IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**OUT OF TIME MOTION FOR**
Appellee	)	**ENLARGEMENT OF TIME (FIRST)**
	)	
v.	)	Before Panel No. 2
	)	
Senior Airman (E-4)	)	No. ACM 40486
ADAM J. SHERMAN	)	
United States Air Force	)	21 August 2023
Appellant	)	

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

Pursuant to Rules 18.5 and 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby withdraws his previously filed Motion for an Enlargement of Time (FIRST), dated 18 August 2023, and moves for an out of time enlargement of time to file an Assignments of Error (AOE). The previously filed motion had the incorrect date of docketing as 27 June 2023. Appellant requests an enlargement for a period of 60 days, which will end on **26 October 2023**. The record of trial was docketed with this Court on 28 June 2023. From the date of docketing to the present date, 54 days have elapsed. On the date requested, 120 days will have elapsed.

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

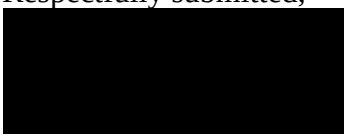
Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: heather.caine.1@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 21 August 2023.

Respectfully submitted,



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21 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ADAM J. SHERMAN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME – OUT OF TIME ACM 40486 Panel No. 2

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

PETE FERRELL, Lt Col, USAF
Director of Operations
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 2
Senior Airman (E-4) **ADAM J. SHERMAN** United States Air Force *Appellant*	)	No. ACM 40486 19 October 2023

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

Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **25 November 2023**. The record of trial was docketed with this Court on 28 June 2023. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

On 15 March 2023, at a general court-martial convened at Beale Air Force Base, California, Appellant was found guilty, contrary to his pleas, of one charge and one specification of Article 120b, Uniform Code of Military Justice (UCMJ); and was found not guilty, consistent with his pleas, of one specification of Article 120b, UCMJ. Entry of Judgment. The military judge sentenced Appellant to a reprimand, reduction to the rank of E-1, 13 years' confinement, and a dishonorable discharge. *Id.* Appellant was given one day of judicially ordered credit. *Id.* The convening authority deferred all of the automatic forfeitures from 30 March 2023 until the date the military judge signed the entry of judgment, which was 23 May 2023. *Id.*; Convening Authority Decision on Action. The convening authority also

waived all automatic forfeitures for a period of six months to be paid to Appellant's spouse for the benefit of his dependents. *Id.*

The trial transcript is 469 pages long and the record of trial is comprised of five volumes containing 17 prosecution exhibits, 12 defense exhibits, 25 appellate exhibits, and one court exhibit. Appellant is currently confined.

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

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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Office: (240) 612-4770
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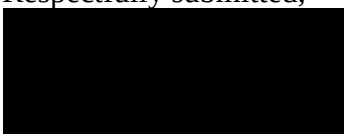
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 19 October 2023.

Respectfully submitted,



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23 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ADAM J. SHERMAN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40486 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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 *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
Senior Airman (E-4) **ADAM J. SHERMAN** United States Air Force *Appellant*	)	No. ACM 40486
	)	17 November 2023

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

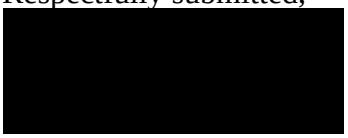
Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **25 December 2023**. The record of trial was docketed with this Court on 28 June 2023. From the date of docketing to the present date, 142 days have elapsed. On the date requested, 180 days will have elapsed.

On 15 March 2023, at a general court-martial convened at Beale Air Force Base, California, Appellant was found guilty, contrary to his pleas, of one charge and one specification of Article 120b, Uniform Code of Military Justice (UCMJ); and was found not guilty, consistent with his pleas, of one specification of Article 120b, UCMJ. Entry of Judgment. The military judge sentenced Appellant to a reprimand, reduction to the rank of E-1, 13 years' confinement, and a dishonorable discharge. *Id.* Appellant was given one day of judicially ordered credit. *Id.* The convening authority deferred all of the automatic forfeitures from 30 March 2023 until the date the military judge signed the entry of judgment, which was 23 May 2023. *Id.*; Convening Authority Decision on Action. The convening authority also waived all automatic forfeitures for a period of six months to be paid to his spouse for the benefit of his dependents. *Id.*

The trial transcript is 469 pages long and the record of trial is comprised of five volumes containing 17 prosecution exhibits, 12 defense exhibits, 25 appellate exhibits, and one court exhibit. Appellant is currently confined.

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

Respectfully submitted,



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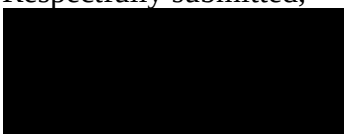
Respectfully submitted,



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21 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ADAM J. SHERMAN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40486 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]
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 *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 2
Senior Airman (E-4) **ADAM J. SHERMAN** United States Air Force *Appellant*	)	No. ACM 40486
	)	18 December 2023

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **24 January 2024**. The record of trial was docketed with this Court on 28 June 2023. From the date of docketing to the present date, 173 days have elapsed. On the date requested, 210 days will have elapsed.

On 15 March 2023, at a general court-martial convened at Beale Air Force Base, California, Appellant was found guilty, contrary to his pleas, of one charge and one specification of Article 120b, Uniform Code of Military Justice (UCMJ); and was found not guilty, consistent with his pleas, of one specification of Article 120b, UCMJ. Entry of Judgment. The military judge sentenced Appellant to a reprimand, reduction to the rank of E-1, 13 years' confinement, and a dishonorable discharge. *Id.* Appellant was given one day of judicially ordered credit. *Id.* The convening authority deferred all of the automatic forfeitures from 30 March 2023 until the date the military judge signed the entry of judgment, which was 23 May 2023. *Id.*; Convening Authority Decision on Action. The convening authority also waived all automatic forfeitures for a period of six months to be paid to his spouse for the benefit of his dependents. *Id.*

The trial transcript is 469 pages long and the record of trial is comprised of five volumes containing 17 prosecution exhibits, 12 defense exhibits, 25 appellate exhibits, and one court exhibit. Appellant is currently confined.

Undersigned counsel is currently assigned 19 cases, with nine initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 3 in this case, undersigned counsel has filed the Petition for Writ of Certiorari in *United States v. Smith* (ACM 36785) with the Supreme Court of the United States (SCOTUS). Undersigned counsel also had three days of prescheduled leave after the Thanksgiving holiday and spent around 18 hours preparing for and assisting in moots.

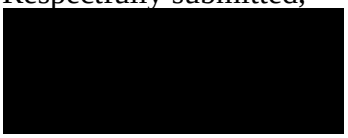
Undersigned counsel intends to file the Petition and Supplement to the Petition for Grant of Review in *United States v. Dugan* (ACM 40320) with the Court of Appeals for the Armed Forces (CAAF) this week. Then, this is my second priority case before this Court with the following being the first:

1. *United States v. Hennessy* (ACM 40439): The trial transcript is 1,190 pages long and the record of trial is comprised of nine volumes containing seven prosecution exhibits, 11 defense exhibits, 54 appellate exhibits, and three court exhibits. Undersigned counsel has reviewed part of the sealed material in this case and will complete review of the sealed material this week. Undersigned counsel will then continue review of the rest of the record of trial.

Appellant was advised of his right to a timely 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.

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

Respectfully submitted,



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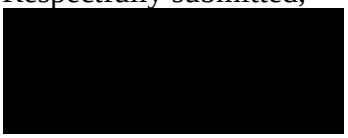
Respectfully submitted,



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20 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ADAM J. SHERMAN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40486 Panel No. 2

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

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

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

[redacted]

JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

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

JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 2
Senior Airman (E-4) **ADAM J. SHERMAN** United States Air Force *Appellant*	)	No. ACM 40486 17 January 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **23 February 2024**. The record of trial was docketed with this Court on 28 June 2023. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 15 March 2023, at a general court-martial convened at Beale Air Force Base, California, Appellant was found guilty, contrary to his pleas, of one charge and one specification of Article 120b, Uniform Code of Military Justice (UCMJ); and was found not guilty, consistent with his pleas, of one specification of Article 120b, UCMJ. Entry of Judgment. The military judge sentenced Appellant to a reprimand, reduction to the rank of E-1, 13 years' confinement, and a dishonorable discharge. *Id.* Appellant was given one day of judicially ordered credit. *Id.* The convening authority deferred all of the automatic forfeitures from 30 March 2023 until the date the military judge signed the entry of judgment, which was 23 May 2023. *Id.*; Convening Authority Decision on Action. The convening authority also waived all automatic forfeitures for a period of six months to be paid to his spouse for the benefit of his dependents. *Id.*

The trial transcript is 469 pages long and the record of trial is comprised of five volumes containing 17 prosecution exhibits, 12 defense exhibits, 25 appellate exhibits, and one court exhibit. Appellant is currently confined.

Undersigned counsel is currently assigned 21 cases, with 11 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 4 in this case, undersigned counsel filed the Petition and Supplement to the Petition for Grant of Review in *United States v. Dugan* (ACM 40320) with the Court of Appeals for the Armed Forces (CAAF). There were then two Family Days and two Holidays followed by undersigned counsel's three days of prescheduled leave at the beginning of the year. Undersigned counsel also spent around 6 hours preparing for and assisting in moots. Additionally, Friday, 12 January, was a Family Day and Monday, 15 January, was a Holiday. Then Tuesday, 16 January, Joint Base Andrews was closed due to inclement weather and there were interruptions to connecting to VPN for those teleworking. Finally, undersigned counsel will be out of the office on Friday, 19 January, while coordinating the all-day Human Trafficking Training Event located at the Smart Center on Joint Base Andrews.

This is undersigned counsel's second priority case before this Court with the following being the first:

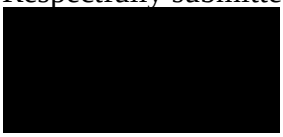
1. *United States v. Hennessy* (ACM 40439): The trial transcript is 1,190 pages long and the record of trial is comprised of nine volumes containing seven prosecution exhibits, 11 defense exhibits, 54 appellate exhibits, and three court exhibits.

Undersigned counsel has reviewed the record of trial. Several potential issues have been identified and civilian defense counsel has begun drafting.

Appellant was advised of his right to a timely 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.

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

Respectfully submitted,



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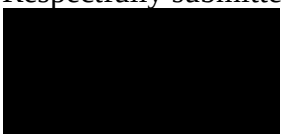
Respectfully submitted,



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Appellate Defense Counsel
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18 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ADAM J. SHERMAN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40486 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 18 January 2024.

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT**
Appellee	)	**OF TIME (SIXTH)**
	)	
v.	)	Before Panel No. 2
	)	
Senior Airman (E-4)	)	No. ACM 40486
ADAM J. SHERMAN	)	
United States Air Force	)	12 February 2024
Appellant	)	

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **24 March 2024**. The record of trial was docketed with this Court on 28 June 2023. From the date of docketing to the present date, 229 days have elapsed. On the date requested, 270 days will have elapsed.

On 15 March 2023, at a general court-martial convened at Beale Air Force Base, California, Appellant was found guilty, contrary to his pleas, of one charge and one specification of Article 120b, Uniform Code of Military Justice (UCMJ); and was found not guilty, consistent with his pleas, of one specification of Article 120b, UCMJ. Entry of Judgment. The military judge sentenced Appellant to a reprimand, reduction to the rank of E-1, 13 years' confinement, and a dishonorable discharge. *Id.* Appellant was given one day of judicially ordered credit. *Id.* The convening authority deferred all of the automatic forfeitures from 30 March 2023 until the date the military judge signed the entry of judgment, which was 23 May 2023. *Id.*; Convening Authority Decision on Action. The convening authority also waived all automatic forfeitures for a period of six months to be paid to his spouse for the benefit of his dependents. *Id.*

The trial transcript is 469 pages long and the record of trial is comprised of five volumes containing 17 prosecution exhibits, 12 defense exhibits, 25 appellate exhibits, and one court exhibit. Appellant is currently confined.

Undersigned counsel is currently assigned 23 cases, with 15 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 5 in this case, undersigned counsel filed the Brief on Behalf of Appellant in *United States v. Hennessy* (ACM 40439) with this Court. Undersigned counsel also spent around 12 hours preparing for moots, assisting in moots, and attending oral arguments. Undersigned counsel was second chair at the oral argument before the CAAF on 7 February 2024 in *United States v. Guihama* (ACM 40039).

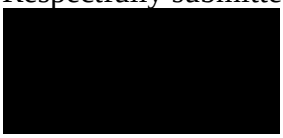
This is undersigned counsel's second priority case before this Court with the following being the first:

1. *United States v. Holmes* (Misc. Dkt. No. 2024-1): The current transcript is 489 pages long and the current record of trial is comprised of 14 volumes. Undersigned counsel will begin review of the record once the Petitions and Supplements to the Petitions for *United States v. Edwards* (40349) (anticipated to be filed this week); *United States v. Greene-Watson* (ACM 40293); and *United States v. Emerson* (ACM 40297) are filed with the Court of Appeals for the Armed Forces (CAAF).

Appellant was advised of his right to a timely 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.

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

Respectfully submitted,



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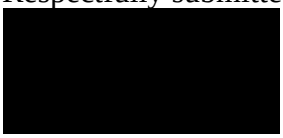
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 12 February 2024.

Respectfully submitted,



HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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Office: (240) 612-4770
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13 February 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ADAM J. SHERMAN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40486 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Senior Airman (E-4) **ADAM J. SHERMAN,** United States Air Force, *Appellant.*	**NOTICE OF APPEARANCE** Before Panel No. 2 Case No. ACM 40486 Filed on: 22 February 2024

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

COMES NOW, Frank J. Spinner, pursuant to Rule 12 of this Court's Rules of Practice and Procedure, and hereby files this written notice of appearance. In addition, counsel hereby informs this Court of the following:

(1) Business mailing address is: 1420 Golden Hills Road, Colorado Springs, CO 80919;

(2) Phone number is: 719-233-7192

(3) Business email is: lawspin@aol.com; and

(5) I am member of this Court's bar.

Respectfully submitted,

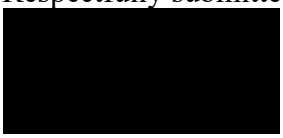
[redacted]

FRANK SPINNER
Appellate Defense Counsel
1420 Golden Hills Road
Colorado Springs, CO 80919
(719) 233-7192
E-Mail: lawspin@aol.com

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 22 February 2024.

Respectfully submitted,



HEATHER M. BRUHA, Maj, USAF
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Email: heather.bruha@us.af.mil

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40486**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Adam J. SHERMAN	)	
Senior Airman	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 14 March 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Seventh) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 15th day of March, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Seventh) is **GRANTED**. Appellant shall file any assignments of error not later than **23 April 2024**.

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

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 2
Senior Airman (E-4) **ADAM J. SHERMAN** United States Air Force *Appellant*	)	No. ACM 40486 14 March 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **23 April 2024**. The record of trial was docketed with this Court on 28 June 2023. From the date of docketing to the present date, 260 days have elapsed. On the date requested, 300 days will have elapsed.

On 15 March 2023, at a general court-martial convened at Beale Air Force Base, California, Appellant was found guilty, contrary to his pleas, of one charge and one specification of Article 120b, Uniform Code of Military Justice (UCMJ); and was found not guilty, consistent with his pleas, of one specification of Article 120b, UCMJ. Entry of Judgment. The military judge sentenced Appellant to a reprimand, reduction to the rank of E-1, 13 years' confinement, and a dishonorable discharge. *Id.* Appellant was given one day of judicially ordered credit. *Id.* The convening authority deferred all of the automatic forfeitures from 30 March 2023 until the date the military judge signed the entry of judgment, which was 23 May 2023. *Id.*; Convening Authority Decision on Action. The convening authority also waived all automatic forfeitures for a period of six months to be paid to his spouse for the benefit of his dependents. *Id.*

The trial transcript is 469 pages long and the record of trial is comprised of five volumes containing 17 prosecution exhibits, 12 defense exhibits, 25 appellate exhibits, and one court exhibit. Appellant is currently confined.

Undersigned counsel is currently assigned 23 cases, with 15 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 6 in this case, undersigned counsel filed the Supplement to Petition for Grant of Review in *United States v. Edwards* (ACM 40349) with the Court of Appeals for the Armed Forces (CAAF); the Petition and Supplement to Petition for Grant of Review in *United States v. Greene-Watson* (ACM 40293) with the CAAF; the Petition and Supplement to Petition for Grant of Review in *United States v. Emerson* (ACM 40297) with the CAAF; and the Brief on Behalf of Appellant in *United States v. Arroyo* (ACM 40321 (f rev)) with this Court. Undersigned counsel also spent around 8 hours preparing for moots, assisting in moots, and attending oral arguments.

In the last three weeks, civilian appellate defense counsel has prepped and traveled to Fort Knox, Kentucky, for a general court-martial—*United States v. Tyler*. This period also included preparation and travel to Camp Mabry, Texas, for a Texas Army National Guard elimination board. Civilian appellate defense counsel's number one priority is drafting the Supplement to Petition for Grant of Review in *United States v. Adams* to be filed with the CAAF. His second priority is working on the AOE in *United States v. Serjak*, which is a 1,481 page record with multiple issues now due to this Court on 13 April 2024. This is civilian appellate defense counsel's third priority case.

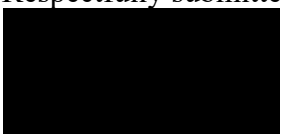
This is undersigned counsel's second priority case before this Court with the following being the first:

1. *United States v. Holmes* (Misc. Dkt. No. 2024-1): The current transcript is 489 pages long and the current record of trial is comprised of 14 volumes. Undersigned counsel has reviewed the record and is drafting Appellee's Answer, which is currently due 20 March 2024. Of note, this Court has ordered an outreach oral argument in *Arroyo* currently scheduled for 10 April 2024, so undersigned counsel will also have to prepare for that prior to being able to finish review and drafting of the AOE in this case (*Sherman*).

Appellant was advised of his right to a timely 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.

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

Respectfully submitted,



HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
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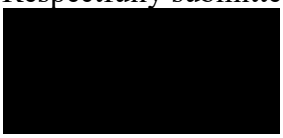
Office: (240) 612-4770
Email: heather.bruha@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 14 March 2024.

Respectfully submitted,



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Air Force Appellate Defense Division
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15 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ADAM J. SHERMAN, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME No. ACM 40486 Panel No. 2

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

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

The United States maintains that, short of a death penalty case or other extraordinary circumstance, 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 essentially ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant will have consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves approximately eight months combined for the United States and this Court to perform their respective statutory responsibilities. In addition and based upon Appellant's filing, 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 requests that this Court deny Appellant's enlargement motion.

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 15 March 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT**
Appellee	)	**OF TIME (EIGHTH)**
	)	
v.	)	Before Panel No. 2
	)	
Senior Airman (E-4)	)	No. ACM 40486
ADAM J. SHERMAN	)	
United States Air Force	)	12 April 2024
Appellant	)	

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **23 May 2024**. The record of trial was docketed with this Court on 28 June 2023. From the date of docketing to the present date, 289 days have elapsed. On the date requested, 330 days will have elapsed.

On 15 March 2023, at a general court-martial convened at Beale Air Force Base, California, Appellant was found guilty, contrary to his pleas, of one charge and one specification of Article 120b, Uniform Code of Military Justice (UCMJ); and was found not guilty, consistent with his pleas, of one specification of Article 120b, UCMJ. Entry of Judgment. The military judge sentenced Appellant to a reprimand, reduction to the rank of E-1, 13 years' confinement, and a dishonorable discharge. *Id.* Appellant was given one day of judicially ordered credit. *Id.* The convening authority deferred all of the automatic forfeitures from 30 March 2023 until the date the military judge signed the entry of judgment, which was 23 May 2023. *Id.*; Convening Authority Decision on Action. The convening authority also waived all automatic forfeitures for a period of six months to be paid to his spouse for the benefit of his dependents. *Id.*

The trial transcript is 469 pages long and the record of trial is comprised of five volumes containing 17 prosecution exhibits, 12 defense exhibits, 25 appellate exhibits, and one court exhibit. Appellant is currently confined.

Undersigned counsel is currently assigned 21 cases, with 15 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 7 in this case, undersigned counsel filed the Appellee's Answer in *United States v. Holmes* (Misc. Dkt. No. 2024-1) and the Reply Brief in *United States v. Hennessy* (ACM 40439) with this Court. Undersigned counsel planned and orchestrated the all-day Human Trafficking Training Event held at the Smart Center on Monday, 25 March 2024. Undersigned counsel also argued on behalf of SrA Arroyo (ACM 40321 (f rev)) at the outreach oral argument on 10 April 2024 with this Court. Additionally, undersigned counsel spent around 5 hours preparing for another colleague's moots, assisting in moots, and attending oral argument.

In the last three weeks, civilian appellate defense counsel has been working on four cases with inmates seeking parole. The United States Disciplinary Barracks (USDB) does not allow delays in submitting matters, so these are high priority cases all due this month. Civilian appellate defense counsel's priorities are drafting the Supplement to Petition for Grant of Review in *United States v. Adams* to be filed with the CAAF in the next two weeks; the Assignments of Error in *United States v. Serjak* (ACM 40392); and the Assignments of Error in *United States v. Baumgartner* (ACM 40413). He anticipates not needing another EOT in *Serjak*. This is civilian appellate defense counsel's third priority case before this Court.

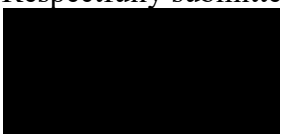
This is undersigned counsel's second priority case before this Court with the following being the first:

1. *United States v. Douglas* (ACM 40324 (f rev)): On 22 March 2024, this Court granted in part the appellant's motion for an enlargement of time. As such, any additional AOE must be filed by 2 May 2024. Prior to drafting the additional AOE, undersigned counsel must file the Reply Brief in *Arroyo* currently due 18 April 2024. Undersigned counsel does not anticipate waiting until 2 May 2024 to file the additional AOE in *Douglas* and anticipates beginning review of *Sherman* on 22 April 2024.

Appellant was advised of his right to a timely 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.

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

Respectfully submitted,



HEATHER M. BRUHA, Maj, USAF
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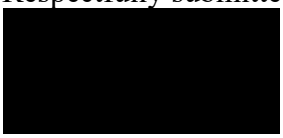
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 12 April 2024.

Respectfully submitted,



HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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Office: (240) 612-4770
Email: heather.bruha@us.af.mil

15 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ADAM J. SHERMAN, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40486 Panel No. 2

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 15 April 2024.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40486**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Adam J. SHERMAN	)	
Senior Airman	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 16 May 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Ninth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. The United States Court of Appeals for the Armed Forces "will apply a presumption of unreasonable delay where appellate review is not completed and a decision is not rendered within eighteen months of docketing the case before the Court of Criminal Appeals." *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). If granted, almost twelve months will have elapsed between docketing and submission of Appellant's brief. At Appellant's defense counsel's current pace, this court will face a presumption of unreasonable delay in deciding Appellant's case.

