UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40581**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Anton D. SOLOSHENKO	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

This case was docketed with the court on 6 March 2024. On 25 April 2024 (50 days after docketing), counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 days to submit Appellant's assignments of error. The Government opposes the motion.

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

Accordingly, it is by the court on this 30th day of April, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **4 July 2024.**

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

Appellant's counsel is advised that any subsequent motions for enlargement of time, shall include, in addition to matters required under this court's Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time.

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

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Senior Airman (E-4) **ANTON SOLOSHENKO,** United States Air Force *Appellant*	)))))))))	**MOTION FOR ENLARGEMENT OF TIME (FIRST)** Before Panel No. 3 No. ACM 40581 25 April 2024

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **4 July 2024**. The record of trial was docketed with this Court on 6 March 2024. From the date of docketing to the present date, 50 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[redacted]

HEATHER M. BRUHA, 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) 612-4772
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 25 April 2024.

Respectfully submitted,

[redacted]

HEATHER M. BRUHA, 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) 612-4772
Email: heather.bruha@us.af.mil

26 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ANTON SOLOSHENKO., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40581 Panel No. 3

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 26 April 2024.

[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* v. Senior Airman (E-4) **ANTON SOLOSHENKO,** United States Air Force *Appellant*	)))))))))	**MOTION FOR ENLARGEMENT OF TIME (SECOND)** Before Panel No. 3 No. ACM 40581 26 June 2024

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for 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 **3 August 2024**. The record of trial was docketed with this Court on 6 March 2024. From the date of docketing to the present date, 112 days have elapsed. On the date requested, 150 days will have elapsed.

On 21 September 2023, at a general court-martial convened at Buckley Space Force Base, Colorado, Appellant was found guilty, contrary to his pleas, of one specification of Article 120, Uniform Code of Military Justice (UCMJ). *Entry of Judgment*, dated 27 October 2023. The members sentenced Appellant to a reduction to the rank of E-3, 15 days of hard labor without confinement, and a dishonorable discharge. *Id.* The convening authority took no action on the findings or sentence. *Convening Authority Decision on Action*, 3 October 2023.

The electronic record of trial is 1,173 pages long comprised of seven prosecution exhibits, two defense exhibits, 27 appellate exhibits, and one court exhibit. Appellant is not confined.

Appellant has provided limited consent to disclose confidential communications with counsel wherein he was advised of his right to a timely appeal, counsel's progress on the case, the request for this enlargement of time, and 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]

HEATHER M. BRUHA, 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) 612-4772
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 26 April 2024.

Respectfully submitted,

[redacted]

HEATHER M. BRUHA, 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) 612-4772
Email: heather.bruha@us.af.mil

27 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ANTON SOLOSHENKO., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40581 Panel No. 3

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 27 June 2024.

[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	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
Appellee	)	
	)	
v.	)	Before Panel No. 3
	)	
Senior Airman (E-4)	)	No. ACM 40581
ANTON SOLOSHENKO,	)	
United States Air Force	)	25 July 2024
Appellant	)	

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **2 September 2024**. The record of trial was docketed with this Court on 6 March 2024. From the date of docketing to the present date, 141 days have elapsed. On the date requested, 180 days will have elapsed.

On 21 September 2023, at a general court-martial convened at Buckley Space Force Base, Colorado, Appellant was found guilty, contrary to his pleas, of one specification of Article 120, Uniform Code of Military Justice (UCMJ). *Entry of Judgment*, dated 27 October 2023. The members sentenced Appellant to a reduction to the rank of E-3, 15 days of hard labor without confinement, and a dishonorable discharge. *Id.* The convening authority took no action on the findings or sentence. *Convening Authority Decision on Action*, 3 October 2023.

The electronic record of trial is 1,173 pages long comprised of seven prosecution exhibits, two defense exhibits, 27 appellate exhibits, and one court exhibit. Appellant is not confined.

Appellant has provided limited consent to disclose confidential communications with counsel wherein he was advised of his right to a timely appeal, counsel's progress on the case, the request for this enlargement of time, and 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]

HEATHER M. BRUHA, 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) 612-4772
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 25 July 2024.

Respectfully submitted,

[redacted]

HEATHER M. BRUHA, 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) 612-4772
Email: heather.bruha@us.af.mil

26 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ANTON SOLOSHENKO., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40581 Panel No. 3

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 26 July 2024.

[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	)	**CONSENT MOTION**
Appellee	)	**TO EXAMINE SEALED**
	)	**MATERIAL AND TRANSMIT**
	)	**TO CIVILIAN COUNSEL**
v.	)	
	)	Before Panel No. 3
Senior Airman (E-4)	)	
ANTON SOLOSHENKO	)	No. ACM 40581
United States Air Force	)	
Appellant	)	21 August 2024

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

Pursuant to Rules 3.1 and 23.3(f) of this Court's Rules of Practice and Procedure and Rule for Courts-Martial (R.C.M.) 1113(b)(3(B)(i), the Appellant moves for both parties, to include civilian appellate defense counsel, to examine the following sealed materials:

1) Appellate Exhibits III-XII: Mil. R. Evid. 412 and Mil. R. Evid. 513 materials.

2) Audio recording of closed sessions.

3) Sealed transcript pages of closed sessions.

The Appellant also requests permission for undersigned counsel to transmit the sealed material to Mr. William Cassara, his civilian appellate defense counsel. Mr. Cassara's office is in Evans, GA and he is unable to travel to view the sealed materials in person. The military judge, trial counsel, and defense counsel at trial reviewed the above listed materials.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these matters is reasonably necessary to appellate counsels' responsibilities, undersigned counsel asserts that review of the referenced exhibits is necessary to conduct a complete review of the record of trial and be able to advocate competently on behalf of Appellant.

Moreover, a review of the entire record of trial is necessary because this Court is empowered by Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, to grant relief based on a review and analysis of "the entire record." To determine whether the record of trial yields grounds for this Court to grant relief under Article 66, UCMJ, 10 U.S.C. § 866, appellate defense counsel must, therefore, examine "the entire record."

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

United States v. May, 47 M.J. 478, 481, (C.A.A.F. 1998). The sealed materials referenced above must be reviewed to ensure undersigned counsel provides "competent appellate representation." *Id*. Accordingly, examination of these exhibits is reasonably necessary since undersigned counsel cannot fulfill their duties of representation under Article 70, UCMJ, 10 U.S.C. § 870, without first reviewing the complete record of trial.

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

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

Respectfully submitted,

[redacted]

HEATHER M. BRUHA, 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) 612-4772
Email: heather.bruha@us.af.mil

//signed//
WILLIAM E. CASSARA, Esq.
Appellate Defense Counsel
PO Box 2688
Evans, GA 30809
706-860-5769
bill@courtmartial.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 21 August 2024.

Respectfully submitted,

[redacted]

HEATHER M. BRUHA, 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) 612-4772
Email: heather.bruha@us.af.mil

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40581**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Anton SOLOSHENKO	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 21 August 2024, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials and Transmit to Civilian Counsel. Specifically counsel request both parties be allowed to examine the audio recording of the closed Article 39a sessions; transcript pages 20–131, 136–53, and 677–87; and Appellate Exhibits III–XII. However, one of Appellant's counsel, Mr. William Cassara, is located outside the local area and "is unable to travel to view the sealed materials in person." All requested items were reviewed by trial and defense counsel at Appellant's court-martial.

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities." Rule for Courts-Martial 1113(b)(3)(B)(i), *Manual for Courts-Martial*, *United States* (2024 ed.).

The court finds Appellant has made a colorable showing that review of sealed materials is reasonably necessary for a proper fulfillment of appellate defense counsel's responsibilities. This court's order permits counsel for both parties to examine the materials.

Accordingly, it is by the court on this 23d day of August, 2024,

ORDERED:

Appellant's Motion to Examine Sealed Materials is **GRANTED**.

Appellate defense counsel and appellate government counsel may view **the closed session audio recording; transcript pages 20–131, 136–53, 677–87**; and **Appellate Exhibits III–XII** subject to the following conditions:

To view the sealed materials, counsel will coordinate with the court.

Except as specified below, no counsel will photocopy, photograph, or otherwise reproduce the sealed material, nor disclose nor make available its contents to any other individual, without this court's prior written authorization.

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

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Acting Deputy Clerk of Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Senior Airman (E-4) **ANTON SOLOSHENKO,** United States Air Force *Appellant*	)))))))))	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)** Before Panel No. 3 No. ACM 40581 23 August 2024

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

Pursuant to Rule 23.3(m) 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 **2 October 2024**. The record of trial was docketed with this Court on 6 March 2024. From the date of docketing to the present date, 170 days have elapsed. On the date requested, 210 days will have elapsed.

On 21 September 2023, at a general court-martial convened at Buckley Space Force Base, Colorado, Appellant was found guilty, contrary to his pleas, of one specification of Article 120, Uniform Code of Military Justice (UCMJ). *Entry of Judgment*, dated 27 October 2023. The members sentenced Appellant to a reduction to the rank of E-3, 15 days of hard labor without confinement, and a dishonorable discharge. *Id.* The convening authority took no action on the findings or sentence. *Convening Authority Decision on Action*, 3 October 2023.

The electronic record of trial is 1,173 pages long comprised of seven prosecution exhibits, two defense exhibits, 27 appellate exhibits, and one court exhibit. Appellant is not confined.

Military appellate defense counsel is currently assigned 21 cases, with 8 initial briefs pending before this Court. Through no fault of Appellant, military appellate defense 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 military appellate defense counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing EOT 3 in this case, civilian appellate defense counsel filed the Brief on Behalf of Appellant in *United States v. Martell* (ACM 40501) with this Court; and military appellate defense counsel filed the Reply Brief in *United States v. Greene-Watson*, (USCA Dkt. No. 24-0096 AF) with the Court of Appeals for the Armed Forces (CAAF). Of note, the JAJA Newcomers Training was held 13-14 August 2021; the family day/Labor Day holiday weekend is 30 August – 2 September; and the Joint Appellate Advocacy Training (JAAT) is scheduled for 25-26 September.

Military appellate defense counsel is currently finishing the Supplement to the Petition for Grant of Review in *United States v. Arroyo* (ACM 40321 (f rev)) currently due to the CAAF on 3 September 2024. Military appellate defense counsel then has two more Petitions currently due to the CAAF on 15 September 2024 and potential Reply Briefs in *Sherman* (ACM 40486) and *Martell* (ACM 40501) due to this Court. Once those are filed, military appellate defense counsel will need to begin oral argument preparations for *Greene-Watson* currently scheduled as an outreach oral argument with the CAAF on 10 October 2024.

This case is currently military appellate defense counsel's fifth priority before this Court. Military appellate defense counsel filed a Consent Motion to Examine Sealed Material and Transmit to Civilian Counsel with this Court on 21 August 2024. Military appellate defense counsel has not begun review of the record in this case. The following cases before this Court have priority over the present case:

1. *United States v. Arizpe* (ACM 40507): The unsealed portion of the verbatim transcript is 1,040 pages long and the record of trial is comprised of four volumes

containing seven prosecution exhibits, one defense exhibit, 34 appellate exhibits, and one court exhibit. Of note, this case has moved up in priority given civilian appellate defense counsel's availability to work this case.

2. *United States v. Clark* (ACM 40540): The trial transcript is 1,579 pages long and the record of trial is comprised of 13 volumes containing 19 prosecution exhibits, one defense exhibit, 87 appellate exhibits, and zero court exhibits. On 30 April 2024, this Court granted in part appellant's Consent Motion to Examine Sealed Material and Transmit to Civilian Counsel. Military appellate defense counsel has since transmitted the sealed material to civilian counsel pursuant to this Court's Order.

3. *United States v. Cooley* (ACM 40376): The unsealed portion of the verbatim transcript is 1,587 pages long and the record of trial is comprised of 10 volumes containing 29 prosecution exhibits, 16 defense exhibits, 109 appellate exhibits, and two court exhibits. The sealed transcript is 69 pages long; there is one sealed exhibit that is a document and one sealed exhibit that is a video lasting approximately eight hours.

4. *United States v. Wells* (ACM S32762 (f rev)): The electronic record of trial is 1,581 pages long comprised of 14 prosecution exhibits, one defense exhibit, six appellate exhibits, and one court exhibit.

Civilian appellate defense counsel currently has three cases pending before this Court; 11 cases pending before the Army Court of Criminal Appeals [CCA]; one case pending before the Navy-Marine Corps CCA; three cases pending before the CAAF; six cases pending before the

US Court of Federal Claims; and four petitions for a writ of habeas corpus in various federal district courts.

Appellant has provided limited consent to disclose confidential communications with counsel wherein he was advised of his right to a timely appeal, counsel's progress on the case, the request for this enlargement of time, and 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]

HEATHER M. BRUHA, 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) 612-4772
Email: heather.bruha@us.af.mil

//signed//
WILLIAM E. CASSARA, Esq.
Appellate Defense Counsel
PO Box 2688
Evans, GA 30809
706-860-5769
bill@courtmartial.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 23 August 2024.

Respectfully submitted,

[redacted]

HEATHER M. BRUHA, 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) 612-4772
Email: heather.bruha@us.af.mil

23 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ANTON SOLOSHENKO., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40581 Panel No. 3

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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 *Appellee* v. Anton D. SOLOSHENKO Senior Airman (E-4) U.S. Air Force *Appellant*	)))))))))	**No. ACM 40581** **ORDER** **Panel 3**

On 20 September 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

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

Accordingly, it is by the court on this 25th day of September, 2024,

ORDERED:

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

Any subsequent motions for enlargement of time shall, in addition to the matters required under this court's Rules of Practice and Procedure, continue to 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.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Senior Airman (E-4) **ANTON SOLOSHENKO,** United States Air Force *Appellant*	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)** Before Panel No. 3 No. ACM 40581 20 September 2024

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

Pursuant to Rule 23.3(m) 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 **1 November 2024**. The record of trial was docketed with this Court on 6 March 2024. From the date of docketing to the present date, 198 days have elapsed. On the date requested, 240 days will have elapsed.

On 21 September 2023, at a general court-martial convened at Buckley Space Force Base, Colorado, Appellant was found guilty, contrary to his pleas, of one specification of Article 120, Uniform Code of Military Justice (UCMJ). *Entry of Judgment*, dated 27 October 2023. The members sentenced Appellant to a reduction to the rank of E-3, 15 days of hard labor without confinement, and a dishonorable discharge. *Id.* The convening authority took no action on the findings or sentence. *Convening Authority Decision on Action*, 3 October 2023.

The electronic record of trial is 1,173 pages long comprised of seven prosecution exhibits, two defense exhibits, 27 appellate exhibits, and one court exhibit. Appellant is not confined.

Military appellate defense counsel is currently assigned 20 cases, with 9 initial briefs pending before this Court. Through no fault of Appellant, military appellate defense 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 military appellate defense counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing EOT 4 in this case, military appellate defense counsel filed the Petitions and Supplements to the Petitions for Grant of Review in *United States v. Arroyo* (ACM 40321 (f rev)) and *United States v. Van Velson* (ACM 40401) with the Court of Appeals for the Armed Forces (CAAF); the Petition for Grant of Review and Motion to File the Supplement Separately in *United States v. Holmes* (Misc. Dkt. No. 2024-1) with the CAAF; a Motion for Reconsideration in *United States v. Hennessy* (ACM 40439) with this Court; and civilian appellate defense counsel filed the Reply Brief in *United States v. Martell* (ACM 40501) with this Court. Of note, the family day/Labor Day holiday weekend was 30 August-2 September; the Joint Appellate Advocacy Training (JAAT) is scheduled for 25-26 September; and the family day/Indigenous Peoples' Day is 11-14 October.

Military appellate defense counsel is currently finishing the Supplement to the Petition for Grant of Review in *Holmes*, which will likely be filed next week with the CAAF. Civilian appellate defense counsel anticipates filing a Reply Brief in *United States v. Sherman* (ACM 40486) due to this Court on 26 September 2024. Military appellate defense counsel then must begin oral argument preparations for *United States v. Greene-Watson* (Dkt. No. 24-0096/AF; ACM 40293) currently scheduled as an outreach oral argument with the CAAF on 10 October 2024.

This case is currently military appellate defense counsel's fifth priority before this Court. Military appellate defense counsel filed a Consent Motion to Examine Sealed Material and Transmit to Civilian Counsel with this Court on 21 August 2024. Military appellate defense counsel has not begun review of the record in this case. The following cases before this Court have priority over the present case:

1. *United States v. Arizpe* (ACM 40507): The unsealed portion of the verbatim transcript is 1,040 pages long and the record of trial is comprised of four volumes containing seven prosecution exhibits, one defense exhibit, 34 appellate exhibits, and one court exhibit. Of note, this case has moved up in priority given civilian appellate defense counsel's availability to work this case, but may shift depending.
2. *United States v. Clark* (ACM 40540): The trial transcript is 1,579 pages long and the record of trial is comprised of 13 volumes containing 19 prosecution exhibits, one defense exhibit, 87 appellate exhibits, and zero court exhibits. On 30 April 2024, this Court granted in part appellant's Consent Motion to Examine Sealed Material and Transmit to Civilian Counsel. Military appellate defense counsel has since transmitted the sealed material to civilian counsel pursuant to this Court's Order.
3. *United States v. Cooley* (ACM 40376): The unsealed portion of the verbatim transcript is 1,587 pages long and the record of trial is comprised of 10 volumes containing 29 prosecution exhibits, 16 defense exhibits, 109 appellate exhibits, and two court exhibits. The sealed transcript is 69 pages long; there is one sealed exhibit that is a document and one sealed exhibit that is a video lasting approximately eight hours.
4. *United States v. Wells* (ACM S32762 (f rev)): The electronic record of trial is 1,581 pages long comprised of 14 prosecution exhibits, one defense exhibit, six appellate exhibits, and one court exhibit.

Civilian appellate defense counsel currently has two cases pending before this Court; 11 cases pending before the Army Court of Criminal Appeals [CCA]; one case pending before the Navy-Marine Corps CCA; one case pending before the CAAF; seven cases pending before the US Court of Federal Claims; and four petitions for a writ of habeas corpus in various federal district courts.

Appellant has provided limited consent to disclose confidential communications with counsel wherein he was advised of his right to a timely appeal, counsel's progress on the case, the request for this enlargement of time, and 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]

HEATHER M. BRUHA, 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) 612-4772
Email: heather.bruha@us.af.mil

//signed//
WILLIAM E. CASSARA, Esq.
Appellate Defense Counsel
PO Box 2688
Evans, GA 30809
706-860-5769
bill@courtmartial.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 20 September 2024.

Respectfully submitted,

[redacted]

HEATHER M. BRUHA, 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) 612-4772
Email: heather.bruha@us.af.mil

24 September 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ANTON SOLOSHENKO., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40581 Panel No. 3

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 24 September 2024.

[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	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (SIXTH)**
	)	
v.	)	Before Panel No. 3
	)	
Senior Airman (E-4)	)	No. ACM 40581
ANTON SOLOSHENKO,	)	
United States Air Force	)	23 October 2024
Appellant	)	

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

Pursuant to Rule 23.3(m) 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 **1 December 2024**. The record of trial was docketed with this Court on 6 March 2024. From the date of docketing to the present date, 231 days have elapsed. On the date requested, 270 days will have elapsed.

On 21 September 2023, at a general court-martial convened at Buckley Space Force Base, Colorado, Appellant was found guilty, contrary to his pleas, of one specification of Article 120, Uniform Code of Military Justice (UCMJ). *Entry of Judgment*, dated 27 October 2023. The members sentenced Appellant to a reduction to the rank of E-3, 15 days of hard labor without confinement, and a dishonorable discharge. *Id.* The convening authority took no action on the findings or sentence. *Convening Authority Decision on Action*, 3 October 2023.

The electronic record of trial is 1,173 pages long comprised of seven prosecution exhibits, two defense exhibits, 27 appellate exhibits, and one court exhibit. Appellant is not confined.

Military appellate defense counsel is currently assigned 17 cases, with 8 initial briefs pending before this Court. Through no fault of Appellant, military appellate defense 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 military appellate defense counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing EOT 5 in this case, military appellate defense counsel filed 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) with the Court of Appeals for the Armed Forces (CAAF); and the Reply Brief in *United States v. Sherman* (ACM 40486) with this Court. Undersigned counsel also prepared for and argued on behalf of the appellant in *United States v. Greene-Watson* (ACM 40293, USCA Dkt. No. 24-0096/AF) at the outreach oral argument with the CAAF on 10 October 2024.

Of note, the family day/Indigenous Peoples' Day was 11-14 October. Military appellate defense counsel was also on unexpected family leave 24-27 September 2024 and has been on emergency medical leave. Military appellate defense counsel must finish the Reply Brief in *Holmes* due to the CAAF first. Then, military appellate defense counsel will turn to the Joint Appendix and Grant Brief in *United States v. Arroyo* (ACM 40321 (f rev), USCA Dkt. No. 24-0212/AF), which is due to the CAAF on 12 November 2024. On 21 October 2024, the CAAF granted review on two issues in *United States v. Navarro Aguirre* (ACM 40352, USCA Dkt. No. 24-0146/AF) with the Grant Brief and Joint Appendix currently also due 12 November 2024. Additionally, the petition for certiorari in *United States v. Guihama* (ACM 40039) is currently due to the Supreme Court of the United States (SCOTUS) on 12 November 2024 absent a motion for an EOT.

