was worried because she was not texting him back. R. at 204. When he found out EW had been with SSgt JK all day, A1C Kim became upset about EW leaving him for SSgt JK. R. at 204. He said some negative things about EW's relationship with SSgt JK. R. at 238. Then, A1C Kim leaned over EW, and pinned her to the bed by her wrists like he had done before. R. at 203, 205; Pros. Ex. 1 at 4. His leg was touching her vulva for about five minutes as he was asking her why she wanted to be with SSgt JK rather than him. R. at 203-04. She tried to push him off and told him to get off, but he just kept talking. R. at 205, 207. Then, A1C Kim "tried to kiss [her] in hopes of starting another intimate moment . . . . [He] put [his] leg between [her] legs in hopes of making [her] give into [her] feelings., [sic] which [he] assumed was still an active interest in [him]." Pros. Ex. 1 at 4. EW turned her head away from him and kept her lips closed tight to prevent him from kissing her. R. at 207. Then, EW began to cry. R. at 208. A1C Kim stopped trying to kiss EW at that point and he left her room. *Id*.[3]

EW immediately told SSgt JK what happened, that A1C Kim pinned her down and tried to kiss her. R. at 209, 250. She also confronted A1C Kim, telling him he "sexually assaulted" her on the night of May 11th. R. at 236; *see* R. at 237-38 (discussing a conversation occurring on May 13th when EW said she felt sexually assaulted and later characterizing the May 11th incident as sexual assault); Pros. Ex. 1 at 2 (showing A1C Kim knew EW told him she felt sexually assaulted

[3] All the conduct occurring on May 11, 2022, is the basis for Charge I, Specification 2 (abusive sexual conduct), and all of Charge II (assault consummated by battery), although A1C Kim was acquitted of one of the specifications under Charge II.

on May 11). She made a restricted report about a month after the May 11th incident. R. at 247, 254-55.

Four months later, on September 23, 2022, EW went to the Sexual Assault Response Coordinator (SARC) and made an unrestricted report for the May 11th incident. R. at 228. They told her that they were not sure that was a sexual assault they could help her with. *Id*. The SARC directed her to the special victim's counsel, who turned her away as well. R. at 229. But after finding out A1C Kim had a new girlfriend and that A1C Kim was allegedly making inappropriate comments in the workplace, EW went back to the SARC. R. at 227, 230, 248. This time, she told SARC that A1C Kim touched her breasts without her consent. R. at 230. A law enforcement investigation ensued on October 5, 2022. R. at 232.

ARGUMENT

I.

A1C Kim's conviction for touching EW's breasts on divers occasions is not factually sufficient.

Standard of Review

Article 66, UCMJ, allows this Court to review a conviction for factual sufficiency when an appellant (1) asserts an assignment of error (2) showing a specific deficiency in proof. *United States v. Harvey*, No. 23-0239, 2024 CAAF LEXIS 502, at *5 (C.A.A.F. Sep. 6, 2024).

Law and Analysis

For factual sufficiency, Article 66(d)(1)(B)(ii), UCMJ, directs this Court to "weigh the evidence and determine controverted questions of fact." "This power is subject, in part, to Article 66(d)(1)(B)(ii)(I), UCMJ, which requires 'appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence.'" *Harvey*, 2024 CAAF LEXIS 502, at *8. This Court does not have to give complete deference to the court-martial, and depending on the

evidence, no deference may be appropriate. *See id.* ("The statute affords the CCA discretion to determine what level of deference is appropriate."). This Court can "weigh the evidence differently from how the court-martial weighed the evidence." *Id*. at *11. If after this weighing, the Court is clearly convinced the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding. Article 66(d)(1)(B)(iii), UCMJ.

For this Court to be "clearly convinced that the finding of guilty was against the weight of the evidence," this Court must (1) decide that the evidence, as just weighed, does not prove that the appellant is guilty beyond a reasonable doubt, and (2) "be clearly convinced of the correctness of this decision." *Harvey*, 2024 CAAF LEXIS 502, at *12.

To prove abusive sexual contact, the Government had to prove A1C Kim committed "sexual contact" upon EW without her consent. 10 U.S.C. § 920(d); *see* 10 U.S.C. § 920(b)(2)(A) (tailoring the theory of liability required to prove abusive sexual contact to sexual contact occurring "without consent"). To prove sexual contact occurred "without consent," the Government had to prove that EW was capable of consenting and, in fact, did not consent. *United States v. Mendoza*, No. 23-0210, 2024 CAAF LEXIS 590, at *17 (C.A.A.F. Oct. 7, 2024). "Sexual contact" includes touching another individual's breast. 10 U.S.C. § 920(g)(2). Abusive sexual contact is a specific intent crime, and as charged here, required the Government to prove A1C Kim touched EW with an intent to gratify his sexual desire. *Id*.; Charge Sheet.

Mistake of fact as to consent is a defense to abusive sexual contact. 10 U.S.C. § 920(f); Rule for Court-Martial (R.C.M.) 916(j). The mistake of fact as to consent "must have existed in the mind of the accused and must have been reasonable under all the circumstances." R.C.M. 916(j). The Government has the obligation, once raised, to disprove mistake of fact as to consent beyond a reasonable doubt. R.C.M. 916(b)(1).

Here, EW did not testify to a lack of consent, and even if she did, the Government did not disprove reasonable mistake of fact as to consent. A1C Kim and EW's relationship was full of blurred lines. R. at 202, 231, 241-42. EW said A1C Kim could not touch her vaginal area, and yet she consented to him doing just that during make out sessions. *Compare* R. at 200, *with* R. at 231-32, and Pros. Ex. 1 at 4. The two of them would cuddle and make out, R. at 197-198, 212, 241, but what boundaries EW set were "aspirational rather than committing to how [she] handled the past." *Schulze v. Hallmark Fin. Servs.*, Civil Action No. 3:20-CV-01130-X, 2021 U.S. Dist. LEXIS 140366, at *19 (N.D. Tex. Jul. 28, 2021) (citing Geoffrey Rush: Capt. Hector Barbossa, PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL (Walt Disney Pictures 2003), https://www.imdb.com/title/tt0325980/characters/nm0001691 (telling Ms. Elizabeth Swann that "the [pirate] code is more what you'd call 'guidelines' than actual rules.")). The breast touching is one example. The first time the touching occurred, the two of them were cuddling, and A1C Kim attempted to advance their relationship. R. at 198. There is no evidence prior to the first touch that EW did not consent to that kind of touching. Rather, the conversation EW testified to prior to the first touch was about "no sex" and no vaginal touching—but, again, that second line was blurred. R. at 200, 231-32.

This was an acquaintance transforming into a dating relationship. It is reasonable to believe that A1C Kim, who wanted to be with EW, would try to continue to advance that relationship from cuddling, to making out, to upper body touching. This is the perfect scenario for mistake of fact as to consent, particularly where the lines are blurred in the relationship. EW had set the guidelines at "no sex" or touching around her "vulva." *Compare* R. at 200, *with* R. at 231-32 (consenting to some vaginal-area touching in the form of "grinding" during make out sessions). It was fair for A1C Kim to think other kinds of touching during this physically intimate relationship were

permissible and that EW consented to such touching—unless and until she made it clear she did not. The first occasion with two touches that EW specifically testified to fall into this category of permissible touches. He touched her breast, trying to progress the relationship. R. at 198. She moved his hand, telling him that made her uncomfortable. R. at 199. She did not say, "Never do that again," or "I do not want you to do that again" or "How dare you think you could touch me like that." There was nothing more than her expression to stop *in that moment*; a never-ending prohibition on this kind of touching was not established, either before or during this conversation. When A1C Kim responded saying as a man he needs certain things, *id*., that was the end of the conversation according to EW. *Id*. There was no push back, no moving away, no reiteration of discomfort or "guidelines," nothing. EW did not say anything else or do anything else. *Id*. This is the context of the second breast touch when A1C Kim put his hand back onto her breast. *Id*. Her non-response gave him a solid basis to test the effectiveness of his answer. EW's nonreaction to the second touch, coupled her admission in court that she "let him do" the second breast touch, *id*., demonstrates the Government did not prove this offense. It was reasonable for A1C Kim to think EW consented at that point after their conversation and after she let him touch her again. The Government did not disprove mistake of fact as to consent for these two touches.

The only other evidence of A1C Kim touching EW's breast came after she had a conversation that she did not want him touching her breasts anymore. R. at 202. EW testified that this conversation occurred *after* she let him touch her breast the first two times. *Id*. However, EW provided no other details for these other two occasions, to include evidence of A1C Kim's intent. R. at 200. The Government had to prove specific intent for this crime, but there was no evidence of intent presented for these other touches. There was no context. This is problematic because a lot of the evidence surrounding the relationship between A1C Kim and EW centered on A1C Kim

trying to convince EW to be with him—not SSgt JK. R. at 201, 203-05, 246-47. That was his specific intent and motive during the weeks they were together. They talked about intimate topics to see if they could be compatible, which was part of A1C Kim trying to convince EW to be with him. R. at 246-47. Even the May 11th incident was motivated by A1C Kim trying to convince EW to be with him. R. at 203-04; Pros. Ex. 1 at 4. But this intent shown by the evidence is not the intent that was charged, an intent to gratify A1C Kim's sexual desire. 10 U.S.C. § 920(g)(2); Charge Sheet. A1C Kim was consistently attempting to elicit an emotional response from *EW* rather than gratify himself. Without proof of "intent to gratify *his* sexual desire" for the other alleged breast-touch incidents, the Government did not prove the crime it charged. The lack of intent, coupled with the mere statement he touched her "breast in a similar manner two other times" is not proof beyond a reasonable doubt for the charged offense.

Finally, all of EW's testimony should be considered in light of her belief of what sexual assault was. EW believed A1C Kim attempting to kiss her on May 11th was sexual assault. *E.g.*, R. at 236, 228-29,250. Legally, it is not, but her perspective is helpful in understanding why she thought what she did for the breast touches was enough to show lack of consent. Comparing the initial breast touch with the May 11th incident, EW made it clear she did not consent to the kissing on May 11th. She tried to push him away, she was crying, and she did not let the incident go—she told people, confronted A1C Kim, and reported the incident, twice. Conversely, the breast touching had none of this context or signs of lack of consent. She just let it go and let him continue. But when nothing was done about the "sexual assault," she escalated her allegations, and claimed she was touched on the breast without consent. This was an allegation with no corroboration: no text messages, no outcries, no physical evidence, nothing. But it was the only way for EW to be heard about what she actually did not consent to: the "sexual assault" of being kissed on May 11th. The

lack of context and corroboration, coupled with EW's motive supports reasonable mistake of fact as to consent for the breast touches.

This Court should find the breast touch specification factually insufficient because the Government failed to disprove mistake of fact as to consent and failed to elicit enough evidence to prove "divers occasions." EW's testimony, on its own, does not prove A1C Kim's guilt beyond a reasonable doubt for this offense.

WHEREFORE, A1C Kim requests that this Court set aside the finding of guilty as to Specification 1 of Charge I, dismiss Specification 1 of Charge I with prejudice, and set aside the sentence.

II.

A1C Kim's conviction for touching EW's vulva with his thigh is legally and factually insufficient because the Government failed to prove what it specifically charged, to include intent.

Standard of Review

This Court reviews issues of legal sufficiency de novo. *United States v. Harrington*, 83 M.J. 408, 414 (C.A.A.F. 2023) (citing *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019)).

Law and Analysis

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (citation omitted).

The factual sufficiency case law cited in Issue I, *supra*, is also applicable for this issue and is incorporated herein.

"To prepare a defense, the accused must have notice of what the government is required to prove for a finding of guilty. The charge sheet provides the accused" such notice. *United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018) (citation omitted). Here, the Government charged A1C Kim with abusive sexual contact by "touch[ing] the vulva of [EW] with his thigh, with an intent to gratify his sexual desire, without her consent." Charge Sheet.

Since "[t]here is no dispute that the government controls the charge sheet," A1C Kim is entitled to rely on the specific intent and the specific body part alleged within the specification: touching her vulva with his "*thigh*, with an intent to gratify *his* sexual desire." *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017). In fact, as the Court of Appeals for the Armed Forces (CAAF) recently observed, the Government has "complete discretion" over how to charge an accused and the Government "accept[s] the risk" that an appellant may not be criminally liable based upon how the charging scheme connects with the evidence. *United States v. Mader*, 81 M.J. 105, 109 (C.A.A.F. 2021).

The Government failed to prove the charged intent for this offense. Instead, the Government proved a different intent, intent to arouse or gratify *EW's* sexual desire. These are different theories of liability under the statute. *See Mendoza*, 2024 CAAF LEXIS 590, at *11-18 (holding different clauses of Article 120, UCMJ, are independent theories of liability to avoid surplusage); *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017) (employing the surplusage canon to ensure a string of words are not rendered meaningless). The Government charged its case wrong for the evidence it had.

"Because actual mind reading is impossible, a person's specific intent generally can be determined only by the person's own admissions or by drawing inferences from the person's statements and actions and from the context and circumstances." *United States v. Ozbirn*, 81 M.J.

38, 42 (C.A.A.F. 2021). No one need infer anything in this case because A1C Kim admitted his intent: "I put my leg between your legs in hopes of making you give into your feelings., [sic] which I assumed was still an active interest in me." Pros. Ex. 1 at 4. A1C Kim was not looking to gratify *his* sexual desire; he was looking to convince EW to be with him through getting her to give in to *her* sexual desire.

This is consistent with the weight of the rest of the evidence. Both EW and A1C Kim acknowledged that this conduct—pinning, making out, and leg touching vulva—happened before. R. at 231-32; Pros. Ex. 1 at 4. And it was consensual. R. at 213, 231-32. A1C Kim was trying to recreate that and get EW to be with him in a last-ditch effort to stop EW being with SSgt JK. R. at 203-04; Pros. Ex. 1 at 4. However misguided that may be, that intent was not what the Government charged. It is not even what the Government argued.