Accordingly, it is by the court on this 22d day of May, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Ninth) is **GRANTED**. Appellant shall file any assignments of error not later than **22 June 2024**.

Appellant's counsel should not rely on subsequent requests for enlargement of time being granted; each request will be considered on its merits. Any subsequent motions for enlargement of time shall, in addition to the matters required under this court's Rules of Practice and Procedure, include a statement as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time. Counsel is not required to re-address item (1) in each subsequent motion for enlargement of time.

Appellant's counsel is advised that any future requests for enlargements of time may necessitate a status conference.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Panel No. 2
Senior Airman (E-4) **ADAM J. SHERMAN** United States Air Force *Appellant*	)	No. ACM 40486 16 May 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **22 June 2024**. The record of trial was docketed with this Court on 28 June 2023. From the date of docketing to the present date, 322 days have elapsed. On the date requested, 360 days will have elapsed.

On 15 March 2023, at a general court-martial convened at Beale Air Force Base, California, Appellant was found guilty, contrary to his pleas, of one charge and one specification of Article 120b, Uniform Code of Military Justice (UCMJ); and was found not guilty, consistent with his pleas, of one specification of Article 120b, UCMJ. Entry of Judgment. The military judge sentenced Appellant to a reprimand, reduction to the rank of E-1, 13 years' confinement, and a dishonorable discharge. *Id.* Appellant was given one day of judicially ordered credit. *Id.* The convening authority deferred all of the automatic forfeitures from 30 March 2023 until the date the military judge signed the entry of judgment, which was 23 May 2023. *Id.*; Convening Authority Decision on Action. The convening authority also waived all automatic forfeitures for a period of six months to be paid to his spouse for the benefit of his dependents. *Id.*

The trial transcript is 469 pages long and the record of trial is comprised of five volumes containing 17 prosecution exhibits, 12 defense exhibits, 25 appellate exhibits, and one court exhibit. Appellant is currently confined.

Detailed military appellate defense counsel, Maj Bruha, is currently assigned 19 cases, with 12 initial briefs pending before this Court. While Maj Bruha has completed review of Appellant's case, the lead counsel, civilian appellate defense counsel, has not been able to due to other client priorities. Accordingly, an enlargement of time is necessary to allow lead civilian appellate defense counsel to fully review Appellant's case, consult with Maj Bruha, and advise Appellant regarding potential errors.

Since filing a Motion for EOT 8 in this case, Maj Bruha filed the Reply Brief on Behalf of Appellant in *United States v. Arroyo* (ACM 40321 (f rev)) with this Court; an Opposition to the Government's Motion to Cite Supplemental Authorities in *Arroyo* with this Court; the Brief on Behalf of Appellant in *United States v. Douglas* (ACM 40324 (f rev)) with this Court; an Opposition to the Government's Motion for Reconsideration: Citation of Supplemental Authorities in *Arroyo* with this Court; and Motions to Withdraw from Appellate Review and Motions to Attach in *United States v. Johnson* (ACM S32774) and *United States v. Willems* (ACM 40562) with this Court. Motions to Withdraw from Appellate Review and Motions to Attach require review of the records in order to advise appellants of their options and coordination with appellants on getting the DD Form 2330s completed. Additionally, Maj Bruha spent around 5 hours preparing for another colleague's moots, assisting in moots, and attending oral argument. Of note, the FOA Sports Day was Friday, 10 May; the Court of Appeals for the Armed Forces (CAAF) Continuing Legal Education (CLE) training was/is being held 15-16 May; and Memorial Day weekend—including a Family Day—is 24-27 May.

Additionally on 7 May 2024, the CAAF granted review of one issue in *United States v. Greene-Watson* (ACM 40293), in which Maj Bruha is the detailed military appellate defense counsel, with the Grant Brief currently due 7 June 2024. Maj Bruha filed a consent motion the same day for an enlargement of time of 19 days—extending the deadline to 26 June 2024. The CAAF granted the motion.

In the last three weeks, civilian appellate defense counsel filed a CAAF Supplement to Petition for Grant of Review in *United States v. Adams*, the Assignment of Errors in *United States v Serjak*, and worked on the Assignment of Errors in *United States v. Baumgartner*. With respect to Appellant's Serjak and Baumgartner, civilian counsel traveled to the Miramar Brig in California to provide them copies of their draft briefs and go over the issues with them as they requested. While Serjak was filed, work remains to be completed in *Baumgartner*. The Assignment of Errors in *Baumgartner* is currently due on 2 June 2024. This is civilian appellate defense counsel's next priority case before this Court. On the personal side, civilian counsel traveled to Hilton Head, SC, for a ten-day vacation that had been planned for one year to celebrate his spouse's 72d birthday.

Maj Bruha has completed review of the record of trial and drafted three potential AOEs in the case. However, due to issues with the confinement facility and coordination on a declaration from the Appellant, Maj Bruha will not be able to complete minor portions of the AOE for civilian appellate defense counsel until after a call with the Appellant Friday morning. Appellant gave limited consent to relay this update to the Court.

Maj Bruha has already built her oral argument preparation binder for *United States v. Holmes* (Misc. Dkt. No. 2024-1), scheduled for 31 May 2024, and will begin more substantive preparations after the CAAF CLE training. Maj Bruha also had to complete review of another

client's record of trial and anticipates submitting a motion for withdrawal from appellate review and motion to attach this week.

Appellant was advised of his right to a timely 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.

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

Respectfully submitted,

[redacted]

FRANK J. SPINNER
Attorney at Law
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Colorado Springs, CO 80919
Phone: (719) 233-7192
Email: Lawspin@aol.com

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 16 May 2024.

Respectfully submitted,

[redacted]

FRANK J. SPINNER
Attorney at Law
1420 Golden Hills Road
Colorado Springs, CO 80919
Phone: (719) 233-7192
Email: Lawspin@aol.com

20 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ADAM J. SHERMAN, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40486 Panel No. 2

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**BRIEF ON BEHALF OF**
Appellee	)	**APPELLANT**
	)	
v.	)	Before Panel 2
	)	
Senior Airman (E-4)	)	No. ACM 40486
ADAM J. SHERMAN	)	
United States Air Force	)	24 June 2024
Appellant	)	

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

Assignments of Error

I.

WHETHER SPECIFICATION 2 OF THE CHARGE IS LEGALLY AND FACTUALLY INSUFFICIENT.

II.

WHETHER SRA SHERMAN'S SENTENCE TO 13 YEARS' CONFINEMENT IS INAPPROPRIATELY SEVERE.

III.

WHETHER SRA SHERMAN IS ENTITLED TO RELIEF BECAUSE HE WAS NOT PROVIDED AN OPPORTUNITY TO REBUT THE MATTERS IN ACCORDANCE WITH RULES FOR COURTS-MARTIAL 1106 AND 1106A PRIOR TO THE CONVENING AUTHORITY'S DECISION ON ACTION.

IV.[1]

WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL DEFENSE COUNSEL INEXPLICABLY FAILED TO PRESENT FAVORABLE EVIDENCE AT TRIAL.

[1] Issue IV is raised in accordance with *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1992), in Appendix A.

Statement of the Case

On 15 March 2023, at a general court-martial convened at Beale Air Force Base, California, SrA Sherman was found guilty, contrary to his pleas, of one charge and one specification of Article 120b, Uniform Code of Military Justice (UCMJ); and was found not guilty, consistent with his pleas, of one specification of Article 120b, UCMJ, 10 U.S.C. § 920b.[2] Entry of Judgment [EOJ]. The military judge sentenced SrA Sherman to a reprimand, reduction to the rank of E-1, 13 years' confinement, and a dishonorable discharge. *Id.*, R. at 467. SrA Sherman was given one day of judicially ordered credit. EOJ. The convening authority deferred all the automatic forfeitures from 30 March 2023 until the date the military judge signed the entry of judgment, which was 23 May 2023. *Id.*; Convening Authority Decision on Action [CADA]. The convening authority also waived all automatic forfeitures for a period of six months to be paid to his spouse for the benefit of his dependents. *Id.*

Statement of the Facts

1. E.M.'s Life Primarily Existed with her Dad where he Lived.

E.M. up in Grove City, Pennsylvania. R. at 146. She lived there almost her whole life. *Id.* At the time of the charged timeframe, E.M. lived there with her younger brother, dad, and stepmom—whom she called mom. *Id.* Most of her friends lived in or near Grove City. *Id.* Her best friend, X.K., lived across the street. R. at 147. E.M.'s grandparents also lived in Grove City. *Id.* Her school, volleyball team, and community youth group were all in Grove City. *Id.* She slept in her own bedroom in the house with her dad. R. at 148. There were two bathrooms—one with

[2] Unless otherwise noted, all references to the UCMJ, the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial*, *United States* (2019 ed.) [2019 *MCM*]. Of note, the acquitted specification, Specification 1 of the Charge, fell under *Manual for Courts-Martial*, *United States* (2016 ed.).

a shower—laundry machines, air conditioning, video game consoles, and the house was clean. R. at 148-49. E.M.'s dad also had over 100 boardgames, which the family played a lot. R. at 149.

2. E.M.'s Testimony on the Time with her Mom for Two Months Over the Summer that was Spent in a Camper.

E.M. spent about two months of the years with her mom in California after her mom moved. R. at 150. Most of that time was spent in a camper with only one bathroom and one real bedroom—the room where her mom and SrA Sherman slept. *Id.* E.M. also shared the camper with her three siblings and a dog. R. at 150-51. The camper was crowded, noisy, cluttered, and hot. R. at 151. During the summers when she visited, E.M. took care of her three younger siblings regularly. R. at 152. Every three weeks they had to pack up the camper and move it, cycling between two different locations. R. at 153-54. E.M. essentially had one friend while visiting her mom, but it was tough to stay in touch due to moving back and forth. R. at 154.

During her stay, E.M. had to interact with SrA Sherman a good amount. R. at 155. E.M. did not like him. *Id.* SrA Sherman was strict. *Id.* E.M. thought he could be mean. *Id.* He yelled at her, her siblings, and her mom sometimes. *Id.* E.M. believed SrA Sherman was lazy because he did not help much around the house. *Id.* She also found him to be loud and obnoxious. *Id.* E.M. thought SrA Sherman set a bad example due to starting fights in front of the kids. R. at 156. E.M. did have a cell phone with her while visiting her mom and used it to stay in touch with her dad. *Id.* When E.M.'s dad and stepmom shared photos and videos, E.M. felt sad because she could not be there with them in Pennsylvania while they were having fun. R. at 156-57.

3. E.M.'s Testimony on the Mil. R. Evid. 414 Allegations.

a. E.M.'s Testimony on Direct Examination.

E.M. primarily lived with her dad since her mom moved to Sacramento, California, in 2017. R. at 115. Prior to that, E.M. visited her mom's house in Harrisville, Pennsylvania, on the

weekends and most of Fridays. *Id.* Her parents' houses were a five-minute drive apart. *Id.* E.M. testified that there were times she was alone with SrA Sherman when he touched her. R. at 116. At the time, she was six years old. *Id.* Her first recount was:

> I was – to the best of my memory, I was in my room. He had called me into the room and told me – he told me to get into the bed, and then – and then he – he told me to – he told me to take my clothes – my pants off. So, at the time I didn't know what he was like trying to do, because I wasn't like fully like understanding. And then at that time he had – at that time he had touched my private area [vagina area] with his male part.

Id. E.M. said SrA Sherman took what looked like a lotion bottle out of the dresser drawer that was pink with a strawberry on it. R. at 117. He rubbed the while substance on E.M.'s private area and licked it off. *Id.* Prosecution Exhibits 1 through 5 were pictures and diagrams E.M. drew prior to trial in order to describe what happened in 2017. R. at 118.

b. E.M.'s Testimony on Cross Examination.

During cross examination, E.M. confirmed her testimony was that SrA Sherman sexually assaulted her "three times." R. at 157. The first of which was when her mom lived in Harrisville, Pennsylvania. *Id.* E.M. agreed that during that alleged sexual assault, her mom was not home. R. at 158. However, she testified she would not say yes or no to whether her mom went out with her siblings to get breakfast that morning since she was not "100 percent sure." *Id.* The circuit defense counsel then confirmed E.M.'s recount of what happened: the strawberry substance, the penile penetration, no communication between the two, no lube being used, no ejaculation, no vaginal pain or bleeding whatsoever. R. at 158-62. E.M. acknowledged she participated in two child forensic interviews prior to testifying. R. at 162. The first was in February of 2021 with Ms. S.C. in Pennsylvania. *Id.* the second was in July 2021. *Id.* Additionally, there was an interview with a special agent with the Office of Special Investigations (OSI). R. at 163. While admitting she told the truth during the February 2021 interview, she also stated that it was possible she told

Ms. S.C. that her mom went out to get breakfast the morning of the alleged assault in Harrisville, Pennsylvania, but that she did "not recall" what she told Ms. S.C. R. at 163-64. E.M. admitted that she may have also said during her second interview that her mom was in the kitchen cooking dinner the entire time the assault in Harrisville was happening. R. at 164. E.M. conceded that she told Ms. S.C. during her second interview that the door to the room was partially open during the alleged assault while she testified that it was closed. *Id.* E.M. rationalized that she was not sure if it was closed or not. *Id.* When confronted with having told Ms. S.C. during her second interview in July of 2021 that the strawberry substance incident occurred in California in the camper as opposed to in Harrisville, Pennsylvania, as E.M. previously testified, E.M. said it would have been a mis-memory. R. at 165. When challenged on what she meant by "mis-memory," E.M. explained it was "Like something that – like I didn't fully – like something I didn't fully recall maybe." *Id.* She then stuck to the strawberry incident occurring in Harrisville and not in California. *Id.*

4. Specification 1 of the Charge.

a. E.M.'s Testimony on Direct Examination.

In 2017, E.M.'s mom moved with SrA Sherman to California. R. at 126. Her mom first moved into base housing since SrA Sherman was in the military at that point. *Id.* Later, they moved to campgrounds in a camper with E.M.'s three younger half-siblings. *Id.* Both campgrounds they moved between were half an hour to an hour from base. R. at 128.

E.M. visited her mom every summer. R. at 127. When she visited, E.M. saw her mom every day except for certain weekends when her mom was at training. *Id.* During those training weekends, E.M. was home alone with SrA Sherman and her three younger siblings. R. at 129. E.M. said there were two times SrA Sherman touched her when they were alone together in California. R. at 129. E.M. did not remember when the first time it happened. R. at 130. She

said it was"most likely around 2020." R. at 130. When pressed, E.M. stated it was sometime during the first or second summer after her mom moved to California. *Id.* She was seven or eight at the time. *Id.* On the first occasion, E.M.'s mom was not home and the three other children were asleep when SrA Sherman allegedly called her into his room. R. at 130-31. E.M. explained that SrA Sherman asked if she wanted to "do our little secret?" R. at 131. She said he then took her shorts and underwear off and his pants off. *Id.* He then "put his male parts in [her] lady private parts." *Id.*

b. E.M.'s Testimony on Cross Examination.

E.M. confirmed that her testimony was that the second time SrA Sherman touched her inappropriately was in 2018 when she visited her mom in California for two months in the summer. R. at 165-66. It happened when her mom was away on drill weekend. R. at 166. It was during this instance that E.M. previously testified SrA Sherman did an up and down motions while getting lower. R. at 167. E.M. admitted there was no contact with his penis prior to or any liquid used. R. at 168. There was only immediate contact between genitals. *Id.* There was no ejaculation. R. at 169. E.M. stated SrA Sherman probably stopped because he wanted to after a few minutes. *Id.* E.M. then got dressed, went out to her part of the camper, and played on her cell phone or watched television. *Id.* She did not experience any pain or bleeding in her vaginal area. Id. She was just kind of confused about what had happened. *Id.*

When confronted about having told Ms. S.C. that it was the second alleged assault in California that happened when her mom was away on drill weekend, E.M. stated she did not recall which time her mom was away on drill weekend. R. at 170. She stated that her mom could have been gone on drill weekend during the 2018 or 2019 alleged assaults and she was not sure. *Id.*

5. Specification 2 of the Charge.

a. E.M.'s Testimony on Direct Examination.

E.M. explained that the second time it happened in California was when she visited during a summer after that. R. at 132. That time, it happened during the day when her mom and half-siblings were not home. *Id.* E.M. did not know where they were, but she and SrA Sherman were in the camper on a campground. *Id.* She said difficulty trying to recall the details, so the trial counsel told her to take a second. R. at 133. She then stated:

> He had – it was – he had done the same thing that he had done the second time. So, he had – he had told me to take – he had told me to take my clothes – my pants off and then – and then – and then – and then – began to touch me with his male private parts and his hands. And at the time – at the time the door was closed, but at that time [N.S.], which is [SrA Sherman's] mom, had – had walked in. She didn't walk in the room but walked in the camper. I don't recall why she had walked in, but I believe she was bringing something to the camper. But at the time we were in the bedroom, but [N.S.] did not – [N.S.] did not see what was happening.

Id. At that time, N.S. was staying in a camper across from them. R. at 135. After clarification, E.M. said "yes" when asked if SrA Sherman "put his boy part inside of [her] at all?" *Id.* E.M. was seven or eight years old when it happened. R. at 136. She said after this second time, SrA Sherman said if E.M. told anyone, she would not be able to go back to Pennsylvania to be with her dad. *Id.* E.M. first testified that she told her friend, X.K., what happened when she returned to Pennsylvania. *Id.* Later, E.M. testified the first person she told was her best friend, X.K., when she was – to the best of her memory – 10 years old. R. at 139. She said it first came up when they were playing – to the best of her memory – truth or dare sharing their biggest secrets. R. at 140. A couple months later it was brought back up at X.K.'s house and "influenced" E.M. to tell X.K.'s stepmom. R. at 140-41. X.K.'s stepmom then told her significant other and the two

of them went to E.M.'s house and told her dad and stepmom the same day. R. at 141. E.M. then explained what happened to her stepmom and her stepmom's mom. *Id.*

b. E.M.'s Testimony on Cross Examination.

E.M. confirmed her testimony was that the second sexual assault allegation occurred also in California when she visited her mother for the summer. R. at 170-71. She believed it was the summer of 2019. R. at 171. However, E.M. then thought it was during the time she was doing virtual learning for COVID-19 when she brought her Chromebook to California to do schoolwork. *Id.* The testimony was as follows:

> Q. Was that when schools were kind of doing virtual learning?
>
> A. Yeah. That was during – that was like – right like – yeah, when they were doing virtual learning for like COVID and stuff like that.
>
> Q. For COVID, okay. And so, if they were doing virtual learning for COVID, wouldn't that have been in 2020?
>
> A. Most likely.
>
> Q. Okay. So, if you weren't doing the virtual schooling before 2020, when you were out there in the summer of 2019, that was just a typical summer visit?
>
> A. I'm pretty sure. Yes.
>
> Q. Okay. And so you spent your –almost your entire summer vacation out there?
>
> A. I believe so. Yes.
>
> Q. And during those roughly 2 months that you were here in California, [SrA Sherman] only sexually assaulted you just that one time, right?
>
> A. Yes.

R. at 171. E.M. acknowledged her mom may have been away on drill weekend, but she was not sure. R. at 172. Later, E.M. admitted that while she originally told Ms. S.C. during her February

2021 interview that her mom had actually gone out to the gas station the night she was assaulted, that was not the time that anything happened. R. at 177.

Just as with the 2018 incident, E.M. stated SrA Sherman called her into his bedroom, had her remove her pants and underwear, and has her get on the bed. R. at 172-73. He allegedly made contact with his penis and her vagina and did an up-and-down motion similar to before. R. at 173. Also as before, no lubrication was used and there was no ejaculation. R. at 173-74. Similar to the 2018 allegation, after SrA Sherman allegedly stopped on his own, E.M. then went back to her part of the camper and played on her cell phone—most likely that's what she did. R. at 174. She did not experience any vaginal pain or bleeding and just felt confused. R. at 174-75.

6. Other than the Three Instances of Alleged Sexual Assault, SrA Sherman did not Act Inappropriately with E.M.

At no point did SrA Sherman ever speak to E.M. in a sexual manner or complement her on how her body looked. R. at 175. He never took photographs of her body without clothes on. *Id.* SrA Sherman did not show E.M. pornographic material. *Id.* Outside of the specific instances of Mil. R. Evid. 414 and two charged instances of sexual assault, E.M. said SrA Sherman never touched her in inappropriate ways to include giving her a massage or helping her shower or bathe. *Id.* E.M. confirmed she was alleging only three incidents of inappropriate touching—the ones previously testified to. R. at 176.

7. E.M. Reported the Allegations After her Dad Said Absent her being Unsafe, E.M. had to Continue Visiting her Mom.

E.M. confirmed she first told X.S. in the 2021 timeframe. R. at 187. The first official report occurred in February of 2021, which was a few months after E.M. spent time in California completing virtual learning in the camper. R. at 177. E.M. had a hard time focusing on her schoolwork since the camper was cramped and hot. R. at 178. There were also a ton of

distractions. *Id.* As such, E.M. received bad grades that semester. *Id.* During this time, E.M. also witnessed SrA Sherman yell at her mom and her siblings. R. at 179. She relayed this to her dad when she got back to Pennsylvania. *Id.* When E.M.'s dad and stepmom started discussing plans for her to go back to California the following summer, E.M. made it clear she did not want to go back. *Id.* Her dad's response was that as long as she was safe, he would be sending her back for the summer. *Id.* When questioned about whether E.M. told her best friend, X.K., that SrA Sherman had allegedly sexually assaulted her after the conversation with her dad, E.M. said she could not recall. R. at 180. She agreed it was possible she told X.K. after. *Id.*

After X.K.'s stepmom relayed the allegation to E.M.'s dad and stepmom, E.M. spoke with her stepmom and her stepmom's mom about it. R. at 180-81. E.M. spoke with the two of them about it in more detail. R. at 182. They had experienced something similar. *Id.* E.M.'s stepmom had been abused by her mom's boyfriend when she was E.M.'s age at the time. *Id.* When ask if the two of them had told E.M. what happened to them, E.M. responded:

> A. They – they like – they like briefly said like oh, that – like that – like she – like she didn't really explain to me like it exactly what happened. She just said that – she just – she just said like – she just said like what happened. She didn't really tell me like exactly like how it happened or any details. So, I don't…
>
> Q. Okay. But she did kind of share her experience with you?
>
> A. Yes.
>
> Q. And that helped you explain what [SrA Sherman] did to you?
>
> A. Sort of. Yeah.

R. at 183. X.K. also had a similar background to E.M. in that her family was also separated and she rarely saw her mom. R. at 189.

8. The military judge Asked Several Clarifying Questions of E.M. to Include her Birthday and Questions on Penetration—Grouping Together Both Specifications.