This case is currently military appellate defense counsel's fourth priority before this Court. Military appellate defense counsel filed a Consent Motion to Examine Sealed Material and Transmit to Civilian Counsel with this Court on 21 August 2024. Military appellate defense counsel has not begun review of the record in this case. The following cases before this Court have priority over the present case:

1. *United States v. Arizpe* (ACM 40507): The unsealed portion of the verbatim transcript is 1,040 pages long and the record of trial is comprised of four volumes containing seven prosecution exhibits, one defense exhibit, 34 appellate exhibits, and one court exhibit. Of note, this case has moved up in priority given civilian appellate defense counsel's availability to work this case but may shift depending.
2. *United States v. Clark* (ACM 40540): The trial transcript is 1,579 pages long and the record of trial is comprised of 13 volumes containing 19 prosecution exhibits, one defense exhibit, 87 appellate exhibits, and zero court exhibits. On 30 April 2024, this Court granted in part appellant's Consent Motion to Examine Sealed Material and Transmit to Civilian Counsel. Military appellate defense counsel has since transmitted the sealed material to civilian counsel pursuant to this Court's Order.
3. *United States v. Cooley* (ACM 40376): The unsealed portion of the verbatim transcript is 1,587 pages long and the record of trial is comprised of 10 volumes containing 29 prosecution exhibits, 16 defense exhibits, 109 appellate exhibits, and two court exhibits. The sealed transcript is 69 pages long; there is one sealed exhibit that is a document and one sealed exhibit that is a video lasting approximately eight hours.

Civilian appellate defense counsel currently has three cases pending before this Court; ten cases pending before the Army Court of Criminal Appeals [CCA]; one case pending before the Navy-Marine Corps CCA; one case pending before the CAAF; six cases pending before the US

Court of Federal Claims; and four petitions for a writ of habeas corpus in various federal district courts.

Appellant has provided limited consent to disclose confidential communications with counsel wherein he was advised of his right to a timely appeal, counsel's progress on the case, the request for this enlargement of time, and 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]

HEATHER M. BRUHA, 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) 612-4772
Email: heather.bruha@us.af.mil

//signed//
WILLIAM E. CASSARA, Esq.
Appellate Defense Counsel
PO Box 2688
Evans, GA 30809
706-860-5769
bill@courtmartial.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 23 October 2024.

Respectfully submitted,

[redacted]

HEATHER M. BRUHA, 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) 612-4772
Email: heather.bruha@us.af.mil

25 October 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ANTON SOLOSHENKO., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40581 Panel No. 3

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 25 October 2024.

[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* v. Senior Airman (E-4) **ANTON SOLOSHENKO** United States Air Force *Appellant*	))))))))))	**CONSENT MOTION TO EXAMINE SEALED MATERIAL AND TRANSMIT TO CIVILIAN COUNSEL** Before Panel No. 3 No. ACM 40581 19 November 2024

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

Pursuant to Rules 3.1 and 23.3(f) of this Court's Rules of Practice and Procedure and Rule for Courts-Martial (R.C.M.) 1113(b)(3(B)(i), the Appellant moves for both parties, to include civilian appellate defense counsel, to examine the following sealed material:

1) Appellate Exhibits XXVII: Ruling on Defense Motion to Admit Evidence Under M.R.E. 412

The original consent motion did not include this exhibit as it is not listed in the EROT as sealed nor does the transcript state it is sealed. However, when military appellate defense counsel went to copy the sealed portions of the record pursuant to this Court's order, military appellate defense counsel noted this exhibit was sealed in the Court's physical copy of the record. Military appellate defense counsel did not open the sealed document given the Court's order had not authorized it. Military appellate defense counsel then checked the EROT's exhibit list and confirmed the exhibit is not listed as sealed. Instead, it notes, the "Military Judge submitted [it] after trial." Military appellate defense counsel then went to the listed exhibit in the EROT to see if it was included and it was. Military appellate defense counsel did not review the exhibit and instead asked the Government if it would consent to the review and copy/transmittal, if necessary, of the exhibit to civilian appellate defense counsel. The Government consented.

As such, the Appellant also requests permission for military appellate defense counsel to transmit the sealed material to Mr. William Cassara, his civilian appellate defense counsel. Mr. Cassara's office is in Evans, GA and he is unable to travel to view the sealed materials in person. The military judge, trial counsel, and defense counsel at trial reviewed the above listed material.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these matters is reasonably necessary to appellate counsels' responsibilities, undersigned counsel asserts that review of the referenced exhibits is necessary to conduct a complete review of the record of trial and be able to advocate competently on behalf of Appellant.

Moreover, a review of the entire record of trial is necessary because this Court is empowered by Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, to grant relief based on a review and analysis of "the entire record." To determine whether the record of trial yields grounds for this Court to grant relief under Article 66, UCMJ, 10 U.S.C. § 866, appellate defense counsel must, therefore, examine "the entire record."

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

United States v. May, 47 M.J. 478, 481, (C.A.A.F. 1998). The sealed material referenced above must be reviewed to ensure undersigned counsel provides "competent appellate representation." *Id*. Accordingly, examination of these exhibits is reasonably necessary since undersigned counsel cannot fulfill their duties of representation under Article 70, UCMJ, 10 U.S.C. § 870, without first reviewing the complete record of trial.

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

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

Respectfully submitted,

[redacted]

HEATHER M. BRUHA, 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) 612-4772
Email: heather.bruha@us.af.mil

//signed//
WILLIAM E. CASSARA, Esq.
Appellate Defense Counsel
PO Box 2688
Evans, GA 30809
706-860-5769
bill@courtmartial.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 19 November 2024.

Respectfully submitted,

[redacted]

HEATHER M. BRUHA, 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) 612-4772
Email: heather.bruha@us.af.mil

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40581**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Anton SOLOSHENKO	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 19 November 2024, counsel for Appellant submitted a second Consent Motion to Examine Sealed Material and Transmit to Civilian Counsel; specifically Appellate Exhibit XXVII.* Appellant's counsel aver they have consulted with counsel for the Government, who consents to this motion.

Appellant requests counsel for both parties be permitted to examine Appellate Exhibit XXVII because this exhibit was not identified as sealed on the exhibit list to the record of trial, and therefore only later discovered by appellate defense counsel that Appellate Exhibit XXVII was sealed in the record. Both trial counsel and trial defense counsel had an opportunity to review the appellate exhibit before conclusion of Appellant's court-martial. Additionally, Appellant requests permission for his military appellate defense counsel to transmit Appellate Exhibit XVII to his civilian appellate counsel, Mr. William E. Cassara, who has an office in Georgia.

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

The court finds Appellant has made a colorable showing that review of the sealed materials is necessary to fulfill appellate counsel's responsibilities.

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

ORDERED:

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* In its order dated 23 August 2024, this court granted appellate government, appellate military defense counsel, and Appellant's civilian counsel authority to review several sealed materials, to including transmittal of listed sealed materials to be transmitted to civilian defense counsel; however, neither the consent motion nor order included Appellate Exhibit XXVII.

Appellant's Consent Motion to Examine Sealed Material and Transmit to Civilian Counsel is **GRANTED**.

Appellate defense counsel and appellate government counsel may examine **Appellate Exhibit XXVII**, subject to the following instructions:

To view the sealed material, counsel will coordinate with the court.

Appellant's military appellate counsel is permitted to scan a hard copy and to transmit encrypted files containing the sealed materials to Appellant's civilian appellate counsel, Mr. William E. Cassara, via DoD SAFE.

Except as specified in this order, no counsel will photocopy, photograph, or otherwise reproduce the sealed material, nor disclose nor make available its contents to any other individual, without this court's prior written authorization.

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

FOR THE COURT

[redacted]

SEAN J. SULLIVAN, Maj, USAF
Deputy Clerk of Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (SEVENTH)**
	)	
v.	)	Before Panel No. 3
	)	
Senior Airman (E-4)	)	No. ACM 40581
ANTON SOLOSHENKO,	)	
United States Air Force	)	21 November 2024
Appellant	)	

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

Pursuant to Rule 23.3(m) 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 **31 December 2024**. The record of trial was docketed with this Court on 6 March 2024. From the date of docketing to the present date, 260 days have elapsed. On the date requested, 300 days will have elapsed.

On 21 September 2023, at a general court-martial convened at Buckley Space Force Base, Colorado, Appellant was found guilty, contrary to his pleas, of one specification of Article 120, Uniform Code of Military Justice (UCMJ). *Entry of Judgment*, dated 27 October 2023. The members sentenced Appellant to a reduction to the rank of E-3, 15 days of hard labor without confinement, and a dishonorable discharge. *Id.* The convening authority took no action on the findings or sentence. *Convening Authority Decision on Action*, 3 October 2023.

The electronic record of trial is 1,173 pages long comprised of seven prosecution exhibits, two defense exhibits, 27 appellate exhibits, and one court exhibit. Appellant is not confined.

Military appellate defense counsel is currently assigned 16 cases, with 7 initial briefs pending before this Court. Through no fault of Appellant, military appellate defense 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 military appellate defense counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing EOT 6 in this case, military appellate defense counsel filed a Reply Brief in *United States v. Holmes* (Misc. Dkt. No. 2024-1, USCA Dkt. No. 24-0224/AF) with the Court of Appeals for the Armed Forces (CAAF); a Motion for an Extension of Time to file the Petition for Certiorari in *United States v. Guihama* (ACM 40039) with the Supreme Court of the United States (SCOTUS); the Joint Appendix (JA)[1] and Grant Brief in *United States v. Arroyo* (ACM 40321 (f rev), USCA Dkt. No. 24-0212/AF) with the CAAF; and a Motion to Withdraw from Appellate Review and Motion to Attach in *United States v. Harmon* (ACM S32785) with this Court. Motions to withdraw from appellate review require appellant counsel to conduct a review of the record and advise the appellant. Military appellate defense counsel also spent approximately 4 hours reviewing the opinion in *United States v. Martell* (ACM 40501) and applicable case law, consulting with civilian appellate defense counsel, and advising the appellant in *Martell* on a potential motion for reconsideration with this Court or petition for grant of review with the CAAF.

Of note, military appellate defense counsel had an emergency medical issue[2] the week of 20 October 2024, which impacted her ability to perform her job. Additionally, the Veterans Day holiday and family day were 8-11 November 2024. Military appellate defense counsel was also occupied from noon until the end of the duty day on 13 November 2024 with a medical

[1] Undersigned counsel asked Government appellate counsel to assist in pulling the portions of the JA it requested for compiling, but Government appellate counsel refused stating the rules make clear the appellant alone is responsible for the JA including the parts (and redactions) the appellee requests. As such, while titled "Joint," the appellant was solely responsible for the JA.

[2] Military appellate defense counsel is willing to disclose more details in a status conference should this Court be inclined to deny this EOT request, but not in this filing as it is made public.

appointment for her son.[3] And as a single parent, military appellate defense counsel had to telework with her five-year-old for two days during this timeframe since there was no school and no aftercare available. Since filing EOT 6 in this case, military appellate defense counsel prepared for and participated as a moot judge in one moot argument and additional mentoring (equaling 4+ hours), completed three peer reviews, and completed approximately 7 hours of virtual training/certifications.

This case is currently military appellate defense counsel's fourth priority before this Court. Military appellate defense counsel scanned and transmitted sealed material to civilian appellate defense counsel pursuant to this Court's order. Military appellate defense counsel has filed an additional motion regarding sealed material after identifying a potential issue with an exhibit identified as sealed in the Court's hard copy of the record. Military appellate defense counsel has not begun review of the record in this case, but civilian appellate defense counsel has. The following cases before this Court have priority over the present case:

1. *United States v. Clark* (ACM 40540): The trial transcript is 1,579 pages long and the record of trial is comprised of 13 volumes containing 19 prosecution exhibits, one defense exhibit, 87 appellate exhibits, and zero court exhibits. On 30 April 2024, this Court granted in part appellant's Consent Motion to Examine Sealed Material and Transmit to Civilian Counsel. Military appellate defense counsel transmitted the sealed material to civilian counsel pursuant to this Court's original order. However, since reviewing the record, undersigned counsel identified two additional exhibits which were sealed and filed a consent motion to view and

[3] Military appellate defense counsel elects to not provide further details given all filings are made public. However, further details may be shared in a status conference should this Court be inclined to deny this EOT request.

transmit on 19 November 2024. This Court granted that motion. Military appellate defense counsel has finished review of 9 of the 13 volumes of the record (the remaining volumes contain the transcript). Military appellate defense counsel has reviewed approximately 861 pages (more than half) of the 1,579-page transcript and has identified one AOE she will be drafting in addition to the six anticipated to be drafted by civilian appellate defense counsel. Military appellate defense counsel has yet to receive a draft of the AOEs from civilian appellate defense counsel.

2. *United States v. Arizpe* (ACM 40507): The unsealed portion of the verbatim transcript is 1,040 pages long and the record of trial is comprised of four volumes containing seven prosecution exhibits, one defense exhibit, 34 appellate exhibits, and one court exhibit. Military appellate defense counsel has reviewed approximately two of the four volumes in the case but has only reviewed about 50 pages of the 1,040-page transcript. Military appellate defense counsel was previously working on this case and on a request to the Government to consent on a motion to view sealed material but was redirected to the *Clark* case above given this Court's denial of EOT 10 in that case. Military appellate defense counsel has since filed a consent motion to view sealed material in *Arizpe* to ensure she can continue reviewing *Arizpe* as next in line after *Clark*. Another EOT (for at least a partial amount of time) in *Arizpe* will likely be needed given the reprioritization required by this Court and the need to get the AOEs through necessary reviews prior to filing.

3. *United States v. Cooley* (ACM 40376): The unsealed portion of the verbatim transcript is 1,587 pages long and the record of trial is comprised of 10 volumes

containing 29 prosecution exhibits, 16 defense exhibits, 109 appellate exhibits, and two court exhibits. The sealed transcript is 69 pages long; there is one sealed exhibit that is a document and one sealed exhibit that is a video lasting approximately eight hours. Civilian appellate defense counsel and military appellate defense counsel have been consulting on a potential motion in the case, but nothing is ready to be filed at this time.

Civilian appellate defense counsel currently has three cases pending before this Court; twelve cases pending before the Army Court of Criminal Appeals [CCA]; one case pending before the Navy-Marine Corps CCA; three cases pending before the CAAF; six cases pending before the US Court of Federal Claims; and four petitions for a writ of habeas corpus in various federal district courts.

Appellant has provided limited consent to disclose confidential communications with counsel wherein he was advised of his right to a timely appeal, counsel's progress on the case, the request for this enlargement of time, and 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]

HEATHER M. BRUHA, 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) 612-4772
Email: heather.bruha@us.af.mil

//signed//
WILLIAM E. CASSARA, Esq.
Appellate Defense Counsel
PO Box 2688
Evans, GA 30809
706-860-5769
bill@courtmartial.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 21 November 2024.

Respectfully submitted,

[redacted]

HEATHER M. BRUHA, 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) 612-4772
Email: heather.bruha@us.af.mil

22 November 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ANTON SOLOSHENKO., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40581 Panel No. 3

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 300 days in length. Appellant's nearly year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18 month standard for this Court to issue a decision, which only leaves about 8 month combined for the United States and this Court to perform their separate statutory responsibilities. It appears that neither counsel has completed review of the record of trial at this late stage of the appellate process.

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[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	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (EIGHTH)**
	)	
v.	)	Before Panel No. 3
	)	
Senior Airman (E-4)	)	No. ACM 40581
ANTON SOLOSHENKO,	)	
United States Air Force	)	19 December 2024
Appellant	)	

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

Pursuant to Rule 23.3(m) 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 **30 January 2025**. The record of trial was docketed with this Court on 6 March 2024. From the date of docketing to the present date, 288 days have elapsed. On the date requested, 330 days will have elapsed.

On 21 September 2023, at a general court-martial convened at Buckley Space Force Base, Colorado, Appellant was found guilty, contrary to his pleas, of one specification of Article 120, Uniform Code of Military Justice (UCMJ). *Entry of Judgment*, dated 27 October 2023. The members sentenced Appellant to a reduction to the rank of E-3, 15 days of hard labor without confinement, and a dishonorable discharge. *Id.* The convening authority took no action on the findings or sentence. *Convening Authority Decision on Action*, 3 October 2023.

The electronic record of trial is 1,173 pages long comprised of seven prosecution exhibits, two defense exhibits, 27 appellate exhibits, and one court exhibit. Appellant is not confined.

Military appellate defense counsel is currently assigned 14 cases, with 6 initial briefs pending before this Court. Through no fault of Appellant, military appellate defense 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 military appellate defense counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing EOT 7 in this case, military appellate defense counsel filed the Brief on Behalf of Appellant in *United States v. Clark* (ACM 40540) with this Court; a Petition for Grant of Review and Motion for an Extension of Time to File the Supplement Separately in *United States v. Martell* (ACM 40501) with the Court of Appeals for the Armed Forces (CAAF), and submitted the Petition for Writ of Certiorari in *United States v. Guihama* (ACM 40039, USCA Dkt. No. 23-0085/AF) to the printer on 16 December 2024 which is due to the Supreme Court of the United States (SCOTUS) on 11 January 2025.

Of note, the Court and undersigned counsel's office are closed 24-26 December 2024 due to the President's Executive Order, a federal holiday, and a family day and closed 1-2 January 2025 due to a federal holiday and family day. Since filing EOT 5 in this case, undersigned counsel prepared for and participated as a moot judge in two moot arguments and attended one oral argument at the CAAF (equaling approximately 9 hours) and completed six peer reviews. Undersigned counsel is currently working on the Reply Brief in *United States v. Arroyo* (ACM 40321 (f rev), USCA Dkt. No. 24-0212/AF) due to the CAAF next week. Undersigned counsel has also been working on the planning and preparations for a *DuBay*[1] hearing ordered in *United States v. Sherman,* (ACM 40486) by this Court.

This case is currently military appellate defense counsel's third priority before this Court. Military appellate defense counsel scanned and transmitted sealed material to civilian appellate defense counsel pursuant to this Court's order. Military and civilian appellate defense counsel

[1] *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

have reviewed the sealed material in this case and civilian appellate defense counsel has continued review of the record. The following cases before this Court have priority over the present case:

1. *United States v. Arizpe* (ACM 40507): The unsealed portion of the verbatim transcript is 1,040 pages long and the record of trial is comprised of four volumes containing seven prosecution exhibits, one defense exhibit, 34 appellate exhibits, and one court exhibit. Military appellate defense counsel has reviewed the physical copy of the four volume record of trial and is finishing review of the transcript while conducting research into the four potential issues identified so far. Undersigned counsel still needs to review the Board of Inquiry (BOI) transcript for two potential issues related to Unlawful Command Influence (UCI), continue conducting case law research, and conduct final consultation with the client on any other potential *Grostefon*[2] issues. The Brief on Behalf of Appellant is due 9 January 2025. The Supplement to the Petition for Grant of Review in *Martell* is also currently due to the CAAF on 6 January 2025.

2. *United States v. Cooley* (ACM 40376): The unsealed portion of the verbatim transcript is 1,587 pages long and the record of trial is comprised of 10 volumes containing 29 prosecution exhibits, 16 defense exhibits, 109 appellate exhibits, and two court exhibits. The sealed transcript is 69 pages long; there is one sealed exhibit that is a document and one sealed exhibit that is a video lasting approximately eight hours. Military appellate defense counsel will need another EOT in order to complete review of the record, work on the brief with civilian appellate defense

[2] *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1992).

counsel, and consult the client—especially given the *DuBay* hearing in *Sherman* is scheduled for the week of 27 January 2025.

Civilian appellate defense counsel currently has three cases pending before this Court; twelve cases pending before the Army Court of Criminal Appeals [CCA]; one case pending before the Navy-Marine Corps CCA; three cases pending before the CAAF; six cases pending before the US Court of Federal Claims; and four petitions for a writ of habeas corpus in various federal district courts.

Appellant has provided limited consent to disclose confidential communications with counsel wherein he was advised of his right to a timely appeal, counsel's progress on the case, the request for this enlargement of time, and 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]

HEATHER M. BRUHA, 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) 612-4772
Email: heather.bruha@us.af.mil

//signed//
WILLIAM E. CASSARA, Esq.
Appellate Defense Counsel
PO Box 2688
Evans, GA 30809
706-860-5769
bill@courtmartial.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 19 December 2024.

Respectfully submitted,

[redacted]

HEATHER M. BRUHA, 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) 612-4772
Email: heather.bruha@us.af.mil

23 December 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ANTON SOLOSHENKO., USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40581 Panel No. 3

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

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

United States Air Force
Court of Criminal Appeals

UNITED STATES	)	**No. ACM 40581**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Anton D. SOLOSHENKO	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 19 December 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) requesting an additional 30 days to submit Appellant's assignments of error. The 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 23d day of December, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than **30 January 2025**.

