IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Captain (O-3), **BENJAMIN C. YORK,** United States Air Force, *Appellant.*	))))))))))	**NOTICE OF DIRECT APPEAL PURSUANT TO ARTICLE 66(b)(1)(A), UCMJ** No. ACM XXXXX 21 September 2023

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

On 16 December 2022 and 11-14 April 2023, a general court-martial consisting of a panel of officer members at Hurlburt Field, Florida, convicted Captain (Capt) Benjamin C. York, contrary to his pleas, of one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2019), and one specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2019). The military judge sentenced Capt York to a reprimand, forfeiture of $4,000 pay per month for six months, and 15 days of confinement. Record of Trial (ROT) Vol. 1, Entry of Judgment dated 31 May 2023.

On 23 June 2023, the Government purportedly sent Capt York the required notice by mail of his right to appeal within 90 days. Pursuant to Article 66(b)(1)(A), UCMJ, Capt York files his notice of direct appeal with this Court.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM _____**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Benjamin C. YORK	)	**DOCKETING**
Captain (O-3)	)	
U.S. Air Force	)	
Appellant	)	

On 21 September 2023, this court received a notice of direct appeal from Appellant in the above-styled case, pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A).

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

Accordingly, it is by the court on this 4th day of October, 2023,

ORDERED:

The case in the above-styled matter is referred to Panel 2.

It is further ordered:

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

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM _____**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Benjamin C. YORK	)	
Captain (O-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 21 September 2023, Appellant filed a "Notice of Direct Appeal Pursuant to Article 66(b)(1)(A), UCMJ," with this court. The above-styled case was docketed on 4 October 2023 and the court ordered the Government to "forward a copy of the record of trial to the court forthwith." Over 120 days have elapsed and, to date, the record has not been provided to the court.

Accordingly, it is by the court on this 5th day of February, 2024,

ORDERED:

Government appellate counsel will inform the court in writing not later than **29 February 2024** of the status of this case with regard to this court's 4 October 2023 order.

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Captain (O-3) **BENJAMIN C. YORK**, USAF *Appellant*	)))))))))	UNITED STATES' NOTICE OF STATUS OF COMPLIANCE Before Panel No. 1 No. ACM ____ 29 February 2024

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

Pursuant to this Court's 5 February 2024 order, the United States hereby provides notice of status of compliance.

On 4 October 2023, the above-styled case was docked with this Court. On the same date the Court ordered the Government to "forward a copy of the record of trial to the court forthwith." (*Notice of Docketing,* 4 October 2023.) On 5 February 2024 this Court ordered the Government to "inform the court in writing not later than 29 February 2024 of the status of this case with respect to this court's 4 October 2023 order." (*Order,* 5 February 2024.)

As of the date of this notice, days one through three of trial have been transcribed. The court reporter anticipates that the transcription will be completed by 18 March 2024.

WHEREFORE, the United States requests this Honorable Court accept this filing as confirmation of the government's compliance with its 5 February 2024 order.

[redacted]

ZACHARY T. EYTALIS, Col, USAF
Appellate Government Counsel
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(808) 372-7022

MARY ELLEN PAYNE
Associate Chief
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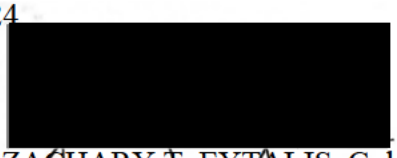
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 29 February 2024.



ZACHARY T. EYTALIS, Col, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
Military Justice and Discipline Directorate
United States Air Force
(808) 372-7022

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40604**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Benjamin C. YORK	)	
Captain (O-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 12 June 2024, 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.

In this motion, Appellant's counsel stated the "record of trial was docketed with this Court on 4 October 2023." In fact, the court docketed this case on that date without a record of trial and ordered the Government to "forward a copy of the record of trial to the court forthwith." Appellant's counsel did not state in his motion whether he received a summarized-transcript record of trial in this case before the case was docketed with this court, or before the verbatim-transcript record of trial was provided to this court on 23 April 2024.

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 17th day of June, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **21 August 2024**.

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

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

Counsel is not required to re-address item (1) in each subsequent motion for enlargement of time.

Appellant's counsel is further advised that any future requests for enlargements of time that, if granted, would expire more than 390 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,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Captain (O-3) **BENJAMIN C. YORK,** United States Air Force, *Appellant.*	)	No. ACM 40604
	)	12 June 2024

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

Pursuant to Rule 23.3(m)(1), (2), and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a 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 **21 August 2024**. The record of trial was docketed with this Court on 4 October 2023. The Government forwarded the record of trial to this Court on 23 April 2024. From the date of docketing to the present date, 252 days have elapsed. On the date requested, 322 days will have elapsed.

On 16 December 2022 and 11–14 April 2023, a general court-martial consisting of officer members at Hurlburt Field, Florida, found Appellant guilty, contrary to his pleas, of one charge and one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920, and one charge and one specification of assault upon a commissioned officer in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 781; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 31 May 2023. The military judge sentenced Appellant to be reprimanded, to forfeit $4,000 pay per month for six months, and to be confined for 15 days. R. at 846; EOJ. The convening authority took no action on the findings or

the sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Capt Benjamin C. York*, dated 3 May 2023.

The record of trial is seven volumes consisting of five prosecution exhibits, two defense exhibits, 36 appellate exhibits, and one court exhibit; the transcript is 847 pages. Appellant is not currently confined.

Counsel is currently representing 26 clients; 17 clients are pending initial AOEs before this Court. Ten matters currently have priority over this case:

1) *United States v. Kershaw*, ACM 40455 – The record of trial is eight volumes consisting of 11 prosecution exhibits, nine defense exhibits, one court exhibit, and 71 appellate exhibits; the transcript is 703 pages. Undersigned counsel has reviewed approximately ninety percent the record of trial and begun drafting the AOE in this case.
2) *United States v. Cadavona*, ACM 40476 – The record of trial is four volumes consisting of 11 prosecution exhibits, two defense exhibits, and 24 appellate exhibits; the transcript is 329 pages. Undersigned counsel has begun reviewing the record of trial in this case.
3) *United States v. Driskill*, ACM 39889 (rem) – The record of trial is 14 volumes consisting of 17 prosecution exhibits, four defense exhibits, and 169 appellate exhibits; the transcript is 2062 pages. Undersigned counsel will need to conduct additional review of the record of trial to prepare a brief on remand in this case.
4) *United States v. Casillas*, ACM 40499 – The record of trial is 14 volumes consisting of 37 prosecution exhibits, three defense exhibits, one court exhibit, and 170 appellate exhibits; the transcript is 1,957 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

5) *United States v. Hughey*, ACM 40517 – The record of trial is three volumes consisting of five prosecution exhibits and 14 appellate exhibits; the transcript is 101 pages. Undersigned counsel has begun reviewing the record of trial in this case.

6) *United States v. Rodgers*, ACM 40528 – The record of trial is eight volumes consisting of three prosecution exhibits, one defense exhibit, and 39 appellate exhibits; the transcript is 199 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

7) *United States v. Henderson*, ACM 40419 – The record of trial is five volumes consisting of ten prosecution exhibits, 21 defense exhibits, two court exhibits, and 25 appellate exhibits; the transcript is 937 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

8) *United States v. Bartolome*, ACM 22045 – The record of trial is two volumes consisting of four prosecution exhibits, ten defense exhibits, and 13 appellate exhibits; the transcript is 467 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

9) *United States v. Morgan*, ACM 22066 – The record of trial is three volumes consisting of five prosecution exhibits, 22 defense exhibits, and 19 appellate exhibits; the transcript is 80 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

10) *United States v. Ching*, ACM 40590 – The record of trial is five volumes consisting of nine prosecution exhibits, 29 defense exhibits, ten appellate exhibits, and one court exhibit; the transcript is 595 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

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

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

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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Air Force Appellate Defense Division
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CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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14 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Captain (O-3) BENJAMIN C. YORK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME No. ACM 40604 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 2
Captain (O-3) **BENJAMIN C. YORK,** United States Air Force, *Appellant.*	)	No. ACM 40604
	)	9 August 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a second enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **20 September 2024**. The record of trial was docketed with this Court on 4 October 2023. The Government forwarded the record of trial to this Court on 23 April 2024. From the date of docketing to the present date, 310 days have elapsed. On the date requested, 352 days will have elapsed.

On 16 December 2022 and 11–14 April 2023, a general court-martial consisting of officer members at Hurlburt Field, Florida, found Appellant guilty, contrary to his pleas, of one charge and one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920, and one charge and one specification of assault upon a commissioned officer in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 781; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 31 May 2023. The military judge sentenced Appellant to be reprimanded, to forfeit $4,000 pay per month for six months, and to be confined for 15 days. R. at 846; EOJ. The convening authority took no action on the findings or

the sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Capt Benjamin C. York*, dated 3 May 2023.

The record of trial is seven volumes consisting of five prosecution exhibits, two defense exhibits, 36 appellate exhibits, and one court exhibit; the transcript is 847 pages. Appellant is not currently confined.

Counsel is currently representing 24 clients; 14 clients are pending initial AOEs before this Court.[1] Seven matters currently have priority over this case:

1) *United States v. Cadavona*, ACM 40476 – The record of trial is four volumes consisting of 11 prosecution exhibits, two defense exhibits, and 24 appellate exhibits; the transcript is 329 pages. Undersigned counsel has drafted the AOE in this case.
2) *United States v. Kershaw*, ACM 40455 – The record of trial is eight volumes consisting of 11 prosecution exhibits, nine defense exhibits, one court exhibit, and 71 appellate exhibits; the transcript is 703 pages. Undersigned counsel is drafting a reply to the Government's answer in this case.
3) *United States v. Casillas*, ACM 40499 – The record of trial is 14 volumes consisting of 37 prosecution exhibits, three defense exhibits, one court exhibit, and 170 appellate

[1] Since the filing of Appellant's last request for an enlargement of time, counsel completed his review of the eight-volume record of trial, prepared and filed a 45-page AOE, and began drafting a reply to the Government's answer in *U.S. v. Kershaw*, ACM 40455; sat as second chair for oral argument before this Court, filed a 29-page supplemental brief and a 27-page reply to the Government's answer based on new post-trial disclosures, and prepared and filed an additional 12-page motion for leave to file a supplemental brief and supplemental brief in *U.S. v. Doroteo*, ACM 40363; completed his review of the four-volume record of trial, including sealed materials, and drafted a 30-page AOE in *U.S. v. Cadavona*, ACM 40476; filed a motion to withdraw from appellate review in *U.S. v. Bartolome*, ACM 22045; reviewed 857 pages of a verbatim transcript requiring certification; and participated in a practice oral argument for one additional case. Additionally, counsel was on leave on 13–15 June 2024 and was off for the Juneteenth and Independence Day holidays.

exhibits; the transcript is 1,957 pages. Undersigned counsel has begun reviewing the record of trial in this case.

4) *United States v. Taylor*, ACM 40371 – The record of trial is six volumes consisting of six prosecution exhibits, one court exhibit, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Undersigned counsel is reviewing this Court's opinion and preparing for a potential petition for grant of review to the United States Court of Appeals for the Armed Forces (CAAF) in this case.

5) *United States v. Rodgers*, ACM 40528 – The record of trial is eight volumes consisting of three prosecution exhibits, one defense exhibit, and 39 appellate exhibits; the transcript is 199 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

6) *United States v. Henderson*, ACM 40419 – The record of trial is five volumes consisting of ten prosecution exhibits, 21 defense exhibits, two court exhibits, and 25 appellate exhibits; the transcript is 937 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

7) *United States v. Ching*, ACM 40590 – The record of trial is five volumes consisting of nine prosecution exhibits, 29 defense exhibits, ten appellate exhibits, and one court exhibit; the transcript is 595 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to timely appeal, was provided an update of the status of counsel's progress

on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

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

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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Joint Base Andrews NAF, MD 20762-6604
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CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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13 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Captain (O-3) BENJAMIN C. YORK, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME No. ACM 40604 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time 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 352 days in length. Appellant's nearly year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two thirds of the 18 month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 August 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
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
Captain (O-3) **BENJAMIN C. YORK,** United States Air Force, *Appellant.*	)	No. ACM 40604
	)	10 September 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a third enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **20 October 2024**. The record of trial was docketed with this Court on 4 October 2023. The Government forwarded the record of trial to this Court on 23 April 2024. From the date of docketing to the present date, 342 days have elapsed. On the date requested, 382 days will have elapsed.

On 16 December 2022 and 11–14 April 2023, a general court-martial consisting of officer members at Hurlburt Field, Florida, found Appellant guilty, contrary to his pleas, of one charge and one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920, and one charge and one specification of assault upon a commissioned officer in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 781; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 31 May 2023. The military judge sentenced Appellant to be reprimanded, to forfeit $4,000 pay per month for six months, and to be confined for 15 days. R. at 846; EOJ. The convening authority took no action on the findings or

the sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Capt Benjamin C. York*, dated 3 May 2023.

The record of trial is seven volumes consisting of five prosecution exhibits, two defense exhibits, 36 appellate exhibits, and one court exhibit; the transcript is 847 pages. Appellant is not currently confined.

Counsel is currently representing 24 clients; 14 clients are pending initial AOEs before this Court.[1] Six matters currently have priority over this case:

1) *United States v. Casillas*, ACM 40499 – The record of trial is 14 volumes consisting of 37 prosecution exhibits, three defense exhibits, one court exhibit, and 170 appellate exhibits; the transcript is 1,957 pages. Undersigned counsel has reviewed approximately seventy percent of the record of trial in this case.
2) *United States v. Taylor*, ACM 40371 – The record of trial is six volumes consisting of six prosecution exhibits, one court exhibit, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Undersigned counsel is reviewing this Court's opinion and preparing for a potential petition for grant of review to the United States Court of Appeals for the Armed Forces (CAAF) in this case.
3) *United States v. Rodgers*, ACM 40528 – The record of trial is eight volumes consisting of three prosecution exhibits, one defense exhibit, and 39 appellate exhibits; the

[1] Since the filing of Appellant's last request for an enlargement of time, counsel prepared and filed a 28-page AOE in *U.S. v. Cadavona*, ACM 40476; prepared and filed an 18-page reply to the government's answer in *U.S. v. Kershaw*, ACM 40455; reviewed approximately sixty-five percent of the 14-volume record of trial and prepared and filed a motion for remand in *U.S. v. Casillas*, ACM 40499; and reviewed all prosecution and defense exhibits as well as two appellate exhibits in the eight-volume record of trial in *U.S. v. Rodgers*, ACM 40528.

transcript is 199 pages. Undersigned counsel has begun reviewing the record of trial in this case.

4) *United States v. Henderson*, ACM 40419 – The record of trial is five volumes consisting of ten prosecution exhibits, 21 defense exhibits, two court exhibits, and 25 appellate exhibits; the transcript is 937 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

5) *United States v. Zhong*, ACM 40411 – The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Undersigned counsel is reviewing this Court's opinion and preparing for a potential petition for grant of review to the CAAF in this case.

6) *United States v. Burkhardt-Bauder*, ACM 24011 – The record of trial is eight volumes consisting of five prosecution exhibits, 19 defense exhibits, 53 appellate exhibits, and one court exhibit; the transcript is 957 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

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

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 10 September 2024.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
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Joint Base Andrews NAF, MD 20762-6604
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Email: frederick.johnson.11@us.af.mil

12 September 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Captain (O-3) BENJAMIN C. YORK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME No. ACM 40604 Panel No. 2

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

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

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

[redacted]

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

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 12 September 2024.

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

UNITED STATES	)	**No. ACM 40604**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Benjamin C. YORK	)	
Captain (O-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

In an order dated 21 August 2024, the court granted Appellant counsel's motion for a Motion for Enlargement of Time (First) requesting an additional 60 days to submit Appellant's assignments of error. In that order, we noted "Appellant's counsel did not state in his motion whether he received a summarized-transcript record of trial in this case before the case was docketed with this court, or before the verbatim-transcript record of trial was provided to this court on 23 April 2024." We also informed counsel that they "may request, and the court may order *sua sponte*, a status conference to facilitate timely processing of this appeal." Finally, we advised Appellant's counsel "that any future requests for enlargements of time that, if granted, would expire more than 390 days after docketing, will not be granted absent exceptional circumstances."

This court granted Appellant's next two requests for enlargements of time—on 14 August 2024 (Second) and 16 September 2024 (Third). In his requests, Appellant's counsel asserted that the present case was his eighth and seventh priority case, respectively. Appellant's counsel has made no request for a status conference in this case.

On 12 October 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Fourth) requesting an additional 30 days to submit Appellant's assignments of error. In this motion, Appellant's counsel noted that "[o]n the date requested, 412 days will have elapsed." He stated that "[f]ive matters currently have priority over this case," but did not state whether he has started review of Appellant's case. Appellant's counsel avers that "Appellant was informed of his right to timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request." The Government opposes the motion.

In his Motion for Enlargement of Time (Fourth), Appellant's counsel argues exceptional circumstances for his inability to submit Appellant's assignments of error with this court. He asserts "the increase in the Division's workload over the last 18 months has compounded such that, at this time, the Division's workload does not support the possibility of substitute counsel to expedite review of Appellant's case, and undersigned counsel has been unable to complete review and any appropriate briefing of Appellant's case." Indeed, most of counsel's arguments for exceptional circumstances relate to high workload and limited manning—circumstances that existed before this court issued its 21 August 2024 order. While Appellant's counsel asserts his Directorate leadership has not been able to improve workload and manning issues sufficiently, he provides no statement from them to that effect. Moreover, Appellant's counsel did not state he notified his leadership of our 21 August 2024 order "that any future requests for enlargements of time that, if granted, would expire more than 390 days after docketing, will not be granted absent exceptional circumstances." Also, Appellant's counsel repeats a fact stated in this court's 21 August 2024 order—the Government's delay in providing a verbatim transcript.

The court finds nothing exceptional in Appellant's counsel's complaints of sustained high workload and limited manning, as they apparently existed before and after this court's 21 August 2024 order. However, Appellant's counsel has convinced us that, without this enlargement of time, he will fail in his responsibility to represent Appellant competently on appeal. Finally, we are persuaded by Appellant's agreement to past and future enlargements of time as necessary for his counsel to complete his assignments of error brief.

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 October, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Fourth) is **GRANTED**. Appellant shall file any assignments of error not later than **19 November 2024**.

Appellant's counsel is further advised that the court will not grant any future requests for enlargements of time absent a status conference. In such case,

counsel should have support from his leadership for any claims relating to their actions outside counsel's purview.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 2
Captain (O-3) **BENJAMIN C. YORK,** United States Air Force, *Appellant.*	)	No. ACM 40604
	)	12 October 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fourth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **19 November 2024**. The record of trial was docketed with this Court on 4 October 2023. The Government forwarded the record of trial to this Court on 23 April 2024. From the date of docketing to the present date, 374 days have elapsed. On the date requested, 412 days will have elapsed.

On 16 December 2022 and 11–14 April 2023, a general court-martial consisting of officer members at Hurlburt Field, Florida, found Appellant guilty, contrary to his pleas, of one charge and one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920, and one charge and one specification of assault upon a commissioned officer in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 781; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 31 May 2023. The military judge sentenced Appellant to be reprimanded, to forfeit $4,000 pay per month for six months, and to be confined for 15 days. R. at 846; EOJ. The convening authority took no action on the findings or the

sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Capt Benjamin C. York*, 3 May 2023.

The record of trial is seven volumes consisting of five prosecution exhibits, two defense exhibits, 36 appellate exhibits, and one court exhibit; the transcript is 847 pages. Appellant is not currently confined.

Counsel is currently representing 27 clients; 14 clients are pending initial AOEs before this Court.[1] Five matters currently have priority over this case:

1) *United States v. Taylor*, ACM 40371, USCA Dkt. No. 24-0234/AF – The record of trial is six volumes consisting of six prosecution exhibits, one court exhibit, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Undersigned counsel has petitioned the CAAF for grant of review and drafted the supplement to the petition in this case.
2) *United States v. Zhong*, ACM 40411 – The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Undersigned counsel is preparing to petition the CAAF for a grant of review in this case.
3) *United States v. Myers*, ACM S32749 – The record of trial is four volumes consisting of seven prosecution exhibits, nine defense exhibits, and 26 appellate exhibits; the

[1] Since the filing of Appellant's last request for an enlargement of time, counsel completed his review of the eight-volume record of trial and prepared and filed a merits brief in *U.S. v. Rodgers*, ACM 40528; petitioned the United States Court of Appeals for the Armed Forces (CAAF) for a grant of review and drafted a 27-page supplement to the petition in *U.S. v. Taylor*, ACM 40371, USCA Dkt. No. 24-0234/AF; prepared and filed an eight-page supplemental reply brief in *U.S. v. Doroteo*, ACM 40363; and reviewed approximately ten percent of the 14-volume record of trial in *U.S. v. Casillas*, ACM 40499. Additionally, counsel was on leave on 13 and 17–25 September 2024 and attended the Joint Appellate Advocacy Training on 26–27 September 2024.

transcript is 656 pages. Undersigned counsel is preparing to petition the CAAF for a grant of review in this case.

4) *United States v. Henderson*, ACM 40419 – The record of trial is five volumes consisting of ten prosecution exhibits, 21 defense exhibits, two court exhibits, and 25 appellate exhibits; the transcript is 937 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

5) *United States v. Burkhardt-Bauder*, ACM 24011 – The record of trial is eight volumes consisting of five prosecution exhibits, 19 defense exhibits, 53 appellate exhibits, and one court exhibit; the transcript is 957 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

On 17 June 2024, this Court issued an order stating that "any future requests for an enlargement of time that, if granted, would expire more than 390 days after docketing, will not be granted absent exceptional circumstances." Order, *United States v. York*, No. ACM 40604, 17 June 2024. Since this motion for enlargement of time, if granted, would expire 412 days after docketing, exceptional circumstances must be shown in accordance with the Court's order. Although this case was docketed with the Court on 4 October 2023, the Government did not forward the record of trial to the court until 23 April 2024. This delay of 202 days, during which time Appellant's counsel had not received a verbatim transcript, is one component of the exceptional circumstances in this case.[2]

[2] Although the Court's order in this case is silent as to the effect of this delay, the Court has previously indicated in at least one other case that such a delay would be taken under advisement as a potential component of exceptional circumstances, while instructing counsel to articulate what, if any, additional factors may warrant the requested enlargement. Order, *United States v. Henderson*, No. ACM 40419, 24 June 2024.

Additional exceptional circumstances warranting an enlargement of time include the number of older cases on counsel's docket. Throughout the entire life of this case, undersigned counsel has been working diligently on cases that were docketed before Appellant's case. During that time, he has filed seven initial AOE briefs, one merits brief, four reply briefs, two supplemental briefs, two supplemental reply briefs, one specified issue brief, one motion to dismiss a petition, and one motion for remand, all before this Court. He has also filed six petitions for grant of review and five petition supplements at the CAAF. Additionally, he has presented oral arguments in two cases, one before the CAAF and one before this Court, and sat as second chair for two additional oral arguments before this Court. Recently, he has been reviewing the 14-volume record of trial, which includes a 1,957-page transcript, in *United States v. Casillas*, ACM 40499, and completed his review of the eight-volume record of trial in *United States v. Rodgers*, ACM 40528, two cases that were docketed before Appellant's case.

As noted in *United States v. May*, 47 M.J. 478, 481 (C.A.A.F. 1998), there is no substitute for the briefing by appellate defense counsel on behalf of an individual appellant, even considering this Court's broad mandate for independent review. Appellant requested representation under Article 70, UCMJ, 10 U.S.C. § 870, on the day of his court-martial. Undersigned counsel's limited progress so far is not due to an unwillingness to familiarize himself with the case or file a brief raising substantive issues, nor is it a deliberate tactical decision in order to create an appellate issue. *See United States v. Roach*, 66 M.J. 410, 418 (C.A.A.F. 2008).

Additionally, undersigned counsel regularly and continually examines his docket, in concert with supervisory counsel within the Appellate Defense Division, to assess the possibility of assigning substitute counsel to expedite review of Appellant's case, but no such substitute counsel has been identified so far due to the Air Force Appellate Defense Division's workload.

Though subject to manual counting, as of 9 October 2024, the Division's records reflect 118 cases pending initial briefing before this Court; however, a comparison with the 130 cases that were pending initial briefing before this Court on 9 June 2017 shows that the twelve fewer cases now reflect fifty-nine percent more pages for counsel to review. This volume of pending cases has arisen in part due to (i) the seventy-three percent increase in cases referred to the Division since the 23 December 2022 expansion of appellate review, *see* National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395 (2022), with 144 cases eligible for direct appeal forwarded to the Division's counsel versus 198 automatic appeals over that same time, (ii) the Division's robust practice before the United States Court of Appeals for the Armed Forces, leading all military services with twelve cases granted oral argument in addition to the seven cases argued by Division counsel before this Court during the October 2023 term, and leading all military services headed into the October 2024 term with nine cases—only one fewer than all other services combined—granted review with briefing ordered so far, (iii) the high volume of top-priority interlocutory appeals spread amongst the Division's counsel, responding to three appeals under Article 62, UCMJ, 10 U.S.C. § 862, and three writ-petitions under Article 6b, UCMJ, 10 U.S.C. § 806b, and (iv) the extensive litigation before the Supreme Court of the United States since July 2023, with thirteen appellants petitioning for review and six briefs prepared by the Division's counsel, with each brief averaging three-to-four weeks of dedicated work to prepare in compliance with the Supreme Court's strict filing timelines.