The military judge confirmed E.M.'s twelfth birthday was 23 April 2023. R. at 190. When asked which hand-drawn pictures applied to which instance of sexual assault, E.M. stated Prosecution Exhibits 1-2 was regarding what happened in Harrisburg, PA (Mil. R. Evid. 414 allegation). R. at 191. However, Prosecution Exhibit 3 applied to all three instances of sexual assault (Mil. R. Evid. 414 as well as both Specifications of the Charge). *Id.* The military judge then clarified if when E.M. said "male parts" she meant penis—E.M. said yes. R. at 192. He also clarified if E.M. meant the boy parts touched the external part of the genitalia or inside the vaginal canal—E.M. said "It was more on the inside." *Id.* The military judge confirmed that happened on both instances in California (both Specifications of the Charge)—E.M. said yes. *Id.*

9. Other Evidence Contradicted E.M.'s Testimony.

X.K. testified E.M. had only talked about SrA Sherman to her once and it was a few years ago. R. at 200-01. X.K. was asked what her understanding was of what happened, but she did not answer the question. R. at 201. Instead, X.K. stated she did not remember exactly how she felt and did not know how to process what E.M. said. *Id.* X.K. denied trying to do research after the conversation. R. at 202, 211. A few weeks to a month after E.M. told X.K., they told X.K.'s stepmom. *Id.* X.K. moved in with her dad when she was four. R. at 206. She does not talk to her mom much and thinks her mom is "a pretty terrible mother." *Id.*

X.K.'s stepmom, C.A., testified she learned of the allegation on 15 February 2021. R. at 217, 226. C.A. confirmed that 10 days prior to learning of the allegation, she had seen X.K.'s search history on her iPad included "sex" and "what is sex." R. at 219, 226. When C.A. confronted X.K. about the searches, X.K. refused to say a single word about it and instead looked like she had "gotten caught red-handed." R. at 226. E.M. visited their house at least five different times during

the 10 days between C.A. seeing the search terms on X.K.'s iPad and E.M. telling C.A. about the allegation. R. at 226.

C.A. explained that E.M. seemed to be uncomfortable starting the conversation on 15 February 2021, so C.A. asked her to write or type it out. R. at 224. E.M. then typed out the work "sex." *Id.* C.A. asked E.M., "What about sex?" *Id.* E.M. verbally responded that SrA Sherman made her have sex. *Id.* E.M. did not give any more details. *Id.*

E.M.'s dad, B.M., testified that she visited her mother from about June to August in 2018 and 2019 with her mom. R. at 236. E.M. spent the fall semester from August to October 2020 with her mom in California as well. R. at 236-37. After E.M. returned from her mom's after doing virtual schooling—October 2020, B.M. told E.M. that as long as she was safe, she would be going back to visit her mom again in 2021. R. at 266. B.M. acknowledged that during a pre-trial interview with the Defense, he said he believed his statement about E.M.'s safety was what triggered her to come forward, but then testified that he misspoke and did not think it was the "direct trigger." R. at 267-77. Since E.M. made the allegation, she no longer has to spend her summers in California and instead spends them home with her dad, family, and friends in Grove City, Pennsylvania. R. at 269.

K.M. confirmed E.M. visited her mom and SrA Sherman in California during the summers of 2018 and 2019 and then in the fall of 2020 (end of August through mid-October). R. at 279-80. K.M. testified when E.M. told her and her mom what happened, she understood that there was no penetration into the vaginal canal due to E.M. stating she did not have pain or bleeding and K.M.'s belief that for a child under 10, there would have been. R. at 286-87. K.M. admitted E.M. told her about the strawberry substance instance during the second conversation, not the first, about the

allegations and only after K.M. shared with E.M. about K.M.'s personal experience of being sexually assaulted by her stepdad. R. at 287-88.

Dr. K.M. testified that during a sexual assault forensic examination, it would be painful for a prepubescent eight- or seven-year-old girl with an intact hymen to have her vaginal canal penetrated by an adult man's erect penis. R. at 304, 306. Bleeding inside the vagina or even outside the vagina could also be present due to the lack of lubrication as prepubescent girls "stay very dry" so there can be abrasions "with rubbing." R. at 306. Ultimately, Dr. K.M. did not see any physical signs of sexual assault during E.M.'s sexual assault examination. R. at 310.

10. A.S. did not Leave E.M. Alone with SrA Sherman During the Charged Timeframes Nor was she Away for Drill As she had not Enlisted Yet.

A.S. testified she did not leave E.M. alone with SrA Sherman in 2017 when E.M. stayed with them. R. at 318. In 2017, A.S. knew SrA Sherman was not alone with E.M. also because he worked two jobs for Uber and Lyft at the time and was gone almost the entire time she visited. *Id.* A.S. also knew E.M. was never alone with SrA Sherman, because when she left the house with one child, she took them all. R. at 319. A.S. did not observe any signs of grooming behavior by SrA Sherman towards E.M. *Id.* SrA Sherman was not overly physical with her, was not overly interested in parental tasks like changing or bathing E.M., did not show or discuss sexual materials or topics with E.M., nor did he expose himself intentionally or accidentally to E.M. R. at 319-20. E.M. also did not complain about any discomfort in her vaginal area either. R. at 320.

Prior to purchasing the camper in March 2019, the family lived in on-base housing at Beale Air Force Base, California. R. at 322; DE A. A.S. confirmed she did not leave E.M. alone with SrA Sherman when E.M. visited them in 2018 and 2019 either. R. at 328. A.S. intentionally did not work when E.M. visited so she could see E.M. when she visited. R. at 329. Again, if A.S. took one child with her, she took them all. *Id.* A.S. also did not see any signs of grooming in 2018

or 2019. *Id.* A.S. first enlisted on 18 September 2019. R. at 330, DE C. As such, it was not possible for A.S. to have been away at a drill weekend during the summers of 2018 or 2019. R. at 332. A.S. denied ever using, owning, or seeing strawberry flavored lubrication or substance in their house or camper. R. at 335.

11. Since Making the Allegations, E.M. is Flourishing and Resembling No Signs of Trauma.

E.M.'s father told the Defense that E.M. was "flourishing" and "doing great" and that E.M. "feels like a weight has lifted off of her shoulders." R. at 351. E.M. had even come out of her shell. *Id.* She did not exhibit any fear of strangers or of being uncomfortable around adults. *Id.*

12. The Convening Authority Considered Matters Submitted by the Defense in Clemency and E.M. Prior to his Decision on Action.

On 16 March 2023, SrA Sherman acknowledged his right to submit matters to the convening authority and indicated he intended to do so. Notice of Right to Submit Matters, 16 March 2023. On 8 May 2023, the convening authority signed the Decision on Action after reviewing the submission of matters submitted on behalf of SrA Sherman by his Area Defense Counsel. CADA; *see also* SrA Sherman's Submission of Matters, 26 March 2023. He also considered matters submitted by E.M. CADA. Her submission of matters was dated 20 March 2023 and stated:

> At the trial, when I told the court what [SrA Sherman] did to me, I thought he might finally admit what he did and at least say that he is sorry. Instead, I was called a liar when I told the truth about what he did to me, and he never showed any sorry for how badly he hurt me.

E.M. Submission of Matters. There is no receipt in the record of trial indicating SrA Sherman was served E.M.'s submission of matters or that he was notified of his opportunity to rebut said matters. There is also no rebuttal from SrA Sherman to E.M.'s submission of matters in the record of trial.

Argument

I.

SPECIFICATION 2 OF THE CHARGE IS LEGALLY AND FACTUALLY INSUFFICIENT.

Standard of Review

This Court reviews issues of factual and legal sufficiency de novo. Article 66(d), U.C.M.J., 10 U.S.C. § 866(d); *United States v. McAlhaney*, 83 M.J. 164, 399 (C.A.A.F. 2023).

Law and Analysis

The Government did not prove beyond a reasonable doubt that SrA Sherman committed a "sexual act upon" E.M. "by intentionally touching, not through the clothing, the genitalia of [E.M.], with an intent to gratify his sexual desire" "between on or about 1 January 2019 and on or about 31 December 2019" while "at or near Beale Air Force Base, California." *See* Charge Sheet. This Court "may affirm only such findings of guilty . . . as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). The guilty finding of Specification 2 of the Charge is not correct in law and fact.

E.M. alleged there were three independent instances of sexual abuse by SrA Sherman: once in 2017 in her mom's house in Pennsylvania (Mil. R. Evid. 414 evidence); once the first or second summer she visited her mom in California (Specification 1 of the Charge); and once the summer after that in California (Specification 2 of the Charge). However, as discussed below, the timing here is not actually cut and dry. E.M. does not know what years the two instances in California happened. She also thought the second instance in California happened when she was doing distance learning due to COVID-19, but that would have been in the fall of 2020—not the summer of 2019—and E.M. did not visit the summer of 2020. Interestingly, the military judge

acquitted SrA Sherman of Specification 1 of the Charge allegedly occurring in 2018. EOJ. E.M. said one of the instances happened when her mom was away at reservist drill training, but her mom did not enlist until September 2019—after the summer of 2019. DE C. Which means if the alleged sexual assault in Specification 2 of the Charge happened when E.M.'s mom was at drill, it could not have happened in 2019. The military judge did not find SrA Sherman guilty of Specification 2 by exceptions and substitutions, changing the date of the offense to a date outside the charged period.

Why would E.M. lie? She did not like visiting her mom in California. The camper they were staying in at the time E.M. made the allegation was cramped, not clean, loud, and hot. R. at 151. She also did not like SrA Sherman and she regularly had to take care of her three younger siblings. R. at 155, 152. When she returned home after visiting in the fall of 2020, her dad was making plans for her to visit again the following summer. R. at 179. She said she did not want to go back. *Id.* Her dad said as long as she was safe, she was going to go to California to spend time with her mom. *Id.* Then, on 5 February 2021, C.A. found the terms "sex" and "what is sex" in X.K.'s search history on her iPad. R. at 219, 226. Ten days later, X.K. told E.M. to tell C.A. "about [SrA Sherman]" and it was only then that E.M. made the sexual assault allegations to an adult. E.M. had visited their house at least five different times during those 10 days, but she did not mention anything. R. at 226. For the following reasons, Specification 2 of the Charge is not legally and factually sufficient.

1. Specification 2 of the Charge is Legally and Factually Insufficient Due to the Uncertainty and Ambiguity as to the Timing of the Alleged Offense.

After viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of Specification 2 of the Charge beyond a reasonable doubt. *United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (citation

omitted). The Government did not prove the offense charged in Specification 2 of the Charge occurred between 1 January 2019 and 31 December 2019 and given the contradictions in E.M.'s testimony, no rational trier of fact could have found that it did. Even if it did occur in 2019, it would have had to occur during the summer visit and not late in the year. E.M. initially testified the first alleged offense happening in California occurred in 2020.[3] R. at 130. After being pressed, E.M. said the first of two instances of sexual abuse occurring in California happened in a camper the first or second summer she was visiting. *Id.* She said the first time it happened, her mom was not in the camper, but her three siblings were there asleep. R. at 130-31. Regarding the convicted offense, E.M. said that occurred the summer after when her mom and siblings were not home. R. at 132. On cross examination, E.M. stated she believed this offense happened in the summer of 2019, but then said she thought it was when she was doing virtual learning due to COVID-19—which would have been the fall of 2020. R. at 170-71.

The use of the phrase "on or about" in the charged timeframe does not help the Government meet its burden because the possible timeframe indicated by the evidence is too large to be considered "on or about" the charged dates. The Court of Appeals of the Armed Forces (CAAF) has previously indicated this pleading language includes dates which are "reasonably near" the charged dates and "connotes a range of days to weeks." *United States v. Simmons*, 82 M.J. 134, 139 (C.A.A.F. 2022) (quoting *United States v. Hunt*, 37 M.J. 344, 347 (C.M.A. 1993)). Thus, the court has found this language encompasses differences of two or three days, seven days, and three weeks. *United States v. Barner*, 56 M.J. 131, 137 (C.A.A.F. 2001); *United States v. Brown*, 34 M.J. 105, 106, 110 (C.M.A. 1992); *Hunt*, 34 M.J. at 347. In contrast, the court in *Simmons* applied precedents from the factual sufficiency context to find a difference of 279 days "far exceeds any

[3] This would have been the specification SrA Sherman was acquitted of. EOJ.

permissible variance" in previous case law and was not "'reasonably near' to the original charged dates." 82 M.J. at 138, 140. As such, even if this Court finds Specification 2 of the Charge legally sufficient, it cannot find it factually sufficient.

Sticking first with legal sufficiency, E.M. alleged there were weekends she was home alone with SrA Sherman and her siblings when her mom was gone for military training. R. at 127, 129. While E.M. previously told Ms. S.C. that sexual assault alleged in Specification 2 of the Charge occurred when her mom was away on drill for the weekend, E.M. stated when confronted that she did not know which summer (2018 or 2019) the assault happened while her mom was gone on drill. R. at 170. Instead, E.M. said it could have been either, she was unsure. *Id.* Using that as at measuring point for when the allegations occurred, means neither could have occurred prior to September 2019 since that is when E.M.'s mom enlisted. R. at 330; DE C. But E.M. did not visit her mom in 2019 at any point other than the summer. R. at 279-80. Then in 2020, E.M. only visited in the fall—August to mid-October. *Id.* That's eight months past the charged timeframe and one year after the actual dates of the visit. Even considering the "on or about" language in the specification, no rational trier of fact could have found the essential element of the time of the offense beyond a reasonable doubt, and this court should also not be convinced beyond a reasonable doubt that the charged misconduct occurred reasonably near the charged timeframe.

Turning to factual insufficiency regarding the charged timeframe, the Army Court of Criminal Appeals found factual insufficiency under similar circumstances in *United States v. Gilliam*, No. ARMY 20180209, 2020 CCA LEXIS 236 (A. Ct. Crim. App. July 15, 2020). That case involved three convictions for sexual offenses against the appellant's stepdaughter, all of which were alleged to have occurred "between on or about" date ranges that spanned more than a year. *Id.* at *2–4. The court found the victim's testimony about both digital penetration and

exposure credible, but it held all three convictions were factually insufficient because of ambiguous evidence regarding the timing of the offenses. *Id.* at *8–11. Based on the victim's testimony, the last incident of digital penetration "could have occurred almost eleven months after the last date charged by the government," leading the court to conclude there was a reasonable possibility the other instances also occurred almost eleven months after the end of the charged timeframe. *Id.* at *9–10. Thus, the court was "not convinced beyond a reasonable doubt that [the offenses] occurred within or even reasonably near to the timeframes charged by the government." *Id.* at *10. The court similarly found the possible timing of the exposure offenses extended well beyond the charged timeframe. *Id.* at *11. Consequently, the court set aside the findings of guilty and the sentence and dismissed the charges and specifications. *Id.*

Gilliam demonstrates that uncertainty and ambiguity as to the timing of an alleged offense is enough for a finding of factual insufficiency. Like the victim in that case, E.M.'s testimony indicated the alleged misconduct could have occurred months outside the charged timeframe. By E.M.'s own account, the charged offense could have occurred eight months after the charged time frame (or one year after the actual visit), a range which, like the possible eleven-month range in *Gilliam*, is not reasonably near the Government's charged timeframe. *Id.* at *9–10. As a result, this Court should reach the same conclusion as the court in *Gilliam* that "the evidence adduced at trial does not establish appellant's guilt beyond a reasonable doubt," set aside the finding of guilty on Specification 2 of the Charge and dismiss this specification and its charge. *Id.* at *10.

2. Specification 2 of the Charge is Factually Insufficient.

A review for factual sufficiency involves "a fresh, impartial look at the evidence," adopting "neither a presumption of innocence nor a presumption of guilty" in order to independently determine whether the evidence constitutes proof beyond a reasonable doubt for each required

element. *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (alteration in original) (*quoting United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002)), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018). Here, with a fresh, impartial look at the evidence—regardless of the timing issues discussed above—the way E.M. described the alleged sexual assault does not follow common sense or the testimony of Dr. K.M.

E.M. stated SrA Sherman made contact with his penis and her vagina and did an up-and-down motion similar to the incident the summer before. R. at 173. The way E.M. described it earlier was that SrA Sherman did an up and down motion while getting lower. R. at 167. There was no lubrication used or any touching just immediate contact between his penis and her vagina. R. at 173-74. There was also no ejaculation. *Id.* Instead, similar to the acquitted allegation, E.M. said SrA Sherman stopped on his own after a few minutes and she went back to her part of the camper and played on her cell phone. R. at 174. E.M. stated she did not experience any pain or bleeding in her vaginal area. R. at 174-75. Instead, she just felt confused. *Id.*

This experience does not make sense in light of what E.M. stated happened and the testimony of Dr. KM. Dr. K.M. testified that adult, male penile penetration of the vaginal canal of a prepubescent eight- or seven-year-old would be painful. R. at 304, 306. Not only that, but bleeding inside or even outside the vagina would be common due to prepubescent girls not being able to produce the lubrication so there would be abrasions with the rubbing. R. at 306. E.M. testified there was no lubrication used during either time the sexual abuse allegedly occurred in California. While Dr. K.M. made no finding there were physical signs of sexual assault two years after is not surprising, E.M.'s testimony that she did not have vaginal pain or bleeding does not make sense. Even if there was no penile penetration (as argued by trial counsel in their attempt to explain the lack of pain or bleeding), E.M. would very likely have experienced pain or discomfort

given prepubescent girls of that age "stay very dry" and the up and down motion described by E.M. indicates there would have been rubbing and friction at a minimum. However, E.M. answered the military judge under oath that there SrA Sherman's adult, male penis touched "the inside" of her vaginal canal or genitalia as opposed to the external parts. R. at 192.

Adding to E.M.'s story not withstanding common sense is the fact that SrA Sherman displayed zero signs of grooming. R. at 175, 319. He never spoke to her in a sexual manner or complemented her body. R. at 175. He did not show her inappropriate photographs or pornography. R. at 175, 319-20. Outside the three distinct times E.M. alleged SrA Sherman touched her, there were no other instances alleged. R. at 176. He did not try to give her a massage or bath/shower. *Id.* All of this on top of the timing of the allegation displaying not only was the details of the allegation not in line with common sense, but the motive to lie about the allegation was clear—E.M. did not want to have to go back to California to stay in the cramped, dirty, and hot camper. E.M.'s dad said as long as she was safe, she would be going back to California to visit her mom. E.M's best friend, X.K., had a similar background with her parents and she no longer had to see her mom much. It was this same friend who searched "sex" and "what is sex" on her iPad 10 days prior to urging E.M.'s to tell her stepmom something about SrA Sherman. R. at 219, 226. When asked why she searched sex, X.K. refused to answer and looked like she had "gotten caught red-handed." R. at 226. X.K.'s mom even asked her about it again after she learned of the sexual assault allegation and still X.K. refused to explain. In fact, E.M.'s description of what happened is more in line with a search of "sex" or "what is sex" than of someone who experienced sex or child sexual abuse.

E.M.'s description of what allegedly occurred does not follow what a prepubescent child at the age of seven or eight would experience—biologically or regarding pain. It is more in line

with two prepubescent children searching the internet about what sex is and then trying to describe an experience that simply did not happen. Further, E.M.'s testimony about it happening only once in 2017 and once each summer she visited coupled with the lack of any sexual interest or grooming displayed by SrA Sherman should not leave this Court convinced beyond a reasonable doubt. For these reasons, Specification 2 of the Charge is not legally and factually sufficient and this Court should not affirm the finding of guilty.

WHEREFORE, SrA Sherman respectfully requests that this Honorable Court set aside and dismiss Specification 2 of the Charge and set aside the sentence.

II.

SRA SHERMAN'S SENTENCE TO 13 YEARS' CONFINEMENT IS INAPPROPRIATELY SEVERE.

Standard of Review

Sentence appropriateness is reviewed *de novo*. *United States v. Flores*, 84 M.J. 277, 2024 CAAF LEXIS 162, at *3[4] (C.A.A.F. 2024) (citations omitted).

Law and Analysis

Under Article 66(d), UCMJ, this Court may only approve "the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1); *Flores*, 2024 CAAF LEXIS 162, at *10. Based on the entire record, the sentence to 13 years' confinement in this case should be reassessed by this Court.

This Court has "broad discretion to determine whether a sentence should be approved, a power that has no direct parallel in the federal civilian sector." *United States v. Behunin*, 83 M.J.

[4] The case has been published but does not include pagination at this time. As such, counsel included the Lexis pin cites for ease of reference.

158, 161 (C.A.A.F. 2023). And, while this Court need not grant relief merely as a matter of clemency, *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (en banc), it is required to "do justice." *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010). In assessing sentence appropriateness, this Court considers "the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial." *Id.* (cleaned up).

Considering this particular appellant, SrA Sherman was born in 1992 in Pittsburgh, Pennsylvania. DE K at 1. He never knew his father growing up until he was 14 years old. *Id.* He met his father for the first time at his grandmother's funeral. *Id.* There were promises that they would be in touch, but his father once again disappeared after giving him a wrong phone number. *Id.* It was not until 2017 that SrA Sherman learned his father had passed away from cancer. *Id.* His father's lack of care or desire to be a part of SrA Sherman's life affected him deeply. *Id.* SrA Sherman's desire to better himself and make a more promising future for himself and hope of a family, led him to join the military in 2011. *Id.* Considering his record of service, SrA Sherman started his military career by spending almost 5 years in a reserve unit. PE 6, 12. He since has had three children whom he loves and prior to his conviction spent a great deal of time with teaching them "lessons like perseverance, resilience, and hard work." DE K at 2; DE J. The Defense also offered evidence of an Army Achievement Medal and four character letters on behalf of SrA Sherman. DE E-I. Understanding the Government submitted paperwork from SrA Sherman's record into evidence, three of them were for failing to receive the COVID-19 vaccine and the other two were for minor issues, which SrA Sherman did not rebut. PE 13-17.

The nature and seriousness of a sexual offense on a minor is typically heightened when considering age. Understanding this Court will consider any aggravating factor there are also

mitigating factors in this case. At the time of the offense, E.M. did not experience any vaginal pain or bleeding and instead was more confused. R. at 174-75. Further, E.M. is currently "flourishing" and "doing great." R. at 351. She has come out of her shell and does not exhibit any fear of strangers or being uncomfortable around adults. *Id.* Considering all matters contained in the record, 13 years' confinement—on top of a dishonorable discharge and SrA Sherman's requirement to register as a sex-offender—is inappropriately severe. DE K at 2.

This Court also takes into consideration "uniformity and evenhandedness of sentencing decisions." *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001). In maintaining uniformity and even-handedness, SrA Sherman asks this Court to rely on the judges' experience distilled from years of practice in military law to determine 13 years' confinement in this case is inappropriately severe and to reassess the sentence. *See United States v. Driskill*, No. ACM 39889 (f rev), 2022 CCA LEXIS 496, at *55-57 (A.F. Ct. Crim. App. Aug. 23, 2022) (finding that while there was no unsworn statement by the appellant, no evidence in mitigation offered by the Defense, no deployments or remote tours and the misconduct was severe, nonetheless this Court found 40 years and 9 months of confinement was inappropriately severe and reassessed the confinement to 30 years).