Further requests by Appellant for enlargements of time may necessitate a status conference.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Chief Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (NINTH)**
	)	
v.	)	Before Panel No. 3
	)	
Senior Airman (E-4)	)	No. ACM 40581
ANTON SOLOSHENKO,	)	
United States Air Force	)	16 January 2025
Appellant	)	

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

Pursuant to Rule 23.3(m) 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 **1 March 2025**. The record of trial was docketed with this Court on 6 March 2024. From the date of docketing to the present date, 316 days have elapsed. On the date requested, 360 days will have elapsed. **Counsel request a status conference should this Court be inclined to deny this EOT.**

On 21 September 2023, at a general court-martial convened at Buckley Space Force Base, Colorado, Appellant was found guilty, contrary to his pleas, of one specification of Article 120, Uniform Code of Military Justice (UCMJ). *Entry of Judgment*, dated 27 October 2023. The members sentenced Appellant to a reduction to the rank of E-3, 15 days of hard labor without confinement, and a dishonorable discharge. *Id.* The convening authority took no action on the findings or sentence. *Convening Authority Decision on Action*, 3 October 2023.

The electronic record of trial is 1,173 pages long comprised of seven prosecution exhibits, two defense exhibits, 27 appellate exhibits, and one court exhibit. Appellant is not confined.

Military appellate defense counsel is currently assigned 14 cases, with 5 initial briefs pending before this Court. Through no fault of Appellant, military appellate defense 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 military appellate defense counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing EOT 8 in this case, military appellate defense counsel filed the Reply Brief in *United States v. Arroyo* (ACM 40321 (f rev), USCA Dkt. No. 24-0212/AF) with the Court of Appeals for the Armed Forces (CAAF); delivered the Petition for Writ of Certiorari in *United States v. Guihama* (ACM 40039, USCA Dkt. No. 23-0085/AF) to the Supreme Court of the United States (SCOTUS); filed an Answer to the Government's motion to reconsider in *United States v. Hennessy* (ACM 40439) with this Court; filed a motion to strike portion of amicus curiae brief of LP and an opposition to amicus motion for oral argument in *Arroyo* with the CAAF; and filed the Brief on Behalf of Appellant in *United States v. Arizpe* (ACM 40507) with this Court.

Of note, the Court and undersigned counsel's office were closed 24-26 December 2024 due to the President's Executive Order, a federal holiday, and a family day; closed 1-2 January 2025 due to a federal holiday and family day; and closed 9 January 2025 due to the President's Executive Order. Undersigned counsel took leave 13-15 January 2025. Since filing EOT 3 in this case, undersigned counsel prepared for and participated as a moot judge in five moot arguments (equaling approximately 12 hours) and completed three peer reviews (equaling approximately 17 hours). Undersigned counsel has also been working on the planning and preparations for a *DuBay*[1] hearing ordered in *United States v. Sherman,* (ACM 40486) by this Court, which is currently scheduled for the week of 27 January 2025. Undersigned counsel will

[1] *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

also file the Supplement to the Petition for Grant of Review in *United States v. Martell* (ACM 40501) with the CAAF by 21 January 2025. Additionally, undersigned counsel will have Reply Briefs due in *United States v. Clark* (ACM 40540) (estimated 3 February 2025) and *Arizpe* (estimated 20 February 2025) and Oral Argument at the CAAF in *Arroyo* (scheduled 25 February 2025).

This case is currently military appellate defense counsel's first priority before this Court. Military appellate defense counsel scanned and transmitted sealed material to civilian appellate defense counsel pursuant to this Court's order. Military and civilian appellate defense counsel have reviewed the sealed material in this case. Civilian appellate defense counsel has completed review of the record and drafted two AOEs. Given that update, military appellate defense counsel has reprioritized this case and has begun reviewing the non-sealed portions of the record of trial. Military appellate defense counsel anticipates adding two AOEs to the brief. Counsel do not anticipate needing an additional EOT if this one is granted.

Civilian appellate defense counsel currently has three cases pending before this Court; ten cases pending before the Army Court of Criminal Appeals [CCA]; one case pending before the Navy-Marine Corps CCA; one case pending before the CAAF; six cases pending before the US Court of Federal Claims; and four petitions for a writ of habeas corpus in various federal district courts.

Appellant has provided limited consent to disclose confidential communications with counsel wherein he was advised of his right to a timely appeal, counsel's progress on the case, the request for this enlargement of time, and 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]

HEATHER M. BRUHA, 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) 612-4772
Email: heather.bruha@us.af.mil

//signed//
WILLIAM E. CASSARA, Esq.
Appellate Defense Counsel
PO Box 2688
Evans, GA 30809
706-860-5769
bill@courtmartial.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 January 2024.

Respectfully submitted,

[redacted]

HEATHER M. BRUHA, 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) 612-4772
Email: heather.bruha@us.af.mil

21 January 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ANTON SOLOSHENKO., USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40581 Panel No. 3

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

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 21 January 2025.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**BRIEF ON BEHALF OF APPELLANT**
Appellee	)	
	)	
v.	)	
	)	Before Panel No. 3
	)	
Specialist 4[1] (E-4)	)	No. ACM 40581
ANTON SOLOSHENKO,	)	
United States Space Force	)	
Appellant	)	3 February 2025

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

WILLIAM E. CASSARA, Esq.
Appellate Defense Counsel
PO Box 2688
Evans, GA 30809
(706) 860-5760
bill@courtmartial.com

HEATHER M. BRUHA, Maj
Major, United States Air Force
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, NAF, MD 20762
(240) 612-4770
heather.bruha@us.af.mil

[1] Previous filings by both parties incorrectly used "Senior Airman" when Specialist 4 (Spc4) Soloshenko is a member of the United States Space Force, not the United States Air Force.

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TABLE OF AUTHORITIES

Statutes

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ASSIGNMENTS OF ERROR

I.

The evidence is legally and factually insufficient to support the finding of guilty for sexual assault.

II.

The military judge abused his discretion in admitting statements of the complaining witness as an excited utterance.

III.

Whether the Government can prove 18 U.S.C. § 922 is constitutional as applied to Appellant by "demonstrating that it is consistent with the nation's historical tradition of firearm regulation" when Appellant e was convicted of non-violent offenses and this court can decide that question.

IV. [2]

Appellant's constitutional rights were violated by being convicted of offenses with no requirement that the court-martial panel (the functional equivalent of the jury) vote unanimously for guilt.

STATEMENT OF THE CASE

On 18-21 September 2023, Specialist 4 (Spc4) Anton Soloshenko [Appellant] was tried at Buckley Space Force Base, Colorado, by a general court-martial composed of officer and enlisted members. Contrary to his plea, Appellant was convicted of one charge and one specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920.[3] R. at 663; *Entry of Judgment* [EOJ], dated 27 October 2023. The members acquitted Appellant of one charge and one specification of assault consummated by a battery in alleged violation of Article 128, UCMJ, 10 U.S.C. § 928. *Id.* The members sentenced Appellant to a

[2] Issue IV is raised in accordance with *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1992).
[3] Unless otherwise indicated, all references to the UCMJ, the Military Rules of Evidence, and the Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.) [2019 *MCM*].

reduction to the rank of E-3, fifteen days of hard labor without confinement, and a dishonorable discharge. EOJ; R. at 772. The convening authority took no action on the findings or sentence. *Convening Authority Decision on Action*, dated 3 October 2023. The convening authority denied Appellant's requests to defer automatic forfeitures and to disapprove the adjudged reduction in grade. *Id*.

STATEMENT OF THE FACTS

Background

Appellant and Ms. LH, then eighteen years old, met on a dating app in June 2022. R. at 443-44, 522. During their intense two-week relationship, they regularly engaged in sexual acts involving bondage and force at LH's request. R. at 521, 523, 527. LH sometimes requested that Appellant hurt her during sex because she enjoyed the feeling of pain during sex. R. at 521. If Appellant did not cause pain during sexual activity, she asked him to "do it" harder so that she could feel pain. R. at 521.

During the time that LH and Appellant dated, she had a strained relationship with her mother. R. at 525. LH refused to obey her mother's rules, which LH considered stupid. R. at 525-26. LH felt rejected and abandoned by her mother, who had kicked LH out of the house. R. at 525. LH needed a place to live, so she "couch surfed" at friends' homes and slept a few nights in her boss's basement. R. at 534, 554, 562. LH's living situation was unstable; she testified, "when you're staying with somebody there's never 100% guarantee that they're going to let you continue to stay there." R. at 562.

On 4 July 2022, LH told her mother that Appellant had bitten her breasts during a sexual encounter even though she told him that she did not want him to do that. R. at 522, 525, 526. LH also told her mother that she and Appellant engaged in bondage-type sex and that she did not want him to do those things to her. R. at 523. LH showed her mother her breasts, which had bruises and other marks on them, and said that she had asked Appellant to stop injuring her like that. R. at 523, 525. LH's mother was concerned and worried that the injuries would be permanent. R. at 522. Even as LH intimated to her mother on 4 July 2022 that she did not want Appellant to hurt her during sex, she communicated her explicit desires to Appellant for him to do just that. R. at 527.

Appellant and LH's Relationship

On 5 July 2022, LH told Appellant that she wanted him to spank her, tie her up, and make her eat his ejaculate because it excited her. R. at 527. The next day, LH told Appellant that she wanted him to have sex with her the way she liked it: dirty, hot, rough, and deep. R. at 527. She told him to handcuff her behind her back, otherwise she would still find ways to do naughty things to him. R. at 527. While discussing sex on 7 July 2022, LH told Appellant, "I want you to stop, but I really don't want to all at the same time." R. at 527. Hours after this sexual encounter, Appellant told LH that sex with her made him depressed and tired. R. at 528.

LH and Appellant engaged in multiple rounds of sex effectively every time they saw each other. R. at 545. She made clear that this was her preference. R. at 545.

On 8 July 2022, Appellant told LH that he was willing to continue having sex with her in a purely sexual relationship, but that he could not take her home to his mother. R. at 529, 543. LH broke up with Appellant the next day. R. at 448, 529. Via text message, she told Appellant that they were incompatible and that she was just not interested in him. R. at 529. She testified that she and Appellant mutually agreed they had nothing in common. R. at 448.

19 July 2022

On 19 July 2022, Appellant texted LH that he missed her. Pros. Ex. 1, at 1. LH apologized for her harsh words toward him. R. at 502-03; Pros. Ex. 1 at 1. They agreed to meet at Appellant's studio apartment. Pros. Ex. 1 at 2, 3. LH wanted Appellant to guarantee that their reunion would not be a "booty call thing," a meeting for the purpose of having sex, because her therapist had recently advised her to be celibate as a way to stop a pattern of self-destructive behavior.[4] R. at 452, 503, 505, Pros. Ex. 1, at 2. Appellant assured her that it was not a booty call. Pros. Ex. 1, at 3.

Sometime that evening, LH arrived at Appellant's home. R. at 453. They engaged in small talk and kissed on the couch. R. at 454, 508. LH explained that she kissed Appellant because "emotions were high" and kissing was not as intimate as sex. R. at 454. She told Appellant that she was trying to be celibate on her therapist's advice. R. at 454, 506. They continued to kiss and talk about how their relationship ended. R. at 454-55. They apologized to each other for the hurtful things they said when they broke up. R. at 506-07.

As Appellant showed LH his new furniture, she followed him into his bedroom where they kissed again. R. at 455, 508, 509. They laid on the bed and kissed. R. at 455, 456, 509. LH testified that she told Appellant, "This is as far as it's ever going to go." R. at 456.

According to LH, Appellant laid on top of her, kissed her aggressively, and touched her with his hands. R. at 456. She could not say anything because he pushed her head down while kissing her. R. at 457. She managed to put her hand over his mouth, but he moved it out of the way. R. at 457. Appellant started to take his shirt off, but LH pulled it down. R. at 457. She said, "If you take your shirt off, this is going other places," or words to that effect. R. at 512-13. He

[4] Sometime after breaking up with Appellant and before the alleged incident, LH told her therapist that she had engaged in behavior contrary to the therapist's advice. R. at 505. In other words, the therapist advised LH to stop doing "X," but LH did so anyway. The therapist told LH that she had, once again, chosen self-destructive behavior, and advised her to be celibate. R. at 505.

took his shirt off and kissed her. R. at 457. She grabbed the shirt and tried to place it between them, but Appellant moved it out of the way. R. at 457.

LH alleged she said "no" approximately "20 to 30 times" as Appellant kissed her. R. at 457-58. He told LH to take off her clothes because she wanted "it." R. at 458, 514. She testified that Appellant "pretty much overpower[ed]" her and she felt like she could not get away from him. R. at 458, 460. She claimed that she felt she had no choice but to do what he asked, so she removed her clothes. R. at 458, 514-15. LH testified that not removing her clothes "would make it more violent[] [than] it already was." R. at 458.

Appellant got off the bed to retrieve a condom. R. at 459-60, 515. He returned to the bed and penetrated LH's vulva with his penis. R. at 459-60, 515. LH testified that Appellant forced her legs open. R. at 515-16, 518. She previously told the detectives, "I laid there." R. at 517. When asked why she had never disclosed this detail with the sexual assault nurse examiner, two detectives, and the prosecution team or why she did not testify about this fact on direct examination, LH answered, "No one's ever asked." R. at 515-17.

When pressed to explain whether she physically resisted Appellant with her legs or whether her legs were sufficiently spread apart, LH answered, "I froze so, I just froze, and I just laid there, and he opened them." R. at 517-18. As Appellant allegedly penetrated LH, he bit her neck and breasts. R. at 461. As Appellant bit her breasts, LH "made noises [of] pain." R. at 461. She could not remember whether Appellant bit one or both breasts. R. at 520.[5]

Afterwards, Appellant laid on LH's chest and was affectionate with her as he asked how she felt. R. at 461, 530. She asked him if he wanted the truth or a lie. R. at 462. After Appellant

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[5] The panel acquitted Appellant of committing an assault consummated by a battery for biting LH's breasts with his teeth. EOJ; R. at 663.

told her that he wanted the truth, she said that she did not feel okay. R. at 461. Appellant told LH that it was not her fault and that she did not need to feel bad about breaking her promise about not having sex. R. at 462, 530-31.

As Appellant cleaned up and ordered food, LH dressed herself and laid on the bed. R. at 466, 468, 530. Appellant picked her up and repositioned her on the bed. R. at 467. He asked if she was upset because of the "celibacy thing." R. at 467. LH answered by telling Appellant that she had sex with another man after breaking up with Appellant. R. at 531. Although Appellant reacted in some way to LH's shocking statement, she claimed at trial that she could not remember how he responded, "because it didn't matter." R. at 532-33. She denied feeling humiliated by Appellant's response. R. at 533. On cross-examination, LH admitted that she never told the investigators or the prosecution team about her shocking confession to Appellant. R. at 531.

LH stayed at Appellant's apartment for approximately forty-five to sixty minutes. R. at 468, 530.

Once outside, LH called her friend, Ms. SS. R. at 469, 544, 567. LH cried and told SS what had happened. R. at 469. LH testified that she did not believe she had been sexually assaulted until she spoke with SS and "started putting it together. . . ." R. at 544. LH told SS that "it hurt" and "if it's not your choice, it hurts." R. at 545.

LH drove to her mother's house. R. at 470, 545. Although she cried and took a shower, LH "didn't really tell her much of what happened." R. at 470.

At 1049 that night, Appellant texted LH, "come back I'm horny," followed immediately by "jk gn," which meant "just kidding, good night." Pros. Ex. 1 at 5. Although LH and Appellant typically engaged in multiple sexual encounters each time they got together because that was her preference, she did not reply to the text. R. at 545, Pros. Ex. 1 at 5. The next morning, Appellant texted, "Hope you don't hate me too much." Pros. Ex. 1, at 5.

LH slept at her mother's house that night. R. at 545. The next morning, her mother told her to go to the hospital if she had been sexually assaulted. R. at 546. After LH reported the alleged assault, her mother allowed her to live at home for a few days. R. at 554-55. Sometime later, her mother kicked her out again. R. at 555.

The Forensic Exam and the Investigation

At the end of her workday, LH reported the alleged incident at a hospital and underwent a forensic exam. R. at 471, 546. The nurse examiner took three photographs of LH's left breast and one photograph of her right breast and neck. R. at 498, 564, Pros. Ex. 4.

LH told the nurse examiner that Appellant made it difficult for her to breathe during the alleged incident. R. at 547. She did not tell the nurse examiner that she had regularly asked Appellant to make it difficult to breathe during sex. R. at 547.

LH did not tell the nurse examiner, the detectives, or the prosecutors about the consensual bondage and the nature of the sexual relationship with Appellant until she learned that the Defense had text messages between her and Appellant. R. at 529.

At the time LH spoke with a detective in July 2022, she and her mother were estranged again. R. at 555. After speaking with a detective, LH told her mother that she had started cutting herself. R. at 555. Her mother started speaking to LH again and arranged for mental health treatment. R. at 555-56.

Additional facts necessary to resolve the assigned errors are contained in the arguments below.

ERRORS AND ARGUMENT

I.

The evidence is legally and factually insufficient to support the finding of guilty for sexual assault.

Additional Facts

The military judge instructed the members on the mistake of fact as to consent defense. R. at 594-95; AE XVIII at 2.

Law

Legal Sufficiency

Issues of legal sufficiency are reviewed de novo. *United States v. Harrington*, 83 M.J. 408, 414 (C.A.A.F. 2023) (citing *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019)); *United States v. Moore*, No. ACM 40442, 2024 CCA LEXIS 485, *12 (A.F. Ct. Crim. App. 13 Nov. 2024).

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)). "The term reasonable doubt, however, does not mean that the evidence must be free from conflict." *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted).

Factual Sufficiency

For cases in which every finding of guilty in the Entry of Judgment (EOJ) is for an offense that occurred on or after 1 January 2021, as here, the amended Article 66(d)(1)(B), 10 U.S.C. § 866(d)(1)(B), applies to a Court of Criminal Appeals (CCA)'s factual sufficiency review. National Defense Authorization Act for Fiscal Year 2021 [FY21 NDAA], Pub. L. No. 116-283, § 542(b), 134 Stat. 3611-12, 3612 (1 Jan. 2021). *See United States v. Harvey*, __ M.J. __, No. 23-0239/NA, 2024 CAAF LEXIS 502 (C.A.A.F. Sep. 6, 2024); *United States v. Martell*, No. ACM 40501, 2024 CCA LEXIS 432, at *9 (A.F. Ct. Crim. App. Oct. 17, 2024).

For offenses occurring after 1 January 2021, the UCMJ specifies that this Court "may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof." Article 66(d)(1)(B)(i), UCMJ, 10 U.S.C. § 866(d)(1)(B)(i) (2024). If "the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding."[6] Article 66(d)(1)(B)(iii), UCMJ, 10 U.S.C. § 866(d)(1)(B)(iii) (2024). The Court of Appeals for the Armed Forces (CAAF) held "weight of the evidence" and "clearly convinced" do not change the burden of proof beyond a reasonable doubt given the quantum of proof required to sustain a conviction is the same. *Harvey*, 2024 CAAF LEXIS 502, at *10-12. The standards for factual sufficiency review under the new statutory language are still not settled. As such, the CAAF granted review in *United States v. Csiti*, __ M.J. __, No. 24-0175/AF, 2024 CAAF LEXIS 533 (C.A.A.F. Sep. 11, 2024) (mem.), *United States v. McLeod*, __ M.J. __, No. 24-0189/AF, 2024 CAAF LEXIS 530

[6] This standard does not require an appellant to show a total lack of evidence supporting an element, which would be redundant with legal sufficiency review. *United States v. Csiti*, No. ACM 40386, 2024 CCA LEXIS 160, at *18 (A.F. Ct. Crim. App. Apr. 29, 2024), *petition granted*, __ M.J. __, No. 24-0175/AF, 2024 CAAF LEXIS 533 (C.A.A.F. Sep. 11, 2024). [As noted above, the CAAF decided *Harvey* on September 6, 2024.]

(C.A.A.F. Sep. 12, 2024) (mem.), and *United States v. Zhong*, __ M.J. __, No. 25-0011/AF, 2024 CAAF LEXIS 812 (C.A.A.F. Dec. 16, 2024) (mem.).

The requirement to give "appropriate deference" when weighing the evidence and determining controverted questions of fact depends on the nature of the evidence at issue. *Harvey*, 2024 CAAF LEXIS 502, at *8; *Moore*, 2024 CCA LEXIS 485, at *14; *Martell*, No. ACM 40501, 2024 CCA LEXIS 432, at *9. This Court

> might determine that the appropriate deference required for a court-martial's assessment of the testimony of a fact witness, whose credibility was at issue, is high because the CCA judges could not see the witness testify. In contrast, when the CCA can assess documents, videos, and other objective evidence just as well as the court-martial, the CCA might determine that the appropriate deference required is low. The statute affords the CCA discretion to determine what level of deference is appropriate, and [the CAAF] review a CCA's decision only for an abuse of discretion.

Harvey, 2024 CAAF LEXIS 502, at *8-9.

The CCA "does not have to give complete deference to the court-martial," such that the CCA "might weigh the evidence differently from how the court-martial weighed the evidence." *Id*. at *11. Accordingly, "the weight of the evidence" in the amended statute means "the "weight of the evidence as the CCA has just weighed it. . . ." *Id*.

Finally, for a CCA to be clearly convinced that the finding of guilty was against the weight of the evidence, "two requirements must be met. First, the CCA must decide that the evidence, as the CCA has weighed it, does not prove that the appellant is guilty beyond a reasonable doubt. Second, the CCA must be clearly convinced of the correctness of the decision." *Id*. at *12; *Moore*, 2024 CCA LEXIS 485, at *15; *Martell*, 2024 CCA LEXIS 432, at *10.