Division leadership has worked to mitigate the impact of these cases on the Division's total workload and its impact on timely resolution of each appellant's case. To address gaps with two active-duty counsel, Division leadership secured reservists to be on orders, with one reservist being on orders spanning August 2023 through August 2024 to fill a vacant billet, and another reservist

to cover the entirety of one active-duty counsel's parental leave from June through November 2024. While helpful in mitigating the impacts of a rising workload, this reserve support only held the equivalent of the Division's active-duty staffing steady at previously existing levels. In 2024, Division leadership put forth a proposed legislative change that, though not adopted, would have authorized the military appellate defense counsel to seek a release from representing an appellant when civilian defense counsel is retained, which would have impacted approximately ten percent of the cases pending initial briefing before this Court. Forecasting the additional strain on the Division's workload arising from the upcoming expansion of the right for military members to petition the Supreme Court for review, *see* National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 533, 137 Stat. 136 (2023), in addition to the impact of direct appeals discussed above, action is pending on a Division request for eight additional active-duty counsel to be assigned to the Division beginning in the summer of 2025. Despite these mitigation measures, the increase in the Division's workload over the last 18 months has compounded such that, at this time, the Division's workload does not support the possibility of substitute counsel to expedite review of Appellant's case, and undersigned counsel has been unable to complete review and any appropriate briefing of Appellant's case.

The totality of these factors, including the 202 days between docketing and receipt of the verbatim transcript, undersigned counsel's diligent efforts on earlier-docketed cases over the life of Appellant's case, and the manning and workload challenges faced by the Appellate Defense Division throughout the life of Appellant's case, constitute exceptional circumstances that warrant granting the requested enlargement of time. Crucially, the fact that undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case is through *no fault of Appellant*. An enlargement of time is necessary to allow counsel to fully review Appellant's case

and advise Appellant regarding potential errors. Appellant was informed of his right to timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

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

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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16 October 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Captain (O-3) BENJAMIN C. YORK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME No. ACM 40604 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 2
Captain (O-3) **BENJAMIN C. YORK,** United States Air Force, *Appellant.*	)	No. ACM 40604
	)	12 November 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fifth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **19 December 2024**. The record of trial was docketed with this Court on 4 October 2023. The Government forwarded the record of trial to this Court on 23 April 2024. From the date of docketing to the present date, 405 days have elapsed. On the date requested, 442 days will have elapsed. From the date the Court received the record of trial to when this enlargement of time, if granted, would end, 240 days will have elapsed.

On 16 December 2022 and 11–14 April 2023, a general court-martial consisting of officer members at Hurlburt Field, Florida, found Appellant guilty, contrary to his pleas, of one charge and one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920, and one charge and one specification of assault upon a commissioned officer in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 781; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 31 May 2023. The military judge sentenced Appellant to be reprimanded, to forfeit $4,000 pay per month for six months, and to be confined for 15 days. R. at 846; EOJ. The convening authority took no action on the findings or the

sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Capt Benjamin C. York*, 3 May 2023.

The record of trial is seven volumes consisting of five prosecution exhibits, two defense exhibits, 36 appellate exhibits, and one court exhibit; the transcript is 847 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 29 clients; 16 clients are pending initial AOEs before this Court. Additionally, one client has a pending brief before the United States Court of Appeals for the Armed Forces (CAAF).[1] Three matters currently have priority over this case:

1) *United States v. Navarro Aguirre*, ACM 40354, USCA Dkt. No. 24-0146/AF – The record of trial is nine volumes consisting of 14 prosecution exhibits, 16 defense exhibits, one court exhibit, and 47 appellate exhibits; the transcript is 896 pages. Undersigned counsel was recently detailed to this case and is now reviewing the record and drafting a grant brief to the CAAF.
2) *United States v. Henderson*, ACM 40419 – The record of trial is five volumes consisting of ten prosecution exhibits, 21 defense exhibits, two court exhibits, and 25

[1] Since the filing of Appellant's last request for an enlargement of time, counsel prepared and filed a 27-page supplement to the petition for grant of review to the CAAF in *U.S. v. Taylor*, ACM 40371, USCA Dkt. No. 24-0234/AF; petitioned the CAAF for a grant of review and prepared and filed a 31-page supplement to the petition in *U.S. v. Zhong*, ACM 40411, USCA Dkt. No. 25-0011/AF; petitioned the CAAF for a grant of review and prepared and filed a 20-page supplement to the petition in *U.S. v. Myers*, ACM S32749, USCA Dkt. No. 25-0012/AF; prepared and filed a 15-page reply brief in *U.S. v. Cadavona*, ACM 40476; prepared and filed a thirteen-page brief on behalf of appellant following redocketing in *U.S. v. Kershaw*, ACM 40455; reviewed approximately eighty-five percent of the five-volume record of trial in *U.S. v. Henderson*, ACM 40419; prepared and filed a five-page response to the Government's motion for reconsideration in *U.S. v. Patterson*, ACM 40426; and participated in practice oral arguments for three additional cases. Additionally, counsel was off for the Columbus Day and Veterans Day holidays and was on leave on 18–20 October 2024.

appellate exhibits; the transcript is 937 pages. Undersigned counsel has reviewed approximately eighty-five percent of the record of trial in this case.

3) *United States v. Burkhardt-Bauder*, ACM 24011 – The record of trial is eight volumes consisting of five prosecution exhibits, 19 defense exhibits, 53 appellate exhibits, and one court exhibit; the transcript is 957 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

On 17 June 2024, this Court issued an order stating "that any future requests for an enlargement of time that, if granted, would expire more than 390 days after docketing, will not be granted absent exceptional circumstances." Order, *United States v. York*, No. ACM 40604, 17 June 2024. Since this motion for enlargement of time, if granted, would expire 442 days after docketing, exceptional circumstances must be shown in accordance with the Court's order. Although this case was docketed with the Court on 4 October 2023, the Government did not forward the record of trial to the court until 23 April 2024. This delay of 202 days, during which time Appellant's counsel had not received a verbatim transcript, is one component of the exceptional circumstances in this case.[2]

Additional exceptional circumstances warranting an enlargement of time include the number of older cases on counsel's docket. Throughout the entire life of this case, undersigned counsel has been working diligently on cases that were docketed before Appellant's case. During that time, he has filed seven initial AOE briefs, one merits brief, five reply briefs, two supplemental briefs, two supplemental reply briefs, one specified issue brief, one motion to dismiss a petition,

[2] The Court's order acknowledges this delay but does not discuss its effect, if any, on a showing of exceptional circumstances. The Court has previously indicated in at least one other case that such a delay would be taken under advisement as a potential component of exceptional circumstances, while instructing counsel to articulate what, if any, additional factors may warrant the requested enlargement. Order, *United States v. Henderson*, No. ACM 40419, 24 June 2024.

one motion for remand, and one additional brief following redocketing, all before this Court. He has also filed eight petitions for grant of review and eight petition supplements at the CAAF. Additionally, he has presented oral arguments in two cases, one before the CAAF and one before this Court, and sat as second chair for two additional oral arguments before this Court. Currently, he is reviewing the nine-volume record of trial, which includes an 896-page transcript, and drafting a grant brief in *United States v. Navarro Aguirre*, ACM 40354, USCA Dkt. No. 24-0146/AF, a case that is older than Appellant's and one in which the CAAF has granted review.

As noted in *United States v. May*, 47 M.J. 478, 481 (C.A.A.F. 1998), there is no substitute for the briefing by appellate defense counsel on behalf of an individual appellant, even considering this Court's broad mandate for independent review. Appellant requested representation under Article 70, UCMJ, 10 U.S.C. § 870, on the day of his court-martial. Undersigned counsel's limited progress so far is not due to an unwillingness to familiarize himself with the case or file a brief raising substantive issues, nor is it a deliberate tactical decision in order to create an appellate issue. *See United States v. Roach*, 66 M.J. 410, 418 (C.A.A.F. 2008).

Additionally, undersigned counsel regularly and continually examines his docket, in concert with supervisory counsel within the Appellate Defense Division, to assess the possibility of assigning substitute counsel to expedite review of Appellant's case, but no such substitute counsel has been identified so far due to the Air Force Appellate Defense Division's workload. Though subject to manual counting, as of 7 November 2024, the Division's records reflect 128 cases pending initial briefing before this Court; however, a comparison with the 130 cases that were pending initial briefing before this Court on 9 June 2017 shows that the two fewer cases now reflect seventy-eight percent more pages for counsel to review. This volume of pending cases has arisen in part due to (i) the sixty-eight percent increase in cases referred to the Division since the

23 December 2022 expansion of appellate review, *see* National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395 (2022), with 146 cases eligible for direct appeal forwarded to the Division's counsel versus 223 automatic appeals over that same time, (ii) the Division's robust practice before the United States Court of Appeals for the Armed Forces, leading all military services with twelve cases granted oral argument in addition to the seven cases argued by Division counsel before this Court during the October 2023 term, and leading all military services—and nearly equating all other services combined—at this juncture for cases to be decided in the October 2024 term, with eleven cases granted review with briefing ordered so far, (iii) the high volume of top-priority interlocutory appeals spread amongst the Division's counsel, responding to three appeals under Article 62, UCMJ, 10 U.S.C. § 862, and three writ-petitions under Article 6b, UCMJ, 10 U.S.C. § 806b, and (iv) the extensive litigation before the Supreme Court of the United States since July 2023, with thirteen appellants petitioning for review and six briefs prepared by the Division's counsel, with each brief averaging three-to-four weeks of dedicated work to prepare in compliance with the Supreme Court's strict filing timelines.

Division leadership has worked to mitigate the impact of these cases on the Division's total workload and its impact on timely resolution of each appellant's case. To address gaps with two active-duty counsel, Division leadership secured reservists to be on orders, with one reservist being on orders spanning August 2023 through August 2024 to fill a vacant billet, and another reservist to cover the entirety of one active-duty counsel's parental leave from June through November 2024. While helpful in mitigating the impacts of a rising workload, this reserve support only held the equivalent of the Division's active-duty staffing steady at previously existing levels. In 2024, Division leadership put forth a proposed legislative change that, though not adopted, would have

authorized the military appellate defense counsel to seek a release from representing an appellant when civilian defense counsel is retained, which would have impacted approximately ten percent of the cases pending initial briefing before this Court. Forecasting the additional strain on the Division's workload arising from the upcoming expansion of the right for military members to petition the Supreme Court for review, *see* National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 533, 137 Stat. 136 (2023), in addition to the impact of direct appeals discussed above, action is pending on a Division request for eight additional active-duty counsel to be assigned to the Division beginning in the summer of 2025. Despite these mitigation measures, the increase in the Division's workload over the last twenty-two months has compounded such that, at this time, the Division's workload does not support the possibility of substitute counsel to expedite review of Appellant's case,[3] and undersigned counsel has been unable to complete review and any appropriate briefing of Appellant's case.

The totality of these factors, including the 202 days between docketing and receipt of the verbatim transcript, undersigned counsel's diligent efforts on earlier-docketed cases over the life of Appellant's case, and the manning and workload challenges faced by the Appellate Defense Division throughout the life of Appellant's case, constitute exceptional circumstances that warrant granting the requested enlargement of time. Crucially, the fact that undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case is through *no fault of Appellant*. An enlargement of time is necessary to allow counsel to fully review Appellant's case

[3] Undersigned counsel has informed division leadership of this Court's order "that any future requests for enlargements of time that, if granted, would expire more than 390 days after docketing, will not be granted absent exceptional circumstances." Order, *United States v. York*, No. ACM 40604, 17 June 2024. Division leadership compiled the information describing the Division's overall workload, manning, and other factors preventing the detailing of substitute counsel to expedite review of Appellant's case and provided it to undersigned counsel to show exceptional circumstances as necessary when requesting enlargements of time.

and advise Appellant regarding potential errors. Appellant was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

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

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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13 November 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Captain (O-3) BENJAMIN C. YORK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME No. ACM 40604 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

MARY ELLEN PAYNE
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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Benjamin C. YORK Captain (O-3) U. S. Air Force *Appellant*	**NOTICE OF APPEARANCE** ACM No. 40604 Panel No. 2 14 November 2024

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

In accordance with Rule 12, U.S.A.F.C.C.A. RULES OF PRACTICE AND PROCEDURE (2020), the undersigned gives notice that he has been retained to represent the Appellant, as co-counsel before this Court.

Counsel has reviewed the trial record, and approximately six issues require research and possible briefing.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that this document was emailed to the Court's electronic filing address on 14 November 2024, that military counsel has been directed to upload a copy into the Court's case management system, and that a copy of the foregoing was emailed to the Chief, Government Trial and Appellate Operations Division.

[redacted]
Philip D. Cave
Civilian Appellate Counsel

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40604**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Benjamin C. YORK	)	
Captain (O-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 13 November 2024, Appellant's counsel submitted a Consent Motion to Examine Sealed Materials, requesting both parties be allowed to examine Appellate Exhibits VI–VIII and transcript pages 83–93. These exhibits were presented or reviewed by the parties at trial.

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 . . . ." R.C.M. 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 15th day of November, 2024,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view **Appellate Exhibits VI–VIII and transcript pages 83–93**, subject to the following conditions:

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

No counsel granted access to the materials may photocopy, photograph, reproduce, disclose, or make available the content to any other individual without the court's prior written authorization.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**CONSENT MOTION TO EXAMINE SEALED MATERIALS**
v.	)	Before Panel No. 2
Captain (O-3) **BENAJMIN C. YORK,** United States Air Force, *Appellant*.	)	No. ACM 40604
	)	13 November 2024

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and Rules 3.1, 23.1(b), and 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, Appellant, Captain Benajmin C. York, hereby moves this Court to permit appellate counsel for the Appellant and the Government to examine Appellate Exhibits VI, VII, VIII and transcript pages 83–93 in Appellant's record of trial.

Facts

On 16 December 2022 and 11–14 April 2023, a general court-martial consisting of officer members at Hurlburt Field, Florida, found Appellant guilty, contrary to his pleas, of one charge and one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920, and one charge and one specification of assault upon a commissioned officer in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 781; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 31 May 2023. In the course of the proceedings, trial defense counsel filed a motion to admit evidence under Mil. R. Evid. 412, and both the trial counsel and victim's counsel subsequently filed responses. App. Exs. VI, VII, VIII. The military judge heard arguments regarding this motion during a closed Article 39(a), UCMJ, session. R. at

82. The military judge ordered that the filings related to this motion be sealed. ROT Vol. 2, Index of Exhibits.

Law

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

Air Force regulations governing professional duties and conduct of appellate defense counsel impose upon counsel, *inter alia*, a duty to provide "competent representation," perform "reasonable diligence," and to "give a client his or her best professional evaluation of the questions that might be presented on appeal…[to] consider all issues that might affect the validity of the judgment of conviction and sentence…[to] advise on the probable outcome of a challenge to the conviction or sentence...[and to] endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance." Air Force Instruction (AFI) 51-110, *Professional Responsibility Program*, Attachment 2: Air Force Rules of Professional Conduct, Rule 1.1, Attachment 7: Air Force Standards for Criminal Justice, Standard 4-8.3(b) (11 December 2018). These requirements are consistent with those imposed by the state bar to which counsel belongs.[1]

This Court may grant relief "on the basis of the entire record" of trial. Article 66, UCMJ, 10 U.S.C. § 866. Appellate defense counsel so detailed by The Judge Advocate General shall

[1] Counsel of record is licensed to practice law in Georgia.

represent accused servicemembers before this Court. Article 70, UCMJ, 10 U.S.C. § 870. This Court's "broad mandate to review the record unconstrained by appellant's assignments of error" does not reduce "the importance of adequate representation" by counsel; "independent review is not the same as competent appellate representation." *United States v. May,* 47 M.J. 478, 481 (C.A.A.F. 1998).

Analysis

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

The Government consents to both parties examining the sealed materials detailed above.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this motion and permit examination of the aforementioned sealed materials contained within the original record of trial.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR RECONSIDERATION**
v.	)	Before Panel No. 2
Captain (O-3) **BENJAMIN C. YORK,** United States Air Force, *Appellant.*	)	No. ACM 40604
	)	15 November 2024

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

Pursuant to Rule 31.1 of this Court's Rules of Practice and Procedure, Appellant respectfully moves this Court to reconsider its 13 November 2024 order denying Appellant's Motion for Enlargement of Time (Fifth). No other court has acquired jurisdiction over Appellant's case. Appellant respectfully requests a status conference.

If this Court reconsiders Appellant's Motion for Enlargement of Time (Fifth), Appellant requests an enlargement for a period of 14 days, which will end on **3 December 2024**. The record of trial was docketed with this Court on 4 October 2023. The Government forwarded the record of trial to this Court on 23 April 2024. From the date of docketing to the present date, 407 days have elapsed. On the date requested, 426 days will have elapsed.

There is good cause to grant this motion based on the exceptional circumstances brought about by the duties competing for counsel's time. Upon receiving this Court's order denying Appellant's fifth motion for an enlargement of time, military appellate defense counsel immediately suspended work on all other duties to exclusively review Appellant's record of trial and prepare an assignments of error (AOE) brief. Working through the evening on 13 November 2024 and into the early morning hours of 14 November 2024, military counsel reviewed all of the record aside from the transcript, including five prosecution exhibits, two defense exhibits, 36

appellate exhibits, and one court exhibit. Continuing his review on 14 November 2024, military counsel has also reviewed approximately 100 pages of the 846-page transcript, meaning counsel has reviewed approximately 60 percent of the overall record. Additionally, military counsel filed a consent motion to examine sealed materials within hours of receiving this Court's order. This Court granted that motion, and military counsel requested an appointment to examine the sealed materials approximately 22 minutes after receiving the Court's order.

Through their reviews, military and civilian counsel identified at least six issues that warrant additional research. An enlargement of time is necessary to appropriately address these issues while fulfilling counsel's other professional obligations that cannot be suspended. In particular, military appellate defense counsel will travel to sit as second chair during oral arguments before this Court in *United States v. Menard*, ACM 40496, at the University of Oklahoma School of Law on 19 November 2024—the same day Appellant's AOE brief is currently due. Military counsel must travel on the days before and after argument due to commercial flight schedules and needs to spend time preparing with his co-counsel for this argument, reducing the time available to review Appellant's record and draft an AOE brief. Counsel consulted with division leadership, who confirmed that no alternate counsel is available to support this outreach oral argument.

Additionally, after filing Appellant's fifth motion for enlargement of time, military appellate defense counsel received the Government's supplemental answer in *United States v. Kershaw*, ACM 40455. Military counsel is reviewing that answer, and a reply brief, if any, will be due on 19 November 2024—the same day as outreach oral argument and the current due date for Appellant's AOE brief. Amidst these competing obligations, counsel needs an enlargement of time to fully and competently review the identified issues in Appellant's record.

An enlargement of time is likewise necessary to allow Appellant's civilian counsel to fully review his record of trial. While Appellant's civilian counsel is available to work on Appellant's case in the days before the current due date, a review completed in that time would be necessarily hasty. Moreover, the professional obligations of both military and civilian counsel will limit the opportunities for them to collaborate before the current due date. An enlargement of time will facilitate full collaboration among Appellant's defense team and allow both counsel to appropriately coordinate with their client throughout the record review and brief drafting processes.

The denial of this motion for an enlargement of time affects another case pending before this Court. Military appellate defense counsel has reviewed approximately 90 percent of the record of trial and anticipated filing an AOE brief before the current deadline in *United States v. Henderson*, ACM 40419, a case that was docketed 27 days before Appellant's. As here, this Court has ordered that additional motions for enlargements of time will not be granted in *Henderson* absent exceptional circumstances. Order, *United States v. Henderson*, No. ACM 40419, 21 October 2024. The suspension of other work that is necessary to review Appellant's record and file a brief in accordance with this Court's order required counsel to request a tenth enlargement of time in *Henderson*.[1] Military counsel's review of *Henderson* will likely be further delayed because counsel must prepare and file a grant brief with the United States Court of Appeals for the Armed Forces (CAAF) by 6 December 2024 in *United States v. Navarro Aguirre*,

[1] This conflict will likely remain even if the Court grants the 14-day enlargement requested in this Motion for Reconsideration. The 30-day enlargement requested in Appellant's Motion for Enlargement of Time (Fifth) would allow military counsel to complete his review of the record and prepare and file an AOE brief in *Henderson* by the current deadline in that case.

ACM 40354, USCA Dkt. No. 24-0146/AF. Counsel was detailed to this case within the past month and has already received an extension of time from the CAAF to file this brief.

Competing professional obligations have forced military appellate defense counsel to prioritize other matters over the review of Appellant's record before receiving this Court's order. Since requesting Appellant's fourth enlargement of time, military counsel prepared and filed 111 substantive pages of filings in six different cases[2] that were all docketed before Appellant's case. This is in addition to military counsel's review of the record in *Henderson* and participation in practice oral arguments for three additional cases. During that same period, counsel was off for the Columbus Day and Veterans Day holidays and was on leave on 18–20 October 2024—leave that only caused counsel to be absent for one duty day. This production is representative of the diligence military counsel has exercised throughout the entire life of Appellant's case, during which time military counsel filed seven initial AOE briefs, one merits brief, five reply briefs, two supplemental briefs, two supplemental reply briefs, one specified issue brief, one motion to dismiss a petition, one motion for remand, and one additional brief following redocketing, all before this Court. Military counsel also filed eight petitions for grant of review and eight petition supplements at the CAAF. Additionally, he has presented oral arguments in two cases, one before the CAAF and one before this Court, and sat as second chair for two additional oral arguments before this Court.

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[2] Military counsel prepared and filed a 27-page supplement to the petition for grant of review to the CAAF in *U.S. v. Taylor*, ACM 40371, USCA Dkt. No. 24-0234/AF; petitioned the CAAF for a grant of review and prepared and filed a 31-page supplement to the petition in *U.S. v. Zhong*, ACM 40411, USCA Dkt. No. 25-0011/AF; petitioned the CAAF for a grant of review and prepared and filed a 20-page supplement to the petition in *U.S. v. Myers*, ACM S32749, USCA Dkt. No. 25-0012/AF; prepared and filed a 15-page reply brief in *U.S. v. Cadavona*, ACM 40476; prepared and filed a 13-page brief on behalf of appellant following redocketing in *U.S. v. Kershaw*, ACM 40455; and prepared and filed a five-page response to the Government's motion for reconsideration in *U.S. v. Patterson*, ACM 40426.

Military appellate defense counsel has and will continue to work diligently to satisfy this Court's orders and fulfill his statutory duties to Appellant and his other 28 clients. While counsel is committed to competently performing his duties, including regularly working at night and on weekends, there is a limit to the output military counsel can reasonably produce. The circumstances described here are exceptional, but not because they are new or previously unknown. They are exceptional because they demonstrate a task saturation brought about by numerous duties that often have conflicting timelines. These duties necessitate difficult prioritizations that have resulted in the requests for enlargements of time throughout the life of Appellant's case.

Crucially, the delay in reviewing Appellant's record necessitated by the prioritization of older matters is *through no fault of Appellant*. Appellant was provided an update of the status of counsel's progress on Appellant's case following this Court's denial of Appellant's fifth motion for enlargement of time. Appellant was consulted with regard to enlargements of time and agrees with necessary requests for enlargements of time, including this request.

Appellant deserves a full review of his record by both detailed military counsel and civilian counsel. Given Appellant's desire for counsel to brief issues, this Court should consider *United States v. May*, 47 M.J. 478 (C.A.A.F. 1998), in assessing the relief sought in this Motion for Reconsideration. *May* underscored that this Court's independent review is no substitute for the briefing by appellate defense counsel on behalf of an individual appellant. *Id.* at 481; *see also United States v. Roach*, 66 M.J. 410, 418 (C.A.A.F. 2006). Military appellate defense counsel has an obligation to Appellant under Article 70, UCMJ, 10 U.S.C. § 870, to serve as his "champion on appeal." *Douglas v. California*, 372 U.S. 353, 356 (1963).

Both military appellate defense counsel and civilian counsel are actively working Appellant's case. Military appellate defense counsel has only just been able to turn his focus to Appellant's case because of his extensive docket and is currently prioritizing this review over other pressing cases in light of this Court's denial of Appellant's fifth motion for enlargement of time. Given military counsel's need to complete his review of the record, his additional responsibilities noted above, and the number of identified issues, counsel are unable to fully research, collaborate, consult the client, and brief all issues by the current deadline of 19 November 2024. This Court should grant additional time to ensure Appellant's military counsel has sufficient time to complete his review of the record of trial and both counsel have ample time to brief assignments of error in accordance with Appellant's wishes.