WHEREFORE, SrA Sherman respectfully requests that this Honorable Court reassess his sentence to 13 years' confinement.

III.

SRA SHERMAN IS ENTITLED TO RELIEF BECAUSE HE WAS NOT PROVIDED AN OPPORTUNITY TO REBUT THE MATTERS IN ACCORDANCE WITH RULES FOR COURTS-MARTIAL 1106 AND 1106A PRIOR TO THE CONVENING AUTHORITY'S DECISION ON ACTION.

Additional Facts

SrA Sherman was not provided an opportunity to rebut E.M.'s submission of matters. Appendix B. He was not aware he was allowed to respond to E.M.'s submission of matters. *Id.* Had SrA Sherman known and been given the opportunity, he would have wanted to respond. *Id.* Specifically, E.M. said in her statement that "At the trial, when I told the court what [SrA Sherman] did to me, I thought he might finally admit what he did and at least say that he is sorry. Instead, I was called a liar when I told the truth about what he did to me, and he never showed any sorrow for how badly he hurt me." E.M.'s Submission of Matters [E.M. Submission], dated 20 March 2023. SrA Sherman would have asked the convening authority not to consider this portion of E.M.'s submission, because it is inappropriate for the convening authority to hold the exercise of his rights or the normal proceedings of a court-martial against him. Appendix B. This portion of E.M.'s submission commented on SrA Sherman's constitutional rights to have the Government prove the charges against him beyond a reasonable doubt, his right to confront witnesses against him in a criminal trial, his right to remain silent, and his right to a fair hearing. *Id.*

Standard of Review

The standard of review for determining whether post-trial processing was properly completed is *de novo*. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000)). When reviewing post-trial errors, this Court will grant relief if an appellant presents "some colorable showing of possible prejudice."

United States v. LeBlanc, 74 M.J. 650, 660 (A.F. Ct. Crim. App. 2015) (quoting *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005)).

Law and Analysis

There is no evidence in the record that SrA Sherman received notification of his right to rebut E.M.'s submission of matters nor that he was provided the mandatory five days to rebut said matters.

1. SrA Sherman Did Not have an Opportunity to Rebut E.M.'s Submission of Matters.

Any crime victim of an offense may submit matters for consideration by the convening authority. R.C.M. 1106A(a). "The convening authority shall ensure any matters submitted by a crime victim under this subsection be provided to the accused as soon as practicable." R.C.M. 1106A(c)(3). Contrary to R.C.M. 1106A(c)(3), the convening authority did not ensure E.M.'s submission of matters was served on SrA Sherman within the timeframe needed to submit a rebuttal. There is no receipt in the record of trial indicating that it was served on SrA Sherman or his trial defense counsel. After receipt of matters submitted by a crime victim, the accused "shall have five days from receipt of those matters to submit any matters in rebuttal." R.C.M. 1106(d)(3). However, the SrA Sherman was not informed of his right to submit a rebuttal statement nor that he was provided the mandatory five days to submit matters. Instead, the convening authority signed the decision on action memorandum after reviewing SrA Sherman's Area Defense Counsel's clemency submission on his behalf and E.M.'s submission of matters. CADA.

2. This Court has recently held remand to the Air Force Trial Judiciary is appropriate when an appellant is not provided an opportunity to rebut matters.

In recent cases where a convening authority did not ensure the appellant was provided an opportunity to rebut the victim's submission of matters prior to making a decision on action, this Court found error. *United States v. Douglas*, No. ACM 40324, 2023 CCA LEXIS 502, at *1 (A.F.

Ct. Crim. App. Dec. 5, 2023) (holding there was error when the record was clear the appellant was not provided an opportunty to respond to the victim's submission of matters prior to the convening authority taking action and that the appellant's due process rights were violated, he had presented some colorable showing of possible prejudice, and the convening authority had the power to grant some clemency relief); *United States v. Haynes*, No. ACM 40306, 2023 CCA LEXIS 361, at *2 (A.F. Ct. Crim. App. Aug. 30, 2023) (finding remand to the Air Force Trial Judiciary is appropriate when the convening authority erred by not giving appellant the opportunity to rebut two victims' submission of matters prior to deciding what action, if any, to take); *United States v. Arroyo*, No. ACM 40321, 2023 CCA LEXIS 358, at *2 (A.F. Ct. Crim. App. Aug., 25 2023) (finding the appellant was entitled to relief because she was not served with the victim's submission of matters and, therefore, not given an opportunity to rebut those matters before the convening authority made his decision on action). This Court should find the same in this case and remand this case to the Air Force Trial Judiciary in order to provide SrA Sherman an opportunity to rebut E.M.'s matters.

3. SrA Sherman would have Submitted a Rebuttal Statement had he been Given the Opportunity.

SrA Sherman's area defense counsel submitted a clemency statement on his behalf, and while SrA Sherman did not know he could submit his own written request, his area defense counsel did ask that his reduction in rank be deferred until the Entry of Judgment was signed. Clemency. The convening authority's decision on action did not address this particular request. CADA. The reduction in rank from senior airman to airman basic impacted the amount of automatic forfeitures that were paid to SrA Sherman's dependents when the convening authority waived the automatic forfeitures for a period of six months. *See* CADA. Therefore, not only was SrA Sherman's clemency request for a deferrement on the reduction in rank not addressed by the convening authority, but SrA Sherman would have also submitted a statement to rebut E.M.'s submission.

CADA; Appendix B.

Had SrA Sherman been served the matters, he would have wanted to respond. Appendix B. The convening authority may not consider matters adverse to the accused without first notifying him and providing an opportunity to rebut. R.C.M. 1109(d)(3)(C)(i). E.M.'s statement included matters adverse to SrA Sherman. She stated that "At the trial, when I told the court what [SrA Sherman] did to me, I thought he might finally admit what he did and at least say that he is sorry. Instead, I was called a liar when I told the truth about what he did to me, and he never showed any sorrow for how badly he hurt me." E.M. Submission. At a minimum, SrA Sherman would have asked the convening authority not to consider this portion of E.M.'s submission. Appendix B. First, it is inappropriate for the convening authority to hold the exercise of SrA Sherman's rights or the normal proceedings of a court-martial against him. Second, this portion of E.M.'s submission commented on SrA Sherman's constitutional rights to have the Government prove the charges against him beyond a reasonable doubt, his right to confront witnesses against him in a criminal trial, his right to remain silent, and his right to a fair hearing.

Since SrA Sherman would rebutted E.M.'s submission if given the opportunity, he has made some colorable showing of prejudice especially given the threshold is low. *United States v. Chatman*, 46 M.J. 321, 323-24 (C.A.A.F. 1997) ("[T]he threshold should be low, and if an appellant makes some colorable showing of possible prejudice, we will give that appellant the benefit of the doubt and 'we will not speculate on what the convening authority might have done' if defense counsel had been given an opportunity to comment.") (quoting *United States v. Jones*, 44 M.J. 242, 244 (C.A.A.F. 1996))). As SrA Sherman has made a colorable showing, this Court must either provide meaningful relief or return the case to the Judge Advocate General for new post-trial action. *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998).

WHEREFORE, SrA Sherman respectfully requests this Honorable Court remand the case to provide him an opportunity to rebut E.M.'s submission of matters.

Respectfully submitted,

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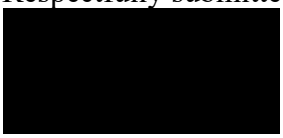
CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,



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APPENDIX A

APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL DEFENSE COUNSEL INEXPLICABLY FAILED TO PRESENT FAVORABLE EVIDENCE AT TRIAL.

Statement of Facts

A.S.'s declaration, filed by separate motion this same date, lays out in detail favorable evidence regarding E.M.'s 2019 summer visit to California that SrA Sherman's trial defense counsel failed to present through her direct testimony at trial. Appendix C.

In Appellate Exhibit I, Attachment 2 (OSI ROI page 21, paragraph 2-30), there is a summary of an interview with A.C., a friend of the Sherman family. She was interviewed on 12 Aug 21. In the body of the second full paragraph on page 21 the following appears:

> A.C. overheard [her son] ask VICTIM [E.M.] about the allegations against SUBJECT. A.C. questioned if VICTIM [E.M.] said the allegation to avoid traveling to CA and VICTIM [E.M.] replied her 'friend' (NFI) told VICTIM [E.M.] if she went to CA for the summer they would not be able to be together during the summer. VICTIM [E.M.] then began to backtrack and deflect A.C.'s questions.

A.C. was not called to testify in any motion hearing or at the trial. There is no further information regarding whether the defense interviewed A.C. about this entry in the OSI ROI or why A.C. was not called as a defense witness.

Standard of Review

This Court reviews claims of ineffective assistance of counsel *de novo*. *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007) (citing *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006)).

Law and Analysis

When reviewing claims for ineffective assistance of counsel, this Court is bound by the two-part test outlined by the United States Supreme Court in *Strickland v. Washington,* 466 U.S.

668, 687 (1984). *United States v. Scott*, 24 M.J. 186 (C.M.A. 1987). Under *Strickland*, the appellant has the burden of demonstrating: (1) a deficiency in counsel's performance that is "so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment"; and (2) that the deficient performance prejudiced the defense through errors "so serious as to deprive the defendant of a fair trial." *Strickland*, 466 U.S. at 687.

In order to satisfy the deficiency prong of *Strickland*, Appellant has to show his defense counsel's performance fell below an objective standard of reasonableness, according to the prevailing standards of the profession. *Id*. at 688. The Court of Appeals for the Armed Forces set out a three-part test to determine if a defense counsel's performance was deficient. Specifically, this Court must determine:

> 1. Are appellant's allegations true and if so 'is there a reasonable explanation for counsel's actions.'? 2. If the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance ... [ordinarily expected] of fallible lawyers"? 3. If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result?

United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing *United States v. Polk,* 32 M.J. 150, 153 (C.M.A. 1991)).

When A.S. testified as a defense witness, among other things the defense counsel questioned her about E.M.'s visit to California the summer of 2019 which involved Specification 2 of the Charge. Inexplicably, defense counsel failed to more fully develop key details from that visit by eliciting testimony from A.S. that would have shown the limited opportunities SrA Sherman had over a 39-day period in which he could have engaged in a sexual assault upon E.M.

In particular, the declaration clarifies how, during the first twenty-three days of the visit, SrA Sherman's mother, N.S., lived in the camper and actually slept in the bedroom

where the alleged sexual assault occurred. The declaration also describes SrA Sherman's long duty hours and work hours at his off-duty civilian employment, making it practically impossible that he was even present in the camper in the manner described by E.M.

With respect to A.C., defense counsel had a clear duty to interview A.C. about the OSI ROI entry summarizing A.C.'s interview in which she spoke to E.M. about E.M.'s reason for not wanting to visit California during the summer. This would have further substantiated E.M.'s motive to come up with a sexual assault claim in order to avoid any future potential visit to California.

There is no reasonable explanation why defense counsel did not have A.S. address these additional facts under oath as set forth in her Declaration. Given that A.S. was the only fact witness called by the defense to describe E.M.'s California visit in the summer of 2019 in their case-in-chief, it was critical to bring out every detail that contradicted E.M.'s testimony, undermined her credibility and explained SrA Sherman's long work hours. Furthermore, defense counsel should have interviewed A.C. about her conversation with E.M. regarding a motive to not travel to California. These failures fell "'measurably below the performance ... [ordinarily expected] of fallible lawyers.'" In this closely contested case, there is "'a reasonable probability that, absent the errors,' there would have been a different result."

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40486**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Adam J. SHERMAN	)	
Senior Airman	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 24 June 2024, Appellant personally raised an issue in which he claims "his trial defense counsel inexplicably failed to present favorable evidence at trial," resulting in ineffective assistance of counsel. Specifically, Appellant asserted his counsel should have questioned one witness more thoroughly, and should have interviewed another witness, about a potential motive of the victim.

On 1 July 2024, the Government filed a Motion to Compel Declarations and contemporaneously filed a Motion for Enlargement of Time. The Government requests this court compel Appellant's trial defense counsel, Major (Maj) Nicholas F. Aliotta and Captain (Capt) Morgan M. Galusha, each to provide declarations in response to the claimed ineffective assistance of counsel, within 30 days of our order. According to the Government, Appellant's trial defense counsel indicated they would only provide a declaration upon order by this court. In the Motion for Enlargement of Time, the Government requests 14 days to submit its answer after the court's receipt of the declarations from trial defense counsel. Appellant did not respond to either motion.

The court has examined the claimed deficiencies and finds good cause to compel a response from Appellant's trial defense counsel with regards to Appellant's claims. The court cannot fully resolve Appellant's claims without piercing the privileged communications between Appellant and his trial defense counsel. Moreover, in light of the court's order granting the Government's Motion to Compel Declarations, it finds good cause to grant the Government's requested enlargement.

Accordingly, it is by the court on this 9th day of July, 2024,

ORDERED:

The Government's Motion to Compel Declarations is **GRANTED**. Maj Aliotta and Capt Galusha are ordered to provide a declaration to the court that

is a specific and factual response to Appellant's claim that trial defense counsel were ineffective.

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

It is further ordered:

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

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' MOTION FOR ENLARGEMENT OF TIME
v.	)	No. ACM 40486
Senior Airman (E-4) **ADAM J. SHERMAN**, USAF, *Appellant.*	)	Before Panel No. 2 1 July 2024

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

Pursuant to Rule 23.3(m) of this Court's Rules of Practice and Procedure, the United States hereby requests an enlargement of time to adequately respond to Appellant's Assignment of Error in which he alleges ineffective assistance of counsel against his trial defense counsel. In conjunction with this motion, the United States filed a Motion to Compel Declarations and asked this Court to order Appellant's trial defense counsel, Maj N.A. and Capt M.G., to each provide a declaration in response to Appellant's alleged ineffective assistance of counsel claims. The United States seeks a fourteen-day enlargement of time following the submission of Maj N.A.'s and Capt M.G.'s declarations to the Court respond properly and completely to Appellant's brief.

The United States' Answer to Appellant's Assignment of Errors brief is currently due to the Court on 24 July 2024. Undersigned counsel will require a reasonable amount of time after the submission of declarations to address properly Appellant's ineffective assistance of counsel claims. Good cause exists to grant this request. Undersigned counsel needs this additional time to address properly Appellant's ineffective assistance of counsel claims, which cannot be analyzed until Maj N.A.'s and Capt M.G.,'s declarations are received. Barring unforeseen circumstances, the United States believes fourteen days is sufficient to prepare a proper and responsive brief for this Honorable Court on this issue once the ordered declarations are received.

This case was docketed with the Court on 27 June 2023. Appellant filed his Assignments of Error brief with this Honorable Court on 24 June 2024, 363 days after docketing. This is the United States' first request for an enlargement of time. As of the date of this request, 370 days have elapsed since docketing.

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

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division and to civilian appellate defense counsel on 1 July 2024 via electronic filing.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' MOTION TO COMPEL DECLARATIONS
v.	)	No. ACM 40486
Senior Airman (E-4) **ADAM J. SHERMAN**, USAF, *Appellant.*	)	Before Panel No. 2 1 July 2024

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

Pursuant to Rule 23.3(e) of this Court's Rules of Practice and Procedure, the United States hereby requests this Court order Appellant's trial defense counsel, Maj N.A. and Capt M.G., to each provide a declaration in response to Appellant's alleged ineffective assistance of counsel claims.

Maj N.A., Circuit Defense Counsel, and Capt M.G., Area Defense Counsel, represented Appellant at his trial. Appellant filed his Assignments of Error and his Motion to Attach his and his wife's declarations with this Court on 24 June 2024. In Issue IV and in his wife's declaration, Appellant alleges, pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982), his trial defense counsels were ineffective. The United States has requested a declaration from each counsel to address the alleged ineffective assistance of counsel, and they indicated they would not do so without an order from this Court.

The United States requires a declaration from Maj N.A. and Capt M.G. to adequately respond to Appellant's brief and to Appellant's ineffective assistance of counsel claim. *See* United States v. Rose, 68 M.J. 236, 236 (C.A.A.F. 2009); United States v. Melson, 66 M.J. 346, 347 (C.A.A.F. 2008). In fact, this Court cannot grant Appellant's ineffective assistance of counsel claim without first obtaining a declaration from trial defense counsel. *See* Rose, 68 M.J. at 237; Melson, 66 M.J. at 347. Declarations are necessary in this case because the allegations of ineffective assistance of counsel

involve strategic decisions regarding presenting or not presenting testimony from more than one witness. Only Appellant's trial defense counsel can explain such decisions that Appellant now challenges.

Accordingly, the United States respectfully requests this Court order Maj N.A. and Capt M.G. each to provide a declaration with specific, factual responses to Appellant's claim of ineffective assistance of counsel within 30 days of the Court's order.

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

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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 and to civilian appellate defense counsel on 1 July 2024 via electronic filing.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**MOTION TO ATTACH**
Appellee,	)	**DOCUMENT**
	)	
	)	
v.	)	Before Panel No. 2
	)	
Senior Airman (E-4),	)	No. ACM 40486
ADAM J. SHERMAN,	)	
United States Air Force,	)	
Appellant.	)	24 June 2024

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

Pursuant to Rule 23(b) of this Honorable Court's Rules of Practice and Procedure, Appellant, SrA Adam J. Sherman, hereby moves to attach the following documents to the Record of Trial:

1. Declaration of SrA Adam J. Sherman, dated 17 May 2024, 1 page (Appendix B)
2. Declaration of Amanda Sherman, dated 23 June 2024, 1 page (Appendix C)

Appendix B is the sworn declaration of SrA Adam J. Sherman. He provides this declaration in support of his argument relating to Assignment of Error (AOE) III. Specifically, SrA Sherman's declaration is relevant to this Court's consideration of AOE III because SrA Sherman's declaration provides additional support for his assertion that he was not timely served with E.M.'s submission of matters. It is also necessary because it provides an essential factual predicate for determining SrA Sherman did not, in fact, receive the victim matters in time to rebut them. SrA Sherman' declaration expounds upon the areas of E.M.'s submission of matters that he would have addressed, corrected, or clarified if he had been timely served E.M.'s submission of matters. SrA Sherman's areas of rebuttal relating to E.M.'s submission of matters was never presented to the convening authority.

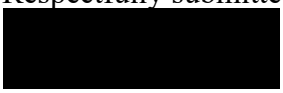
Appendix C is a declaration from Amanda Sherman, SrA Sherman's wife. She provides this declaration in support of SrA Sherman's argument relating to AOE IV. Specifically, Mrs. Sherman's declaration is relevant to this Court's consideration of AOE IV because she provides additional support for SrA Sherman's assertion that he was not provided effective assistance of counsel. It is also necessary because it provides an essential factual predicate for determining in detail the favorable evidence regarding E.M.'s 2019 summer visit to California that SrA Sherman's trial defense counsel failed to present through her testimony.

Therefore, both declarations are relevant and necessary to this Court's consideration of whether SrA Sherman has demonstrated "some colorable showing of possible prejudice" concerning Issues III (E.M.'s submission of matters) and IV (ineffective assistance of counsel). *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005).

In *United States v. Jessie*, 79 M.J. 437, 445 (C.A.A.F. 2020), the Court of Appeals for the Armed Forces continued the practice of allowing consideration of matters outside the record to resolve issues reasonably raised by materials in the record but not fully resolvable by those materials. The failure to timely serve SrA Sherman with E.M.'s submission of matters and him not being provided effective assistance of counsel are reasonably raised by materials in SrA Sherman's record, but not fully resolvable from the materials in the record.

WHEREFORE, SrA Sherman respectfully requests this motion be granted.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 24 June 2024.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' MOTION TO ATTACH DOCUMENTS
v.	)	No. ACM 40486
Senior Airman (E-4) **ADAM J. SHERMAN**, USAF, *Appellant.*	)	Before Panel No. 2 6 August 2024

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

Pursuant to Rule 23(b) of this Court's Rules of Practice and Procedure, the United States hereby submits this Motion to Attach Documents, that is, the declarations of Appellant's trial defense counsel: Maj N.A. and Capt M.G. These declarations are responsive to this Court's 9 July 2024 Order granting the United States' 1 July 2024 Motion to Compel Declarations, and are essential for the Court to adjudicate Appellant's claims of ineffective assistance of those counsel in his Assignments of Error, Issue IV.

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

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, the Air Force Appellate Defense Division, and civilian defense counsel on 6 August 2024 via electronic filing.

[redacted]
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Senior Airman (E-4) **ADAM J. SHERMAN,** United States Air Force, *Appellant*.	**CONSENT MOTION FOR LEAVE TO FILE SUBSTITUTE ASSIGNMENT OF ERROR AND TO ATTACH** Before Panel No. 2 No. ACM 40486 19 August 2024

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

COMES NOW the Appellant, Senior Airman (SrA) Adam J. Sherman, by and through counsel, pursuant to Rules 23(b) and 23.3 of this Honorable Court's Rules of Practice and Procedure, and respectfully moves for leave to file a substitute Assignment of Error (AOE) and to attach the substitute AOE.

On 24 June 2024, SrA Sherman filed his AOEs in the Brief on Behalf of Appellant. The brief incorrectly stated that there was no receipt in the record of trial indicating SrA Sherman was served with E.M.'s submission of matters. This was an error. The record of trial does contain a receipt dated 21 April 2023 signed by SrA Sherman acknowledging receipt of the victim's submission of matters, dated 20 March 2023. SrA Sherman is filing a motion to amend the Brief on Behalf of Appellant to correct said error. However, in addition to correcting the error, SrA Sherman requests to substitute AOE III as the AOE needed to be corrected to reflect that SrA Sherman did not understand he had an opportunity to rebut E.M.'s submission of matters as opposed to the Government not having served the matters on SrA Sherman.

Appellate Government Counsel have been consulted about this motion and consent to the relief sought by the SrA Sherman.

WHEREFORE, SrA Sherman respectfully requests that this Honorable Court grant this motion.

Respectfully submitted,

[redacted]

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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 Government Trial and Appellate Operations Division on 19 August 2024.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Senior Airman (E-4) **ADAM J. SHERMAN,** United States Air Force, *Appellant*.	**CONSENT MOTION TO AMEND PLEADING** Before Panel No. 2 No. ACM 40486 19 August 2024

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

COMES NOW the Appellant, Senior Airman (SrA) Adam J. Sherman, by and through counsel, pursuant to Rule 23.3(n) of this Honorable Court's Rules of Practice and Procedure, and respectfully moves to amend the Brief on Behalf of Appellant.

On 24 June 2024, SrA Sherman filed his Assignments of Error (AOE) in the Brief on Behalf of Appellant. The brief incorrectly stated that there was no receipt in the record of trial indicating SrA Sherman was served with E.M.'s submission of matters. This was an error. The record of trial does contain a receipt dated 21 April 2023 signed by SrA Sherman acknowledging receipt of the victim's submission of matters, dated 20 March 2023.

A proposed corrected copy of pages one and 14 are attached as an appendix to this motion. Page one needs to be amended as the language of AOE III needed to be amended and page 14 needed to be amended to correctly state a receipt was contained in the record.