In opening, the Government consistently forecast how A1C Kim was "forcing" EW to "give into him." R. at 180-81. "He tried to force her mentally and physically to be with him." R. at 182. "Force" was a consistent theme for the Government in opening, and it was all about getting EW to be with A1C Kim, not getting some sort of sexual gratification out of this encounter. The same theme appeared in closing, consistent with the evidence. The Government argued A1C Kim, "fearing he was losing [EW] to [SSgt JK]," R. at 344, assaulted her on May 11th to convince her "[she] want[s] what he wants." R. at 346. He was trying to get EW to give into her feelings, like she did before. R. at 346. All the evidence went to that intent—not an intent to gratify A1C Kim's sexual desire. By "narrow[ing] the scope of the charged offense by alleging the particular type of force, [the Government] was required to prove the facts as alleged." *United States v. English*, 79 M.J. 116, 120 (C.A.A.F. 2019). Similarly, here, by picking a specific intent to prove, the

Government was required to prove the facts as alleged. It did not, and the Government contradicted its theory of liability with evidence it offered and argued.

This is particularly important for the factual sufficiency analysis because this Court can give different levels of deference to the texts versus EW's testimony. EW clearly believed she was "sexually assaulted" during this incident because she was kissed against her will and pinned to the bed. But this is distinct from the leg allegation. She said he had his leg between her legs touching her vulva during the five minutes he was talking to her about why she wanted to be with SSgt JK and not him. R. at 203-04. Based on this testimony alone, A1C Kim's specific intent is not clear. But the texts provide clarity wherein A1C Kim admits his intent. Pros. Ex. 1 at 4. This evidence should be weighed against EW's minimal testimony going towards intent.

Additionally, by charging the word "thigh" as the offending body part, the Government was required to prove it was A1C Kim's thigh that touched her vulva. There is no evidence on this point. EW and A1C Kim only mention his leg. R. at 203-04; Pros. Ex. 1 at 4. Trial defense counsel talks about the prior instance involving A1C Kim's leg or hip generally. R. at 231. In opening, the Government said it was A1C Kim's knee. R. at 180. No one identified the specific body part involved. The Government needed to be more specific in its questioning of EW. While a "thigh" is certainly part of a "leg," a "thigh" is much more specific. *See* 10 U.S.C. § 920(g)(2) (criminalizing touching the "inner thigh" but not the inner "leg"). By failing to clarify what part of A1C Kim's leg touched her vulva, it failed to prove what it charged.

Finally, there is no evidence of lack of consent as to the leg-to-vulva touching. All of EW's testimony is about being pinned by her wrists and trying to push A1C Kim off before he kisses her. R. at 205, 207. But she also, apparently, lays there for five minutes letting the leg touch happen. R. at 203. What she fights against is being pinned by her wrists, not him touching her

vaginal area. This brings up mistake of fact as to consent. Previously, EW gave consent for A1C Kim to lay on top of her with his leg between her thighs and move his leg or hips (notably, not identified as his thigh). R. at 231-32. This was part of the "blurred lines" of their relationship. R. at 231. Apparently, this type of vaginal touching was acceptable. And A1C Kim knew that because for this incident, he was trying to get her to give into her feelings as before by doing the same thing. Pros. Ex. 1 at 4. The texts are the Court's best source of evidence and dictate that the Government (1) failed to prove the intent it charged, (2) failed to prove the touching occurred with the body part alleged, *and* (3) failed to disprove mistake of fact as to consent.

WHEREFORE, A1C Kim requests that this Court set aside the finding of guilty as to Specification 2 of Charge I, dismiss Specification 2 of Charge I with prejudice, and set aside the sentence. Alternatively, should this Court find no specific intent, but lack of consent, the Court should affirm the lesser included offense of assault consummated by battery. Article 66(d)(1)(B)(iii), UCMJ; *United States v. Upham*, 66 M.J. 83, 87-88 (C.A.A.F. 2008) (citing Article 59(b), UCMJ; *United States v. McKinley*, 27 M.J. 78, 79 (C.M.A. 1988) (citations omitted); *United States v. Wells*, 52 M.J. 126, 131-32 (C.A.A.F. 1999) (recognizing that the lower court, on remand, may affirm a lesser offense and reassess the sentence)).

III.

A1C Kim's record of trial is incomplete where it is missing post-trial motions and a ruling that affected the convening authority's action and reprimand. This error requires remand for correction or, alternatively, sentencing relief.

Additional Facts

There are two Convening Authority Decision on Action Memorandums (CADAM) in A1C Kim's record of trial. The first is dated August 31, 2023. The second is dated October 6, 2023. The second CADAM does not say it is a corrected or changed copy. However, in comparing

the two CADAMs, the language in the reprimand is different. Specifically, the reference to A1C Kim holding EW down contained in the first CADAM is omitted in the second CADAM. *See* CADAM (Aug. 31, 2023) ("Your actions in pinning another Airman down against her will by holding her wrists and pushing her onto her bed . . . ."). The second version of the reprimand language is what is contained in the entry of judgment. *Compare* CADAM (Oct. 6, 2023), *with* Entry of Judgment. The entry of judgment states it includes any post-trial motions made, but none are attached or referenced. Entry of Judgment at 3.

The Judge Advocate General's Corps (JAGC) Department of the Air Force (DAF) Docket includes A1C Kim's trial result details and documents. JAGC DAF Docket, Trial Results, Details, U.S. v. Airman First Class W Kim (last visited Mar. 2, 2025) https://legalassistance.law.af.mil/AMJAMS/PublicDocket/docket.html. Within the listed documents, there is a ruling by the military judge concerning post-trial motions filed over the first CADAM. JAGC DAF, Trial Results, Details, U.S. v. Airman First Class W Kim, Documents, Ruling_US_v._Kim_Post_trial_MFAR_Redacted.pdf (last visited Mar. 2, 2025) https://legalassistance.law.af.mil/140a/docs/519211/Ruling_US_v._Kim_Post_trial_MFAR_Redacted.pdf. This ruling is stamped as "Appellate Exhibit ___," but no appellate exhibit number is included. *Id*. at 1. This ruling reveals the military judge found that the original reprimand language erroneously referenced acquitted conduct, which explains the second CADAM and the change in the reprimand language. *Id*. at 2-3. But none of these motions, nor the ruling, are included in the record of trial.

Standard of Review

This Court reviews whether a record of trial is complete de novo. *United States v. Clifford*, No. ACM 39299, 2019 CCA LEXIS 16, at *7 (A.F. Ct. Crim. App. Jan. 16, 2019) (citing *United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000)).

This Court has discretion to award appropriate relief for errors raised by an appellant that occurred after the entry of judgment. Article 66(d)(2), UCMJ.

Law and Analysis

1. The omission of the post-trial proceedings that affected the convening authority's action and the reprimand language renders A1C Kim's record of trial substantially incomplete and justifies remand.

The record of trial for every special court-martial must include "any appellate exhibits." R.C.M. 1112(b). A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut. *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000) (citing *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981); *United States v. Gray*, 7 M.J. 296 (C.M.A. 1979); *United States v. Boxdale*, 47 C.M.R. 351 (C.M.A. 1973)). A record of trial with missing appellate exhibits, including post-trial motions, is incomplete and should be remanded for correction. *E.g.*, *United States v. Martinez*, No. ACM 39903 (reh), 2024 CCA LEXIS 551, at *2-3 (A.F. Ct. Crim. App. Dec. 16, 2024).

The missing post-trial motions and ruling should have been appellate exhibits included in the record of trial. The ruling, at minimum, was intended to be an appellate exhibit, as indicated on the Article 140a, UCMJ, website. JAGC DAF, Trial Results, Details, U.S. v. Airman First Class W Kim, Documents, Ruling_US_v._Kim_Post_trial_MFAR_Redacted.pdf (last visited Mar. 2, 2025) https://legalassistance.law.af.mil/140a/docs/519211/Ruling_US_v._Kim_Post_trial_MFAR_Redacted.pdf. But none of these documents are present in the record of trial. The

motions are significant omissions because the military judge relied upon them when considering the challenge to the reprimand contained in the initial CADAM. *Id*. Independent of the motions, the ruling is a significant omission because it caused the convening authority to change the CADAM and reprimand language. *Id*.; *compare* CADAM (Aug. 31, 2023), *with* CADAM (Oct. 6, 2023). The ruling and motions affected the sentence A1C Kim received, and thus, are substantial omissions requiring remand for correction.

Another way of considering the missing ruling and motions is through R.C.M. 1112(b)(1) and R.C.M. 801(f). The first requires a substantially complete recording of the proceeding and the second dictates that all sessions involving rulings shall be made on the record. R.C.M. 1112(b)(1); R.C.M. 801(f). This is distinct from conferences under R.C.M. 802, which do not have to be included, and if they are not included, the issue of inclusion is waived. R.C.M. 802(b). However, a "sidebar" "involving a ruling by the judge affecting rights of the accused at trial must be fully recorded if the transcript is to be verbatim." *Gray*, 7 M.J. at 298 (quoting *United States v. Sturdivant*, 1 M.J. 256 (C.M.A. 1976)). Post-trial proceedings, much like Article 30a, UCMJ, proceedings, do not always occur in open session, but nevertheless could trigger record completeness concerns. *Compare* R.C.M. 309(e) (requiring a "separate record of any proceedings under this rule shall be prepared" and "[i]f charges are referred to trial in the case, such record shall be included in the record of trial"), *with* R.C.M. 1104(d)(2) (requiring the record of post-trial sessions "shall be included in the record of the prior proceedings"). When this happens, there may be no indication appellate exhibits or proceedings are missing, thus triggering a "substantially complete recording" problem.

While previous versions of the UCMJ and R.C.M.s dealt with verbatim transcripts, the current version requires a "substantially verbatim recording." *Compare Sturdivant*, 1 M.J. at 257,

with R.C.M. 1112(b)(1). Despite the switch from requiring a verbatim *transcript* to a verbatim *recording*, the logic behind including rulings in the record remains. "The omission of rulings . . . which affect an appellant's rights at trial render appellate review impossible and are substantial omissions." *United States v. Samuels*, No. ACM S32060, 2013 CCA LEXIS 824, at *6-7 (A.F. Ct. Crim. App. Sept. 20, 2023) (citing *United States v. Abrams*, 50 M.J. 361, 364 (C.A.A.F. 1999); *Gray*, 7 M.J. at 298). The ruling and motions here affected the convening authority's action, A1C Kim's sentence, and the entry of judgment, but there is no reference to them at all. Consistent with the precedent related to the previous transcript requirement, under the current R.C.M.s, a substantially verbatim recording of the proceeding does not exist if a *ruling* by the military judge affecting the rights of the accused is absent. A record of trial that does not include a substantially verbatim recording of the court-martial proceedings is incomplete and should be remanded for correction. *United States v. Valentin-Andino*, 83 M.J. 537, 540-41 (A.F. Ct. Crim. App. 2023).

The record should be sent back for correction under R.C.M. 1112(d)(2) because there are missing appellate exhibits or, alternatively, a missing "substantially verbatim recording" via omission of the military judge's ruling that affected A1C Kim's sentence and substantial rights.

2. Should this Court find the omissions insubstantial, appropriate relief is still warranted under Article 66(d)(2), UCMJ, for systemic neglect in Air Force post-trial processing.

Record completion and remand is an issue predicated on prejudice. *Henry*, 53 M.J. at 111 (distinguishing between substantial and insubstantial omissions, the former triggering a presumption of prejudice); *United States v. Harrow*, 62 M.J. 649, 654 (A.F. Ct. Crim. App. 2006) (citation omitted), *aff'd*, 65 M.J. 190 (C.A.A.F. 2007) ("Insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete

one."). If there is an insubstantial omission, there is still a record completeness problem and thus error. But in such circumstances, there is no prejudice and therefore no relief as presented.

However, this Court's power under Article 66(d)(2), UCMJ, to award appropriate relief for errors occurring after the entry of judgment does *not* require prejudice. Therefore, even if there is an insubstantial omission rendering the record of trial incomplete, appropriate relief can still be awarded because prejudice is not required. This is consistent with the evolution of excessive post-trial delay relief from *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002).

In 2002, the CAAF held that "an accused has a [statutory] right to timely review of the findings and sentence." *Tardif*, 57 M.J. at 222 (citing Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2000)). Article 66(c), UCMJ, empowered the Courts of Criminal Appeals (CCAs) with the authority to "tailor an appropriate remedy" for excessive post-trial delay. *Tardif*, 57 M.J. at 225. When the CCAs find that *Tardif* relief is warranted, the prescribed relief must be "meaningful." *United States v. Pflueger*, 65 M.J. 127, 130-31 (C.A.A.F. 2007). But *Tardif* relief does not require a finding of prejudice as a predicate to providing meaningful relief. *Tardif*, 57 M.J. at 224.

When Congress passed the Military Justice Act of 2016, it "amended the UCMJ such that Article 66(d)(2), UCMJ, specifically invests the [CCAs] with authority to grant 'appropriate relief' for error or excessive delay in court-martial processing after the Entry of Judgment." *United States v. Allison*, No. 201800251, 2021 CCA LEXIS 605, at *13 n.39 (N-M Ct. Crim. App. Nov. 16, 2021); *see* 10 U.S.C. § 866(d)(2) (prescribing that a "[CCA] may provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record"). By using the same language and same standard for relief determined by the courts, it is clear that in creating Article 66(d)(2), UCMJ, Congress was codifying *Tardif*. "[W]here Congress borrows terms of art in which are accumulated the legal

tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word . . . and the meaning . . . unless otherwise instructed." *Morissette v. United States*, 342 U.S. 246, 263 (1952). Here, *Tardif* relief has terms of art that were adopted into the statute without modification—except for the addition of "error."

By coupling the terms of art associated with *Tardif* relief with "error," Congress extended the possibility for appropriate relief beyond excessive post-trial delay to any other "error" occurring after entry of judgment. This is consistent with the "series-qualifier canon." *Facebook, Inc. v. Duguid*, 592 U.S. 395, 402 (2021). "Under conventional rules of grammar, '[w]hen there is a straightforward, parallel construction that involves all nouns . . . in a series,' a modifier at the end of the list 'normally applies to the entire series.'" *Id*. at 402-03 (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 147 (2012) (quotation modified)). As the Supreme Court noted, "This canon generally reflects the most natural reading of a sentence." *Id*. at 403. When naturally read, "error" and "excessive delay" are coupled together in Article 66(d)(2), UCMJ, in a way that everything surrounding "error" was the original *Tardif* standard. This is consistent with Congress codifying *Tardif* in the first place.