WHEREFORE, Appellant respectfully requests that this Court grant this Motion for Reconsideration and allow Appellant to file an AOE brief not later than 3 December 2024.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

[redacted]

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Captain (O-3) **BENJAMIN C. YORK** United States Air Force *Appellant.*	)	No. ACM 40604 5 December 2024

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

Pursuant to Rule 23.3(m)(5), the United States respectfully requests that it be given 14 days after this Court's receipt of a declaration or affidavit from trial defense counsel to submit its answer so that it may incorporate statements provided by Appellant's trial defense counsel in response to the specified ineffective assistance of counsel issue. This case was docketed with the Court on 4 October 2023. The Court received a verbatim transcript on 23 April 2024. Appellant filed their brief on 19 November 2024. A responsive brief is currently due on 19 December 2024. Since docketing, Appellant has been granted four enlargements of time. This is the United States' first request for an enlargement of time. As of the date of this request, 428 days have elapsed since docketing, and 226 days will have elapsed since receipt of the verbatim transcript.

There is good cause for the enlargement of time in this case. Appellant has raised one assignment of error in which he claims his trial defense counsel were ineffective. The United States cannot prepare its answer to the allegations of ineffective assistance of counsel without a statement from trial defense counsel. An enlargement of time is necessary to ensure trial defense

counsel have time to review the allegations before they draft and submit their statements to the Court, and to give the United States sufficient time to incorporate trial defense counsels' statements into its answer. The additional time will permit counsel to incorporate the changes and accommodate for the drafting and supervisory review before the United States files its answer.

To avoid any confusion as to due dates, the United States respectfully asks this Court to provide a specific date on which the United States' brief will be due to the Court.

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

[redacted]
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 5 December 2024.

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40604**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Benjamin C. YORK	)	
Captain (O-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 19 November 2024, Appellant submitted his assignments of error brief in which he raised an issue claiming his "[t]rial defense counsel were ineffective in investigating and seeking discovery to lay a sufficient foundation to establish evidence that would shift the burden to the prosecution to disprove unlawful influence."

On 5 December 2024, the Government filed a Motion to Compel Declarations to respond to Appellant's claim of ineffective assistance of counsel. The Government requests this court compel Appellant's trial defense counsel, Major Jonathan R. Fallon and Ms. Jocelyn Stewart, to provide affidavits or declarations in response to the allegation of ineffective assistance of counsel within 30 days of our order. According to the Government, Appellant's trial defense counsel both indicated they would not provide an affidavit or declaration absent an order by this court. Appellant did not respond to this motion.

Also on 5 December 2024, the Government moved for an enlargement of time in which to file its answer brief. The Government did not request a specific period of enlargement, but desired "sufficient time to incorporate trial defense counsels' statements into its answer." Appellant did not respond to this motion.

Accordingly, it is by the court on this 17th day of December 2024,

ORDERED:

The Government's Motion to Compel Declarations is **GRANTED**. Major Jonathan R. Fallon and Ms. Jocelyn Stewart are ordered to provide affidavits or declarations to the court with specific and factual responses to Appellant's claim that trial defense counsel were ineffective.

A responsive affidavit or declaration by each counsel will be provided to the court not later than **16 January 2025**. The Government shall also deliver a copy of the responsive documents to Appellant's counsel.

It is further ordered:

The Government's Motion for Enlargement of Time is **GRANTED**. The Government's answer to Appellant's assignments of error brief will be filed not later than **30 January 2025**.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Acting Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' MOTION TO COMPEL DECLARATIONS**
v.	)	Before Panel No. 2
Captain (O-3) **BENJAMIN C. YORK** United States Air Force *Appellant.*	)	No. ACM 40604 5 December 2024

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

Pursuant to Rule 23.3(e) of this Honorable Court's Rules of Practice and Procedure, the United States hereby requests this Court compel each of Appellant's trial defense counsel, Maj Jonathan Fallon and Ms. Jocelyn Stewart, to provide an affidavit or declaration in response to Appellant's allegations of ineffective assistance of counsel (IAC). In his first assignment of error, Appellant claims, "[t]rial defense counsel were ineffective in investigating and seeking discovery to lay a sufficient foundation to establish evidence that would shift the burden to the prosecution to disprove unlawful [command] influence." (App. Br. at 10).

On 3 December 2024, Appellant's trial defense counsel responded to undersigned counsel stating that they would only provide an affidavit or declaration pursuant to an order from this Court. To prepare an answer under the test set out in United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991), the United States requests that this Court compel trial defense counsel to provide an affidavit or declaration. Trial defense counsel filed a pre-trial motion to dismiss Appellant's case based on unlawful command influence. (ROT, Vol 2). Appellant is alleging his trial defense counsel failed to conduct a sufficient investigation into the allegation that Appellant's investigation and preferral were the result of unlawful command influence. According to

Appellant, trial defense counsel should have conducted further investigation into the alleged unlawful command influence because "the matter was seemingly a close call." (App. Br. at 10). Appellant has also requested a Dubay hearing for a judge to order "discovery, production, or subpoena of evidence" on this issue. (App. Br. at 11).

A statement from Appellant's trial defense counsel is necessary because the record is insufficient to determine the strategy they used when filing the motion to dismiss and any investigation conducted prior to filing the motion. Thus, the United States requires statements from both trial defense counsel to adequately respond to Appellant's brief. *See* United States v. Rose, 68 M.J. 236, 236 (C.A.A.F. 2009); United States v. Melson, 66 M.J. 346, 347 (C.A.A.F. 2008). In fact, this Court cannot grant Appellant's ineffective assistance of counsel claim without first obtaining statements from both trial defense counsel. *See* Rose, 68 M.J. at 237; Melson, 66 M.J. at 347.

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

[redacted]
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 5 December 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES MOTION TO ATTACH DOCUMENTS**
v.	)	Before Panel No. 2
Captain (O-3) **BENJAMIN C. YORK** United States Air Force *Appellant.*	)	No. ACM 40604 16 January 2025

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

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

- Appendix A – Mrs. Jocelyn C. Stewart Declaration with attachments, dated 15 January 2025 (32 pages)
- Appendix B – Major Jonathan R. Fallon Declaration, dated 16 January 2025 (2 pages)

The attached declarations are responsive to this Court's order directing Maj Fallon and Mrs. Stewart to provide declarations responsive to Appellant's Assignment of Error concerning whether he received ineffective assistance of counsel. (Court Order, dated 17 December 2024.) Appellant claims his trial defense counsel were ineffective. (App. Br. at 5-13.) These declarations are necessary to resolve these assignments of error.

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

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

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

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 16 January 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Captain (O-3) **BENJAMIN C. YORK,** United States Air Force, *Appellant*.	**BRIEF ON BEHALF OF APPELLANT** Before Panel No. 2 No. ACM 40604 19 November 2024

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

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RULES AND OTHER AUTHORITIES

Assignments of Error[1]

I.

Whether trial defense counsel were ineffective in investigating and seeking discovery to lay a sufficient foundation to establish evidence that would shift the burden to the prosecution to disprove unlawful influence. Alternatively, whether an evidentiary hearing is warranted to further develop the facts supporting this claim.

II.

Whether the convening authority impermissibly considered the gender of potential court members when detailing members to this court-martial.

III.

Whether the findings as to abusive sexual contact are legally and factually sufficient where evidence did not establish the required specific intent beyond a reasonable doubt.

IV.

Whether the military judge erred by instructing the members that assault consummated by a battery was a lesser-included offense of abusive sexual contact and that certain evidence could be considered for certain purposes under Mil. R. Evid. 404(b).

V.

Whether the Government can prove 18 U.S.C. § 922 is constitutional as applied to Captain York when he was convicted of offenses that do not fall within the nation's historical tradition of firearm regulation.

Statement of the Case

On 14 April 2023, a general court-martial consisting of officer members at Hurlburt Field, Florida, convicted Appellant, Captain (Capt) Benjamin C. York, contrary to his pleas, of one charge and one specification of abusive sexual contact in violation of Article 120, Uniform Code

[1] Additionally, Appellant personally raises one issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). *See* Appendix.

of Military Justice (UCMJ),[2] 10 U.S.C. § 920, and one charge and one specification of assault upon a commissioned officer in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 781. The military judge sentenced Capt York to be reprimanded, to forfeit $4,000 pay per month for six months, and to be confined for 15 days. R. at 846. The convening authority took no action on the findings or the sentence. Convening Authority Decision on Action – *United States v. Capt Benjamin C. York*, 3 May 2023.

Statement of Facts

Capt York and C.W-S., the named victim, both served as instructors in the Air Force Reserve Officer Training Corps (ROTC). R. at 417–18. They initially met when C.W-S. came to the assess the programs at Capt York's ROTC detachment. R. at 418. C.W-S. described their interactions during that assessment as professional with some small talk. *Id.*

The two next encountered each other in the summer of 2019 when they both served as training officers for ROTC field training at Maxwell Air Force Base, Alabama. R. at 419–20. Capt York had previous experience at field training, so he served as a squadron training officer overseeing multiple flights. R. at 420. C.W-S. served as a flight training officer, but Capt York did not oversee her flight. *Id.* They ran into each other during in-processing, and Capt York mentioned an agent from the Air Force Office of Special Investigations (OSI) he thought she might know since C.W-S. was an OSI agent. *Id.* Capt York later message C.W-S. on GroupMe, an application the field training officers used send messages to each other and to groups. R. at 421. This began a chain of messages over a couple of weeks between Capt York and C.W-S. Pros. Ex. 1. They discussed events at field training and outings by the training officers. *Id.* Capt York

[2] Unless otherwise noted, all references to the UCMJ, the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

invited C.W-S. to have a beer with him several times, and although she declined each invitation for different reasons, she generally expressed interest in doing so at some point. *Id.* Capt York also mentioned booking a massage at some point, and C.W-S. indicated she would be interested in a massage and asked Capt York to tell her if he found a place for them. *Id.* at 4.

The interaction at issue began when Capt York came to pick up some leftover food C.W-S. kept for him following a dinner outing with several training officers. R. at 430. C.W-S. sent Capt York her room number, and he came to her room to get his food and drop off some stickers that were part of a running joke at field training. R. at 432–333; Pros. Ex. 1 at 11. C.W-S. answered the door but had to retrieve the food from the refrigerator on the other side of the room. R. at 435. After she handed him the food, they made small talk by the door, which C.W-S. did not mind. R. at 436. After a little while, C.W-S. sat down on some furniture near the door. *Id.* Capt York sat down next to her after a few minutes. R. at 437. According to C.W-S.'s testimony, Capt York then swung his leg around her and sat behind her with his legs around hers. R. at 438. He began massaging her shoulders, saying he had not yet gotten a massage, and leaned in to kiss her neck. R. at 439. C.W-S. stated that she then jumped up and told him to get his shoes and his food and leave. R. at 440.

C.W-S. next testified that Capt York got up and tried to pull her towards him, grabbing her "all over." R. at 440. She indicated she tried to push him off, but they went "round and round in circles." *Id.* According to C.W-S., he "grabbed [her] butt while trying to pull [her] towards him." R. at 440–41. Capt York also grabbed her back and sides. R. at 440. C.W-S. did not want to escalate this situation or disturb her neighbor across the hall. R. at 441. Eventually, Capt York turned on her shower and began singing a song, after they may have discussed karaoke earlier, and C.W-S. may have pretended to film him, teasing that she was going to send a video of him to a

group chat. R. at 441, 447, 499–500. C.W-S. testified that Capt York again tried to pull her towards him but tripped over the leg of a loveseat, and they both fell to the floor. R. at 447. She stated they "basically roll[ed] around on the floor." *Id.*

During this interaction, C.W-S. sent a message to a friend of hers, Capt J.S., saying she was having trouble getting a "dude" out of her room. R. at 441, 444. Capt J.S. was in his lodging room in another building, so he created a group message with the C.W-S. and Capt C.S., another training officer who was lodged in the same building as C.W-S. R. at 441, 445. C.W-S. provided her room number in the group message, and Capt C.S. went to her room. R. at 445, 448. Capt C.S. suggested that she and C.W.-S. should go to the automated teller machine (ATM) to get cash before cadets arrived the next day. R. at 448. They all left C.W-S.'s room, and C.W-S. and Capt C.S. went to a nearby ATM, where they met Capt J.S. R. at 449.

C.W-S. reported this incident to OSI and was interviewed days later. R. at 449; App. Ex. II at 14. During this interview, C.W-S. stated that Capt York did not touch her breasts but "might have just barely grazed [her] butt." App. Ex. XXXI at 30. She provided further detail for this, saying, "[H]e wasn't grabbing my parts." *Id.* Following OSI's investigation, Capt York received a letter of reprimand (LOR) that was later downgraded to a letter of admonishment (LOA). App. Ex. II at 148–50. Apparently, the Government never provided C.W-S. an update on the disposition of her allegations, and C.W.-S. filed a FOIA request to learn more. App. Ex. XXXIII at 9–11. Dissatisfied with what she learned from the FOIA request, C.W-S. initiated a Congressional inquiry with Senator Tammy Duckworth. App. Ex. II at 4. Senator Duckworth, in turn, sent a letter to the Chief of Staff of the Air Force, General Charles Q. Brown, which stated she was "inquiring as to whether appropriate measures are being taken to ensure that there isn't a serial

abuser in the Air Force officer corps." App. Ex. II at 161. The letter went on to say Senator Duckworth would appreciate General Brown and his staff "looking into this matter." *Id.* at 162.

OSI had previously responded to another congressional inquiry from Senator Jeanne Shaheen, stating that it "conducted a thorough review into the investigation" in this case. App. Ex. V. This response went on to say, "The review revealed that the investigation was conducted in an unbiased manner and in accordance with Air Force and OSI policy." *Id.* Despite this, OSI initiated a new investigation following Senator Duckworth's letter to General Brown and reinterviewed C.W-S. App. Ex. II at 4. This time, C.W-S. told the investigators Capt York touched her breasts and grabbed her butt. App. Ex. XXXIII at 28–30. She explained the differences in her account by saying she was "minimizing" during her first interview. R. at 514. The reinvestigation ultimately led to the preferral and referral of charges against Capt York.

Additional facts are included *infra* as necessary.

Argument

I.

Trial defense counsel were ineffective in investigating and seeking discovery to lay a sufficient foundation to establish evidence that would shift the burden to the prosecution to disprove unlawful influence. Alternatively, an evidentiary hearing is warranted to further develop the facts supporting this claim.

Additional Facts

OSI began investigating Capt York based on statements and information it received from C.W-S. App. Ex. II at 99. As the investigation progressed, OSI briefed the Chief of Military Justice at Maxwell Air Force Base, who opined that the allegations did not satisfy the elements of an Article 120 UCMJ offense but did violate Article 128. App. Ex. 2 at 3. Capt York's commander issued him a LOR in November 2019, which was later downgraded to a LOA, for "attempt[ing] to establish an unprofessional, adulterous relationship." App. Ex. II at 148–49.

C.W-S. reportedly told a friend that she was "bummed" that the Applicant did not get into more trouble. App. Ex. II at 3, 20. In the summer of 2021, C.W-S. submitted an inquiry to Senator Duckworth about why the Applicant was not prosecuted. *Id.* at 4, 21. Senator Duckworth asked the General Brown to "inquire" about the incident. Subsequently, OSI reopened the investigation, and C.W-S. substantially changed her story during a reinterview. *Id.* at 4, 23. Ten months later, the charges were preferred against Capt York.

OSI reported that they reopened the investigation into Capt York "based on information received from Senator Tammy Duckworth." App. Ex. II at 85. Senator Duckworth had "expressed concern that the VICTIM's report of sexual assault was not appropriately investigated." *Id*. Four months after receiving Senator Duckworth's letter, OSI reviewed its investigation, coordinated with the servicing staff judge advocate, and concluded there was probable cause for an Article 120 allegation. App. Ex. III at 2, 9.

Capt York moved to dismiss the Charges and Specifications due to unlawful command influence. App. Ex. II. After a hearing, the military judge denied the Defense's motion. R. at 96; App. Ex. XXXVI. The military judge found that Senator Duckworth made a broad request to General Brown to review practices, procedures, and sexual assault complaints at Maxwell to ensure there were no systemic failures across the board. App. Ex. XXXVI at 2, 4. The military judge also found that Senator Duckworth's letter was not directed at Capt York, nor was it a prejudgment of his guilt. App. Ex. XXXVI at 4, 6–10. Although the military judge initially concluded on the record that the Defense had presented enough evidence to shift the burden to the Government, his written ruling found the Defense had not presented sufficient evidence. R. at 70–71, 107; App. Ex. XXXVI at 16, 21. He did note, however, that there was a "reasonable inference that the Chief of Staff directed the reopening of the investigation." R. at 70.

Standard of Review

Claims of ineffective trial defense counsel (TDC) assistance are reviewed de novo. *United States v. Palacios Cueto*, 82 M.J. 323 (C.A.A.F. 2022). A claim of unlawful influence from a non-command source is evaluated by the same standard used to evaluate "abuses perpetrated by those in command or those acting with the mantle of command authority." *United States v. Barry*, 78 M.J. 70, 76–77 (C.A.A.F. 2018).

Law and Analysis

The Constitution guarantees the right to effective assistance of counsel before and during trial. U.S. Const. amend VI, cl. 6; *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Gilley*, 56 M.J. 113 (C.A.A.F. 2001). TDC is clothed with a "strong presumption" of competence, and an appellant bears the heavy burden of establishing "objectively [un]reasonable" and "deficient performance," as well as prejudice. *Palacios Cueto,* 82 M.J. at 327; *United States v. Drewell*, 55 M.J. 131, 133 (C.A.A.F. 2001). The conduct of a TDC team "is measured by the combined efforts of the defense team as a whole." *United States v. Boone*, 42 M.J. 308, 313 (1995)

(citing *United States v. Walker*, 45 C.M.R. 150, 154 (C.M.A. 1972)); *United States v. Golston*, 53 M.J. 61, 67 (C.A.A.F. 2000) (Gierke, J., concurring).

The United States Court of Appeals for the Armed Forces (CAAF) uses a three-part test to determine whether this presumption of competence has been overcome:

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

United States v. Palik, 84 M.J. 284, 289 (C.A.A.F. 2024) (quoting *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011)). Prejudice does not require deficient performance that "more likely than not altered the outcome . . . but rather . . . establishes a probability sufficient to undermine confidence in [that] outcome." *United States v. Akbar*, 74 M.J. 364, 436 (C.A.A.F. 2015) (citing *Porter v. McCollum*, 558 U.S. 30, 44 (2009)). "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, 446 U.S. at 694.

In acting effectively, "Defense counsel must perform a reasonable investigation or make a reasonable decision that an avenue of investigation is unnecessary." *United States v. Osheskie*, 63 M.J. 432, 435 (C.A.A.F. 2006) (citing *United States v. Brownfield*, 52 M.J. 40 (C.A.A.F. 1999)); *United States v. Scott*, 24 M.J. 186 (C.M.A. 1987). *Scott* is the seminal case on pretrial preparation. The appellant told his counsel that he had an alibi, most of which was already detailed in a

statement to investigators. Yet, the counsel failed to investigate. In reversing Scott's conviction, the Court of Military Appeals stated

> Because "[i]nvestigation is an essential component of the adversary process," . . . that testing process generally will not function properly unless defense counsel has done some investigation. Thus, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary . . . [A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."

Scott, 24 M.J. at 188 (citations omitted) (quoting *Wade v. Armontrout*, 798 F.2d 304, 307 (8th Cir. 1986); *Strickland*, 466 U.S. at 691).

Undoubtedly, defense counsel must be diligent and investigate in preparation for trial, which extends to investigating appropriate pretrial motions like unlawful command influence (UCI) and unlawful influences (UI). *Cf., United States v. Brozzo*, No. ACM 34542 (f rev), 2003 CCA LEXIS 187, at *9 (A.F. Ct. Crim. App. Aug. 26, 2003) ("Considering the entire record, it is apparent trial defense counsel zealously defended their client in this case. For example, they made extensive requests for discovery."); *see also Strickland*, 466 U.S. 668. To claim UCI, an appellant must allege acts that, if true, would constitute UCI and that such acts have a logical connection to potential unfairness in the court-martial. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). If the defense produces "some evidence" of UCI, the burden shifts to the government to show that (1) the facts as alleged are untrue, (2) that the alleged facts do not constitute unlawful command influence, or (3) even if there was unlawful command influence, there was no material prejudice to the appellant beyond a reasonable doubt. *United States v. Simpson*, 58 M.J. 368

(C.A.A.F. 2003). The number of facts needed from the defense is low but must be more than speculation or a "mere allegation." *Id*.

The evidence in the record was more than enough to alert TDC of the need for further investigation. But for Senator Duckworth's communique to General Brown and the probable subsequent communications within the Air Force, it is unlikely that any OSI activities at Maxwell would have been put under the microscope as they were. TDC thought enough of the potential UCI or UI to file a motion to dismiss based upon it. App. Ex. II. The military judge acknowledged that the facts presented a "reasonable inference that the Chief of Staff directed the reopening of the investigation." R. at 70. Based on the record, the matter was seemingly a close call, as demonstrated by the military judge's initial finding that the Defense presented sufficient evidence to shift the burden to the Government before changing this finding in his written ruling. *Compare* R. at 70–71, 107 *with* App. Ex. XXXVI at 16, 21. Where there is such a close call on a potentially case-dispositive motion, reasonable counsel should conduct additional investigation to uncover all available evidence.

Despite the ample reasons for additional investigation, the defense motion to dismiss for actual and apparent UCI is long on the law but devoid of facts to support the claim, just as the record is devoid of efforts to garner relevant facts. App. Ex. II. There is a letter from Senator Duckworth to General Brown, the investigation is reopened, and eventually charges are preferred. It is highly improbable that the apparent void in the record between these events was not filled with communications up and down the Air Force and OSI command chains. Discovery and investigation by the defense would have likely revealed communications between the Chief of Staff's office and other entities, discussions amongst the decisions makers involved, and responses used to prepare an eventual response to Senator Duckworth. These communications would have

shown the extent to the influence of the Chief of Staff and other Air Force officials on the reinvestigation and preferral of charges against Capt York after a United States Senator suggested he may be a "serial abuser." App. Ex. II at 161. The failure to seek such evidence falls measurably below the performance ordinarily expected of fallible lawyers. *Palik*, 84 M.J. at 289.

This Court cannot assess prejudice to the Appellant without first ordering a post-trial hearing consistent with *United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1967). A *Dubay* judge may order discovery, production, or the subpoena of evidence. The issue in *Dubay* was allegations that the convening authority had violated Article 37, UCMJ, 10 U.S.C. § 837 by exercising "command interference" with the "judicial bodies." 37 C.M.R. at 413. The court stated,

> [A]ppellate bodies in the past have had to resort to the unsatisfactory alternative of settling the issue on the basis of *ex parte* affidavits, amidst a barrage of claims and counterclaims. Compare *United States v Ferguson*, 5 USCMA 68, 17 CMR 68, with *United States v Shepherd*, 9 USCMA 90, 25 CMR 352. The conflicts here make resort to affidavits unsatisfactory and we determine upon the following as the means of settling the matter herein, as well as in future cases in which a similar issue may be raised either here or before a board of review.

Id. Later caselaw has established that affidavits may be suitable resolutions, but not here. If TDC declare that they did make significant discovery efforts and received nothing helpful in return, that begs the question—why file the motion? If counsel declare they made discovery efforts but were rebuffed, why file the motion without litigating issues of discovery and production, requesting the issuance of subpoenas, or seeking depositions?

In *United States v. Sales*, 56 M.J. 255 (C.A.A.F. 2020), and *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997), criteria were adopted for when a *Dubay* hearing is appropriate.[3] An analysis of the six principles in *Ginn* indicates a *Dubay* hearing is appropriate. *Ginn* expressly

[3] In *Sales* and *Ginn* the question related to resolving conflicting affidavits of the appellant and the trial defense counsel.

contemplated a scenario in which an appellant claims ineffective assistance via an affidavit, but the same reasoning can be applied to this claim. 47 M.J. at 248.

First, if the claim includes fact that "allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor, the claim may be rejected on that basis." *Id.* This principle favors fact-finding because it is not met. Without facts, it is not possible to know whether TDC adequately investigated the potential UCI or UI, much less whether a motion to dismiss for unlawful influence should have been successful. This claim should result in relief if all factual disputes are resolved in Capt York's favor.

Second, if the claim "does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis." *Id.* This claim sets forth facts regarding the congressional inquiry and resulting reinvestigation. It also highlights the dearth of evidence that would have resulted from further investigation or litigation regarding such investigative steps.

Third, if a claim "is factually adequate on its face to state a claim of legal error and the Government either does not contest the relevant facts or offers an affidavit that expressly agrees with those facts, the court can proceed to decide the legal issue on the basis of those uncontroverted facts." *Id.* The Government has not yet indicated whether it agrees with the facts set forth in this claim.

Fourth, if the claim "is factually adequate on its face but the appellate filings and the record as a whole 'compellingly demonstrate' the improbability of those facts, the court may discount those factual assertions and decide the legal issue." *Id.* The assertions underlying this claim are based on the record as a whole, so the record cannot "compellingly demonstrate" the improbability of those facts.

"Fifth, when an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record . . . unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal." *Id.* This case does not involve a guilty plea.

"Sixth, the Court of Criminal Appeals is required to order a factfinding hearing only when the above-stated circumstances are not met." *Id.* Here, none of the of above are met.