Appellate Government Counsel have been consulted about this motion and consent to the relief sought by the SrA Sherman.

WHEREFORE, SrA Sherman respectfully requests that this Honorable Court grant this motion and accept the amended versions of pages one and 14 of the Brief on Behalf of Appellant.

Respectfully submitted,

[redacted]

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APPENDIX

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**BRIEF ON BEHALF OF**
Appellee	)	**APPELLANT**
	)	
v.	)	Before Panel 2
	)	
Senior Airman (E-4)	)	No. ACM 40486
ADAM J. SHERMAN	)	
United States Air Force	)	14 August 2024
Appellant	)	

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

Assignments of Error

I.

WHETHER SPECIFICATION 2 OF THE CHARGE IS LEGALLY AND FACTUALLY INSUFFICIENT.

II.

WHETHER SRA SHERMAN'S SENTENCE TO 13 YEARS' CONFINEMENT IS INAPPROPRIATELY SEVERE.

III.

WHETHER SRA SHERMAN IS ENTITLED TO RELIEF BECAUSE HE DID NOT UNDERSTAND HE HAD AN OPPORTUNITY TO REBUT E.M.'S SUBMISSION OF MATTERS IN ACCORDANCE WITH RULES FOR COURTS-MARTIAL 1106 AND 1106A PRIOR TO THE CONVENING AUTHORITY'S DECISION ON ACTION.

IV.[1]

WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL DEFENSE COUNSEL INEXPLICABLY FAILED TO PRESENT FAVORABLE EVIDENCE AT TRIAL.

[1] Issue IV is raised in accordance with *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1992), in Appendix A.

or 2019. *Id.* A.S. first enlisted on 18 September 2019. R. at 330, DE C. As such, it was not possible for A.S. to have been away at a drill weekend during the summers of 2018 or 2019. R. at 332. A.S. denied ever using, owning, or seeing strawberry flavored lubrication or substance in their house or camper. R. at 335.

11. Since Making the Allegations, E.M. is Flourishing and Resembling No Signs of Trauma.

E.M.'s father told the Defense that E.M. was "flourishing" and "doing great" and that E.M. "feels like a weight has lifted off of her shoulders." R. at 351. E.M. had even come out of her shell. *Id.* She did not exhibit any fear of strangers or of being uncomfortable around adults. *Id.*

12. The Convening Authority Considered Matters Submitted by the Defense in Clemency and E.M. Prior to his Decision on Action.

On 16 March 2023, SrA Sherman acknowledged his right to submit matters to the convening authority and indicated he intended to do so. Notice of Right to Submit Matters, 16 March 2023. On 8 May 2023, the convening authority signed the Decision on Action after reviewing the submission of matters submitted on behalf of SrA Sherman by his Area Defense Counsel. CADA; *see also* SrA Sherman's Submission of Matters, 26 March 2023. He also considered matters submitted by E.M. CADA. Her submission of matters was dated 20 March 2023 and stated:

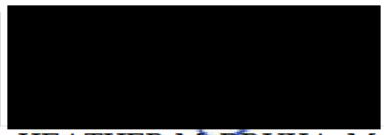
> At the trial, when I told the court what [SrA Sherman] did to me, I thought he might finally admit what he did and at least say that he is sorry. Instead, I was called a liar when I told the truth about what he did to me, and he never showed any sorry for how badly he hurt me.

E.M. Submission of Matters. While there is a receipt dated 21 April 2023 acknowledging SrA Sherman received E.M.'s submission of matters, there is no rebuttal from SrA Sherman to E.M.'s submission of matters in the record of trial. Receipt of E.M. Submission of Matters.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 19 August 2024.

Respectfully submitted,



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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee, v. Senior Airman (E-4) **ADAM J. SHERMAN**, USAF Appellant.	)))))))))	**UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR** Before Panel 2 No. ACM 40486 12 September 2024

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

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before Panel No. 2
Senior Airman (E-4) **ADAM J. SHERMAN,** United States Air Force, *Appellant.*	)	No. ACM 40486
	)	12 September 2024

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

ISSUE PRESENTED

I.

WHETHER SPECIFICATION 2 OF THE CHARGE IS LEGALLY AND FACTUALLY INSUFFICIENT.

II.

WHETHER [APPELLANT'S] SENTENCE TO 13 YEARS' CONFINEMENT IS INAPPROPRIATELY SEVERE.

III.

WHETHER [APPELLANT] IS ENTITLED TO RELIEF BECAUSE HE WAS NOT PROVIDED AN OPPORTUNITY TO REBUT THE MATTERS IN ACCORDANCE WITH RULES FOR COURTS-MARTIAL 1106 AND 1106A PRIOR TO THE CONVENING AUTHORITY'S DECISION ON ACTION.

IV.[1]

WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL DEFENSE COUNSEL INEXPLICABLY FAILED TO PRESENT FAVORABLE EVIDENCE AT TRIAL.

[1] Appellant raised Issue IV pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1992), in Appendix A.

STATEMENT OF CASE

The United States accepts Appellant's statement of the case. Additionally, Appellant elected to be tried by military judge alone. (R. at 103-04; App. Ex. XIX.)

STATEMENT OF FACTS

Government witnesses included victim E.M. (R. at 113-95); her friend, X.K. (R. at 198-214); X.K.'s mother, C.A. (R. at 214-31); E.M.'s father, B.M. (R. at 233-75); E.M.'s stepmother, K.M. (R. at 278-89); and Dr. K.M. (R. at 290-314). Defense witnesses included Appellant's wife, A.S. (R. at 316-47); defense paralegal SSgt C.R. (R. at 348-57); and child forensic interviewer S.C. (R. 367-86). In rebuttal, the government recalled B.M. (R. at 393-94.)

A. E.M.'s Family Background

Victim E.M. testified at the court-martial. (R. at 113.) She was 11 years old at the time of her testimony in March 2023, and would be turning 12 the next month. (R. at 113, 234.) She lived with her biological father, B.M., and step-mother, K.M., in Pennsylvania with her younger half-brother. (Id.) E.M.'s mother, A.S., and three younger half-siblings lived in California with Appellant. (R. at 115.) B.M. and A.S. met in 2009, got married in 2011, and ended their marriage four and a half to five years later, because A.S. was having an affair with Appellant and left B.M. to be with Appellant. (R. at 235, 246-47.) E.M. was approximately 2 or 3 years old at the time the marriage ended. (R. at 247.)

After A.S. left B.M., E.M. lived primarily with B.M., but while A.S. lived 35 minutes away in Pennsylvania before moving to California, E.M. went to her mother's house on weekends. (R. at 115.) While A.S. lived in Pennsylvania apart from B.M., Appellant lived with A.S. (R. at 116.) E.M. longed to see A.S. and the three half-siblings every time she could. (R. at 250, 251.) However, E.M. would be apprehensive about visiting and would ask if Appellant would be there.

(Id.) There was no custody agreement in place when A.S. moved to California, but it was important for B.M. that E.M. remain in contact and spend time together with A.S., and E.M. felt the same way. (R. at 251, 258.) E.M. had good days and bad days when staying in California with A.S. and Appellant's family. (R. at 257.)

B. Appellant's Pennsylvania Sexual Assault of E.M. Admitted pursuant to M.R.E. 414[2]

In 2017, when E.M. was six years old, and alone with Appellant[3] at his and A.S.'s home in Pennsylvania, Appellant told E.M. to get onto the bed in his bedroom[4] and to take her underpants off. (R. at 116, 118, 136-37, 157; 25; Pros. Ex. 1, 2.) While E.M. was laying on her back, wearing only her shirt, Appellant took off her pants and underwear. (R. at 117-18, 159.) Appellant put his penis against her "vagina area." (R. at 116-17, 121, 160; Pros. Ex. 3, 4.) Appellant also put a white cream from a strawberry-labeled tube container on her vagina and licked it off. (R. at 117, 124, 137, 160, 165, 377; Def. Ex. D, 4th video file, timer start through 0:00:45, 0:01:10 to 0:01:21.)[5] Appellant was wearing only a shirt, but nothing from the waist down. (R. at 117-18.)

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[2] The military judge admitted this evidence from 2017 pursuant to Military Rule of Evidence 414. (R. at 101; App. Ex. XVIII.)

[3] E.M. was not sure where her mother, A.S., was at the time of the Pennsylvania sexual assault, but A.S. was not at home. (R. at 158, 163) E.M. believed A.S. was probably out running errands, possibly getting breakfast for E.M. with the other kids. (R. at 158.) On cross-examination, E.M. said it was possible she told the child forensic interviewer, S.C., during their first interview, that A.S. had gone out for breakfast, but E.M. could not recall what she told S.C. (R. at 164.) Then, E.M. said she "might have" told S.C., during their second interview, that A.S. was in the kitchen cooking dinner during the Pennsylvania sexual assault. (Id.) But E.M. followed up and said, "I do not know exactly what [A.S.] was doing or where she was." (Id.)

[4] In Appellant's assignment of error, he incorrectly represented, "E.M. conceded that she told Ms. S.C. during her second interview that the door to the room was partially open during the alleged assault while she testified that it was closed." (App. Br. at 5 (citing R. at 164)). E.M. did not make such a concession. Rather, when confronted during cross-examination, E.M. testified she could not recall whether the door was closed for the Pennsylvania sexual assault or the 2018 California sexual assault, but she was certain it was closed for the 2019 California rape. (R. at 164-65.)

[5] In Appellant's assignment of error, he points out that E.M. told S.C., during part of their second July 2021 interview, that the strawberry substance incident was in California, not Pennsylvania,

E.M. could not remember whether Appellant ejaculated. (R. at 161.) Appellant told E.M. it was their "little secret" and to not tell anybody about what happened, so she did not do so. (R. at 125, 194.)

C. E.M.'s Mother, A.S., Moved to California

E.M.'s mother, A.S., moved to Sacramento, California in 2017, because Appellant was stationed there, and A.S. moved there to be with him. (R. at 125.) At first, they lived in on-base housing, where E.M. visited "one or two summers." (R. at 126, 150.) Then, in March 2019, A.S. and Appellant moved to a camper and lived on one of two campgrounds, to which they cycled every three weeks. (R. 126, 154, 320-21, 322, 327, 332; Def. Ex. A.)

During the summer, E.M. lived with A.S., Appellant, and E.M.'s three half-siblings. (R. at 126.) In the camper, E.M. slept in the loft in the kitchen/dining area, Appellant and A.S. had a bedroom in the front of the camper, and E.M.'s half-sibling shared a sleeping space in the rear of the camper. (R. at 127, 150.) E.M.'s half-siblings had an earlier bedtime than E.M. (R. at 129.) The camper was crowded, noisy, and hot in the summer. (R. at 150.) Appellant could be mean, would yell at E.M., A.S., and E.M.'s half-siblings. (R. at 155, 261.) When E.M. visited A.S., E.M. enjoyed playing outside and going to the playground with her half-siblings and mother. (R. at 128.) E.M. also had a friend who lived in another camper near Appellant's and A.S.'s camper. (Id.)

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and E.M. testified that such a statement by her would have been a "mis-memory." (App. Br. at 5 (citing R. at 165); *compare* R. at 390-91.) K.M. arranged the second interview with S.C., because E.M. disclosed in a subsequent discussion with K.M. the strawberry substance event. (R. at 289, 385.)

D. Appellant's 2018 California Sexual Assault of E.M. (Specification 1 - Acquitted)

Appellant touched E.M.'s genitalia on two occasions while she was alone with him in the camper in California, when she was ages seven and eight. (R. at 129, 136.)[6] The first time was in 2018, the first summer after A.S. and Appellant moved to California, when E.M. was 7 years old. (R. 130, 165-66, 170-71, 238.)[7]

Leading to the 2018 sexual assault in California, E.M. was in her loft, her half-siblings were already asleep, and her mother was not home. Appellant called her into his bedroom, and he took off her clothes from the waist down. (R. at 131.) He took off his pants and underpants. (R. at 167.) Appellant asked E.M., "Do you want to do our little secret?" (Id.) Then, Appellant climbed on top of E.M. and "he put his male part in [her] lady private parts." (R. at 131, 142.) She could feel his penis inside of her vagina. (R. at 132, 192.) Appellant was in "sort of like a crawling position … over [E.M.]" and "he got lower as it went – as it like went in." (R. at 142-143.) E.M. testified, "It was a very weird feeling. I didn't really understand what he was trying to do. . . . [I]t didn't really hurt, but it was just a very like weird feeling." (Id.) Appellant did not ejaculate. (R. at 169.)

E. Appellant's 2019 California Rape of E.M. (Specification 2 - Convicted)

Appellant's rape of E.M. was in the daytime during the next summer visit, in California in 2019. (R. at 132, 170-71, 176.) E.M. testified she was 7 or 8 years of age at the time of the rape.

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[6] During cross-examination, E.M. admitted that, during the second child forensic interview, E.M. might have said her mother was asleep in the back of the camper with E.M.'s three half-siblings during the 2018 sexual assault in California. (R. at 170.)

[7] During cross-examination, E.M. testified, "It was either the first time it happened in California or the second time it happened in California that she was on drill weekend. I do not recall which time it was she was on drill weekend." (R. at 170.) E.M. testified her mother could have been on drill weekend during the 2018 or the 2019 incident, or both. (R. at 170, 176.) The defense proved that recollection incorrect, because A.S. enlisted in the Air Force Reserve on 18 September 2019. (R. at 329-30, 332; Def. Ex. C.)

(R. at 136.) E.M. could not recall where her mother or half-siblings were, but they were not home in the camper. (R. at 132, 172, 193.)[8] At around 1700 or 1800 hours on the day of the rape, Appellant called E.M. into his bedroom, closed the door to his bedroom, and told her to take her clothes/pants off. (R. at 133, 164, 172.) Appellant took his pants off, and E.M. saw his penis. (R. at 134, 173.)

Appellant then "touched" E.M.'s vagina with his penis and his hands while they were laying next to each other. (R. at 133, 134, 142.) Appellant put his penis inside of E.M.'s vagina and made an "up-and-down motion" with his body. (R. at 135, 142, 173, 192.) Appellant's mother, who stayed in a camper across the way, entered Appellant's camper, said something, dropped off something, and left. (R. at 135, 193.) Appellant stopped raping E.M. and did not ejaculate. (R. at 173.) Right after Appellant's mother left, Appellant told E.M. to get dressed, he got dressed, and he left. (Id.) Appellant threatened E.M. that, if she told anybody about what he had done, she would not be able to go back to Pennsylvania. (R. at 136, 184, 194, 387; Def. Ex. D, 1st video file, timer 0:00:57 to 0:01:07.)

After the 2019 rape in California, E.M. liked being around her mother and half-siblings, but it was "awkward" being around Appellant. (R. at 138-39.) When E.M.'s father was planning for her visit the next summer, in about October 2020, and E.M. resisted, her father said that, if she was safe in California, she would be going back there. (R. at 179, 265-66.)[9]

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[8] During cross-examination, trial defense counsel asked E.M. whether she said, during the child forensic interviews, that her mother had gone to the gas station. (R. at 177.) She responded that her mother had left her alone with Appellant to go to the gas station one time, but that she did not recall that was a time when Appellant sexually assaulted or raped E.M. (Id.) During the video recorded interview, E.M. stated, "The most recent time she was at the – if I'm remembering this correctly I re – I'm pretty sure that she was at the gas station." (R. at 388; Def. Ex. E, 1st video file, timer 0:01:33 to 0:01:46.)

[9] E.M. testified that conversation might have taken place after E.M. told her best friend, X.K., in February 2021, about the sexual assault and rape, but it possibly took place earlier. (R. at 180.)

After the summer of 2019, E.M. went to stay with A.S. and her family in California one more time, during the fall of the COVID-19 pandemic in August to October of 2020, when E.M. attended "cyber school." (R. at 171, 236, 258-59, 264.)

F. E.M. Reported Appellant's Sexual Assaults and Rape

The first person whom E.M. told about the sexual assaults and rape was X.K., when E.M. was 10 years old, in February 2021, while playing in E.M.'s yard and sharing secrets. (R. at 139-40, 177, 187, 201, 209.)[10] In X.K.'s opinion, E.M. is a truthful person. (R. at 203-04, 212-13.)

A couple of weeks later, on 15 February 2021, X.K. convinced E.M. to tell X.K.'s stepmother, C.A., about what had happened with Appellant. (R. at 140, 141, 180, 202, 213, 217, 225.)[11] C.A. testified that, when E.M. recounted to C.A. what had happened, E.M. was upset, teary-eyed, and pale. (R. at 217.) E.M. asked C.A., "You know Adam?" E.M. did not say anything else, but kept crying. (R. at 223.) E.M. was at a loss for words, so C.A. prompted her to type out what she could not say. (R. at 224.) E.M. typed the word, "sex." (Id.) C.A. asked, "What about sex," and E.M. said, "[Appellant] made me have sex," and then broke down crying. (Id.) Leading up to 15 February 2021, it appeared to C.A. that something was off with E.M. (R. at 225.)

C.A. then told her fiancé, D.K. (R. at 141, 219.) That night, C.A. and D.K. told E.M.'s father, B.M., and stepmother, K.M., what E.M. had told C.A. (R. at 141, 180, 219.) Then E.M. explained it mostly to her stepmother, K.M., and her stepmother's mother, S. (R. at 141, 180-81,

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[10] At the time of the court-martial, X.K. was 11 years of age. (R. at 198.)

[11] During cross-examination, X.K. denied researching rape or sex, and said E.M. did not use X.K.'s electronic devices. (R. at 211-12.) However, her stepmother, C.A., testified that on 5 February 2021, 10 days before E.M. told C.A. about Appellant sexually assaulting and raping her, C.A. noticed on X.K.'s iPad two internet searches related to the word "sex." (R. at 219, 226.) When C.A. asked X.K. about the searches, she looked terrified but refused to discuss it. (R. at 226, 230.) However, X.K. told C.A. that E.M. had told her about the sexual assault and rape at a time that coincided with the timing of the internet search. (R. at 228.) C.A. did not remember finding any websites had been visited in conjunction with the internet searches. (R. at 229-30.)

263, 274.) K.M. had been abused as a child by K.M.'s mother's boyfriend. (R. at 182.) But K.M. had not told E.M. about that abuse until E.M. told K.M. about Appellant abusing her. (R. at 187-88.) Knowing about K.M.'s experience made E.M. more comfortable sharing what Appellant had done to her. (R. at 183.) After E.M. "got it of [her] chest," she felt "more like safe and like loved by more people." (R. at 142.) E.M. spoke with a counselor about the sexual assaults and rape. (R. at 184.)

Prior to testifying at Appellant's court-martial, E.M. had two child forensic interviews in Pennsylvania, in February and July 2021, and one with the Air Force Office of Special Investigations (OSI). (R. at 162-63.) Trial defense counsel asked E.M. if, during the first child forensic interview, she said her mother had gone out for breakfast with E.M.'s half-siblings during the Pennsylvania sexual assault, but E.M. could not remember that during the court-martial. (R. at 164.)[12] Defense counsel then asked E.M. if, during the second child forensic interview, she said her mother was in the kitchen cooking dinner during the Pennsylvania sexual assault, but E.M. could not remember that during the court-martial. (Id.)[13] And, when trial defense counsel asked E.M. if she said, during the second child forensic interview, that Appellant's licking of her vagina took place in the California camper, E.M. insisted that it was in Pennsylvania and anything to the contrary in the child forensic interview would have been a "mis-memory." (R. at 165.)

After the crimes came to light, B.M. encouraged A.S. to visit E.M. in Pennsylvania, and A.S. did so. (R. at 268.) And since E.M. reported the crimes, it took a year or more for her to

[12] During the first interview, on 24 February 2021, E.M. testified that, during the Pennsylvania sexual assault, A.S. was out with the other kids getting breakfast. (R. at 389; Def. Ex. D, 3rd video file, timer 0:00:13-0:00:16.)

[13] During the second interview, on 29 July 2021, when asked where her mother was at the time of the Pennsylvania sexual assault, E.M. said, "Oh, she was downstairs in the kitchen cooking dinner." (R. at 389; Def. Ex. D, 2nd video file, timer 0:02:42-0:02:48.)

work through the trauma, but as of the court-martial, she had started to do much better, but there is still long-lasting trauma. (R. at 269-270.)

G. Expert Testimony of Dr. K.M.

Dr. K.M., a pediatric physician with the Child Advocacy Center in Pittsburgh, Pennsylvania, testified as an expert in the field of sexual assault forensic examination. (R. at 290-92.) She examined E.M. in March 2021, two months before E.M.'s tenth birthday. (R. at 293.) In preparation for her examination, Dr. K.M. reviewed the recorded interview investigators had already conducted with E.M. (R. at 294.) Because the rape was two years prior, Dr. K.M. was not surprised to find no physical evidence of rape. (R. at 295.) Dr. K.M.'s examination included E.M.'s genitals (external and internal), rectum, legs, head, ears, eyes, nose, throat, heart, lungs, and the body overall. (R. at 295-96.) On cross-examination, Dr. K.M. testified that, if a man's erect penis penetrated the vaginal canal of a pre-pubescent girl with an intact hymen, it would be painful or very uncomfortable. (R. at 304, 305-06.)

H. The Defense Case

During the defense's case, they called Appellant's wife and E.M.'s mother, A.S., as a witness. (R. at 316.) A.S. resided in Pennsylvania until September 2017. (R. at 316-17.) A.S. testified she never saw any signs of physical abuse, sexual grooming, or inappropriate behavior by Appellant towards E.M. (R. at 319-20, 329, 333.) A.S. testified she never left E.M. alone with Appellant for "extended periods of time." (R. at 328.) If she left E.M. with Adam, "there was usually another adult there as well." (Id.) A.S. testified that, if she ever took any of the kids out of the trailer, she took them all. (R. at 319, 329.) She denied taking all the kids, other than E.M., to a gas station after dinner, leaving E.M. with Appellant. (R. at 333.) A.S. had never seen a strawberry-flavored lubricant in her home. (R. at 335.) During cross-examination, A.S. confirmed

that she and her children, including E.M., are on Appellant's Tricare plan, she does not have a job, and they rely on his income. (R. at 337.) A.S. acknowledged that, in 2020, Appellant flew out to Pennsylvania, picked up E.M., stayed overnight in a hotel with E.M., and brought her to California, all on his own, without A.S. or another adult. (R. at 339-40, 343.) And in September 2020, A.S. was on reserve duty at Travis Air Force Base, and Appellant was alone with E.M. for the 45-minute drive to base. (R. at 340-42.)