The most critical part of codifying *Tardif* is that since the prior standard under *Tardif* required no prejudice, similarly, the adoption of the *Tardif* standard into Article 66(d)(2), UCMJ, also requires no prejudice. This is because Congress is presumed to legislate with knowledge of existing law. *H.V.Z. v. United States*, 85 M.J. 8, 12 (C.A.A.F. 2024) (citing *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979); *United States v. Ware*, 1 M.J. 282, 285-86 (C.M.A. 1976)). Had Congress wanted to include a prejudice requirement, it would have done so. *Id*. (citing *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993)). Thus, by applying the canons of statutory

interpretation just discussed, the no prejudice requirement also extends to the new "error" provision because of the way the statute is written.

This Court has awarded relief under Article 66(d)(2), UCMJ, or *Tardif*, for record of trial errors when there was no prejudice to the appellant. "Post-trial processing errors like the ones highlighted in this case are happening at an alarming frequency in the Air Force. Accordingly, we find a systemic problem indicating institutional neglect." *United States v. Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *17 (A.F. Ct. Crim. App. Jun. 7, 2024), *rev. granted*, ___ M.J. ___, 2024 CAAF LEXIS 571 (C.A.A.F. Sept. 30, 2024). The frequency of such incomplete records is disturbing, disconcerting, and continuous—32 cases since January 2022.[4]

[4] *United States v. Burkhardt-Bauder*, No. ACM 24011, 2025 CCA LEXIS 81 (A.F. Ct. Crim. App. Jan. 24, 2025) (remand order); *United States v. Casillas*, No. ACM 40499, 2024 CCA LEXIS 394 (A.F. Ct. Crim. App. Sep. 24, 2024) (remand order); *United States v. Kershaw*, No. ACM 40455, 2024 CCA LEXIS 354 (A.F. Ct. Crim. App. Aug. 26, 2024); *United States v. Boren*, No. ACM 40296, 2024 CCA LEXIS 246 (Jun. 24, 2024) (remand order); *United States v. Howard*, No. ACM 40478, 2024 CCA LEXIS 137 (A.F. Ct. Crim. App. Apr. 9, 2024) (remand order); *United States v. Moore*, No. ACM 40442, 2024 CCA LEXIS 118 (A.F. Ct. Crim. App. Mar. 21, 2024) (remand order); *United States v. Donley*, No. ACM 40350, 2024 CCA LEXIS 115 (A.F. Ct. Crim. App. Mar. 19, 2024); *United States v. Smith*, No. ACM 40437, 2024 CCA LEXIS 109 (A.F Ct. Crim. App. Mar. 11, 2024) (remand order); *United States v. Harnar*, No. ACM 40559, 2024 CCA LEXIS 39 (A.F. Ct. Crim. App. Jan. 31, 2024) (remand order); *United States v. Wells*, No. ACM S32762, 2024 CCA LEXIS 15 (A.F. Ct. Crim. App. Jan. 18, 2024) (remand order); *United States v. Conway*, No. ACM 40372, 2023 CCA LEXIS 501 (A.F. Ct. Crim. App. Dec. 5, 2023); *United States v. Blackburn*, No. ACM 40303, 2023 CCA LEXIS 386 (A.F. Ct. Crim. App. Sep. 11, 2023) (remand order); *United States v. Portillos*, No. ACM 40305, 2023 CCA LEXIS 321 (A.F. Ct. Crim. App. Aug. 1, 2023) (remand order); *United States v. Manzano Tarin*, No. ACM S32734, 2023 CCA LEXIS 291 (A.F. Ct. Crim. App. Jun. 27, 2023) (remand order); *United States v. Hubbard*, No. ACM 40339, 2023 CCA LEXIS 263 (A.F. Ct. Crim. App. Jun. 15, 2023) (remand order); *United States v. Simmons*, No. ACM 40462, 2023 CCA LEXIS 236 (A.F. Ct. Crim. App. Jun. 5, 2023) (remand order); *United States v. Gammage*, No. ACM S32731, 2023 CCA LEXIS 240 (A.F. Ct. Crim. App. Jun. 5, 2023) (remand order); *United States v. Goodwater*, No. ACM 40304, 2023 CCA LEXIS 231 (A.F. Ct. Crim. App. May 31, 2023) (remand order); *United States v. Irvin*, No. ACM 40311, 2023 CCA LEXIS 201 (A.F. Ct. Crim. App. May 12, 2023) (remand order); *Valentin-Andino*, 83 M.J. at 544; *United States v. Lake*, No. ACM 40168, 2022 CCA LEXIS 706 (A.F. Ct. Crim. App. Dec. 7, 2022) (remand order); *United States v. Fernandez*, No. ACM 40290, 2022 CCA LEXIS 668 (A.F. Ct. Crim. App. Nov. 17, 2022) (remand order); *United States v. Stafford*, No. ACM 40131, 2022 CCA LEXIS 654 (A.F. Ct. Crim. App. Nov. 8, 2022) (remand

A1C Kim's case falls into this category of cases, regardless of whether the record of trial omission is prejudicial. The mere fact there is a ruling on the Article 140a, UCMJ, website that is not in the record of trial emphasizes the continued institutional neglect towards compiling complete records of trial. And, at a certain point, which has now been surpassed, an appellant should get relief—in part—to motivate the Government to do its job correctly in preparing and docketing a correct record of trial.

A1C Kim has met the three requirements under Article 66(d)(2), UCMJ, for this Court to award appropriate relief: (1) there is an error; (2) A1C Kim raised the error; and (3) the error occurred after the entry of judgment. *United States v. Williams*, No. 24-0015, 2024 CAAF LEXIS 501, at *13-15 (C.A.A.F. Sep. 5, 2024). He has raised an error, an incomplete record of trial via omission of the post-trial motions and ruling, which occurred after entry of judgment—since that is when the record of trial is built. Certification of the Record of Trial in the case of *United States v. A1C Won Kim* (Dec. 8, 2023). Therefore, should this Court find no prejudice for the missing motions and rulings and thus decline to remand, A1C Kim requests meaningful relief under Article 66(d)(2), UCMJ. He specifically requests this Court to disaffirm the portion of his sentence that calls for forfeitures and the reduction in rank to E-1. This would produce financial relief for A1C

order); *United States v. Lampkins*, No. ACM 40135, 2020 CCA LEXIS 500 (A.F. Ct. Crim. App. Oct. 25, 2022) (remand order); *United States v. Romero-Alegria*, No. ACM 40199, 2022 CCA LEXIS 558 (A.F. Ct. Crim. App. Sep. 22, 2022) (remand order); *United States v. Goldman*, No. ACM 39939 (f rev), 2022 CCA LEXIS 511 (A.F. Ct. Crim. App. Aug. 30, 2022) (requiring second remand for noncompliance with initial remand order); *United States v. Payan*, No. ACM 40132, 2022 CCA LEXIS 242 (A.F. Ct. Crim. App. Apr. 28, 2022) (remand order); *United States v. Cooper*, No. ACM 40092, 2022 CCA LEXIS 243 (A.F. Ct. Crim. App. Apr. 28, 2022) (remand order); *United States v. Westcott*, No. ACM 39936, 2022 CCA LEXIS 156 (A.F. Ct. Crim. App. Mar. 17, 2022); *United States v. Goldman*, No. ACM 39939, 2022 CCA LEXIS 43 (A.F. Ct. Crim. App. Jan. 20, 2022) (remand order); *United States v. Mardis*, No. ACM 39980, 2022 CCA LEXIS 10 (A.F. Ct. Crim. App. Jan. 6, 2022); *United States v. Daley*, No. ACM 40012, 2022 CCA LEXIS 7 (A.F. Ct. Crim. App. Jan. 5, 2022).

Kim, which is meaningful and appropriate in light of the institutional neglect for compiling complete records of trial in the Department of the Air Force.

WHEREFORE, A1C Kim requests that this Court remand his record of trial for correction or provide appropriate relief under Article 66(d)(2), UCMJ.

IV.

A1C Kim's constitutional rights were violated when he was convicted of an offense with no requirement that the court-martial panel (the functional equivalent of the jury) vote unanimously that he is guilty.

Additional Facts

The defense filed a motion for a unanimous verdict. Appellate Ex. VIII. The military judge found the motion "mooted" by *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023).

While delivering findings instructions, the military judge informed the members, "As the findings do not require a unanimous agreement, no one will ever know how you voted in this case or whether you concurred with the finding ultimately announced." R. at 328. He later expressly instructed the members:

> 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 four members, that means three members must concur in any finding of guilty. If you have at least three votes of guilty of any offense, then that will result in a finding of guilty for that offense.

R. at 363.

The members found A1C Kim guilty of three specifications. R. at 376-77. It is unknown and unknowable whether his conviction for each offense was based on a vote of 3-1 or 4-0.

Standard of Review

The standard of review for questions of constitutional law is de novo. *United States v. Busch*, 75 M.J. 87, 91 (C.A.A.F. 2016).

Law and Analysis

In *United States v. Anderson*, the CAAF held that non-unanimous findings of guilty do not violate a court-martial accused's constitutional rights. *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 1003 (2024). A1C Kim acknowledges that, absent intervening CAAF or Supreme Court case law, this Court is bound by the *Anderson* opinion. Nevertheless, A1C Kim maintains that *Anderson* was wrongly decided and expressly preserves this issue for further appellate review.

WHEREFORE, A1C Kim requests this Court set aside the findings and the sentence, while authorizing a rehearing at which A1C Kim may be found guilty only upon a unanimous vote of the members.

Respectfully submitted,

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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 Air Force Government Trial and Appellate Operations Division on 19 March 2025.

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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. 3
Airman First Class (E-3)	)	
WON KIM	)	No. ACM 24007
United States Air Force	)	
Appellant	)	18 April 2025

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

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III.

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.

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

COURT OF APPEALS FOR THE ARMED FORCES

COURTS OF CRIMINAL APPEALS

FEDERAL CIRCUIT COURTS

UNIFORM CODE OF MILITARY JUSTICE

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) **WON KIM**, United States Air Force *Appellant.*	)))))))))	**UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR** No. ACM 24007 Before Panel No. 3 18 April 2025

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

ISSUES PRESENTED

I.

APPELLANT'S CONVICTION FOR TOUCHING EW'S BREAST ON DIVERS OCCASIONS IS FACTUALLY INSUFFICIENT.

II.

APPELLANT'S CONVICTION FOR TOUCHING EW'S VULVA WITH HIS THIGH WITH AN INTENT TO GRATIFY HIS SEXUAL DESIRE IS LEGALLY AND FACTUALLY INSUFFICIENT.

III.

THE GOVERNMENT'S FAILURE TO INCLUDE POST-TRIAL MOTIONS AND THE ACCOMPANYING RULING RENDERS THE RECORD INCOMPLETE OR ALTERNATIVELY CONSTITUTES AN ERROR AFTER THE ENTRY OF JUDGMENT FOR WHICH THIS COURT SHOULD AWARD APPROPRIATE RELIEF.

IV.

APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN HE WAS CONVICTED OF AN OFFENSE WITH NO REQUIREMENT THAT THE COURT-MARTIAL

PANEL (THE FUNCTIONAL EQUIVALENT OF THE JURY) VOTE UNANIMOUSLY THAT HE IS GUILTY.

STATEMENT OF THE CASE

On August 16, 2023, at Osan Air Base, Republic of Korea (Osan), a special court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one charge and two specifications of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ); and one charge and one specification of assault consummated by battery in violation of Article 128, UCMJ. (*Entry of Judgment*, dated 19 October 2023 (EOJ), Record of Trial (ROT), Vol. 1). The members sentenced Appellant to a reprimand, forfeiture of $500 pay per month for four months, hard labor without confinement for 30 days, and restriction to the limits of Osan for 30 days. (Id.). The convening authority reduced Appellant's forfeitures from four months to two months. (*Convening Authority Decision on Action*, dated 6 October 2023 (CADAM), ROT, Vol. 1).

STATEMENT OF FACTS

Victim's Testimony

EW met Appellant through work at a flight event. (R. at 193). She first started talking to him while at a bar following the event. (Id.). EW and Appellant had a "couple of drinks and then [they] went to karaoke." (Id.). They drank more alcohol at karaoke. (Id.). While at karaoke, EW sat next to Appellant and talked to him for about two hours. (Id.). They discussed "interests," and Appellant asked EW if she "was in a relationship" and "what kinds of things in a guy [she] was interested in." (Id.).

EW had been drinking and was "leaning up against [Appellant]. (R. at 194). EW was "drunk" and did not "remember most of the night." (Id.). While sitting with him, Appellant started kissing EW. (Id.). The kiss lasted about ten seconds. (Id.). EW considered the kiss a

"key detail" of that night, so she remembered it. (Id.). EW clarified that she "didn't really want [the kiss]," but because "[they] were both drunk" she didn't consider it that "big of an issue then." (Id.). EW did not push Appellant away from her. (R. at 218).

EW had invited Appellant to go with her and about five friends to a baseball game the next day. (R. at 194-195). EW did this because she wanted to get to know Appellant. (R. at 195). Before the baseball game, EW "sat him down" and said she "wasn't really comfortable with what happened the night before." (R. at 194). EW explained to Appellant that while she "did have interest in him" and "wanted to get to know him," she "didn't want to move fast." (R. at 195). EW stated she "wanted to be friends first before [they] moved on" to a relationship. (Id.). EW wanted to see what Appellant's "beliefs" were to know if she wanted a relationship. (Id.). They talked about topics such as marriage, religion, "what [they] wanted out of life," and how many kids each wanted. (R. at 195-196).

Over the next two weeks, EW and Appellant spent time in her room, watched movies, and texted each other. (R. at 197). Appellant came to EW's room every other day. (Id). EW gave Appellant her door code so she would not have to get up when he arrived, but Appellant "typically texted [EW] before he would come." (Id.). EW gave Appellant and other friends her door code because she was "lazy" and didn't want to "get out of bed." (Id.).

While watching movies in EW's room, EW and Appellant would sit on her bed. (Id.). They were often "cuddling" by either sitting up or lying down on the bed. (R. at 198). If they were sitting up, Appellant would sit at EW's side with his arm around her shoulder. (Id.). If they were lying down, EW would be on her back and Appellant would be "on his side with his arm around" her stomach. (Id.). Occasionally while doing this, Appellant and EW would "make out," which EW described as "multiple kisses" that "would include tongue." (Id.). There were

also occasions where Appellant was lying on top of EW while they "made out" and his leg would be between her thighs. (R. at 231). Appellant's legs and hips would sometimes be moving on these occasions. (Id.).