WHEREFORE, Capt York respectfully asks that this Court remand his case for further factfinding in accordance with *Dubay*.

II.

The Convening Authority selected all of the potential court members presented with traditionally female names, creating a prima facie showing that gender was impermissibly considered when selecting members, giving rise to a presumption that the panel was not properly constituted.

Additional Facts

When convening this court-martial, the convening authority selected members from a list of 24 potential members provided to him. 1st Indorsement, AFSOC/JA, 7 Nov 22, Pretrial Advice – *United States v. Captain Benjamin C. York*, 7 November 2022. The convening authority selected all of the members on the list with traditionally female names. *Id.* At the same time, all of the members not selected by the convening authority had traditionally male names. *Id.*

Standard of Review

Where no objection is made, court-martial composition issues are reviewed for plain error. *United States v. King*, 83 M.J. 115, 120-21 (C.A.A.F. 2023). Under plain error review, the appellant bears the burden to demonstrate error that is clear or obvious and results in material prejudice to his substantial rights. *Id.* "[W]here the law at the time of trial was settled and clearly

contrary to the law at the time of appeal—it is enough that an error be 'plain' at the time of appellate consideration." *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008) (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)). Relatedly, "an appellant gets the benefit of changes to the law between the time of trial and the time of his appeal." *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019); *see also Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021).

"[W]henever an accused makes a prima facie showing that race played a role in the panel selection process at his court-martial, a presumption will arise that the panel was not properly constituted." *United States v. Jeter*, 84 M.J. 68, 70 (C.A.A.F. 2023). The Government may then seek to rebut that presumption. *Id*. Should the Government be unable to rebut the presumption, automatic reversal is warranted. *Id*. at 74; s*ee also Weaver v. Massachusetts*, 582 U.S. 286, 301 (2017) (granting "automatic relief to defendants who prevailed on claims alleging race . . . discrimination in the selection of the petit jury"); *Batson v. Kentucky*, 476 U.S. 79, 100 (1986) ("If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed."); *Johnson*, 520 U.S. at 466 (citing Supreme Court precedent for the proposition that cases *not* governed by Federal Rule of Criminal Procedure Rule 52(b) are "structural errors" without a prejudice analysis).

Law and Analysis

"The Equal Protection Clause . . . forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black." *Batson*, 476 U.S. at 97. This statement is no less true in the military justice system where the convening authority might arbitrarily select members based on race to create a more diverse

panel, or one representative of the accused's race. *Jeter*, 84 M.J. at 73. In extending *Batson* to panel member selection, the Court of Appeals for the Armed Forces (CAAF) unequivocally articulated, "It is impermissible to exclude or intentionally include prospective members based on their race." *Id.* "Just as in the civilian context, a convening authority may not draw up a members panel pursuant to the neutral criteria of Article 25, UCMJ, only to have discriminated at other stages of the process." *Id*. at 74.

However, at the time of Capt York's court-martial, *United States v. Crawford* provided that convening authorities *could* use race to select a panel when it was "in favor of, not against, an accused." *United States v. Crawford*, 35 C.M.R. 3, 13 (U.S. C.M.A. 1964). Military appellate courts did "not presume improper motives from inclusion of racial . . . identifiers on lists of nominees for court-martial duty." *United States v. Loving*, 41 M.J. 213, 285 (C.A.A.F. 1994). Taking note of race during panel selection became further extended in *United States v. Smith*, a case about gender, providing:

> As we interpret Article 25 in light of *Crawford*, Congress has not required that court-martial panels be unrepresentative of the military population. Instead, Congress has authorized deviations from the principle of representativeness, if the criteria of Article 25 are complied with. Thus, *a commander is free to require representativeness in his court-martial panels and to insist that no important segment of the military community -- such as blacks, Hispanics, or women -- be excluded from service on court-martial panels*.

United States v. Smith, 27 M.J. 242, 249 (C.M.A. 1988) (emphasis added). Not only could race be used to make a panel more representative of the accused's race, but also race could be considered to make a more diverse panel, representative of the military community. Then, based on this extension of *Crawford*, the CAAF noted, "In our view, a convening authority may take gender into account in selecting court members, if he is seeking in good faith to assure that the court-martial panel is representative of the military population." *Id*. As such, at the time of Capt

York's trial, both race and gender could be considered to create a panel.

Last year, though, *Jeter* explicitly held *Batson* had abrogated *Crawford*'s encouragement to use race when deciding who should be appointed to a panel: "A person's race is simply unrelated to his fitness as a juror." *Jeter* did not consider the question of using gender as a basis for juror fitness. However, it is clear through the abrogation of *Crawford* by *Batson*, *Smith* is similarly abrogated by *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 129 (1994). *J.E.B.* followed *Batson* and extended *Batson*'s holding to gender: "We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality." *Id.* As with race, "intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause." *Id*. The Supreme Court also wrote:

> Failing to provide jurors the same protection against gender discrimination as race discrimination could frustrate the purpose of *Batson* itself. Because gender and race are overlapping categories, gender can be used as a pretext for racial discrimination. Allowing parties to remove racial minorities from the jury not because of their race, but because of their gender, contravenes well-established equal protection principles and could insulate effectively racial discrimination from judicial scrutiny.

Id. at 145. It is clear, then, that gender, like race, cannot be considered for court member selection, whether members of certain genders or races are intentionally "included" or "excluded." To "include" one means "excluding" another. "The exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system." *Id*. at 142 n.13. *Jeter* unequivocally states that "race shall not be a criterion in the selection of court-martial members," and its reasoning indicates the same must be true of gender. 84 M.J. at 73. This Court recently expressed a similar view, stating, "*J.E.B.* essentially put gender on the same constitutional footing as race in this respect." *United States v. Patterson*, No. ACM 40426, 2024 CCA LEXIS 399, at *20–21 (A.F. Ct. Crim. App. Sept. 27, 2024) (assuming for the purposes of analysis that the rationale in *Jeter* regarding race "applies to selection or exclusion of members

based on gender").

Jeter lays out a process for determining whether impermissible criteria were used in the selection of court-martial members. First, "whenever an accused makes a prima facie showing that race played a role in the panel selection process at his court-martial, a presumption will arise that the panel was not properly constituted." 84 M.J. at 70. Here, the convening authority's selection of members creates such a prima facie showing. When referring the charges and specifications to a general court-martial, the convening authority selected members from a list provided for that purpose. 1st Indorsement, AFSOC/JA, 7 Nov 22, Pretrial Advice – *United States v. Captain Benjamin C. York*, 7 November 2022. The convening authority selected every member with a traditionally female name, and every member on the list who was not selected had a traditionally male name. *Id.* Prima facie means "sufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it may later be proved to be untrue." *Prima Facie*, *Black's Law Dictionary* (11th ed. 2019). On first examination, selecting every potential member with a traditionally female name while only not selecting potential members with traditionally male names seems to indicate consideration of gender when selecting members.

The *Jeter* court also noted the understandable belief that *Crawford* was still good law at the time contributed to the prima facie showing, and the same is true here because Capt York's court-martial also took place before the court's holding in *Jeter*. *Id.* at 74. At the time, the convening authority would have reasonably believed it was permissible to consider gender for the purpose of creating a panel that is representative of the military community. Based on these factors, Capt York has made a prima facie showing that gives rise to a presumption that impermissible criteria was allowed to enter the court member selection process.

Once a prima facie showing has given rise to the presumption that the panel was not properly constituted, "[t]he government may then seek to rebut that presumption." *Jeter*, 84 M.J. at 70. Here, the documentation regarding the selection of court members fails to rebut this presumption because none of it indicates the convening authorities did not consider the racial and gender identifiers available to them in the court member data sheets. On the contrary, the results of the selection process indicate a probable consideration of gender. Without rebuttal, the presumption that these impermissible identifiers were used when selecting court members stands, constituting clear and obvious error since it is plain at the time of appellate review that this factor may not be considered at all. Although the plain error standard normally calls for an assessment of prejudice, that is not necessary here because the composition of a court-martial is a structural issue, and the unrebutted presumption warrants automatic reversal. *See Jeter*, 84 M.J. at 74; *Johnson*, 520 U.S. at 466. This Court should therefore grant the same remedy the court granted in *Jeter* by setting aside the findings of guilty and the sentence. 84 M.J. at 75.

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

III.

The findings of guilty of abusive sexual contact are legally and factually insufficient because the evidence failed to establish the required specific intent beyond a reasonable doubt.

Standard of Review

This Court reviews issues of legal and factual sufficiency de novo. Art. 66(d), UCMJ, 10 U.S.C. § 866(d); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law and Analysis

This Court "may affirm only such findings of guilty . . . as the Court finds correct in law

and fact and determines, on the basis of the entire record, should be approved." Art. 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). "The 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 test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [this Court] are themselves convinced of appellant's guilt beyond a reasonable doubt."[4] *Rosario*, 76 M.J. at 117 (quoting *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011)).

Here, the legal and factual insufficiency arises from the Government's failure to prove specific intent for abusive sexual contact. To meet its burden on that specification, the Government had to prove Capt York touched C.W-S.'s buttocks with his hands "with an intent to gratify his sexual desire." R. at 694. The evidence did not establish the requisite intent. C.W-S.'s testimony provided the only account of the incident in question, and she described a touch that does not inherently show an intent to gratify sexual desire. According to her testimony, Capt York "grabbed [her] butt while trying to pull [her] towards him." R. at 440–41. Indeed, he also grabbed her back and sides at the same time. R. at 440. Based on this description, any touch of C.W-S.'s buttocks was not intended to gratify Capt York's sexual desire. It was to pull C.W-S. towards him, just as the concurrent touches to her back and sides were intended to pull her towards him.

Additional doubt regarding Capt York's specific intent comes from C.W-S.'s prior

[4] Since Capt York's convictions are for offenses that occurred in 2019, the factual sufficiency review standards in effect before 1 January 2021 apply here. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542 (e)(2), 134 Stat. 3388, 3612–13 (2021).

inconsistent statements. Although she testified at trial that Capt York "grabbed" her butt, this testimony differed significantly from the statement she made to OSI mere days after the incident. *Compare* R. at 440–41 *with* App. Ex. XXXI at 30. In that interview, C.W-S. told OSI Capt York "might have just barely grazed [her] butt" and "wasn't grabbing [her] parts." App. Ex. XXXI at 30. These inconsistencies should lead a reasonable factfinder to doubt the veracity of C.W-S.'s testimony that Capt York "grabbed" her buttocks, and it is harder to infer intent to gratify sexual desire from other, potentially less deliberate forms of touching. This doubt adds to the insufficiency of the conviction.

It is important to distinguish between overall intent in a situation and the intent of a specific action within that situation. The Government attempted to meet its burden by arguing that Capt York earlier attempt to kiss C.W-S.'s neck showed intent to gratify his sexual desire. R. at 720. However, kissing or attempting to kiss C.W-S.'s neck is not the act the Government charged, and it was not simultaneous with Capt York reportedly touching her buttocks. R. at 439–41. Whatever Capt York's overall intent or desire for that encounter may have been, an overall intent cannot be imputed to every discrete action within the situation. The buttocks touch itself was not intended to gratify sexual desire, and an earlier kiss or attempted kiss does not necessarily indicate otherwise. C.W-S.'s own description is much more indicative of a touch intended to pull her towards him.

The evidence here does not prove Capt York touched C.W-S.'s buttocks with an intent to gratify his sexual desire. Considering this evidence, no reasonable trier of fact could have found the essential element of specific intent beyond a reasonable doubt, meaning the conviction is legally insufficient. Moreover, the only evidence of this touch—C.W-s.'s testimony—leaves significant doubt as to Capt York's intent, especially when viewed in conjunction with evidence

of prior inconsistent statements. Thus, the members of this Court should not themselves be convinced of Capt York's guilt beyond a reasonable doubt, making the conviction for abusive sexual contact factually insufficient.

WHEREFORE, Capt York respectfully requests this Honorable Court set aside the findings of guilty as to Charge I and its specification and dismiss this charge and specification.

IV.

The military judge erred by instructing the members that assault consummated by a battery was a lesser-included offense of abusive sexual contact and that certain evidence could be considered for certain purposes under Mil. R. Evid. 404(b).

Additional Facts

The lesser included offense instruction: Capt York was charged with abusive sexual contact under Article 120, UCMJ, for touching C.W-S.'s "buttocks" and with assault upon a commissioned officer under Article 128, UCMJ, for grabbing C.W-S.'s torso. DD Form 458, Charge Sheet, 25 May 2022.[5] The military judge held a hearing on his proposed findings and instructions. R. at 644. The prosecution asked for a lesser-included offense ("LIO") instruction for assault consummated by a battery under the abusive sexual contact charge. R. at 644. The Defense objected to this instruction. R. at 645. Trial counsel argued that the buttocks touch was without consent, and if the members found that it was not to gratify the Appellant's sexual desire, that would be sufficient for the LIO. R. at 644. The military judge granted the Government's request. R. at 648.

The Mil. R. Evid. 404(b) instruction: The prosecution did not provide notice to the defense of its intent to offer testimony under Mil. R. Evid. 404(b). R. at 679. Nevertheless, the military

[5] The Specification of Charge II initially alleged that the Appellant grabbed the victim's "clothes," but that was amended at the time of referral to "torso."

judge sua sponte conducted a Mil. R. Evid. 404(b) analysis for certain evidence and told the parties he would instruct on the Rule. R. at 92.[6] When the defense later objected to the proposed Mil. R. Evid. 404(b) instruction, the Government argued that the testimony was res gestae. R. at 679–80. The military judge disagreed that the testimony was res gestae but concluded he would still provide the Mil. R. Evid. 404(b) instruction. R. at 681–83. This instruction told the member they could consider evidence of massaging and kissing as evidence of intent to gratify sexual desire. R. at 683.

Standard of Review

A preserved claim of an instructional error is a question of law reviewed de novo. *United States v. Payne*, 73 M.J. 19, 22 (C.A.A.F. 2014). A military judge's decision to provide an instruction is reviewed for abuse of discretion. *United States v. Anderson*, 51 M.J. 145, 153 (C.A.A.F. 1999); *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002).

Law

A military judge is duty-bound to correctly instruct the members, including whether a charge is a lesser-included offense of another. This duty is independent of any request or objection by the parties. A military judge must instruct on lesser included offenses where "there is in the record some evidence reasonably placing" the lesser offense in issue. *United States v. Smith*, 50 M.J. 451, 455 (C.A.A.F. 1999).

The military judge applies the elements test to determine whether an offense is a lesser included offense. *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010) (the court held that aggravated sexual assault could be a lesser included offense of forcible rape, noting that the listed

[6] Although this analysis originally took place during a closed hearing, Appellant is not moving to file this portion of the brief under seal because the subject matter at issue was not the reason for closing the hearing, as the military judge noted when discussing it in open court later. R. at 681.

lesser included offenses in the MANUAL FOR COURTS-MARTIAL are "not all-exclusive"). The Discussion to Part IV, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019) states,

> Presidentially prescribed lesser included offenses, as authorized under Article 79(b)(2), are established in Appendix 12A. For offenses not listed in Appendix 12A that may or may not be lesser included offenses, see R.C.M. 307(c)(3) and its accompanying Discussion regarding charging in the alternative. Practitioners are advised, to read and comply with *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010).

"The statutory authority for affirming an LIO rather than the facially charged offense derives from Article 79, UCMJ: 'An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein.'" *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010).

An offense of assault consummated by a battery is not a lesser included offense of abusive sexual contact. *United States v. Riggins*, 75 M.J. 78 (C.A.A.F. 2016); *United States v. Armstrong*, 77 M.J. 465 (C.A.A.F. 2018).

Analysis

1. The lesser included offense instruction was erroneous because assault consummated by a battery is not a lesser included offense of abusive sexual contact.

The issue is preserved because the defense objected to the instruction. R. at 648. In *Alston*, the CAAF held that an aggravated sexual assault was not a lesser included offense of rape, because there was not adequate notice of a need to defend against such a charge. 69 M.J. at 216. The CAAF adopted the elements test of *United States v. Schmuck*, 489 U.S. 705 (1989), and reinforced that in *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010). A comparison of the required elements of abusive sexual contact and assault consummated by a battery fails the elements test. Abusive sexual contact requires proof that the offense was committed with the intent to gratify the

Appellant's sexual desire. Assault consummated by a battery requires proof that the act was done with unlawful force or violence.

The CAAF decision in *United States v. Riggins*, 75 M.J. 78, 80 (C.A.A.F. 2016), is close to dispositive. In *Riggins*, the court held that an Article 128 assault consummated by a battery is not a lesser included offense of "abusive sexual contact" because the Article 120 offense does not require the prosecution to prove a lack of consent. *Accord United States v. Armstrong*, 77 M.J. 465 (C.A.A.F. 2018). Therefore, the defense's statement that it was an all-or-nothing situation was legally correct. This was not a case where the military judge could disagree with a defense all-or-nothing request and instruct anyway. *See, e.g., United States v. Duncan*, 36 M.J. 688 (N.M.C.M.R. 1992).

During closing argument, the defense was forced to argue against considering the "out" of the lesser included offense, paradoxically bolstering the idea that there may have been intent to gratify sexual desire and minimizing the effect of its other arguments. R. at 754. Further, the military judge can be viewed as having placed his judicial imprimatur on a choice for the members beyond the usual one. The members could interpret the instruction as the judge suggesting that at least an assault happened, thus the question was whether it was or was not the more serious offense. In these ways, the erroneous instruction prejudiced Capt York.

2. The Mil. R. Evid. 404(b) instruction was erroneous because there was never any notice of intent to use evidence for a purpose under that rule.

The defense was surprised in several ways by the military judge's sua sponte decision to give a Mil. R. Evid. 404(b) instruction. First, the defense learned for the first time that the prosecution intended to argue the evidence to rebut a mistake defense. Second, the military judge did his own analysis without requiring briefs from the parties. And lastly, the military judge would

excuse the Government's failure to give the required notice[7] and would also give an instruction that could place judicial emphasis on the evidence in a way that might disfavor the defense. Rather than stop after rejecting the Government's argument that the evidence at issue was res gestae, the military judge departed from the role of a neutral and impartial overseer of the proceedings to aid the prosecution and abused his discretion in giving the other acts instruction.

The issue of evidence under Mil. R. Evid. 404(b) did not arise until the discussion of instructions. R. at 679. The defense then objected to language implicating Mil. R. Evid. 404(b)—preserving the objection. *Id*. The Defense noted that it "appears to be the court has provided a 404(b) with regard to [sic] under the next section the uncharged physical contact. Because the government did not provide a 404(b) notice for any purpose, for any of the uncharged misconduct[.]" *Id.* Defense counsel then went on to state, "I mean, I think certainly the government could have elicited 404(b), but they didn't. And it appears that the court is inserting this – and sitting with the trial counsel who is doing the close, he said he does not intend to argue it." R. at 680. The STC then interjected, seemingly to contradict a lack of intent "to argue it."

> STC: I guess, nuance, sir. I *do* intend to argue the massage and the kiss for a specific intent of the abusive sexual contact. And I believe the reason that the court – and first of all, the government's position, this is not 404(b), and this, one, *res gestae*. It sounds like the court may have had a different interpretation of that, but this is direct evidence going to the first element of the 120 charge, which is to show the specific intent to gratify sexual desire as it is immediately proceeding what happens next.
>
> It goes to show that. So it's not 404(b). It's not uncharged misconduct. It is specific evidence for an element of the crime. And I believe the reason that this language was added, if we're going back to what happened right after the – within the 412 ruling is the government's concern is that if there is an instruction that says you may only consider this for the limited purpose of deciding whether or not there was a reasonable mistake of fact as to consent, I didn't want the members to be limited to that because we are intending to argue it as evidence of the specific intent to gratify

[7] This excuse compares unfavorably with the military judge holding the defense strictly accountable for filing their post-trial R.C.M. 917 motion late.

> sexual desire, which is understanding it looks a lot like a 404(b) instruction. The government's only concern is just to make sure that the members are not limited from considering the evidence in the manner in which the government intends to argue it because it is evidence of his mindset at that point.

R. at 680 (emphasis added).

The military judge continued,

> Well, I apologize for any confusion, but I will talk about the portions of the 412 hearing, which while sealed, I will talk about those portions which did not consider 412 evidence, and therefore, would not be a violation to talk about in open session. I specifically did a 404(b) analysis on this in the hearing. I specifically did it. I specifically found that out of an abundance of caution that I don't read *res gestae* as broadly as the parties do in applying *United States versus Gaddis*, the unpublished Army decision.
>
> I noted that there had been no specific notice by the parties on this. I also noted that there had been no motion *in limine*. I did a 404(b) analysis, including all three prongs of the *Reynolds* test, and articulated motive and intent in that hearing without objection by anyone.
>
> Now if there is an objection now that the government is not permitted to use this by virtue of lack of notice, I would ask the defense in what way you're unprepared to address this issue insofar as this information is provided to months ago in discovery and discussed on Tuesday, the first day of the trial were you unprepared to proceed to trial on this information specifically discussed by the court after the hearing?

R. at 681. The defense counsel responded,

> Sir, to take it back just a moment, there's a difference, as the court is aware, of including some in a packet of information that are alleged events. There's a difference between that and the government saying, we intend to do it for this purpose. Because as the court noted, there has not been any pre-trial litigation on this matter because we didn't receive any notice to challenge. Understand that my understanding of what took place during the closed session was that the court was doing its diligence that finding that because it was not 412 under a 404(b) analysis it could be presented for the following reasons.

Id.

An additional colloquy followed on the issue:

> CIVDC: But that – I did not interpret it – interpret that to mean that that had been litigated at that moment and that I was now on notice and that they would now be able to use it for a permitted use for which they never gave us notice.

MJ: All right. So government, what language – the defense is – Defense you're objecting to –

CIVDC: Everything after "rather."

MJ: -- everything after "rather," all right.

CIVDC: Yes, sir.

MJ: Trial Counsel, what's your position?

STC: My position is the language is fine. I think my position is also that the court said this will be the instruction and asked for objection, and there was none made at the time.

MJ: That's correct, as well.

STC: So the government is fine with the language. My previous articulation was just to show what the government's position was and to clarify what the intent was. I don't have objection to the language as its stated here, Your Honor.

MJ: All right.

CIVDC: Sir, if the court intends to keep the language, obviously we'll note our objection on the record. But I would at least request without waiving that objection that after you have the word, "limited purpose," if any be added to the language, because it sounds like it is concluding that it happened. Or at least somewhere. Let me see. If any –

MJ: Of its tendency –

CIVDC: Yes, sir.

MJ: -- if any, to demonstrate.

CIVDC: Yes, sir. Thank you.

MJ: All right. So government, your intent on arguing the massaging and kissing, is as to inform specific intent to gratify sexual desire?

STC: Yes, sir.

. . .

> MJ: All right. And my apologies for any confusion. My understanding was that functionally the court, out of an abundance of caution in the interest of the accused, had done a 404(b) analysis insofar as it appeared to the court that functionally the government was seeking to do this with or without notice. I wanted to put the T-DAT issue up for the defense for objections if necessary. It seems like this would be – as I remarked, a classic 404(b) type evidence because of the temporal proximity to this, and I wanted to make sure that if this was coming in, that the members are properly oriented to the limited use of this so as not to infer anything. That was the court's intent. My apologies if that was garbled on translation.
>
> Ms. Stewart, I appreciate your professionalism in raising this. And my tone and response was just surprise. I had not anticipated an objection in light of our earlier discussion. I certainly do not begrudge you at all zealously representing for your client, and when we have a difference on the view of evidence, it is your job to raise these things to my attention, so I do not mean to disincentivize you at all from – from doing that. Please continue to do so.

This colloquy about the use of evidence for Mil. R. Evid. 404(b) demonstrates several things. First, the Government knew in advance of trial it was seeking to use evidence under Mil. R. Evid. 404(b) and failed to give the required notice. The tone and tenor of the colloquy indicate a deliberate choice to avoid the notice requirement (regardless of their belief the evidence was res gestae evidence). The military judge did not require the Government to provide an adequate explanation of the failure to give notice under Mil. R. Evid. 404(b), even though its argument that the information was res gestae was insufficient.

The Defense was surprised at the "end" of the presentation of evidence by the prosecution's intent to use Mil. R. Evid. 404(b), and the military judge, of his own accord, decided to conduct an analysis for admissibility under that Rule. The defense was deprived of the opportunity to fully litigate the issue in a pretrial motion in limine and to craft its case, assuming the military judge overruled its motion in limine.