The defense also called SSgt C.R., a defense paralegal, who was a participant note-taker during the interview of B.M. on 1 March 2023 by Appellant's circuit defense counsel (CDC). (R. at 348-49.) SSgt C.R. testified she remembered the CDC asking B.M. if E.M. ever reported, "before the time period of the allegations that brought us [to this court-martial]," Appellant hurting E.M. (R. at 349.) SSgt C.R. testified B.M. told the CDC that E.M. did not like going to Appellant's home and was uncomfortable there, because Appellant was "abusive and always yelling and physical and there was always fighting." (R. at 349.) During a follow-up question by defense counsel, SSgt C.R. testified that, when the CDC asked B.M. if Appellant "ever abused [E.M.]," B.M. said, "No." (R. at 350.) SSgt C.R. did not recall the CDC ever asking B.M. what point B.M. felt would be the point in time that he would no longer let E.M. visit California. (Id.) During a follow-up question, SSgt C.R. testified B.M. told them that, as long as E.M. felt safe, she would continue to go to California. (Id.) SSgt C.R. testified B.M. did not mention signs of E.M.'s trauma, fear of strangers, or discomfort around adults. (R. at 350, 356.) On cross-examination, however, SSgt C.R. admitted she did not recall whether B.M. was directly asked about E.M.'s fear of strangers or trauma. (R. at 357.)

The defense called S.C., a child forensic interviewer at the Children's Advocacy Center in Butler, Pennsylvania. (R. at 367.) She interviewed E.M. on 25 February 2021 and 29 July 2021.

(R. at 370.) She confirmed the authenticity of four video clips of her interviews with E.M. contained in Defense Exhibit D. (R. at 373-74; *see also* R. at 387-391 (transcription of clips in Def. Ex. D).) During cross-examination, S.C. testified that E.M. had an "average" ability to provide a clear, linear narrative. (R. at 376.) It is difficult, for a child of E.M.'s age at the time of her interviews, to orient a story by beginning, middle, and end, because of their mental development, comfort level discussing personal intrusive events with a stranger. (Id.) S.C. discussed how trauma can impact memory and explained that blocking of memories is a coping mechanism. (R. at 378.) S.C. found the overall themes from E.M.'s interviews to be consistent. (R. at 379.)

Additional facts are included, if necessary, for each Issue below.

ARGUMENT

I.

SPECIFICATION 2 OF THE CHARGE IS LEGALLY AND FACTUALLY SUFFICIENT.

Standard of Review

This Court reviews issues of legal and factual sufficiency *de novo*. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

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. 2018). The term reasonable

doubt, however, does not mean that the evidence must be free from conflict. United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018). In resolving questions of legal sufficiency, the Court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution. United States v. Plant, 74 M.J. 297, 301 (C.A.A.F. 2015). The test for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1973)). As a result, the standard for legal sufficiency involves a very low threshold to sustain a conviction. King, 78 M.J. at 221.

The test for factual sufficiency for Appellant's 2019 crime is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the Court is convinced of the [appellant]'s guilt beyond a reasonable doubt. United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000) (internal citation omitted).

Analysis

Appellant claims the evidence supporting the military judge's finding of guilty for Specification 2 of the Charge is both legally and factually insufficient. (App. Br. at 15-22.) Appellant's claim is based on his incorrect assumptions and is without merit.

A. Legal and Factual Sufficiency Based on Timing of the Offense -- The Evidence Established Appellant Raped E.M. in 2019 as Charged, Not in 2020 as Appellant Misconstrues the Evidence

Appellant argues "the timing [of three instances of sexual assault in evidence in Appellant's case] is not actually cut and dry," and E.M.'s testimony indicated the count of conviction took place in 2020, not in 2019 as charged. (App. Br. at 15.) Appellant fails to acknowledge the evidence that established beyond a reasonable doubt that the rape in Specification

2 took place during the summer of 2019, not the fall of 2020, and instead makes this new argument on appeal by taking two small portions of E.M.'s testimony out of context to change the meaning of her testimony.

It is uncontroverted that Appellant and his family moved from Pennsylvania in September 2017, when E.M. was age six (R. at 125, 251, 279, 316-18), that E.M. stayed with Appellant in California during the summers of 2018 and 2019, that is, June through August, and that she did not stay with them again until the fall of 2020, that is, late August through October. (R. at , 177-178, 185-86, 236-37, 258-59, 264, 279-280, 320, 322, 328.)

E.M. testified the sexual assaults and rape took place in three consecutive years at Appellant's residences; that is, in Pennsylvania when she was age six and the next two summers in California when she was ages seven and eight. (R. at 116, 136.) She repeatedly confirmed that both times Appellant touched her were in Appellant's camper during the summer, which were in 2018 and 2019. (R. at 129-32, 170-72.) E.M.'s father, B.M., testified E.M. reported that Appellant sexually assaulted her during the "two summers" she was in California with Appellant. (R. at 273.)

Appellant excerpts a portion of one sentence during E.M.'s testimony in which she made brief remark the first time Appellant touched her in California was "mostly likely around 2020." (App. Br. at 5-6 (citing R. at 130), 17 (same).) The full testimony, however, demonstrated she was unclear about the year but was clear Appellant touched her during the summer: "I don't remember the exact – the exact date, but it was – it was in the summer, and it was – it was most likely around 2020, but I –" (R. at 130.) E.M. clarified it was the first or second *summer* after her mother and Appellant moved to California (id.), which was clearly 2018 or 2019, not 2020, based on the record.

The second portion of E.M.'s testimony Appellant takes out of context – to assert she testified the rape took place while she was doing remote learning in 2020 – was during E.M.'s cross-examination. (App. Br. at 17 (citing R. at 170-71).) However, the passage that Appellant cites started with her confirming the rape took place in the summer of 2019, then included a discussion of when E.M. next visited her mother and Appellant, and then concluded with her reconfirming the rape took place during the summer:

> Q. All right. So then let's talk about the second sexual assault that occurred in California. And so, on that one, that also occurred when you went out to visit [Appellant] and your mother in California?
>
> A. Yes.
>
> Q. That was in the summer of 2019?
>
> A. I believe so.
>
> Q. You had gone out to visit them for about the same 2 months again, right?
>
> A. That may – may have been the – that may have been the time where I did my online schooling out there. I don't know if I mentioned this earlier, but I – I don't remember which year it was, but I did some – some of my schooling – I brought my like Chromebook out to California and did some of my schoolwork at – in California.
>
> Q. Was that when schools were kind of doing virtual learning?
>
> A. Yeah. That was during – that was like – right like – yeah, when they were doing virtual learning for like COVID and stuff like that.
>
> Q. For COVID, okay. And so, if they were doing virtual learning for COVID, wouldn't that have been in 2020?
>
> A. Most likely.
>
> Q. Okay. So, if you weren't doing the virtual schooling before 2020, when you were out there in the summer of 2019, that was just a typical summer visit?
>
> A. I'm pretty sure. Yes.

> Q. Okay. And so, you spent your –almost your entire summer vacation out there?
>
> A. I believe so. Yes.
>
> Q. And during those roughly 2 months that you were here in California, [Appellant] only sexually assaulted you just that one time, right?
>
> A. Yes.

(R. at 170-71.) Appellant takes, out of context again, the excerpt of the discussion of remote learning during COVID in 2020 and tries to make it seem as if E.M. changed the date of when Appellant raped her. However, E.M. discussed 2020 only because trial defense counsel had asked her, after she pinpointed 2019 as the year of the rape, when she had gone out to visit them "again." And, in any event, trial defense counsel got E.M. to clarify that she was probably not doing virtual learning during summer of 2019, that it was just a typical summer visit, and that it was during that two month summer vacation that Appellant sexually assaulted her. All of the testimony from E.M. and B.M. was consistent that Appellant raped her during the summer of 2019, not the fall of 2020. A reasonable factfinder could have easily concluded based on this evidence that the offense took place in the summer of 2019.

Because Appellant's argument that the testimony showed the alleged crime took place in 2020 instead of 2019 is simply incorrect, his arguments about (1) the limitations of "on or about" language and (2) whether the date proven involves a "material variance" and "major change" per United States v. Simmons, 82 M.J. 134, 139 (C.A.A.F. 2022), are inapplicable. (*See* App. Br. at 17-19.)

Appellant notes the military judge acquitted him of Specification 1 from 2018 and did not convict him of Specification 2 with exceptions and substitutions. (App. Br. at 15-16.) Appellant tries to make the logical leap of concluding the military judge adjusted both specifications to one

year later, that is, 2019 for Specification 1 and 2020 for Specification 2. That leap is not only speculative, but it is not consistent with the facts. Although the military judge did not explain his findings in acquitting Appellant of Specification 1 (R. at 442), it is more likely that the military judge found Specification 1 to be insufficient because E.M. testified it took place in the camper in 2018, but Appellant lived in on-base housing in 2018 and did not buy and move into the camper until March 2019. (R. at 320-21, 322, 327, 332; Def. Ex. A.) In any event, the military judge's finding that Appellant committed the child rape of E.M. in 2019 and not 2020, inherent in his guilty verdict, is fully supported by the evidence.

B. Factual Sufficiency of the Charge -- the Military Judge Found E.M. Credible, She was Corroborated by Other Witnesses, and Appellant's Theory of E.M.'s Motivation and Method to Lie is without Merit

Appellant was convicted of rape of a child in violation of Article 120b(a), UCMJ, in Specification 2 of the Charge, which alleged:

> In that Senior Airman Adam J. Sherman, United States Air Force, 9th Aircraft Maintenance Squadron, Beale Air Force Base, California, did, at or near Beale Air Force Base, California, between on or about 1 January 2019 and on or about 31 December 2019, commit a sexual act upon [E.M.], a child who had not attained the age of 12 years, by intentionally touching, not through the clothing, the genitalia of [E.M.], with an intent to gratify his sexual desire.

(ROT, Vol. 1, *Charge Sheet*.) That specification required the Government to prove two elements beyond a reasonable doubt: (1) Appellant committed a sexual act upon E.M. by touching, not through the clothing, her genitalia, with an intent to gratify his sexual desire; and (2) that E.M. had not attained the age of 12 years at the time of the sexual act. Manual for Courts-Martial (MCM), para. 45b.b.(1)(a) (2019 Ed.).

1. The military judge found E.M. credible, and multiple witnesses corroborated her

The most significant evidence came directly from victim E.M., who described in convincing detail how Appellant called her into his bedroom in the late afternoon when the rest of the family was away, closed the bedroom door, told her to take her pants and underwear off, took off his own pants, put his penis against her vaginal area, and made an "up-and-down motion" with his body. (R. at 132-35.) The testimony established that she was 8 years old at the time. That Appellant's penis was erect demonstrated he committed the sexual act with intent to gratify his sexual desire, as did the way Appellant moved.

Appellant poses, "Why would E.M. lie? She did not like visiting her mom in California." (App. Br. at 16.) Appellant argues E.M. conspired with her young best friend, conjured up a false story of sexual assaults and rape, and devised a plan to avoid leaving Pennsylvania and going to visit her mother at the camper in California for the summer, and manipulated several adults to accomplish their scheme. (App. Br. at 16 (citing R. at 151, 152, 155, 179).) That extreme theory did not succeed at the court-martial, and it should fail on appellate review.

The military judge was an experienced jurist and in the best position to view and hear E.M.'s testimony -- her tone and pace of speaking, her facial expressions and body language, and other non-verbal aspects of her testimony that this Court is unable to consider -- and he made his credibility determination in favor of E.M. That is exactly why Article 66(d)(1) requires this Court, in considering the record, weighing the evidence, judging the credibility of witnesses, and determining controverted questions of fact, to recognize that the trial court saw and heard the witnesses. And from a perspective of legal sufficiency, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact, such as the military judge in this case, could have found the essential elements of the crime beyond a reasonable doubt.

The level of detail E.M. provided, especially for things beyond the ordinary experience a child of age 6 (when Appellant committed the first sexual act) to age 10 (when E.M. first reported the sexual assaults and rape), such as the use of strawberry lubricant, the appearance of an erect male penis, and the movement of a man's body during sexual intercourse supported her credibility. Her openness to admitting when she did not remember details during her testimony also demonstrated her veracity. B.M. and X.K. testified that she was an honest person. And the trauma of rape, especially for a young child like E.M., understandably has an enormous impact on recollection. So does the passage of time, from E.M.'s age at the time Appellant sexually assaulted and raped her to years later when she reported his crime, which notably was due to Appellant's threat to prevent E.M. from ever returning home to Pennsylvania if she disclosed their "secret."

Appellant states, on the one hand, E.M. should be believed as truthful when she explained she did not see Appellant use lubrication in preparation for the rape, she did not see Appellant ejaculate, and she did not suffer from pain or bleeding in her vaginal area during or after the rape. On the other hand, Appellant asserts E.M. should not be believed when she testified Appellant made contact with his penis and her vagina and "did an up-and-down motion." (App. Br. 20 (citing R. at 167, 173-175, 304, 306).) His argument is that penetration would have caused bleeding and pain, so there was no penetration. (Id.) However, Appellant was not charged with penetration of E.M.'s vagina; contact with the external genitalia was legally and factually sufficient for conviction. Appellant tries to paint the details in E.M.'s testimony as inconsistent, but they are all consistent with his failed attempt to achieve penetration.

Although E.M. testified Appellant's penis touched "the inside" of her vagina (R. at 192), it would stand to reason that a young child would consider any contact with her "lady parts," even with the labia majora or labia minora, to be "inside," even if Appellant did not actually enter her

vaginal opening. That is the conclusion that K.M. drew from the conversation when E.M. revealed the rape, as well; that is, that Appellant's penis rubbed against her labia but not inside her vaginal canal. (R. at 284.) Similarly, Dr. K.M. testified:

> The other reason there can be no findings is because kids don't understand what inside means. You know, there has been a lot of studies of that. But the labia folds on the outside and there is a space between the labia and the hymen, which sits internally, and that can be up to like a centimeter. It's pretty deep. So that somebody can say it's inside, but what they mean by inside is inside the labia. It's inside the genitalia itself but is not touching the hymen. And because of kid's confusion as well as like the fact that most kids do not have any physical evidence of assault despite saying that there was penetration, theories have developed like maybe there's penetration through the labia, like a hot dog and a bun, rather than in through the hymen. . . .

(R. at 298.)

Penetration of the vaginal opening was not required for the charge of child rape to be legally sufficient. Appellant was charged with "intentionally touching, not through the clothing, the genitalia of [E.M.]." (*Charge Sheet*.) Any contact with the external genitalia or labia is contact with the vulva and, thus, constitutes a "sexual act" for purposes of child rape. MCM, para. 62.a(a)(1) and (h)(1) (2019 Ed.) (referring to para. 60.a(g)(1)); *see* United States v. Spencer, Misc. Dkt. No. 2011-09, 2012 CCA LEXIS 50, *6 (A.F. Ct. Crim. App. 26 Jan. 2012) (unpub. op.) (citing WEBSTER'S NEW WORLD DICTIONARY 562 (3d College Edition 1988)) ("Vulva" is defined as "the external *genital* organs of the female, including the labia majora, labia minora, clitoris, and the entrance to the vagina"). Therefore, Appellant's up-and-down movement of his penis between E.M.'s external genitalia may have felt like "inside" to her, but it was legally sufficient to constitute child rape.

There were minor details about which E.M. had a lack of recollection or a different recollection than from a prior statement -- such as A.S.'s location when the rape took place, when

A.S. enlisted, or which sexual assault or rape involved the strawberry substance -- but these details were not material to the credibility of E.M.'s account. E.M. was being raped and knew A.S. was not in the room. Whether she was at a gas station with the other children, or anywhere else, does not change the fact that E.M. was alone in the room with Appellant when he raped her. Also, because Appellant received the discovery in this case, he and his wife, A.S., were aware of the facts contained in E.M.'s statements and had the opportunity to prepare A.S.'s testimony to contradict E.M, such as denying that Appellant had strawberry lubricant in their home. A.S. came across as a biased witness to protect Appellant, because he was the sole source of income and health insurance for their family of five people. And the fact that E.M. recalled A.S. was in the military, when A.S. did not enlist until shortly after the rape, was a reasonable mistake based on E.M.'s age and the trauma she suffered. E.M. was with A.S. in California in September 2020, when A.S. was performing military duty (R. at 340), so this was a minor mis-recollection.

Appellant claims he did not demonstrate "grooming" of E.M., such as speaking with her in a sexual manner, showing her inappropriate photographs, or giving her a massage or bath. (App. Br. at 21.) However, Appellant performing oral sex on E.M. before engaging in penile sex, telling her that his sexual abuse is their "little secret," and threatening her with never returning to Pennsylvania if she talks to others about it, were grooming behaviors.

As an evidentiary standard, proof beyond a reasonable doubt does not require more than one witness to testify credibly. *See* United States v. Rodriguez-Rivera, 63 M.J. 372, 383 (C.A.A.F. 2006) (holding that the testimony of a single witness may satisfy the Government's burden to prove every element of a charged offense beyond a reasonable doubt (citations omitted)). However, in this case, there were four "outcry witnesses," X.K., C.A., B.M., and K.M., who corroborated E.M.

X.K. testified E.M. was scared to tell X.K. what Appellant had done to E.M. a few years prior. (R. at 201.) X.K. testified she "couldn't really know how to process" what E.M. told her. X.K. tried "moving on from it, not trying to think about it too much," but she was unable to do so. (R. at 201.) So, a few weeks later, X.K. told her own mother, C.A., after C.A. overheard the two girls talking and convinced them to tell her what happened. (R. at 202, 217, 225.) Neither girl wanted to tell C.A. what happened. E.M. was upset and pale, and her eyes were "glassed over" and teary-eyed. (R. at 217, 223.) E.M. felt so uncomfortable talking, C.A. got E.M. to type the word "sex." (R. at 224.) Then, after C.A. was able to get E.M. to say, "Adam made me have sex," E.M. broke down emotionally. (R. at 224-25.) X.K. and E.M. were not master thespians and expert manipulators.

Their reluctance to tell C.A. what happened is consistent with how young girls would react to Appellant's rape of E.M. It would not make sense for X.K. to lie to her own mother and subject herself to the judicial process just to help E.M. avoid going to California for the summer. And E.M. would not need to act, or be expected to act, so reluctant to tell C.A. what happened if her goal was to make a false allegation against Appellant. C.A., a disinterested party, had no motive to perjure herself about X.K.'s and then E.M.'s disclosure of the rape, and how they both struggled over whether to tell anybody else. If anything, C.A. might not have wanted to get involved in reporting such a crime. But she spoke with her fiancé and did the right thing by notifying E.M.'s father and stepmother. (R. at 141, 180, 219.)

B.M., E.M.'s father, testified X.K.'s parents told him about E.M. coming forward about Appellant raping her, and then B.M. and K.M. spoke with E.M. (R. at 263, 283.) Even though B.M. might arguably be an interested party as E.M.'s father and ex-husband of A.S., it was clear that, even without a judicial custody agreement, he encouraged E.M. to maintain her relationships

with her mother and half-siblings, even with Appellant. (R. at 251) B.M. was aware of the pros and cons of E.M.'s experiences in California, including high points like seeing her mother, half-siblings, and dog, playing with kids at the campgrounds, going on family outings, going to parades, and getting souvenirs. (R. at 257.) And he facilitated the summer trips until, of course, he learned of the sexual abuse. (R. at 257, 268.) Even after Appellant's crimes came to light, B.M. encouraged A.S. to visit E.M. in Pennsylvania. (R. at 268.) Therefore, B.M.'s testimony was credible.

Appellant theorizes that B.M.'s comment -- that E.M. would have to go to California "as long as she was safe" -- was a "triggering event" for a false disclosure. (App. Br. at 12.) If anything, it was a triggering event for a truthful disclosure, one that would be necessary to avoid continued sexual abuse.

K.M., E.M.'s stepmother, testified that E.M. enjoyed going to California. (R. at 280-81.) K.M. described speaking with E.M. about Appellant having sex with E.M. (R. at 283.) E.M. was very hesitant, nervous, and uncomfortable to speak about it. (Id.) K.M., who was a victim of child abuse, did not disclose her own story to E.M. until E.M. disclosed her victimization, in an effort for K.M. to give E.M. comfort knowing she was not alone in her experience. (R. at 285.)

The military judge observed E.M.'s demeanor, body posture, tone of voice and pacing, and other non-verbal communications, as well as that of the other witnesses corroborating her testimony, and reasonably found Appellant guilty of Specification 2.

2. E.M. was not trying to avoid California to the extent she would fabricate Appellant's crime; rather, despite wanting to see her mother and half-siblings, she wanted to stop Appellant from raping her again

Appellant's theory of E.M. lying fails because she was not motivated to fabricate a crime. E.M. found the camper to be hot and cramped, she did not like taking care of her half-siblings to

the extent she was asked to do, and she did not like Appellant because of how he treated everybody. (R. at 127, 150, 155.) But the fact that E.M. disliked or was uncomfortable with Appellant would not reasonably lead to the extreme measure of creating false allegations of child rape. E.M. liked visiting her mother, playing with her half-siblings and being a role model for them, riding bikes, and playing on the playground with her half-siblings and her friend from another camper. (R. at 128.)

Since reporting the sexual abuse, E.M. has stayed in Pennsylvania for summers. (R. at 269.) A.S. only had visitation with E.M. in Pennsylvania. (R. at 235.) And E.M. has not seen her half-siblings since then. (R. at 115.) E.M. knew that, by making allegations against Appellant, she was destroying or limiting the chances she would have to see her mother and half-siblings. That is why she was reluctant to tell anybody about Appellant's crime. It does not make sense that E.M. would ruin those loving relationships just to avoid a "strict," "mean," "loud," and "obnoxious" person like Appellant.

Another reason why E.M. would not make up false allegations or, would have recanted a false allegation early in the process, is that she was subjected to multiple interviews by friends and family members, as well as law enforcement and child forensic interviews, an invasive physical examination of her vagina and entire body, and then had to go through the court-martial process and testify at trial. It does not make sense that she would go through such discomfort, embarrassment, and scrutiny just to avoid spending summers in the California camper. Also, E.M.'s psychological condition had started to improve overall since reporting the crimes that Appellant committed (R. at 269-270), despite regret she had from ceasing visits with her beloved mother and half-siblings. There is not even a hint in the record of E.M. trying to recant her account. Even assuming for argument's sake that Appellant had not sexually assaulted and raped E.M., her

preference to avoid going to California would not reasonably lead E.M. to make extraordinary allegations to avoid going there at all and, instead, be subject to the stress and anxiety of being a child victim in the criminal justice system.

On the topic of A.S.'s testimony that she never left E.M. with Appellant (R. at 318, 328, 338-39), it was an untrue representation, which A.S. and other witnesses contradicted. E.M. testified there were a few times A.S. left E.M. alone with Appellant in both Pennsylvania and California. (R. at 116, 129.) K.M. testified that she had once dropped E.M. off with Appellant when no other adult was home. (R. at 281.) And K.M. and even A.S. testified Appellant had come to Pennsylvania to get E.M. and stayed in a hotel room alone with her en route back to California. (R. at 283, 339, 343.) Interestingly, A.S. testified that if she had to leave E.M. with Appellant, there was always another adult present. (R. at 328, 344.) Such an alibi is suspect where A.S. had a direct financial interest in the court-martial, because Appellant was the sole bread-winner and insurance-provider for the family.