A couple of days into spending time together, Appellant was in EW's room sitting up and "cuddling" with her. (R. at 198). Appellant's arm was around EW's shoulder. (Id.). They were watching a movie. (Id.). EW was not wearing a bra at this time. (Id.). Appellant moved his arm around EW's waist, which EW was comfortable with. (Id.). Appellant then slid his hand under her shirt, which made EW uncomfortable. (R. at 199). EW did not initially react when Appellant put his hand under her shirt, but then he moved his hand up to her "naked" breast. (R. at 198-199). EW moved his hand away from her breast and told him she "wasn't comfortable with that." (R. at 199). EW told Appellant that he was "pushing it too far into the line of dating and intimacy." (Id.). Appellant told EW that he knew she wore a "chastity ring" and "didn't want to have sex before marriage." (Id.). Appellant told EW that he "wasn't going to make [her] take [her] ring off, but as a man he needed certain things." (Id.).

Appellant's comments made EW feel like "he didn't really respect [her] and what [she] wanted." (Id.). After EW moved his hand away, Appellant moved his hand back to EW's breast. (Id.). EW "let it go" because he didn't listen the first time and she "didn't really know what to do." (Id.).

While still "friends" after the initial breast touch, EW and Appellant had a conversation about EW's romantic feelings for her "best friend," JK, another airman stationed at Osan. (R. at 201, 219, 246). EW explained that she had feelings for JK, but that she was trying to move past them. (Id.). Appellant told EW that he would have EW as a girlfriend and that JK would not be a problem. (Id.). Appellant told EW that "he could get [EW] to like him more than [JK]." (Id.).

EW didn't have a problem with that, as she was glad Appellant "understood [her] feelings" and "didn't overreact." (R. at 202). EW didn't think it was "fair" to Appellant to pursue something with him while she had feelings for JK, but Appellant "was trying to convince [her] to stay with him." (R. at 246).

EW also spoke with Appellant about their friendship and explained that while "cuddling and making out" was fine, EW wasn't comfortable with anything else. (R. at 202). EW had this conversation with Appellant because the "line" of their friendship was "kind of blurred like what was friends and what was dating." (Id.). EW told Appellant that "anything else" included "touching [her] breast, touching [her] anywhere else." (Id.). However, within a couple of days of the initial incident, Appellant touched EW twice more on her breast without her consent. (R. at 200). During one occasion when they were kissing, Appellant "playfully" put EW's "hands behind [her] back." (R. at 212). They were both laughing and "[i]t was 100 percent consensual." (R. at 213). EW did not push Appellant back. (Id.).

Between these incidents and 11 May 2022, EW told Appellant that she didn't have "any interest in dating him anymore, that [she] just wanted to be friends but nothing else." (R. at 202). On cross-examination, EW stated that even while talking with Appellant, she had "had more interest in [JK]." (R. at 220). The only reason she wasn't "with [JK]" was because he had a girlfriend. (Id.). JK broke up with his girlfriend shortly before EW told Appellant she did not have romantic interest in him anymore. (Id.).

After this conversation, Appellant was "still very relentless" and "would accept it." (R. at 205). Appellant would "always be texting [EW]." (Id.). He would buy her things and bring her things at work, such as hot chocolate, bread, or chips, to "win [her] over." (Id.).

On 11 May 2022, EW was studying for a test at JK's house. Appellant texted EW asking where she was, but EW ignored Appellant's texts. (R. at 202-203). EW returned to her dormitory room and sat in her chair next to her bed studying. (R. at 203). Appellant did not text EW that he was coming over. (Id.). Someone knocked on EW's door, but she did not say if they could come in or not. (Id.). Appellant then typed in her code and came into her room. (Id.). Appellant asked EW where she had been since she wasn't responding to his text messages. (R. at 204). EW told Appellant she had been at JK's house. (Id.). Appellant did not react well to this and talked to EW about why she wanted to be with JK and not him. (Id.). EW got up from her low chair and moved to sit on her bed to be at a better physical "talking level" with Appellant. (Id.).

Appellant came to stand in front of EW. (R. at 203). EW testified that Appellant grabbed her wrists and pushed her down onto the bed. (Id.). Appellant held one of EW's hands in each of his and their forearms were aligned. (R. at 205). Appellant's chest was against EW's chest and his leg was between her legs. (R. at 203). Appellant's leg touched EW's vulva through her clothes. (Id.). Appellant was very close to EW's face and had "his nose on [her] cheek." (Id.). EW turned her head to the right so he could not touch her lips. (Id.). Appellant did not move his thigh between EW's legs or rub against her. (R. at 232). EW laid there for about a minute because she realized how angry Appellant was. (R. at 205).

EW then tried to push Appellant off, but Appellant pushed back. (Id.). EW told Appellant to get off of her, but Appellant "just kept talking and wasn't listening to [her]." (Id.). Appellant said "some negative things" about EW and JK's compatibility. (R. at 238). EW tried to push him off with her own arm strength but was unable to do so. (R. at 206). EW told Appellant to get off of her at least ten times. (R. at 207). EW did so aggressively. (Id.). After

about five minutes, Appellant moved his head to her lips and tried to kiss her. (R. at 203). Appellant tried to stick his tongue in EW's mouth. (Id.). EW kept her lips pressed tightly together to prevent him from sticking his tongue in her mouth. (R. at 207). This went on for about ten seconds until EW started crying. (R. at 208). EW testified that Appellant noticed she was crying, got up, and walking out the door. (Id.).

After Appellant left, EW called JK to come pick her up because she "didn't feel safe in there anymore" and she "didn't know if [Appellant] was going to come back." (R. at 209). EW told JK she needed him to come "pick [her] up immediately," and he did so. (Id.). EW packed up her things to leave before JK arrived and then went outside to leave with him. (Id.). At JK's house, EW told JK what had happened and tried to comfort her. (Id.).

About thirty minutes after leaving EW's room, Appellant started to text her. (R. at 210). Appellant mentioned EW "crying" in the text and asked if she wanted to talk about it. (Id.).

Appellant texted EW approximately fifty times after 11 May 2022, and she replied to one or two of these texts. (R. at 210). Some of these text messages were in Korean, but an English translation was admitted into evidence. (Pros. Ex. 1, Pros. Ex. 3). On 13 May 2022, Appellant came to EW's room again. (R. at 235, 249). EW did not expect Appellant to come over and did not remember if he knocked. (R. at 249). Appellant entered "very quiet[ly]," and "didn't say anything." (R. at 250). For five minutes Appellant didn't say anything and the whole time EW told "him to get out and that [she] didn't want him in there." (Id.). EW told Appellant to leave about ten times and Appellant did not respond or acknowledge her words. (Id.). Eventually, they discussed the incident on 11 May 2022. (R. at 236).

On 14 May 2022, Appellant texted EW "I'm so sorry I didn't know you felt that way." (R. at 237, Pros. Ex. 1). Appellant also texted "I would never try to sexually assault you yet it is

entirely my fault for making you feel that way." (Id.). Appellant stated he was "shocked" from what EW said to him about sexually assaulting her. (R. at 238, Pros. Ex. 1). After Appellant took time to "digest" what EW said to him, he texted her again on 15 May 2022. (Pros. Ex. 1). Appellant said he "tried to kiss [her] in hopes of starting another intimate moment like [they] had before." (Id.). Appellant wanted EW to "give in to [her] feelings." (Id.). Appellant texted that "[EW] tried to push [Appellant] away several times when [Appellant] was on top of [her] but [Appellant] thought if [he'd] back away now, [her] feelings towards [JK] would get stronger over time." (Id.). Appellant then said he "thought lightly about what [he'd] done because [they had] had intimate moments before." (Id.). "It never crossed [Appellant's] mind that [he] was sexually assaulting [EW]." (Id.). Appellant told EW that if she felt she was sexually assaulted, then Appellant was "a criminal" who was "hiding behind a thin veil." (Id.). Appellant went on to ask for a chance to speak with EW in person so she knew his apologies were "genuine" and so he could "redeem" himself. (Id.). EW did not respond to these text messages. (Id.).

On 16 May 2022, Appellant texted EW that he "didn't mean to hurt [her] like that." (Id.). He also texted her that he spoke with JK but didn't tell JK anything. (Id.). At this point, EW texted Appellant to "stop messaging [her]." (Id.). Appellant said "okay," but text EW again on 22 May 2022 to ask to speak with her again. (Id.).

On 23 May 2022, Appellant texted EW that he liked her, would never "take advantage of her, that he had a "different read" than her on what happened the night of 11 May 2022, and that he felt "terrible [she was] hurt because of [Appellant]." (R. at 239, Pros. Ex. 1). Appellant said he just meant to kiss [her] like we did before and [he] didn't catch on that [she was] really uncomfortable with what [Appellant] was doing." (Pros. Ex. 1). Appellant compared the night of 11 May 2022 to the previous occasion when he pinned EW down consensually and said he

was "just trying to do that again." (R. at 241). EW asked if Appellant agreed that "it was sexual assault," and Appellant replied "did [he] come off as a guy that could do such a thing?" (Pros. Ex. 1). A minute later, Appellant texted EW that he agreed with her, but if he'd known she "felt that way [he] never would have even made such an action." (Id.). Appellant apologized again and asked EW to speak with him, but EW did not respond. (Id.).

On 24 May 2022, Appellant asked to call EW and she did not respond. (Id.). Appellant told EW he missed her and wanted to apologize face to face, so he asked to "go up" to her room. (Pros. Ex. 3). On 25 May 2022, Appellant asked EW if she still hated him. (Id.). At 2130, Appellant said he was going to stop by her room for them to talk. (Id.). EW did not respond. Appellant then accused EW of having a "different reason" for ignoring him. (Pros. Ex. 1). Appellant said EW couldn't "be this heartless and turn into a different person just like that. All [Appellant] was trying to do was try to make out with [her] like before. [Appellant] was really surprised when [EW] started crying too." (Id.). Appellant wanted to "talk about it" instead of EW "cutting [him] out of [her] life." (Id.). Appellant asked EW if he was "really worth so small to [her] that [she] would cut ties with [him] so easily?" (Id.). Appellant texted about ten minutes later that EW could "cut ties" with him, but he wanted a chance to have "a conversation with [her] about what happened." (Id.). EW never responded. (Id.).

On 26 May 2022, Appellant accused EW of being "too extreme" but cutting him off. (Id.). He pointed out that he had tried to kiss her because they "did the same thing and more a week prior so [he] was just trying to do that again." (Id.). Since EW wouldn't "recognize [Appellant's] existence. . . all because [he] tried to kiss [her]," Appellant thought he must be "missing something." (Id.). Appellant compared kissing EW without her consent to "commit[ing] grand theft" and EW's decision not to respond to him as "a death sentence," which

Appellant felt was "too extreme." (Id.). Appellant texted EW a final time on 5 June 2022. He asked again to talk about what had happened, but said he would not contact EW again. (Pros. Ex. 3). EW did not reply.

EW did not report Appellant's actions at the time because she was worried about her WAPS test on 12 May 2022 and did not want anything to affect that. (R. at 210). She made a restricted report about a month after 11 May 2022. (R. at 255). EW didn't want to "deal with any official things," but she saw Appellant at work "making people uncomfortable, making comments that weren't appropriate in the workplace." (R. at 248). EW didn't want "anyone else to go through what [she] went through with him." (Id.).

In September 2022, EW learned Appellant was in a new relationship. (R. at 227). After learning this, she unrestricted her report and went to the Air Force Office of Special Investigations (AFOSI). (R. at 228). EW testified that both the Sexual Assault Response Coordinator (SARC) and Victims' Counsel "turned her away" on 23 September 2022 as they weren't certain what she reported qualified as a sexual assault. (R. at 228-229). EW testified that AFOSI also informed EW that what she reported wasn't a sexual assault. (R. at 229-230). After that, she went back to AFOSI and provided more details about what had happened, which was the first time she disclosed Appellant touching her breast. (R. at 230).

EW had a full interview with AFOSI on 5 October 2022. (R. at 234). EW initially told AFOSI that she was sitting next to Appellant on her bed when he "flipped over and pinned [her] down," but she later clarified that Appellant had been standing in front of her. (Id.).

JK Testimony

JK met EW in 2021. (R. at 256). They were both stationed at Osan together in the same unit. (Id.). They became "really good friends at one point." (Id.). They spent time together

outside of work and talked "on a regular basis." (Id.). They spent time together socially about "three to five times a week." (Id.). At the time, JK had a girlfriend with whom he had had an "on and off" relationship since 2019. (R. at 267).

In May 2022, EW called JK and he went to pick her up from the dormitory. (R. at 257). JK could tell EW was crying during the phone call. (R. at 258). EW was in the parking lot when he drove up to the dorm. (R. at 258). EW was wearing a hoodie with the hood up and she was covering her face. (Id.). EW was "very distraught." (Id.). While in JK's car, EW was "bawling her eyes out" and "didn't say what had happened" at first. (Id.). Based on her behavior, JK assumed a family member had died. (Id.). JK asked what had happened, but EW just continued to cry. (R. at 259). JK started driving around, and EW eventually told him what had happened. (Id.). Based on what she told JK, he and EW talked about going to the SAPR office and he asked if EW needed to go to the hospital. (R. at 260). EW did not feel safe going back to her dorm, so JK let her stay in his guest bedroom. (Id.). JK thought she stayed in that bedroom for "one or two nights." (Id.). EW was still "very distraught and just traumatized" and she "stayed to herself" and stayed in the guest bedroom without saying much. (Id.).

JK "escorted" EW back to the dorm so she could pick up some clothes because he wanted to "make sure that [Appellant] wasn't there again to confront her, and if he was, [JK] was there." (R. at 260-261). One of the days EW went to collect some things, Appellant was on the first floor. (R. at 261). Appellant walked toward JK and said "what are you doing here" in a "confrontational tone." (Id.). JK did not believe he gave an "actual response" besides a "murmur." (Id.). On cross-examination, JK could not recall if Appellant also made a comment about JK trying to date EW now that he was single. (R. at 266).

JK testified that while his relationship with EW became more romantic after 11 May 2022, he said that it "was never official." (R. at 268). The relationship did not last "very long." (Id.). After the relationship ended, JK and EW continued to talk until EW was in another relationship. (Id.). EW said she and JK shouldn't continue talking "out of respect for that other relationship." (Id.).

ARGUMENT

I.