The instruction read to the members was,

Limited Use Evidence
Uncharged Physical Contact between the Accused
and Major Watler-Speight

> You heard testimony that the Accused may have sat behind and rubbed the shoulders of Major Watler-Speight and also kissed her neck, or attempted to kiss her neck, in the moments shortly preceding the charged misconduct. That is the buttocks grabbing and the torso grabbing. Neither of those instances, that is the kiss – alleged kiss on the neck or shoulders rubbing are themselves the charged misconduct in this case, and so I advise you that that testimony was admitted for a limited purpose, namely the parties intend to offer counter arguments as to the implications of these actions. The defense intends to argue that it if true, this may have created a "reasonable mistake of fact" in the mind of the Accused that Major Watler-Speight may have been consenting to the charged misconduct. The government intends to argue in contrast that those actions tend to demonstrate the Accused's sexual desire of Major Watler-Speight and his intent to gratify his sexual desire in touching her with or without her consent. You may consider the evidence solely for its tendency, if any, to inform those two bases which I just mentioned. You *cannot* consider it for any other purpose.
>
> Specifically, you may *not* infer from this evidence that Major Watler-Speight is a bad person with bad character or has any propensity to engage in sexual acts generally. Rather, you may consider it only for the limited purpose of whether her responses to the Accused's actions in her room on the night of 5 July 2019 created any "reasonable mistake of fact as to consent" in the mind of the Accused.
>
> By the same token, you may *not* infer from this evidence that the Accused is a bad person with bad character or has any general criminal propensity in sexual acts generally. Rather, you may consider it only for the limited purpose of its tendency if any, to demonstrate that Accused's motive and intent to gratify his sexual desire pertinent to Charge I.
>
> In deciding the weight, if any, to give to this evidence, you may consider the totality of the circumstances of these events. Ultimately, the weight, if any, you give to this evidence is solely in your own discretion.

R. at 708–09. The Government referenced the neck kissing several times in its initial closing statement. R. at 722–23.

This surprise was not just unhelpful; the military judge's sua sponte resolution was an abuse of discretion. Defense counsel's statement "I mean, I think certainly the government could have elicited 404(b), but they didn't" exhibits detrimental reliance by the Defense when the prosecution failed to provide notice. R. at 680. The notice was too late for the Defense to plan their case

presentation, to litigate the admissibility of the evidence, and prepare a more thorough response to the instruction.

WHEREFORE, Capt York respectfully requests this Court set aside the findings of guilty as to Charge I and its Specification and reassess the sentence.

V.

The government cannot prove 18 U.S.C. § 922 is constitutional as applied to Captain York because he was convicted of offenses that do not fall within the nation's historical tradition of firearm regulation.

Additional Facts

The first indorsements to both the Entry of Judgment and Statement of Trial Results state that Capt York is subject to a "Firearm Prohibition Triggered Under 18 U.S.C. § 922." Entry of Judgment, 31 May 2023; Statement of Trial Results, 14 April 2023.

Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *United States v. Lepore*, 81 M.J. 759, 760 (A.F. Ct. Crim. App. 2021).

Law and Analysis

1. Section 922 is unconstitutional as applied to Captain York.

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."

N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 24 (2022) (quoting *United States v. Konigsberg*, 366 U.S. 36, 50, n.10 (1961)).

Although the annotation that Section 922 applies to the case is vague, the Government presumably intended to apply Section 922(g)(1), which 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 Capt York, who stands convicted of offenses that has historically not merited firearms restrictions. To prevail, the Government would have to show a historical tradition of applying an undifferentiated ban on firearm possession, no matter the convicted offense, as long as the punishment could exceed one year of confinement. Regardless of the type or severity of an offense, all would be painted with the same brush. This the Government cannot show.

The historical tradition took a narrower view of firearms regulation for criminal acts than that reflected in Section 922:

> [A]ctual "longstanding" precedent in America and pre-Founding England suggests that a firearms disability can be consistent with the Second Amendment to the extent that . . . its basis credibly indicates *a present danger that one will misuse arms against others and the disability redresses that danger*.

C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y 695, 698 (2009) (emphasis added). 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. Earlier, the Uniform Firearms Act of 1926 and 1930 stated that "a person convicted of a 'crime of violence' could not 'own or have in his possession or under his control, a pistol or revolver.'" *Id*. at 701, 704 (quoting 1926 Uniform Firearms Act §§ 1, 4). 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 (quoting 1926 Uniform Firearms Act § 1). The offenses of which Capt York was convicted fall short of these. 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 § 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' imprisonment. *Range v. AG United States*, 69 F.4th 96, 98 (3d Cir. 2023), *vacated* (U.S. Jul. 2, 2024) (remanding for further consideration in light of *United States v. Rahimi*, 602 U.S. ___, 2024 U.S. LEXIS 2714 (Jun. 21, 2024)). Evaluating § 922(g)(1) in light of *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. It found no "relevantly similar" analogue to imposing lifetime disarmament upon those who committed nonviolent crimes. *Id.* at 103–05. The real question, then, is whether Capt York's convictions meet the historical tradition of regulating firearms based on a limited framing of "violent."

In addition to the distinction on violence, a felony conviction today is vastly different from what constituted a felony prior to the 20th century, let alone at the time of this country's founding. This is problematic because categorizing crimes as felonies has not only increased, but done so in a manner inconsistent with the traditional understanding of a felony:

> The need [for historical research] is particularly acute given the cancerous growth since the 1920s of "regulatory" crimes punishable by more than a year in prison, as distinct from traditional common-law crimes. The effect of this growth has been to expand the number and types of crimes that trigger "felon" disabilities to rope in persons whose convictions do not establish any threat that they will physically harm anyone, much less with a gun.

Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y at 697. Notably, the "federal 'felon' disability--barring any person convicted of a crime punishable by more than a

year in prison from possessing any firearm--is less than [64] years old." *Id*. at 698. In fact, "one can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I." *Id.* at 708. On this point alone, the Government has not proven that such a ban is consistent with this country's history and tradition.

All the arguments above demonstrate that abusive sexual contact and assault consummated by a battery do not qualify for a lifetime ban on firearms. The recent case of *United States v. Rahimi* does not change the analysis. 602 U.S. ___, 144 S. Ct. 1889 (2024). In *Rahimi*, the Supreme Court addressed the validity of Section 922(g)(8)(C)(i), which applies once a court has found that a defendant "represents a credible threat to the physical safety of another" and issued a restraining order. *Id.* at 1901–02. The Court concluded that the historical analysis supported the proposition that when "an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." *Id.* at 1901.

But the historical analogue breaks down when applied here. In *Rahimi*, the Court noted that the "surety" and "going armed laws" which supported a restriction involved "whether a particular defendant likely would threaten or had threatened another with a weapon." *Id.* at 1902. The Court also noted that surety bonds were of limited duration, and that Section 922(g)(8) only applied while a restraining order was in place. *Id.* By contrast, this case did not involve a threat with a weapon, and the firearms ban will last forever. Ultimately, the Supreme Court itself noted the limited nature of its holding. As the Supreme Court stated, "We conclude only this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Id.* at 1903. Such a narrow holding cannot support the broad restriction encompassed here.

2. This Court may order correction of the First Indorsement to the Entry of Judgment under Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2).

It is important to note that this issue constitutes a justiciable case or controversy. The CAAF is currently considering how its prudential case or controversy doctrine applies to errors raised regarding firearms prohibitions under 18 U.S.C. § 922. *United States v. Johnson*, 2024 CAAF LEXIS 561 (C.A.A.F. Sept. 24, 2024). The deprivation here is more than hypothetical. Capt York participated in competitive rifle shooting events for years, so the firearms prohibition prevents him from participating in an activity at which he previously excelled. R. at 824. Correcting this error would allow him to resume this previous pursuit. Capt York's history of lawful firearms use, as noted in the record, means that the deprivation of rights from this error constitutes a justiciable case or controversy and that an opinion on the matter would not be an advisory opinion. *See generally United States v. Wall*, 79 M.J. 456, 461 (C.A.A.F. 2020) (citing *United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003)) (describing an advisory opinion as "an opinion issued by a court on a matter that does not involve a justiciable case or controversy between adverse parties").

In *United States v. Williams*, the CAAF considered whether the Army Court of Criminal Appeals (Army Court) had the authority to alter the military judge's correction to the Statement of Trial Results (STR), which is incorporated into the judgment of the court signed by the military judge. *United States v. Williams*, __ M.J. __, 2024 CAAF LEXIS 501, at *1-3 (C.A.A.F. 2024). In *Williams*, the military judge had erroneously marked on the STR that the appellant's conviction triggered the Lautenberg Amendment, 18 U.S.C. § 922(g), after advising the appellant of the opposite during his guilty plea. *Id*. at *1-2. Later, in promulgating the judgment, the military judge incorporated and amended the original STR to correct the firearms ban so that 18 U.S.C. §

922(g) was not triggered. *Id*. at *6. On appeal, the Army Court changed the firearm bar on the STR *back*, to reindicate the appellant was barred from possessing a firearm. *Id*.

The CAAF determined that changing the STR back was an ultra vires act by the Army Court because "the STR is not part of the findings or sentence," but rather "other information" required by R.C.M. 1101(a)(6). *Id*. at *12-13. Therefore, the Army Court did not have authority to act pursuant to Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2018),[8] in this way. *Id*.

The CAAF then analyzed whether the Army Court had the authority to change the firearm ban under Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2), as an "error . . . in the processing of the court-martial after the judgment was entered into the record." *Id*. at *13. The CAAF concluded that Article 66(d)(2) did not apply for three reasons related to the unique facts of that case. *Id*. at *14-15. First, there was no "error" because the military judge corrected any erroneous notation on the STR before signing the judgment. *Id*. at *14. Thus, by the plain language of the statute, there was no error to consider after the entry of judgment. Second, assuming error, the burden of raising such error was on the accused. *Id*. As the appellant in *Williams* agreed with the military judge's action in correcting the firearm notation, no error was raised. *Id*. Therefore, the Army Court's "correction authority" had not been "triggered," as the appellant never raised the firearm notation as an error. Third, assuming error and assuming the error had been raised, the timing of the military judge's erroneous notation preceded the entry of judgment; it was on the STR. *Id*. Therefore, based on the plain language of Article 66(d)(2), UCMJ, it was not an error occurring *after* the entry of judgment. *Id.*

[8] The language at issue in Article 66, UCMJ, is not substantively different between the 2018 version analyzed in *Williams* and the version applicable to Capt York's appeal.

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 Capt York's case.[9] Unlike the appellant in *Williams*, Capt York meets the factual predicate to trigger this Court's review under Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2).

First, Capt York "demonstrated error" in his case—that he was erroneously and unconstitutionally deprived of his right to bear arms. In demonstrating this error, Capt York seeks correction of EOJ, which includes the First Indorsement with the erroneous firearm bar. This requested remedy is in line with *Williams*. While this Court cannot correct the erroneous firearms bar associated with the STR, it *can* correct the erroneous firearm notation on the First Indorsement attached to the EOJ, which was completed *after* the entry of judgment during post-trial processing. *Williams*, __ M.J. __, 2024 CAAF LEXIS 501, at *14-15; *see also infra* (discussing timing in detail). Unlike the appellant in *Williams*, there is an error raised and demonstrated by Capt York for this Court to consider under Article 66(d)(2), UCMJ.

Second, the error on the First Indorsement erroneously depriving Capt York 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

[9] The statutory authority for this Court to act may differ from the authority of the CAAF to address this issue under Article 67, 10 U.S.C. § 867, a question which may be resolved by the CAAF in *United States v. Johnson*, No. ACM 40257, USCA Dkt. No. 24-0004/SF, 84 M.J. 343 (C.A.A.F. Mar. 29, 2024), *vacated and review of other issues granted*, ___M.J. ___ (C.A.A.F. Sep. 24, 2024) (the CAAF granted review of this case and later vacated its initial order and granted review of different issues). The military judge's inclusion of the STR and its First Indorsement—and the firearms prohibition therein—into the EOJ is a "decision, judgment, or order" that was "incorrect in law."

[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*. Additionally, as this First Indorsement is the most recent notification to law enforcement entities about the applicability of 18 U.S.C. § 922 to Capt York, it makes sense that this is the document the Court should review for post-trial processing error. *See id*. at ¶¶ 20.42, 29.6, 29.32, 29.33 (dictating when notifications are made through distribution of the EOJ and attachments). Therefore, unlike the issue addressed in *Williams*, the error here occurred after the entry of judgment, in accordance with the last triggering criterion under Article 66(d)(2), UCMJ.

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*, __ M.J. __, 2024 CAAF LEXIS 501, at *11-13. However, Capt York 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 Indorsement is a required component of

the EOJ, albeit not part of the "findings" and "sentence," and the error materially affects Capt York's constitutional rights. R.C.M. 1111(b)(3)(F); R.C.M. 1112(b)(9); DAFI 51-201, at ¶ 20.41.

WHEREFORE, Capt York respectfully requests that this Honorable Court hold 18 U.S.C. § 922 is unconstitutional as applied to him and order correction of the first indorsement to the entry of judgment, pursuant to its authority under Article 66(d)(2), UCMJ.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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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*:*

VI.

Whether the military judge abused his discretion in denying Captain York's post-trial motion for a finding of not guilty as to Charge I.

After trial, on 12 May 2024, the defense submitted a motion under R.C.M. 917 for a finding of not guilty on Charge I. Record of Trial (ROT), Vol. 1. Neither appellate counsel nor this Court knows what the defense argued because the motion is not included in the record of trial (nor is a government response, if there was one).[1] On 15 May 2024, the military judge responded denying the motion "because it is untimely, filed more than 14 days after Defense's prior receipt of the Statement of Trial Results [on 14 April 2024], without any prior request for an extension of time during the applicable filing period." ROT Vol. 1, Email, RE: CUI//U.S. v. York - Entry of Judgment Review--RCM 917 Motion DENIED, 15 May 2023. The military judge does state he would have denied dismissal anyway. But in doing so, there is no analysis of what deficiency was raised as to an element.

WHEREFORE, Capt York personally requests this Court set aside the finding of guilty as to Charge

[1] Neither are listed as an exhibit on the Index of Exhibits. While the military judge's denial is in the record, it is not referenced in the Index.

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,	)	
Appellee,	)	**UNITED STATES ANSWER TO**
	)	**ASSIGNMENTS OF ERROR**
v.	)	
	)	
	)	Before Panel No. 2
Captain (O-3)	)	
BENJAMIN C. YORK,	)	No. ACM 40604
United States Air Force	)	
Appellant	)	30 January 2025

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

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**UNITED STATES'**
Appellee,	)	**ANSWER TO ASSIGNMENTS**
	)	**OF ERROR**
v.	)	
	)	No. ACM 40604
Captain (O-3)	)	
BENJAMIN C. YORK,	)	Before Panel No. 2
United States Air Force	)	
Appellant.	)	30 January 2025

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

ISSUES PRESENTED

I.

WHETHER TRIAL DEFENSE COUNSEL WERE INEFFECTIVE IN INVESTIGATING AND SEEKING DISCOVERY TO LAY A SUFFICIENT FOUNDATION TO ESTABLISH EVIDENCE THAT WOULD SHIFT THE BURDEN TO THE PROSECUTION TO DISPROVE UNLAWFUL INFLUENCE. ALTERNATIVELY, WHETHER AN EVIDENTIARY HEARING IS WARRANTED TO FURTHER DEVELOP THE FACTS SUPPORTING THIS CLAIM.

II.

WHETHER THE CONVENING AUTHORITY IMPERMISSIBLY CONSIDERED THE GENDER OF POTENTIAL COURT MEMBERS WHEN DETAILING MEMBERS TO THIS COURT-MARTIAL.

III.

WHETHER THE FINDINGS AS TO ABUSIVE SEXUAL CONTACT ARE LEGALLY AND FACTUALLY SUFFICIENT WHERE EVIDENCE DID NOT ESTABLISH THE REQUIRED SPECIFIC INTENT BEYOND A REASONABLE DOUBT.

IV.

WHETHER THE MILITARY JUDGE ERRED BY INSTRUCTING THE MEMBERS THAT ASSAULT CONSUMMATED BY A BATTERY WAS A LESSER-INCLUDED OFFENSE OF ABUSIVE SEXUAL CONTACT AND THAT CERTAIN EVIDENCE COULD BE CONSIDERED FOR CERTAIN PURPOSES UNDER MIL. R. EVID. 404(B).

V.

WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL AS APPLIED TO CAPTAIN YORK WHEN HE WAS CONVICTED OF OFFENSES THAT DO NOT FALL WITHIN THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION.

VI[1].

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING CAPTAIN YORK'S POST-TRIAL MOTION FOR A FINDING OF NOT GUILTY AS TO CHARGE I.

STATEMENT OF THE CASE

On 11 April 2023, a general court-martial convened at Hurlburt Air Force Base (AFB), Florida. (R. at 12.) Appellant elected to be tried by a panel of officers and entered pleas of not guilty. (*Entry of Judgment*, dated 31 May 2023, ROT, Vol. 1). Contrary to his pleas, the members found Appellant guilty of one charge and one specification of abusive sexual contact in violation of Article 120, UCMJ and one charge and one specification of assault upon a commissioned officer in violation of Article 128, UCMJ. (Id.). The military judge sentenced Appellant to a reprimand, forfeiture of $4,000 pay per month for six months, and confinement for 15 days. (Id.). After considering Appellant's post-trial submissions, the convening authority

[1] This issue is raised in the appendix pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

took no action on Appellant's case. (*Convening Authority Decision on Action*, dated 3 May 2023, ROT, Vol. 1).

STATEMENT OF FACTS

Maj C.W-S. joined the Air Force in 1995. From 2018 until 2021, Maj C.W-S. served as an instructor in the Reserve Officer Training Corp (ROTC). (R. at 417). As part of her official duties, she went on temporary duty (TDY) as a detachment assessor. (R. at 417-18). Maj C.W-S. met Appellant at his detachment in New Hampshire through this position. (R. at 418). At that initial meeting, Maj C.W-S. spoke with Appellant in her capacity as detachment assessor.

Maj C.W-S. next met Appellant in the summer of 2019 at Maxwell AFB, Alabama. (R. at 419). Appellant was serving as a squadron training officer at that time. (R. at 420). Maj C.W-S. was a flight training officer in a different squadron. (R. at 420). Maj C.W-S. engaged in small talk with Appellant during in-processing at Maxwell AFB. (R. at 420-21). Appellant saw Maj C.W-S. every day in uniform and heard her be addressed by her rank. (R. at 449). Appellant later found Maj C.W-S. on GroupMe, a messaging application, and reached out to her directly. (R. at 421). They sent messages about having a beer and Maj C.W-S.'s physical training test. (R. at 421). At one point, they messaged about Appellant bringing Maj C.W-S. a beer and her drinking one with him. (R. at 481). Maj C.W-S. never went to get a beer with Appellant. (R. at 426).

On 4 July 2019, Maj C.W-S. asked the First Sergeant to give her a ride so she could get dinner. (R. at 428). Unbeknownst to her, the First Sergeant already planned to take a large group into town, so Maj C.W-S. joined the group when he picked her up. (R. at 429). Appellant was in this group. (R. at 429). After dinner, Appellant asked Maj C.W-S. to take his leftover

pizza back to her room since he was staying out, and she was returning to her room. (R. at 430). Maj C.W-S. agreed and took Appellant's food to her room for the night. (R. at 430).

After work the next day, Maj C.W-S. returned to her room sometime after 2100. (R. at 430). Maj C.W-S. had spoken to Appellant about picking up his pizza. (R. at 432). When he asked, she gave him her room number. (R. at 432-33). When Appellant came to her room, Maj C.W-S. went to the refrigerator to grab his pizza. (R. at 436). After handing Appellant his pizza, Appellant set the pizza back down on the table near the door and made small talk with Maj C.W-S. at the door. (R. at 436). Eventually, Maj C.W-S. sat down on the ottoman by the door. (Pros. Ex. 2; R. at 436-37). Appellant then came into the room and sat beside her on the ottoman closely enough that Appellant's right leg touched Maj C.W-S.'s left leg. (R. at 436-38). Appellant continued to talk to Maj C.W-S., who started to think of "how to get out of" that situation. (R. at 438). Appellant then stood up and swung his leg behind Maj C.W-S. so he was straddling her from behind. (R. at 438-9). Appellant referred to a previous conversation he'd had with Maj C.W-S. about him getting a massage and that he had not received one yet. (R. at 491-92). Maj C.W-S. did not recall Appellant asking to touch her before he started to do so. (R. at 492). Appellant started touching Maj C.W-S.'s sides and rubbing her shoulders. (R. at 439). This massage lasted less than a minute. (R. at 490). Appellant leaned in and kissed the back of Maj C.W-S.'s neck. (R. at 439). Maj C.W-S jumped up and saw Appellant had removed his shoes. (Id.) Maj C.W-S. told Appellant he "need[ed] to get [his] shoes and get [his] pizza and go." (R. at 440). Appellant remained sitting on the ottoman and said "[b]ut do I, but do I?" (Id.)

Maj C.W-S said Appellant was "about to get [himself] in trouble" and he needed "to get [his] pizza and go." (Id.) Appellant did not leave. (Id.) He stood up and started "trying to pull [Maj C.W-S.] towards him," "grabbing at [her] clothes" and "grabbing all over." (Id.) Appellant

tickled Maj C.W-S.'s sides and she tried to push him away with her right hand. (Id.) Appellant grabbed Maj C.W-S.'s back, butt, and sides. (Id.) Maj C.W-S. kept trying to push Appellant away. (R. at 441).

Eventually, Appellant released Maj C.W-S. and went into her bathroom. (Id.) Appellant then turned on her shower, although Maj C.W-S. did not know why. (Id.) At that time, Maj C.W-S. texted J.S., another officer on base. (Pros. Ex. 3; R. at 442-44). Maj C.W-S. texted J.S. that she "[couldn't] get a dude outta [her] room." (Pros. Ex. 3). Maj C.W-S. texted J.S. because she wanted help getting Appellant out of her room. (R. at 444).

After Appellant got out of Maj C.W-S.'s shower, he approached her and started pulling at her clothes. (R. at 446). Appellant backed Maj C.W-S. between the loveseat and table in her room. (Id.) Appellant kept trying to pull Maj C.W-S. toward him. (R. at 447). At some point, Appellant tripped and pulled Maj C.W-S. down on top of him. (Id.) Appellant was still holding Maj C.W-S. by the torso and they rolled on the floor. (Id.) Maj C.W-S tried to get away from him. Appellant eventually stopped and Maj C.W-S. managed to text a group chat with J.S. and C.S. (R. at 444, 447). C.S. asked if Maj C.W-S. "need[ed] assistance" and Maj C.W-S. replied "[y]es!!" (Pros. Ex. 3). Appellant started singing *My Heart Will Go On* by Celine Dion, and Maj C.W-S. laughed nervously at him. (R. at 447). C.S. then came to Maj C.W-S.'s room to help her. (R. at 448). Maj C.W-S. left her room with C.S. under the guise of going to the ATM. (R. at 449).

Maj C.W-S. reported the incident to the Air Force Office of Special Investigations (AFOSI) on 6 July 2024, the day after the incident. (R. at 449). She provided AFOSI with the messages between herself and Appellant on GroupMe, and then deleted them from the application because she did not wish to see them. (R. at 464).

ARGUMENT

I.

TRIAL DEFENSE COUNSEL REQUESTED IN-DEPTH DISCOVERY REGARDING APPELLANT'S ALLEGATION OF UNLAWFUL COMMAND INFLUENCE AND ZEALOUSLY ARGUED FOR DISMISSAL ON THAT BASIS

Additional Facts

In response to Appellant's allegation of ineffective assistance of counsel (IAC), Appellant's trial defense counsel, Ms. Jocelyn Stewart and Maj Jonathan Fallon, provided declarations to this court on 16 January 2025. (*Ms. Stewart Declaration* and *Maj Fallon Declaration*).

On 29 August 2022, Appellant's then-area defense counsel (ADC), Capt Jenna Stewart, submitted a discovery request to the Government. (*Ms. Stewart Declaration* at 2, Attachment 2.) On 9 January 2023, Appellant's new ADC, Maj Fallon, made defense's initial discovery request in Appellant's case. (Id.). Both of these requests specifically sought information on Maj C.W-S.'s FOIA request, her congressional inquiry, and who accessed Appellant's case file with AFOSI. (Id.). This request was made as part of trial defense's effort to research potential unlawful command influence (UCI) in Appellant's case. (*Ms. Stewart Declaration* at 2).

Trial defense received copies of Senator Tammy Duckworth's request to General Charles Brown, Chief of Staff of the Air Force (CSAF) and the notice that the inquiry was closed. (*Ms. Stewart Declaration* at 2, Attachment 4a, 4b). Trial defense also received a copy of SA Jennifer Holland's response to Congresswoman Jeanne Shaheen, who had reached out in 2020 to request "an unbiased review" of the investigation on Appellant's behalf. (*Ms. Stewart Declaration* at 2, Attachment 4c).

On 22 February 2023, trial defense filed a supplemental discovery request related to a prior investigation into Appellant. (*Ms. Stewart Declaration* at 2, Attachment 5). The Government denied this discovery request. (*Ms. Stewart Declaration* at 2, Attachment 6). Following additional communication with trial defense, the Government provided the requested information. (*Ms. Stewart Declaration* at 2).

On 7 March 2023, trial defense filed a fourth discovery request. (*Ms. Stewart Declaration* at 2-3, Attachment 7). Ms. Stewart also prepared and filed a motion to dismiss for UCI based on the discovery previously provided. (*Ms. Stewart Declaration* at 3; App. Ex. II). The motion was 165 pages long and accused CSAF and the Air Force Special Operations Command (AFSOC) commander of actual and apparent UCI. (App. Ex. II). The motion explained trial defense's understanding of the facts and circumstances that led to preferral of charges against Appellant. (Id.) Trial defense alleged actual UCI occurred when Senator Duckworth communicated with CSAF and asked him to review the case, resulting in AFOSI re-opening the investigation a month later. (Id.) The Government opposed trial defense's motion on 20 March 2023. (App. Ex. III).