<u>The Elements of Sexual Assault</u>

The elements of sexual assault, in violation of Article 120(b)(2)A), UCMJ, are:

> (1) That the accused committed a sexual act upon another person; and
>
> (2) That the accused did so without the consent of the other person.

MCM, pt. IV, ¶ 60.b.(2)(d).

The term "consent" means:

> A freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.
>
> . . . .
>
> All the surrounding circumstances are to be considered in determining whether a person gave consent.

Id. at ¶ 60.a.(g)(7)(A), (C).

An honest and reasonable mistake of that the victim consented to the charged sexual act is an affirmative defense to sexual assault. *United States v. McDonald*, 78 M.J. 376, 379 (C.A.A.F. 2019); *United States v. Rodela*, 82 M.J. 521, 526 (A.F. Ct. Crim. App. 2021); R.C.M. 916(j)(1). "Mistake of fact" means that the accused held, as a result of ignorance or mistake, an incorrect belief that the other person consented to the sexual conduct. R.C.M. 916(j)(1). The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. *Id*.; *Rodela*, 82 M.J. at 526. To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented to the sexual conduct. *Id*. Once the affirmative defense is raised, the Government bears the burden to prove beyond a reasonable doubt that the defense does not exist.

United States v. Moore, No. ACM S32477, 2018 CCA LEXIS 560, at *12 (A.F. Ct. Crim. App. Dec. 11, 2018) (citations omitted).

Analysis

LH claimed that the 19 July 2022 encounter was nonconsensual, but her words and conduct during the sexual assignation, coupled with Appellant's knowledge of LH's preference for rough sex led Appellant to honestly believe that she consented to vaginal intercourse. An ordinary, prudent, sober adult who knew all the circumstances of the alleged incident, the history and nature of the sexual relationship between LH and Appellant, and Appellant's perception that LH's words and conduct during the sexual encounter were similar to her words and conduct in previous consensual sexual activities would conclude that Appellant's mistake of fact was reasonable. *See Moore*, 2018 CCA LEXIS 560, at *12.

A. The evidence is legally insufficient to sustain the conviction.

Appellant introduced evidence of an honest and reasonable mistake of fact regarding LH's consent to engage in vaginal intercourse, but the government failed to disprove the defense beyond a reasonable doubt.

1. Appellant honestly believed that LH consented to penetrative sexual intercourse.

LH and Appellant reunited ten days after ending a sexually and emotionally intense relationship. R. at 448, 453, 529. She agreed to come to Appellant's apartment so long as the invitation was not a "booty call" because she wanted to comply with her therapist's advice to refrain from sex. R. at 452, 503; Pros. Ex. 1, at 2. LH's resolve seemed to fade after she and Appellant apologized to each other, talked about their lives since the breakup, and kissed throughout the apartment. She told Appellant that she was trying to follow her therapist's advice to be celibate, but it felt good to be with Appellant and she had always had such a hard time following her therapist's advice. R. at 505. LH wanted to change her behavior – she really did – but she had a pattern of engaging in self-destructive behavior contrary to her therapist's advice. Although LH walked into Appellant's apartment allegedly intending to remain celibate, she changed her mind. Appellant believed LH had changed her mind because of the way she kissed and touched Appellant and followed him into the bedroom.

Initially, LH claimed that Appellant "guided" her toward the bedroom by distracting her with conversation and that she "wasn't paying attention" when she found herself in the bedroom. R. at 455, 508-09. This testimony is implausible. Appellant lived in a tiny studio apartment and each of their previous sexual encounters occurred in the apartment. R. at 446. On cross-examination, LH conceded that she willfully entered the bedroom, and that Appellant did not dupe or trick her. R. at 508-09.

LH claimed not to like how aggressively Appellant kissed her, but this testimony was incongruous with her testimony that she preferred rough, bondage-type sex in every encounter with Appellant. She enjoyed being physically restrained from movement and "forced" to engage in fellatio and penetrative sexual intercourse. R. at 527. If she could not achieve pleasure through pain, despite Appellant's efforts, she asked him to do it harder so that she would feel the kind of pain that brought her pleasure. R. at 521.

As they kissed on the bed, LH told Appellant that "this" – presumably kissing – "is as far as it's ever going to go." R. at 456. LH told Appellant, "If you take your shirt off, this is going other places," or words to that effect. R. at 513. She also testified that she told Appellant "No" twenty to thirty times and that she tried to pull his shirt back down. R. at 457. LH insisted that these statements reflected a lack of consent, but she had previously enjoyed pretending that Appellant had forced her to engage in sexual acts. She had also previously told Appellant something similar – "If you keep doing this, you're going to make me want it" – on multiple occasions when she wanted him to continue engaging in sexual activity. R. at 511. Based on prior sexual encounters with LH, Appellant understood that this statement by LH served as part of their foreplay: that if he took his shirt off, then they would engage in consensual sex and that she would be unable to stop herself, meaning that she would consent to sexual intercourse with Appellant. Moreover, in prior sexual encounters, LH made it clear to Appellant that he could not satisfy her sexually without causing her pain. During the alleged incident, he tried to satisfy her in the way she preferred. He believed that LH was pretending to be forced to engage in vaginal intercourse. Therefore, Appellant honestly believed that LH consented.

LH admitted that she did not consider that her words and conduct led Appellant to believe that she consented to vaginal intercourse with him. R. at 531. She apparently did not realize that Appellant could presume that she consented based on her words and conduct in these moments, which were similar to her words and conduct in previous consensual sexual activities.

Finally, LH testified that she did not realize she had been sexually assaulted until an hour or so after the alleged incident. R. at 544. Indeed, she did not perceive that she was in any danger as the events occurred, R. at 510, nor did she believe that she had been sexually assaulted when she left the apartment. R. at 544. In other words, while LH allegedly said "no" 20 to 30 times, she did not think that the incident was a sexual assault. If she did not "realize" that the sex was nonconsensual during the encounter, then it follows that Appellant could not have known that she did not consent either. He could not read LH's mind and even if he could, she was not saying she was not consenting. Accordingly, the Government failed to disprove beyond a reasonable doubt that Appellant honestly believed that LH consented to vaginal intercourse.

2. Appellant's mistake of fact was reasonable.

A mistake of fact must be reasonable under all circumstances "as assessed by an ordinary, prudent, sober adult." *Moore*, 2018 CCA LEXIS 560, at *12 (citation omitted). An ordinary, prudent, sober adult who knew of LH and Appellant's prior sexual encounters, including her repeated desire for bondage and to be "forced" to engage in sex acts, would conclude that Appellant's mistake of fact as to consent was reasonable. *See United States v. DiPaola*, 67 M.J. 98, 101 (C.A.A.F. 2008) ("These consensual acts could be seen, in conjunction with their past sexual relationship, as creating a 'mixed message' as to which acts were permissible and which were off-limits.").

LH willingly followed Appellant into the bedroom, kissed him, removed her clothes, and laid in bed as he got off the bed to get a condom for vaginal intercourse. R. at 459, 460, 515. LH's protestations as Appellant tried to take his shirt off resembled her previous protestations that if Appellant continued to touch her in a certain way, then she would have no choice but to have sex with him. In those previous sexual encounters, LH did not actually protest Appellant's advances; to the contrary, she wanted to have sex with him and was aroused by the game of pretending to be forced to participate in sexual activities. If an ordinary, prudent, sober adult knew these circumstances, including LH's sexual preferences and desires, then that person would conclude that Appellant's mistake was reasonable. Accordingly, the Government failed to prove beyond a reasonable doubt that Appellant's honest mistake was not reasonable.

B. The evidence is factually insufficient to sustain the conviction.

The Government's evidence consisted of text messages between LH and Appellant on 19-20 July 2022, LH's testimony, and SS's testimony which was admitted as an excited utterance pursuant to Mil. R. Evid. 803(2).[7] For the following reasons, the proof was deficient.

1. LH was an unreliable and dishonest witness.

Once LH decided that she had been sexually assaulted, she deliberately withheld facts and evidence from the nurse examiner, law enforcement personnel, and prosecutors that tended to exonerate Appellant. The day after the alleged incident, LH told the nurse examiner and a detective that Appellant had sexually assaulted her and bit her breasts. She spoke with a detective in September 2022 and with the prosecutors in early 2023. She did not tell any of them that she regularly asked Appellant to make it difficult to breathe during sex and to hurt her so that she could climax. R. at 547. She did not disclose that almost every sexual encounter with Appellant involved bondage and masochism. R. at 543. She withheld the fact that she told Appellant about having sex with another man two days after the breakup. These facts cut against the Government's theory of the case and put the alleged incident in a different light: that Appellant and LH engaged in rough sex on 19 July 2022, just like their previous sexual encounters and just like LH desired. R. at 527.

LH did not reveal the truth about her sexual history with Appellant until *one or two days before trial* when she learned that the Defense possessed texts between her and Appellant in which she repeatedly expressed her desire for bondage and pain. R. at 529. Additionally, in all her meetings with the detectives and the prosecutors, she did not allege that Appellant "forced" her legs open until she testified on cross-examination. R. at 515-18. LH claimed that she did not

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[7] *See* Assignment of Error II, *infra*.

disclose these facts because no one ever asked about the nature of her sexual relationship with Appellant. R. at 529. This testimony was disingenuous, if not dishonest. During the September 2022 interview, the detective asked LH if there was anything else she thought that law enforcement should know. R. at 544. This was LH's opportunity to reveal the nature of her sexual relationship with Appellant, but she chose not to do so. R. at 544. This was especially important given she did not believe she was not consenting during the encounter when she said "no" 20-30 times or even during the vaginal sex after she laid there waiting for Appellant to get a condom.

LH allegedly suffered from convenient memory lapses. While she frequently claimed that she could not remember certain details because of the passage of time, R. at 521, 543, 555, she feigned a lack of memory when the evidence would have publicly embarrassed her. Most notably, although LH could recall when Appellant's food delivery arrived and that Appellant told her not to feel bad about breaking her celibacy promise, she could not recall whether Appellant bit one or both breasts, nor could she recall Appellant's response when she revealed that she had sex with someone else two days after the breakup. R. at 486, 532, 533. She testified, "I don't remember [what his response was] because it didn't matter. . . . We weren't together." R. at 532. When asked if she did not remember Appellant's nasty response, LH replied, "No, not really" and "it was 14 months ago, like I said." R. at 533, 543. This testimony stretched credulity past its breaking point. LH claimed not to remember Appellant's harsh retort, likely because she felt humiliated.

Next, LH lied at trial about blocking Appellant's phone number after the alleged incident. R. at 548-50, 560-61. Then she claimed she did not know if she blocked the number. R. at 549. Moments later, she claimed that she forgot that she had blocked the number. R. at 549. Finally, she admitted that she blocked the number. R. at 560-61.

2. LH had multiple motives to fabricate the allegations.

After Appellant humiliated LH twice, she retaliated by fabricating the allegations against him. First, after a consensual sexual encounter on 7 July 2022, Appellant told LH that sex with her left him depressed and tired. R. at 528. The next day, he informed her that they could continue having sex, but that he could not take her home to meet his mother. R. at 529, 543. LH likely felt embarrassed and offended when he deemed her to be worthy only of a sexual relationship but unworthy of meeting his family. Next, after the alleged incident, Appellant told LH not to feel bad about breaking her promise to remain celibate. R. at 531. She felt ashamed for her inability, once again, to follow her therapist's advice to stop engaging in self-destructive behavior and she felt demeaned by his assessment of her character, so she decided to tell Appellant something she knew would offend and shock him: that she had slept with another man two days after breaking up with Appellant. R. at 530-31. She wanted Appellant to feel like their relationship meant nothing to her and that she had moved on already. Under the guise of "processing what happened" when she left the apartment, LH called her friend, SS, who told her that LH had been sexually assaulted. R. at 544. To retaliate against Appellant, LH fabricated the allegations.

Next, LH fabricated the allegations as part of a pattern of attention-getting behavior with her mother. LH and her mother had a strained relationship when she dated Appellant. R. at 525. LH's mother kicked LH out of the house because LH refused to obey her mother's rules. R. at 525-26. LH felt rejected and abandoned by her mother. R. at 525. On or about 4 July 2022, LH showed her mother her breasts and said that Appellant had bitten her breasts during a sexual encounter. R. at 525. LH's mother expressed her concern that the injuries would be permanent. R. at 522. LH apparently wanted her mother to think that Appellant had abused her so that her mother would give her the sympathy and affection she craved, even as the next day she begged

Appellant to spank her, tie her up, and "force" her to eat his ejaculate. R. at 527. LH lied to her mother about the nature of her sexual relationship with Appellant. She then lied at trial on this point. During the Government's case-in-chief, LH testified that she had told her mother in early July 2022 that she and Appellant had bondage-type sex, but in a pretrial hearing she testified that she told her mother that she did not want Appellant to hurt her for pleasure. R. at 523.

As much as LH despaired for her mother's sympathy and affection, she also needed a place to live. She had couch surfed at friends' homes and slept a few nights in her boss's basement. R. at 534, 554, 562. On the night of the alleged incident, LH's mother allowed her to return home. The next morning, LH's mother told her to go to the hospital if she had actually been sexually assaulted. R. at 546. LH went to the hospital and reported a sexual assault and deliberately withheld facts which tended to exonerate Appellant. *See supra*. Only after reporting an alleged assault did LH's mother permit her to live at home. R. at 554-55. Approximately two weeks later, something transpired between LH and her mother, and her mother kicked her out again. R. at 555. Desperate for a connection with her mother and a place to live, LH told her mother that she had engaged in self-harm as a result of the alleged incident. R. at 555-56.

LH engaged in a pattern of attention-seeking behavior with her mother: she broke her mother's rules, her mother kicked her out and/or broke off communication, and LH claimed some type of injury, whether physical or emotional, to reunite with her mother. Based on this pattern, the evidence is clear that LH fabricated the allegations, and she felt she had to keep lying in order to have any kind of relationship with her mother. She lied to her mother, the nurse examiner, the investigators, the prosecutors, and the court-martial.

3. The finding of guilty was against the weight of the evidence.

Under Article 66(d)(1)(B)(i), Appellant has made specific showings of deficiencies in the Government's proof. In assessing what deference to give the court-martial, this Court can assess the objective evidence, that is, the texts between LH and Appellant and LH's testimony about other texts, just as well as the court-martial, such that the required deference is low. The texts LH and Appellant regularly engaged in bondage and masochistic sex acts because those were her preference. She was aroused by pain and by pretending to be forced to participate in various sexual activities. Appellant's text to LH after she left his apartment reflected his awareness that she regularly liked to have multiple rounds of sex each time they saw each other. He honestly believed that she had consented to the vaginal intercourse earlier that night and that she may be interested in having sex again. Given the history of the sexual relationship with LH, this belief was reasonable. *See DiPaola*, 67 M.J. at 101.

This Court may determine that a higher deference is appropriate for the court-martial's assessment of LH's and SS's testimony as the fact witnesses, but the testimonial evidence revealed that LH lied throughout the investigation and the court-martial, deceived her mother and SS[8] about the nature of her sexual relationship with Appellant, and had multiple motives to fabricate the allegations against Appellant. Moreover, this is a case with scant documentary evidence, such that the Government's case-in-chief turned on the credibility of the complaining witness. *See generally United States v. Warda*, 84 M.J. 83, 94 (C.A.A.F. 2023) ("In cases such as this one, where there is no substantial evidence supporting the complaining witness's allegation of domestic abuse, the

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[8] The military judge admitted SS's testimony about LH's call as an excited utterance pursuant to Military Rule of Evidence [Mil. R. Evid.] 803(2) over defense objection. R. at 586. *See* Assignment of Error II, *infra*. LH lied to SS about how many times she and Appellant had sex. R. at 573.

credibility of the complaining witness is of central importance."); *United States v. Jasper,* 72 M.J. 276, 281 (C.A.A.F. 2013) (concluding where the victim's testimony was critical to the government's case and the defense theory was that she fabricated at least some allegations against the accused, that "the credibility of the putative victim [wa]s of paramount importance"). In cases where the alleged victim was the key witness to the offense, the complaining witness's credibility is vital. *See Csiti,* 2024 CCA LEXIS 160, at *20 ("We appreciate that in a case such as the instant one, where the victim cannot remember the charged offense, the victim's credibility is arguably less vital than in a case where the victim was the key witness to the offense itself or where her testimony was in substantial conflict with other evidence."). Even though the panel saw LH testify, this Court should give less deference to the court-martial's assessment of her testimony because she was neither credible nor consistent in her testimony. This Court can, and should, weigh the evidence differently than how the court-martial weighed the evidence and conclude that the finding of guilty was against the weight of the evidence. *Harvey*, 2024 CAAF LEXIS 502, at *11.

Conclusion

WHEREFORE, because of error prejudicial to the substantial rights of Appellant, he respectfully requests that this Honorable Court set aside and dismiss the finding of guilty and the sentence and restore all rights, property, and privileges to Appellant.

II.

The military judge abused his discretion in admitting statements of the complaining witness as an excited utterance.

Additional Facts

LH and SS were family friends who knew each other their whole lives. R. at 567. They typically spoke once a week. R. at 568. In some of those calls, LH told SS that she was dating

Appellant and that they had sexual intercourse "maybe once, twice." R. at 573. SS knew that LH and Appellant had broken up. R. at 573.

On the night of 19 July 2022, LH called SS from her car. R. at 568, 569. LH was upset after leaving Appellant's home and SS had trouble understanding her. R. at 570-71.

The Defense objected to SS's testimony as hearsay evidence. R. at. 568. The Government asserted that the evidence was an excited utterance, pursuant to Mil. R. Evid. 803(2). R. at 568-69. The Defense, in arguendo, allowed that the evidence may have satisfied the requirement for excitement or emotionality but argued that the Government failed to prove that LH's excitement was contemporaneous to the event because more than an hour had passed between the alleged incident and the call to SS. R. at 569, 570.

The military judge overruled the objection. R. at 571. He cited *United States v. Arnold,* 25 M.J. 129 (C.M.A. 1987) and *United States v. Donaldson*, 58 M.J. 477, 483 (C.A.A.F. 2003) and stated:

> [T]he court notes that a lapse in time between a startling event and the utterance, while a factor, is not dispositive. The court looks to other factors such as whether the declarant was under the stress of the startling event at the time of the statements, the lapse in time of course, whether the statement was made in response to an inquiry, age of declarant, physical and mental condition of the declarant, and characteristics of the events, and subject matter of the statement. While the court does not have the benefit of the subject matter of the statement, the court, based upon the context of previous evidence admitted before this forum, believes that the statements are – occurred approximately an hour after the event.
>
> They were, as the court understands, about the incident that happened an hour earlier. And, therefore, the court does find that there is a sufficient nexus here and foundation laid to find that this hearsay statement does fall within the exception of an excited utterance; and, therefore, is going to overrule the objection.

R. at 570-71.

SS testified that LH said that she had just left Appellant's home, that she had sex with him but did not want to, that she had pushed Appellant off her, and that she said "no" as many times as she could. R. at 571. LH did not know how much time had passed since the alleged incident. R. at 572. She testified, "All I was aware of was that it was generally during the night; and the same day." R. at 572.

Standard of Review

A military judge's decision admitting or excluding an excited utterance is reviewed for an abuse of discretion. *United States v. Smith*, 83 M.J. 350, 355 (C.A.A.F. 2023) (citing *United States v. Henry*, 81 M.J. 91, 95 (C.A.A.F. 2020) (quotation omitted)). The military judge abuses his discretion when he (1) bases his ruling on findings of fact which are not supported by the evidence; (2) uses incorrect legal principles; (3) applies the correct legal principles to the facts in a clearly unreasonable way; or (4) fails to consider important facts. *United States v. Tapp*, 85 M.J. 19, 2024 CAAF LEXIS 419, at *15 (C.A.A.F. July 24, 2024) (citing *United States v. Rudometkin*, 82 M.J. 396, 401 (C.A.A.F. 2022)). Generally, "military judges are . . . granted a wide degree of deference when making discretionary decisions during trial." *United States v. Ramirez*, 84 M.J. 173, 176 (C.A.A.F. 2024).

Law

Hearsay is an out-of-court statement that is offered at trial to prove the truth of the matter asserted and is not admissible unless an exception applies. Mil. R. Evid. 801(c); Mil. R. Evid. 802. One exception is an excited utterance, which is "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." Mil. R. Evid. 803(2). An excited utterance is an exception to the prohibition against hearsay because the "implicit premise . . . is that a person who reacts to a startling event or condition while under the stress of excitement caused thereby will speak truthfully because of a lack of opportunity to fabricate." *Henry*, 81 M.J. at 96 (cleaned up). "This premise becomes more tenuous where the exciting influence has dissipated and one has had the opportunity to deliberate or fabricate." *Donaldson*, 58 M.J. at 483. "[A] statement that qualifies for admission under a 'firmly rooted' hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability." *White v. Illinois*, 502 U.S. 346, 357 (1992) (quoting *Idaho v. Wright*, 497 U.S. 805, 820-21 (1990)).

To be admissible as an excited utterance under Mil. R. Evid. 803(2), the proponent of the statement must satisfy three prongs: "(1) the statement must be spontaneous, excited or impulsive rather than the product of reflection and deliberation; (2) the event prompting the utterance must be startling; and (3) the declarant must be under the stress of excitement caused by the event." *Smith*, 83 M.J. at 357 (quoting *Arnold*, 25 M.J. at 132) (internal quotation marks omitted)). "The proponent of the excited utterance has the burden to show by a preponderance of the evidence that each element is met." *Id*. at 356 (quoting *Henry*, 81 M.J. at 96).