Even if A.S. *tried* to never leave Appellant alone with E.M. without at least another adult present, it begs the question of why not. She left her other children, younger than E.M., alone with Appellant. Although A.S. would not want to admit it during testimony, it stands to reason that she knew her husband and was concerned what he might do if left alone with a non-biological child like E.M.

3. E.M.'s disclosure to X.K. demonstrates she was not simply avoiding California

Appellant's theory also fails because of the person to whom E.M. first disclosed the sexual assaults and rape. E.M. would not have made the allegation to a play-friend if she wanted adults to act on her sexual abuse claim. If, as Appellant claims, E.M.'s father, B.M., "triggered" the claim by insisting E.M. go to California as long as she was safe there, it would have made sense

for E.M. to tell B.M. or K.M. directly instead of involving a friend. In any event, if B.M.'s comment was a "trigger," it is consistent with E.M. being a 10-year-old child rape victim realizing for the first time that she could avoid future abuse. E.M. and X.K. were not conspiratorial masterminds making dominoes fall into place to cease summer visits to California. They were friends trying to figure out how to help and comfort each other.

Appellant draws the incorrect conclusion that the 5 February 2021 internet search on X.K.'s iPad for "sex" and "what is sex" demonstrates X.K. was helping E.M. come up with a false allegation of child rape by Appellant. (App. Br. at 21-22.) Appellant emphasizes X.K.'s refusal to answer her (X.K.'s) mother about the reason for the searches, claiming that proved E.M. had not experienced child sexual abuse. (Id.) However, the more reasonable conclusion is that X.K. wanted to understand what E.M. had experienced, and she felt her confidence with E.M. was being compromised, and she did not want to discuss E.M.'s upsetting personal matter with her mother. That is why she was prodding E.M. to speak with C.A. when C.A. overheard. (R. at 141, 217, 222.)

Appellant notes that, on 5 February 2021, C.A. found two internet searches using the word "sex" on X.K.'s iPad. The timing of those two searches is consistent with E.M.'s then-recent disclosure to her about Appellant having sex with E.M. and X.K. trying to understand what E.M. described to her. And there is no evidence that E.M. was with X.K. when X.K. did the two searches, or that she did any of her own such research.

4. E.M. would have alleged a lesser crime than rape to avoid California

Appellant's theory is also without merit because of the nature of E.M.'s allegations. If E.M. wanted to fabricate an unsafe environment to avoid going to California, she could have alleged something simpler and less extraordinary and embarrassing for her. She would have

started with a repeat of something she had already reported to B.M. For example, Appellant was a known yeller and "physical" person – including hitting E.M. on one occasion (R. at 261) -- so E.M. would be expected to have started off with an allegation that Appellant hit her again, instead of alleging sexual abuse. If a child were creating a false story, common sense dictates she would start with that and only escalate facts if necessary. In this case, what makes most sense is that E.M. reluctantly came forward with her sexual victimization to a friend because the trauma of having been raped was eating away at her.

In summary, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. And in considering the record and weighing the evidence, recognizing that the military judge saw and heard the witnesses, this Court should be convinced of Appellant's guilt beyond a reasonable doubt. Therefore, the finding of Appellant's guilt for child rape was legally and factually sufficient, and this Court should affirm it.

II.

APPELLANT'S SENTENCE WAS NOT INAPPROPRIATELY SEVERE.

Additional Facts

The maximum punishment authorized under Article 120b, UCMJ, for rape of a child was confinement for life without eligibility for parole, a mandatory dishonorable discharge, and reduction in grade to E-1, and forfeiture of all pay and allowances. MCM, para. 62.d(1) (2019 Ed.).

The evening between findings and sentencing, Appellant's commander restricted Appellant to base for his safety and to ensure his presence at the rest of the court-martial. (R. at

444-45.) The parties concurred in that action and agreed that Appellant should receive credit for one day of time served. (Id.)

The government's sentencing exhibits included a personal data sheet (Pros. Ex. 6), six enlisted performance reports (EPR) (Pros. Ex. 7-12),[14] three letters of counseling (LOC) (Pros. Ex. 13, 14, 17),[15] and two letters of reprimand (LOR) (Pros. Ex. 15, 16).[16]

Victim's Counsel submitted a victim impact statement on E.M.'s behalf. (R. at 453; Court Ex. A.)

Appellant's trial defense submitted an Army Achievement Medal (Def. Ex. E), four good-character letters (Def. Ex. F-I), a picture presentation (Def. Ex. J), Appellant's unsworn statement (Def. Ex. K), and an index of the sentencing exhibits (Def. Ex. L).

Trial counsel requested a sentence of a dishonorable discharge, a reduction to E-1, and "at least" 20 years of confinement. (R. at 459-63.) They emphasized E.M.'s "[o]vercoming the burden of secrecy and the barrier of silence" to report and testify that Appellant created when he raped her at age 8. (R. at 459.) Appellant waited until E.M. was alone with no protection and abused his relationship with her as a stepfather. (R. at 460.) The traumatic impact on E.M. was evident in the court-martial. (Id.)

Although Appellant's trial defense counsel did not request a specific period of incarceration, they did argue against the 20-year sentence requested by trial counsel. (R. at 463-

[14] In the 2011-2016 EPR, Appellant received a referral EPR in which, overall, he "met some, but not all expectations"; in his 2018 and 2022 EPRs, he merely "met all expectations"; in the 2019 and 2021 EPRs, he "exceeded some, but not all expectations"; and in the 2020 EPR, he "exceeded most, if not all expectations."

[15] The three LOCs were in 2018 for poor work performance, in 2020 for posting of inappropriate comments on social media in violation of a lawful regulation, and in 2022 for failing to be tested for COVID-19 with the rest of his unit.

[16] The two LORs were in 2021 for refusing to receive the COVID-19 vaccine.

65.) They emphasized the impact of losing Appellant on his three biological children and his wife. (Id.)

The military judge sentenced Appellant to 13 years of confinement, a dishonorable discharge, reduction to E-1, and a reprimand. (R. at 467.) The military judge awarded one day of tantamount-to-confinement credit for the night before sentencing when Appellant's commander restricted him to base. (R. at 467-68.)

Standard of Review

This Court reviews sentence appropriateness *de novo*. United States v. Sauk, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (*en banc*) (*per curiam*) (citation omitted). The Court may only affirm the sentence if it finds the sentence to be "correct in law and fact and determines, on the basis of the entire record, [it] should be approved." Article 66(d)(1), UCMJ.

Law

This Court "may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1)(A), UCMJ. The Court's authority to review a case for sentence appropriateness "reflects the unique history and attributes of the military justice system, [and] includes but is not limited to, considerations of uniformity and evenhandedness of sentencing decisions." United States v. Sothen, 54 M.J. 294, 296 (C.A.A.F. 2001) (citations omitted). The Court "assess[es] sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." Sauk, 74 M.J. at 606 (alteration in original) (citations omitted). Although this Court has great discretion to determine whether a sentence is appropriate, the Court lacks any authority to grant mercy. United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation

omitted). Unlike the act of bestowing mercy through clemency, which was delegated to other channels by Congress, military Criminal Courts of Appeal are entrusted with the task of determining sentence appropriateness, thereby ensuring the accused gets the punishment he deserves. United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988).

Analysis

Appellant argues that his sentence of 13 years of confinement for child rape was inappropriately severe and that this Court should reassess his sentence. (App. Br. at 22-24.) His assignment of error is without merit.

Appellant argues many of the same matters in mitigation that he argued at trial, such as details about his absent father, his love for his children, his military service, and "mitigating factors" that victim E.M. "did not experience any vaginal pain or bleeding" and was "currently flourishing and doing great." (App. Br. at 23-24; R. at 174-75, 351, 461, 463; Def. Ex. E-K.) The military judge is presumed to have considered those factors and followed the law, absent clear evidence to the contrary. United States v. Erickson, 65 M.J. 221, 225 (C.A.A.F. 2007). Appellant cites to nothing in the record that calls into question whether the military judge afforded Appellant's points the appropriate weight and followed the law.

While Appellant's case did not involve a rape-murder or other hyper-violent crime, it is hard to imagine a more serious type of violent crime than his of raping a child of 8 years of age. E.M.'s current recovering mental state is not a mitigating factor that should benefit Appellant. Rather it is a testament to E.M.'s resiliency.

Appellant refers to the unpublished opinion in United States v. Driskill, No. ACM 39889 (f rev), 2022 CCA LEXIS 496 (A.F. Ct. Crim. App. Aug. 23, 2022) (unpub. op.). (App. Br. at 24.) However, Appellant does not explain how Driskill is closely related to his case or that the

sentences are highly disparate, so he provides no basis upon which to invoke the Court's ability to ensure uniformity and evenhandedness. Even if the Court considers Driskill, the appellant in that case received a higher sentence. That appellant was convicted for putting his penis in his daughter's mouth and ejaculated on one occasion and caused her to touch his genitalia, and he possessed child pornography. 2022 CCA LEXIS at *17-19. The Court reduced his 40-year and 9-month sentence to 30 years. *Id*. at *57. In Appellant's case, he rubbed his penis against E.M.'s vulva and appears to have tried to penetrate her vagina with his penis. Appellant was fortunate not to receive a similar sentence to the 30-year sentence in Driskill. According to the UCMJ, Appellant could have been confined for the rest of his life without a chance of parole. Trial counsel emphatically argue for a sentence of at least 20 years. The military judge considered all mitigating factors, and his sentence of 13 years demonstrated leniency.

This Court should find Appellant's arguments unpersuasive and his sentence of 13 years of confinement appropriate. Appellant's claim does not warrant leniency, which this Court cannot grant. This Court should deny this assignment of error.

III.

APPELLANT WAS PROVIDED AN OPPORTUNITY TO REBUT THE MATTERS IN ACCORDANCE WITH RULES FOR COURTS-MARTIAL 1106 AND 1106A PRIOR TO THE CONVENING AUTHORITY'S DECISION ON ACTION. EVEN IF APPELLANT DID NOT WAIVE THIS ISSUE, CONSIDERATION OF THE VICTIM'S STATEMENT WAS NOT ERROR, LET ALONE PLAIN ERROR.

Additional Facts

On 8 March 2023, Appellant signed acknowledgement of the "Post-Trial and Appellant Rights Advisement," confirming he understood he would have the opportunity to rebut matters to the convening authority and to rebut matters submitted by a victim before the convening authority

took action. (App. Ex. XXIV, paras. 13, 14.)

> **Right to Rebut Matters Submitted by a Victim:** In any case involving a crime victim, the crime victim has the right to submit matters in writing to the Convening Authority. Like your submission, a victim's submission may include matters that may reasonably tend to inform the Convening Authority's decision whether to approve or disapprove the findings and/or sentence adjudged. You have the right to receive a copy of, and to rebut, the victim's submission. You only have five days to rebut anything the crime victim submits. Failure to submit matters in a timely manner will constitute a waiver of your right to submit matters. R.C.M. 1106(e).

(Id., pp.4-5 (emphasis in original).)

On 15 March 2023, at the conclusion of the defense pre-sentencing argument, the military judge asked, "Defense Counsel, have you advised [Appellant] orally and in writing of his post-trial and appellate rights including the rights contained in Rule for Courts-Martial 1010?" Defense counsel responded, "Yes, Your Honor." (R. at 465.) The military judge confirmed with Appellant that it was his signature on the form and asked him, "[Appellant], did your defense counsel explain your post-trial and appellate rights to you?" Appellant responded, "Yes, sir." (R. at 466.) The military judge followed up, "Do you have any questions about your post-trial and appellate rights?" Appellant responded, "No, sir." (Id.)

On 16 March 2023, Appellant signed acknowledgement of receipt of, among other things, the advisement in "Submission of Matters to the Convening Authority," which specifically addressed the right to rebut matters submitted by a victim. (ROT, Vol 3.)

> The victim in your case are [] also being afforded a chance to submit written matters to the convening authority for consideration in deciding what, if any, action to take in your case. Any matters submitted by a victim will be forwarded to you so that you may rebut them, if you so choose.

(Id., p.2.) Appellant signed receipt on that same page. (Id.)

On 20 March 2023, E.M. signed a one-page submission of matters to the convening authority. (ROT, Vol 3.)

On 26 March 2023, trial defense counsel submitted Appellant's "Request for Waiver and Deferment of Automatic Forfeitures." (ROT, Vol. 3.)

On 11 April 2023, the convening authority issued an initial convening authority decision on action memorandum (CADAM). (ROT, Vol. 1.)

On 21 April 2023, Appellant signed acknowledgement of receipt of the "Victim Submission of Matter, dated 20 March 2023." (ROT, Vol. 3.)

On 8 May 2023, the convening authority replaced his prior CADAM and issued a new CADAM. (ROT, Vol 1.)

Nonetheless, on 17 May 2024, Appellant signed a declaration for submission to this Court, under penalty of perjury, denying all the facts just cited from the record:

> I did not know I could rebut E.M.'s post-trial submission of matters and I was not provided the opportunity to do so. I did not receive anything from the Government or my trial defense counsel relating my ability to rebut E.M.'s submission of matters. My trial defense counsel did not discuss my ability to submit my own statement in clemency nor E.M.'s post-trial matters with me. I was not advised that I could submit matters to rebut what E.M. said.

(App. Br., Appx. B, para. 3.)

Standard of Review

The standard of review for determining whether post-trial processing was properly completed is *de novo*. United States v. Kho, 54 M.J. 63, 65 (C.A.A.F. 2000).

Law

"In a case with a crime victim, after a sentence is announced in a court-martial any crime victim of an offense may submit matters to the convening authority for consideration in the

exercise of the convening authority's powers under R.C.M. 1109 or 1110." Rules for Courts-Martial (R.C.M.) 1106A(a). "The convening authority shall ensure any matters submitted by a crime victim under this subsection be provided to the accused as soon as practicable." R.C.M. 1106A(c)(3).

If a crime victim submits matters under R.C.M. 1106A, "the accused shall have five days from receipt of those matters to submit any matters in rebuttal." R.C.M. 1106(d)(3). "Before taking or declining to take any action on the sentence [in clemency], the convening authority shall consider matters timely submitted under R.C.M. 1106 and 1106A, if any, by the accused and any crime victim." R.C.M. 1109(d)(3)(A). In making a clemency decision, a convening authority "may not consider matters adverse to the accused without providing the accused an opportunity to respond." R.C.M. 1106A(c)(2)(B), Discussion. The convening authority may also consider "additional matters," including evidence introduced at the court-martial, appellate exhibits, the recording or transcription of the proceedings, the personnel records of the accused, and any other such matters the convening authority deems appropriate. R.C.M. 1109(d)(3)(B).

The Rules for Courts-Martial state that, where an appellant fails to object or submit a rebuttal to matters submitted by the victim to the convening authority, the issue is waived. R.C.M. 1106(e)(1); United States v. Gardner, No. ACM 39929, 2021 CCA LEXIS 604, *60 (A.F. Ct. Crim. App. 16 Nov. 2021) (unpub. op.).

Analysis

Appellant argues he "did not understand he was allowed to rebut E.M.'s submission of matters," because his "Area Defense Counsel did not discuss that option with him," and "[h]ad

[Appellant] understood, he would have wanted to respond." (App. Br. at 25.)[17] However, the record of trial proves that to be false. Appellant received notification, twice, of his right to rebut any matters submitted to the convening authority by the victim. (App. Ex. XXIV, paras. 13, 14; ROT, Vol. 3, 16 March 2023 acknowledgement of "Submission of Matters to the Convening Authority".) And he confirmed, on the record with the military judge, having been advised of those rights. (R. at 465-66.) Appellant signed receipt for the victim's submissions (ROT, Vol. 3), despite his declaration claiming to have not received them.[18] Because he failed to comply with the Rules for Court-Martial requiring a timely rebuttal to the victim submissions, he waived any issue he might now raise. R.C.M. 1106(e)(1).

Even if this Court reviewed the convening authority's consideration of the victim's statement, it was not error, let alone plain error. Article 60(d), UCMJ, does not limit what a victim may submit to a convening authority. United States v. Kmet, No. ACM 38755, 2016 CCA LEXIS 339, *17 (A.F. Ct. Crim. App. 2 Jun. 2016) (unpub. op.). R.C.M. 1106A(c)(2) only limits a victim's submission that relates to the character of the accused unless such matters were admitted as evidence at trial. *See also* R.C.M. 1107(b) (providing convening authority broad discretion to determine what to consider during clemency process).

The part of E.M.'s submission with which Appellant takes issue was:

---

[17] Appellant did not claim, under this assignment of error, that trial defense counsel was constitutionally ineffective.

[18] In the middle of Appellant's argument about the victim's submission to the convening authority, he inserts a paragraph about deferral of his reduction in rank. (App. Br. at 27.) However, the defense clemency request, "Request for Waiver and Deferment of Automatic Forfeitures," dated 26 March 2023, did not specifically request deferment of the reduction in rank. Rather, it made passing reference to the reduction in rank in terms of compounding the impact on Appellant's family from the forfeitures he sought to have waived or deferred. Ultimately, Appellant failed to file a post-trial motion regarding the lack of a deferral of the reduction in rank, as would be required by R.C.M. 1104(b)(1)(F) and 1104(b)(2)(B), so he cannot raise it now.

> At the trial, when I told the court what [SrA Sherman] did to me, I thought he might finally admit what he did and at least say that he is sorry. Instead, I was called a liar when I told the truth about what he did to me, and he never showed any sorrow for how badly he hurt me.

(App. Br. at 25 (citing E.M.'s Submission of Matters, dated 20 March 2023).) E.M. merely addressed Appellant's conduct, not his character, so it was permissible under R.C.M. 1106A(c)(2).

Appellant asserts that, had he received E.M.'s submission, he would have responded that the convening authority should not consider those two sentences, because the convening authority should not hold the exercise of rights against Appellant. (Appellant's Declaration, dated 17 May 2024.) Here, there is no reasonable likelihood the convening authority would have granted clemency, even if Appellant had submitted that rebuttal. Trial defense counsel submitted a request for waiver and deferment of automatic forfeitures that explained the convening authority's factors to consider under R.C.M. 1103(d)(2). They emphasized several factors weighing in favor of deferment, such as the lack of forfeitures in the military judge's sentence, the financial impact Appellant's reduction in rank would have on his family, the fact that Appellant was the sole breadwinner for the family, the family's lack of support in California, the young age of Appellant's three children, who will be growing up without Appellant, and the loss of the family's on-base housing and support system. (ROT, Vol. 3, "Request for Waiver and Deferment of Automatic Forfeitures," dated 26 March 2023.) The convening authority denied that request. (ROT, Vol. 1, CADAM, dated 8 May 2023.) Had Appellant responded to E.M.'s submission and reminded the convening authority that there should be no penalty for exercising one's legal rights, there would have been no change in his sentence.

The contested portions of E.M.'s submission – that Appellant did not apologize and that she was implicitly called a liar during her cross-examination -- were already in the record and

obvious to a reasonable person. General court-martial convening authorities are senior officers selected for their role because of many attributes, including their military experience, fair application of discipline, and knowledge of the ways of the world. Nothing in E.M.'s statement was unusual or unexpected for a testifying victim in a general court-martial. Appellant pleaded not guilty and exercised his right to trial. One expects that an accused who goes to trial will not "admit what he did" or say he is sorry to the victim. One also expects a competent trial defense counsel will – without using the word "liar" – seek to discredit a testifying victim before the fact-finder as having incorrect recollection, bias, and lacking credibility. Thus, E.M.'s statement had no impact on the convening authority's decision to not grant clemency.

Further diminishing any arguable error, the victim's statement related to the convicted conduct. Even where a victim has raised matters to the convening authority outside the record and beyond the charged conduct, this Court has affirmed the sentence. In United States v. Pheasant, No. ACM S32237, 2015 CCA LEXIS 385 (A.F. Ct. Crim. App. 16 Sep. 2015) (unpub. op.), this Court rejected the appellant's assignment of error for the victim's submission referring to matters outside the record, including the appellant harming their child, her claim that she was prevented from testifying to the complete story, and implications that the appellant harmed others. Id. at *9. The Court stated, "Both the UCMJ and the R.C.M. already gave a convening authority broad discretion to determine what to consider during the clemency process." Id.

In this case, Appellant had an opportunity to respond, was advised of that right on two occasions in writing and confirmed it orally during the court-martial, but he failed to respond, so he waived the issue. That failure also demonstrated any arguable error was not plain and obvious. Even if Appellant had responded to E.M.'s submission to the convening authority, there would have been no change to his sentence, so any arguable error was not plain error. The conviction for

child rape included a mandatory minimum dishonorable discharge, so the convening authority could not disapprove the discharge or reduce its characterization. MCM, para. 62.d(1) (2019 Ed.). And, pursuant to R.C.M. 1109, the convening authority could not reduce the term of confinement in this case. R.C.M. 1109(a)(1)(A), 1109(a)(1)(C), 1109(a)(2)(A), 1109(a)(2)(B), 1109(b). Thus, this assignment of error is without merit, and the Court should affirm the sentence.

IV.[19]

DEFENSE COUNSELS' REPRESENTATION OF APPELLANT WAS NOT CONSTITUTIONALLY INEFFECTIVE.

Additional Facts

Trial defense counsel have provided declarations, which the United States submitted with its Motion to Attach Documents filed on 6 August 2024 pursuant to the Court's 9 July 2024 Order granting the United States' 1 July 2024 Motion to Compel Declarations.

A. Witness A.S.

In the declaration of Maj N.A., Appellant's Circuit Defense Counsel, he described his communications and meetings with Appellant and A.S., including his emphasis that they provide "*any* and *all* evidence that could potentially be used to rebut the charges…." (Maj N.A. declaration, paras. 2.c, 2.d, 3.d, 3.e (emphasis in original).). Despite the opportunity and request from defense counsel for Appellant and A.S. to provide such evidence, they never presented the evidence alleged in the assignment of error. (Maj N.A. declaration, paras. 2.d, 2.e, 2.f, 3.e and n.5.) And "much of what the Appellant now claims could have been dispositive in his case was actually elicited at trial – albeit to a lesser degree." (Maj N.A. declaration, para. 3.f (citing examples), 3.g (citing examples).) Maj N.A. pointed out that even if A.S.'s newly identified

[19] Appellant raised Issue IV pursuant to Grostefon in Appendix A.

evidence had been presented at trial, it would have been "impossible" for A.S. to account for all the time E.M. stayed at Appellant's home. (Maj N.A. declaration, para. 3.f.) Also, Maj N.A. noted A.S.'s credibility problems at trial. (Id. at n.7.)