On 6 April 2023, the Government responded to trial defense's fourth discovery request. (*Ms. Stewart Declaration*, Attachment 8). The Government clarified that it had no responsive materials to the request that had not already been provided. (*Id*.) Ms. Stewart interpreted the month-long delay in the Government's response as indicative that the Government had "engaged in substantial effort to exhaust potential avenues to uncover responsive materials." (*Ms. Stewart Declaration* at 3). Trial defense "relied in good faith on the government's response that all responsive material had been provided and that if additional material became known to them, they would provide them as part of their continuing duties of discovery and disclosure." (*Id.*).

On 11 April 2023, trial defense counsel litigated the motion to dismiss for UCI. (R. at 29). Trial defense counsel argued that the UCI in Appellant's case was a type of "accusatory" UCI that stemmed from the re-opening of the investigation itself. (Id.) Trial defense counsel argued that but for Senator Duckworth's communication to CSAF, Appellant's investigation would not have been re-opened and the court-martial would not exist. (R. at 30). Trial defense counsel argued that Senator Duckworth "was the conduit of the UCI to. . . [CSAF]." (R. at 31). More specifically, trial defense counsel argued that apparent UCI existed when Senator Duckworth reached out to CSAF and CSAF then "direct[ed] the reopening of an investigation, as opposed to let's figure out what happened here and let's report back the events that took place." (R. at 33). The military judge noted that there was no "tasking memo or anything from [CSAF] to AFOSI," which trial defense counsel confirmed they did not possess. (R. at 35-36). He further noted that Senator Duckworth was "a National Guard retiree and [was] not covered by Article 2. Members of the reserve component are only subject to the Code after retirement if receiving hospitalization pay." (R. at 30). Trial defense counsel could not offer evidence that Senator Duckworth was receiving such pay. (Id.). While the military judge took judicial notice that Senator Duckworth is "a retiree from the Army National Guard. . ." he said "no evidence was presented that she is a retired member of a reserved component receiving hospitalization from an armed force, as would be necessary to render her still admissible to the Code under Article 2." (R. at 97).

The Government argued against actual or apparent UCI and highlighted the chain of the investigation that led to a second interview with Maj C.W-S. and her second statement wherein she alleged Appellant grabbed her buttocks. (R. at 53-54). The Government argued that AFOSI

re-opened the investigation on their own following a review of the original report of investigation. (R. at 59).

Following the Government's argument, the military judge initially stated on the record that he found that trial defense counsel "made some showing of UCI to shift the burden to the government" under United States v. Gerlich, 45 M.J. 309 (C.A.A.F. 1996) (R. at 69). The military judge originally based this finding on the premise that when Appellant requested an internal review of his investigation, AFOSI found they followed procedure, but after Senator Duckworth contacted CSAF, AFOSI found they should re-open the investigation and re-interview Maj C.W-S. (R. at 70).

Following a recess, the military judge reversed his initial decision and denied trial defense counsel's motion to dismiss for UCI. The military judge found that Senator Duckworth's letter to CSAF was (1) "not a prejudgment of guilt." (2) "a recommendation for a particular case disposition," (3) an express or implied threat to take adverse career action against [CSAF]." (R. at 98). The military judge further found that CSAF "made no case disposition recommendations in any request for reinvestigation." (Id.). The military judge found "no regulatory authority" that "a request for re-investigation emanating from congress" is "unlawful." (R. at 101). Likewise, the military judge found "no citation of law" that such a request from CSAF is unlawful. (R. at 102).

The military judge found that Appellant had made no claim of a violation of Article 13, UCMJ; "defective preferral or referral;" or speedy trial violation. (R. at 98). The military judge also found "a superior commissioned officer may request re-initiation of a case investigation without prejudice to the accused. There is no statutory, regulatory, or constitutional right for an accused to be investigated one and only time by law enforcement authorities." (R. at 106-107).

Following a thorough recitation of the law and facts at issue (R. at 99-109), the military judge stated that the facts in this case differed from cases such as Boyce and Bergdahl because the re-investigation *did* yield "clarification of prior facts which were not made clear in the initial investigation," meaning the "grazing of a buttocks to the grasping of the buttocks." (R. at 109). Regarding CSAF, the military judge found no threats or "public" embarrassment" were present in this case. (R. at 110). The military judge found that the request to reopen the investigation was "open-ended" and lacked "an implicit or explicit conclusion . . . to those investigators." (Id.) The military judge issued a written ruling at the close of trial. (App. Ex. XXXVI).

Following the military judge's ruling at the motions hearing, trial defense counsel discussed the UCI claim with Appellant. (*Ms. Stewart Declaration* at 3). Ms. Stewart explained the Appellant that there had been numerous discovery requests, and no other evidence had been provided to indicate CSAF had committed UCI. (*Id.*). Ms. Stewart also advised Appellant that trial defense counsel was unlikely to overcome the military judge's ruling that Senator Duckworth was not subject to the UCMJ. (*Id.*). In addition to this, the military judge had already analyzed the allegations of UCI from both perspectives: whether Senator Duckworth was subject to the UCMJ or not. (R. at104).

Ms. Stewart furthered advised Appellant that seeking additional evidence, such as from CSAF, was likely to be a "losing battle" and she did not "reasonably foresee a different result." (*Ms. Stewart Declaration* at 4). Ms. Stewart advised Appellant that even if Senator Duckworth *could* commit UCI, her communication "was not directive of any particular outcome" and this distinguished her letter from the case in Bergdahl. (*Id.*).

With respect to requesting an interview with CSAF, Ms. Stewart opined to Appellant that she did not think it likely the military judge "would grant any order or other relief that would

compel [CSAF] to submit to an interview. (*Id.*). Ms. Stewart also explained to Appellant that she did not believe such an interview would "reasonably produce any response from [CSAF] that either he would admit to directing any member of the chain of command to prefer charges (actual UCI) or any similar inclination that could produce any better inference of UCI (apparent UCI)." (*Id.*). Trial defense counsel further explained that any such efforts would likely delay the court-martial. (*Id.*). Appellant had previously discussed the "toll" the investigation had had on him. (*Id.*). Ms. Stewart knew the case "was weighing heavily on him." (*Id.*).

Trial defense counsel explained that the "best evidence" were the inconsistent statements made by Maj. C.W-S. (*Ms. Stewart Declaration* at 5). Ms. Stewart was hesitant to introduce evidence of Maj C.W-S.'s congressional complaint to the members as it may influence their verdict to "appease Congress." (*Id.*).

Following these discussions, Appellant "concurred with [Ms. Stewart's] proposed strategy to discontinue efforts regarding the UCI motion" and to "focus efforts on preparing for trial, including cross-examination of Maj [C.W-S.] and impeaching her credibility." (*Id.*).

Standard of Review

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

Allegations of UCI are reviewed de novo. United States v. Boyce, 76 M.J. 242, 249 n.7 (C.A.A.F. 2017) (citation omitted). This standard applies even with a more "generalized allegation of unlawful influence" from those acting without "the mantle of command authority." United States v. Barry, 78 M.J. 70, 76-77 (C.A.A.F. 2018).

Law

Ineffective Assistance of Counsel

The Sixth Amendment guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668, 686 (1984). "In order to prevail on a claim of ineffective assistance of counsel (IAC), an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing Strickland, 466 U.S. at 698). "Appellate courts do not lightly vacate a conviction in the absence of a serious incompetency which falls measurably below the performance . . . of fallible lawyers." United States v. DiCupe, 21 M.J. 440, 442 (C.M.A. 1986) (quotations omitted) (citing United States v. DeCoster, 624 F.2d 196, 208 (D.C.Cir.1979)). If an appellant has made an "insufficient showing" on even one of the elements, this Court need not address the other. Strickland, 466 U.S. at 697.

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

Military courts use a three-part test to determine whether the presumption of competence has been overcome: (1) are Appellant's allegations true, and if so, is there a reasonable explanation for counsel's actions; (2) if the allegations are true, did defense counsel's level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers; and (3) if defense counsel was ineffective, whether there a reasonable probability that, absent the errors, there would have been a different result. United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)) (quotations omitted).

Unlawful Command Influence

Article 37(a)(2), UCMJ, states:

> No person subject to this chapter . . . may attempt to coerce or, by any unauthorized means, attempt to influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority or preliminary hearing officer with respect to such acts taken pursuant to this chapter . . . as prescribed by the President.

Under the traditional test, to determine if apparent unlawful command influence was present, the defense shoulders the initial burden of raising a claim of unlawful command influence. United States v. Stombaugh, 40 M.J. 208, 213 (C.M.A. 1994). The defense must bring forth "some evidence" to suggest that: (a) the facts, if true, constitute unlawful command influence; and (b) this unlawful command influence placed an "intolerable strain" on the public's perception of the military justice system because "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." United States v. Boyce, 76 M.J. 242, 249 (C.A.A.F. 2017).

"Some evidence" requires more than speculation. Put another way, "[p]roof of command influence in the air, so to speak, will not do" to show an appearance of command influence.

United States v. Allen, 33 M.J. 209, 212 (C.M.A. 1991) (overruled on other grounds, *see* United States v. Dinger, 77 M.J. 447 (C.A.A.F. 2018)).

Under the traditional test for apparent unlawful influence:

> If the accused presents "some evidence" of unlawful command influence, "the burden shifts to the government to prove beyond a reasonable doubt that either: (a) the 'predicate facts proffered by the appellant do not exist,' or (b) 'the facts as presented do not constitute unlawful command influence.'" . . . If the government fails to rebut the accused's factual showing, it may still prevail if it proves:
>
> [B]eyond a reasonable doubt that the unlawful command influence did not place an intolerable strain upon the public's perception of the military justice system and that an objective, disinterested observer, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of the proceeding.

United States v. Proctor, 81 M.J. 250, 256 (C.A.A.F. 2021) (internal citations omitted).

However, in 2019 Congress amended Article 37 and added subsection (c): "No finding or sentence of a court-martial may be held incorrect on the ground of a violation of this section unless the violation materially prejudices the substantial rights of the accused." Article 37(c); National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019). This amendment calls into question whether the military judge could grant a remedy where there has not even been an attempt to show that the Accused suffered material prejudice to a substantial right

The test for actual unlawful command influence requires an Appellant to demonstrate (1) facts, which if true, constitute unlawful command influence; (2) the court-martial proceedings were unfair to the appellant; and (3) the unlawful command influence was the cause of that unfairness. Boyce, 76 M.J. at 248.

Analysis

1. Trial defense counsel's performance was not deficient.

a. Trial defense counsels' recommendation to proceed with trial on the merits without further litigation on UCI has a reasonable explanation.

Appellant's claim fails because there was a "reasonable explanation for counsel's actions." *See* Gooch, 69 M.J. at 362. The trial defense team analyzed and advised Appellant of the possible benefits and disadvantages of delaying the trial to further investigate the allegation of UCI. Trial defense counsel had already filed four discovery requests related to UCI, including a request for "any and all reports" and "any and all statements, memoranda for records, emails, papers to or from HQ AFROTC and AFROTC Northeast Region relating to [Appellant], [Maj C.W-S.], and/or the allegation substantive in this case." (*Ms. Stewart Declaration*, Appendix B, Attachments 1, 2, 5, and 7). Trial defense counsel had already been informed over several months that they possessed all responsive records in possession of the Government. (*Ms. Stewart Declaration* at 4). Trial defense counsel had no reason to believe the Government had not acted in good faith or that other responsive records existed for Appellant's allegation of UCI.

Ms. Stewart reasonably believed she was unlikely to secure an interview with CSAF in this case and that even if she did, he was unlikely to provide her with information to substantiate an allegation of actual or apparent UCI. (*Ms. Stewart Declaration* at 4). Such a perspective was consistent with the law regarding UCI and the military judge's own ruling on the UCI motion, which included the finding that Senator Duckworth's letter to CSAF was "open-ended." (*See* App. Ex. XXXVI; R. at 99-110). The military judge had already said there wasn't evidence that Senator Duckworth was subject to the UCMJ. (R. at 97). Her letter to CSAF did not contain "a prejudgment of guilt," did not recommend "a particular punishment for" Appellant, and did not threaten his career or imply CSAF would suffer consequences if he did not comply with her

request. (R. at 98). Senator Duckworth's letter to CSAF did not direct any particular action in Appellant's case, and there was no documentation that CSAF had directed particular action. There was nothing to indicate CSAF would be able to provide a previously written statement regarding the extent of his involvement in Appellant's case or that he would admit to influencing the outcome of either Appellant's investigation or preferral. In light of these facts, Ms. Stewart had no reason to believe such a request to CSAF would bear fruit to the benefit of Appellant. Ms. Stewart's advice to Appellant on this subject was reasonable.

Ms. Stewart was further aware of the mental toll the military justice process had taken on Appellant and advised him that seeking such an interview would likely delay the court-martial. (*Id.*). Ms. Stewart recommended they proceed in Appellant's case with what they *did* have: inconsistent statements by Maj C.W-S. (*Ms. Stewart Declaration* at 5). Appellant knowingly agreed with Ms. Stewart's proposed way forward, and so they proceeded with trial on the merits. (*Id.*).

Trial defense counsel reasonably believed pursuing the allegation of UCI further would not yield any benefit to Appellant, they believed it would delay the court-martial, and they believed they had sufficient evidence to impeach the Government's main witness. Trial defense counsel's recommendation to proceed with trial on the merits had a reasonable explanation.

b. Trial defense counsels' performance did not fall measurably below the standard expected of fallible lawyers.

In his argument, Appellant seeks to have it both ways: He criticizes his trial defense team for even filing a motion to dismiss for UCI if "they did make significant discovery efforts and received nothing helpful in return" (App. Br. at 11) while simultaneously criticizing them for not doing more to investigate. While Appellant describes trial defense counsel's "failure to seek" evidence of UCI (App. Br. at 11), trial defense counsel made four different discovery

requests to the Government in this case, each focusing-on tracking down evidence of possible UCI. (*Ms. Stewart Declaration*, Attachments 1, 2, 5, and 7). When trial defense counsel received a denial from trial counsel, they engaged with the Government and received an additional response. (*Ms. Stewart Declaration* at 2.) Trial defense counsel had no reason to "doubt[] the Government's truthfulness when they indicated that everything had been turned over." (*Maj Fallon Declaration* at 2). Since all discovery requests were responded to and resulted in either receipt of new evidence or an explanation that no other evidence existed, trial defense counsel had no reason to file a motion to compel discovery. Trial defense counsel also had no reason to believe additional letters or directives existed that were relevant to Appellant's UCI allegation.

"After a losing effort, hindsight usually suggests other ways that might have worked better; but that is not the measure of ineffective assistance of counsel." United States v. Sanders, 37 M.J. 116, 118 (C.M.A. 1993). Such is the case with Appellant's trial defense counsel—they are not immune to the "distorting effects of hindsight," Strickland, 466 U.S. at 689. Trial defense counsel came very close to convincing the military judge that there was "some evidence" of UCI from Senator Duckworth's letter to CSAF and the subsequent reinvestigation by AFOSI. (R. at75). By the military judge's own words, he was initially going to rule that the trial defense team had met their burden and require the Government to prove beyond a reasonable doubt that the "alleged facts do not constitute UCI or that they don't place an intolerable strain on the" on the perception of fairness. (R. at 70). Given how close they came to succeeding with the evidence that existed, there is nothing in the record to suggest that either trial defense counsel should have done more in preparing for the UCI motion. The assertion that more evidence must exist, such as some kind of statement by CSAF, is purely speculative. The record shows "trial

defense counsel zealously defended their client in this case." United States v. Brozzo, 2003 CCA LEXIS 187, at *9 (A.F. Ct. Crim. App. Aug. 26, 2003).

Following the military judge's ruling, trial defense counsel's performance did not fall below the standard of fallible attorneys because they had a coherent strategy based on undermining Maj C.W-S.'s credibility, reasonably believed it was the best plan at the time, and they acted on that plan. Throughout cross-examination of Maj C.W-S., trial defense counsel thoroughly questioned her on the inconsistencies in her statement. See Issue III below.

2. Appellant has not demonstrated a reasonable probability that his charges would have been dismissed but for trial defense counsel's performance.

To establish prejudice, Appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 698; Loving v. United States, 68 M.J. 1, 6-7 (C.A.A.F. 2008). "A reasonable probability is one sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Appellant has not shown that the military judge's ruling in the motion's hearing would have been different but for his trial defense counsel's performance. At best, Appellant has speculated that further discovery or investigation might have yielded more evidence despite the Government's statement that no other responsive records existed. As CAAF stated in Allen, "[p]roof of command influence in the air" is not enough to show apparent UCI. 33 M.J. at 212. Since Appellant can only speculate as to what further investigation might have uncovered, he cannot show a reasonable *probability* that such investigation would have yielded a different result at his trial.

Request for a Hearing under Dubay

This Court should deny Appellant's request for a hearing pursuant to United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967). This court can resolve the claim without a fact-finding hearing if an assessment of the appellate filings and the record as a whole compellingly demonstrate the improbability of the facts alleged by the appellant. United States v. Ginn, 47 MJ 236, 244 (C.A.A.F. 1997); United States v. Fagan, 59 M.J. 238, 243 (C.A.A.F. 2004). Here, both members of the trial defense team provided adequate affidavits regarding Appellant's assertion of IAC surrounding the alleged UCI in his case. As described above, the record as a whole supports trial defense counsel's strategic decision to press with trial on the merits despite Appellant's certainty that some kind of UCI occurred in his case. Trial defense counsel advised Appellant of the likelihood that he would prevail on the UCI claim even if they delayed the trial, and he ultimately agreed it was best to move forward with the court-martial. (*Ms. Stewart Declaration* at 4-5). While not a case involving a guilty plea, Ginn's language can be applied here. This Court should "disregard all 'speculative or conclusory observations'" made by Appellant. Ginn, 47 MJ at 244-245. Appellant did not even truly allege new facts in dispute. Instead, he continues to speculate that there must be *some* other evidence of UCI in his case, despite repeated responses from the Government that no other responsive evidence existed, (*Ms. Stewart Declaration* at 2-3), and therefore his counsel must have been ineffective for failing to find it. Based on discovery previously provided by the Government, it is improbable that other evidence of UCI exists, and less so that it would benefit Appellant.

Appellant's assertion that more evidence of UCI exists is "inherently incredible," his argument of IAC fails, and no rehearing should be ordered. Ginn, 47 MJ at 245.

3. Conclusion.

In sum, Appellant's IAC claim fails all three prongs of the Gooch test. 69 M.J. at 362. Appellant's own certainty that some UCI existed in his case and that charges would not have been preferred against him but for that UCI is not supported by the evidence. It does not follow that, because Appellant is displeased with the result, his trial defense team's strategy was unreasonable or ineffective. From the record, Ms. Stewart and Maj Fallon made every effort to zealously advocate for Appellant and have his charges dismissed for UCI. There is no need for the Court to order a Dubay hearing in this case. This Court should deny this assignment of error.

II.

THE CONVENING AUTHORITY DID NOT IMPERMISSIBLY CONSIDER GENDER WHEN DETAILING WOMEN AS POTENTIAL COURT MEMBERS.

Additional Facts

On 21 October 2022, the convening authority was provided with 24 potential court-martial members. (ROT, Vol. 4, *Forwarding of Court-Martial Charges*, dated 21 October 2022). Of those 24, only three had "traditionally female names." (Id.; App. Br. at 13). The other 21 potential members had traditionally male names. (Id.). The convening authority detailed 16 of the 24 personnel to serve as members of Appellant's court-martial "[b]y reason of their age, education, training, experience, length of service, and judicial temperament under Article 25, UCMJ." (ROT, Vol. 1, *Special Order A-1*, dated 7 November 2022; Vol. 4, *Forwarding of Court-Martial Charges*, dated 21 October 2022). The three members with female names were selected. (Id.) The other thirteen members had traditionally male names. (Id.)

On 13 March 2023, the convening authority excused three members. (ROT, Vol. 1, *Special Order A-7*). One of the three excusals was a member with a female name from Special

Order A-1. (Id.). The other two excusals had male names. (Id.) In Special Order A-7, the convening authority also detailed three replacement members to the panel. (Id.) All three replacements had traditionally male names. (Id.)

The military judge conducted a motions hearing in Appellant's case on 11 April 2023. (R. at 25). Trial defense counsel only filed a motion based on UCI, discussed in Issue I above. (ROT, Vol 2, *Exhibit List*). Immediately before pleas, trial defense counsel stated they had "no additional motions." (R. at 112).

The word "gender" does not appear once in the transcript. Following *voir dire*, trial counsel and trial defense counsel mutually agreed to challenge six potential members for cause. (R. at 369). The two remaining panel members with female names were included in this. (Id.) Both members with female names were subsequently excused, and the panel was comprised entirely of members with traditionally male names. (R. at 389).

Standard of Review

When no objection is made at the trial level, this Court reviews court-martial composition issues for plain error. United States v. King, 83 M.J. 115, 121 (C.A.A.F. 2023). Under plain error review, Appellant bears the burden of establishing that (1) there is error; (2) the error is clear or obvious; and (3) the error materially prejudiced a substantial right. Id. at 123 (citation omitted). "[F]ailure to establish any one of the prongs is fatal to a plain error claim." United States v. Bungert, 62 M.J. 346, 348 (C.A.A.F. 2006).

Law and Analysis

Pursuant to Article 25, "[w]hen convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in the opinion of the convening authority, are best qualified for the duty by reason of age, education, training, experience, length

of service, and judicial temperament." 10 U.S.C.S. § 825(e)(2). Absent contrary indication, military appellate courts presume that the convening authority acted in accordance with Article 25, UCMJ, in "carr[ying] out the duties imposed upon him by the Code and the Manual." United States v. Bess, 80 M.J. 1, 10 (C.A.A.F. 2020) (citing United States v. Wise, 6 C.M.A. 472, 478, 20 C.M.R. 188, 194 (1955)).

There were no motions about improper panel constitution, nor were there any related objections at trial. (ROT, Vol 2). Nowhere in the unsealed portions of the transcript does the word "gender" appear.

The Government does not disagree with Appellant's recitation of the law with regard to whether gender can be considered by a convening authority. Under United States v. Jeter, convening authorities cannot include or exclude "prospective members based on their race." 84 M.J. 68, 73 (C.A.A.F. 2023). This Court previously found that "for purposes of our analysis, the same rationale applies to the selection or exclusion of members based on gender. J.E.B. v. Ala. ex rel. T.B., 511 U.S. 127, 129 (1994)] essentially put gender on the same constitutional footing as race in this respect." United States v. Patterson, 2024 CCA LEXIS 399, at *20-21 (A.F. Ct. Crim. App. Sep. 27, 2024).

But Appellant has not demonstrated error in the panel composed by the convening authority just because it had women. The "routine provision" of members with traditionally female names to a convening authority "does not in itself constitute a prima facie showing the convening authority in fact improperly relied on such criteria in selecting members under the plain error standard of review." Id. at 21-22.

Women are a part of the military. In 2023, women made up a little under 25% of active-

duty officers in the Air Force.[2] Consequently, active-duty women are permitted and expected to serve on courts-martial panels the same as their male counterparts. This Court should not accept Appellant's argument that choosing all three of the potential panel members with traditionally female names is a prima facie showing that the convening authority impermissibly considered the genders of potential panel members. By simple math, when there is a small minority of women offered as potential court-members, it is *more* likely that all of them will be selected while not *all* members of the majority with traditionally male names will be selected. That was the case here: Of 24 potential panels members, three had traditionally female names and the remaining 21 had traditionally male names. (ROT, Vol. 4, *Forwarding of Court-Martial Charges*, dated 21 October 2022). Sixteen panel members were selected. (ROT, Vol. 1, *Special Order A-1*, dated 7 November 2022). Three had traditionally female names and 13 had traditionally male. (Id.). But there is no indication that the convening authority deliberately chose the 3 female names *because* they were female names. This Court does not "presume improper motives from inclusion of racial and gender identifiers on lists of nominees for court-martial duty." United States v. Loving, 41 M.J. 213, 285 (C.A.A.F. 1994), and so should not presume them simply by considering the names of potential members.

Furthermore, it makes mathematical sense for the convening authority to have selected potential panel members in such a break down. As stated above, the Air Force is approximately 25% female. Statistically speaking, having a panel that is made up of close to 20% females is a normal and accurate reflection of the active-duty Air Force population. The convening authority need not have considered gender or deliberately focused on it for such a panel to exist.

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[2] *See Distribution of commissioned active duty officers in the United States military in 2023, by gender and service branch*, https://www.statista.com/statistics/214875/share-of-commissioned-officers-in-the-us-military-by-gender-and-branch (last visited January 27, 2025).