The first and third *Arnold* elements "implicate the timing of the event." *Henry*, 81 M.J. at 96. "The first element implicates the timing of the event, as the closer in time, the less likely the statements are the result of careful consideration (and possible mendacity)." *Id*. at 96-97.

When analyzing the third *Arnold* element, the CAAF considers six factors "to help determine whether the declarant was still under the stress of excitement caused by the startling event." *Id*. at 97 (citing *Donaldson*, 58 M.J. at 483) (citation omitted). These include: "the lapse of time between the startling event and the statement, whether the statement was made in response to an inquiry, the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event, and the subject matter of the statement." *Donaldson*, 58 M.J. at 483 (citation omitted).

While time is "not dispositive . . . [a]s a general proposition, where a statement relating to a startling event does not immediately follow that event, there is a strong presumption against admissibility under M.R.E. 803(2)." *Id*. (citation omitted). Ultimately, "[]t is the totality of the circumstances, not simply the length of time that has passed between the event and the statement, that determines whether a hearsay statement was an excited utterance." *Henry*, 81 M.J. at 96 (citation omitted).

Analysis

The military judge abused his discretion in admitting LH's statements as an excited utterance. While the military judge cited the correct test and applicable case law, he erred in applying the law to the facts.

A. The military judge erred in his application of the law to the facts.

To determine whether a statement is an excited utterance, a military judge must conclude that the statement satisfies all prongs of the three-prong test. Here, the Defense acknowledged that the Government "may have met the element of there being excitement or emotionality," meaning that LH was emotional when she spoke to SS. It is unclear which prong or prongs Appellant's civilian defense counsel addressed. Regardless, the military judge addressed only the one-hour lapse in time between the alleged incident and LH's statements to SS.

Under the first prong, the Government failed to prove that LH's statement to SS was not the product of reflection and deliberation. The military judge acknowledged that, although he did not know the subject matter of LH's statement, he had the benefit of "the context of previous evidence admitted before this forum." R. at 571. The military judge considered only the one-hour lapse in time and failed to account for what transpired in that hour between the alleged incident and LH's statements to SS. *See Rudometkin*, 82 M.J. at 401 (A military judge abuses his discretion by failing to consider important facts.). The military judge failed to find that Appellant and LH discussed her feelings, that he told her that she did not need to feel bad for breaking her celibacy promise, that LH laid on the bed while Appellant ordered food, that Appellant asked if LH was upset because of the "celibacy thing," that LH shocked Appellant by telling him that she had sex with another man after the breakup, and that Appellant's response humiliated LH. Had LH remained silent for the hour between the incident and the call to SS or had she been emotional for the duration of that time, then perhaps her statement could have been spontaneous, excited, or impulsive, but this was not the case. By the time LH called SS, the exciting influence had dissipated, and LH had the opportunity to deliberate or fabricate. *See Donaldson*, 58 M.J. at 486. Indeed, Appellant asserts that LH formed one of her motives to fabricate the allegations in this time. *See* Assignment of Error I, *supra*. Her statements to SS were "the result of careful consideration (and possible mendacity)." *Henry*, 81 M.J. at 96; *see also United States v. Barrick*, 41 M.J. 696, 699 (A.F. Ct. Crim. App. 1995) (holding that statements which were the product of remorse and regret were inadmissible as excited utterances).

Next, for purposes of the hearsay objection, the Government failed to prove, and the military judge failed to address whether the alleged incident was startling. As discussed in Assignment of Error I, *supra*, LH and Appellant had regularly engaged in bondage and masochistic-type sex. She had a history of desiring to be "forced" to engage in sexual acts and she wanted Appellant to hurt her during sex because she derived pleasure from pain. LH admitted that at no point during the sexual encounter did she think she was being sexually assaulted.

Regarding the third prong, the military judge correctly stated the factors used to determine whether LH was still under the stress of excitement caused by the startling event, but he only addressed the one-hour lapse in time and concluded that the passage of time was not dispositive. In *Smith*, there was evidence that the alleged victim's hands were shaking when she sent the text —the Mil. R. Evid. 803(2) evidence— she was nauseated and sweating, and her statement related to her discovery of bruises on her chest that she had not seen before. 83 M.J. at 352. Here, there was no evidence that LH was nauseated, sweating, shaking, or that she had just discovered something new regarding the alleged sexual assault when she made her statements to SS.

Turning to the remaining factors, the fact that LH initiated her statements and that they were not made in response to an inquiry by SS favors admission, but this is the only factor weighing in favor of admission. LH was eighteen years old on the date of the alleged incident. R. at 443. She was an adult, planning to take classes at the University of Denver. R. at 443. She was not a child who made unsolicited, spontaneous statements to someone. *See Arnold*, 25 M.J. at 132 (a child's initial statement to her counselor was properly admitted as an exited utterance because it unsolicited, spontaneous, and made at the first available opportunity while in a highly agitated state); *United States v. Iron Shell*, 633 F.2d 77, 80-81 (8th Cir. 1980) (it was not an abuse of discretion to admit a nine-year-old girl's statements to a law enforcement officer forty-five to seventy-five minutes after an attempted sexual assault where multiple witnesses testified that she had been grabbed by the defendant and assaulted and was crying and hollering and seen with weeds on her back and head with disheveled hair and a swollen face). Regarding LH's physical and mental condition, although she claimed that Appellant had left marks on her breasts[9], she also

[9] The panel acquitted Appellant of assault consummated by a battery regarding this allegation. EOJ.

testified that she had recently had sex with another man, and she could not remember whether Appellant had bitten one or both breasts. She apparently did not allege any other physical injury when she reported the incident to the nurse examiner and the detectives.

Next, as discussed above, the characteristics of the event were a sexual encounter with a partner with whom LH had regularly engaged in "dirty, hot, rough, and deep sex." R. at 527. LH repeatedly asked Appellant to restrain her, otherwise she would find ways to do naughty things to him. R. at 527. She achieved pleasure through pain and regularly asked Appellant to "force" her to engage in sex acts. *Id.* The alleged incident involved the kind of sex LH desired. The startling event was Appellant's response to her announcement that she had sex with another man after the breakup.

Finally, the subject of the statement to SS was the rough sex with Appellant. Because LH had not been truthful with SS about how often she had sex with Appellant during their relationship and she did not tell SS about the kind of sex she and Appellant enjoyed, SS believed that Appellant had forced LH to have nonconsensual sex. The military judge should have considered LH's deception, at best, or mendacity, at worst, when she told SS that she had sex with Appellant "maybe once, twice." LH was so close with SS that she considered her a "cousin" and not just a family friend. R. at 469. Given that LH lied to SS about her sexual relationship with Appellant and that SS did not know about the nature of the sexual relationship, LH's statements to SS were inherently suspect and unreliable.

By failing to address the relevant legal considerations to support his findings and conclusions and ignored important facts in "the context of previous evidence," the military judge abused his discretion. *Rudometkin*, 82 M.J. at 401.

B. The erroneously admitted evidence prejudiced Appellant.

"[A] finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Article 59(a), UCMJ, 10 U.S.C. § 859(a) (2012). "For nonconstitutional errors, the Government must demonstrate that the error did not have a substantial influence on the findings." *United States v. Hall*, 66 M.J. 53, 54 (C.A.A.F. 2008).

This Court evaluates the harmlessness of an evidentiary ruling by weighing: "(1) the strength of the Government 's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Bowen*, 76 M.J. 83, 89 (C.A.A.F. 2017) (quoting *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F.1999) (internal quotation marks omitted)).

The Government cannot demonstrate that the erroneously admitted evidence did not substantially influence the panel's findings. This was a closely contested trial in which the panel acquitted Appellant of biting LH's breasts. R. at 663; EOJ. LH's testimony was neither credible nor consistent, she had two motives to fabricate the allegations against Appellant, and she lied at trial. For the reasons articulated in Assignment of Error I, *supra*, the Government's case was weak and the Defense case was strong.

The Government did not introduce any testimonial or documentary evidence from the nurse examiner regarding the alleged vaginal penetration or from the detectives who interviewed LH multiple times during the investigation. Accordingly, SS's testimony was essential to the Government's case. The Government introduced SS's testimony to bolster LH's credibility and to imply that LH's testimony was reliable. Moreover, during its closing argument, the Government urged the panel to rely on SS's testimony to "support[]" LH's testimony. R. at 607. The

Government referenced SS's evaluation of LH's state of mind and summarized SS's testimony. R. at 607. The Government relied on the improper hearsay evidence to advocate for Appellant's conviction. Accordingly, the improper hearsay evidence was material to the panel's resolution. Finally, without SS's testimony, the Government's case rested on LH's unreliable and inconsistent testimony and texts showing her asking for rough sex with Appellant. SS's testimony bolstered LH's problematic account and was presumably compelling and convincing. The improper admission of the hearsay evidence materially prejudiced Appellant and substantially influenced the panel's verdict.

Conclusion

WHEREFORE, because of errors prejudicial to the substantial rights of Appellant, he respectfully requests that this Honorable Court set aside dismiss the finding of guilty and the sentence and restore all rights, property, and privileges to Appellant.

III.

The Government cannot prove 18 U.S.C. § 922 is constitutional as applied to Appellant by "demonstrating that it is consistent with the nation's historical tradition of firearm regulation" when Appellant was convicted of non-violent offenses and this court can decide that question.

Additional Facts

After his conviction, the Government determined that Appellant's case met the firearm prohibition under 18 U.S.C. § 922. EOJ. The Government did not specify why, or under which section his case met the requirements of 18 U.S.C. § 922.

Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *United States v. Hale*, 78 M.J. 268, 270 (C.A.A.F. 2019); *United States v. Wilson*, 76 M.J. 4, 6 (C.A.A.F. 2017).

Law and Analysis

A. Section 922's firearms ban cannot constitutionally apply to Appellant.

Appellant faces a lifetime ban on possessing firearms—despite a constitutional right to keep and bear arms—for the offense he was convicted of. EOJ. The Government cannot demonstrate that such a ban, even if it were limited temporally, is "consistent with the nation's historical tradition of firearm regulation." *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 579 U.S. 1, 24 (2022).

The test for applying the Second Amendment is as follows:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Id. (quoting *United States v. Konigsberg*, 366 U.S. 36, 50 n.10 (1961)).

Section 922(g)(1) bars the possession of firearms for those convicted "in any court, of a crime punishable by imprisonment for a term exceeding one year." Under *Bruen*, subsection (g)(1) cannot constitutionally apply to Appellant, who stands convicted of nonviolent offenses. To prevail, the Government would have to show a historical tradition of applying an undifferentiated ban on firearm possession, no matter what the convicted offense is, as long as the punishment could exceed one year of confinement. Murder or mail fraud, rape or racketeering, battery or bigamy—all would be painted with the same brush. This the Government cannot show.

The distinction between violent and nonviolent offenses is important and lies deeply rooted in history and tradition. *See* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y 695, 698 (2009). Prior to 1961, "the original [Federal Firearms Act] had a narrower basis for a disability, limited to those convicted of a 'crime of violence.'" *Id.* at 699. For example, under the 1926 Uniform Firearms Act, a "crime of violence" meant "committing or attempting to commit murder, manslaughter, rape, mayhem, assault to do great bodily harm, robbery, larceny, burglary, and housebreaking." *Id.* at 701 (cleaned up) (citing Uniform Act to Regulate the Sale & Possession of Firearms (Second Tentative Draft 1926)). Appellant's conduct falls completely outside these categories. It was not until 1968 that Congress "banned possession and extended the prohibition on receipt to include any firearm that ever had traveled in interstate commerce." *Id.* at 698. "[I]t is difficult to see the justification for the complete lifetime ban for all felons that federal law has imposed only since 1968." *Id.* at 735.

The Third Circuit recently adopted this logic to conclude that Section 922(g)(1) was unconstitutional as applied to an appellant with a conviction for making a false statement to obtain food stamps, which was punishable by five years confinement. *Range v. AG United State*s, 69 F.4th 96, 98 (3rd Cir. 2023), *remanded by Garland v. Range*, 2024 U.S. LEXIS 2917 (U.S., July 2, 2024). Evaluating Section 922(g)(1) and considering *Bruen*, the court noted that the earliest version of the statute prohibiting those convicted of crimes punishable by more than one year of imprisonment, from 1938, "applied only to violent criminals." *Id.* at 104 (emphasis in original). It found no "relevantly similar" analogue to imposing lifetime disarmament upon those who committed nonviolent crimes. *Id.* at 103–05.

In light of *Bruen*, Section 922 is unconstitutional as applied to Appellant.

B. This Court may order correction of the EOJ.

The CAAF has held that it was ultra vires for a Court of Criminal Appeals (CCA) to modify the statement of trial results to change sex offender registry using its power under Article 66, UCMJ, 10 U.S.C. § 866 (Supp. III 2019–2022). *United States v. Williams*, __M.J.__, No. 24-

0015/AR, 2024 CAAF LEXIS 501, at *14–15 (C.A.A.F. Sep. 5, 2024).[10] The CAAF did not foreclose properly raising an erroneous firearm notation to the service courts of appeal under Article 66(d)(2), UCMJ, when the error raised occurs *after* the entry of judgment, as in Appellant's case. Unlike the appellant in *Williams*, Appellant meets the factual predicate to trigger this Court's review under Article 66(d)(2), UCMJ. First, Appellant is demonstrating error in his case—that he was erroneously and unconstitutionally deprived of his right to bear arms—in this brief to this Court. Appellant is asking for correction of the EOJ, which includes the First Endorsement with the erroneous firearm bar. This requested remedy is in line with *Williams*. While this Court cannot correct the erroneous firearms ban associated with the STR, it *can* correct the erroneous firearm notation on the First Endorsement attached to the EOJ, which was completed after the entry of judgment during post-trial processing. *Williams*, 2024 CAAF LEXIS 501, at *14-15.

Second, the error on the First Endorsement erroneously depriving Appellant of his constitutional right to a firearm was an error in the "processing of the court-martial after the judgment was entered into the record under section 860(c) . . . (article 60(c))." Article 66(d)(2), UCMJ. Under the applicable Air Force regulation, "*[a]fter* the EOJ is signed by the military judge and returned to the servicing legal office, the [Staff Judge Advocate] signs and attaches to the [EOJ] a first indorsement, indicating whether . . . firearm prohibitions are triggered." Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice* ¶ 20.41 (Apr. 14, 2022) (emphasis added). The firearm denotation on the First Indorsement that accompanies the entry of judgment into the record of trial explicitly happens *after* the entry of judgment is signed by the military judge pursuant to Article 60(c), UCMJ. *Id.*

[10] Appellant acknowledges the CAAF's holding in *Williams*, but nevertheless maintains his argument, for the purpose of preserving the issue, that a CCA can modify the STR and EOJ to correct errors in applying 18 U.S.C. § 922.

Finally, this Court's authority to review the erroneous firearm ban under Article 66(d)(2), UCMJ, is not foreclosed by this Court's published opinion in *United States v. Vanzant*, 84 M.J. 671 (A.F. Ct. Crim. App. 2024). In *Vanzant*, this Court determined it did not have authority to act on collateral consequences not a part of the findings or sentence under Article 66(d)(1), UCMJ. *Id.* at 680 ("Article 66(d), UCMJ, provides that a CCA 'may act only with respect to the findings and sentence as entered into the record under [Article 60c, UCMJ, 10 U.S.C. § 860c].'"). The CAAF agreed with this interpretation. *Williams*, 2024 CAAF LEXIS 501, at *11-13. However, Appellant is asking this Court to review an error in post-trial processing under Article 66(d)(2), UCMJ, which this Court did not analyze in *Vanzant*. *See* 84 M.J. at 680 (quoting the language of Article 66(d)(1), UCMJ, not (d)(2)). To effectuate any remedy, this Court should use its power under R.C.M. 1112(d)(2), which permits this Court to send a defective record back to the military judge for correction, as, ultimately, the First Endorsement is a required component of the EOJ, albeit not part of the "findings" and "sentence," and the error materially affects Appellant's constitutional rights. R.C.M. 1111(b)(3)(F); R.C.M. 1112(b)(9); DAFI 51-201, at ¶ 20.41

Conclusion

WHEREFORE, because of error prejudicial to the substantial rights of Appellant, he respectfully requests that this Honorable Court set aside and dismiss the finding of guilty and the sentence and restore all rights, property, and privileges to Appellant.

PRAYER FOR RELIEF

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested relief.

//signed//
WILLIAM E. CASSARA, Esq.
Appellate Defense Counsel
PO Box 2688
Evans, GA 30809
(706) 860-5769
bill@courtmartial.com
[redacted]
HEATHER M. BRUHA
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, NAF, MD 20762
(240) 612-4772
heather.bruha@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was sent via email to the Court and served on the Appellate Defense Division and the Appellate Government Division on 3 February 2025.

[redacted]

HEATHER M. BRUHA
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, NAF, MD 20762-6604
(240) 612-4772
heather.bruha@us.af.mil

APPENDIX

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant, through appellate defense counsel, personally requests that this Court consider the following matter:

IV.

Appellant's constitutional rights were violated by being convicted of offenses with no requirement that the court-martial panel (the functional equivalent of the jury) vote unanimously for guilt.

Additional Facts

The military judge informed Appellant only three-fourths of the members would have to agree in order to find him guilty of any offense. R. at 12. While delivering findings instructions, the military judge informed the members a "concurrence of at least three-fourths of the members present when the vote is taken is required for any finding of guilty. Since we have eight members, that means six members must concur in any finding of guilty." R. at 631. The members found Appellant guilty of sexual assault. R. at 663. It is unknown and unknowable whether that conviction was unanimous.

Standard of Review

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

Law and Analysis

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

Conclusion

WHEREFORE, this Honorable Court should reverse the findings of guilty and the sentence and remand this case for further proceedings at which Appellant may be found guilty only upon a unanimous vote of the court-martial members.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Specialist 4 (E-4) **ANTON SOLOSHENKO**, United States Space Force, *Appellant.*	)))))))))	**UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR** Before Panel No. 3 No. ACM 40581 23 February 2025

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

ASSIGNMENTS OF ERROR

I.

[WHETHER] THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUPPORT THE FINDING OF GUILTY FOR SEXUAL ASSAULT.

II.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING STATEMENTS OF THE COMPLAINING WITNESS AS AN EXCITED UTTERANCE.

III.

WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL AS APPLIED TO APPELLANT BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION" WHEN APPELLANT WAS CONVICTED OF NON-VIOLENT OFFENSES AND THIS COURT CAN DECIDE THAT QUESTION.

IV.[1]

WHETHER APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY BEING CONVICTED OF OFFENSES

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

WITH NO REQUIREMENT THAT THE COURT-MARTIAL PANEL (THE FUNCTIONAL EQUIVALENT OF THE JURY) VOTE UNANIMOUSLY FOR GUILT.

STATEMENT OF CASE

The United States accepts Appellant's statement of the case.

STATEMENT OF FACTS

Victim L.H. testified at Appellant's court-martial. (R. at 442-565.) She was approximately 18 years of age in June 2022 when she met Appellant on a dating app. (R. at 443-44.) They had consensual sex at times in his home, including rough sex. (R. at 446, 521-27.) After a couple of weeks, L.H. and Appellant broke up because they did not have anything in common. (R. at 447.) The break-up was on or about 9 July 2022, about 10 days before the sexual assault. (R. at 448.)

On 19 July 2022, Appellant sent L.H. text messages saying he missed L.H. and wanted to talk. (R. at 448; Pros. Ex. 1.) L.H. clarified what would and would not be happening when they meet again, stating in one text message, "Okay but I want to make sure this is not like a booty call [call to come over for sex] thing, right." (R. at 452, 503; Pros. Ex. 1, p. 2.) L.H. did so, because they had a lot of sex in the first couple weeks of their relationship, and she wanted to make sure that expectation was set before they met. (R. at 452.) Appellant confirmed in a text message that the meeting was not for sex, "It's not." (Id.) L.H. was decided to not have sex and to be celibate, after having discussed the topic with a therapist, so there was "no way" she was going to have sex with Appellant. (R. at 503, 505.)

After those text messages, L.H. arrived at Appellant's home at nighttime. (R. at 453.) They exchanged small talk and discussed work while sitting on the couch in the living room. (R. at 453-54.) They also discussed L.H.'s decision to remain celibate after her therapist suggested it. (R. at 506.) They apologized to each other during their breakup. (R. at 506-07.) Appellant leaned in and kissed L.H., but that did not change her position about not having sex with Appellant. (R. at 454, 507.) L.H. told Appellant, "I'm trying to be celibate and not do anything sexual in nature and I just want to let you know this is as far as it's going to go it's PG, that's it." (Id.) Appellant responded that what L.H. said was fine. (Id.) Appellant started showing L.H. around the apartment, because he had gotten new furniture, but he started guiding her towards his room. (R. at 455.)