In the declaration of Capt M.G., Appellant's Area Defense Counsel, she described the level of contact she and her defense paralegal had with Appellant. (Capt M.G. declaration, paras. 2.b, 2.c, 2.d, 2.e, 4.a.) After Appellant claimed to have multiple individuals who could verify his version of events, Capt M.G. "continually asked him multiple times and contact information of these individuals . . . even before the Article 32 hearing." (Id., para. 2.c (emphasis original).) However, "as time went by, this supposed list of individuals amounts to only a token few who were not able to provide anything valuable to [Appellant's] case, and some [] even claimed not to know who [Appellant] even was." (Id.) From the early stages of the court-martial process until trial, Capt M.G. had one to three conversations per week with Appellant during which she urged him to provide her with "evidence, documents, dates, witnesses, or pictures that would either help corroborate his version of events or discredit E.M.'s version of events." (Id.) Some of those conversations included A.S. (Id., paras. 2.c, 2.e.) Capt M.G. asked Appellant and A.S. for a timeline showing when E.M. was visiting and when A.S. and N.S. were present, as well as Appellant's works schedule during E.M.'s visits, to address when Appellant had and did not have an opportunity to commit the crime. (Id., para. 4.b.) However, neither provided any responsive materials. (Id., paras. 2.c, 2.d, 4.b.) A.S. provided text messages from B.M. in which B.M. made threats to A.S. related to custody if A.S. continued to ask E.M. more about the allegations while law enforcement investigated; however, A.S. provided no other materials. (Id., para. 2.f.)

B. Witness A.C.

Trial defense counsel interviewed A.C. and specifically asked her about E.M.'s credibility and potential motives to fabricate the allegations against Appellant. (Maj N.A. declaration, para. 2.g.) A.C. told defense counsel evidence to the contrary; that is, in A.C.'s last conversation with E.M. in 2021, "E.M. had expressed *excitement* and a *strong desire*" to go to California to see her half-siblings and "always seemed happy visiting the Shermans." (Maj N.A. declaration, para. 2.g.) That statement by A.C. would have "absolutely eviscerated the Defense's theory of why E.M. was lying," because "it was paramount that absolutely no evidence showing E.M. actually enjoyed her time in California be presented…." (Maj N.A. declaration, para. 3.c.) Calling A.C. to testify was "not only unnecessary but would've been a strategic and tactical liability that ultimately could've undermined the Defense's theory of innocence." (Id.) Maj N.A. believed A.C.'s testimony was "unnecessary" because the defense had already established the theory that E.M. fabricated the false allegations to remain away from California during her summers. (Id., para. 3.b (citing examples).)

In the declaration of Capt M.G., Appellant's Area Defense Counsel, she described conducting two pretrial interviews with A.C. during which she said E.M. "expressed *excitement* and a *strong desire* to come back out to California in order to see her half-siblings and always seemed happy visiting the Shermans." (Capt M.G. declaration, para. 2.g (emphasis original).) Capt M.G.'s declaration explained how she believes the defense team established at trial "E.M.'s motive to fabricate and exposed E.M.'s credibility flaws," and, thus, why A.C.'s testimony was not needed and, in fact, would have "refuted the Defense's entire strategy." (Id., paras. 3.b, 3.c.)

In concluding his declaration, Maj N.A. noted several ways in which the trial defense team demonstrated competent and zealous advocacy, including the successful Rule 404(b) motion, the acquittal of one of the two charges, the post-trial relief obtained from the convening authority, and

the sentencing credit for time restricted to base. (Maj N.A. declaration, para. 4.) He credited those results to the defense team performing due diligence in their investigation and trial preparation, researching and applying the law to the facts, and developing a viable trial strategy. (Id.) Capt M.G. provided similar comments about the performance of the defense team, and specifically credited the acquittal on the specification regarding the 2018 California sexual assault to their diligence in obtaining the bill of sale for the camper. (Capt. M.G. declaration, paras. 4.c, 5.)

Standard of Review

Allegations of ineffective assistance of counsel are reviewed *de novo*. United States v. Palacios-Cueto, 82 M.J. 323, 327 (C.A.A.F. 2022) (citations omitted).

Law

The Sixth Amendment guarantees an accused the right to effective assistance of counsel. U.S. CONST. Amend. VI; United States v. Strickland, 466 U.S. 668, 686 (1984). "In order to prevail on a claim of ineffective assistance of counsel (IAC), an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing Strickland, 466 U.S. at 698). "Appellate courts do not lightly vacate a conviction in the absence of a serious incompetency which falls measurably below the performance… of fallible lawyers." United States v. DiCupe, 21 M.J. 440, 442 (C.M.A. 1986) (citation and quotations omitted). If an appellant has made an "insufficient showing" on even one of the elements, this Court need not address the other. Strickland, 466 U.S. at 697. "When a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion…, an appellant must show that there is a reasonable probability that such a motion would have been meritorious." United States v. McConnell, 55 M.J. 479, 482 (C.A.A.F. 2001) (internal citation omitted).

In assessing the effectiveness of counsel, courts "*must* indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 671 (emphasis added); *see also* Harrington v. Richter, 562 U.S. 86, 105 (2011) ("Even under de novo review, the standard for judging counsel's representation is a most deferential one."). Counsel's performance is not deficient "when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so." United States v. Datavs, 71 M.J. 420, 424 (C.A.A.F. 2012). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." United States v. Dewrell, 55 M.J. 131, 133 (C.A.A.F. 2001) (quoting Strickland, 466 U.S. at 690).

Military courts use a three-part test to determine whether the presumption of competence has been overcome: (1) are appellant's allegations true, and if so, is there a reasonable explanation for counsel's actions; (2) if the allegations are true, did defense counsel's level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers; and (3) if defense counsel was ineffective, whether there is a reasonable probability that, absent the errors, there would have been a different result. United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (citation and quotations omitted). "A reasonable probability is one sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Analysis

Appellant claims his trial defense counsel were constitutionally ineffective because they (1) failed to question A.S. more thoroughly about details from E.M.'s 2019 summer visit to California, and (2) failed to interview or call as a witness, A.C., a friend of Appellant's family, about a conversation she overheard between E.M. and A.C.'s son regarding E.M.'s motivation to make false allegations against Appellant. (App. Br., Appendix.) More specifically, Appellant

represents that A.S. would have testified about the following details that demonstrate Appellant's limited opportunity to commit the crime: Appellant's mother lived in the camper and slept in Appellant's bedroom for the first 23 days of E.M.'s 39-day summer visit; and Appellant worked long duty hours and off-duty civilian employment hours, making it practically impossible for him to have been present in the camper as E.M. described. (Id.) And, regarding A.C., Appellant alleges she overheard her son ask E.M. if she made the allegations against Appellant to avoid going to California, and E.M. replied that her friend (presumably X.K.) told E.M. that, if E.M. went to California, the two of them (E.M. and X.K.) would not get together during the summer. (Id.)

For the reasons discussed below, Appellant's claims of ineffective assistance of counsel are without merit because they fail both prongs of the Strickland test; that is, (1) his counsel competently represented him and their performance was not deficient; and (2) even assuming *arguendo* that counsel's performance was deficient, there is no prejudice because Appellant has failed to establish a reasonable probability that, had there been no such error, his trial would have resulted in an acquittal.

A. Witness A.S.

Appellant's argument regarding the timeline his wife, A.S., could have established is without merit, because, as both trial defense counsel expressed in their declarations, the trial defense team repeatedly asked Appellant and A.S. for "any and all evidence" that could potentially be used to rebut the charges, including the types of documents that A.S. claims to have. (Maj N.A. declaration, paras. 2.c, 2.d, 3.d, 3.e; Capt M.G. declaration, paras. 2.e, 2.f.) Neither Appellant nor A.S. provided the evidence to trial defense counsel that they argue on appeal they could have provided. (Id.) Therefore, Appellant's assignment of error is untrue and, thus, does not meet the first prong of the Gooch analysis for overcoming the presumption of counsel's competence.

Even if, for argument's sake, Appellant's allegations were true and trial defense counsel were deficient in seeking the specific proffered evidence from Appellant and his wife, defense counsels' performance did not fall "measurably below the performance ordinarily expected of fallible lawyers." They made repeated requests for evidence from Appellant and his wife, and it was abundantly clear that timing was at issue in the case. And, regardless of whether the proffered "new" evidence could reduce the number of days E.M. stayed with Appellant and A.S., or whether it could account for Appellant's whereabouts during the summer of 2019, the court-martial received testimony from A.S. that she never left E.M. alone with Appellant for extended periods of time, and there was usually another adult present. (R. at 328.) Also, as described above, A.S. had bias and credibility problems. And the defense could not have called Appellant's mother, N.S., to testify in support of the claim she slept in the camper 22 of the 39 days E.M. was there in the summer of 2019. N.S. was the person who made the claims of Appellant physically abusing the children in California that were the subject of the United States' motion pursuant to M.R. E. 404(b), which the military judge denied.

In any event, the additional proffered evidence would not have resulted in acquittal, because, as Maj N.A.'s declaration points out, the defense would not have eliminated *all* possible times in which Appellant could have raped E.M. Therefore, defense counsel provided constitutionally effective assistance in this regard.

B. <u>Witness A.S.</u>

Appellant's assignment of error claims, "With respect to A.C., defense counsel had a clear duty to interview A.C. about the OSI ROI entry summarizing A.C.'s interview in which she spoke to E.M. about E.M.'s reason for not wanting to visit California during the summer." (App. Br., Appendix at 4.) However, trial defense counsel did interview A.C., and she provided a statement

that would have directly contradicted the defense theory that E.M. created false allegations against Appellant to avoid going to California. That is, as both trial defense counsel state in their declarations, in A.C.'s last conversation with E.M. in 2021, "E.M. had expressed *excitement* and a *strong desire*" to go to California to see her half-siblings and "always seemed happy visiting the Shermans." (Maj N.A. declaration, para. 2.g; Capt M.G. declaration, para. 2.g.) And as Maj N.A. also pointed out, the defense had already established the theory that E.M. fabricated the false allegations to remain away from California during her summers. (Id., para. 3.b (citing examples); *see also* Capt M.G. declaration, para. 3.b.) Therefore, not calling A.C. to testify as a witness at the court-martial was sound strategy and well within reasonable standards of performance. Had the defense called witness A.C. to testify, it would have "destroyed" the defense theory of why E.M. fabricated the allegations; thus, they would not have had a reasonable probability of an acquittal.

C. <u>Other Evidence of Trial Defense Counsel's Competence</u>

As Maj N.A. noted in his declaration, the trial defense team successfully submitted and argued a motion in limine to exclude evidence of Appellant's physical abuse of his three children with A.S. pursuant to M.R.E. 404(b). (Maj N.A. declaration, para. 4; see App. Exs. I, XVII.) That motion included two stipulations of expected testimony. (App. Ex. XV, XVI; R. at 16-17.) And during the motion hearing, they called two witnesses, Appellant's wife, A.S., and his former neighbors, SSgt R.C. and A.C., (R. at 20-39, 40-49, 51-59), and gave extensive argument. (R. at 65-72.)

In their case-in-chief, the trial defense team called three witnesses and secured an acquittal on one of the two Specifications of the Charge against Appellant. In sentencing, they obtained credit for Appellant for time restricted on base and, during post-trial clemency, post-trial relief

from the convening authority in the form of securing waiver and deferral of forfeitures of all pay and allowances for Appellant's family. (R. at 442; ROT, Vol. 1, Entry of Judgment.)

In summary, trial defense counsel's performance was competent and well within the wide range of reasonable professional assistance, and any arguable deficiency did not result in prejudice that caused Appellant's conviction. Therefore, this assignment of error should be rejected.

CONCLUSION

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

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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 12 September 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**OUT OF TIME MOTION FOR ENLARGEMENT OF TIME TO FILE REPLY BRIEF**
v.	)	Before Panel No. 2
Senior Airman (E-4) **ADAM J. SHERMAN** United States Air Force *Appellant*	)	No. ACM 40486 13 September 2024

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

Pursuant to Rule 23.3(m)(6) and (m)(7) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an out of time enlargement of time (EOT) to file a Reply Brief. Appellant requests an enlargement for a period of 7 days, which will end on **26 September 2024**. Appellant filed his assignments of error (AOE) on 24 June 2024. Appellant then filed a consent motion to amend his pleading and a consent motion for leave to file a substitute AOE on 19 August 2024. The Government filed its Answer yesterday, 12 September 2024. The case was docketed with this Court on 28 June 2023. On the date requested, 456 days will have elapsed.

Appellant is currently confined. Due to coordination requirements between counsel and with the confinement facility, this request for an enlargement of time was not filed until today, which is good cause for why it was submitted out of time.

On 15 March 2023, at a general court-martial convened at Beale Air Force Base, California, Appellant was found guilty, contrary to his pleas, of one charge and one specification of Article 120b, Uniform Code of Military Justice (UCMJ); and was found not guilty, consistent with his pleas, of one specification of Article 120b, UCMJ. Entry of Judgment. The military judge sentenced Appellant to a reprimand, reduction to the rank of E-1, 13 years' confinement, and a

dishonorable discharge. *Id.* Appellant was given one day of judicially ordered credit. *Id.* The convening authority deferred all of the automatic forfeitures from 30 March 2023 until the date the military judge signed the entry of judgment, which was 23 May 2023. *Id.*; Convening Authority Decision on Action. The convening authority also waived all automatic forfeitures for a period of six months to be paid to his spouse for the benefit of his dependents. *Id.*

The trial transcript is 469 pages long and the record of trial is comprised of five volumes containing 17 prosecution exhibits, 12 defense exhibits, 25 appellate exhibits, and one court exhibit.

Civilian appellate defense counsel, who is lead counsel, is currently on leave in Vail, Colorado, for his birthday. With travel, he will not return home until Monday and requests this 7-day extension for filing the Reply Brief in this case. This will be lead counsel's top priority case. However, there are several other factors that constitute good cause for this EOT. The Answer is 51 pages and counsel will have to coordinate a response with the Appellant, who is currently confined, which slows communication.

Military appellate defense counsel is currently assigned 20 cases, with 9 initial briefs pending before this Court. Military appellate defense counsel is simultaneously working on the Supplement to the Petition for Grant of Review in *United States v. Holmes* (Misc. Dkt. No. 2024-1; USCA Dkt No. 24-0224/AF) to be filed with the Court of Appeals for the Armed Forces (CAAF) and the Supplement to the Petition for Grant of Review in *United States v. Van Velson* (ACM 40401), which should be filed with the CAAF within the next coming days. Military appellate defense counsel also needs to turn to oral argument preparations in *United States v. Greene Watson* (Dkt. No. 24-0096/AF; ACM 40293) next week, which is currently scheduled as an outreach oral argument with the CAAF on 10 October 2024.

Appellant was advised of his right to a timely appeal, was consulted with regard to this EOT, and agrees with this EOT. Accordingly, there is good cause for an EOT to allow lead civilian appellate defense counsel to fully review the Government's Answer, consult with military appellate defense counsel, and coordinate with Appellant on a response that will aid this Court in resolution of the case.

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

Respectfully submitted,

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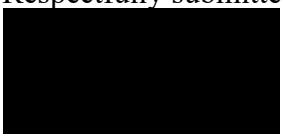
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 13 September 2024.

Respectfully submitted,



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17 September 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ADAM J. SHERMAN, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME FOR REPLY BRIEF OUT OF TIME ACM 40486 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file a Reply to the United States' Answer to Assignments of Error.

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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 17 September 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**REPLY BRIEF ON BEHALF OF**
Appellee	)	**APPELLANT**
	)	
v.	)	Before Panel 2
	)	
Senior Airman (E-4)	)	No. ACM 40486
ADAM J. SHERMAN	)	
United States Air Force	)	26 September 2024
Appellant	)	

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

Appellant, Senior Airman (SrA) Adam J. Sherman, pursuant to Rule 18(d) of this Court's Rules of Practice and Procedure, files this Reply to the Government's Answer (Ans.), dated 12 September 2024. In addition to the arguments in his opening brief (Appellant's Br.), filed on 24 June 2024, SrA Sherman submits the following arguments for the issues below.

I.

SPECIFICATION 2 OF THE CHARGE IS LEGALLY AND FACTUALLY INSUFFICIENT.

The Government's argument fails because it is grounded on E.M.'s forensically uncorroborated, confusing, inconsistent, and self-contradictory testimony. She repeatedly conflated different events that occurred in 2020, during COVID, with her trip to California in 2019, before COVID. She also conflated A.S.'s entry into the Air Force Reserve and related absences that occurred in 2020 with the 2019 visit. These points are clearly made in SrA Sherman's Brief. Her responses to questions regarding the timing of the alleged sexual assault were repeatedly conditioned on her poor memory and uncertainty, when she stated, "I believe so" or "that may have been the time" or "I'm pretty sure", mostly in response to leading questions by trial counsel. R. at 170-71, Ans. at 14-15.

The Government unjustifiably gives great weight to the military judge's credibility determination in favor of E.M. Ans. at 17. This makes no sense in light of the not guilty finding of Specification 1. When E.M. testified under oath that something happened in a camper in 2018 and she did not live in a camper in 2018, then her credibility is seriously undermined, regardless of her demeanor, which was surely the same as when she testified about the alleged incident in 2019.

Demeanor evidence is highly overrated. When the Government states, "The military judge is an experienced jurist" the inference is that he is a human lie detector and can determine credibility simply by observing a witness testify. Ans. at 17. There is no basis in law, logic or experience for drawing this conclusion. Anyone who has practiced litigation for any extended period knows that witnesses can be histrionic and emotional, cry, and still lie. To be sure, a witness can also tell the truth. Appellate courts are much better situated to assess factual evidence because of access to a transcript, as in this case, where forensically uncorroborated, confusing, inconsistent, and self-contradictory testimony can be identified with certainty.

In every case where the Defense receives discovery, the accused obtains information about the facts of the case. It is unjust to infer that the accused and witnesses for the accused must be lying because of discovery or that the accused and/or his family will lie because they have something to lose, such as income and medical care. Every accused, even those who are innocent, stand to lose their reputation, income and medical care if they are unjustly convicted.

Finally, the Government minimizes E.M.'s confusion, poor memory and self-contradiction as being "minor mis-recollection[s]." Ans. at 20. On the other hand, the Government overreaches when suggesting that A.S., E.M.'s natural mother, was biased and was subjected to an improper influence by SrA Sherman to lie. Ans. at 20. E.M. testified under oath. Mistakes are

not permissible when the stakes are so high. Her willingness to take an oath and then purportedly "mistakenly" testify about significant events and their timing cannot and should not serve as the basis for a child rape conviction.

IV.

SRA SHERMAN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL DEFENSE COUNSEL INEXPLICABLY FAILED TO PRESENT FAVORABLE EVIDENCE AT TRIAL.

In his lengthy declaration submitted by the Government, trial defense counsel did not explain in any way why he completely failed to present any evidence of SrA Sherman's off-duty civilian work schedule as a mechanic with Frankenstein Motors from 5 July to 13 August 2019. The Government misapprehended a portion of the argument on this point. From her personal knowledge, A.S. could have testified in detail about SrA Sherman's Air Force and civilian work schedules had she been appropriately prepared by trial defense counsel. It would have been counsel's decision whether to offer corroborating evidence in the form of documents or text messages.

Inexplicably, trial defense counsel argued in his closing that he did present evidence of SrA Sherman's work schedule in 2019 through A.S.'s testimony, when, in fact he did not. He argued as follows:

> We heard from [A.S.] that she purposely would not work when [E.M.] would come to visit for the reasons articulated previously. She *detailed* Adam's work schedule or Senior Airman Sherman's work schedule. In 2017 he was an Uber and Lyft driver. In order to make a buck doing that job you have got to be out there driving on the road pretty often. and then in 2018, 2019, even up to present day, he has worked two jobs. He has worked at the Air Force, and he has worked as a *car mechanic*.

R. at 436 (emphasis added). In fact, trial defense counsel did not elicit any testimony from A.S. that SrA Sherman worked as a car mechanic during E.M.s' entire thirty-nine-day 2019 visit, much

less his schedule. Shockingly, no evidence whatsoever was presented by trial defense counsel on this point.

Nor did trial defense counsel elicit any testimony from A.S. regarding where N.S. lived or slept, even though A.S. could have testified that from 5 July 2019 to 27 July 2019, twenty-two of thirty-nine days (E.M.'s visit), N.S. actually lived in and slept in the camper with the Shermans. Whether the Shermans had documents or texts about this is irrelevant. A.S. could have testified to this fact as a matter of personal observation. In his declaration, trial defense counsel offers no explanation for this failure. No evidence was presented by trial defense counsel on this point.

Regardless of A.S.'s testimony and the matters she presented in her declaration, the Defense at trial had other evidence at their fingertips that could have truly detailed SrA Sherman's civilian work schedule. In a pretrial motion hearing, trial defense counsel submitted two stipulations of expected testimony from the owners of Frankenstein Motors, who employed SrA Sherman during the period in question. App. Ex. XV and XVI. They were admitted only for purposes of the motion hearing and not as part of the defense findings case. This demonstrates that trial defense counsel had access to SrA Sherman's civilian mechanic work hours and records during the period of 5 July to 13 August 2019. The defense did not have to rely on A.S. locating and giving them documents or text messages substantiating what days and hours SrA Sherman worked.

It is clear that trial defense counsel had access to these records and testimony independent of A.S.'s memory because they requested the production of the Frankenstein Motors owners, S.M. and B.M., for the very purpose of testifying about SrA Sherman's work schedule. App. Ex. XIII. The request states, in pertinent part:

> 1.e. Mrs. [S.M.] owns Frankenstein Motors . . . . She will also testify [as a fact witness] as to the amount of time SrA Sherman spends working at the shop and the

> hours he was regularly there. *This is incredibly relevant due to the fact that the allegations center around timeframes during which E.M. was alone with SrA Sherman*.
>
> * * *
>
> 1.f. Mr. [B.M.] owns Frankenstein Motors, the shop that SrA Sherman works while off-duty. . . . He will also testify [as a fact witness] as to the amount of time SrA Sherman spends working at the shop and the hours at which he was regularly there. *This is incredibly relevant due to the fact that the allegations center around timeframes during which E.M. was alone with SrA Sherman*.

App. Ex. XIII (emphasis added). Trial defense counsel offers no explanation why the owners were not called to testify in person or by stipulation about this "incredibly relevant" information. Even trial defense counsel admits that this information was "incredibly relevant." Thus, the failure to present this evidence was very prejudicial given that it went to the very heart of the defense's case, the limited opportunity in which SrA Sherman had access to E.M. during her visit.

In light of all these deficiencies and the prejudice suffered by SrA Sherman, trial defense counsel's performance fell "measurably below the performance . . . of fallible lawyers." *United States v. Palik*, 84 M.J. 284, 289 (C.A.A.F. 2024) (citations and quotations omitted).

Respectfully submitted,

[redacted]

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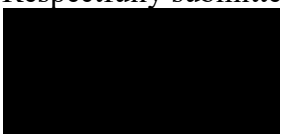
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 26 September 2024.

Respectfully submitted,



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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40486**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Adam J. SHERMAN, Jr.	)	**PANEL CHANGE**
Senior Airman (E-4)	)	
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 2 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

RICHARDSON, NATALIE D., Colonel, Senior Appellate Military Judge
MASON, BRIAN C., Lieutenant Colonel, Appellate Military Judge
KEARLEY, CYNTHIA T., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

Chief Commissioner