This Court should not apply greater scrutiny every time a woman is selected to a court-martial panel than it would if a man were selected. In Patterson, this Court was:

> not persuaded [that] the selection on one occasion of two females and two males from a pool of two female and seven male prospective members meets the "clear" or "obvious" standard where (1) an innocent explanation is facially plausible, and (2) Appellant has not identified a similar pattern of possible discrimination in any of the other five member selections in this court-martial, nor in any other court-martial involving these convening authorities.

2024 CCA LEXIS at *22.

Appellant's contention that a convening authority's selection of all potential court members with traditionally female names, even when they were a stark minority of potential members, is a prima facie showing of gender consideration fails in the same vein. When the convening authority excused members in advance of trial, he excused one with traditionally female names and replaced them with all traditionally male names. (ROT, Vol. 1, Special Order A-1, dated 7 November 2022). As was the case in Patterson, these circumstances distinguish this case from Jeter, where there was evidence of systemic inclusion of all white panels in courts-martial against African Americans. 2024 CCA LEXIS at *22.

To take Appellant's view on member selection would *discourage* convening authorities from selecting women to serve on court-martial panels. If this Court accepted Appellant's argument, it would send a message to the convening authorities that female panel members are still considered different from male panels members, which would be contrary to the original purpose of Batson and Jeter. In effect, such a holding would return the Air Force to the problem originally prohibited by Batson: considering impermissible factors when selecting a panel of members. There was no error in member selection by the convening authority, and even if there was, it was not clear and obvious.

This Court should not find Appellant made a prima facie showing that gender played a role in his court-martial panel, and this Court should deny his request for relief.

III.

APPELLANT'S CONVICTION FOR ABUSIVE SEXUAL CONTACT IS LEGALLY AND FACTUALLY SUFFICIENT.

Additional Facts

Prior to 5 July 2024, Maj C.W-S. had spoken with J.S. about how "persistent" Appellant was being about having a beer with her. (R. at 509). Maj C.W-S.'s "issue" was about the time of night when Appellant would mention it. (R. at 510).

Maj C.W-S. testified that she wondered what signal she could have given Appellant to make him think his behavior was okay. (R. at 459). Maj C.W-S. denied sending flirtatious messages to Appellant over GroupMe. (R. at 464, 469). She said that Appellant knew she was married and had a family, including a child. (R. at 476). Maj C.W-S. denied feeling flattered by any attention she received from Appellant. (R. at 477). Maj C.W-S. felt uncomfortable by his messages. (R. at 478).

Maj C.W-S. also admitted to laughing some of the time Appellant was in her room, although she clarified she was frantic at the time. (R. at 500). When Appellant was singing *My Heart Will Go On*, Maj C.W-S. took that opportunity to text her friend, J.S. (R. at 500). She was stalling for time and pretended to be recording Appellant and did not tell him she was texting someone. (R. at 500-501). Appellant asked Maj C.W-S. not to send the recording to anyone. (R. at 500). Maj C.W-S. did not recall asking Appellant "what he's going to do about it to try to stop [her] from sending" the supposed recording to anyone. (R. at 501). She likewise did not recall that statement leading to Appellant approaching her a second time to touch her. (R. at

501). Maj C.W-S. did not recall having a conversation about the bathroom and showers immediately before Appellant went into her shower. (R. at 508-09).

Maj C.W-S. received training herself as an AFOSI agent and had been assessing whether Appellant was a threat to her that night. (R. at 502). When he kissed the back of her neck, she "jumped up and said, [he] needs to get [his] shoes, and pizza, and go." (R. at 507). She wanted to avoid escalating the situation, so she did not scream at Appellant when she told him to leave. (R. at 503). Maj C.W-S. spoke to Appellant firmly when she told him to leave. (R. at 505). Appellant "willfully refused." (R. at 507). While he was touching her, it "kind of stopped and started." (R. at 489). At some points Maj C.W-S. was pushing him away and at other times Appellant stopped on his own. (R. at 489-499). Maj C.W-S. kept asking "him repeatedly to go. . . [She] kept telling him he was going to get himself in trouble." (R. at 490).

In her initial AFOSI interview in 2019, Maj C.W-S. described Appellant's hands on her as tickling. (R. at 486). In the same interview, Maj C.W-S. did not say Appellant touched her breasts and said he "grazed" her butt. (R. at 486-487). At a later interview with AFOSI in July of 2021, she described his actions as "grabbing." (R. at 486). Maj C.W-S. explained that in 2019 she was "minimizing" Appellant's conduct because she did not want him to get in trouble. (R. at 514). In her testimony, Maj. C.W-S. stated she felt Appellant would have done more to her body if she "had not been fighting him off." (R. at 511). She testified that she did not originally relay this fear in her interview with AFOSI. (Id.). She also testified that in 2019, she asked the servicing legal office to let her provide more details about the incident, but she was not afforded the opportunity to do so. (R. at 515-516).

J.S. testified that he was Maj C.W-S.'s colleague during the summer of 2019. (R. at 543-544). At approximately 2200 on 5 July 2019, J.S. received a text message from Maj C.W-S. (R.

at 545). Maj C.W-S. texted him that she "[couldn't] get dude out of [her] room." (R. at 545). J.S. correctly surmised that it was Appellant based on previous conversations he had had with Maj C.W-S. about Appellant's behavior toward her. (R. at 545-546). Maj. C.W-S. confirmed this. (R. at 545). Maj C.W-S. had previously spoken to J.S. about Appellant's requests to get a drink with her and that she had never agreed to meet with him. (R. at 546).

After receiving this text message, J.S. texted C.S., another coworker who was in the same building as Maj C.W-S. (R. at 547). In a group chat with J.S., Maj C.W-S. and C.S., Maj C.W-S. stated she needed assistance. C.S. then went to Maj C.W-S.'s room to help her. (R. at 547). These text messages were captured in Prosecution Exhibit 3.

Shortly after the incident, Maj C.W-S. told J.S. that Appellant "attempted to grab her," but clarified that she said "he grabbed her and attempted to tickle her or did tickle her." (R. at 559). To J.S., Maj C.W-S. was visibly upset. (Id.). Maj C.W-S. appeared to be in shock. (Id.). At some point when J.S. asked her about why she let Appellant into her room, Maj C.W.-S stated it was just to pick up pizza. (R. at 578).

C.S. testified that she met Maj C.W-S. in 2018. (R. at 581). C.S. was at Maxwell AFB, AL, in July 2019 for a TDY. (Id.) On 5 July 2019, she went to her own room at about 1900. (R. at 582). C.S. remained there until she received a text message later than night. (Id.) The text message asked her to leave her room to help Maj C.W-S with a "dude issue in her room." (R. at 582-583). Once C.S. understood that Maj C.W-S. needed help, she went to her room. (R. at 583). C.S. had to knock two separate times before the door opened. (Id.). Appellant opened the door and C.S. could see Maj. C.W-S. standing in the back of the room. (R. at 584). C.S. offered to go with Maj C.W-S. to the OTS Shoppette to get cash. (Id.). C.S. felt there was a "hesitation" in the room and so walked further inside. (R. at 585). C.S. again said to Maj C.W-S. that they

should go get cash. (Id.) Appellant then said "oh, I guess I'm not invited," and then turned to leave. (Id.). After Appellant left the room, Maj C.W-S. stated she "wanted to get out of there," so the two went to the Shoppette. (Id.). J.S. met up with them at that point. (Id.). Maj C.W-S. told C.S. that Appellant had grabbed her, that he "had gotten behind her and straddled her on the couch and had touched her in inappropriate places . . . below the belt areas." (R. at 586).

Standard of Review

The standard of review for factual and legal sufficiency is de novo. United States v. McAlhaney, 83 M.J. 164, 166 (C.A.A.F. 2023) (citing United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006).

Law and Analysis

Legal and Factual Sufficiency

The test for legal sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal citations omitted). This test does not require a court to ask whether it believes the evidence established guilt beyond a reasonable doubt, but rather whether any rational factfinder could do so. United States v. Acevedo, 77 M.J. 185, 187 (C.A.A.F. 2017). The term reasonable doubt, however, does not mean that the evidence must be free from conflict. United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017), aff'd 77 M.J. 289 (C.A.A.F. 2018). In resolving questions of legal sufficiency, the Court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution. United States v. Plant, 74 M.J. 297, 301 (C.A.A.F. 2015). The test for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable

inferences from basic facts to ultimate facts." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1973)). As a result, the standard for legal sufficiency involves a very low threshold to sustain a conviction. King, 78 M.J. at 221.

The test for factual sufficiency "is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witness," this Court is "convinced of the accused's guilt beyond a reasonable doubt." United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)). This Court's review of the factual sufficiency of evidence for findings is limited to the evidence admitted at trial. Article 66(d)(1), UCMJ[3]; United States v. Beatty, 64 M.J. 456, 458 (C.A.A.F. 2007) (citations omitted).

In the performance of this review, "the Court of Criminal Appeals applies neither a presumption of innocence nor a presumption of guilt." United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002). While this Court must find that the evidence was sufficient beyond a reasonable doubt, it "does not mean that the evidence must be free of conflict." United States v. Galchik, 52 M.J. 815, 818 (A.F. Ct. Crim. App. 2000) (citation omitted).

Abusive Sexual Contact

The specification as charged under Article 120(d), UCMJ, states that Appellant "did, at or near Maxwell Air Force Base, Alabama, on or about 5 July 2019, unlawfully touch the buttocks of Maj C.WS., with his hands, with an intent to gratify his sexual desire, without the consent of Maj C.WS." (ROT, Vol. 1, *Charge Sheet*).

[3] Appellant's conviction stems from an offense with a date range including 2019, therefore the previous version of Article 66(d)(1) applies.

At trial, the military judge instructed the members as to the elements of the offense, as follows:

(1) That on or about 5 July 2019, at or near Maxwell Air Force Base, Alabama, the accused committed sexual contact upon Maj C.W-S., by unlawfully touching her buttocks with his hands, with an intent to gratify his sexual desire; and,

(2) That the accused did so without the consent of [Maj C.W-S.].

(R. at 694).

In discussing the term "sexual contact," the military judge stated:

> "Sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to arouse or gratify the sexual desire of any person. . . A "touching" may be accomplished by any part of the body.

(R. at 695.)

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

> "Consent means a freely given agreement to the conduct at issue by a competent person.
>
> (A) A "competent person" is a person who possesses the physical and mental ability to consent.
>
> (B) "Freely Given Agreement." To be able to freely make an agreement, a person must first possess the cognitive ability to appreciate the nature of the conduct in question and then possess the mental and physical ability to make and to communicate a decision regarding that conduct to the other person.
>
> (C) 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. Direct and circumstantial evidence may be considered in evaluating the presence or absence of consent.

(Id. at 695-696).

The military judge also advised the members that:

> in weighing the evidence, bear in mind that only matters properly before the court as a whole should be considered in your deliberations. In weighing and evaluating the evidence you are expected to use your own common sense, and *your knowledge of human nature* and *the ways of the world.* In light of all the circumstances in the case, you should consider the inherent probability or improbability of the evidence offered to you.

(R. at 717) (emphasis added).

Appellant argues that his conviction is legally and factually insufficient because (1) the Government failed to provide evidence of Appellant's intent to gratify his sexual desire and (2) Maj C.W-S.'s statements to AFOSI contained inconsistencies (App. Br. at 19-20). This argument is unpersuasive because his view of what can show an intent to gratify sexual desires is too limited.

Maj C.W-S. testified that Appellant climbed on the ottoman and sat behind her. (R. at 436-438). She testified that he was straddling her with one leg on either side of her. (R. at 438). This type of position could easily be understood as sexual. While she did not say it explicitly in her AFOSI interview, Maj C.W-S. assumed it was obvious that this position put Appellant's penis against her buttock. (R. at 482, 485).

Maj C.W-S. has consistently stated that Appellant gave her a massage that she did not verbally consent to and then kissed the back of her neck. (R. at 439). When Maj C.W-S. leapt up from the chair after the kiss and told him to leave, Appellant grabbed her "all over." (Id.).

He started to pull her toward him and tickled her sides while she tried to push him away. (Id.). Then Appellant grabbed Maj C.W-S.'s buttock with his hand. (Id.).

All of Appellant's actions leading up to the butt grab were evidence of his intent to gratify his sexual desire. A factfinder aware of the ways of the world could find a massage and a kiss to the back of the neck were both sexual in nature. Pulling on Maj C.W-S.'s clothes to pull her toward Appellant was also evidence of sexual intent in his touches. (Id.). Despite Appellant's assertion, touching other parts of the body in addition to touching Maj C.W-S.'s butt does not mitigate the theory that he touched her to gratify his own sexual desire. (App. Br. at 19). Using common sense, engaging in sexual conduct will often result in touches beyond just the buttock.

Some of Appellant's actions immediately following the charged abusive sexual contact also demonstrate his intent. After Appellant went into the bathroom and turned on the shower, he proceeded to touch and pull at Maj C.W-S.'s clothes again. (R. at 446).

Appellant's intent to gratify his sexual desire was further demonstrated when he sang a well-known romance song, *My Heart Will Go On* by Celine Dion, after his advances were rejected by Maj C.W-S. (R. at 447). There is no platonic explanation for singing such a song following touches all over Maj C.W-S.'s body, including grabbing her buttock.

While Appellant focused heavily on the differences between Maj C.W-S.'s statements to AFOSI in 2019 and 2021, Maj C.W-S. testified regarding Appellant's actions. She explained that in her 2019, she was "minimizing" Appellant's conduct. (R. at 514). While she said Appellant "grazed" her buttock in 2019, she clarified in 2021 and at tried that he had in fact grabbed it. While Appellant argues this should hurt her credibility with a reasonable factfinder

(App. Br. at 20), it is equally possible that a factfinder could believe her reason for not telling the entire story to AFOSI the first time.

A rational factfinder could have found the government proved each element of the offense beyond a reasonable doubt. Importantly, while corroboration of a witness's testimony is not required for legal sufficiency, *see* United States v. Rodriguez-Rivera, 63 M.J. 372, 383 (C.A.A.F. 2006) ("The testimony of only one witness may be enough…so long as the members find that the witness's testimony is relevant and sufficiently credible."), here there were two witnesses who provided corroborating evidence.

The Government provided the text messages Maj C.W-S. sent to J.S. and C.S. on the night Appellant came to her hotel room. (Pros. Ex. 3). While Appellant argues that Maj C.W-S. should not have been believed by the factfinder, these text messages corroborated Maj C.W-S.'s version of events that she wanted Appellant to leave her room and need help to get him "out of her room." (Id.).

Finally, if this Court finds that the massage and neck kiss were improperly considered as evidence of intent under Issue IV below, this Court should still find the evidence was legally and factually sufficient considering the other evidence of Appellant's intent. Appellant straddled Maj C.W-S. from behind and placed his penis against her buttock. (R. at 485). He sang a romance song to her when she rejected him. (R. at 447). And his contention that he grabbed her buttock to pull her toward him is unpersuasive: Appellant was already touching Maj C.W-S. all over her body to pull her toward him. It is unreasonable for Appellant to argue that he only grabbed her buttock to effectuate that, rather than to gratify his sexual desire.

In considering the evidence "in the light most favorable to the prosecution," King, 78 MJ at 221, a rational trier of fact could have found the essential elements were present to find

Appellant guilty of abusive sexual contact. Maj C.W-S. had some inconsistencies in her statements to AFOSI, but evidence need not be "free from conflict" to be legally sufficient. Wheeler, 76 MJ at 568.

Addressing factual sufficiency, the weight of the evidence from Maj C.W-S.'s testimony, text messages, and corroborating witnesses, with allowances that this Court did not observe the witnesses, should convince this Court of Appellant's guilt beyond a reasonable doubt. Reed, 54 MJ at 41.

The panel at Appellant's court-martial correctly found Appellant guilty of abusive sexual contact, and there is no credible basis in the record for this Court to disturb Appellant's just verdict and sentence. Here, the United States presented the panel with ample evidence to convince them of Appellant's guilt beyond a reasonable doubt. This Honorable Court should equally be convinced and affirm Appellant's conviction.

IV.

THE MILITARY JUDGE DID NOT ERR BY INSTRUCTING THE MEMBERS ON LESSER INCLUDED OFFENSES OR THAT CERTAIN EVIDENCE COULD BE CONSIDERED UNDER MRE 404(B).

Additional Facts

Lesser Included Offense

Over trial defense counsel's objection (R. at 645), the military judge instructed the members that assault consummated by battery in violation of Article 128, UCMJ, was a lesser included offense (LIO) of the specification for abusive sexual contact:

> If after considering the evidence you acquit the Accused of the specification of Charge I—Article 120, UCMJ—Abusive Sexual Contact, you should next consider whether the Accused is guilty or not guilty of the *lesser included offense* of Article 128, UCMJ—Assault Consummated by a Battery.

> A lesser included offense is an offense that is "subsumed" within a greater 15 offense. When the government charges a greater offense at trial, the Accused is liable not only 16 for that greater offense, but for any applicable lesser included offense. . . .
>
> Elements of the lesser included offense is as follows: (1) That on or about 5 July 2019, at or near Maxwell AFB, Alabama, the Accused inflicted bodily harm upon the person of [Maj C.W-S.] by touching her buttocks with his hands; and (2) That the bodily harm was done unlawfully; and, (3) That the bodily harm was done with sufficient force or violence.

(R. at 696-697).

The military judge provided the following definitions for the LIO:

> "Assault." An assault is an unlawful offer of force or violence against another.
>
> "Battery." An assault in which bodily harm is inflicted is called a "battery." A "battery" is an unlawful infliction of bodily harm to another, made with force or violence, by an intentional or a culpably negligent act or omission. And I'll define those terms for you here in a moment.
>
> "Intent." The intent necessary to prove this case is that of either "general intent" (i.e. an intentional act) or "culpable negligence."
>
> "General Intent." Assault consummated by a battery is a general intent crime, meaning the offense does not require specific intent to inflict bodily harm. The focus of the offense is whether bodily harm resulting from an assault (that is, whether the alleged physical contact constituted "an offensive touching—however slight"). That's what bodily harm means. So bodily harm doesn't mean someone scratched, bleeding, etcetera. It could mean that, but the definition of bodily harm just means an offensive touching, however slight. General intent requires only that the Accused undertook an intentional act in assaulting another person, and that the assault resulted in bodily harm. . . .
>
> The only intent required for a battery is the general intent to take the action which caused the "offensive touching, however slight."
>
> The other way to potentially commit a battery, if it's not an intentional act, is 15 an act done with culpable negligence.

> "*Culpable negligence."* is a degree of carelessness greater than simple negligence. "Simple negligence" is the absence of due care. The law requires everyone at all times to demonstrate the care for the safety of others that a reasonably careful person would demonstrate under the same or similar circumstances; that is what "due care" means. "Culpable negligence," on the other hand, is a negligent act or failure to act accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable results to others.
>
> "Unlawful Force or Violence." An infliction of bodily harm is "unlawful" if done without legal justification or excuse and without the lawful consent of the victim.
>
> So the amount of force – it doesn't have to be he-man level force, it's whatever force used, did you have a legal justification or excuse to use it, or was it non-consensual?

(R. at 697-699).

Instruction under MRE 404(b)

During an Article 39(a) hearing on 13 April 2023 prior to opening statements, the military judge informed the parties that he had prepared a limiting instruction for this evidence. He read the proposed instruction:

> Members, you've heard testimony concerning that the accused may have rubbed the shoulders of [Maj C.W-S], and also kissed her neck. Neither of those instances are charged misconduct in this case, and so I advise you that that testimony was admitted for a limited purpose. Namely, the parties intend to offer counter arguments as to the implications of these actions. The defense intends to argue that if true, it may create a reasonable mistake of fact in the mind of the accused that [Maj C.W-S.] may have been consenting to the charged misconduct. The government intends to argue in contrast that those actions simply demonstrate the accused's sexual desire of [Maj C.W-S.], and his intent to gratify his sexual desire in touching her with or without her consent. You may consider the evidence solely for its tendency, if any, to inform those bases I've just identified. You may not consider it for any other purpose.

(R. at 400-401).

The military judge asked if there were any objections to that limiting instruction, and trial defense counsel said "[none], sir." (R. at 401).

While discussing instructions for the members after the defense rested, trial defense counsel objected to the inclusion of the instruction that the members might consider evidence of Appellant kissing and massaging Maj C.W-S. as evidence of his intent to gratify his sexual desire" under MRE 404(b). (R. at 679-680). Trial defense counsel stated that "[they] think certainly the government could have elicited 404(b), but they didn't." (Id.).

The Government did not provide notice under MRE 404(b) of its intent to argue Appellant's massage of Maj C.W-S. and his kiss on her neck as evidence of his intent to gratify his sexual desire because, under the Government's theory, such actions by Appellant were *res gestae.* (R. at 680).

The military judge disagreed with the Government's position on *res gestae*. (R. at 681). Moreover, the military judge clarified that he had already performed an analysis of the evidence under Reynolds. (Id.), *see* United States v. Reynolds, 29 M.J. 105 (C.M.A. 1989). While this analysis was made on the record during a sealed hearing, the military judge summarized it for the parties in an open session. (R. at 681). From the military judge's perspective, he had:

> [O]ut of an abundance of caution in the interest of the accused, . . . done a 404(b) analysis insofar as it appeared to the court that functionally the government was seeking to do this with or without notice. [The military judge] want to put the . . . issue up for the defense for objections if necessary."

(R. at 683-684).

The military judge further clarified that he received no notice by the parties or motions in limine at that time from either party. (R. at 681). The military judge also agreed with trial counsel that, during the sealed hearing, the military judge indicated that it would be an

instruction and asked for an objection, to which there was none. (R. at 682). Trial defense counsel did not disagree with this summary. (Id.).

The military judge asked trial defense counsel "in what way [they are] unprepared to address this issue insofar as this information [was] provided to months ago in discovery and discussed on . . . first day of the trial." (R. at 681). Trial defense counsel responded that they did not file a motion because they had not received notice of the Government's intent to use the evidence under MRE 404(b). (Id.). Trial defense counsel stated they had not interpreted the military judge's analysis "to mean that that had been litigated at that moment and that [they] were not on notice." (R. at 682).

The military judge overruled trial defense counsel's objection to the instruction at that time. (R. at 683).

Standard of Review

A preserved claim of an instructional error is a question of law reviewed de novo. United States v. Payne, 73 M.J. 19, 22 (C.A.A.F. 2014). A military judge's decision to provide an instruction is reviewed for abuse of discretion. United States v. Anderson, 51 M.J. 145, 153 (C.A.A.F. 1999); United States v. McDonald, 57 M.J. 18, 20 (C.A.A.F. 2002).

Law and Analysis

Lesser Included Offense

"The test for determining lesser included offenses under the UCMJ provides in pertinent part that '[a]n accused may be found guilty of an offense necessarily included in the offense charged.'" United States v. Alston, 69 M.J. 214, 215 (C.A.A.F. 2010) (citing Article 79, UCMJ, 10 U.S.C. § 879 (2006)). An elements test can be applied in two ways: (1) comparing the statutory language definition of the two offenses and (2) by examining the specification of the

charged offense. United States v. Gonzales, 78 M.J. 480, 484 (C.A.A.F. 2019) (citing United States v. Armstrong, 77 M.J. 465, 469-470 (C.A.A.F. 2018). Under the second method, an "offense can also be a lesser included offense of the charged offense if the specification of the charged offense is drafted in such a manner that it alleges facts that necessarily satisfy all the elements of each offense. Id.

Comparing the elements of abusive sexual contact and assault consummated by battery as defined by the military judge to the panel, the Government charged Appellant in such a way that captured assault consummated by battery in Charge I. In relevant part, in Charge I Appellant was specifically charged with "unlawfully touch[ing] the buttocks of [Maj C.W-S.], . . . without the consent of [Maj C.W-S.]. (ROT, Vol 1). This Court should consider the model specification for assault consummated by battery found in the UCMJ: that the accused "unlawfully" made contact with the victim on their body.[4] With this charging language, the Government incorporated the language used for assault consummated by battery into the specification for abusive sexual contact.

Appellant is incorrect that this case presented an "all or nothing" situation. (App. Br. at 24; R. at 645). The military judge correctly found that evidence was raised at trial that it was the specific intent element that was in dispute. (R. at 647). The military judge correctly found that in this case, assault consummated by battery was a lesser included offense of abusive sexual contact. (R. at 648). This case does not fit under United States v. Riggins, 75 M.J. 78 (C.A.A.F. 2016) or Gonzales because the Government was not trying to shoehorn in a lesser included offense with a specific intent requirement that was not capture in the greater offense. 78 M.J. at 485 (finding that the specific intent required for abusive sexual contact was not present in a

[4] MCM, pt. IV, para. 128e.(2).

charge of rape of a child, whose elements do not contain that specific intent.). Rather, in this case, the greater offense of abusive sexual contact has a specific intent requirement not found in the LIO of assault consummated by battery. The concern from Riggins does not apply here because the Government intentionally charged Appellant with "unlawfully" touching Maj C.W-S.'s buttock without her consent. 75 MJ at 83-84. This resolved the issue of missing an element from assault consummated by battery.