APPELLANT'S CONVICTIONS FOR ABUSIVE SEXUAL CONTACT ARE LEGALLY AND FACTUALLY SUFFICIENT.[1]

Additional Facts

Specification 1 as charged under Article 120(d), UCMJ, states that Appellant "did, at or near Osan Air Base, Republic of Korea, on divers occasions, between on or about 1 April 2022 and on or about 30 April 2022, touch the breast of [EW] with his hand, with an intent to gratify his sexual desires, without her consent." (ROT, Vol. 1, *Charge Sheet*).

Specification 2 as charged under Article 120(d), UCMJ, states that Appellant "did, at or near Osan Air Base, Republic of Korea, on or about 11 May 2022, touch the vulva of [EW] with his thigh, with an intent to gratify his sexual desires, without her consent." (Id.).

The military judge instructed the members that "[d]ivers occasions" means two or more occasions. (R. at 330). He defined "sexual contact" as "touching or causing another person to touch either directly or through the clothing, the vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person." (Id.). The military judge defined "vulva'

[1] Issues I and II have been combined for ease of understanding.

as "the external genital organs of the female, including the entrance of the vagina and the labia majora or labia minora. 'Labia' is the Latin and medically correct term for lips." (Id.).

The military judge then provided the following definition of "consent":

> "Consent" means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner address of the person involved with the accused in the conduct at issue does not constitute consent. All of the evidence concerning consent to the sexual conduct is relevant and must be considered in determining whether the government has proven that the sexual conduct was done by the accused without the consent of [EW] beyond a reasonable doubt.
>
> Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven the elements of this charge. All the surrounding circumstances are to be considered in determining whether a person gave consent.

(R. at 330-331).

The military judge also instructed the members on the defense of mistake of fact as to consent:

> Mistake of fact is a defense to the charged offense. Mistake of fact means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person consented to the sexual conduct. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable, the ignorance or mistake must have been based on information or lack of it that would indicate to a reasonable person that the other person consented to the sexual conduct. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts.
>
> "Negligence" is the absence of due care. "Due care" is what a reasonable person would do under the same or similar

> circumstances. You should consider the inherent probability or improbability of the evidence presented on this matter. You should consider the accused's age, education, and experience, along with the other evidence in this case. The prosecution has the burden of proving beyond a reasonable doubt that the defense of mistake of fact did not exist.
>
> If you're convinced beyond a reasonable doubt that at the time of the charged offense, the accused did not believe that the alleged victim consented to the sexual conduct, the defense does not exist. Furthermore, even if you conclude that the accused was under a mistaken belief that the alleged victim consented to the sexual conduct, if you are convinced beyond a reasonable doubt that at the time of the charged offense, the accused mistake was unreasonable, the defense does not exist.

(R. at 331-332).

The military also instructed the members that evidence may be applicable to more than one offense:

> If evidence has been presented which is relevant to more than one offense, you may consider that evidence with respect to each offense to which it is relevant. For example, if a person were charged with stealing a knife and later using that knife to commit another offense, evidence concerning the knife, such as that person being in possession of it or that person's fingerprints being found on it, could be considered with regard to both offenses. But the fact that a person's guilt of stealing the knife may have been proven is not evidence that the person is also guilty of any other offense. The burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt. Proof of one offense carries with it no inference that the accused is guilty of any other offense.

(R. at 337).

Standard of Review

Issues of legal sufficiency are reviewed *de novo*. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

"The Court may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with subparagraph (B)." 10 U.S.C. § 866(d)(1)(A). Factual sufficiency is

reviewed using the following standard if every finding of guilty is for an offense occurring on or after 1 January 2021[2]:

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

10 U.S.C. § 866(d)(1)(B).

Law and Analysis

Appellant argues that his convictions for touching EW's vulva with his thigh and EW's breast with his hand on divers occasions is factually insufficient.

To obtain a conviction for abusive sexual contact for touching EW's breast, the Government needed to prove beyond a reasonable doubt (1) that Appellant committed sexual contact on EW by touching her breast with his hand with the intent to gratify his sexual desires; and (2) that Appellant did so without EW's consent. (ROT, Vol. 1, *Charge Sheet*). Because the

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

Government charged Specification 1 as "on divers occasions," the Government also needed to prove beyond a reasonable doubt that Appellant did this to EW on more than one occasion. (Id.).

To obtain a conviction for abusive sexual contact for touching EW's vulva, the Government needed to prove beyond a reasonable doubt (1) that Appellant committed sexual contact on EW by touching her vulva with his thigh with the intent to gratify his sexual desires; and (2) that Appellant did so without EW's consent. (Id.).

The Government proved both convictions beyond a reasonable doubt through EW's testimony, JK's testimony as an outcry witness, and text messages between EW and Appellant.

A. Appellant has not shown a deficiency of proof in the Government's case to trigger a factual sufficiency review.

Appellant has not demonstrated a deficiency of proof in the findings of these specifications. Our sister services have found that a "general disagreement with a verdict" or with a conclusion of a fact finder is insufficient to establish a deficiency of proof. *See* United States v. Valencia, 85 M.J. 529, 535 (N-M Ct. Crim. App. 2024). "[M]inor inconsistencies in the victim['s] testimony" likewise do not "establish a specific deficiency of proof." United States v. Brassfield, 85 M.J. 523, 528 (A. Ct. Crim. App. 2024).

Mistake of Fact as to Consent

First, Appellant disagrees with the verdict because he feels the Government failed to disprove his defense of mistake of fact as to consent for both the breast and vulva touches. However, there was no reasonable mistake of fact in Appellant's case.

EW testified regarding her conversations with Appellant about physical intimacy and that she wanted to get to know him better as a person before they moved into a dating relationship. (R. at 194-195). EW informed Appellant that she did not wish "to move fast" and that she wished to be friends first. (R. at 195). EW had this conversation with Appellant after he kissed

her while she was drunk at karaoke. (R. at 195). Appellant told EW he understood and "respected" what she had said. (R. at 196).

Despite this conversation, Appellant put his hand under EW's shirt and groped her "naked" breast. (R. at 198-199). Appellant contends he was just trying to "advance their relationship" and there was no reason to think EW wouldn't consent to that first touching of her breast. (App. Br. at 7). However, this isn't a case of two people who are "transforming into a dating relationship;" EW had already told Appellant she didn't want to move fast. (R. at 195; App. Br. at 7). Appellant was not starting with a blank slate regarding what EW would and wouldn't be okay with. EW testified that the second day they met socially she explained to him that she wanted to get to know him first before moving into a relationship. (Id.). Appellant cannot reasonably claim a mistake of fact as to consent when EW had previously set boundaries on their relationship. It is also clear that Appellant knew when he first touched EW's breast that she did not want it because, when she pushed his hand away, he defended his actions by saying he "needed certain things" as a man, but wouldn't make her take off her "chastity ring" by pushing for sex. (R. at 199). That is nearly a confession that he understood EW did not want him to touch her breast but was going to anyway because of his sexual needs.

This led to the second unwanted touching. EW told Appellant she was not comfortable with him touching her breast and pushed his hand away. (Id.). On top of that, EW told Appellant that he was "pushing it too far into the line of dating and intimacy." (Id.). This was a direct call back to their earlier conversation wherein EW told Appellant she did not want to move fast and wanted to get to know him before dating him. (R. at 195). Rather than respecting her wishes, Appellant doubled down that he "needed certain things" and moved his hand back to her breast. (Id.). He did not ask her if he could or engage in further discussion. Instead, he put his hand

back on her breast despite her initial verbal protest. Appellant's argument that EW only indicated he need to stop touching her breast "*in that moment*" is unpersuasive and would create an absurd result. (App. Br. at 8). Were the Court to accept that argument, all verbal requests for one person to stop touching another would only apply for a single moment. A lack of verbal resistance does not constitute consent, but verbal resistance is positive evidence of a *lack* of consent. EW was under no obligation, nor should she have been, to articulate "[n]ever do that again" or similar language, or to move away as Appellant contends. (Id.). And in this case, EW *did* imply that her lack of consent was ongoing. She specifically said Appellant was pushing their relationship too far and she wasn't comfortable. (R. at 199). EW's statement had no time constraint on it to make Appellant think that it was okay to touch her again only a few moments later. Appellant had no reasonable mistake of fact as to consent to touch EW's present again in this interaction, and EW's lack of reaction the second time did not retroactively create either consent or a reasonable mistake of fact as to consent as Appellant attempts to rely on now. (Id., App. Br. at 8). There is no "blurred line," as Appellant contends, when there was a clear and unequivocal verbalization of a lack of consent. (App. Br. at 7).

Following this second instance of abusive sexual contact, EW had *another* conversation with Appellant about her boundaries and specifically told him that while making out and cuddling were okay, she wasn't comfortable with him touching her "breast" or "anywhere else." (R. at 200). Despite this, Appellant touched EW's breast on two additional occasions. (Id.). While EW did not provide further details, her other testimony demonstrated that she never consented to *any* of these breast touches, informed Appellant of that nonconsent on at least three separate occasions, and Appellant continued to touch her anyway despite that.

Turning to the vulva touch on 11 May 2022, EW testified that Appellant came into her room uninvited after she ended things with him romantically. (R. at 202-203). Prior to 11 May 2022, EW informed Appellant that she was no longer interested in dating him and wished only to be friends. (R. at 202). When Appellant came into EW's room, he pinned her to the bed and put his thigh between her legs so it was against her vulva. (R. at 203). Considering EW had already told Appellant she no longer had "any interest in dating him," Appellant could have no reasonable mistake of fact to believe EW would consent to him putting his thigh between her legs. (R. at 202). That Appellant was unwilling to accept EW's rejection and preference for JK does not create a reasonable mistake of fact as to consent, even if EW had let him do something similar while they were still getting to know each other. (R. at 231). As the military judge correctly instructed the members, a previous dating relationship by itself does not constitute consent. (R. at 331).

While pinning EW to the bed, Appellant laid down on top of EW so his chest was against her chest and his hands pinned her arms.[3] (Id.). EW turned her face away from Appellant, but otherwise laid there without resisting for about a minute while Appellant disparaged her and JK's relationship. (R. at 203-204, 238). EW then began trying to push Appellant away and told him at least ten times to get off her. (R. at 207). Appellant did not remove his thigh from EW's vulva and attempted to kiss her without her consent. (R. at 203). There is no doubt at that point that Appellant did not have consent to have his thigh against EW's vulva.

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[3] While Appellant was acquitted of these actions in Charge II, Specification 2, the members and this Court could have considered this evidence when determining whether Appellant was guilty of Charge I, Specifications 1 and 2. *See* United States v. Rosario, 76 M.J. 114, 117-118 (C.A.A.F. 2017).

That *Appellant* wanted to move forward in a romantic relationship with EW does not mean he had a reasonable mistake of fact as to consent. It means Appellant chose *his* wants over EW's and touched her without her consent. "The testimony of only one witness may be enough" if "the members find that the witness's testimony is relevant and is sufficiently credible," and the panel could easily believe EW's testimony regarding these touches. United States v. Rodriguez-Rivera, 63 M.J. 372, 383 (C.A.A.F. 2006). EW testified regarding Appellant's actions and made no attempt to hide the occasions where she had allowed him to touch her in a more sexual manner. (R. at 231). Her testimony credibly demonstrated the difference between those occasions and the charged misconduct. Appellant has not shown a deficiency in proof with respect to his defense of mistake of fact as to consent, and this Court should not conduct a factual sufficiency review on that basis.

On Divers Occasions

As explained in the section above, EW testified in detail that Appellant touched her breasts twice while they were sitting together on her bed. (R. at 198). Appellant completed the first touching after EW had already told him she did not want their relationship to "move fast." (R. at 199). Appellant completed the second touching immediately after the first after EW physically removed his hand and told him she was not comfortable and he was pushing the relationship too far. (Id.).

While not described in detail, EW also testified that Appellant touched her breast twice more with his hand on another occasion before 11 May 2022. (R. at 200). These last two touches occurred after a *third* conversation from EW to Appellant that she was not comfortable with him touching her breasts. (R. at 202). There was no deficiency of proof that the Government failed to provide evidence of "divers" instances of Appellant touching EW's breasts

to gratify his sexual desire without her consent because EW had made it clear Appellant never had her consent to touch her breasts and he did so on four occasions anyway. (App. Br. at 10).

Intent to Gratify His Sexual Desires

Appellant further argues that there was a deficiency of proof without respect to his intent while touching EW. This argument also fails considering all the evidence.

EW testified that Appellant said he was touching her breast—even after she told him she wasn't comfortable with it—because "as a man he needed certain things." (R. at 199). Appellant's self-proclaimed need to touch her breast is evidence that the reason he repeatedly did so without her consent was to gratify *his* sexual desire. Appellant specifically mentioned EW's chastity ring, which related to her decision to abstain from sex, and that he would not make her take it off. (Id.). So he was not touching EW to "elicit an emotional response from [her]" or to convince her to be with him instead of JK as Appellant now claims. (App. Br. at 9). There was no mention in EW's testimony of JK or her relationship with JK when Appellant chose to touch EW's breast. Therefore, the evidence and reasonable inferences drawn therefrom strongly supported that Appellant touched EW's breast to gratify *his* sexual desire.

With respect to touching EW's vulva with his thigh, Appellant urges this Court to find that his intent was to arouse her sexual desire rather than gratify his own. (App. Br. at 11-12). Appellant asks this Court to consider the evidence too narrowly and without the context provided by other surrounding circumstances introduced at trial. *See* United States v. Alston, 75 M.J. 875, 886 (A. Ct. Crim. App. 2016) ("surrounding circumstances may establish the necessary intent.") While Appellant's text messages to EW do inform on his mindset at the time of the offense, they do not form the entirety of the evidence of the incident. Two things can be true at the same time: the members could have found that Appellant had multiple intentions while touching EW's vulva

with his thigh. Part of Appellant's intentions *could* have been to arouse EW to convince her that she should be with Appellant romantically and not JK as he stated in a text message to EW. (Pros. Ex. 1). But that does not undo the evidence that Appellant was also touching EW for his own sexual gratification. As he said to her the first time EW told him she did not wish for him to touch her too intimately, Appellant "needed things" as a man. (R. at 199). The Government wasn't required to show that Appellant was physically aroused or grinding an erection against EW for the members to find he was putting his thigh against her vulva to gratify his own sexual desires.