Inside Appellant's bedroom, after he showed L.H. his new nightstands in the bedroom, he sat her down on his bed and started kissing her. (Id.) L.H. reiterated that kissing was "as far as it was ever going to go," and Appellant said it was fine. (R. at 456.) After a minute it "escalated into becoming a problem." (Id.) Appellant got on top of L.H. and began kissing her more aggressively. (Id.) She stopped kissing him back and "[just] kind of was there." (R. at 457.) Appellant started pushing down on L.H.'s face that it felt like she could not breath. (Id.) L.H. put her hand over her mouth to prevent Appellant from kissing her, but he moved her hand out of the way. (Id.) Appellant tried to take his shirt off and L.H. tried to pull it back down and put it back on him, but Appellant continued to take it off anyway. (Id.) Once Appellant's shirt was off, L.H. tried to put it between their faces to get him to stop kissing her. (Id.)

During the encounter, L.H. told Appellant "no" about 20 to 30 times, but Appellant told her that she "wanted it." (R. at 458, 514.) But L.H. did not "want it." (Id.) Appellant told L.H. to take her clothes off while overpowering her. (R. at 458.) She felt like she did not have any other choice than to do what Appellant asked, so she took her clothes off. (Id.) L.H. thought that, if she did not take her clothes off, Appellant would make it more violent than it already was. (Id.) Appellant grabbed a condom from about four feet away and forced sex on L.H. (R. at 459.) L.H. did not run away because she was in shock and scared. (R. at 460.) Appellant got back on top of

L.H., opened her legs, and penetrated her vagina with his penis. (R. at 460-61, 515-18.) At the same time, Appellant was biting L.H.'s neck and breasts. (R. at 461.) During the sexual assault, which lasted 15 minutes, L.H. was making noises from the pain. (Id.)

At the conclusion, Appellant laid on L.H.'s chest and asked how she was. (R. at 461.) L.H. was holding back tears, because she was afraid what Appellant would do if he saw her crying. (Id.) L.H. asked Appellant if he wanted the truth or a lie, and he said he wanted the truth. (R. at 462.) L.H. told Appellant she was not feeling okay. (Id.) Appellant told L.H. it was not her fault, it was "all on him," and she did not need to feel bad about it. (Id.) What Appellant said made L.H. a lot worse about everything that just happened and, "It just confirmed it." (R. at 466.)

L.H. got up, took care of the condom, and got dressed, because she wanted to be covered, and curled into a ball on the bed. (R. at 466.) Appellant picked L.H. up and put her down so that she wouldn't be in a ball anymore. (R. at 467.) L.H. stayed "frozen" there for about 45 minutes before leaving. (R. at 468.) When L.H. left Appellant's home, she felt "awful" and "absolutely broken" and, on her way to her car, called her family friend, to whom she referred as a "cousin," S.S. (R. at 469.) L.H. was crying and upset when she spoke with S.S. (Id.) L.H. broke down and started crying screaming to S.S. about what had just happened. (Id.)

Then, L.H. spoke briefly with her sister, but her sister was not able to stay on the phone, so L.H. called her mother. (R. at 470.) It was 45 minutes after the sexual assault, so L.H. was feeling bad but also numb. (Id.) L.H. started to drive back to where she was staying but, halfway there, turned around and drove to her mother's home. (Id.) Once L.H. arrived at her mother's home, she started crying again. (Id.) L.H. took a shower, and her mother washed L.H.'s clothes. (Id.)

Appellant later sent L.H. text messages, but L.H. did not respond. (R. at 471; Pros. Ex. 1.) Appellant wrote, "come back I'm horny," and "jk [just kidding] gn [good night]." (Pros. Ex. 1.) L.H. testified she did not respond, "Because he had just sexually assaulted me and told me and told me to come back because he was horny. There is no response to that." (R. at 471.) Appellant wrote to L.H. again the next day, 20 July 2022, "Good morning. Hope you don't hate me too much," but L.H. did not respond. (R. at 471; Pros. Ex. 1.) L.H. testified, "How was I supposed to respond to, hope you don't hate me, after someone raped me? How do you respond to that?" (R. at 471.)

L.H. went to the hospital on 20 July 2022 and had a "sexual assault exam." (R. at 471.) The medical professionals took photographs of L.H.'s neck, leg, and breast. (R. at 471-72, 497-98, 564; Pros. Ex. 4.) Appellant caused her injuries when he was biting her during the sexual assault. (R. at 563-64.)

Ms. S.S. testified at Appellant's court-martial. (R. at 566-573.) She had been a family friend of L.H. her entire life. (R. at 567.) In July 2022, L.H. and S.S. spoke by phone about once per week. (R. at 568.) They spoke by phone on 19 July 2022. (Id.) L.H. called S.S. from her car, had just left a boy's house, and was crying. (R. at 569-70.) S.S. testified:

> She called me and she was obviously very upset. It was a little difficult to discern what she said, but, I got about 90% of it pretty clearly. She called me very upset and said that she had just left [Appellant's] home and that she had sex with him, but she did not want to in the least. She was pushing him off of her and saying no as many times as she could get out. She was very clear about that, and she was very upset over it.

(R. at 571.) S.S. was aware L.H. and Appellant had already broken up. (R. at 572.)

The defense presented no witness for findings. (R. at 575.)

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

ARGUMENT

I.

THE EVIDENCE WAS LEGALLY AND FACTUALLY SUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR SEXUAL ASSAULT.

Standard of Review

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

Law

1. Elements of the Offense of Sexual Assault

To convict Appellant of sexual assault, the Government was required to prove beyond a reasonable doubt all elements as charged: (1) Appellant committed a sexual act upon another person, that is, Appellant penetrated L.H.'s vulva with his penis, and (2) Appellant did so without the consent of L.H. *MCM*, Pt. IV, ¶ 60.b.(2)(d).

2. Legal Sufficiency

The test for legal sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, a 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. United States v. Acevedo, 77 M.J. 185, 187 (C.A.A.F. 2018). In applying this test, this Court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." United States v. Bright, 66 M.J. 359, 365 (C.A.A.F. 2008). Thus, legal sufficiency is a very low threshold. King, 78 M.J. at 221 (citation omitted). The standard 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).

3. Factual Sufficiency

The test of factual sufficiency is governed by the following amendment to the UCMJ:

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

Article 66(d)(1), UCMJ (Supp. III 2019-2022). The factual sufficiency standard applies to courts-martial in which every finding of guilty in the entry of judgment is for an offense occurring on or after 1 January 2021. *See* The National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(e)(2), 134 Stat. 3388, 3612-13 (1 Jan. 2021).

The requirement of "appropriate deference" when this Court weighs the evidence and determines controverted questions of fact "depend[s] on the nature of the evidence at issue." United States v. Harvey, 2024 CAAF LEXIS 502, *7-8 (C.A.A.F. 6 September 2024). This Court has discretion to determine what level of deference is appropriate, which CAAF reviews only for an abuse of discretion. Id. at *8. For this Court "to be clearly convinced that the finding of guilty was against the weight of the evidence, two requirements must be met." Id. at *12. "First, [this Court] must decide that the evidence, as [the Court] weighed it, does not prove that the appellant is guilty beyond a reasonable doubt. Second, [this Court] must be clearly convinced of the correctness of this decision." Id.

Analysis

1. Appellant's Conviction is Legally Sufficient

Appellant claims his conviction was legally insufficient because L.H.'s "words and conduct during the sexual assignation, coupled with Appellant's knowledge of L.H.'s preference for rough sex led Appellant to honestly believe that she consented to vaginal intercourse"; therefore, he argues, his mistake of fact was reasonable. (App. Br. at 12.) The court-members considered the testimony, text messages, and photographs of L.H.'s injuries and rejected that defense of mistake of fact, as should this Court.

Appellant's brief acknowledges L.H. did not want to have sex with him and that she told him so when she agreed to meet with him. (App. Br. at 12 ("the invitation was not a 'booty call'").) Then, the brief returns to a perpetrator's fantasy, claiming "L.H.'s resolve seemed to fade after she and Appellant apologized to each other, talked about their lives since the breakup, and kissed throughout the apartment." (Id.) Consent to kissing does not mean consent to sex.

Appellant's assignment of error misstates L.H.'s testimony when he writes, "[L.H.] told Appellant that she was trying to follow her therapist's advice to be celibate, but it felt good to be with Appellant and she had always had such a hard time following her therapist's advice." (App. Br. at 12-13 (citing R. at 505).) In that portion of her testimony, she did not say it felt good to be with Appellant, and she did not say she had always had a hard time following her therapist's advice. Rather, during a lengthy cross-examination question with multiple factual predicates and possible interpretations, the last sentences of trial defense counsel's question was, "And [the therapist] determined and told you that you were engaged in self-destructive behavior. So this has been a patter that had happened in the past, correct?" (R. at 505.) L.H. responded, "Yes, that I was changing. … And I was following my therapist advice to be celibate." (Id.)

And Appellant does not cite, from one page earlier in the testimony, when the defense cross-examined L.H. about whether she could have changed her mind about not having sex, L.H. testified:

> No, I was pretty set. I had already decided to be celibate, so there was no way that I was going to have sex, because I decided celibate. So, that was not going to change going over there, since it was a pre-decided thing that I was not going to be engaging in sex.

(R. at 504.) When trial defense counsel continued, "But that's not always how you operate, ma'am, is it?" L.H. responded:

> No, because I didn't always have the desire to be celibate and then I decided I wanted to work on myself and be celibate and that's how I was going to do it. And thus, there was no changing my mind cause I had already made a decision prior to the 19th, to do that.

(Id.)

Appellant claims, "Although L.H. walked into Appellant's apartment allegedly intending to remain celibate, she changed her mind. Appellant believed L.H. had changed her mind because of the way she kissed and touched Appellant and followed him into the bedroom." (App. Br. at 13.) However, the testimony was clear that L.H. had *not* changed her mind (R. at 504), and there was no testimony about what Appellant believed.

Appellant argues, "L.H. claimed not to like how aggressively Appellant kissed her, but this testimony was incongruous with her testimony that she preferred rough, bondage-type sex in every encounter with Appellant." (App. Br. at 13.) That continues to demonstrate Appellant's common theme of focusing on his relationship with L.H. before she broke up with him, and his refusal to acknowledge that L.H. testified clearly that she did not want to re-start a relationship with him and did not want to have sex with him. As Appellant acknowledges, L.H. told him the kissing was "as far as it's ever going to go," and L.H. told Appellant "No" 20 to 30 times and tried to pull his shirt back on. (App. Br. at 13 (citing R. at 456, 457).)

Appellant argues that taking off his shirt, in their prior relationship, meant they would have sex. (App. Br. at 13-14.) However, as L.H. testified, she fought to keep his shirt on, even putting it between her mouth and Appellant to prevent him from kissing her, after her attempts to block him with her hand failed. (R. at 457, 513.) Appellant argues that, when L.H. tried to stop Appellant from taking off his shirt, she was pretending to be the victim of forced sex. (App. Br. at 13.) But there is no evidence that L.H. had ever tried to prevent him from taking off his shirt in past encounters. That L.H. tried to prevent him from taking off his short on 19 July 2022 further demonstrated her lack of consent to having sex.

Appellant claims L.H. willingly took off her clothes. (App. Br. at 15.) However, as she testified, Appellant told L.H. to take her clothes off while overpowering her. (R. at 458.) She felt like she did not have any other choice than to do what Appellant asked, because, if she did not do so, Appellant would make it more violent than it already was. (Id.)

Appellant argues:

> L.H. admitted that she did not consider that her words and conduct led Appellant to believe that she consented to vaginal intercourse with him. R. at 531.

(App. Br. at 14.) However, L.H. did not provide such testimony. The closest testimony to that subject was when L.H. testified about Appellant's "highly confusing" attempt to be affectionate after sexually assaulting her. She testified she did not consider the notion that Appellant showed affection because he thought she wanted such affection. (R. at 530-31.) There was no discussion about L.H. "admitting" anything, let alone Appellant's belief that L.H. had consented to having sex.

Appellant misstates the facts when he concludes his argument:

> Finally, L.H. testified that she did not realize she had been sexually assaulted until an hour or so after the alleged incident. R. at 544. Indeed, she did not perceive that she was in any danger as the events occurred, R. at 510, nor did she believe that she had been sexually assaulted when she left the apartment. R. at 544. In other words, while L.H. allegedly said "no" 20 to 30 times, she did not think that the incident was a sexual assault. If she did not "realize" that the sex was nonconsensual during the encounter, then it follows that Appellant could not have known that she did not consent either. He could not read L.H.'s mind and even if he could, she was not saying she was not consenting. Accordingly, the Government failed to disprove beyond a reasonable doubt that Appellant honestly believed that L.H. consented to vaginal intercourse

(App. Br. at 14.) L.H. testified that she was "processing" what happened, the "extent of what happened," and "realizing how bad it was" when she called S.S. (R. at 544.) But she knew she was being sexually assaulted as it happened. She was making noises from the pain. (R. at 461). Immediately after Appellant sexually assaulted L.H., she was holding back tears for fear of what he would do. (Id.) L.H. told Appellant she was not feeling okay from him having sex with her, and he told her it was not her fault. (R. at 462.) When Appellant told her it was not her fault and it was "all on him," it made L.H. feel even worse and confirmed her belief that he had sexually assaulted her. (R. at 466.) Contrary to Appellant's claim about page 544 in the transcript that L.H. did not believe she had been sexually assaulted when she left the apartment, her testimony was that it was just the "emotionals [sic] didn't all the way kick in" until after she left Appellant's residence. (R. at 544.) And Appellant tries to mischaracterize L.H.'s testimony when she testified about not knowing she was in danger. That testimony related to before the sexual assault; she was testifying about sitting down on the bed. (R. at 510.) These mischaracterizations of the testimony demonstrate why Appellant's mistake of fact argument failed at trial and continues to be without merit on appeal.

Notably, trial defense counsel elicited from L.H. that Appellant and L.H.'s sex life was ending after 7 July 2022 because of incompatibility that left him feeling "like a withered husk," exhausted, uninterested in continuing to engage in sex, and depressed. (R. at 528.) Two days later, L.H. sent Appellant a text message breaking up with him. (R. at 529.)

Trial defense made a strategic decision to argue that maybe Appellant and L.H. did not even have sex on 19 July 2022, which is why he sent L.H. the email stating he was "horny." (R. at 618-19.) While it was not unreasonable to do so, because there was no eyewitness testimony or physical evidence presented of their having had sex, it might have alienated jurors and detracted from the defense's central argument that he had made a reasonable mistake of fact in having sex with L.H.

Also, the trial defense theory was that L.H. made the initial allegation that Appellant sexually assaulted her, and went through an intrusive sexual assault forensic examination, because, when she "dropped a bomb" and told him that she had recently had sex with another man, he said terrible things to her. (R. at 616, 618, 619.) And that is why, the defense argued, Appellant later sent the apology text message to L.H. (R. at 619.) The more likely conclusion from the facts – where L.H. ended the relationship, Appellant did not want it to end, Appellant continued to try and win L.H. back, and L.H. told him that she had sex with another man (R. at 531-32) – is that Appellant was motivated by anger and power when he sexually assaulted L.H. In addition to the penetrative crime of sexual assault, Appellant's anger was clear when he pushed down on L.H.'s face so hard that she could not breath and caused visible injuries to her breasts, thigh, and neck that the S.A.F.E. examiners photographed. (Pros. Ex. 4; R. at 457, 471-72, 497-98, 563-64.)

Viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of Appellant's crime of sexual assaulting L.H. beyond a reasonable doubt. The government's case meets the "very low threshold" of legal sufficiency on appellate review.

2. Appellant's Conviction is Factually Sufficient

As a threshold matter, Appellant has failed to make a specific showing of a deficiency in proof in this case to merit further appellate review. Instead, he argues that an affirmative defense, that of mistake of fact, should have resulted in acquittal. Appellant simply disagrees with the factfinders' conclusion of guilt. But because he has not made the required showing under Article 66(d)(1), this Court cannot – or if it has discretion to do so, should not -- exercise its power to review the factual sufficiency of Appellant's case. Article 66(d)(1)(B)(i), UCMJ. *See* United States v. Myers, ARMY 20230100, 2024 CCA LEXIS 535, *14 (A. Ct. Crim. App. 16 December 2024) (unpub. op.) (rejecting appellant's assignment of error where it found appellant failed to make specific showing of deficiency in proof as required by Harvey).

Even if this Court were to review the factual sufficiency of Appellant's conviction, the evidence overcame any mistake of fact defense. Although an accused need not testify to establish the defense of mistake of fact, United States v. Thompson, 83 M.J. 1 (C.A.A.F. 2022), the fact that Appellant did not testify about his mistaken belief gives the government a greater ability to rebut the defense beyond a reasonable doubt.

As in his legal sufficiency argument, Appellant argues his conviction was factually insufficient because he claims L.H. was an unreliable and dishonest witness. (App. Br. at 16.)

Appellant claims L.H. "deliberately withheld facts and evidence from the nurse examiner, law enforcement personnel, and prosecutors that tended to exonerate Appellant," claiming she did not tell any of them that "she regularly asked Appellant to make it difficult to breathe during sex and to hurt her so that she could climax. R. at 547." (App. Br. at 16.) However, when trial defense counsel asked L.H. about her historical sexual encounters with Appellant, she emphasized that Appellant's preventing her breathing during the sexual assault was "not the same" as their prior sexual activities. (R. at 547.) And medical personnel and investigators were focused on facts about the 19 July 2022 sexual assault, so they did not ask L.H. about the details of their sexual history and the nature of their sexual acts. (R. at 529.) Trial defense counsel made the same argument at trial about L.H. not discussing her prior sexual activities with medical personnel and investigators (R. at 615-16), and that was as unconvincing then as it is now.

L.H. did not fabricate a new fact at trial that Appellant "forced" her legs open. (App. Br. at 16.) Rather, during cross-examination, she explained the physical reality of what happened when he had sex with her when she did not want to do so:

> Q. So, now you're saying that your legs were forced open.
>
> A. If I did not open my own legs, that is force. And if I was frozen, I wasn't opening my own legs because I was just lying there.
>
> Q. When you say the word forced, and perhaps this is my confusion, what I'm hearing is that there was resistance. Are you saying that there was not, no resistance to his manipulation of your body, is that what you're trying to say?
>
> A. There was no resistance cause I was frozen. But because I didn't want it, and I already specified so many times that I didn't want it, and he opened my legs without even caring whether or not I wanted that or not. That's force to me, yes.

(R. at 518.)

Appellant argues about various small points trial defense counsel tried to make during L.H.'s cross-examination, but none of them impeached her effectively. Appellant argues, "Most notably, although L.H. could recall when Appellant's food delivery arrived…." (App. Br. 17.) However, L.H. testified without reluctance about his food delivery. (R. at 530, 532.) And Appellant makes much of L.H. momentarily forgetting that the police directed her about blocking and unblocking text messages from Appellant. (App. Br. at 17.) But she quickly remembered that the police had given her instructions about blocking and unblocking Appellant's text messages, and she was consistent about never deleting any text messages from him. (R. at 548-553.)

Appellant tries to explain why L.H. went through the ordeal of a sexual assault forensic examination and the court-martial process by arguing Appellant "humiliated" her by saying sex with her left him "depressed and tired," that he told her he would not take her home to meet his mother, and that he reminded her that she did not follow her therapist's advice to remain celibate. (App. Br. at 18.) So, Appellant argues, she got back at him not only by saying she had sex with another man, but also, he claims, by fabricating false sexual assault allegations. (Id.) Appellant even tries to tie in the claim that L.H.'s poor relationship with her mother caused her to seek her mother's attention by way of false sexual assault allegations. (Id.) All these defense arguments, which the court-martial members rejected, do not make sense. There are plenty of ways of getting back at a boyfriend's judgment and unkind words, or to get attention from one's mother, without invoking criminal proceedings. The defense theory of L.H.'s motivation to fabricate are quite weak and, in any event, do not render the finding of guilt factually insufficient.

Although Appellant understandably did not want to be found guilty of his sexual assault of L.H., the court members found, as any rational court member could, all the elements of the sexual assault beyond a reasonable doubt. This Court should not decide that the evidence "does not prove that the appellant is guilty beyond a reasonable doubt" and should not be "clearly convinced of the correctness of this decision." Harvey, 2024 CAAF LEXIS 502, at *12. The Court should find L.H. told Appellant before meeting that she did not want to have sex, told him "no" dozens of times when he was trying to become intimate with her, and he had sex with L.H. knowing he did not have her consent.

In summary, the evidence was legally sufficient because a rational trier of fact, after viewing the evidence in the light most favorable to the prosecution, would find Appellant sexually assaulted L.H. Additionally, this Honorable Court should find Appellant has failed to show a specific deficiency in proof. Even if this Court were to conduct a factual sufficiency review, after weighing the testimony of victim L.H., L.H.'s text messages with Appellant, and the photographs of L.H.'s injuries from the sexual assault, providing appropriate deference to the court-martial members, who saw and heard the witnesses and other evidence, the Court cannot be "clearly convinced that the findings of guilty were against the weight of the evidence." Thus, the Court should affirm the findings of guilt and reject Appellant's assignment of error.

II.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY ADMITTING STATEMENTS OF THE VICTIM AS EXCITED UTTERANCES.

Additional Facts

During opening statement, the defense did not object when trial counsel stated, "After the assault the victim leaves the accused apartment, and she makes two phone calls. She calls her best friend, [S.S.] and her mother [K.H.]. She calls them distraught, crying, tells them what happens." (R. at 435.)