Finally, Appellant suffered no prejudice because he was not convicted of the lesser included offense of assault consummated by battery. (ROT, Vol 1). He was convicted of the greater offense of abusive sexual contact. (Id.). There was also no prejudice to Appellant through trial defense counsel's closing argument. Appellant opines that his trial defense counsel could not argue the "out" of assault consummated by battery or by the military judge instructing the members on the offense. (App. Br. at 24). Trial defense counsel did argue against a finding of guilty for assault consummated by battery and specifically addressed that the members should not use it as a possible "out" if the members did not find the touch to the buttocks as sexual. (R. at 754). Trial defense reiterated that the touching might not have been "an intentional application." (R. at 755). They offered "consent, mistake of fact as to consent, and also accident" as a defense to the lesser included offense. (R. at 756). Furthermore, it is not "judicial imprimatur," (App. Br. at 24) for a military judge to explain to members that some evidence has been raised with respect to a lesser included offense. The military judge did not instruct the members that he felt a battery under Article 128 had occurred. He simply instructed the members that they had a "legal obligation to consider whether [Appellant] might be guilty or not guilty of the lesser included offense." (R. at 697). If this constitutes judicial imprimatur, it would be inappropriate judicial approval every time a military judge instructed members that the

evidence has raised a possible offense or defense. Appellant suffered no prejudice from the military judge's instruction on the lesser included offense.

This Court should hold that, in this particular case, the Government charged abusive sexual contact in such a way as to capture the elements of assault consummated by battery, and the military judge did not err by instructing the members of the LIO.

404(b) evidence

The military judge's instruction to the members that they could consider Appellant's actions under MRE 404(b) did materially prejudice a substantial right of Appellant.

This Court should look to United States v. Reeder, 2005 CCA LEXIS 211 (N-M Ct. Crim. App. June 30, 2005). In that case, the Government failed to provide the accused with notice of their intent to use statements by the accused under MRE 404(b). Id. at 4. It was undisputed that the defense in that case "requested notice under [MRE] 404(b) and that the prosecution failed to comply." Id. NMCCA found that this omission was "unintentional." NMCCA reviewed the "military judge's decision to excuse the required pretrial notice and admit the challenged evidence for an abuse of discretion." Id. at 5; *see generally* United States v. McCollum, 58 M.J. 323, 335 (C.A.A.F. 2003). NMCCA cited to Reynolds as the test to determine whether such evidence should be admissible. Id. at 4-5.

Despite the lack of formal notice, NMCCA found that "the appellant had actual advance notice of the existence of the disputed statements." Id. at 6. In particular, NMCCA found that the military judge admitted the evidence under the factors set forth in Reynolds, conducted an MRE 403 balancing test, and "gave an appropriate limiting instruction to the members regarding their use of the evidence." Id. at 7-8. NMCCA found that the military judge's admission of the evidence was within his discretion.

Reeder further found that the defense's argument that their strategy was "scuttled by the lack of reasonable notice" was without merit. Id. at 8. NMCCA highlighted the fact that the defense had been in possession of the evidence at least one month prior to trial, id. at 7, and the issue had come up during trial counsel's opening statement. Id. at 9. Defense counsel "reasonably should have known that the 404(b) evidence remained in play." Id.

This case provides a very similar scenario. From the record, the Government did not intentionally fail to provide notice under MRE 404(b). Rather, the Government felt Appellant's actions fell within *res gestae*. It was not until the military judge disagreed with this that the Government became aware that he considered the evidence under MRE 404(b). (R. at 681). The military judge performed a Reynolds analysis of the evidence with all parties present during the sealed hearing prior to trial on the merits and heard no objections. He later provided the parties with his proposed limiting instruction ahead of trial on the merits and heard no objections. (R. at 401).

Trial defense counsel made no argument that they did not receive the contested evidence in the case, and neither does Appellant in his brief. The evidence at issue was contained in Maj C.W-S.'s AFOSI interviews, both of which were in trial defense counsel's possession as evidenced from their cross-examination of Maj C.W-S. regarding her interviews. When first objecting to this instruction, trial defense counsel acknowledged that they understood how the Government might have "elicited 404(b)" with that evidence. (R. at 680). This demonstrates knowledge of the evidence on the part of trial defense counsel and their understanding that it *could* be used under MRE 404(b). Finally, trial defense counsel fully intended to argue the same evidence in support of their mistake of fact as to consent defense. (R. at 679). In essence, trial defense counsel had received the evidence, had not objected to its admission during the court-

martial, understood how it could come in under MRE 404(b), and wanted to argue it for their own purposes, but alleged surprise at the military judge's decision to include the evidence as evidence of intent to gratify Appellant's sexual desire.

This Court should find that the defense "had actual advance notice of the existence of the" evidence in question, and the military judge did not err in including the limiting instruction to the panel members. This Court should deny this assignment of error.

V.

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 CONSTITUTIONAL AS APPLIED TO APPELLANT

Additional Facts

The maximum punishment for abusive sexual contact in this case was a dismissal, forfeiture of all pay and allowances, and confinement for seven years. Manual for Courts-Martial (MCM), pt. IV, ¶ 60.d.(4) (2019 ed.). The maximum punishment for assault upon a commissioned officer was dismissal, forfeiture of all pay and allowances, and confinement for three years. Id. at ¶ 77.d.(2)(b).

The Staff Judge Advocate's first indorsement to the Entry of Judgment and Statement of Trial Results in Appellant's case contains the following statement: "Firearm Prohibition Triggered Under 18 U.S.C. § 922: Yes." (*Statement of Trial Results*, dated 14 April 2023, ROT, Vol. 1 and *Entry of Judgment*, dated 31 May 2023, 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, 18 U.S.C. § 922, makes it unlawful for any person, *inter alia*, "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" Id. at § 922(g)(1).

Appellant asserts that 18 U.S.C. § 922 is unconstitutional as applied to him. (App. Br. at 30.) Appellant asserts that under the Second Amendment, U.S. CONST. AMEND. II and N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022), the Government cannot show that there is a historical tradition in applying a firearm ban in Appellant's case. (App. Br. at 31). Appellant's constitutional argument is without merit and is a collateral matter beyond this Honorable Court's authority to review.

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

This Court recently held in its published opinion in United States v. Vanzant, 84 M.J. 671, 681 (A.F. Ct. Crim. App. 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(d)(1), UCMJ. Id. at *24.

Appellant's argument that this Court could provide relief under Article 66(d)(2) also fails because Article 66(d)(2) did not grant this Court jurisdiction in Appellant's case to correct the 18 U.S.C. § 922 annotation on the First Indorsement of the STR or the EOJ. "Article 66(d)(2), UCMJ, only authorizes a CCA to provide relief when there has been an 'error or excessive delay

in the processing of the court-martial." United States v. Williams, 2024 CAAF LEXIS 501, *14 (C.A.A.F. 5 September 2024). In Williams, CAAF pointed to three statutory conditions that must be met before this Court may review a post-trial processing error under Article 66(d)(2). Id. at *14. First, an error must have occurred. Id. Second, an appellant must raise a post-trial processing error with this Court. Id. Third, the error must have occurred after the judgment was entered. Id.

The military judge enters the court-martial judgment into the record via the EOJ. 10 U.S.C. § 860c(a)(1). By statute, the EOJ includes the STR. 10 U.S.C. § 860c(a)(1)(A). The STR contains: (1) "each plea and finding;" (2) "the sentence, if any; and" (3) "such other information as the President may prescribe by regulation." 10 U.S.C. § 860(a)(1). The President prescribed that "[a]ny additional information directed by the military judge or required under regulations prescribed by the Secretary concerned" may be added to the STR. R.C.M. 1101(a)(6). This Court determined an annotation on the STR notifying the Appellant of an 18 U.S.C. § 922 firearm prohibition constituted "other information" as required by R.C.M. 1101(a)(6). Williams, 2024 CAAF LEXIS 501, *12-13.

Following the President's instructions in R.C.M. 1101(a)(6), the Secretary of the Air Force required "other information" be provided in a First Indorsement attached to the STR. Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice*, para. 20.6 (dated 14 April 2022). On the STR, the SJA must annotate whether "firearm prohibitions are triggered." Id. The Secretary of the Air Force also requires a First Indorsement to the EOJ that also states whether a firearm prohibition is triggered by a conviction. DAFI 51-201, para. 20.41. "In cases where specifications allege offenses which trigger a prohibition under 18 U.S.C. § 922 and the accused is found guilty of one or more such offenses, the appropriate box

must be completed on the first indorsements to the STR and EoJ by the SJA." DAFI 51-201, para. 20.39.

Firstly, while Appellant has requested relief under the second prong, the 18 U.S.C. § 922 firearm annotation was neither an error, nor one that occurred after the judgment of the court-martial was entered on the record. The 18 U.S.C. § 922 annotation on the First Indorsement of the STR and on the First Indorsement of the EOJ were not errors because they accurately stated that the firearm prohibition applied to Appellant in accordance with federal law for his convictions. Secondly, because the STR and the First Indorsement are entered into the record before the EOJ is entered into the record under Article 60c, the § 922 annotation on the STR's First Indorsement is not an error occurring "*after* the judgment was entered into the record." 10 U.S.C. § 866(d)(2) (emphasis added).

2. 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 of abusive sexual contact in violation of Article 120, UCMJ, and assault upon a commissioned officer, both of which are crimes punishable by imprisonment for a term exceeding one year. (MCM, pt. IV, para. 60.d.(4); para. 77.d.(2)(b) (2019 ed.); ROT, Vol 1, *Entry of Judgment*). Thus, the Staff Judge Advocate followed the appropriate Air Force regulations in signing the first indorsement to the STR and EOJ. DAFI 51-201, paras. 29.30, 29.32.

3. 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* Bruen, 597 U.S. at 20; 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). 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 735 (citing Heller, 554 U.S. at 626). Because Appellant has been convicted by a general court-martial of a serious crime, application of 18 U.S.C. § 922(g) to him is constitutional.

Appellant's argument presumes, incorrectly, that his crime was not a violent offense or "crime of violence." (App. Br. at 13.) 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) (emphasis added). Touching the buttocks of another person without consent and putting hands on their torso to pull them close, as Appellant did, are both examples of a "violent offense." 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.

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.

VI.[5]

THE MILITARY JUDGE PROPERLY DECLINED TO CONSIDER APPELLANT'S R.C.M. 917 MOTION AS UNTIMELY. IN ADDITION, THE MILITARY JUDGE CLARIFIED HE WOULD HAVE DENIED THE MOTION ON THE MERITS HAD HE CONSIDERED IT.

Additional Facts

The Statement of Trial Results (STR) in Appellant's case was completed on 14 April 2023. (ROT, Vol 1) Maj Fallon signed a receipt for the STR on 18 April 2023. (ROT, Vol 4, Post-Sentencing). On 11 May 2023, Maj Fallon e-mailed the military judge and trial counsel. (ROT, Vol 1). Maj Fallon requested an extension of time to file a motion under R.C.M. 917. (Id.). The ADC explained that there had been a miscommunication between himself and the civilian defense counsel regarding who would be accomplishing post-trial matters for Appellant. Id. The ADC believed there were "issues to raise under R.C.M. 917" and sought an extension until 14 May 2023 to file the motion. Id.

Without receiving a response from the military judge and to "avoid wasting the Court's time," the ADC filed a motion for a finding of not guilty under R.C.M. 917 on 12 May 2023. (ROT, Vol 1; Appendix C). The motion argued the Government failed to provide evidence of Appellant's intent to gratify his sexual desire.

On 14 May 2023, the military judge e-mailed his ruling to the parties. (ROT, Vol 1). The military judge declined to consider the ADC's motion as untimely filed and found that the ADC's reason for the delay did "not constitute 'good cause shown.'" (ROT, Vol 1, citing R.C.M. 1104). The military judge found that the motion was untimely and "waived." (ROT,

[5] This issue is raised in the appendix pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

Vol 1). However, the military judge also stated that had he considered the motion under R.C.M. 917(d), he would have denied the motion under R.C.M. 917 because of the "testimony of the victim and supporting 'outcry report' witnesses, viewed in the light most favorable to the government and drawing all reasonable inferences therefrom." Id.

Standard of Review

This Court reviews a military judge's ruling on a post-trial motion for an abuse of discretion. United States v. Rudometkin, 82 M.J. 396, 400 (C.A.A.F. 2022).

Law and Analysis

After trial following a conviction, the accused may file a motion with the military judge to set aside the findings as legally insufficient. R.C.M. 1104(b)(1)(B). Such a motion must be filed within 14 days of defense counsel's receipt of the Statement of Trial Results (STR). R.C.M. 1104(b)(2)(A). On a showing of good cause, the military judge may grant an extension for an additional thirty days. Id.

To find an abuse of discretion, Appellant must convince this Court that either: (1) the military judge predicated a ruling on findings of fact that are not supported by the evidence of record, United States v. Ellis, 68 M.J. 341, 344 (C.A.A.F. 2010); (2) the military judge used the incorrect legal principles, id.; (3) the military judge applied the correct legal principles to the facts in a way that is clearly unreasonable, id.; or (4) the military judge failed to consider important facts. *See* United States v. Solomon, 72 M.J. 176, 180-81 (C.A.A.F. 2013).

None of the four listed possibilities are applicable in Appellant's case. At no point did the military judge use the incorrect legal principles when assessing Appellant's untimely motion, since the military judge enforced the filing timeline laid out in R.C.M. 1104. It was not clearly unreasonable or a miscarriage of justice for the military judge to enforce such a timeline or to

reject Appellant's request for an extension. Finally, there were no important facts the military judge failed to consider. The military judge's ruling outlined his findings of fact and law to support his conclusion that he would not consider the motion because it was filed out of time. Likewise, the military judge did not abuse his discretion in concluding that the ADC's reason for the delay did not constitute "good cause shown" as required by R.C.M. 1104(b)(2)(A). The military judge pointed that the ADC had acknowledged his responsibility for Appellant's post-trial processing on 14 April 2023. (ROT, Vol 1) and should have clarified responsibilities for post-trial with the civilian defense counsel at the end of trial.

Finally, the military judge clarified that even if he had considered the motion, he would have denied it based on the evidence provided at trial. Id. The military judge specifically highlighted the victim's and outcry witness testimony in reaching this conclusion and quoted the correct test for whether a conviction should be set aside as legally insufficient. Id. This was not an abuse of discretion.

Accordingly, this Court should deny Appellant's request to set aside the finding of guilty as to Charge I.

CONCLUSION

WHEREFORE, this Court should affirm the findings and sentence.

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 30 January 2025 via electronic filing.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Captain (O-3) **BENJAMIN C. YORK,** United States Air Force, *Appellant*.	**REPLY BRIEF ON BEHALF OF APPELLANT** Before Panel No. 2 No. ACM 40604 6 February 2025

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

Appellant, Captain (Capt) Benjamin C. York, pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this Reply to the United States' Answer, dated 30 January 2025 (Ans.). In addition to the arguments in his opening brief, filed on 19 November 2024, Capt York submits the following additional arguments.

I.

Trial defense counsel were ineffective because they failed to further investigate unlawful command influence based on an unsupported assumption that doing so would not be beneficial.

It was not reasonable for trial defense counsel to assume that the Chief of Staff of the Air Force (CSAF) would not consent to an interview or that such an interview would not have been fruitful. Ans. at 15–16. At the time, there was significant reason to believe the CSAF may have relevant information for the Defense's unlawful command influence (UCI) motion. The Air Force Office of Special Investigations (AFOSI) reopened its investigation into Capt York, which eventually led to the preferral of charges, after the CSAF received a letter from Senator Duckworth. App. Ex. II at 4, 85. Information about this letter had to go from the CSAF's office to AFOSI, but none of the Defense's discovery requests produced any record of such communications. *See* Ans.

at 6–7 (citing Declaration of Ms. J.S., 15 January 2025). There was a reasonable chance that those communications would provide evidence of UCI, but trial defense counsel made no further attempts to investigate them, choosing instead to rely on the Government's assertion that all responsive material had been provided. Ans. at 7.

If the CSAF declined to be interviewed, there were other reasonable means for trial defense counsel to seek this information. For example, they could have requested or moved to compel a deposition. Either an in-person or a written deposition could have been utilized to accommodate the difficulties of deposing a senior officer. *See* Rule for Courts-Martial (R.C.M.) 702. Failing to at least attempt to utilize tools like these was not a reasonable strategic decision.

Contrary to the Government's argument, the fact that trial defense counsel seemingly came very close to convincing the military judge there was some evidence of UCI does not show their performance met the standard expected of fallible lawyers. Ans. at 17. Rather, the fact that they came so close shows how important it was to continue investigating when they lacked evidence of significant communications that must have occurred for this case to be reopened. The close call based on the evidence they had indicates that a little more evidence would likely have made the difference, and there were clear avenues to pursue such evidence. Choosing not to do so based on an assumption that it would not be fruitful was a failure to properly investigate this matter and constitutes ineffective assistance of counsel.

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

II.

The convening authority's selection of all the potential panel members presented with traditionally female names creates a prima facie showing of impermissible gender consideration, giving rise to an unrebutted presumption that the panel was not properly constituted.

A prima facie showing is a low standard, and Capt York made a prima facie showing that the convening authority impermissibly considered gender when selecting panel members. *See United States v. Proctor*, 81 M.J. 250, 255 (C.A.A.F. 2021) (noting that a prima facie showing is a low burden). Contrary to the Government's insinuation, Capt York is not suggesting that women should not serve as panel members. Ans. at 22–23. On the contrary, Capt York is arguing that gender should not be considered at all when selecting panel members, a proposition with which the Government agrees. Ans. at 22. The Government points to *United States v. Loving*, 41 M.J. 213 (C.A.A.F. 1994), highlighting the proposition that "[t]his Court does not 'presume improper motives from inclusion of racial and gender identifiers on lists of nominees for court-martial duty' . . . and so should not presume them simply by considering the names of potential members." Ans. at 23 (quoting *Loving*, 41 M.J. at 285). After *Jeter*, the question is no longer whether there were improper motives; rather, *any* use of race or gender is impermissible, regardless of the motive. *See United States v. Jeter*, 84 M.J. 68, 73–74 (C.A.A.F. 2023).

The prima facie showing here is not based on the mere presence of gender indicators. Rather, the prima facie showing comes from the results of the member selection in which, as the Government concedes, the convening authority selected all three panel members with traditionally female names. Ans. at 23. The statistics highlighted by the Government bolster this prima facie showing. As the Government indicates, potential members with traditionally female names constituted 12.5 percent of the pool from which the convening authority selected members. *Id.* (noting that three of 24 potential panel members had traditionally female names). In contrast, the

panel selected was "made up of close to 20% females" because the convening authority selected all three potential members with traditionally female names. *Id.* The fact that the convening authority selected 100 percent of the potential panel members with traditionally female names, making them a larger proportion of the panel than they were of the pool from which they were selected, suggests consideration of gender. The Government's observation that this brought the proportion of female members closer to the overall percentage of females in the active-duty Air Force does not lessen this suggestion. Ans. at 23. In fact, to the extent there was any desire to construct a panel that mirrored the gender composition of the Air Force, that goal would further indicate an impermissible consideration of gender in member selection.

A prima facie showing of impermissible gender consideration creates a rebuttable presumption that the panel was improperly constituted. *See Jeter*, 84 M.J. at 70. The Government does not rebut this presumption, choosing instead to argue that there is no prima facie showing. Ans. at 21–25. As a result of *Jeter*, the unrebutted presumption now constitutes plain error at the time of appellate review. *See United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008) ("where the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be 'plain' at the time of appellate consideration"). Consequently, this Court should grant relief for the impermissible consideration of gender when detailing panel members.

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

IV.

The military judge erred by instructing the members that assault consummated by a battery was a lesser-included offense of abusive sexual contact and that certain evidence could be considered for certain purposes under Military Rule of Evidence 404(b).

A. The language of the abusive sexual contact specification does not make assault consummated by a battery a lesser included offense.

Assault consummated by a battery is not a lesser included offense of abusive sexual contact. *United States v. Riggins*, 75 M.J. 78, 80 (C.A.A.F. 2016). Contrary to the Government's assertion, it did not charge abusive sexual contact in a way that makes assault consummated by a battery a lesser included offense. Ans. at 39. Assault consummated by a battery has three elements:

(a) That the accused did bodily harm to a certain person;
(b) That the bodily harm was done unlawfully; and
(c) That the bodily harm was done with force or violence.

Manual for Courts-Martial, United States (2019 ed.) (*2019 MCM*), Part IV, ¶ 77(b)(2) (emphasis added). In contrast, there is no element of abusive sexual contact that requires force or violence. *Id.* at Part IV, ¶ 60(b)(4)(d). Additionally, this element is not incorporated by alleging an accused "unlawfully" touched the victim, contrary to the Government's argument, because unlawful bodily harm is a different element of assault consummated by a battery. Ans. at 39. Since assault consummated by a battery requires an element that is not required for abusive sexual contact and that was not alleged in the specification, assault consummated by a battery is not a lesser included offense. The military judge erred by instructing the panel that it is. R. at 696–97.

B. The Government failed to meet the notice requirements applicable at Capt York's court-martial for evidence under Military Rule of Evidence 404(b), and the military judge abused his discretion by instructing the panel about this rule.

Capt York never received notice of the Government's intent to present evidence under Mil. R. Evid. 404(b). R. at 679. In fact, it seems the Government did not intend to utilize Mil. R. Evid. 404(b) until the military judge stated that its evidence was not res gestae but could be used under Mil. R. Evid. 404(b). R. at 680–81. This did not relieve the Government of the notice requirement under Mil. R. Evid. 404(b)(3). It is not enough, as the Government argues, for Capt York to have been aware of the existence of this evidence. Ans. at 42–43. The rule requires the Government to "articulate in the notice the permitted purpose for which trial counsel intends to offer the evidence and the reasoning that supports the purpose." Mil. R. Evid. 404(b)(3)(B). The Government never provided notice with such an articulation, violating this rule.

The current notice requirement in Mil. R. Evid. 404(b) came into effect on 1 June 2022, 18 months after the corresponding amendment to the Federal Rules of Evidence. *See* Mil. R. Evid. 1102. The new rule, which applied at Capt York's court-martial in April 2023, requires more than the prior version, which only required "reasonable notice of the general nature of any such evidence that the prosecution intends to offer at trial." *2019 MCM*, Part III, Mil. R. Evid. 404(b)(2)(A). Because of this new, more exacting requirement to articulate the permitted purpose of the evidence, the Government's reliance on a case in which the old rule applied is misplaced. Ans. at 41–42 (citing *United States v. Reeder*, No. NMCCA 9800702, 2005 CCA Lexis 211 (N-M. Ct. Crim. App. June 30, 2005)). Regardless of whether actual notice of the existence of evidence was sufficient in 2005, it did not meet the requirement at Capt York's court-martial for the Government to articulate the permitted purpose and the reasoning that supports the purpose. Mil. R. Evid. 404(b)(3)(B). By the Government's logic, an accused would have to object to

everything that could be used for any Mil. R. Evid. 404(b) purpose, even if the Government has not indicated it intended that purpose. *See* Ans. at 42. This is plainly against the requirement to articulate a permitted purpose. Mil. R. Evid. 404(b)(3)(B).

The military judge abused his discretion by giving the challenged Mil. R. Evid. 404(b) instruction despite the absence of the required notice. Moreover, by conducting a *Reynolds* analysis and giving this instruction when the Government indicated it did not believe Mil. R. Evid. 404(b) applied, the military judge helped the Government overcome its error regarding res gestae evidence and inappropriately aided the Government's case. R. at 680–81. This furthered the abuse of discretion. This Court should therefore set aside the findings on the charge and specification to which this erroneous instruction applied.

WHEREFORE, Capt York respectfully requests that this Honorable Court set aside the findings of guilty as to Charge I and its Specification and reassess the sentence.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 6 February 2025.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' MOTION TO ATTACH DOCUMENTS**
v.	)	Before Panel No. 2
Captain (O-3) **BENJAMIN C. YORK,** United States Air Force *Appellant.*	)	No. ACM 40604
	)	30 January 2025

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

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

- Appendix C – *Maj Jonathan R. Fallon Declaration*, dated 23 January 2025 (1 page)
- Appendix D - *Motion for a Finding of Not Guilty Under RCM 917*, dated 12 May 2023 (89 pages)

Appellant's sixth assignment of error asserts that he is entitled to relief because the military judge abused his discretion by failing to appropriately consider Appellant's post-trial motion for a finding of not guilty. Appellant was found guilty on 14 April 2023, and the Defense filed this motion on 12 May 2023. In his 15 May 2023 email to the parties, the military judge declined to consider the motion as untimely filed, but clarified that if he had considered it, he would have denied the motion. (ROT, Vol 1). While the military judge's email is included in the Record of Trial (ROT), the Defense's motion was not. (Id.).

The attached declaration and attachment are responsive to Appellant's sixth assigned error. Maj Fallon served as Appellant's Area Defense Counsel during his court-martial and filed the motion contained within Appendix D. Maj Fallon prepared the attached declaration to authenticate the motion as a true copy of what he previously filed with the military judge.

Our Superior Court held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court concluded that "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442 (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)). This issue is raised by materials in the record, because the record contains the military judge's refusal to consider the motion, but does not contain the motion itself. These documents are relevant and necessary to resolve Appellant's claims of error related to the military judge's ruling.

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

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I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 30 January 2025.

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