EW testified that Appellant kept his leg between hers against her vulva while he laid down on top of her and tried to forcibly kiss her. (R. at 202-203). EW felt Appellant's "wet" tongue "all over [her] lips" as he tried to force his tongue into her mouth. (R. at 208). Appellant was trying to kiss EW to gratify his own sexual desires, and he had his thigh pressed against her vulva for the same reason. If Appellant had wanted to "recreate" a previous consensual encounter with EW as he now argues (App. Br. at 12), then it would have made sense for him to "grind" or move his thigh against EW's vulva to stimulate her sexually as he was permitted to do on one prior occasion. (R. at 231). Based on human biology, the fact that Appellant did not grind his thigh against EW's vulva supports the Government's specification; he was not concerned with *her* arousal or sexual desires. It is entirely possible that Appellant also hoped EW would "give in" to romantic feelings for him if he persisted, but that is not inconsistent with Appellant's intent to gratify his own sexual desires as well.

Appellant has not shown a deficiency in proof with respect to his intent under either charge of abusive sexual contact, and this Court should not conduct a factual sufficiency review on that basis.

Appellant's Thigh was Against EW's Vulva

Contrary to Appellant's claim, there was evidence that it was his thigh between EW's legs and against her vulva. EW provided specific details of how Appellant's body was aligned with her while Appellant was pinning her to the bed: While on top of her on the bed, Appellant's chest was on EW's chest. (R. at 203). Appellant had his nose on EW's cheek. (Id.). His hands were on each of EW's hands and his forearms were aligned with EW's forearms. (R. at 205). At the same time, Appellant "had his leg in between my legs touching my vulva." (R. at 203). Taking this entire description together, it is apparent from EW's testimony that Appellant was lying down on top of her. With their chest and forearms aligned, it is also apparent that Appellant is not kneeling on top of EW or looming over her. Therefore, it is further apparent that the portion of his leg that would have been against her vulva would have been some part of his thigh, as there was no other way for Appellant to lie down on top of EW and hold that position.

Appellant did not make a showing of a specific deficiency of proof as required by Article 66(d)(2), and this Court should refrain from conducting a factual sufficiency review on that basis.

B. The government provided evidence for each element of the offense demonstrating that Appellant committed both specifications of abusive sexual contact.

If this Court finds that Appellant did allege a deficiency in proof, it still should not grant Appellant relief. As captured in section A above, the government presented evidence beyond a reasonable doubt to show that Appellant committed both specifications of abusive sexual contact against EW.

EW testified that on several occasions, Appellant touched her breast with his hand. (R. at 199-200). Appellant committed these touches after EW had told him numerous times that she

was not comfortable with such a touch. (R. at 195, 202). Appellant justified touching EW anyway because "as a man he needed things," which in context meant sexual needs. (R. at 199).

EW further testified that while holding EW down on a bed with his body and trying to forcibly kiss her, Appellant put his leg between hers and touched her vulva. He did this while she told him repeatedly to get off her and tried to physically force him up. Appellant did this to gratify his sexual desire, which was reflected by pressing his body against EW and kissing her. That he may also have wanted to arouse EW does not negate his intent to gratify his own sexual desire at the same time.

While the Government has a heavy burden of persuasion, it need not prove its case to a mathematical certainty." United States v. Kloh, 27 C.M.R. 403, 406 (C.M.A. 1959). The Government may meet its burden of proof with direct or circumstantial evidence. *See generally* United States v. Maxwell, 38 M.J. 148, 150-51 (C.M.A. 1993). Military jurisprudence has long held that "direct evidence of a crime or its elements is not required for a finding of guilty; circumstantial evidence may suffice." United States v. Hart, 25 M.J. 143, 147 (C.M.A. 1987) (affirming a conviction based on circumstantial evidence); *see also* United States v. Davis, 49 M.J. 79, 83 (C.A.A.F. 1998) (finding sufficient evidence of premeditation based on circumstantial evidence of intent). And the Supreme Court has "never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required." Desert Palace, Inc. v. Costa, 539 U.S. 90, 100 (2003); *see* Holland v. United States, 348 U.S. 121, 140 (1954) ("Circumstantial evidence … is intrinsically no different from testimonial evidence.").

"'[A]ppropriate deference' when a CCA 'weigh[s] the evidence and determine[s] controverted questions of fact'" implies "that the degree of deference will depend on the nature

of the evidence at issue." United States v. Harvey, 85 M.J. 127, 130 (C.A.A.F. 2024). "For example, a CCA might determine that the appropriate deference required for a court-martial's assessment of the testimony of a fact witness, whose credibility was at issue, is high because the CCA judges could not see the witness testify. Id. at 131.

This Court should follow the example offered in Harvey and give high deference to EW's testimony. As the main witness, the members found her to be a credible witness during findings. Contrary to Appellant's argument, EW's testimony alone *can* sustain a guilty conviction so long as each element of the charges are met. Rodriguez-Rivera, 63 M.J. at 383.

However, EW's testimony does not stand alone. The Government introduced text messages from EW and Appellant that corroborate EW's version of events. Appellant acknowledged that EW was "crying" on 11 May 2022, and they discuss EW's assertion that Appellant "sexually assaulted" her. (Pros. Ex. 1). In addition to this was the testimony by JK. JK testified that EW called him to come pick her up from the dorm. (R. at 257). When JK arrived, EW was "distraught" and crying hard enough to make JK believe someone had died. (R. at 258). EW eventually told JK some details about what Appellant had done, which caused JK to discuss SAPR with her. (R. at 260). This evidence corroborates EW's version of events and bolsters her credibility.

Accordingly, this Court should not be clearly convinced that the finding of guilt was against the weight of the evidence and should deny Appellant relief under this assignment of error.

C. Appellant's conviction was legally sufficient.

Finally, Appellant also stated his conviction for touching EW's vulva with his thigh was legally insufficient. The test for legal sufficiency is "whether, after viewing the evidence in the

light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal citations omitted). This test does not require a court to ask whether it believes the evidence established guilt beyond a reasonable doubt, but rather whether any rational factfinder could do so. United States v. Acevedo, 77 M.J. 185, 187 (C.A.A.F. 2017). The term reasonable doubt, however, does not mean that the evidence must be free from conflict. United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017), aff'd 77 M.J. 289 (C.A.A.F. 2018). In resolving questions of legal sufficiency, the Court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution. United States v. Plant, 74 M.J. 297, 301 (C.A.A.F. 2015). The test for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1973)). As a result, the standard for legal sufficiency involves a very low threshold to sustain a conviction. King, 78 M.J. at 221.

Because Appellant's conviction meets the higher burden of factual sufficiency, it is also legally sufficient. Any rational trier of fact could have found the essential elements of abusive sexual contact beyond a reasonable doubt in Appellant's case.

II.

THE RECORD OF TRIAL'S OMISSIONS DO NOT REQUIRE RELIEF OR REMAND FOR CORRECTION.

Additional Facts

On 31 August 2023, the convening authority included a reprimand in the CADAM per Appellant's sentence. (ROT, Vol 1). This reprimand included language regarding Appellant's

"actions in pinning another Airman down against her will by holding her wrists and pushing her onto her bed." (Id.). Appellant was found not guilty of one specification of assault consummated by battery for "unlawfully touch[ing] [EW] on her torso and arms with his hands." (EOJ). This charged stemmed from EW's allegation that Appellant had pinned her to her bed by her wrists. (R. at 203).

On 25 September 2023, trial defense counsel filed a motion for appropriate relief to have this language removed from the reprimand on the grounds that it captured acquitted conduct. (*Def. Motion*, Appendix B). Trial counsel opposed on 2 October 2023 on the basis that these facts came out during EW's testimony and her victim impact statement. (*Gov. Motion*, Appendix C). On 4 October 2023, the military granted trial defense counsel's motion and ordered the language be removed from Appellant's reprimand. (*Ruling*, Appendix D).

In compliance with this order, the convening authority issued a second CADAM on 6 October 2023 with the prohibited language removed. (ROT, Vol 1). The prohibited language was likewise absent from the EOJ. (Id.).

Neither trial defense counsel's motion, trial counsel's response, nor the military judge's ruling were present in the ROT.

Standard of Review

Proper completion of post-trial processing is a question of law subject to de novo review. United States v. Sheffield, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 22 Jul. 2004).

Law and Analysis

Appellate courts understand that records of trial will sometimes be imperfect and therefore review for substantial omissions. United States v. Lashley, 14 M.J. 7, 8 (C.M.A. 1982). A substantial omission renders a record incomplete and raises a presumption of prejudice that the

government must rebut. United States v. Henry, 53 M.J. 108, 1111 (C.A.A.F. 2000) (citing United States v. McCullah, 11 M.J. 234, 237 (C.M.A. 1981)). Insubstantial omissions do not raise a presumption of prejudice or affect the record's characterization as complete. Id. A substantial omission may not be prejudicial if the appellate courts can conduct an informed review. *See* United States v. Simmons, 54 M.J. 883, 887 (N-M. Ct. Crim. App. 2001); *see also* United States v. Morrill, ARMY 20140197, 2016 CCA LEXIS 644, at *4-5 (A. Ct. Crim. App. 31 October 2016) (unpub. op.) (finding that despite the omission from the record of an Article 39(a) session containing the military judge's findings and conclusions related to an R.C.M. 917 motion, the record, as it was, was "adequate to permit informed review by this court and any other reviewing authorities").

However, this Court need not address whether the omission was substantial or insubstantial. Although the record of trial was missing Appendices B-D, this Court can conduct its appellate review because the Government filed a separate motion to attach the missing documents to the record. In United States v. Haynes, this Court completed its Article 66 review of the appellant's court-martial when the United States filed a separate motion to attach missing documents from the record of trial. ACM 40306 (f rev) 2024 14 CCA LEXIS 219, (A.F. Ct. Crim. App. 31 May 2024) (unpub. op.). Therefore, a remand is not necessary or appropriate.

Even if this Court *did not* have access to the documents, this would be considered an insubstantial omission because this Court could still have conducted a meaningful appellate review. *See* Simmons, 54 M.J. at 887. The military judge granted Appellant's motion to have language of his acquitted conduct stricken from his reprimand. (Appendix D). The change to Appellant's reprimand is apparent when comparing the first and second CADAMs, which demonstrate the removal of the prohibited language. (ROT, Vol 1). Despite asserting that the

absence of these documents "affected [Appellant]'s sentence and substantial rights," Appellant made no assignment of error related to this motion or ruling independent of their omission. (App. Br. at 18). In fact, by pointing out that this Court could see the difference between the two CADAMs in the record without the motions or ruling, Appellant has essentially conceded the motions or ruling are not required for this Court to perform an "informed review." (App. Br. at 15); Morrill, 2016 CCA LEXIS 644 at *4-5. Considering Appellant succeeded on his motion, made no subsequent request for relief related to it, and the evidence of the military judge's ruling is present in the second CADAM and EOJ, this Court should not find it could not conduct a meaningful appellate review warranting a remand.

Finally, Appellant argues that this Court should grant him sentencing relief under Article 66(d)(2) by disaffirming his forfeitures and restoring his rank. This Court should deny this assignment of error because Appellant suffered no prejudice and this case does not warrant relief for institutional neglect.

Appellant argues that he should receive relief under United States v. Tardif, 57 M.J. 219 (C.A.A.F. 2002) and that such relief must be "meaningful" under United States v. Pflueger, 65 M.J. 127 (C.A.A.F. 2007). (App. Br. at 19-21). Appellant's argument fails for two reasons: (1) Tardif is no longer controlling caselaw for post-trial delay or errors; and (2) the Court of Appeals for the Armed Forces (CAAF) found "appropriate relief" under Article 66(d)(2) does not need to be "meaningful."

After Appellant filed his brief, CAAF issued its opinion in United States v. Valentin-Andino, 2025 CAAF LEXIS 248 (C.A.A.F. Mar. 31, 2025). CAAF explained that Article 66(d)(2) superseded Tardif and its progeny, which had previously been controlling caselaw with respect to sentencing relief under Article 66(d)(1). Id. at *10 n.4. CAAF clarified that "Article

66(d)(2) is a specific provision incorporated to govern errors of excessive delay in post-trial processing, and we will not undermine its express limitations by grafting onto it our case law concerning more generalized provisions." Id. Tardif is not "codified" in Article 66(d)(2) as Appellant contends. (App. Br. at 20). With CAAF's holding, Appellant is not entitled to any relief under Tardif.

This case also addressed whether "appropriate relief" under Article 66(d)(2) requires "meaningful relief" that has a "tangible benefit." Id. at *2. CAAF found this was not the case, as the plain meaning of "appropriate" only required this Court to ensure any sentencing relief granted under Article 66(d)(2) was "suitable under the facts and circumstances of the case." Id. Therefore, Appellant is not entitled to "meaningful" relief.

Finally, Appellant should not receive relief for the post-trial error under Article 66(d)(2). While the omission of Appendices B-D was error, Appellant was not prejudiced and the error did not rise to a level of institutional neglect at the installation or across the service. United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015).

Taking up prejudice, Appellant succeeded on his motion for relief to have a reference to his acquitted conduct removed from his reprimand. (Appendix D). There was no "right at trial" still at issue from the omitted documents. The lack of prejudice is reflected in the assignments of error, which do not include any reference to harm independent of the documents' absence.

Institutional neglect is not apparent in this case. The missing documents did not cause any delay to Appellant's post-trial processing, nor did they require repeated show cause orders or remands as was the case in United States v. Valentin-Andino, 2024 CCA LEXIS 223 (A.F. Ct. Crim. App. Jun. 7, 2024). Appellant has not demonstrated that his case in particular warrants

relief, let alone tangible relief such as disaffirming his forfeitures or restoring his rank. Therefore, this Court should deny this assignment of error.

III.

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

Additional Facts

Appellant filed a motion for unanimous verdict at trial, which was denied as "moot" under United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2023). (App Ex. VIII; R. at 17).

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. Appellant preserved this issue with a motion at trial and now argues that Anderson was "wrongly decided" and makes this assignment of error to preserve the issue for further appellate review by either CAAF or the Supreme Court. (R. at 16; App. Br. at 23).

In Ramos v. Louisiana, the Supreme Court held that the Sixth Amendment right to a jury includes the right to a unanimous jury. 590 U.S. 83 (2020) 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.

CAAF addressed the applicability of Ramos to courts-martial in United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2023). Our superior Court reaffirmed that servicemembers do not have a Sixth Amendment right to a jury trial. Id. at 295. CAAF 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. CAAF 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. This Court should follow CAAF's binding precedent and deny Appellant's assignment of error.

CONCLUSION

WHEREFORE, this Court should affirm the findings and sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 18 April 2025 via electronic filing.