During L.H.'s testimony, she testified that, while Appellant sexually assaulted her and was biting her, she was making noises of pain. (R. at 460-61.) At the conclusion of the sexual assault, L.H. was holding back tears and curled up into a ball. (R. at 461, 466.) She did not leave immediately because she was in shock. (R. at 466.) As she left Appellant's home, L.H. felt awful" and "absolutely broken" and, on the way to her car, called her cousin, S.S. (R. at 469.) L.H. was breaking down and crying screaming when she told S.S. what Appellant had done. (Id.)

Trial defense counsel objected on hearsay grounds at that point in L.H.'s testimony, but the military judge ruled:

> I'm going to overrule the objection at this time, as I don't believe the hearsay statement was -- understanding the broad definition of statement applied. I am going overall the objection at this time, but trial counsel I'm going to strongly recommend you tailor your next question to avoid hearsay issues.

(R. at 469.)

During S.S.'s testimony, trial counsel asked her to describe her call with L.H. the evening of 19 July 2022. (R. at 568.) S.S. testified:

> I was about to go to bed, and I got a call from her. I always answer calls from her because I just try to keep in contact with her best I can. So, she calls me crying, extremely upset. I believe she told me she was in the car –

(Id.) Trial defense counsel objected on hearsay grounds, and trial counsel argued it was admissible as an excited utterance under M.R.E. 803(2). (Id.) Trial defense counsel asserted that, because at least an hour had passed since the sexual assault, the call did not meet the element of M.R.E. 803(2) of "contemporaneous to the event." (R. at 568-69.)

The military judge permitted trial counsel to lay a foundation for the admission of the statement. (R. at 569.) S.S. testified that L.H. was calling from her car, had just left a boy's house, and was crying. (R. at 569-70.) In admitting the statement, the military judge ruled:

> Looking to [United States versus Arnold [citation omitted] in determining whether – and United States versus Donaldson, [citation omitted] both CAAF cases, the court notes that a lapse in time between a startling event and the utterance, while a factor, is not dispositive. The court looks to other factors such as whether the declarant was under the stress of the startling event at the time of the statements, the lapse in time of course, whether the statement was made in response to an inquiry, age of declarant, physical and mental condition of the declarant, and characteristics of the events, and subject matter of the statement. While the court does not have the benefit of the subject matter of the statement, the court, based upon the context of previous evidence admitted before this forum, believes that the statements are -- occurred approximately an hour after the event.
>
> They were, as the court understands, about the incident that happened an hour earlier. And, therefore, the court does find that there is a sufficient nexus here and foundation laid to find that this hearsay statement does fall within the exception of an excited utterance; and, therefore, is going to overrule the objection.

(R. at 570-71.) S.S. testified:

> She called me and she was obviously very upset. It was a little difficult to discern what she said, but, I got about 90% of it pretty clearly. She called me very upset and said that she had just left [Appellant's] home and that she had sex with him, but she did not want to in the least. She was pushing him off of her and saying no as many times as she could get out. She was very clear about that, and she was very upset over it.

(R. at 571.)

Standard of Review

A military judge's decision admitting or excluding an excited utterance is reviewed for an abuse of discretion. United States v. Smith, 83 M.J. 350, 355 (C.A.A.F. 2023) (citation omitted). An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact. Id. (citing United States v. Donaldson, 58 M.J. 477, 482 (C.A.A.F. 2003)). The abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range. Id. (citation omitted). Where the military judge places on the record his analysis and application of the law to the facts, deference is clearly warranted. Id. (citation omitted).

Whether an error is harmless is a question of law the Court reviews *de novo*. United States v. Bowen, 76 M.J. 83, 87 (C.A.A.F. 2017). For nonconstitutional errors, the government must demonstrate the error did not have a substantial influence on the findings. Id. In evaluating harmlessness of an evidentiary ruling, the Court weighs (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question. Id. at 89. (citing United States v. Kerr, 51 M.J. 401, 405 (C.A.A.F. 1999)).

Law

M.R.E. 803(2) provides that an "excited utterance," defined as a "statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused," is an exception to the general prohibition on hearsay evidence. *See* M.R.E. 801, 802; Smith, 83 M.J. at 355. An excited utterance is an exception to the prohibition against hearsay because the "implicit premise [of the exception] is that a person who reacts to a startling event or condition while under the stress of excitement caused thereby will speak truthfully because of a lack of opportunity to fabricate." Id. (quoting United States v. Jones, 30 M.J. 127, 129 (C.M.A. 1990)).

"[T]o qualify as an excited utterance: (1) the statement must be 'spontaneous, excited or impulsive rather than the product of reflection and deliberation'; (2) the event prompting the utterance must be 'startling'; and (3) the declarant must be 'under the stress of excitement caused by the event.'" Id. (quoting United States v. Arnold, 25 M.J. 129, 132 (C.M.A. 1987)). "The proponent of the excited utterance has the burden to show by a preponderance of the evidence that each element is met." Id. (quoting United States v. Henry, 81 M.J. 91, 95 (C.A.A.F. 2021)).

When analyzing the third Arnold element, CAAF considers six factors "to help determine whether the declarant was still under the stress of excitement caused by the startling event." Id. at 97 (citing Donaldson, 58 M.J. at 483) (citation omitted). These include: "the lapse of time between the startling event and the statement, whether the statement was made in response to an inquiry, the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event, and the subject matter of the statement." Donaldson, 58 M.J. at 483 (citation omitted).

While time is "not dispositive . . . [a]s a general proposition, where a statement relating to a startling event does not immediately follow that event, there is a strong presumption against admissibility under M.R.E. 803(2)." Id. (citation omitted). Ultimately, "[]t is the totality of the circumstances, not simply the length of time that has passed between the event and the statement, that determines whether a hearsay statement was an excited utterance." Henry, 81 M.J. at 96 (citation omitted).

Analysis

1. The Military Judge Did Not Err

Appellant claims the military judge erred in applying the law to the facts when he admitted L.H.'s excited utterance to S.S. and that he was materially prejudiced as a result. (App. Br. at 25-30.) Appellant's assignment of error is without merit, because the military judge applied the law correctly to the facts, and Appellant was not prejudiced by any arguable error.

A mere one hour or less passed from Appellant's sexual assault to L.H.'s call with S.S. For the first 45 minutes, L.H. was with Appellant, in his home, where he sexually assaulted her. She was curled up in a ball in a "frozen" state, still under the "shock" of what had just been done to her. She was not yet free from danger to reflect on what she might tell other people. Once L.H. left Appellant's home, it was a matter of minutes before she called S.S. on her way to her car.

Appellant focuses on what happened while L.H. laid on Appellant's bed after he sexually assaulted her. But he concedes, "Had L.H. remained silent for the hour between the incident and the call to S.S. or had she been emotional for the duration of that time, then perhaps her statement could have been spontaneous, excited, or impulsive, but this was not the case. By the time L.H. called S.S., the exciting influence had dissipated, and L.H. had the opportunity to deliberate or fabricate." (App. Br. at 26.) Appellant's emphasis fails to acknowledge the trauma that he had caused L.H., that she was curled up in a ball while he callously spoke to her, and that, once she was over her "shock" enough to leave Appellant's presence and residence, L.H. was "crying screaming" as soon as she could speak with another human being. More importantly, Appellant fails to acknowledge all of L.H.'s testimony and S.S.'s testimony that supported the military judge's finding, which the military judge incorporated into his ruling. (R. at 570-71 ("based upon the context of previous evidence admitted before this forum").)

Appellant takes issue with the military judge not repeating in his ruling the facts he had just heard. However, the military judge need not do so. In United States v. Smith, 83 M.J. 350 (C.A.A.F. 2023), after hearing testimony of one witness in a hearing pursuant to Article 39(a), UCMJ, the military judge merely stated: "I do believe that the Government has laid the appropriate foundation for an exited utterance exception to the hearsay rule," and did not place further analysis on the record. Id. at 355. AFCCA found that the military judge did not abuse his discretion in admitting the excited utterance, and CAAF affirmed that decision. Id. (internal citation omitted).

This Court, in its most recent opinion involving the excited utterance exception, United States v. Doroteo, 2025 CCA LEXIS 49 (A.F. Ct. Crim. App. 7 February 2025) (unpub. op.), found an abuse of discretion in admission of text messages from the victim as "excited utterances." Id. at *63-64. As a threshold matter, the Court found the military judge had admitted one text message that did not even exist, and the military judge erroneously stated the defense, instead of the government, bore the burden of persuasion. Id. Also, the victim did not testify at the trial on the merits. Id. at *11. But this Court's determination was based mainly on the finding that the texts were not "spontaneous, excited or impulsive rather than the product of reflection and deliberation," or that the victim remained "under the stress of excitement caused by the event" when she wrote all of the texts. Id. at 64-65 (citing Henry, 81 M.J. at 96 (quoting Arnold, 25 M.J. at 132)). She sent a text asking where another airman was located, but did not utter anything about the assault. Id. at *65. The next text was at least another 10 minutes later, only stating she might try to find another ride home. Id. at *65-66. Another 19 minutes passed before the victim texted about being "furious." And another 20 minutes later, the victim finally identified Appellant as the cause of her anger. Id. at *66. Moreover, the victim's text messages about being "furious" were in response to another person's text messages, so the Court found the victim was not speaking spontaneously. Id. Finally, the Court found the victim, a fellow airman, was an adult, so she was not more susceptible to increased or prolonged state of excitement. Id. at *67.

Those facts in Doroteo are distinguishable from Appellant's case and they demonstrate why L.H.'s excited utterances in Appellant's case were properly admitted through S.S.'s testimony. As discussed above in this Answer, Appellant's victim was "curled up in a ball" and "frozen" in his bed for 45 minutes, demonstrating the severe trauma and "shock" she was suffering. (R. at 466, 468.) She was just 18 years of age. *See* Arnold, 25 M.J. at 132 (affirming admission of 16-year-old rape victim's excited utterance despite at least 12-hour lapse between rape and utterance). When L.H. finally left Appellant, feeling "absolutely broken" (R. at 469), she was still under the distress caused by the crime when she called S.S. "crying screaming" on the way to her car (R. at 469), demonstrating it was immediately after leaving the crime scene and was spontaneous, not in response to another person's message or inquiry. (*See* App. Br. at 27 (conceding that L.H. initiated her statements weighed in favor of admission).)

United States v. Smith is also instructive regarding the numerous events that can take place between a sexual assault and a validly admitted excited utterance. After the rape in Smith, the victim took an Uber to retrieve her car, drove back to her hotel to change clothes and check out, had breakfast at a cafe with the appellant, drove back to base, and stopped at a gas station. 83 M.J. at 353. It was at the gas station, when the victim looked in the mirror and saw bruises, that she panicked and freaked out, but did not cry, and sent a message to a friend that was ultimately admitted at trial. Id. Based on such intervening activities and delayed, but admissible, reporting in Smith, L.H.'s proximate reporting was properly admitted. *See also*, United States v. Tarnowski, 2022 CCA LEXIS 653, *29 (A.F. Ct. Crim. App. 4 November 2022) (unpub. op.) (upholding admission of excited utterance made within two hours of assault in question). L.H.'s excited utterances were even closer in time to Appellant's sexual assault, and she had less time to deliberate, than many other cases upholding military judges' admission of excited utterances. Thus, this Court should not find the military judge in Appellant's case abused his discretion in admitted L.H.'s excited utterances.

2. Even if There Was Any Arguable Error, It Did Not Prejudice the Findings

The evidence against Appellant was overwhelming, the defense did not put on a case, and the result would have been the same regardless of the admission of S.S.'s testimony. Thus, any arguable error did not prejudice Appellant.

Independent of S.S.'s brief testimony, the court-martial considered the key evidence in this case: L.H. testified about her absolute refusal to have sex with Appellant. (R. at 454, 517.) She described how Appellant had sex with her without her consent. Importantly, after the sexual assault, L.H. was "crying screaming" to S.S. right after L.H. left the scene of Appellant's sexual assault, regardless of the content of the call. (R. at 471.) Then, L.H. subjected herself to an invasive sexual assault forensic examination. (R.at 471.) Appellant sent the text message to L.H. the day after he sexually assaulted her, "Hope you don't hate me too much." (R. at 471; Pros. Ex. 1, p. 5.) Appellant caused injuries to L.H.'s breasts, thigh, and neck that were captured in photographs, consistent with her testimony. (Pros. Ex. 4; R. at 471-72, 497-98, 564.) Appellant does not challenge on appeal the admissibility of L.H.'s testimony regarding those facts or the exhibits.

Appellant does not challenge on appeal the military judge's admission of L.H.'s testimony that she called S.S. and told her what Appellant had done to her. Therefore, the evidence of the call was properly before the court-martial members. Appellant only challenges S.S.'s testimony about the content of the call. (App. Br. at 22; R. at 568-70.) The content – that L.H. was upset, had sex with Appellant but "did not want to do so in the least" (R. at 571) and said "no" many times (R. at 510) – was already in evidence through L.H.'s testimony. And the inaccurate portions of S.S.'s testimony – when S.S. said that L.H. said she "had been pushing him off" (R. at 571) and L.H. said she previously had sex with Appellant "maybe once, twice" (R. at 573) – was inconsistent with L.H.'s testimony that she had sex with Appellant many more times previously and that she did not push Appellant off during the sexual assault (R. at 461, 517, 545). Thus, that portion of S.S.'s testimony helped Appellant's defense rather than hurt it, so he was not prejudiced.

Contrary to Doroteo, 2025 CCA LEXIS 49 at *69, where the victim, without explanation, did not testify, and where the Court found the overall evidence "not particularly strong," L.H. testified at Appellant's court-martial, there was contemporaneous reporting of the crime, and there were corroborating photographs and text messages to prove his sexual assault.

The military judge placed his analysis and application of the law to the facts on the record, so deference to his decision is "clearly warranted." And, unlike other cases this Court has reversed, Appellant's victim was a young victim, who was still "absolutely broken" under the duress of Appellant's sexual assault, and she called her confident at the earliest possible time and, while "crying screaming," spontaneously told S.S. what Appellant had done to her. Thus, this Court should not find the military judge abused his discretion in admitting S.S.'s testimony, so the Court should reject Appellant's assignment of error.

III.

THIS COURT DOES NOT HAVE JURISDICTION TO DECIDE WHETHER THE FIREARM PROHIBITION IN THE GUN CONTROL ACT OF 1968, 18 U.S.C. § 922, IS CONSTITUTIONAL BECAUSE IT IS A COLLATERAL ISSUE NOT SUBJECT TO REVIEW UNDER ARTICLE 66, UCMJ. EVEN IF THIS COURT DID POSSESS JURISDICTION TO REVIEW THIS ISSUE, AIR FORCE INSTRUCTION REQUIRED THE STATEMENT OF TRIAL RESULTS AND ENTRY OF JUDGMENT TO ANNOTATE APPELLANT'S CRIMINAL INDEXING. FINALLY, 18 U.S.C. § 922 IS CONSTITUIONAL AS APPLIED TO APPELLANT.

Additional Facts

The Staff Judge Advocate's first indorsement to the Statement of Trial Results (STR) and Entry of Judgment (EOJ) in Appellant's case contains the following statements: "Firearm Prohibition Triggered Under 18 U.S.C. § 922: Yes." (*STR* and *EOJ*, ROT, Vol. 1.)

Standard of Review

The scope and meaning of Article 66, UCMJ, is a matter of statutory interpretation, which is reviewed de novo. United States v. Lepore, 81 M.J. 759, 760-61 (A.F. Ct. Crim. App. 2021).

Law and Analysis

The Gun Control Act of 1968 makes it unlawful for a person to possess a firearm if he has been, *inter alia*, "convicted in any court of a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1).

Appellant asserts that 18 U.S.C. § 922 is unconstitutional as applied to him. (App. Br. at 30-34.) Appellant asserts that any prohibitions on the possession of firearms imposed runs afoul of the Second Amendment, U.S. CONST. AMEND. II, the Supreme Court's interpretation of that amendment in N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022). (Id. at 31.) Appellant's constitutional argument is without merit and is a collateral matter beyond this Honorable Court's authority to review.

A. This Court lacks jurisdiction to determine whether Appellant should be criminally indexed in accordance with 18 U.S.C. § 922.

This Court held in its published opinion in United States v. Vanzant, 84 M.J. 671 (A.F. Ct. Crim. App. 2024), *rev. granted*, __ M.J. __, No. 24-0182, 2024 CAAF LEXIS 640 (C.A.A.F. 17 October 2024), that 18 U.S.C. § 922(g)'s firearm prohibitions and the criminal indexing requirements that follow that statute are collateral consequences of the conviction, rather than elements of the findings or sentence, so they are beyond the scope of this Court's jurisdiction under Article 66, UCMJ. Id. at 681. And the Court of Appeals for the Armed Forces (CAAF) held it was error for a Criminal Court of Appeal to modify the sex offender registry notation in the statement of trial results under Article 66, UCMJ. United States v. Williams, 2024 CAAF LEXIS 501, *14-15 (C.A.A.F. 7 May 2024).

B. The Statement of Trial Results and Entry of Judgment were prepared correctly in accordance with the applicable Air Force Instruction.

Even if this Court has jurisdiction to review this issue, Appellant was found guilty before a general court-martial of one charge and specification of sexual assault in violation of Article 120, UCMJ, which is a crime of violence punishable by imprisonment for a term exceeding one year, that is, by 30 years of confinement. (MCM, pt. IV, para. 60.d(2) (2019 ed.); R. at 663.) Thus, the Staff Judge Advocate followed the appropriate Air Force regulations in signing the first indorsement to the STR and EOJ. DAFI 51-201, dated 14 April 2022, paras. 29.30, 29.32.

C. The Firearm Prohibition in the Gun Control Act of 1968 is Constitutional as Applied to Appellant and his Conviction for a Crime of Violence.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST., amend. II. But as the Supreme Court has repeatedly emphasized, "the right secured by the Second Amendment is not unlimited." District of Columbia v. Heller, 554 U.S. 570, 626 (2008); *see* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 20 (2022); McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) (plurality opinion). "[T]he right was *never* thought to sweep indiscriminately." United States v. Rahimi, 602 U.S. 680, 691 (2024) (citing Heller, 554 U.S. at 626.). The history of firearms regulation reflects "a concern with keeping firearms out of the hands of categories of potentially irresponsible persons, including convicted felons," Barrett v. United States, 423 U.S. 212, 220 (1976), and "an intent to impose a firearms disability on *any* felon based on the fact of conviction." Lewis v. United States, 445 U.S. 55, 62 (1980) (emphasis added). Firearms prohibitions for felons are "presumptively lawful." Rahimi, 602 U.S. at 699 (citing Heller, 554 U.S. at 626). Because Appellant has been convicted by a general court-martial of a serious violent crime, application of 18 U.S.C. 922(g) to him is constitutional.

Appellant's argument asserts, absolutely incorrectly, that his crime of sexual assault was a "nonviolent offense." (App. Br. at 31.) But federal law defines the term "crime of violence" as "an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. §§ 924(c)(3)(A), 3156(a)(4)(A). Where Appellant committed a sexual assault upon victim L.H. by penetrating her vulva with his penis without L.H.'s consent, the Manual for Courts-Martial (MCM) also considers the violation of Article 120 to be a "violent offense." MCM, Part VI, paras. 60.a.(b)(2)(A), 60.a.(g)(1)(A), and 60.b(2)(d); *see also* United States v. Benfield, 2018 CCA LEXIS 335, *8-9 (A.F. Ct. Crim. App. 10 July 2018) (unpub. op.) (including sexual assault as a "crime of violence").

Appellant's argument under Article 66(d)(2), UCMJ, also fails. Article 66(d)(2) provides three prerequisites that an appellant must meet before AFCCA has jurisdiction to review a case for post-trial processing error: (1) an error occurred; (2) the appellant met his burden to demonstrate an error occurred and raised the issue at the Court of Criminal Appeals; and (3) the error occurred "after the judgment was entered into the record" via the entry of judgment (EOJ). Appellant did not meet the first or third prerequisite to trigger Article 66(d)(2) review. Regarding the first prerequisite, the Section 922 annotation was not an error because it accurately notified Appellant that his conviction triggered the firearms prohibition under federal law. Regarding the third prerequisite, the Section 922 annotation on the First Indorsement to the statement of trial results was entered into the record before the judgment of the court was entered via the EOJ, pursuant to R.C.M. 1101(a)(6), and again simultaneously with the EOJ when the EOJ was entered into the record, pursuant to Article 60c(a)(1)(A), UCMJ. Thus, any arguable error did not occur "after the judgment was entered into the record."

Because Appellant's constitutional argument is without merit and is a collateral matter beyond this Honorable Court's authority to review, the Court should deny the assignment of error.

IV.[2]

APPELLANT HAD NO CONSTITUTIONAL RIGHT TO REQUIRE THE COURT-MARTIAL PANEL VOTE UNANIMOUSLY FOR GUILT.

Standard of Review

The adequacy of a military judge's instructions is reviewed *de novo*. United States v. Dearing, 63 M.J. 478, 482 (C.A.A.F. 2006) (citations omitted). The constitutionality of a statute is a question of law that is reviewed *de novo*. United States v. Wright, 53 M.J. 476, 478 (C.A.A.F. 2000) (citing United States v. Brown, 25 F.3d 307, 308 (6th Cir. 1994)).