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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. 3
Airman First Class (E-3) **WON KIM,** United States Air Force, *Appellant.*	)	No. ACM 24007
	)	25 April 2025

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

Airman First Class (A1C) Won Kim, Appellant, pursuant to Rule 18(d) of this Court's Rules of Practice and Procedure, files this Reply to the United States Answer to Assignments of Error (Ans.) (Apr. 18, 2025).[1] In addition to the arguments in his opening brief, filed on March 19, 2025, A1C Kim submits the following additional arguments. The original assignments of error are maintained in this brief even though the Government elected to merge errors I and II.[2]

I.

A1C Kim's conviction for touching EW's breasts on divers occasions is not factually sufficient.

EW, the named victim, consented to the charged conduct: "I didn't really know what to do, so *I just let him do it*." R. at 199 (emphasis added). This triggers factual sufficiency review because A1C Kim identified a weakness in the evidence admitted at trial on the element of consent. *See United States v. Valencia*, 85 M.J. 529, 535 (N-M Ct. Crim. App. 2024) (holding that to trigger factual sufficiency analysis an appellant must identify a weakness in the evidence at trial and

[1] The Government's brief does not have page numbers. Any citations to the Government's brief are based on the Index, Ans. at ii-iii, and manual pagination.

[2] The Government elected to merge Issues I and II for "ease of understanding." Ans. at 12. The issues are broken apart here, as in the original brief, to emphasize the deficiencies of proof A1C Kim identified.

explain why the evidence—or lack thereof—contradicts a finding of guilt). Specifically, A1C Kim highlighted EW's testimony that she *let him touch her breasts*, or, at minimum in light of her testimony, the Government failed to prove mistake of fact as to consent beyond a reasonable doubt. R. at 199.

The root of that deficiency is EW herself. Contrary to the Government's expansive assertion that she set out "clear and unequivocal verbalization of lack of consent," Ans. at 18, EW said otherwise in both word and act. EW said her physical relationship with A1C Kim had "blurred" lines. R. at 202, 231, 241. And while EW implied that she did not consent to A1C Kim touching her breast the first time, remarking, "I just let it go because he didn't listen the first time, so I didn't really know what to do, so I just let him do it," R. at 199, such acquiescence is a far cry from "clear and unequivocal" lack of consent. Furthermore, her description is emblematic of her saying one thing and doing the complete opposite. In other areas of the consensual sexual relationship between A1C Kim and EW, she said "no sex" and no "sexual touching, like my vulva or any area like that," R. at 200, but EW did not abide by this line either. She admitted she let A1C Kim touch her vaginal area with his leg and grind on her vaginal area when they made out. R. at 231-32 (testifying A1C Kim consensually touched her vaginal area).

EW consented to A1C Kim making out with her, cuddling with her in bed, grinding on her, and touching her vaginal area. The lines blurred by her words and conduct, corresponding with consent to a variety of sexual activity, demonstrates this case is rife with mistake of fact as to consent. The well-known adage, "Do as I say, not as I do," exists for hypocritical or confusing situations as this; EW was not clear about the sexual boundaries in the relationship and she acted against any boundaries she did set. Contrary to the Government's presentation of EW's aspirational boundaries and chastity, *see* Ans. at 17, 21 (referencing her chastity ring and her

decision to "abstain from sex"), EW gave A1C Kim mixed signals about what types of physical touching was allowed in their relationship. *See* R. at 202, 231, 241-42 (referencing the "blurred lines" of the relationship).

Prior to the "first time" A1C Kim touched EW's breast, there was no indication that part of EW's body was untouchable in the context of this relationship. Even her vaginal area did not fall into that category, by her own actions. But then when he touched her breast, his contact started a conversation. EW moved his hand from her breast and she said that made her uncomfortable. R. at 199. In that moment, she said he was "pushing it too far into the line of like dating and intimacy." *Id*. But that does not overcome the mistake of fact as to consent for the first touch in the full context of this relationship when previous conversations did not cover breast touching.

Then, after the first breast touch, and after A1C Kim and EW talked, EW "let" A1C Kim touch her breast again. *Id*. The Government minimizes this conversation and EW's admission. Ans. at 17-18; *see also* at Ans. at 4 (showing the Government excises the part of the quote that EW said "I just let him do it"). He advocates for himself, and she "*let him*" touch her again. R. at 199 (emphasis added). This was consensual or, at the very least, A1C Kim had a reasonable mistake of fact as to consent. The law states that lack of physical or verbal resistance is not proof of consent. Article 120(g)(7)(A), UCMJ. This does not mean the reverse is true and that consent can *only* happen when words are involved, as the Government suggests. Ans. at 17 ("He did not ask her if he could or engage in further discussion."). Consent and mistake of fact as to consent are evaluated in context and all the surrounding circumstances. *United States v. Rodela*, 82 M.J. 521, 527 (A.F. Ct. Crim. App. 2021). Here, based on the complete context of this newly forming relationship with unclear boundaries, this Court should find the evidence insufficient because the Government failed to disprove mistake of fact as to consent beyond a reasonable doubt.

Furthermore, a lack of proof exists when the only evidence of "divers" conduct is a single vague sentence: "[H]e touched my breast in a similar manner two other times." R. at 200. That is all EW said. This sentence lacks all context and poses a number of questions. Was the sequence of events the same, the manner, the means, the intent? Were there conversations? And, significantly, did she just *let him do it—again?* Her testimony on divers is not enough for proof beyond a reasonable doubt when the first two instances involved unclear statements of consent and inconsistent or aspirational boundary lines. *See* R. at 202, 231, 241-42 (referencing the "blurred lines" of the relationship). Overall, EW's testimony is substantially inconsistent on the question of consent and mistake of fact as to consent. The Government did not prove A1C Kim's guilt beyond a reasonable doubt through the testimony it elicited through EW.

WHEREFORE, A1C Kim requests that this Court set aside the finding of guilty as to Specification 1 of Charge I, dismiss Specification 1 of Charge I with prejudice, and set aside the sentence.

II.

A1C Kim's conviction for touching EW's vulva with his thigh is legally and factually insufficient because the Government failed to prove what it specifically charged, to include intent.

A1C Kim identified two deficiencies of proof on this offense that go hand-in-hand with the legal sufficiency challenge. First, the Government failed to prove A1C Kim touched EW's vulva with anything more specific than just his "leg." This means the Government failed to prove he used his *thigh*, as charged. Charge Sheet. Second, the Government failed to prove A1C Kim touched EW's vulva with his leg to gratify his sexual desire, as charged. Charge Sheet. Rather, the evidence merely shows A1C Kim touched EW's vulva for some other purpose, likely to gratify

her sexual desire as a means to convince her to stay with A1C Kim. Pros. Ex. 1 at 4. Therefore, the Government failed to prove the intent it charged as well.

Throughout its brief, the Government takes liberty with the term "thigh," despite no witness ever identifying A1C Kim's "thigh" being the part of his leg that touched EW's vulva. *Compare* Ans. at 6 (describing in the fact section that A1C Kim used his "thigh" (citing R. at 232)), *and* Ans. at 19 (using the word "thigh" three times (citing R. at 203)), *with* R. at 203 ("[H]is leg in between my legs touching my vulva . . . ."), *and* R. at 232 (showing the word "leg" was used). The Government controls the charge sheet and "[i]t is the Government's responsibility to determine what offense to bring against an accused. Aware of the evidence in its possession, the Government is presumably cognizant of which offenses are supported by the evidence and which are not." *United States v. Morton*, 69 M.J. 12, 16 (C.A.A.F. 2010). Here, the Government could have elicited the correct evidence or broadly charged the body part at issue by using the word "leg," but it did not. Left in this situation, this Court cannot affirm the abusive sexual contact specification.

Even if there were evidence that A1C Kim's "thigh" touched EW's vulva, the Government still failed to prove the intent that it charged: intent to gratify A1C Kim's sexual desire. The text message from A1C Kim admits his intent: "I put my leg between your legs in hopes of making you give into your feelings., [sic] which I assumed was still an active interest in me." Pros. Ex. 1 at 4. While A1C Kim *could* have more than one intent, as the Government suggests, Ans. at 21, there is *no evidence* that he intended to gratify *his* sexual desire. There is no testimony he was erect, or that EW could feel his groin through her clothes. In fact, if A1C Kim had said nothing in text message, the leg-to-vulva contact A1C Kim made during his attempt to convince EW to be with him rather than SSgt JK (the man she had long been interested in and was leaving A1C Kim to pursue) would seem accidental. The entire situation that night was not about A1C Kim "trying

to kiss EW to gratify his own sexual desires," as the Government argues. Ans. at 22. Rather, it was a misguided attempt to get EW to stay with him; A1C Kim was upset that she no longer wanted to be with him and that he was trying to convince her for minutes on end that she should not leave him for SSgt JK. R. at 203-04; *see* R. at 247 (discussing A1C Kim generally being upset about EW wanting to be with SSgt JK rather than him).

This Court is charged with weighing the evidence and is allowed to give different evidence different weight. *United States v. Harvey*, No. 23-0239, 2024 CAAF LEXIS 502, at *8, 11 (C.A.A.F. Sep. 6, 2024). Unlike in most cases, there is clear evidence of intent here: A1C Kim *admitted* his intent in written form. Pros. Ex. 1 at 4. Furthermore, all of EW's testimony supports A1C Kim's admitted intent. The Government's argument on appeal is untethered from the evidence; it is pure conjecture. The *evidence* of intent is clear from EW's testimony, the surrounding circumstances of the breakup, and A1C Kim's statements shortly after the incident. This intent to elicit a response from EW and to convince her to stay with him is not something A1C Kim just "now claims." Ans. at 21 (citing Br. on Behalf of Appellant at 9). This was his intent during and right after the incident (before any investigation, too), and which was long before trial or this appeal. Pros. Ex. 1 at 4. Perhaps realizing the weakness of its argument at trial, the Government now adjusts its theory on appeal: apparently a lack of grinding proves A1C Kim was touching EW to gratify himself. Ans. at 22. This is nonsensical while also contradicting the Government's theory at trial: the fear of losing EW to SSgt JK and convincing EW "[she] want[s] what he wants." R. at 344, 346. At trial, the Government never argued A1C Kim did *anything* to "gratify" his sexual desire. *See* R. at 330 (showing the only time the word "gratify" is used is during instructions). Just like at trial, the Government has failed to demonstrate the charged intent and, as such, the Government failed to prove the crime that it charged.

As a final matter, this Court can affirm a lesser included offense of assault if it finds the specific intent element was not met but that A1C Kim used his thigh. There is no denying EW *thought* she was sexually assaulted that night. R. at 236, 228-29, 250. But her use of that term is limited to being kissed without her consent. The Government's use of SSgt JK as an outcry witness and her emotional reaction following the situation have little bearing on the leg touching incident. Ans. at 25. The assault in Charge II, Specification 1, happened (A1C Kim attempting to kiss EW without her consent). But a *sexual* assault in the form of abusive sexual contact did not because, at minimum, the Government failed to prove the charged intent. Should the Court agree, this Court can affirm an assault as a lesser included offense. Article 66(d)(1)(B)(iii), UCMJ; *United States v. Lubasky*, 68 M.J. 260, 265 (citing Article 59(b), UCMJ).

WHEREFORE, A1C Kim requests that this Court set aside the finding of guilty as to Specification 2 of Charge I, dismiss Specification 2 of Charge I with prejudice, and set aside the sentence. Alternatively, the Court should affirm the lesser included offense of assault consummated by battery.

III.

A1C Kim's record of trial is incomplete where it is missing post-trial motions and a ruling that affected the convening authority's action and reprimand. This error requires remand for correction or, alternatively, sentencing relief.

1. Recent precedent interpreting Article 66(d)(2), UCMJ, shows this Court has authority to provide A1C Kim appropriate relief for missing post-trial filings.

After A1C Kim submitted his brief, the Court of Appeals for the Armed Forces (CAAF) decided *United States v. Valentin-Andino*, No. 24-0208, 2025 CAAF LEXIS 248 (C.A.A.F. Mar. 31, 2025). There, the CAAF held this Court did not err by granting relief for excessive post-trial delay under Article 66(d)(2), UCMJ, where the delay was unreasonable and there was institutional

neglect in post-trial processing, specifically incomplete records. In analyzing the text of Article 66(d)(2), UCMJ, the CAAF made several points clear:

1. Courts must presume what Congress says in a statute is what it means there and means in a statute what it says there. *Id*. at *9.

2. Courts will not read into statutes "rule[s] out of thin air." *Id*. at *11.

3. *Tardif* [3] and its progeny have been superseded by Article 66(d)(2), UCMJ. *Id*. at *10 n.4.

These three critical holdings make the relief for the post-trial processing error in A1C Kim's case clear. A1C Kim is entitled to appropriate relief due to the Government's admitted error that the post-trial motions and accompanying ruling were not in the record of trial. Ans. at 30 ("[T]he omission of Appendices B-D was error."). Nothing more must be shown under Article 66(d)(2), UCMJ, to trigger this Court's discretionary power. *United States v. Williams*, 85 M.J. 121, 126-27 (C.A.A.F. 2024). Since record incompleteness continues to happen "at an alarming frequency in the Air Force," this Court should award appropriate relief in the form of disaffirming the portion of A1C Kim's sentence that calls for forfeitures and the reduction in rank to E-1. *United States v. Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *17 (A.F. Ct. Crim. App. June 7, 2024); *see* Br. on Behalf of Appellant at 21-22 n.4 (citing a plethora of cases with incomplete records).

A prejudice analysis is not required in assessing whether appropriate relief should be awarded under Article 66(d)(2), UCMJ, because the statute does not require a prejudice analysis. The language is clear: if the appellant demonstrates a post-trial error, this Court may award appropriate relief. Article 66(d)(2), UCMJ. That is all. The Government spends time arguing there is no prejudice and that is why A1C Kim does not deserve appropriate relief under Article 66(d)(2),

[3] *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002).

UCMJ. Ans. at 29-30. Certainly, whether to award relief under Article 66(d)(2), UCMJ, is a different analysis than whether there is a substantial omission in the record requiring remand. *See* Br. on Behalf of Appellant at 16-18 (acknowledging prejudice is required for remanding for record completion). A finding of prejudice is required for the latter, but not for Article 66(d)(2), UCMJ, by the plain language of the statute. Reading in a requirement for prejudice would contravene Congress's express language and requirement. Article 66(d)(2), UCMJ; *Valentin-Andino*, No. 24-0208, 2025 CAAF LEXIS 248, at *9, *11.