Law and Analysis

Appellant claims his constitutional right to a unanimous verdict was violated. (App. Br., Appx. at 1-2.) As he acknowledges this Court in United States v. Anderson, No. ACM 39969, 2022 CCA LEXIS 181, at *55-56 (A.F. Ct. Crim. App. Mar. 25, 2022) (unpub. op.), rejected the same claims Appellant raises now. Then, CAAF affirmed this Court's decision and definitively held that military members do not have a right to a unanimous verdict at court-martial under the Sixth Amendment, Fifth Amendment due process, or Fifth Amendment equal protection. *See* United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2023). Notably, the Supreme Court denied *certiorari* in that case. Anderson, 144 S. Ct. 1003 (Feb. 20, 2024). Accordingly, the military judge did not err in not providing an instruction for a unanimous verdict and Appellant's claim must fail.

[2] Appellant raises Issue IV in his appendix pursuant to Grostefon.

CONCLUSION

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

[redacted]

STEVEN R. KAUFMAN
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, Civilian Appellate Defense Counsel (Mr. William E. Cassara, Esq.), and the Air Force Appellate Defense Division (Maj Heather M. Bruha) on 23 February 2025.

[redacted]

STEVEN R. KAUFMAN
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* v. Specialist 4 (E-4) **ANTON SOLOSHENKO**, United States Space Force *Appellant*	))))))))))	**APPELLANT'S MOTION FOR ENLARGMENT OF TIME TO FILE A REPLY (FIRST)** Before Panel No. 3 No. ACM 40581 24 February 2025

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file a Reply to the Government's Answer. The Government filed its Answer to the Brief on Behalf of Appellant on Sunday, 23 February 2025, at 2154. By operation of Rules 18(d)(1) and 15, Appellant's Reply Brief is currently due on 3 March 2025. Appellant requests an enlargement for a period of 14 days, which will end on 17 March 2025. The record of trial was docketed with this Court on 6 March 2024. From the date of docketing to the present date, 355 days have elapsed. On the date requested, 376 days will have elapsed.

On 18-21 September 2023, Appellant was tried at Buckley Space Force Base, Colorado, by a general court-martial composed of officer and enlisted members. Contrary to his plea, Appellant was convicted of one charge and one specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 920. R. at 663; Entry of Judgment [EOJ], dated 27 October 2023. The members acquitted Appellant of one charge and one specification of assault consummated by a battery in an alleged violation of Article 128, UCMJ, 10 U.S.C. § 928.

Id. The members sentenced Appellant to a reduction to the rank of E-3, fifteen days of hard labor without confinement, and a dishonorable discharge. R. at 772; EOJ.

The electronic record of trial is 1,173 pages long, comprised of seven prosecution exhibits, two defense exhibits, 27 appellate exhibits, and one court exhibit. Appellant is not confined.

Undersigned military defense counsel has oral argument at the Court of Appeals for the Armed Forces (CAAF) in *United States v. Arroyo*, ACM No. 40321 (f rev), USCA Dkt. No. 24-0212/AF, tomorrow, 25 February 2025; a Reply Brief in *United States v. Clark*, ACM No. 40540, due to this Court on 5 March 2025; a Brief on Behalf of Appellant in *United States v. Cooley*, ACM No. 40376, due to this Court on 6 March 2025; and a Brief in Response to the Military Judge's Findings of Fact in *United States v. Sherman*, ACM No. 40486, anticipated to be due on 10 March 2025.

Undersigned civilian defense counsel has three cases before this Court; 10 cases before the Army Court of Criminal Appeals; one case before the Court of Appeals for the Armed Forces; six cases before the U.S. Court of Federal Claims; and seven other cases in federal district courts.

Undersigned civilian defense counsel has reviewed the Government's Answer but has not begun researching or drafting the Reply. Undersigned military appellate defense counsel has not yet reviewed the Government's Answer as she is preparing for oral argument in *Arroyo*. The requested enlargement is necessary to allow sufficient time for counsel to review and research the Government's 30-page Answer, for coordination between military and civilian appellate defense counsel, to effectively advise Appellant, and to file a thorough Reply.

Through no fault of Appellant, his counsel are unable to fully review the Government's Answer and file a Reply Brief before this Court's current deadline. Appellant was apprised of and consents to this extension of time request.

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

Respectfully submitted,

[redacted]
WILLIAM E. CASSARA, Esq.
Appellate Defense Counsel
PO Box 2688
Evans, GA 30809
(706) 860-5769
bill@courtmartial.com

[redacted]
HEATHER M. BRUHA
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, NAF, MD 20762
(240) 612-4772
heather.bruha@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was sent via email to the Court and served on the Appellate Defense Division and the Appellate Government Division on 24 February 2025.

[redacted]

HEATHER M. BRUHA
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, NAF, MD 20762-6604
(240) 612-4772
heather.bruha@us.af.mil

27 February 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Specialist 4 (E-4) ANTON SOLOSHENKO, USSF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME OUT OF TIME ACM 40581 Panel No. 3

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

Pursuant to Rules 18.5 and 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 Government's Answer in this case. The Government's response is being filed out of time due to an internal administrative error.

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 27 February 2025.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Specialist 4 (E-4) **ANTON SOLOSHENKO**, United States Space Force *Appellant*	))))))))))	**REPLY BRIEF ON BEHALF OF APPELLANT** Before Panel No. 3 No. ACM 40581 6 March 2025

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

Pursuant to Rules 18(d) and 18.3 of the United States Air Force Court of Criminal Appeals Rules of Practice and Procedure, dated 23 December 2020, Specialist 4 [Spc4] Anton Soloshenko [Appellant] hereby replies to the Government's Answer to Assignments of Error filed on 23 February 2025 [Ans.]. Appellant primarily rests on the arguments contained in his Brief on Behalf of Appellant, filed on 3 February 2025 [Opening Br.], and provides the following additional arguments in reply to the Government's Answer.

I.

The evidence is legally and factually insufficient to support the finding of guilty for sexual assault.

The Government failed to prove beyond a reasonable doubt that LH did not consent to the sexual intercourse with Appellant. Consent is understood from the totality of the circumstances and the facts of this case demonstrate actual consent. Article 120(g)(7)(C), Uniform Code of Military Justice [UCMJ]. Moreover, the Government failed to prove that Appellant did not have an honest and reasonable mistake of fact as to consent. Because the evidence is legally and factually insufficient, this Court cannot affirm the conviction for sexual assault.

A. LH's credibility was of paramount importance to the Government's case, but she was neither credible nor consistent in her testimony.

While the Government frequently misconstrues arguments extrapolated from the testimony of LH, the alleged victim, Ans. at 8, 9, 10, the Government also fails to adequately confront LH's utter lack of credibility. With multiple citations to the Record of Trial [ROT], Appellant argues that LH "deliberately withheld facts and evidence from the nurse examiner, law enforcement personnel, and prosecutors that tended to exonerate Appellant." Opening Br. at 16. The Government maintains that "medical personnel and investigators were focused on facts about the 19 July 2022 sexual assault, so they did not ask [LH] about the details of their sexual history and the nature of their sexual acts." Ans. at 14. The facts indicate otherwise:

> Circuit Defense Counsel [CDC]: And when you went to that nurse examiner you didn't tell her about the history of bruises that you had received during consensual sex with the accused, correct?
>
> LH: No. She just asked for that night.
>
> CDC: No, actually she asked you about a history of injury.
>
> LH: Okay.
>
> CDC: And you denied it, right?
>
> LH: Yes.

R. at 546.

Contrary to the Government's argument, the nurse examiner asked LH whether there was any history of injury between her and Appellant. R. at 546. The nurse examiner also asked whether there was any history of Appellant threatening her. R. at 520. LH denied that there was any history of injury and that Appellant had ever threatened her. R. at 520, 546. LH was untruthful with the nurse examiner about the alleged incident, *and* she deliberately withheld the truth about the consensual bondage and the nature of her sexual relationship with Appellant until one or two days before trial when she learned that the Defense had text messages between her and Appellant in which she repeatedly expressed her desire for bondage and pain. R. at 529. Moreover, when given the opportunity by an investigator to tell them anything else she thought that law enforcement should know, LH said nothing. R. at 544. In fact, LH confirmed that when interviewed in September by a detective, she never told them she and Appellant had a history of "BDSM"[1]-type sex. R. at 543. Then she admitted that she purposefully did not tell the detective that she and Appellant "had a history of aggressive sex" "[c]ause it doesn't excuse, rape. No." R. at 544. This testimony demonstrates her premeditated decision not to tell investigators or trial counsel about her aggressive/BDSM consensual sexual history with Appellant. *Id.* This specific sexual history not only provides the context with which Appellant was receiving information and making reasonable decisions throughout that night, but also of the valid defenses for both the sexual assault allegation and the assault consummated by a battery allegation. The Government has no answer for LH's obfuscation of the facts at best and mendacity at worst. Instead, the Government hypes the bruises on LH's neck and breasts, Ans. at 4, 13, 24, - of which Appellant was acquitted - even though the bruises were visible evidence of the aggressive/BDSM consensual sexual history with Appellant that LH hid from law enforcement.

Next, while the Government disputes Appellant's argument regarding LH's memory of when the food order arrived and whether the police instructed her to block Appellant's messages, Ans. at 15, it has no answer for LH's convenient memory lapses about whether Appellant bit one or both breasts and what Appellant's response was when she revealed that she had sex with someone else two days after she and Appellant broke up. R. at 486, 532-33, 543. LH's testimony

[1] Bondage, discipline (or domination), sadism, and masochism.

that she did not remember Appellant's response "because it didn't matter," R. at 532, or because "it was 14 months ago," R. at 533, was preposterous.

Rather than confront LH's duplicity with her mother about the nature of her relationship with Appellant, R. at 523, 525, 527, the Government merely acknowledges "LH's poor relationship with her mother" and then argues, "[t]here are plenty of ways of getting back at a boyfriend's judgment and unkind words, or to get attention from one's mother, without invoking criminal proceedings." Ans. at 15. The Government demonstrates an ostrich-like approach to the evidence when it deliberately fails to acknowledge that LH lied multiple times before and during trial. LH was an inherently unreliable witness as demonstrated by her untruthfulness with her mother, the nurse examiner, the detectives, and the prosecutors. She hid salient facts about her consensual sexual history with Appellant even while alleging that he bit and bruised her. The entire case rested on LH's testimony and her credibility was of paramount importance, but she lied so frequently and transparently that she had no credibility. Because she lied or deliberately withheld the truth from her mother, the nurse examiner, the detectives, and the prosecutors seeking a conviction on her behalf, it is reasonable to conclude that she lied about not consenting to sexual intercourse with Appellant. In other words, LH "[got] back" at Appellant's "judgment and unkind words" and "[got] attention from [her] mother" by invoking criminal proceedings. *See* Ans. at 15.

The Government does not recognize the logical flaw in LH's account. LH claimed that she felt like she did not have any other choice than to do what Appellant asked, because, if she did not do so, Appellant would make "it" more violent than it already was. R. at 458; *see also* Ans. at 10 ("She felt like she did not have any other choice than to do what Appellant asked, because, if she did not do so, Appellant would make it more violent than it already was."). First, the encounter was not violent; rather, it was exactly the kind of dominant, bondage-type sexual encounter that

LH preferred, but the Government fails to acknowledge the nature of LH and Appellant's relationship, apart from a single reference to consensual "rough sex." Ans. at 2. Moreover, if the encounter was as "violent" as LH claimed it was, and if she was as scared as she claimed to be, R. at 460, then why would LH risk provoking Appellant into a violent response by telling him that she recently had sex with someone else? Given this internal inconsistency in LH's account, coupled with her pattern of untruthfulness and obfuscation, the logical, reasonable conclusion is that LH fabricated the allegations against Appellant.

This Court should give less deference to the non-unanimous panel's assessment of LH's testimony because her testimony was not credible. Therefore, this Court can, and should, weigh the evidence differently than how the non-unanimous panel weighed the evidence and conclude that the finding of guilty was against the weight of the evidence. *United States v. Harvey*, __ M.J. __, 2024 CAAF LEXIS 502, at *11 (C.A.A.F. Sep. 6, 2024).

B. The Government does not address Appellant's honest and reasonable mistake of fact.

The Government fails to seriously address Appellant's mistake of fact regarding LH's consent. Opening Br. at 12-15. This is because, as stated above, the Government deliberately ignores the nature of the sexual relationship between LH and Appellant, including that she repeatedly enjoyed being physically restrained from movement and "forced" to engage in fellatio and penetrative sexual intercourse, that she intentionally sought to achieve pleasure through pain, and that, on 7 July 2022, she texted Appellant, "I want you to stop, but I really don't want to all at the same time." R. at 521, 527.

Based on prior sexual encounters with LH, Appellant believed that her statement "[i]f you take your shirt off, this is going other places," R. at 513, was similar to her previous statement "If you keep doing this, you're going to make me want it," R. at 511, which occurred during a consensual sexual encounter. Additionally, in prior sexual encounters, LH made it clear to Appellant that he could not satisfy her sexually without causing her pain. R. at 521. During the alleged incident, Appellant sought to satisfy LH in the manner she desired. The evidence supports the conclusion that Appellant honestly believed that LH consented, and this belief was reasonable, given the history and nature of their sexual relationship. Instead of acknowledging the history and nature of LH and Appellant's sexual relationship, the Government asserts without citation to any statute, rule, or decision that, while Appellant "need not testify to establish the defense of mistake of fact . . . the fact that Appellant did not testify about his mistaken belief gives the government a greater ability to rebut the defense beyond a reasonable doubt." Ans. at 13. This argument and reasoning violates Appellant's constitutional right to remain silent. The Government bears the burden to prove its case beyond a reasonable doubt that Appellant not only penetrated LH without consent but also that Appellant was not reasonable in his belief that LH did consent. *United States v. Moore*, No. ACM S32477, 2018 CCA LEXIS 560, at *12 (A.F. Ct. Crim. App. Dec. 11, 2018). While the Government may ignore the explicit pattern of LH and Appellant's sexual rendezvous and her specific preferences, this Court must not do the same when concluding that the Government failed to prove beyond a reasonable doubt that Appellant's mistake of fact was not honest or reasonable.

II.

The military judge abused his discretion in admitting statements of the complaining witness as an excited utterance.

The military judge abused his discretion in admitting LH's statements to SS as an excited utterance. The military judge failed to consider important facts and erred in applying the law to the facts. *United States v. Tapp*, 85 M.J. 19, 2024 CAAF LEXIS 419, at *26-27 (C.A.A.F. July 24, 2024) (citing *United States v. Rudometkin*, 82 M.J. 396, 401 (C.A.A.F. 2022)). Because the

Government cannot demonstrate that the erroneously admitted evidence did not substantially influence the panel's findings, this Court cannot affirm the conviction for sexual assault.

A. LH had the opportunity to deliberate or fabricate her statements to SS.

Just as the Government ignored LH's deficient credibility regarding the sufficiency of the evidence, *see* Assignment of Error I, *supra*, the Government also ignored LH's lack of credibility for the purported excited utterance to SS. LH had been untruthful with SS, her lifelong family friend, R. at 567, with whom she spoke about once a week, R. at 568, regarding her relationship with Appellant. LH told SS that she had sex with Appellant once or twice before breaking up with him, R. at 573, which was blatantly false. R. at 521, 523, 527. "The 'implicit premise' underlying the excited utterance exception is 'that a person who reacts to a startling event or condition while 'under the stress of excitement caused' thereby will speak truthfully because of the lack of opportunity to fabricate." *United States v. Donaldson*, 58 M.J. 477, 483 (C.A.A.F. 2003) (quoting *United States v. Jones*, 30 M.J. 127, 129 (C.M.A. 1990) (internal quotation marks omitted)); *see also White v. Illinois*, 502 U.S. 346, 357 (1992) (explaining that "a statement that qualifies for admission under a 'firmly rooted' hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability" (quoting *Idaho v. Wright*, 497 U.S. 805, 820-21 (1990))). Because LH repeatedly lied or concealed the facts before and during trial, *see* Assignment of Error I, *supra*, and because she lied to SS about how often she had sex with Appellant, it cannot be said that she spoke truthfully to SS about the alleged incident. Accordingly, her statements were not trustworthy or reliable.

Next, the Government maintains that LH was curled up in a "frozen" state, still under the "shock" of what had just been done to her, that she was not yet free from danger to reflect on what she might tell other people, and that once LH left Appellant's home, it was a matter of minutes before she called SS on her way to her car. Ans. at 20-21. The Government suggests that LH was mute while laying on Appellant's bed for approximately an hour, yet it fails to acknowledge that (1) LH and Appellant discussed her feelings, R. at 461, 530; (2) that he told her that she did not need to feel bad for breaking her celibacy vow, R. at 462, 530-31; (3) that LH laid on the bed while Appellant ordered food, R. at 530; (4) that he asked if LH was upset because of the "celibacy thing," R. at 467; (5) that LH shocked Appellant by telling him that she had sex with another man after the breakup, R. at 531; (6) and that Appellant responded in a way that she later claimed not to remember, R. at 532-33. Contrary to the Government's assertion, LH had ample opportunity to deliberate and fabricate her allegations.

The Government claims that "Appellant takes issue with the military judge not repeating in his ruling the facts he had just heard." Ans. at 21. The Government misconstrues both the military judge's ruling and Appellant's argument: The military judge erred in failing to consider these important facts. *See Tapp*, 2024 CAAF LEXIS 419, at *15 (citing *Rudometkin*, 82 M.J. at 401 (A military judge abuses his discretion by failing to consider important facts.)).

The Government cites this Court's decision in *United States v. Doroteo*, ACM No. 40363, 2025 CCA LEXIS 49 (A.F. Ct. Crim. App. Feb. 7, 2025), to distinguish from the instant case. Ans. at 21-23. In *Doroteo*, the Court noted that the military judge concluded that a certain act of appellant constituted a "startling event." *Id*. at *64. Here, the Government makes the same mistake that the military judge made at trial in failing to address whether the alleged incident was startling. The Government merely references "the trauma that he had caused [LH]," Ans. at 21, without acknowledging that LH and Appellant had regularly engaged in bondage and masochistic-type sex. R. at 527. LH had a history of wanting to be "forced" to engage in sexual acts and wanting Appellant to hurt her during sex because she derived pleasure from pain. R. at 521, 527.

Finally, the Government asserts that, unlike in other cases this Court has reversed, *see* Opening Br. at 27, LH "was a young victim," Ans. at 25, as if she was an impressionable minor. LH was 18 years old during her relationship with Appellant. R. at 443-44. She was not a child; rather, she was an adult, working full-time while planning to take classes at the University of Denver. R. at 443, 453. She was old enough to vote and to enlist in the military and was capable of making her own choices, whether or not her mother or her therapist agreed with them. LH legally could consent to sexual intercourse, including BDSM/aggressive sex even, and she did so that night without relaying what allegedly was going on in her mind.

By failing to address the relevant legal considerations to support his findings and conclusions and ignoring important facts in "the context of previous evidence," the military judge abused his discretion. *Tapp*, 2024 CAAF LEXIS 419, at *15.

B. The erroneously admitted evidence prejudiced Appellant.

"For nonconstitutional errors, the Government must demonstrate that the error did not have a substantial influence on the findings." *United States v. Hall*, 66 M.J. 53, 54 (C.A.A.F. 2008). This Court evaluates the harmlessness of an evidentiary ruling by weighing: "(1) the strength of the Government 's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Bowen*, 76 M.J. 83, 89 (C.A.A.F. 2017) (quoting *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F.1999) (internal quotation marks omitted)). The Government did not meet this burden, and the error had a substantial influence on the findings.

The Government relies entirely on LH's testimony when asserting that any error did not prejudice Appellant. Ans. at 24. The Government deliberately ignores LH's repeated lies and deceptions and refuses to acknowledge that her testimony was neither credible nor consistent and that she had two motives to fabricate the allegations. At trial, the Government recognized that LH had a problem with the veracity and reliability of her account, so it offered SS's testimony to bolster LH's credibility and to imply that LH's testimony was reliable. The Government had no other evidence for the charged acts: the Government did not introduce any testimonial or documentary evidence from the nurse examiner regarding the alleged vaginal penetration or from the detectives who interviewed LH multiple times. The military judge abused his discretion when he admitted statements by SS as excited utterances which were used to bolster the testimony of LH. This error prejudiced Appellant as those statements made close in time to the alleged sexual assault bootstrapped LH's testimony, which was otherwise unreliable, fraught with inconsistencies, and motivated by a need to appease her mother to receive love and have a place to live.

PRAYER FOR RELIEF

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested relief.

[redacted]

WILLIAM E. CASSARA, Esq.
Appellate Defense Counsel
PO Box 2688
Evans, GA 30809
(706) 860-5769
bill@courtmartial.com

[redacted]

HEATHER M. BRUHA
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, NAF, MD 20762
(240) 612-4772
heather.bruha@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was sent via email to the Court and served on the Appellate Defense Division and the Appellate Government Division on 6 March 2025.

[redacted]

HEATHER M. BRUHA
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, NAF, MD 20762-6604
(240) 612-4772
heather.bruha@us.af.mil

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40581**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Anton D. SOLOSHENKO	)	**PANEL CHANGE**
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 7th day of March, 2025,

ORDERED:

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

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
MERRIAM, ERIC, Colonel, Appellate Military Judge
WARREN, CHARLES G., Lieutenant Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

CHRISTIAN A. BOND, SrA, USAF
Appellate Court Paralegal