Not requiring a finding of prejudice is also consistent with Article 59, UCMJ, for three reasons: (1) the plain language; (2) Congress is presumed to legislate knowing what the law is; and (3) a specific provision of a statute trumps a general one. The plain language of Article 59(a), UCMJ, clearly applies to Article 66(d)(1)(A), UCMJ, rather than Article 66(d)(2), UCMJ. Article 59(a), UCMJ, discusses holding a finding or sentence "incorrect on the ground of an error of law," which matches with the language of "correct in law" under Article 66(d)(1)(A), UCMJ. Article 66(d)(2), UCMJ, is about an entirely different topic, providing "appropriate relief" for an error "after the judgment was entered into the record." *See also Williams*, 85 M.J. at 125-27 (differentiating between subsections (1) and (2) under Article 66(d), UCMJ). Furthermore, Congress is presumed to know what the law is when it enacts legislation. *Miles v. Apex Marine Corp*., 498 U.S. 19, 32 (1990) (citing *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979)). Had it required prejudice as a predicate to awarding appropriate relief in Article 66(d)(2), UCMJ, it would have said so or otherwise amended Article 59(a), UCMJ, to cover Article 66(d)(2), UCMJ.

Finally, the general requirement of prejudice in Article 59(a), UCMJ, does not trump the specific statutory authorization for this Court to award appropriate relief when an appellant

demonstrates an error in post-trial processing. *See California ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1013 (9th Cir. 2000) (citing *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524 (1989) (stating that a general statutory rule does not govern unless there is no more specific rule). As the CAAF provided in *Valentin-Andino*, "Article 66(d)(2) is a specific provision incorporated to govern errors of excessive delay in post-trial processing, and we will not undermine its express limitations by grafting onto it our case law concerning more generalized provisions." *Valentin-Andino*, No. 24-0208, 2025 CAAF LEXIS 248, at *10 n.4. Article 66(d)(2), UCMJ, is not to be nullified by a requirement of prejudice through a more general provision of the UCMJ. An appellant is only required to demonstrate error. Article 66(d)(2), UCMJ. Thereafter, this Court may provide appropriate relief. *Id.*

Additionally, the CAAF affirmed this Court's decision to award appropriate relief even when this Court found no prejudice in *Valentin-Andino*. No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *16. Instead, this Court provided appropriate relief based on the length of the delay and the Government's gross indifference to post-trial processing and institutional neglect concerning incomplete records. The CAAF did not question this Court's award of appropriate relief under those circumstances.

A1C Kim's is another example of institutional neglect on record completeness. As the Government concedes, "[T]he omission of Appendices B-D [(the post-trial motions and ruling)] was error." Ans. at 30. The post-trial motions at issue here were omitted from the record of trial, along with the ruling stamped as an "Appellate Exhibit." A1C Kim's record of trial is another example of the "systemic" institutional neglect towards creating *complete* records of trial. *Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *17. He should be provided

appropriate relief through disaffirming the portion of his sentence that calls for forfeitures and the reduction in rank to E-1.

2. The Government's motion to attach is insufficient to make the record complete, so remand is required.

As this Court has repeatedly held, attachments to the appellate record do not complete the record. *See, e.g.*, *United States v. Welsh*, No. ACM S32719, 2022 CCA LEXIS 631, at *2 (A.F. Ct. Crim. App. Oct. 26, 2022) ("We acknowledge the motion to attach was granted, but we do not agree that this cures the defect without the exhibit actually being incorporated into the [record of trial]."); *United States v. Garcia-Arcos*, No. ACM 40009, 2022 CCA LEXIS 339, at *6 (A.F. Ct. Crim. App. Jun. 9, 2022) ("[W]e do not consider the attachments to the appellate record as a means to complete the record; we assume our granting both motions does not change the fact that the record, as certified and submitted to the court, is incomplete."); *United States v. Mardis*, No. ACM 39980, 2022 CCA LEXIS 10, at *7 (A.F. Ct. Crim. App. Jan. 6, 2022) ("[W]e considered the attachments to trial counsel's declaration to determine whether the omission of the exhibits from the record of trial was substantial . . . we did not consider the exhibits as a means to complete the record."). Indeed, in both *Welsh* and *Mardis*, this Court remanded the record for correction after the Government attached missing materials to the appellate records because those attachments did not cure the defects and incorporate the materials into the records. 2022 CCA LEXIS 631, at *2–3; 2022 CCA LEXIS 10, at *4, 8–9.

Nevertheless, the Government here attempts to cure what is ultimately a record of trial omission by attaching missing materials to the appellate record. Motion to Attach Documents. The Government admits, "[T]he omission of Appendices B-D was error." Ans. at 30. While not saying so explicitly, the Government recognizes these filings should have been appellate exhibits included in the record. The Government was required to include appellate exhibits in the record.

Rule for Courts-Martial 1112(b)(5). Here, the Government failed to submit a complete record. Attaching the materials in the Government's motion will not correct the substantial omission from A1C Kim's record of trial because attaching those materials does not incorporate them into the record. *Welsh*, 2022 CCA LEXIS 631, at *2. Rather, granting the Government's motion would leave the Court facing the same situation as in *Welsh* and *Mardis*: still needing to return the record to the military judge to properly correct it. Thus, at this stage, this error has two results. If the omission is substantial, remand is required. If the omission is not substantial and no remand occurs, this error results in appropriate relief under Article 66(d)(2), UCMJ, because the omission is an error that occurred after the entry of judgment and warrants relief due to systemic record completeness errors.

WHEREFORE, A1C Kim requests that this Court remand his record of trial for correction or provide appropriate relief under Article 66(d)(2), UCMJ.

Respectfully submitted,

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Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 25 April 2025.

Respectfully submitted,

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24007**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Won KIM	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 18 April 2025, the Government submitted a motion to attach four documents to the record, including a declaration from trial counsel and three documents evidently missing from the record of trial: a post-trial defense motion for appropriate relief, a government response to that motion, and the military judge's ruling on the motion.

On 25 April 2025, Appellant opposed the motion to attach on the grounds that attaching the documents would not make the record complete, and requested this court remand the record for correction.

Having considered the Government's motion, the Appellant's opposition, and the applicable law, we find it appropriate to grant the motion to attach. However, we defer a decision on whether to remand the record for correction until the court has had additional opportunity to review the record.

Accordingly, it is by the court on this 28th day of April, 2025,

ORDERED:

The Government's Motion to Attach dated 18 April 2025 is **GRANTED**.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Chief Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	MOTION TO ATTACH
Appellee,	)	DOCUMENTS
	)	
v.	)	Before Panel No. 3
	)	
Airman First Class (E-3)	)	No. ACM 24007
WON KIM	)	
United States Air Force	)	18 April 2025
Appellant.	)	

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 - Declaration of Capt Vanessa Jacobsen, dated 10 April 2025 (1 page)**
- **Appendix B – Defense Motion for Appropriate Relief: Correction to Action Memorandum, dated 25 September 2023 (13 pages)**
- **Appendix C – United States Response to Defense Motion for Appropriate Relief: Correction to Action Memorandum, dated 2 October 2023 (8 pages)**
- **Appendix D – Ruling: Defense Motion for Appropriate Relief: Correction to Action Memorandum, dated 4 October 2023 (3 pages)**

The attached declaration and documents are responsive to Appellant's allegation of missing post-trial documents in Issue III of Appellant's Assignments of Error, dated 19 March 2025.

Capt Vanessa Jacobsen is currently a Victims' Counsel at Join Base Langley-Eustis, Virginia. She was detailed trial counsel in the above captioned case at Osan Air Base, Republic of Korea. (R. at 3). She reviewed her files and located copies of trial defense counsel's motion, the response she filed as trial counsel, and the military judge's ruling. She then prepared the attached declaration to authenticate the copies.

Our superior Court has held that 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)).

Appendices B-D to this filing provide the missing post-trial motions from this case. The issue of an incomplete record of trial is raised by materials in the record, and the attached documents are relevant and necessary to address whether the record of trial is complete. This Court should accept this filing rather than remanding the case for correction. Capt Jacobsen's declaration should satisfy this Court that the attached documents are what they purport to be.

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

[redacted]
REGINA HENENLOTTER, Maj, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
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(240) 612-4800

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 18 April 2025.

REGINA HENENLOTTER, Maj, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S RESPONSE TO MOTION TO ATTACH DOCUMENTS**
v.	)	
	)	Before Panel No. 3
Airman First Class (E-3), **WON KIM,** United States Air Force, *Appellant.*	)	No. ACM 24007
	)	25 April 2025

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, Airman First Class (A1C) Won Kim, Appellant, responds to the Government's Motion to Attach Documents, dated 18 April 2025. Appellant opposes this motion and requests this Court deny it because attaching these post-trial filings to the record of trial (ROT) does not make the record complete.

Facts

On March 19, 2025, Appellant filed his initial assignments of error with this Court. Br. on Behalf of Appellant. One of the errors involved record incompleteness. *Id*. at 38-39. Specifically, a defense post-trial motion, Government post-trial motion response, and the military judge's ruling were omitted from the record of trial. *Id*.

On April 18, 2025, the Government filed its answer brief and moved to attach the two motions and the ruling,[1] citing *United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020). United States Answer to Assignments of Error (Ans.); Motion to Attach Documents at 2. The Government conceded omission of these post-trial filings was error. Ans. at 30.

[1] The Government also moved to attach an affidavit to "satisfy this Court that the attached documents are what they purport to be." Motion to Attach Documents at 2.

Law and Analysis

As this Court has repeatedly held, attachments to the appellate record do not complete the record. *See United States v. Welsh*, No. ACM S32719, 2022 CCA LEXIS 631, at *2 (A.F. Ct. Crim. App. Oct. 26, 2022) ("We acknowledge the motion to attach was granted, but we do not agree that this cures the defect without the exhibit actually being incorporated into the ROT."); *United States v. Garcia-Arcos*, No. ACM 40009, 2022 CCA LEXIS 339, at *6 (A.F. Ct. Crim. App. Jun. 9, 2022) ("[W]e do not consider the attachments to the appellate record as a means to complete the record; we assume our granting both motions does not change the fact that the record, as certified and submitted to the court, is incomplete."); *United States v. Mardis*, No. ACM 39980, 2022 CCA LEXIS 10, at *7 (A.F. Ct. Crim. App. Jan. 6, 2022) ("[W]e considered the attachments to trial counsel's declaration to determine whether the omission of the exhibits from the record of trial was substantial . . . we did not consider the exhibits as a means to complete the record."). Indeed, in both *Welsh* and *Mardis*, this Court remanded the ROTs for correction after the Government attached missing materials to the appellate records because those attachments did not cure the defects. 2022 CCA LEXIS 631, at *2–3; 2022 CCA LEXIS 10, at *4, 8–9.

Nevertheless, the Government here attempts to cure what is ultimately a ROT omission by attaching missing materials to the appellate record. Motion to Attach Documents. The Government admits, "[T]he omission of Appendices B-D was error." Ans. at 30. While not saying so explicitly, the Government recognizes these filings should have been appellate exhibits included in the record. The Government was required to include appellate exhibits in the record. Rule for Courts-Martial (RC.M.) 1112(b)(5). Here, the Government failed to submit a complete record. Attaching the materials in the Government's motion will not correct the substantial

omission from A1C Kim's ROT because attaching those materials does not incorporate them into the ROT. *Welsh*, 2022 CCA LEXIS 631, at *2. Rather, granting the Government's motion would leave the Court facing the same situation as in *Welsh* and *Mardis*: still needing to return the ROT to the military judge to properly correct it.

At this stage, if this Court finds the omission of these post-trial filings to be a substantial omission, remand is the only recourse. This is because the Rules for Courts-Martial contemplate only one method for correcting a ROT found to be incomplete after it has reached the appellate court: the incomplete ROT may be returned to the military judge for correction. R.C.M. 1112(d)(2); *see also, e.g., Welsh*, 2022 CCA LEXIS 631, at *2-3 (explaining R.C.M. 1112(d) provides for correction of a record of trial found to be incomplete or defective after authentication and returning the ROT for correction); *Mardis*, 2022 CCA LEXIS 10, at *9-10. R.C.M. 1112(d)(2) specifically states, "A superior competent authority may return a [ROT] to the military judge for correction under this rule." This rule says nothing about correcting a ROT by attaching materials to the appellate record. *Id.* Moreover, the rule further states, "The military judge *shall* give notice of the proposed correction to all parties and permit them to examine and respond to the proposed correction." *Id.* (emphasis added). Attaching materials to the appellate record in an attempt to correct it would neglect this required step in the correction process. Appellant's ROT should be corrected in accordance with the procedures set forth in R.C.M. 1112(d)(2), which necessitates remanding the ROT to the military judge to correct it.

This Court should deny the Government's Motion to Attach Documents because it attempts to improperly correct Appellant's ROT in a manner that is unknown to R.C.M. 1112 and that this Court has repeatedly found does not cure defects in ROTs. *Welsh*, 2022 CCA LEXIS 631, at *2; *Mardis*, 2022 CCA LEXIS 10, at *7. The Court should remand the ROT to the

military judge to correct it in accordance with R.C.M. 1112(d)(2), properly curing the defect and allowing for full and fair consideration of the proposed attachments after the military judge has certified the record.

WHEREFORE, Appellant respectfully requests this Court deny the Government's Motion to Attach Documents and remand Appellant's record of trial to the Chief Trial Judge, Air Force Trial Judiciary, for correction of the record of trial.

Respectfully submitted,

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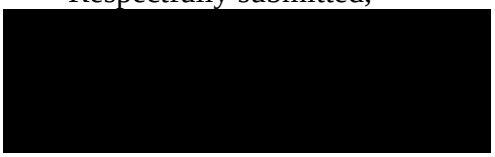
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 25 April 2025.

Respectfully submitted,



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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24007**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Won KIM	)	**PANEL CHANGE**
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 6th day of May, 2025,

ORDERED:

The record of trial in the above styled matter is withdrawn from Panel 3 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
GRUEN, PATRICIA A., Colonel, Appellate Military Judge
WARREN, CHARLES G., Lieutenant Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Chief Commissioner

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24007**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Won KIM	)	**PANEL CHANGE**
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 3d day of July, 2025,

ORDERED:

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

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
GRUEN, PATRICIA A., Colonel, Appellate Military Judge
KEARLEY, CYNTHIA T., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal