IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* *v.* Senior Airman (E-4) **JOHN K. BRASSILKRUGER**, United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME NO. 1** Before Panel No. 1 Case No. ACM 40223 Filed on: 27 January 2022

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

Pursuant to Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignment of Errors (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **6 April 2022**. Appellant's case was docketed with the Court on 7 December 2021. From the date the case was docketed to the present date, 51 days have elapsed. On the date requested, 120 days will have elapsed.

Accordingly, counsel requests that this Honorable Court grant this motion.

Respectfully Submitted,

[redacted]

KIRK W. ALBERTSON
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division 27 January 2022.

[redacted]
KIRK W. ALBERTSON, Lt Col, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
[redacted]

1 February 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JOHN K. BRASSILKRUGER, USAF, *Appellant.*	))))))))))	UNITED STATES' GENERAL OPPOSITION, OUT OF TIME, TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40223 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 1 February 2022.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* *v.* Senior Airman (E-4) **JOHN K. BRASSILKRUGER**, United States Air Force, *Appellant.*	**CONSENT MOTION TO VIEW SEALED MATERIALS** Before Panel No. 1 Case No. ACM 40223 Filed on: 21 March 2022

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 Rule 23.3(f) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby move to examine the portions of Appellant's record of trial that are sealed, including:

- Pages 16-80, 106-153, 156-161, and 385-395 of the trial transcript;
- App. Ex. II – Defense Notice and Motion to Admit Evidence Under MRE 412;
- App. Ex. III – Government's Response to Defense Motion to Admit Evidence Under MRE 412;
- App. Ex. VI – SVC's Response to Defense Notice and Motion to Admit Evidence Under MRE 412;
- App. Ex. IX – Ruling and Order, Defense Notice and Motion to Admit MRE 412 Evidence;
- App. Ex. XI – Defense Supplementary 412 Notice;
- App. Ex. XII – Statement Regarding the Case of United States v. A1C John Brassilkruger, from Mr. Jacob Hubbs;

- App. Ex. XIII – Email from Trial Counsel to Defense Counsel, Post-Vic Interview Brady Notice;

- App. Ex. XIV – Statement on the case of the United States v. John K. Brassilkruger by SPC Caleb Brock;

- App. Ex. XV – Statement from Specialist John W. Poorbaugh;

- App. Ex. XVI – Defense's Second Supplementary MRE 412 Notice;

- App. Ex. XVII – Government's Motion to Admit MRE 412 Evidence;

- App. Ex. XVIII – Memorandum from Technical Sergeant Joshua Bellanger, Defense Paralegal;

The above referenced pages from the transcript involved the trial participants, while the cited appellate exhibits were produced or released to trial and defense counsel. The undersigned has consulted with counsel for the United States and understands that the United States consents to Appellant's counsel reviewing any exhibits that were released to both parties at trial, so long as the United States can also review the sealed portions of the record as necessary to respond to any assignment of error that references the sealed materials.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these materials is reasonably necessary to fulfill appellate counsel's responsibilities, undersigned counsel avers that viewing the referenced material is reasonably necessary to determine whether Appellant is entitled to relief due to errors associated with the application, or lack thereof, of the cited documents during trial. A review of the *entire* record of trial is also necessary because this Court is empowered by Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c), to grant relief based on a review and analysis of "the entire record." To

determine whether the record of trial yields grounds for this Court to grant relief under Article 66(c), UCMJ, 10 U.S.C. § 866(c), appellate defense counsel must therefore examine "the entire record."

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

United States v. May, 47 M.J. 478, 481, (C.A.A.F. 1998). The sealed material referenced above must be reviewed to ensure undersigned counsel provides "competent appellate representation." *Id.*

Accordingly, good cause exists in this case since undersigned counsel cannot fulfill his duty of representation under Article 70, UCMJ, 10 U.S.C. § 870, without first reviewing the complete record of trial.

Wherefore, counsel requests that this Honorable Court grant this motion.

Respectfully Submitted,

[redacted]

KIRK W. ALBERTSON
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division 21 March 2022.

[redacted]

KIRK W. ALBERTSON
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40223**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
John K. BRASSILKRUGER	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 21 March 2022, Appellant's counsel moved this court for both the Government and Appellant's counsel to examine sealed materials, specifically, pages 16–80, 106–153, 156–161, and 385–395 of the trial transcript, and Appellate Exhibits II, III, VI, IX, XI, XII, XIII, XIV, XV, XVI, XVII, and XVIII. The exhibits were sealed by the military judge who presided over Appellant's court-martial. Appellate defense counsel argues it is necessary to review the entire record, including this sealed material and closed session of court, to ensure undersigned counsel provides "competent appellate representation." Appellate defense counsel further explains that examination of the sealed materials is reasonably necessary, as he cannot fulfill his duty of representation under Article 70, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 870, without first reviewing the complete record of trial. Appellant's counsel filed the motion as a consent motion; accordingly, the Government has indicated its support for the motion. *See* A.F. CT. CRIM. APP. R. 23.1(b).

Materials presented or reviewed at trial and sealed, as well as materials reviewed *in camera*, released to trial counsel or trial defense counsel, and sealed, may be examined by appellate counsel upon "a colorable showing to the reviewing or appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities under the UCMJ, this Manual, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional conduct." Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i), *Manual for Courts-Martial*, *United States* (2019 ed.).

The sealed material that Appellant's counsel requests permission to examine were available to both trial counsel and defense counsel, and we find a colorable showing has been made that examination of the materials is reasonably necessary to fulfill the professional responsibilities Appellant's counsel owes to

Appellant. This court's order permits counsel for both parties to examine the materials.

Accordingly, it is by the court on this 30th day of March, 2022,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view **pages 16–80, 106–153, 156–161, and 385–395 of the trial transcript, and Appellate Exhibits II, III, VI, IX, XI, XII, XIII, XIV, XV, XVI, XVII, and XVIII**, subject to the following conditions: To view these sealed material, counsel will coordinate with the court. No counsel granted access to the materials may photocopy, photograph, reproduce, disclose, or make available their contents to any other individual without the court's prior written authorization.

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* *v.* Senior Airman (E-4) **JOHN K. BRASSILKRUGER**, United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME NO. 2** Before Panel No. 1 Case No. ACM 40223 Filed on: 29 March 2022

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

Pursuant to Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignment of Errors (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **5 May 2022**. Appellant's case was docketed with the Court on 7 December 2021. From the date the case was docketed to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

Per Rule 23.3(m), Appellant provides the following information in support of this request:

On 20-23 September, 2021, Appellant was tried before a general court-martial comprised of officer and enlisted members at Joint Base Lewis-McChord, Washington. Contrary to his pleas, Appellant was found guilty of one charge and two specifications of sexual assault, in violation of Article 120 UCMJ, 10 U.S.C. § 920. R. at Vol. 1, Entry of Judgment. Consistent with his pleas, Appellant was found not

guilty of one specification of abusive sexual contact, in violation of Article 120, UMCJ, 10 U.S.C. § 920. *Id.*

Appellant was sentenced to confinement for 1 year, reduction to E-1, a dishonorable discharge, and forfeiture of all pay and allowances. *Id.* The convening authority took no action on the findings or sentence. R. at Vol. 1, Convening Authority Decision on Action. Appellant is in confinement.

There were 3 motions filed/argued. The record of trial has 6 volumes and the trial transcript has 753 pages. There are 15 prosecution exhibits, 6 defense exhibits, 44 appellate exhibits, and 1 court exhibit.

Counsel has reviewed the record and begun researching the identified issues, but further time is necessary in light of the identified issues so that Appellant may have the benefit of appellate counsel.

Accordingly, counsel requests that this Honorable Court grant this motion.

Respectfully Submitted,

[redacted]

KIRK W. ALBERTSON, Lt Col, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division 29 March 2022.

[redacted]

KIRK W. ALBERTSON
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
[redacted]

31 March 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JOHN K. BRASSILKRUGER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40223 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 31 March 2022.

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40223**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
John K. BRASSILKRUGER	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 29 March 2022, counsel for Appellant submitted a Motion for Enlargement of Time (Second), requesting an additional 30 days to submit his assignments of error, which according to the motion, would set a new deadline of 5 May 2022. On 31 March 2022, the Government entered a general opposition to Appellant's motion.

Counsel for Appellant states this enlargement would end 150 days after docketing. This appears to be a one-day miscalculation. The case was docketed with the court on 7 December 2021 and Appellant's first enlargement of time set a deadline of 6 April 2022; accordingly, a 30-day enlargement of time would set a new deadline of 6 May 2022, 150 days after the case was docketed with the court.

The record of trial in Appellant's case consists of 15 prosecution exhibits, 6 defense exhibits, 44 appellate exhibits, 1 court exhibit, and 753 transcript pages.

Accordingly, it is by the court on this 1st day of April, 2022,

ORDERED:

Appellant's Motion for Enlargement of Time is **GRANTED**. Appellant is granted a 30-day enlargement of time and shall file any assignments of error not later than **6 May 2022**.

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* *v.* Senior Airman (E-4) **JOHN K. BRASSIL-KRUGER**, United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME NO. 3** Before Panel No. 1 Case No. ACM 40223 Filed on: 28 April 2022

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

Pursuant to Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignment of Errors (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **5 June 2022**. Appellant's case was docketed with the Court on 7 December 2021. From the date the case was docketed to the present date, 142 days have elapsed. On the date requested, 180 days will have elapsed.

Per Rule 23.3(m), Appellant provides the following information in support of this request:

On 20-23 September, 2021, Appellant was tried before a general court-martial comprised of officer and enlisted members at Joint Base Lewis-McChord, Washington. Contrary to his pleas, Appellant was found guilty of one charge and two specifications of sexual assault, in violation of Article 120 UCMJ, 10 U.S.C. § 920. R. at Vol. 1, Entry of Judgment. Consistent with his pleas, Appellant was found not

guilty of one specification of abusive sexual contact, in violation of Article 120, UMCJ, 10 U.S.C. § 920. *Id.*

Appellant was sentenced to confinement for 1 year, reduction to E-1, a dishonorable discharge, and forfeiture of all pay and allowances. *Id.* The convening authority took no action on the findings or sentence. R. at Vol. 1, Convening Authority Decision on Action. Appellant is in confinement.

There were 3 motions filed/argued. The record of trial has 6 volumes and the trial transcript has 753 pages. There are 15 prosecution exhibits, 6 defense exhibits, 44 appellate exhibits, and 1 court exhibit.

Counsel is an Individual Mobilization Augmentee (Category B) Reservist and is employed full time as an Assistant United States Attorney in the District of South Dakota. Counsel has reviewed the record and begun researching the identified issues and drafted a brief, but believes further time is necessary in light of the identified issues so that Appellant may have the benefit of appellate counsel.

Accordingly, counsel requests that this Honorable Court grant this motion.

Respectfully Submitted,

[redacted]

KIRK W. ALBERTSON
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division 28 April 2022.

[redacted]

KIRK W. ALBERTSON, Lt Col, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
[redacted]

29 April 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JOHN K. BRASSIL-KRUGER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40223 Panel No. 1

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

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

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

[redacted]

JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 29 April 20[redacted]

[redacted]
JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* *v.* Senior Airman (E-4) **JOHN K. BRASSIL-KRUGER**, United States Air Force, *Appellant.*	**MOTION TO FILE UNDER SEAL** Before Panel No. 1 Case No. ACM 40223 Filed on: 2 June 2022

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

Pursuant to Rule 23.3(o) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves to file the following portions of Appellant's Assignment of Errors under seal:

- Assignment of Error III, beginning on page 15 and ending on page 20;
- Assignment of Error IV, beginning on page 21 and ending on page 26.

The information contained therein is subject to the requirements of Mil. R. Evid. 412 and, due to its nature, should be sealed.

The above-referenced portions will be delivered in hard copy to the Court and to the Appellate Government Division. The remaining portions, redacted for ease of review and reference, are being filed separately via email on 2 June 2022.

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

Respectfully Submitted,

[redacted]

KIRK W. ALBERTSON, Lt Col, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 2 June 2022.

[redacted]

KIRK W. ALBERTSON, Lt Col, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

JOHN K. BRASSIL-KRUGER,
Senior Airman (E-4),
United States Air Force
Appellant.

No. ACM 40223

BRIEF ON BEHALF OF APPELLANT

KIRK W. ALBERTSON, Lt Col, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
[redacted]

Counsel for Appellant

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* *v.* Senior Airman (E-4) **JOHN K. BRASSIL-KRUGER**, United States Air Force, *Appellant.*	**BRIEF ON BEHALF OF APPELLANT** Before Panel No. 1 Case No. ACM 40223 Filed on: 2 June 2022

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

Issues Presented

I.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ALLOWING THE GOVERNMENT TO CHOOSE TO WITHDRAW A SPECIFCATION PRIOR TO ENTRY OF PLEAS.

II.

WHETHER THE MILITARY JUDGE ERRED BY INCORRECTLY INSTRUCTING THE MEMBERS REGARDING CONSENT.

III.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY GRANTING THE GOVERNMENT'S MOTION TO ADMIT EVIDENCE PURSUANT TO MIL. R. EVID. 412

IV.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY DENYING THE DEFENSE'S MOTION TO ADMIT EVIDENCE PURSUANT TO MIL. R. EVID. 412

V.

WHETHER TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT BY COMMENTING ON APPELLANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT.

VI.

WHETHER THE GOVERNMENT CAN PROVE BEYOND A REASONABLE DOUBT THAT THE MILITARY JUDGE'S FAILURE TO INSTRUCT THE PANEL THAT A GUILTY VERDICT WAS UNANIMOUS WAS HARMLESS.

VI.

WHETHER THE GOVERNMENT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS WHEN IT CHARGED HIM WITH SEXUAL ASSAULT UNDER A THEORY OF WITHOUT CONSENT, BUT CONVICTED HIM UNDER A DIFFERENT THEORY.

VIII.

WHETHER THE EVIDENCE IS FACTUALLY AND LEGALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS.

IX.

WHETHER THE CUMULATIVE ERROR DOCTRINE REQUIRES RELIEF.

Statement of the Case

On 20-23 September 2021, Appellant was tried before a general court-martial comprised of officer and enlisted members at Joint Base Lewis-McChord, Washington. Contrary to his pleas, Appellant was found guilty of one charge and two specifications of sexual assault, in violation of Article 120 UCMJ, 10 U.S.C. § 920. Record (R.) at Vol. 1, Entry of Judgment. Consistent with his pleas, Appellant was found not guilty of one specification of abusive sexual contact, in violation of Article 120, UMCJ, 10 U.S.C. § 920. *Id*. Appellant was sentenced to confinement for one year, reduction to E-1, a dishonorable discharge, and forfeiture of all pay and allowances.

Id. The convening authority took no action on the findings or sentence. R. at Vol. 1, Convening Authority Decision on Action.

Statement of the Facts

Background

Senior Airman (SrA) Brassil-Kruger was born with a heart defect that required open heart surgery when he was a baby. R. at Vol. 1, Def. Ex. C at 1. He was raised primarily by his mother, who he considers his best friend. *Id*. Both of SrA Brassil-Kruger's grandfathers retired from the Air Force and he wanted to continue his family's tradition of Air Force service. *Id*. After graduating from high school, he went to college on a music scholarship with plans to study aerospace engineering and commission in the Air Force as a pilot. *Id*. He subsequently learned his eyesight dramatically impacted his Air Force career options, but he still elected to enlist and went to Basic Military Training in March 2018. *Id*. In August 2018, SrA Brassil-Kruger arrived at Joint Base Lewis-McChord, Washington, which would be his first and only duty station. *Id*. at 2.

Charged Incident

On the evening of August 7, 2020, SrA Brassil-Kruger went with friends to a social gathering at American Lake at Joint Base Lewis-McChord. R. at Vol. I, Prosecution Exhibit (PE) 1, 1.mp4, at 14:15.[1] The accuser, Specialist (SPC) CB was also present at American Lake with a group of friends, but she and SrA Brassil-Kruger did not interact. R. at 342-43. Later that evening, SPC CB and SrA Brassil-Kruger separately departed the lake to attend a house party at a residence in the local area. R. at 344; R. at Vol. I, PE 1, 1.mp4 at 14:30. SPC CB rode to the party with Mr.

[1] Prosecution Exhibit 1 is a disc containing the four-part video recording of the AFOSI interview of SrA Brassil-Kruger. R. at 277.

JH. R at 344, 485. SrA Brassil-Kruger drove his own vehicle, but got a flat tire along the way, and Mr. JH stopped to help fix it. R. at 485. According to Mr. JH, SPC CB exited Mr. JH's vehicle at that time and she and SrA Brassil-Kruger exchanged introductions. R. at 485. SPC CB denied meeting SrA Brassil-Kruger at that time or even exiting the vehicle. R. at 345.

According to SPC CB, there were approximately 20 to 25 people at the house party when she arrived, only a handful of whom she knew. R. at 345. She claimed she drank four beers between the time she got off duty and the time of the assault. R. at 343, 346, 365. She also claimed the last thing she remembered was telling Mr. JH she was tired, and that she subsequently awoke to discover SrA Brassil-Kruger was performing oral sex on her. R. at 351, 370. She testified that she woke to experiencing an orgasm. R. at 374. She testified that SrA Brassil-Kruger then digitally penetrated her vagina with his fingers and kissed her breast. R. at 351. She claimed the encounter ended with her saying, "I need to go to the bathroom," at which point she got up and left the apartment. *Id*.

SPC KH was also at American Lake that evening and saw both SrA Brassil-Kruger and SPC CB there, as he was friendly with both of them. R. at 508. He also attended the house party that both SrA Brassil-Kruger and SPC CB were at. *Id*. According to SPC KH, at some point in the evening, SPC CB approached him and asked if she could sleep next to him. R. at 512. SPC KH perceived SPC CB was intoxicated at that point. R. at 513. SPC KH believed he was intoxicated as well. R. at 525. SPC KH used a blanket to make a bed for himself and SPC CB on the floor in the dining area and the two of them lied down to go to sleep. R. at 516; R. at Vol. I, PE 9. According to SPC KH, SrA Brassil-Kruger and Mr. JH subsequently came into the residence and asked if he wanted to continue drinking. R. at 518. SPC KH agreed and the three men drank for a short while before SrA Brassil-Kruger and Mr. JH walked back outside. *Id*. SPC KH testified

that SrA Brassil-Kruger subsequently returned and again asked if SPC KH wanted to continue drinking, but SPC KH declined. *Id*. SPC KH awoke the next morning to discover SPC CB was no longer sleeping beside him. R. at 519. SPC KH testified that, in a subsequent telephone conversation, SPC CB told him that SrA Brassil-Kruger had crawled on top of her and tried to get her clothes off while she was fighting back and repeatedly saying, "no." R. at 539. SPC KH testified that SPC CB didn't say anything about SrA Brassil-Kruger performing oral sex on her. R. at 540. SPC KH testified he is a light sleeper and he believed he would have woken up if SPC CB was engaged in any kind of a struggle while she was sleeping next to him that night. R. at 533-34.

Mr. JH testified that he and SrA Brassil-Kruger went outside to their parked vehicles at approximately 1:45 a.m., and subsequently sat in SrA Brassil-Kruger's vehicle listening to music and singing songs. R. at 488. According to Mr. JH, he and SrA Brassil-Kruger re-entered the residence at approximately 2:25 a.m. and discovered everyone was asleep. R. at 489. While inside, Mr. JH looked for SPC CB and found her sleeping next to SPC KH with her arm across his chest. R. at 490. Mr. JH testified he woke up SPC CB, who told him she didn't want to sleep in the truck. R. at 491. He and SrA Brassil-Kruger then returned to their vehicles. He testified SPC CB subsequently came to his vehicle, repeatedly saying, "He wouldn't stop touching me." R. at 492. Mr. JH described SPC CB as intoxicated by the end of the evening. R. at 495. According to Mr. JH, in a subsequently conversation, SPC CB told him SrA Brassil-Kruger was on top of her and trying to pull her jeans off, but she was fighting him, repeatedly saying "no," and attempting to wake other people up. R. at 501.

SrA Brassil-Kruger was interviewed by the Air Force Office of Special Investigations (AFOSI) on 9 August 2020. R. at 297. He initially denied having any sexual contact with SPC

CB. R. at 299, 304; Vol. I, PE 1, 1.mp4 at 11:05-12:05, 23:00-24:25. He subsequently described that he came into the residence to sleep because it was cold outside. Vol. I, PE 1, 1.mp4 at 26:30 to 26:55. He stated that he lied down on the floor between SPC CB and SPC KH and then put his arm around SPC CB. *Id*. SPC CB embraced him so he decided to "make a move," and asked her "Are you ok with this?" *Id*. at 26:55 to 27:35. She replied, "Yes." *Id*. He then described that he assisted SPC CB in taking her pants off and he then penetrated her vagina with his fingers. *Id*. at 27:35 to 29:13; R at 306. He said that after approximately two minutes, SPC CB told him to stop and she got up to use the bathroom, at which point he went back outside to his vehicle. *Id*. Upon further questioning, SrA Brassil-Kruger described that he also performed oral sex on SPC CB during the encounter. R. at 307-08; Vol. I, PE 1, 1.mp4 at 35:02 to 36:28.

Additional facts necessary to argue the issues are contained in the argument sections below.

Argument

I.

THE MILITARY JUDGE ABUSED HIS DISCRETION BY ALLOWING THE GOVERNMENT TO CHOOSE TO WITHDRAW A SPECIFICATION PRIOR TO ENTRY OF PLEAS.

Additional Facts

As originally drafted, the charge sheet contained three specifications of sexual assault and one specification of abusive sexual contact, all in violation of Article 120, UCMJ. Specification 1 alleged sexual assault by contact between SrA Brassil-Kruger's mouth and the accuser's vulva when he reasonably should have known the accuser was asleep. R. at Vol. I., Charge Sheet. Specification 2 alleged sexual assault by contact between SrA Brassil-Kruger's mouth and the accuser's vulva without her consent. *Id*. Specification 3 alleged sexual assault by penetrating the accuser's vulva with his finger without consent. *Id*. Specification 4 alleged abusive sexual contact

by touching the accuser's breast with his hand and mouth without consent. *Id*. Prior to trial, SrA Brassil-Kruger submitted a Motion to Dismiss Specification Based on Multiplicity and Unreasonable Multiplication of Charges, requesting that the military judge dismiss Specification 2 as multiplicious and merge the remaining specifications for sentencing. R. at Vol. II, Appellate Exhibit (App. Ex.) IV.[2] In its written response to the motion, the government opposed the motion in all aspects. R. at Vol. II, App. Ex. V. The military judge conducted a hearing on the motion, during which the following exchange between the military judge and trial counsel occurred:

> **Military Judge**: So, can you envision a scenario then where--because the instruction that I would give in this case, essentially if you went forward with Spec 1 is, essentially a person can't consent when they're asleep, right. I mean, that's the instruction you would be seeking, right?
>
> **Trial counsel**: Yes, Your Honor.
>
> **Military Judge**: Okay, so how is, in terms of factually, how would a scenario ever arise here someone is convicted of Spec 1 where they find she's asleep, that they would not also necessarily find that it was without her consent? Can you think of a single factual scenario where that would be true?

R. at 83. The military judge also asked trial counsel how the "asleep theory" could not be a subset of the "without consent" theory. R. at 84. Trial counsel ultimately agreed with the military judge. R. at 85.

In ruling on the motion, the military judge ultimately denied in part and granted in part, finding Specifications 1 and 2 were not multiplicious, but that they did represent an unreasonable multiplication of charges. R. at Vol. II, App. Ex. X at 3, 5. The military judge determined the appropriate remedy was that trial counsel would choose whether they were proceeding on Specification 1 or 2, and that the other of the two specifications would be dismissed. *Id*. at 5. At

[2] During argument on the motion, the defense modified its position and withdrew its argument that Specifications 3 and 4 were multiplicious and instead requested Specifications 3 and 4 be merged for sentencing. R. at Vol II, App. Ex. X at 3; R. at 81.

a subsequent hearing pursuant to Article 39(a), UCMJ, trial counsel informed the military judge that Specification 1 would be dismissed. R. at 103. The military judge then directed trial counsel to renumber the specifications. *Id*. In fashioning this remedy, the military judge relied upon *United States v. Cardenas*, 80 M.J. 420 (C.A.A.F. 2021), which "permit[s] the courts of criminal appeals to remedy multiplicity error identified on appeal by allowing the government to elect which multiplicious conviction to retain and which to dismiss." 80 M.J. at 422.

Standard of Review

"Unreasonable multiplication of charges is reviewed for an abuse of discretion." *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004). "A military judge abuses discretion: (1) when the findings of fact upon which the ruling is predicated are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if the application of the correct legal principles to the facts is clearly unreasonable. *United States v. Carter*, 2021 WL 71250 at *4 (A.F. Ct. Crim. App. 7 January 2021) (unpub. op.) (citing *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010); *United States v. Mackie*, 66 M.J. 198, 199 (C.A.A.F. 2008)).

Law

Rule for Courts-Martial 307(c)(4) provides in pertinent part: "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." Rule for Courts-Martial 906(b)(12) sets for the following remedies for unreasonable multiplication of charges:

> (A) *As applied to findings*. Charges that arise from substantially the same transaction, while not legally multiplicious, may still be unreasonably multiplied as applied to findings. When the military judge finds, in his or her discretion, that the offenses have been unreasonably multiplied, the appropriate remedy shall be dismissal of the lesser offenses or merger of the offenses into one specification.
>
> (B) *As applied to sentence*. Where the military judge finds that the unreasonable multiplication of charges requires a remedy that focuses more appropriately on

> punishment than on findings, he or she may find that there is an unreasonable multiplication of charges as applied to sentence. If the military judge makes such a finding and sentencing is by members, the maximum punishment for those offenses determined to be unreasonably multiplied shall be the maximum authorized punishment of the offense carrying the greatest maximum punishment. If the military judge makes such a finding and sentencing is by military judge, the remedy shall be as set forth in R.C.M. 1002(d)(2).

R.C.M. 906(b)(12). A ruling on this motion ordinarily should be deferred until after findings are entered. R.C.M. 906(b)(12) Discussion.

A military judge considers the following non-exhaustive list of factors when analyzing unreasonable multiplication of charges: (1) whether each charge and specification is aimed at distinctly separate criminal acts; (2) whether the number of charges and specifications misrepresents or exaggerates the accused's criminality; (3) whether the number of charges and specifications unreasonably increases the accused's punitive exposure; and (4) whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charge. *United States v. Campbell*, 71 M.J. 19, 22 (C.A.A.F. 2012) (citing *United States v. Quiroz,* 55 M.J. 334, 338-39 (C.A.A.F.2001). These factors must be balanced, with no single factor necessarily governing the result. *Pauling*, 60 M.J. at 95.

Analysis

The military judge correctly applied the *Quiroz* factors in ruling on the motion to dismiss but applied an incorrect legal principle in fashioning a remedy. Instead of deferring ruling on this motion until after findings, as ordinarily provided in R.C.M. 906(b)(12), the military judge elected to allow trial counsel to choose a specification to dismiss prior to entry of pleas. The only authority cited by the military judge for this remedy was *Cardenas*, which does not authorize the military judge's actions. In *Cardenas*, the Court of Appeals for the Armed Forces (CAAF) considered a multiplicity error first identified on appeal by the Army Court of Criminal Appeals, where CAAF

approved the lower court's remedy of permitting the government to choose, on appeal, which of the appellant's convictions to dismiss. The case dealt with a multiplicity error, rather than unreasonable multiplication of charges, and the only question presented was whether the lower court erred by permitting the government to choose, rather than requiring dismissal of the lesser included offense. *Id*. at 422-23. *Cardenas* has no application in the context of unreasonable multiplication of charges, which by definition does not involve lesser included offenses, and *Cardenas* does not create a remedy for unreasonable multiplication of charges beyond what is included in R.C.M. 906(b)(12).

In this case, the government's theory as to Specifications 1 and 2, as charged, indicated a belief that the conduct underlying Specification 1 immediately preceded the conduct underlying Specification 2. R. at 83. As described by trial counsel, Specification 1 was directed towards conduct that occurred while the accuser was asleep, "and then when she woke up a second sexual act started, because she was conscious at the time. *Id*. As indicated above, trial counsel elected to dismiss Specification 1 after the military judge effectively telegraphed to trial counsel that he was of the opinion that Specification 1 was essentially subsumed within Specification 2. *Id.* at 83, 89. The military judge could have chosen to merge the specifications or dismissed one of the specifications with prejudice after findings if there was a conviction of both. Either of these authorized remedies would have required the members to be fully instructed as to how to weigh and consider evidence that the accuser was asleep, incompetent, or otherwise incapable of consenting. He instead permitted a remedy not authorized by R.C.M. 906(b)(12), *Cardenas*, or other case law that prejudiced SrA Brassil-Kruger by allowing the government to argue the accuser was incapable of consenting without having to prove that the SrA Brassil-Kruger reasonably should have known the accuser was asleep or otherwise incapable of consenting.

Moreover, the military judge's chosen remedy, which indicated the Specification the government elected not proceed on was dismissed, was not executed. The Entry of Judgment and Statement of Trial Results instead indicate that Specification 1 was "withdrawn and dismissed." R. at Vol. 1, Entry of Judgment, Statement of Trial Results. Withdrawal of charges at the direction of the convening authority or other competent authority is permitted by R.C.M. 604. There is nothing in that rule that permits withdrawal at the direction of a military judge. At a minimum, this Court should remand the record for correction of the Statement of Trial Results and Entry of Judgment to indicate that Specification 1 was dismissed. Moreover, such dismissal should be with prejudice.

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

II.

THE MILITARY JUDGE ERRED BY INCORRECTLY INSTRUCTING THE COURT MEMBERS REGARDING CONSENT.

Additional Facts

Prior to ruling on the motion to dismiss for multiplicity and unreasonable multiplication or charge, the military judge queried the parties on the appropriateness of giving the standard instruction on consent, including the language that a sleeping person cannot consent. R. at 83, 93-94. At that time, before entry of pleas or presentation of any evidence, defense counsel acknowledged that was part of the instruction on consent and indicated no intent to object. R. at 94. Prior to closing argument, defense counsel submitted a request for a tailored instruction, which proposed the military judge instruct as follows:

> The Government bears the affirmative responsibility to prove that SPC [CB] did not, in fact, consent. SPC [CB]'s capability/ability to consent is not in question.

> SPC [CB]'s level of intoxication and the fact that she might have been asleep, as it pertains to her ability to consent, is not relevant to the charge. You cannot find that SPC [CB] was too drunk or asleep and therefore cannot consent.

R. at Vol. II, App. Ex. XXXII. The military judge declined to give the requested instruction. R. at. 592-94. The military judge indicated he intended to instruct the members that a "sleeping, unconscious, or incompetent person" cannot consent, to which defense counsel objected as irrelevant to the charged theory of guilt. R. at 594-96. The military judge subsequently sought to limit the scope of permissible argument, however, by asking trial counsel whether they intended to argue the accuser was incapable of consenting, to which trial counsel they intended to argue that sleeping or conscious people cannot consent. R. at 603. The military judge then suggested that an argument that the accuser was drinking so she could not consent would be impermissible, but ultimately decided it was up to counsel to object if they heard impermissible argument. R. at 603-04. The military judge also instructed on mistake of fact as to consent, voluntary intoxication as it relates to mistake of fact as to consent, and voluntary intoxication as it relates to specific intent. R. at 589-90, 601-11.

Standard of Review

The adequacy of the military judge's instructions is reviewed *de novo*. *United States v. Dearing*, 63 M.J. 478, 482 (C.A.A.F. 2006). Whether the military judge correctly instructed the court members is a question of law this court reviews *de novo*. *United States v. Payne*, 73 M.J. 19, 22 (C.A.A.F. 2014). Denial of a defense-requested instruction is reviewed for an abuse of discretion. *United States v. Carruthers*, 64 M.J. 340, 345–46 (C.A.A.F. 2007). When a military judge commits an instructional error, this Court assesses prejudice by viewing the military judge's instructions as a whole. *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996) (citing *United States v. Snow*, 82 F.3d 935-39 (10th Cir. 1996)).

Law

"[A] military judge has wide discretion in choosing the instructions to give but has a duty to provide an accurate, complete, and intelligible statement of the law." *United States v. Behenna*, 71 M.J. 228, 232 (C.A.A.F. 2012) (citations omitted). "[T]he military judge ... is required to tailor the instructions to the particular facts and issues in a case." *United States v. Baker*, 57 M.J. 330, 333 (C.A.A.F. 2002) (citations omitted). "[A]ny party may request that the military judge instruct the members on the law as set forth in the request." R.C.M. 920(c). The Court applies a three-part test to evaluate whether the failure to give a requested instruction is error: "(1) the requested instruction is correct; (2) it is not substantially covered in the main instruction; and (3) it is on such a vital point in the case that the failure to give it deprived the appellant of a defense or seriously impaired its effective presentation." *Carruthers, 64 M.J.* at 346 (citing *United States v. Gibson*, 58 M.J. 1, 7 (C.A.A.F. 2003)). All three prongs of the test must be satisfied in order to find error. *United States v. Barnett*, 71 M.J. 248, 253 (C.A.A.F. 2012).

Analysis

First, the military judge erred by refusing the defense's requested instruction, which accurately reflected that "without the consent of the other person" represents a separate and distinct theory of criminality from "knew or reasonably should have known the other person is asleep, unconscious, or otherwise unaware" or "incapable of consenting . . . and that condition is known or reasonably should be known by the person". See *United States v. Williams*, No. ACM 39746, 2021 CCA LEXIS 109 at *51-52 (A.F. Ct. Crim. App. 12 March 2021); *United States v. Brown*, No. ACM 39728, 2021 CCA LEXIS 414 at *34 (A.F. Ct. Crim. App. 16 August 2021) (citing *United States v. Sager*, 76 M.J. 158, 162 (C.A.A.F. 2017). The distinction that the defense was requesting was not covered anywhere else in the military judge's instructions and it was on a vital

point that seriously impacted the defense presentation. The military judge's refusal of this instruction, coupled with other instructions, created confusion as to the charged theory of criminality and permitted the government to obtain a conviction by arguing a blended theory of criminality that incorporated evidence the accuser was intoxicated and/or asleep.

Second, the military judge erred by instructing the members, over the defense's objection, that a sleeping, unconscious or incompetent person cannot consent. The instruction was irrelevant to the charged theory of criminality, and to the extent it was relevant, it conflicted with the instruction that all surrounding circumstances are to be considered in determining whether a person gave consent. The instruction was also incomplete as it did not indicate whether the government had to prove the accuser was sleeping, unconscious, or incompetent, nor did it indicate whether the government had to prove SrA Brassil-Kruger's knowledge of the accuser's condition. The military judge did not further define the terms, "sleeping," "unconscious," or "incompetent," despite the fact that definitions of "competent," and "incompetent" are include in the Military Judge's Benchbook. DA PAM 27-9 at 3a-44-2. This instruction severely impaired the defense case as it effectively permitted the government to pursue the dismissed theory that the accuser was incapable of consenting while simultaneously relieving the government of proving that theory beyond a reasonable doubt.

Williams, in which this Honorable Court upheld a conviction under a "bodily harm" theory despite the government's evidence indicating the victim was "incapable of consenting" due to intoxication, is readily distinguishable from the present case. First, unlike the present case, the military judge's instructions regarding consent in *Williams* did not include the instruction that a sleeping, unconscious, or incompetent person cannot consent. *Williams*, 2021 CCA LEXIS 109 at *52-53. Therefore, the risk that the members would mistakenly relieve the government of

proving every element of the charged offense beyond a reasonable doubt was minimal. Second, trial counsel focused on the military judge's instruction that "all the surrounding circumstances are to be considered in determining whether a person gave consent" to argue the improbability that the apparently non-responsive victim actually consented. *Williams*, 2021 CCA LEXIS 109 at *54-55. By contrast, in the present case, the government argued the accuser was asleep and incompetent and therefore unable to consent.

In this case, the military judge's instructions permitted trial counsel to argue uncharged and dismissed theories of criminality and caused confusion about the government's burden of proof as to the offenses of conviction.

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

III.

THE MILITARY JUDGE ERRED BY GRANTING THE GOVERNMENT'S MOTION TO ADMIT EVIDENCE PURSUANT TO MIL. R. EVID. 412.

Additional Facts

[redacted]

[redacted]

Standard of Review

[redacted]

[redacted]

Law

[redacted]

[redacted]

[redacted]

Analysis

[redacted]

IV.

THE MILITARY JUDGE ERRED BY DENYING THE DEFENSE MOTION TO ADMIT EVIDENCE PURSUANT TO MIL. R. EVID. 412.

Additional Facts

[redacted]

[redacted]

Standard of Review

[redacted]

[redacted]

[redacted]

Analysis

[redacted]

[redacted]

[redacted]

V.

TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT BY COMMENTING ON APPELLANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT.

Additional Facts

During closing argument, trial counsel commented on SrA Brassil-Kruger's invocation of his right to remain silent: "It's uncontroverted that she was asleep in there when he went back in. You'll hear it in the interview multiple times, she was asleep." R. at 617. This was followed moments later by "First element is that he caused the mouth to touch the vulva. That's uncontroverted….Uncontroverted that his mouth touched her vulva." R. at 618.

Standard of Review

Whether a trial counsel's comments in closing argument improperly referenced an accused's constitutional right to remain silent is a question of law this court reviews *de novo*. *See United States v. Flores*, 69 M.J. 366, 369 (C.A.A.F. 2011) (citing *Moran*, 65 M.J. at 181). "When no objection is made during the court-martial, a counsel's arguments are reviewed for plain error." *Id.* (citing *United States v. Schroder*, 65 M.J. 49, 57–58 (C.A.A.F. 2007)). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice." *Id.* (citing *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008)). The burden is on Appellant to show that there was error and that the error was plain. *United States v.*

Carter, 61 M.J. 30, 34 (C.A.A.F. 2005) (citation omitted). However, "[r]egardless of whether there was an objection or not, '[i]n the context of a constitutional error, the burden is on the Government to establish that the comments were harmless beyond a reasonable doubt.'" *Flores*, 69 M.J. at 369 (quoting *Carter*, 61 M.J. at 35); *see also United States v. Tovarchavez*, 78 M.J. 458, 463 (C.A.A.F. 2019) (citations omitted) (explaining that material prejudice for forfeited constitutional errors is assessed for harmlessness beyond a reasonable doubt).

Law

"It is black letter law that a trial counsel may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense." *United States v. Mobley*, 31 M.J. 273, 279 (C.M.A. 1990) (citing *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L.Ed.2d 106 (1965)). However, a "prosecutorial comment must be examined in light of its context within the entire court-martial." *Carter*, 61 M.J. at 33 (citation omitted). Improper comments that are "isolated" or a "slip of the tongue" may be evaluated differently than comments that are repeated so as to become "a centerpiece of the closing argument." *Id.* at 34 (citations omitted). "[W]hether [an] error is harmless beyond a reasonable doubt 'will depend on whether there is a reasonable possibility that the evidence [or error] complained of might have contributed to the conviction.'" *United States v. Paige*, 67 M.J. 442, 451 (C.A.A.F. 2009) (quoting *Moran*, 65 M.J. at 187).

To find that an error did not contribute to the conviction is "to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Moran*, 65 M.J. at 187 (citation omitted). "'[I]t is improper for a prosecutor to ask the court members to infer guilt because an accused has exercised his constitutional rights.'" *United States v. Gilley,* 56 M.J. 113, 123 (C.A.A.F.2001) (quoting *United States v. Carpenter,* 51 M.J.

393, 396 (C.A.A.F.1999)). An argument by trial counsel "which comments upon an accused's exercise of his or her constitutionally protected rights is 'beyond the bounds of fair comment.'" *United States v. Edwards,* 35 M.J. 351, 355 (C.M.A.1992) (finding that it is improper for counsel to comment on accused's refusal to plead guilty) (citation omitted); *see also United States v. Toro,* 37 M.J. 313, 318 (C.M.A.1993) (finding that it is improper for trial counsel to comment on an accused's exercise of his right to remain silent); *United States v. Clifton,* 15 M.J. 26, 29 (C.M.A.1983) (finding that it is improper for trial counsel to argue that the fact that the accused "asserted his rights" and "fought this every inch of the way" was indicative of his guilt).

However, "it is permissible for trial counsel to comment on the Defense's failure to refute Government evidence or to support its own claims." *Paige*, 67 M.J. at 448. A violation occurs "only if either the defendant alone has the information to contradict the Government evidence referred to or the [members] 'naturally and necessarily' would interpret the summation as a comment on the failure of the accused to testify." *Id.* (quoting *Carter*, 61 M.J. at 33) (quoting *United States v. Coven*, 662 F.2d 162, 171 (2d Cir. 1981) (alteration in original). Prosecutorial comments are examined "within the context of the entire court-martial." *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000).

Analysis

Trial counsel improperly commented on SrA Brassil-Kruger's invocation of his right to remain silent by describing its evidence that 'everyone,' including the accuser, was asleep as 'uncontroverted.' According to the government's evidence, the only persons who were both present and awake at the time of the incident were the accuser and SrA Brassil-Kruger. The only witness who could contradict the government's evidence was SrA Brassil-Kruger. This argument

was therefore necessarily a comment on his failure to testify and it was plain error. Moreover, trial counsel's claim that it was 'uncontroverted' that SrA Brassil-Kruger put his mouth on the accuser's vulva was untrue as SrA Brassil-Kruger had admitted to doing to so. R. at 307-08, Vol. I, PE 1, 1.mp4 at 35:02 to 36:28. Finally, given the relative weakness of the government's evidence, the government cannot establish that the error was harmless beyond a reasonable doubt. The only witnesses to the charged incident were the accuser and SrA Brassil-Kruger. There were no screams, no injuries, and no other signs of a struggle. Furthermore, defense counsel did not promise to introduce evidence. Under the circumstances, the government cannot establish that the error was harmless beyond a reasonable doubt. See *Carter*, 61 M.J. at 35.

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

VI.

THE GOVERNMENT CANNOT PROVE BEYOND A REASONABLE DOUBT THAT THE MILITARY JUDGE'S FAILURE TO INSTRUCT THE PANEL THAT A GUILTY VERDICT MUST BE UNANIMOUS WAS HARMLESS.

Additional Facts

During arraignment, the military judge advised Appellant he had the right to be tried by a panel and that a three-fourths quorum was necessary to return a guilty verdict. R. at 9. He elected trial by a panel of officer and enlisted members. R. at 10. Appellant's panel consisted of eight members, and—prior to their deliberations—the military judge instructed them that "[t]he concurrence of at least three-fourths of the members present when the vote is taken is required for any finding of guilty." R. at 666. It is unknown whether Appellant was convicted by a unanimous verdict.

Standard of Review

"An appellant gets the benefit of changes to the law between the time of trial and the time of his appeal." *Tovarchavez*, 78 M.J. at 462. "A new rule of criminal procedure applies to cases on *direct* review, even if the defendant's trial has already concluded." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021) (emphasis in original). Thus, as the Court of Appeals for the Armed Forces (CAAF) has explained, when an appellant fails to object at trial to an error of constitutional dimension that was not yet resolved in his favor at the time of his trial, the "error in the case is forfeited rather than waived." *See Tovarchavez*, 78 M.J. at 462. In such circumstances, military appellate courts review for plain error, but "the prejudice analysis considers whether the error was harmless beyond a reasonable doubt." *Id*. (internal quotations omitted). This is the same approach the Oregon Supreme Court recently took when it was tasked with answering this question in relation to a non-unanimity error that was not raised at trial:

> This case presents the question of whether a defendant is entitled to reversal even where the challenge to a nonunanimous verdict was not preserved in the trial court and was raised for the first time on appeal—that is, whether such a challenge may be raised as a "plain error" that an appellate court should exercise its discretion to correct. We conclude that the answer is yes.

State v. Ulery, 366 Or. 500, 501 (2020); *see also State v. Kincheloe*, 367 Or. 335, 339 (2020) ("As to defendant's nonunanimous verdict for first-degree rape, we would reverse that conviction even if defendant had failed to preserve an objection."). This Court should likewise review this constitutional issue for plain error, with the Government bearing the burden of proving harmlessness beyond a reasonable doubt.

Law & Analysis

In *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), the Supreme Court "repudiated [its] 1972 decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), which had allowed non-unanimous juries in

state criminal trials." *Edwards*, 141 S. Ct. at 1551. Instead, *Ramos* held that the Due Process Clause of the Fourteenth Amendment required applying the same jury-unanimity rule to state convictions for criminal offenses that already applied to federal (civilian) convictions under the Jury Trial Clause of the Sixth Amendment. 140 S. Ct. at 1397. As the Supreme Court reiterated this past May, in so holding, *Ramos* unequivocally broke "momentous and consequential" new ground. *See Edwards*, 141 S. Ct. at 1559; *see also id*. at 1555–56 (noting that "[t]he jury-unanimity requirement announced in *Ramos* was not dictated by precedent or apparent to all reasonable jurists" beforehand). Indeed, the *Edwards* majority recognized that *Ramos* was on par with other "landmark" cases of criminal procedure "like *Mapp, Miranda, Duncan, Batson,* [and] *Crawford* . . . ." *Id.* at 1559.

For decades, the prevailing assumption has been that, as was true for state courts until last year, the Constitution does not require unanimous verdicts for non-capital courts-martial.[3] *See, e.g.*, *United States v. Lebron*, 46 C.M.R. 1062, 1068–69 (A.F.C.M.R. 1973). As this Court's predecessor explained in 1973, this purportedly followed from the Supreme Court's recognition in cases such as *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), and *Ex parte Quirin*, 317 U.S. 1 (1942), that the Sixth Amendment's jury-trial right does not extend to military tribunals. *See Lebron*, 46 C.M.R. at 1068–69; *see also United States v. McClain*, 22 M.J. 124, 128 (C.M.A. 1986) ("[C]ourts-martial have never been considered subject to the jury-trial demands of the Constitution.").[4]

[3] The UCMJ and the Constitution both require unanimous verdicts as to the conviction and sentence in capital cases. *See* Article.52(b)(2), UCMJ; *United States v. Gray*, 51 M.J. 1, 61 (C.A.A.F. 1999).

[4] In fact, the Supreme Court has never squarely *held* that the Sixth Amendment Jury Trial Clause is inapplicable to courts-martial. The oft-quoted statements to that effect in *Milligan* and *Quirin*, both cases about military *commissions* rather than courts-martial, were dicta at best. *Cf. Ortiz v.*

Ramos turns that assumption on its head. It does this not by applying the Sixth Amendment Jury Trial Clause to courts-martial, but by emphasizing two features of the unanimity requirement that *do* apply to military trials, whether through the Sixth Amendment or the Fifth Amendment: First, *Ramos* makes clear that the right to a unanimous verdict is an essential aspect of the Sixth Amendment right to an *impartial* jury—a right that, as the CAAF has recognized, both the UCMJ and the Constitution provide to the accused in a court-martial. *See, e.g.*, *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005).

Second, *Ramos* recognizes that unanimity is central to the fundamental *fairness* of a jury verdict—as opposed to a verdict rendered by a judge. Under *Milligan* and *Quirin*, Congress may not have been under a constitutional obligation to provide Appellant with the right to be tried by a panel in the first place. But as the CAAF has long held, "[a]s a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001). Thus, whether under the Sixth Amendment or the

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United States, 138 S. Ct. 2165, 2179 (2018) ("[N]ot every military tribunal is alike."). Nor did the Supreme Court *hold* that the Sixth Amendment Jury Trial right is inapplicable to courts-martial in *Whelchel v. McDonald*, 340 U.S. 122 (1950). First, the *Whelchel* Court's statement that "[t]he right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial" (*id*. at 127) was made in reference to the *composition* of the court-martial. There is more than one right encompassed within the Sixth Amendment's Jury Trial Right, and Appellant makes no claim under the Vicinage Clause of the Sixth Amendment. Additionally, *Whelchel* came to the Court by way of a writ of habeas corpus and solely focused upon whether his court-martial possessed jurisdiction over him. *See id*. at 123. Because it was not necessary to the disposition of the case, the Court's fleeting reference to the jury trial right at courts-martial which existed prior to enactment of the UCMJ does not constitute a "holding." And even if this dictum were persuasive, it would only be persuasive with respect to an argument premised upon the *composition* of the panel, not its function. The right to unanimity, unlike the rights encompassed within the Vicinage Clause, goes to the very *function* of what a criminal fact-finding body is charged to undertake in the first place. Appellant does, however, recognize that the CAAF has held that there is no constitutional right to jury trial in a court-martial. This Court is, of course, bound by those rulings of the CAAF. Thus, Appellant assumes, solely for the sake of proceedings before this Court, that he did not have a constitutional right to trial by jury in his court-martial. Appellant reserves the right to argue on appeal that those decisions should be overruled.

Fifth, Congress's choice to provide a statutory right to trial by a panel necessarily triggered constitutional requirements of fairness and impartiality—requirements that, after *Ramos*, can no longer be satisfied by non-unanimous convictions for the offenses for which Appellant was tried.

A. *Ramos* Unequivocally Holds That Unanimous Verdicts are Central to a Defendant's Right Not Just to a Trial by Jury, But to a Jury That is Itself Impartial

The Supreme Court's landmark decision in *Ramos* was not just a technical interpretation of the Sixth Amendment's Jury Trial Clause. Rather, both the holding and the result in *Ramos* were based upon "a fundamental change in the rules thought necessary to ensure *fair criminal process*." *Edwards*, 141 S. Ct. at 1574 (Kagan, J., dissenting) (emphasis added). Indeed, Part I of Justice Gorsuch's opinion for the *Ramos* Court opens with three pages on the extent to which it was understood at the Founding that unanimity was central not just to the right to *a* petit jury in a criminal case, but to the right to an *impartial* jury—which, unlike unanimity, the text of the Sixth Amendment expressly requires. *See Ramos*, 140 S. Ct. at 1395–97. As he explained, "[w]herever we might look to determine what the term 'trial by an *impartial* jury' meant at the time of the Sixth Amendment's adoption—whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict." *Id*. at 1395 (emphasis added).

This analysis was more than just a frolic or detour. As Justice Gorsuch stressed, the proposition that the Sixth Amendment Jury Trial Clause requires unanimous verdicts had long been settled by the Supreme Court. Likewise, the Court has also long made clear that constitutional provisions that have been incorporated against the states through the Fourteenth Amendment's Due Process Clause, *including* the Sixth Amendment Jury Trial Clause (which was incorporated in *Duncan v. Louisiana*, 391 U.S. 145 (1968)), necessarily have the same scope and meaning as applied to states as they do directly against the federal government. Neither of these principles was

in dispute. *See Ramos*, 140 S. Ct. at 1397. Rather, the question was whether, taken together, they justified overruling *Apodaca*—in which Justice Powell's enigmatic solo concurring opinion attempted to split the difference. And the Court's central justification for relegating *Apodaca* "to the dustbin of history," *Id*. at 1410 (Sotomayor, J., concurring in part), was the extent to which it was inconsistent with fundamental (and Founding-era) understandings of procedural fairness.

In her concurring opinion, Justice Sotomayor reinforced the connection between unanimity and fairness. As she wrote, non-unanimous verdicts can give rise to at least a "perception of unfairness," especially when there are racial disparities in the pool of defendants and/or the composition of the jury. *See id*. at 1418 (Sotomayor, J., concurring in part).[5] In that respect, *Ramos* did more than just overrule *Apodaca* and incorporate the unanimous jury requirement against the states; it reinforced that unanimous juries are part-and-parcel of the Constitution's *separate* requirements to *impartial* juries and *fair* verdicts. *See, e.g.*, *Edwards*, 141 S. Ct. at 1575 (Kagan, J., dissenting) ("[T]he [*Ramos*] Court took the unusual step of overruling precedent for the most fundamental of reasons: the need to ensure, in keeping with the Nation's oldest traditions, fair and dependable adjudications of a defendant's guilt."). That distinction is critical here, for it underscores why, even if Appellant had no constitutional right to a trial by petit jury in his court-martial, the Constitution nevertheless required that, once he was tried by a jury that Congress chose

[5] The historical origins of non-unanimous verdicts in courts-martial do not share the troubled, racially motivated underpinnings behind the Louisiana and Oregon statutes that *Ramos* struck down. *See* Murl A. Larkin, *Should the Military Less-Than-Unanimous Verdict of Guilt Be Retained?*, 22 HASTINGS L.J. 237, 239 & n.13 (1971). That said, many of the concerns about racial disparities to which Justice Sotomayor adverted in her *Ramos* concurrence are undeniably present in contemporary courts-martial—including in the Air Force. *See* Air Force Inspector General, Report of Racial Inquiry, Independent Racial Disparity Review, December 2020. In any event, Justice Gorsuch's majority opinion in *Ramos* made explicit that "a jurisdiction adopting a nonunanimous jury rule, *even for benign reasons*, would still violate the Sixth Amendment." *Ramos*, 140 S. Ct. at 1440 n.44 (emphasis added).

to provide, his convictions had to be unanimous. *Cf. Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (explaining why, even if a criminal defendant has only a statutory—rather than a constitutional—right to appeal a conviction, "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution").

B. As the CAAF Has Repeatedly Recognized, the UCMJ and the R.C.M. Create Both Statutory *and* Constitutional Rights for the Accused Vis-à-Vis the Panel.

In the abstract, the argument that the Constitution protects rights to an impartial panel and a fair verdict even in cases in which there is no constitutional right to a trial by petit jury in the first place may seem unorthodox. But the CAAF's jurisprudence unequivocally establishes that proposition—and has reflected it for decades. Thus, it is the combination of the Supreme Court's decision in *Ramos* and the line of CAAF decisions recognizing constitutional rights to both an impartial decision maker and a fair verdict that required unanimous convictions here.[6]

As far back as 1964, the CAAF's predecessor explicitly recognized that, even if servicemembers do not have a constitutional right to trial by petit jury, "[c]onstitutional due process includes the right to be treated equally with all other accused in the selection of *impartial* triers of the facts." *United States v. Crawford*, 35 C.M.R. 3, 6 (C.M.A. 1964) (emphasis added);

[6] It is for this reason that, in a unpublished decision addressing an assignment of error raised pursuant to *Grostefon*, one panel of this Court erred in concluding that "there can be no requirement for a unanimous jury verdict at courts-martial under [the Sixth] amendment" on the grounds that there is no Sixth Amendment right to a jury trial in the first place. *See United States v. Albarda*, No. ACM (f rev), 2021 CCA LEXIS 347, at *2 n.3 (A.F. Ct. Crim. App. 7 Jul 2021) (unpub. op.). Putting aside for a moment the fact that *Albarda* does not address at all whether the *Fifth* Amendment requires unanimity, for the reasons set forth in Appellant's brief, this conclusion is not logically sound. Even if *arguendo*, Appellant has no Sixth Amendment right to a petit jury, the issue here is more insular and focuses upon whether the right to a unanimous verdict is guaranteed consistent with the Sixth Amendment's assurances of an impartial panel—a right that this Court's superior *has* recognized. *See Lambert*, 55 M.J. at 295. Under the logic of *Albarda*, if there is no Sixth Amendment right to a jury trial in the military, then there would also be no Sixth Amendment right to an impartial panel. But *Lambert* rejects this flawed syllogism, and the same holds true with respect to the Sixth Amendment right to a unanimous verdict.

see also United States v. Deain, 17 C.M.R. 44, 49 (C.M.A. 1954) ("Fairness and impartiality on the part of the triers of fact constitute a cornerstone of American justice."). More recently, the CAAF has suggested that the right to an impartial court-martial panel comes not only from the Due Process Clause of the Fifth Amendment, as in *Crawford*, but from the Sixth Amendment *itself*. *See, e.g.*, *United States v. Lambert*, 55 M.J. 293, 295 (C.A.A.F. 2001) ("[T]he *Sixth Amendment* requirement that the jury be impartial applies to court-martial members and covers not only the selection of individual jurors, but also their conduct during the trial proceedings and the subsequent deliberations." (emphasis added)).

Lambert is hardly the only case in which the CAAF has extended Sixth Amendment protections to courts-martial. To the contrary, the CAAF has also held that courts-martial accused are entitled under the Sixth Amendment—and not just the UCMJ—to (1) a speedy trial, *see United States v. Danylo*, 73 M.J. 183, 186 (C.A.A.F. 2014); (2) a public trial, *see United States v. Hershey*, 20 M.J. 433, 435 (C.M.A. 1985); (3) the ability to confront witnesses, *see United States v. Blazier*, 69 M.J. 218 (C.A.A.F. 2010); (4) notice of the factual and legal bases for the charges, *see United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011); (5) the ability to compel testimony that is material and favorable to the defense, *see United States v. Bess*, 75 M.J. 70, 75 (C.A.A.F. 2016); (6) counsel, *see United States v. Wattenbarger*, 21 M.J. 41, 43 (C.M.A. 1985); and (7) the effective assistance thereof, *see United States v. Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011). *Lambert*'s reasoning—that the Sixth Amendment right to an *impartial* jury also applies to court-martial panels—is deeply consistent with this large body of case law. *See also United States v. Castellano*, 72 M.J. 217, 219 (C.A.A.F. 2013) (holding that, by finding a *Marcum* factor by himself rather than

having it found by the panel, the judge violated "Appellant's due process rights under the Fifth and Sixth Amendments").[7]

Thus, once an accused elects to be tried by a panel, *Lambert* establishes that he has a *constitutional* right to impartiality under the Sixth Amendment with respect to both how the panel members are selected and how they deliberate their verdict. If, as *Ramos* suggested, unanimous convictions are necessary to impartiality, then it follows that an accused in a court-martial who elects to be tried by a panel has a Sixth Amendment right to a unanimous guilty verdict.

C. Even if the Sixth Amendment Does Not Require Unanimous Verdicts for Serious Offenses Tried By Court-Martial, the Due Process Clause of the Fifth Amendment Does

The above analysis demonstrates why Appellant had a right to a unanimous guilty verdict as part of his right to an impartial panel under the Sixth Amendment. But he also had a right to a unanimous guilty verdict as part of his right to due process under the Fifth Amendment—because "[i]mpartial court-members are a *sine qua non* for a fair court-martial." *United States v. Modesto*, 43 M.J. 315, 318 (C.A.A.F. 1995); *see also United States v. Witham*, 47 M.J. 297, 301 (C.A.A.F. 1997) ("[A] military accused has no right to a trial by jury under the Sixth Amendment. He does, however, have a right to due process of law under the Fifth Amendment, and Congress has provided for trial by members at a court-martial." (citations omitted)). This Court's superior has also recognized that when a right applies by virtue of due process "it applies to courts-martial, just as it does to civilian juries." *United States v. Santiago-Davilla*, 26 M.J. 380, 390 (C.M.A. 1988)

[7] One of the cases that the CAAF cited in *Castellano* for the proposition that *Marcum* factors must be found by the panel is *Apprendi v. New Jersey*, 530 U.S. 466 (2000)—in which the Court held that the Sixth Amendment Jury Trial Clause, not the Fifth Amendment Due Process Clause, requires that any facts that increase the penalty for a crime beyond the prescribed statutory maximum be submitted to the jury and proved beyond a reasonable doubt. *See* 72 M.J. at 219 (citing *Apprendi*, 530 U.S. at 490).

(holding that the Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), applied to courts-martial).[8]

As with any number of other due process contexts, Congress may not have been obliged to offer Appellant the option of being tried by a panel, but once it chose to provide that option, it had to do so in a manner consistent with fundamental notions of procedural fairness—because criminal trials necessarily implicate the accused's liberty. *See, e.g.*, *Wilkinson v. Austin*, 545 U.S. 209, 221–24 (2005). Put another way, Congress could hardly rely upon an accused's lack of a constitutional right to a trial by jury to provide a panel that reaches its verdict by flipping a coin. *See Evitts*, 469 U.S. at 393; *see also United States v. Rodriguez-Amy*, 19 M.J. 177, 178 (C.M.A. 1985) ("a military criminal appeal is a creature . . . solely of statutory origin, conferred neither by the Constitution nor the common law. However, once granted, the right of appeal must be attended with safeguards of constitutional due process") (internal quotations and citations omitted).

As the Supreme Court made clear in *Weiss v. United States*, 510 U.S. 163 (1994), when it comes to an accused's procedural rights in a court-martial, the relevant question under the Due Process Clause is "'whether the factors militating in favor of [the right] are so extraordinarily weighty as to overcome the balance struck by Congress.'" *Id*. at 177–78 (quoting *Middendorf v. Henry*, 425 U.S. 25, 44 (1976)). In *Weiss*, the Petitioners challenged whether they had a right to have their courts-martial presided over by military judges with fixed terms in office. In holding that the Due Process Clause did not require fixed terms, the Court expressly tied its analysis to the *lack* of a connection between fixed terms and impartiality, rejecting Petitioners' claim that "a military judge who does not have a fixed term of office lacks the independence necessary to ensure

[8] Since *Santiago-Davilla* was decided, the CAAF "has repeatedly held that the *Batson* line of cases . . . applies to the military justice system." *Witham*, 47 M.J. at 297.

impartiality." *Id*. at 178. *Ramos*, in contrast, establishes the precise connection that the *Weiss* Petitioners could not. Indeed, it is impossible to read *Ramos*—or the Court's subsequent discussion of it in *Edwards*—and *not* come away with the conclusion that "the factors militating in favor of [unanimous verdicts] are . . . extraordinarily weighty." *Weiss*, 510 U.S. at 177. If unanimous verdicts are necessary in the civilian criminal justice system "to ensure impartiality," as *Ramos* held, it ought to follow that they are equally necessary in a court-martial.[9]

Moreover, unanimity is also central to a distinct due process right possessed by courts-martial accused: the right to have the government prove its case beyond a reasonable doubt. *See United States v. Gay*, 16 M.J. 475, 477 (C.M.A. 1983) ("Due process requires proof beyond a reasonable doubt for conviction of a crime." (citing *In re Winship*, 397 U.S. 358 (1970))). *See generally United States v. Hills*, 75 M.J. 350, 356 (C.A.A.F. 2015). For decades, federal civilian courts have recognized a direct connection between this right and the requirement of jury unanimity as to guilt. As Judge Prettyman wrote in *Billeci v. United States*, 184 F.2d 394 (D.C. Cir. 1950):

> An accused is presumed to be innocent. Guilt must be established beyond a reasonable doubt. All twelve jurors must be convinced beyond that doubt; if only a verdict of guilty cannot be returned. These principles are not pious platitudes recited to placate the shares of venerated legal ancients. They are working rules of law binding upon the court. Startling though the concept is when fully appreciated, those rules mean that the prosecutor in a criminal case must actually overcome the presumption of innocence, all reasonable doubts as to guilt, and the unanimous verdict requirement.

[9] Notably, in *Middendorf*, the Court recognized that "the Sixth Amendment makes absolutely no distinction between the right to jury trial and the right to counsel." 425 U.S. at 32 n.13. At the time *Middendorf* was decided, it was an open question whether an accused had a Sixth Amendment right to counsel at court-martial. *Id*. at 33. Although *Middendorf* itself did not settle that issue, the CAAF now has—in favor of a right to counsel. *See, e.g.*, *Gooch*, 69 M.J. at 361. If *Middendorf* meant what it said, then that only further underscores why Appellant should prevail under *Ramos*.

Id. at 403; *see also Hibdon v. United States*, 204 F.2d 834, 838 (6th Cir. 1953) ("The unanimity of a verdict in a criminal case is inextricably interwoven with the required measure of proof. To sustain the validity of a verdict by less than all of the jurors is to destroy this test of proof for there cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remain reasonably in doubt as to guilt. It would be a contradiction in terms."). More recently, the three dissenting Justices in *Edwards* recognized the interplay between a unanimous guilty verdict and the right to have one's guilt proven beyond a reasonable doubt. Repeatedly citing to *Winship*, Justice Kagan observed that unanimity was "similarly integral" to the jury-trial right that requires proof beyond a reasonable doubt. *Edwards*, 141 S. Ct. at 1576–77 (Kagan, J., dissenting). As she elaborated:

> Allowing conviction by a non-unanimous jury "impair[s]" the "purpose and functioning of the jury," undermining the Sixth Amendment's very "essence." It "raises serious doubts about the fairness of [a] trial." And it fails to "assure the reliability of [a guilty] verdict." So when a jury has divided, as when it has failed to apply the reasonable-doubt standard, "there has been no jury verdict within the meaning of the Sixth Amendment."

Id. at 1577 (alterations in original; citations omitted).

So long as *Apodaca* was the law of the land, there was at least a plausible argument that this understanding applied only in federal civilian courts—because the gravamen of Justice Powell's solo opinion (filed in the companion case, *Johnson v. Louisiana*, 406 U.S. 366 (1972)), was that the unanimity right did *not* have the same valence in all courts—and that other tribunals retained "freedom to experiment with variations in jury trial procedure." *Id*. at 376 (Powell, J., concurring in the judgment); *see also Mendrano v. Smith*, 797 F.2d 1538, 1547 (10th Cir. 1986) (rejecting the "close and troubling question[]" of whether non-unanimous court-martial

convictions violate due process).[10] It is this exact functional approach that *Ramos* rejected. *See* 140 S. Ct. at 1398–1400. As Justice Gorsuch put it:

> The deeper problem is that [*Apodaca*] subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment in the first place. . . . As judges, it is not our role to reassess whether the right to a unanimous jury is 'important enough' to retain. With humility, we must accept that this right may serve purposes evading our current notice. We are entrusted to preserve and protect that liberty, not balance it away aided by no more than social statistics."

[10] The central conclusion in *Johnson*—that the Fourteenth Amendment's Due Process Clause did not independently prohibit nonunanimous verdicts—is no longer good law following *Ramos*. Indeed, a five-justice majority in *Ramos* applied the Sixth Amendment guarantee to a unanimous verdict *by way of* the Fourteenth Amendment's Due Process Clause through the doctrine of incorporation. Whenever a guarantee enshrined in the Bill of Rights is made applicable against the states pursuant to the doctrine of incorporation, it is done so precisely *because* the Court has made a threshold determination that such a right is required as a fundamental matter of due process. Only those rights which are required by virtue of due process in the first place are held to apply against the states. The relevant question in determining whether a guarantee enshrined in the Bill of Rights is applicable to the states asks whether the right at issue "is fundamental to *our* [i.e., American] scheme of ordered liberty . . . or as [the Supreme Court has] said in a related context, whether this right is deeply rooted in the Nation's history and tradition." *McDonald v. City of Chi.*, 561 U.S. 742, 767 (2010) (internal quotations omitted). *See also Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) (noting that a right may only be incorporated if it is either "'fundamental to our scheme of ordered liberty' or 'deeply rooted in this Nation's history and tradition'" and that once "a Bill of rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires."). Therefore, while the Supreme Court did not explicitly state in *Ramos* that "unanimous verdicts are required as a matter of due process" it did not have to. This was implicit by virtue of the fact that it incorporated the right against the states. A determination that a right is required as a matter of due process is a fundamental prerequisite to incorporating that right. Moreover, even in *Johnson* itself, the Court did not consider a traditional due process claim like the one Appellant brings in this case. As Justice Powell observed at the time, "in *Johnson* v. *Louisiana*, appellant concedes that the nonretroactivity of *Duncan* prevents him from raising his due process argument in the classic 'fundamental fairness' language adopted there" and was instead left only with the ability to raise the limited argument on appeal that a nonunanimous verdict was a violation of the requirement to prove guilt beyond a reasonable doubt. *Johnson*, 406 U.S. at 367-68 (Powell, J., concurring). Unlike the petitioner in *Johnson*, here Appellant is raising a traditional due process argument which attacks the fundamental fairness of the nonunanimous verdict system on a number of fronts, including—but not limited to—the fact that it is inextricability intertwined with the requisite burden of proof as, again, three Justices expressly observed this past year. *See Edwards*, 141 S. Ct. at 1576–77 (Kagan, J., dissenting).

Id. at 1401–02. Because *Ramos* thus makes clear that unanimity is central to the underlying *fairness* of a criminal proceeding in *any* U.S. forum, it likewise makes clear that military accused such as Appellant have a due process right to a unanimous guilty verdict.[11] If anything, the unanimity requirement is even *more* important in trial courts, such as courts-martial, that utilize panels with fewer than twelve members. *See Ballew v. Georgia,* 435 U.S. 223, 234 (1978) ("Statistical studies suggest that the risk of convicting an innocent person . . . rises as the size of the jury diminishes."). Appellant's panel in this case, consistent with Article 52(a)(3), UCMJ, had eight members. It was only four years ago that the Supreme Court claimed that "[t]he procedural protections afforded to a service member are 'virtually the same' as those given in a civilian criminal proceeding, whether state or federal." *Ortiz*, 138 S. Ct. at 2174. Until the right to a unanimous conviction is guaranteed at courts-martial, however, that pronouncement will ring more than a little hollow.

D. The Government Cannot Establish that this Constitutional Violation was Harmless Beyond a Reasonable Doubt

There is no way of knowing whether any or all of Appellant's convictions were secured by a non-unanimous verdict. But that is a problem for the government, not Appellant. Where constitutional error is at hand, the *government* bears the burden of proving harmlessness beyond a reasonable doubt. And—because there is no way of knowing the vote count (especially since the

[11] Because the right to a unanimous verdict is an individual right held by the accused, it does not require that *acquittals* be unanimous. As the Oregon Supreme Court explained, "*Ramos* does not imply that the Sixth Amendment prohibits *acquittals* based on nonunanimous verdicts or that any other constitutional provision bars Oregon courts from accepting such acquittals." *State v. Ross*, 481 P.3d 1286, 1293 (Or. 2021) (emphasis added). Thus, recognizing that the Constitution requires a panel to return a unanimous verdict to *convict* is not akin to invalidating all non-unanimous verdicts. Even if Article 52(a)(3), UCMJ, is unconstitutional to the extent that it authorizes less than unanimous guilty verdicts, *Ross* makes clear that it is very much constitutional to the extent that it authorizes 5-3 acquittals.

Rules for Courts-Martial explicitly preclude the members from being polled)—the Government cannot meet this already onerous burden. *See* R.C.M. 922(e); *cf.* R.C.M. 1007(c). "It is long-settled that a panel member cannot be questioned about his or her verdict . . . ." *Lambert*, 55 M.J. at 295.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside his convictions and the sentence.

VII.

THE GOVERNMENT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS WHEN IT CHARGED HIM WITH SEXUAL ASSAULT UNDER A THEORY OF WITHOUT CONSENT, BUT CONVICTED HIM UNDER A DIFFERENT THEORY.

Additional Facts

All three specifications tried in this case required the government to prove the conduct at issue was committed without the consent of the accuser. During the government's opening statement and closing argument, trial counsel improperly conflated the theories of incapable of consent with lack of consent. During opening statement, trial counsel claimed that SrA Brassil-Kruger "admitted in the OSI interview that he saw [SPC CB] was intoxicated and asleep." R. at 283 (citing PE 1). During findings argument, trial counsel focused on the accuser's testimony that she did not remember going to sleep and her level of alcohol consumption. R. at 619. Further, despite the military judge's earlier admonitions, trial counsel argued in closing argument that the accuser "was not a competent person, she could not give consent." R. at 619. Defense counsel objected, which was overruled. *Id*. Defense counsel then requested a standing objection. *Id*.

Standard of Review

Questions of law and statutory construction are reviewed *de novo*. *United States v. Atchak*, 75 M.J. 193, 195 (C.A.A.F. 2016); *United States v. Tunstall*, 72 M.J. 191, 192 (C.A.A.F. 2013).

Law

The Fifth Amendment to the United States Constitution provides that no person shall be deprived of "life, liberty, or property, without due process of law." U.S. Const. amend. V. This "Due Process" clause precludes the government from convicting an accused of an offense for which he has not been charged. *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 20011) (referencing *United States v. Marshall*, 67 M.J. 418, 421 n. 3 (C.A.A.F. 2009) (noting the government's dual due process obligations of fair notice and "proof beyond a reasonable doubt of the offense alleged")); *see also Patterson v. New York*, 432 U.S. 197, 210 (1977) ("[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged."); *United States v. Wilcox*, 66 M.J. 442, 448 (C.A.A.F. 2008) ("To satisfy the due process requirements of the Fifth Amendment, the government must prove beyond a reasonable doubt every element of the charged offense."); *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008) ("An appellate court cannot affirm a criminal conviction on the basis of a theory of liability not presented to the trier of fact."). "Thus, when all of the elements are not included in the definition of the offense of which the defendant is charged, then the defendant's due process rights have in fact been compromised." *Girouard*, 70 M.J. at 10 (quoting *Patterson*, 432 U.S. at 210) (internal quotations and alterations omitted).

"Deviation from a legal rule is 'error' unless the rule has been waived." *United States v. Olano*, 507 U.S. 725, 732-33 (1993). Constitutional error is tested for prejudice under the standard

of "harmless beyond a reasonable doubt." *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006) (internal citation omitted). "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." *Id.* (internal quotations and citation omitted). "An error is not harmless beyond a reasonable doubt when there is a reasonable possibility that the error complained of might have contributed to the conviction." *Hills*, 75 M.J. at 357 (internal quotations, citations, and alterations omitted). "For preserved constitutional errors, such as in this instant case, the government bears the burden of establishing that the error is harmless beyond a reasonable doubt." *United States v. Riggins*, 75 M.J. 78, 85 (C.A.A.F. 2016).

Article 120, UMCJ, sets forth multiple theories of criminality as to the crime of sexual assault, one of which is "without the consent of the other person." Article 120.a.(b)(2)(A), UCMJ; UCMJ; 10 U.S.C. § 920.a.(b)(2)(A). Article 120 defines the term "consent" and explains that "all surrounding circumstances" are to be considered in determining whether it existed.

> (A) The term 'consent' means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear 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.
>
> (B) A sleeping, unconscious or incompetent person cannot consent.
>
> . . . .
>
> (C) All the surrounding circumstances are to be considered in determining whether a person gave consent.

Article 120.a.(g)(7), UCMJ; 10 U.S.C. § 920.a.(g)(7). Other relevant theories of criminality as to sexual assault include when the accused "knows or reasonably should have known that the other

person is asleep, unconscious, or otherwise unaware that the sexual act is occurring,"[12] **or** when "the other person is incapable of consenting to the sexual act due to impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known" by the accused.[13]

In *United States v. Riggins*, the Court noted there is a difference between the burden to prove facts that establish an individual's "*legal inability to consent*" and the burden to prove that an individual "*did not, in fact, consent*." 75 M.J. 78, 84 (C.A.A.F. 2016) (emphasis in original). One year later, in *United States v. Sager*, the Court considered whether Article 120(b)'s prohibition of "sexual contact with another person if they are 'asleep, unconscious, or otherwise unaware that the sexual [contact] is occurring' . . . created a single theory of criminal liability[.]" 76 M.J. 158, 159 (C.A.A.F. 2017). In determining that it did not, the Court noted "that the words, 'asleep, unconscious, or otherwise unaware,' are separated by the disjunctive 'or.'" *Id*. at 161. Therefore, because the word "or" "marks an alternative which generally corresponds to the word 'either,'" the Court concluded that "under the 'ordinary meaning' canon of construction" this "reflect[ed] separate theories of liability." *Id.* at 161-162. The Court noted that to hold otherwise would be to violate the surplusage canon of construction because it would render language within the same statutory scheme as superfluous. *Id*. at 162.

"To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process." *Dunn v. United* States, 442 U.S. 100, 106 (1979). Indeed, "[f]ew constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused." *United States v.*

[12] Article 120.a.(b)(2)(B), UCMJ; UCMJ; 10 U.S.C. § 920.a.(b)(2)(B).

[13] Article 120.a.(b)(3)(A), UCMJ; UCMJ; 10 U.S.C. § 920.a.(b)(3)(A)

Teffeau, 58 M.J. 62, 67 (C.A.A.F. 2003) (quoting *Dunn*, 442 U.S. at 106-07). It is immaterial whether the same verdict may have been obtained on a different theory; "appellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial." *Dunn*, 442 U.S. at 107. Rather, as the Supreme Court has repeatedly recognized, "it is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Id*. (quoting *Cole v. Arkansas*, 333 U.S. 196, 201 (1948)).

The Court has recognized, consistent with due process, that "[t]o prepare a defense, the accused must have notice of what the government is required to prove for a finding of guilty . . . [and] [t]he charge sheet provides the accused" such notice. *United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018). "No article of the UCMJ . . . currently authorizes a court-martial to find the accused guilty of an offense that is not necessarily included in a charged offense." *Id*. The Court has likewise observed that "the government controls the charge sheet" and "[t]he defense [is] entitled to rely on the charge sheet and the government's decision not to amend the charge sheet prior to trial." *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017).

Analysis

SrA Brassil-Kruger was charged with sexual assault and abusive sexual contact under a theory of lack of consent. This is distinctly different theory from sexual assault or abusive sexual contact upon an individual who is asleep or who is incapable of consenting due to impairment. Yet, the instructions to the members and trial counsel's argument suggest SrA Brassil-Kruger was convicted under a theory other than the charged theory. SrA Brassil-Kruger's conviction for uncharged offenses was a violation of his Due Process rights, and was in error. Because this error

resulted in his conviction, it was not harmless beyond a reasonable doubt. Accordingly, his convictions must be set aside.

This case is similar to *Sager*, where the Court relied upon the "ordinary meaning" and "surplusage" canons to resolve the government's Article 120 charging scheme. Applying these same cannons here reveals that the military judge erred by allowing the government to argue two different theories of liability under Article 120 other than the one it charged. If the government were permitted to seek convictions under a lack of consent on the basis that an individual lacked the competency to consent due to impairment by alcohol, or because the individual was asleep, this would render Article 120.a.(b)(2)(B) and (b)(3)(A) superfluous and insignificant.

Like *Sager*, Appellant's case also involves use of the disjunctive modifier "or" separating pertinent portions of the statute. In *Sager*, the Court explained, "[i]n ordinary use the word 'or' . . . marks an alternative which generally corresponds to the word 'either.'" 76 M.J. at 161 (internal citations and quotations omitted). Therefore, consistent with the ordinary meaning canon, the Court concluded that the phrase "asleep, unconscious, or otherwise unaware" reflects three distinct theories of liability under Article 120(b)(2), UCMJ. *Id*. at 162. This same canon of construction applies here because Article 120(b)(1)(B) and Article 120(b)(3)(A) are also separated by "; or" – the same disjunctive modifier at issue in *Sager*. Indeed, Article 120(b) contains three separate subsections: b(1), b(2), and b(3). Subsection b(1) is separated from subsection b(2) with a semicolon. But subsection b(2) is separated from subsection b(3) by a semicolon followed by the word "or." Accordingly, consistent with principles of legal interpretation, we read b(1), b(2), and b(3) to be disjunctive. That is, they present distinct, independent theories of liability for precisely those reasons the Court relied upon in *Sager.*

In *United States v. Weiser*, 80 M.J. 635 (C.G. Ct. Crim. App. 2020), the Coast Guard Court of Criminal Appeals affirmed a conviction where the government charged a bodily harm theory, but its evidence supported a legally-unable theory. 80 M.J. at 641. That case is readily distinguishable from Appellant's case. In *Weiser*, trial counsel expressly disavowed other theories of liability in closing argument, stating "Now we're not arguing to you that she was so drunk and so tired that she could not consent. But her level of intoxication and her level of fatigue are factors you should consider in whether or not she was consenting." 80 M.J. at 641-42. In this case, however, trial counsel embraced the legally-unable theory by arguing the accuser was not competent. R. at 619. In affirming the conviction in *Weiser*, the court stated, "to avoid the risk of variance, practitioners and military judge's must be vigilant of the difference between a theory that a putative victim *did not, in fact,* consent (bodily harm) and that a putative victim was *legally unable* to consent (e.g. incapacitated or sleeping). 80 M.J. at 641 (emphasis in original). Trial counsel and the military judge in this case took the opposite position that 'legally unable' and 'lack of consent' were one in the same. R. at 83.

Another similar case, *United States v. Gomez*, No. 201600331, 2018 CCA LEXIS 167 (N-M Ct. Crim. App. 4 April 2018) (unpub. op), is also readily distinguishable. In *Gomez*, the Navy-Marine Court of Criminal Appeals upheld a conviction on a bodily harm theory despite evidence that supported a legally-unable theory where the military judge specifically limited the government to arguing whether or not the offense was committed by bodily harm and prohibited the government from arguing the victim was not competent. *Gomez*, 2018 CCA LEXIS 167 at *18. Here, the military judge overruled the defense objection when trial counsel stated in closing argument that the accuser was not competent. R. at 619.

Further, with respect to the surplusage canon, there would have been no reason for Congress to devise a distinct theory of liability tailored to sexual assault cases—including abusive sexual contact cases—in which a victim is too intoxicated to consent if the same conduct can be punished under a lack of consent theory that it created in a different subsection of the same article. Indeed, Congress's decision to include a specific *mens rea* in Article 120(b)(3)(A) would serve no purpose if the government is free to pursue a lack of consent theory that does not contain such an explicit, statutorily set forth *mens rea*. As the CAAF recently observed in *United States v. McDonald*:

> In Article 120(b)(2) and 120(b)(3) . . . Congress provided an explicit mens rea that the accused "knows or reasonably should know" certain facts: that the victim is unaware of the sexual act or incapable of consenting to it. By contrast, under Article 120(b)(1)(B), it is an offense simply to commit a sexual act without consent. The fact that Congress articulated a specific mens rea with respect to the victim's state of mind elsewhere in the statute further demonstrates that the required mens rea in this case is only the general intent to do the wrongful act itself.

78 M.J 376, 380 (C.A.A.F. 2019).[14] Moreover, if the government is free to argue—as trial counsel did here—that SPC CB "was not a competent person, she could not give consent," this undermines the framework devised by Congress. It fails to honor the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Put simply, if Congress had intended for the government to obtain sexual assault (including abusive sexual contact) convictions on a lack of consent theory by arguing that the

[14] That the government is able to effectively ignore a statutorily prescribed *mens rea* is cause for concern in and of itself. *See United States v. Wheeler*, 77 M.J. 289, 293 (C.A.A.F. 2018) (noting that the government may not use Article 134, UCMJ, to lessen its evidentiary burden at trial by circumventing a *mens rea* or removing a specific vital element from an enumerated UCMJ offense).

alleged victim lacked the legal capacity to consent due to impairment by alcohol, there would have been no point in adding Article 120(b)(3)(A).

The government attempted to charge an alternative theory – that SrA Brassil-Kruger reasonably should have known the accuser was asleep, but the military judge dismissed this specification before entry of pleas. This further compounded the due process problem. Indeed, "the nuances and complexity of Article 120, UCMJ . . . make charging in the alternative an unexceptional and often prudent decision." *United States v. Elesperu*, 73 M.J. 326, 329-30 (C.A.A.F. 2014).

As the CAAF has reiterated:

> It is the Government's responsibility to determine what offense to bring against an accused. Aware of the evidence in its possession, the Government is presumably cognizant of which offenses are supported by the evidence and which are not. In some instances there may be a genuine question as to whether one offense as opposed to another is sustainable. In such a case, the prosecution may properly charge both offenses for exigencies of proof, a long accepted practice in military law. In cases where offenses are pleaded for exigencies of proof, depending on what the plea inquiry reveals or of which offense the accused is ultimately found guilty, the military judge may properly accept the plea and dismiss the remaining offense.

Id. at 329 (quoting *United States v. Morton*, 69 M.J. 12, 16 (C.A.A.F. 2010) (internal citations omitted)).

Because the case was not presented in the alternative, there is no way of knowing whether the panel members convicted Appellant of the offenses on the basis that SPC CB had the capacity to consent but did not consent (as charged), on the basis that Appellant reasonably should have known the accuser was asleep (as the government argued) (R. at 619), or on the basis that SPC CB lacked the capacity to consent due to impairment by alcohol (as the government never charged but also argued). *Id*. Additionally, as described above, the military judge's instructions further

compounded this issue as he blended the instructions for an incapable of consenting theory with the instructions for a lack of consent theory.

The military judge's instructions combined the concept of "consent" with the concept of an "incompetent person," who by statutory definition cannot consent. Based on these instructions, it is entirely possible that the panel members convicted Appellant because they found that SPC CB was an "incompetent person" due to her impairment by alcohol and claim of being asleep and thus could not legally consent. Indeed, this is exactly what trial counsel argued—that SPC CB "was not a competent person, she could not give consent." R. at 619. However, this is not what was charged. The specifications only alleged a theory of lack of consent, therefore, that as a matter of law for purposes of the court-martial, SPC CB was competent and capable of consenting to the sexual act at issue. This argument is the opposite of the argument in *Weiser*. 80 M.J. at 641-42. The military judge should not have allowed the government to argue that SPC CB was incapable of consenting due to impairment by alcohol or being asleep.

This, in turn, created a fundamental error of constitutional magnitude. By allowing the government to argue a theory of liability that had not been charged, Appellant was not provided with notice consistent with the demands of due process. The due process principle of fair notice mandates that "an accused has a right to know what offense *and under what legal theory* he will be convicted[.]" *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010) (internal citation and quotation omitted) (emphasis added). The analysis pays no mind to whether the Defense correctly guesses the government's theory of the case; rather, it is "[t]he charge sheet itself" which gives content to the general language of a punitive article "thus providing the required notice of what an accused must defend against." *Id*. at 472. Any argument that the Defense was constructively on notice of the government's intent to argue that A1C M.T. lacked capacity due to impairment by

alcohol fails to recognize that "[t]he *charge sheet* provides the accused notice that he or she will have to defend against any charged offense . . . ." *Armstrong*, 77 M.J. at 469 (emphasis added). And, as the Supreme Court has expressed, "it is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Dunn*, 442 U.S. at 107 (internal citations and quotations omitted).

While there is no way of knowing what theory of liability the panel members ultimately relied upon to reach a guilty verdict, the military judge's instructions exacerbated this issue as they were confusing and misleading. The findings instructions combined the concept of "consent" with the concept of an "incompetent person," stating, "[a] sleeping, unconscious, or incompetent person cannot consent." R. at 609. Based on these instructions, the members erroneously believed they could find Appellant guilty on the lack of consent theory if they concluded that SPC was legally incapable of consenting due to her impairment by alcohol or if she was asleep.

Finally, this Court cannot exercise its independent "awesome, plenary, and de novo power" under Article 66(c), UCMJ, to review Appellant's record for factual and legal sufficiency, and to substitute its judgment for that of the court below, if this Court cannot determine what legal theory Appellant was convicted under. *See United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990); *United States v. Chin*, 75 M.J. 220 (C.A.A.F. 2016).

In *United States v. Walters*, the Court addressed the issue of findings that were "vague and ambiguous and failed to reflect what facts constituted the offense." 58 M.J. 391, 394 (C.A.A.F. 2003). There, the members found the appellant not guilty of use of ecstasy on divers occasions but guilty on one occasion, without specifying the occasion. *Id.* The Court stressed that "[a] Court of Criminal Appeals cannot find as fact any allegation in a specification for which the fact-finder

below has found the accused not guilty." *Id.* at 395. The Court held that "the Court of Criminal Appeals, in turn, could not conduct a factual sufficiency review of Appellant's conviction because the findings of guilty and not guilty [did] not disclose the conduct upon which each of them was based." The Court ultimately set aside the finding and sentence and dismissed the charge, finding the appellant was materially prejudiced since he was entitled to a full and fair review of his conviction under Article 66(c), UCMJ. *Id.* at 397. Additionally, "appellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial." *Dunn*, 442 U.S. at 107.

Similarly, here, is it important for this Court to discern whether the panel members convicted Appellant because they believed SPC CB was incapable of consenting or because they believed she *could* consent but did not. Due to the military judge's confusing findings instructions and trial counsels' improper argument, this Court cannot be confident that Appellant was convicted based on a theory of lack of consent instead of a theory that SPC CB was incapable of consenting. Thus, this Court cannot conduct a full and fair review of Appellant's conviction under Article 66(c), UCMJ.

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

VIII.

THE EVIDENCE IS FACTUALLY AND LEGALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS.

Standard of Review

Under Article 66(c), UCMJ, this Court can only approve findings of guilty that it determines to be correct in both law and fact. 10 U.S.C. §866(c). Issues of legal and factual sufficiency are reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

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 Court is] convinced of [the appellant's] guilt beyond a reasonable doubt." *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). In conducting its review, this Court takes "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Id.* (quoting *Washington*, 57 M.J. at 399). The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *Id.* (quoting *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002)). This Court's assessments of legal and factual sufficiency are limited to the evidence produced at trial. *Id.* (quoting *United States v. Dykes*, 58 M.J. 270, 272 (C.M.A. 1993)).

"In the military justice system, where servicemembers accused at court-martial are denied some rights provided to other citizens, [this Court's] unique factfinding authority is a vital

safeguard designed to ensure that every conviction is supported by proof beyond a reasonable doubt." *United States v. Rivera*, 2016 CCA LEXIS 92 at *8 (A.F. Ct. Crim. App. 18 Feb. 2016) (unpub. op.). This authority provides "a source of structural integrity to ensure the protection of service members' rights within a system of military discipline and justice where commanders themselves retain awesome and plenary responsibility." *United States v. Jenkins*, 60 M.J. 27, 29 (C.A.A.F. 2004).

The theory of "*per se* incapacitation due to impairment from alcohol" has been consistently rejected by military appellate courts for years. *United States v. Rogers*, 75 M.J. 270 (C.A.A.F. 2016); *United States v. Pease*, 74 M.J. 763 (N-M Ct. Crim. App. 2015), *aff'd* 75 M.J. 180 (C.A.A.F. 2016); *United States v. Long*, 73 M.J. 541 (Army Ct. Crim. App. 2014); *United States v. Thomas*, 2019 CCA LEXIS 78 (A.F. Ct. Crim. App. 28 February 2019) (unpub. op.); *United States v. Nicely*, 2007 CCA Lexis 322 (A.F. Ct. Crim. App. 15 August 2007) (unpub. op.); *United States v. Newlan*, 2016 CCA Lexis 540 (N-M Ct. Crim. App. 3 September 2016) (unpub. op.); . As the courts have consistently recognized over time, drunk people, even those who are "blacked out" drunk, ***can be*** capable of consenting to sex. *Id*.

"Consent can be viewed as a decision or, at a minimum, as a manifestation of a mental process or calculation." *United States v. Brown*, 2014 CCA LEXIS 870, at *8 n.3 (Army Ct. Crim. App. 21 November 2014) (unpub. op.), *pet. denied*, 2015 CAAF Lexis 380 (C.A.A.F., 30 April 2015) (citing *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011). "Incapable of consenting" means: (1) lacking the cognitive ability to appreciate the sexual conduct; or (2) lacking the physical or mental ability to make a decision to engage in the sexual conduct; or (3) lacking the physical or mental ability to communicate that decision to the accused. *Pease*, 74 M.J. at 770, 75 M.J. at 185-86; *Long*, 73 M.J. at 544-45; *United States v. Lovett*, 2016 CCA LEXIS 276, at *11 (Army Ct.

Crim. App. 29 April 2016) (unpub. op.), *pet. denied*, 2016 CAAF LEXIS 696 (C.A.A.F. 18 August 2016); *see* R.C.M. 916(k)(1) (lack of mental responsibility when the person is "unable to appreciate the nature and quality or wrongfulness of his or her acts"); *see also United States v. Martin*, 56 M.J 97, 107-09 (C.A.A.F. 2001) (discussing meaning of "appreciate" and "nature and quality.").

"Impairment" alone is not legally sufficient to render a person "incapable" of understanding the consequences of sexual activity, unable to make a decision to engage in sexual activity, or unable to communicate that decision to another person. *Pease*, 74 M.J. at 770; *United States v. Condon*, 2017 CCA LEXIS 187, at *45 (A.F. Ct. Crim. App. 10 March 2017) (unpub. op.), *aff'd*, 77 M.J. 244 (C.A.A.F. 2018). Similarly, the competency of the decision to engage in sexual activity, *i.e.* whether the decision is "good" or "bad,", is not part of the "capacity" analysis that looks to the competence of the person. *Brown*, 2014 CCA LEXIS 870 at *6. Although drunk people often do not make "good" decisions, they can nevertheless make decisions. *Id*. Therefore, "litigants and military judges who fixate solely on . . . 'impairment' do so at their peril." *Newlan*, unpub. op. at *7.

Analysis

In this case, no reasonable factfinder could have found all the essential elements of any of the offenses beyond a reasonable doubt. Specifically, the government did not prove the absense of consent, to include that there was not a reasonable mistake of fact as to consent. In order to convict SrA Brassil-Kruger, the members had to rely on the accuser's testimony as she presented the only evidence of non-consent. Her testimony was inconsistent and it was contradicted by other witnesses. Regarding her level of intoxication, she claimed she drank four beers between the time she got off duty and the time of the assault. R. at 343, 346, 365. Despite her claimed memory

gap, she also testified that on previous occasions it took approximately 12 beers for her to black out. R. at 368-369. Her description of the incident was contradicted by the testimony of SPC KH and Mr. JH, both of whom testified that SPC CB described to them a violent encounter during which she fought back and repeatedly said, "No." R. at 501, 539. Her testimony that she had only met SPC KH that day was contradicted by SPC KH himself, who testified they had actually known each other for several months and had a romantic relationship. R. at 371-73; 526-27.

According to the accuser, she had no recollection of the night in question, between the point at which she told Mr. JH she was tired, and the point at which she awoke to discover SrA Brassil-Kruger was performing oral sex on her. R. at 351, 370. She testified that she woke to experiencing an orgasm. R. at 374. She testified that SrA Brassil-Kruger then digitally penetrated her vagina with his fingers and then kissed her breast. R. at 351. She claimed the encounter ended with her saying, "I need to go to the bathroom," at which point she got up and left the apartment. R. at 351.

It is apparent that SrA Brassil-Kruger believed the encounter was consensual. PE 1. As he described to to AFOSI, he came into the residence to sleep because it was cold outside. Vol. I, PE 1, 1.mp4 at 26:30 to 26:55. He lied down on the floor between SPC CB and SPC KH and put his arm around SPC CB. *Id*. SPC CB embraced him so he decided to "make a move," and asked her "Are you ok with this?" *Id*. at 26:55 to 27:35. She replied, "Yes." *Id*. He then described that he assisted SPC CB in taking her pants off and he then penetrated her vagina with his fingers. *Id*. at 27:35 to 29:13; R at 306. He described that after approximately two minutes, SPC CB told him to stop and got up to use the bathroom, at which point he went back outside to his vehicle. *Id*. Upon further questioning, SrA Brassil-Kruger described that he also performed oral sex on SPC CB during the encounter. R. at 307-08; Vol. I, PE 1, 1.mp4 at 35:02 to 36:28. He provided his

impression that the encounter ended the way it did as follows: "My best guess is that she either—either one, she was still half asleep or whatever and didn't understand it, but, I mean, I specifically remember hearing her say , yes' that's why I asked, is because we had been drinking. And I needed some kind of consent, like some kind of formal consent. And then maybe she just wasn't with it" R. at 306, Vol. I, PE 1, 1.mp4 at 29:05 to 29:30.

In this case, it is likely that—due to the military judge's blended instructions and the government's argument that the accuser was not competent to consent—the members convicted SrA Brassil-Kruger under a blended theory of criminality that incorporated inability to consent. The members therefore would have concluded the accuser was unable to consent without having to decide whether SrA Brassil-Kruger knew or should have known she was unable to consent. This finding is both legally and factually insufficient to sustain the convictions in this case.

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

IX.

THE CUMULATIVE ERROR DOCTRINE REQUIRES RELIEF.

The cumulative error doctrine provides that "a number of errors, no one perhaps sufficient to merit reversal, in combination [can] necessitate relief." *United States v. Banks*, 36 M.J. 150, 170-71 (C.M.A. 1992) (citation and quotation omitted). Under this doctrine, this Court may reverse if it finds the cumulative errors denied SrA Brassil-Kruger a fair trial. *Id*. Assuming *arguendo* that this Court finds that none of SrA Brassil-Kruger t's assigned errors warrant relief individually, the cumulative effect of these errors denied him due process of law and merit reversal.

WHEREFORE, SrA Brassil-Kruger respectfully requests that this Honorable Court set aside the findings and sentence.

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 electronic mail to the Court and served on the Appellate Government Division on 2 June 2022.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**UNITED STATES' MOTION FOR**
Appellee	)	**ENLARGEMENT OF TIME**
	)	
v.	)	Before Panel No. 1
	)	
Senior Airman (E-4)	)	No. ACM 40223
JOHN K. BRASSIL-KRUGER	)	
United States Air Force	)	2 June 2022
Appellant	)	

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

Pursuant to Rule 23.3(m)(5)-(6) of this Court's Rules of Practice and Procedure, the United States respectfully requests that it be granted until 22 July 2022[1] to provide its answer to Appellant's Assignments of Error.

This case was docketed with the Court on 7 December 2021. Since docketing, Appellant has requested and been granted 3 enlargements of time. Appellant filed his Assignments of Error with this Court on 2 June 2021, 177 days after docketing. Appellant's motion to exceed the page limit is still pending before this Court, and the United States does not intend to oppose it. This is the United States' first request for an enlargement of time. As of the date of this request, 177 days have elapsed. As of the new requested filing date, 227 days will have elapsed.

There is good cause for an enlargement of time in this case. This case will be assigned to a JAJG reservist who will begin a tour on 28 June 2022. Due to an extremely heavy workload in JAJG, deployments, separations, and PCS season, there is no other attorney who would be able to complete a brief sooner. An enlargement is necessary to ensure assigned counsel has

[1] The precise due date of the United States' answer brief is as yet unknown, since this Court has not yet acted on Appellant's motion to exceed the page limit. The United States assumes that the actual due date will be sometime before 22 July 2022.

sufficient time to finish drafting the United States' answer to all nine assignments of error and to allow adequate time for supervisory review.

For these reasons, the United States respectfully requests until 22 July 2022 to file its answer brief. In the event that the answer is completed before 22 July 2022, the United States will file promptly with this Court. The United States requests this Honorable Court grant this Motion for Enlargement of Time.

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 2 June 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**CONSENT MOTION TO COPY,**
	)	**RETAIN, AND TRANSMIT**
Appellee,	)	**SEALED MATERIALS**
	)	
v.	)	ACM 40223
	)	
Senior Airman (E-4)	)	Panel No. 1
JOHN K. BRASSIL-KRUGER, USAF,	)	
	)	
Appellant.	)	

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

Pursuant to Rule 23(d) of Honorable Court's Rules of Practice and Procedure, the United States hereby moves for leave to file a motion to copy, retain, and transmit to geographically-separated reserve counsel, sealed material contained in the original record of trial. Appellant's counsel has indicated its support for this motion. *See* A.F. Ct. Crim. App. R. 23.1(b).

On 21 March 2022, Appellant moved this Court to permit both Appellant and Government counsel access to examine the following sealed exhibits and trial transcript portions in the original record of trial: Appellate Exhibits II, III, VI, IX, XI, XII, XIII, XIV, XV, XVI, XVII, and XVIII, and transcript pages 16-18, 106-153, 156-161, and 385-395. On 30 March 2022, this Court granted Appellant's motion. On 2 June 2022, Appellant filed a brief alleging nine assignments of error, two of which specifically address Mil. R. Evid. 412 matters. (App. Br. at 15-26.)

The United States has assigned this brief to Maj Sarah Mottern, a reserve appellate counsel teleworking from her residence located in Simpsonville, South Carolina. Given the volume of sealed material in this case (twelve appellate exhibits, and 64 pages of transcript), their relevance and materiality to Appellant's brief, and the physical distance of Maj Mottern's telework location from Joint Base Andrews, Maryland, the United States requests this Court's permission for Government

counsel personnel to create, securely retain, and transmit digital copies of this material to enable the United States to properly respond to Appellant's brief.

If this Court grants the United States's request, the undersigned counsel proposes the following procedure for effecting the Court's order, subject to any directive by this Court: Government counsel personnel, locally situated at Joint Base Andrews, Maryland, will scan and create an electronic file containing the sealed material. Government counsel personnel will then electronically transmit that file to their respective official, encrypted email account. Government counsel personnel will retain a copy of that electronic file—with clear markings to indicate it contains sealed material—exclusively on the Air Force Government Trial and Appellate Operations Division's secure electronic drive. Government counsel personnel will securely transmit a copy of the electronic file to Maj Mottern via DoD SAFE, and Maj Mottern will securely store the file in accordance with her professional rules of conduct governing the retention of sealed material.

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

[redacted]

SARAH L. MOTTERN, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
United States Air Force
[redacted]

[redacted]

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 8 July 2022 via electronic filing.

SARAH L. MOTTERN, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
United States Air Force
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40223**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
John K. BRASSILKRUGER	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 21 March 2022, Appellant moved this court to permit both Appellant and government counsel access to examine the following sealed exhibits and trial transcript portions in the original record of trial: Appellate Exhibits II, III, VI, IX, XI, XII, XIII, XIV, XV, XVI, XVII, and XVIII, and transcript pages 16–18, 106–53, 156–61, and 385–95. On 30 March 2022, this court granted Appellant's motion. On 2 June 2022, Appellant filed a brief alleging nine assignments of error, two of which specifically address Mil. R. Evid 412 matters.

On 8 July 2022, the Government filed a Consent Motion to Copy, Retain, and Transmit Sealed Materials. Specifically, the Government requests permission to copy, securely retain, and transmit digital copies of Appellate Exhibits II, III, VI, IX, XI, XII, XIII, XIV, XV, XVI, XVII, and XVIII, and transcript pages 16–18, 106–53, 156–61, and 385–95 to Major (Maj) Sarah Mottern, a reserve appellate counsel, assigned as appellate government counsel to this case who is currently located in South Carolina. The Government provides the sealed exhibits and trial transcript pages described above are necessary to properly address Appellant's nine assignments of error. The Government avers that they will transmit the materials encrypted via "secure means." The Government also provided that Appellant's counsel supports this motion.

Accordingly it is by the court on this 18th day of July, 2022,

ORDERED:

The Government's Consent Motion to Copy, Retain and Transmit Sealed Materials to Maj Sarah Mottern is **GRANTED**, subject to the following conditions:

(1) As necessary, to comply with this order, a member of the appellate section of the Government Trial and Appellate Operations Division (JAJG) is permitted to do the following:

(a) With respect to the sealed documents, scan a hardcopy of the sealed documents; email the scanned sealed documents using encryption from one ".mil" email address to the ".mil" email address provided by Maj Mottern, or transmit these files containing sealed materials encrypted or password protected to Maj Mottern via DoD SAFE.

(b) The member of JAJG assisting Maj Mottern is permitted to mail the sealed materials to Maj Mottern via certified U.S. mail, Federal Express, or by similar secure means of shipment.

(2) The member of JAJG shall destroy any copies of materials generated in compliance with this order after confirmation that Maj Mottern received copies of the sealed materials subject to this order.

(3) Maj Mottern may retain copies of the sealed materials subject to this order until she has completed the Government's answer to Appellant's brief, after which Maj Mottern shall destroy any retained copies.

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

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**THE UNITED STATES' MOTION TO FILE ANSWER BRIEF IN EXCESS OF PAGE LIMIT OUT OF TIME**[1]
Appellee,	)	
v.	)	
Senior Airman (E-4) **JOHN K. BRASSIL-KRUGER,** United States Air Force	)	No. ACM 40223
Appellant.	)	Panel No. 1

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

Pursuant to Rules 17.3 and 23.3(q) of this Honorable Court's Rules of Practice and Procedure, the United States respectfully moves to file its answer brief in excess of the page limit prescribed by this Court. The United States' answer is 55 pages.

There is good cause to grant this motion. Appellant raised nine assignments of error, spanning 60 pages. In order to properly address Appellant's arguments, and identify the relevant facts and law necessary for resolution of the issues raised, the United States is required to exceed this Court's page limit in its brief.

WHEREFORE, the United States respectfully requests this Honorable Court grant its Motion to File Answer Brief in Excess of Page Limit.

[1] There is good cause for the United States to file out of time. *See* Motion for Leave to File out of Time, dated July 25, 2022.

[redacted]

SARAH L. MOTTERN, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
United States Air Force
[redacted]

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 25 July 2022.

SARAH L. MOTTERN, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**THE UNITED STATES REQUEST TO FILE**
Appellee,	)	**UNDER SEAL OUT OF TIME**[1]
v.	)	No. ACM 40223
Senior Airman (E-4) **JOHN K. BRASSIL-KRUGER,** United States Air Force	)	Panel No. 1
Appellant.	)	

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

Pursuant to Rule 13.2(b), 17.2(b), and 23.3(o) of this Court's Rules of Practice and Procedure, the United States moves to file its answers to Issues III and IV of Appellant's assignments of error under seal.

This Court granted Appellant's request to file Issues III and IV under seal. His brief on these two issues contained discussion of sealed materials in the record of trial. Due to the nature of the assigned errors, the United States' answers to Issues III and IV required discussion of the same sealed materials (Brief on Behalf of the United States at 21-37). These pages have been excised from the electronic filing. They were appropriately packaged, marked, and delivered to both this Court and the Air Force Appellate Defense Division on the date of this filing.

For these reasons, the United States respectfully requests this Honorable Court grant this motion and permit the United States to file its answers to Issues III and IV under seal.

[1] There is good cause for the United States to file out of time. *See* Motion for Leave to File out of Time, dated July 25, 2022.

[redacted]
SARAH L. MOTTERN, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
United States Air Force
[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 25 July 2022.

SARAH L. MOTTERN, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
United States Air Force


IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**MOTION TO ATTACH**
	)	
Appellee,	)	
	)	
v.	)	No. ACM 40223
	)	
Senior Airman (E-4)	)	Panel No. 1
JOHN K. BRASSIL-KRUGER,	)	
United States Air Force,	)	
	)	
Appellant.	)	

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

Pursuant to Rules 23 and 23.3(b) of this Honorable Court's Rules of Practice and Procedure, the United States, respectfully moves to attach the following document to the record of trial: A three-page email, dated July 22, 2022.

This email is relevant and necessary for this Court's resolution of the Appellant's Brief and the United States' Answer in that it serves as proof that the United States attempted to comply with this Court's Rules of Practice and Procedure regarding electronic filing. *See* A.F. Ct. Crim. App. R. 13.2. More specifically, the email is evidence that the United States electronically filed its Answer in the above-captioned matter on Friday, 22 July 2022, at 12:01 p.m. Eastern Time (EST), prior to the expiration of the filing deadline. *See* Email, dated July 22, 2022.

This Court is permitted to receive this email and attach it to the record. *See generally United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020). Here, the United States prepared and attempted to electronically file an Answer to Appellant's Brief prior to the expiration of the filing deadline, which was 22 July 2022. However, due to the size of the Answer (due to the United States' redactions of the contents therein), the United States' electronic filing was rejected and apparently never received by this Court. The proposed attachment, a three-page email dated July 22, 2022, is

proof that the United States indeed complied with this Court's Rules of Practice and Procedure and timely filed its Answer in the manner prescribed by this Court. Moreover, the authenticity of the email is readily apparent as it is a document generated directly from the email account of the undersigned counsel. Further, the undersigned counsel asserts that all statements contained within the attached email were in fact made by the undersigned counsel and are true and correct under penalty of perjury pursuant to U.S.C. § 1746.

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

[redacted]

SARAH L. MOTTERN, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
United States Air Force
[redacted]

[redacted]

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 25 July 2022 via electronic filing.

[redacted]

SARAH L. MOTTERN, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
United States Air Force
[redacted]

25 July 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**MOTION FOR LEAVE**
	)	**OUT OF TIME**
Appellee,	)	
	)	
v.	)	No. ACM 40223
	)	
Senior Airman (E-4)	)	Panel No. 1
JOHN K. BRASSIL-KRUGER, USAF,	)	
	)	
Appellant.	)	

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

Pursuant to Rules 23(d) and Rule 23.3 of this Honorable Court's Rules of Practice and Procedure, the United States respectfully moves for leave to file the following items out of time: the United States' Answer to Appellant's Brief, Motion to File Under Seal, and Motion for Excess Page Limit.

The United States makes this request in order to perfect service of its Answer and related motions, as well as to demonstrate to this Court that the United States attempted to comply with this Court's Rules of Practice and Procedure regarding electronic filing. *See* A.F. Ct. Crim. App. R. 13.2. The United States understands that its Answer to Appellant's brief was due on 22 July 2022. On Friday, 22 July 2022, at 12:01 p.m. Eastern Standard Time (EST), the United States electronically filed its Answer, as well as a Motion to File Under Seal and a Motion to Exceed Page Limit. *See* Email, dated July 22, 2022. On or about 22 July 2022, the United States filed a Motion for Extension of Time Out of Time. The United States now understands that its original electronic filing, sent at 12:01 p.m. EST, was never received by this Court due to the size of the filing (presumably due to the redactions contained therein).

The United States requests this Court accept the original email sent from the undersigned counsel on 22 July 2022, at 12:01 p.m. EST, as proof that the United States made a good faith effort to comply with this Court's electronic filing requirements. *See* email dated 22 July 2022. But for the size of one of its attachments, it appears that the undersigned counsel's email, with the original filings, would have been delivered in accordance with this Court's Rules of Practice and Procedure prior to the expiration of the filing deadline. For these reasons, there is good cause for the United States to file its Answer, Motion to File Under Seal, and Motion to Exceed Page Limit, all out of time.

WHEREFORE, the United States respectfully requests that this Honorable Court grant the United States' Motion for Leave to file the following items out of time: the United States' Answer to Appellant's Brief Answer, Motion to File Under Seal, and Motion for Excess Page Limit.

[redacted]
SARAH L. MOTTERN, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
United States Air Force
[redacted]

[redacted]
THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 25 July 2022 via electronic filing.

[redacted]

SARAH L. MOTTERN, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**ANSWER TO ASSIGNMENTS**
	)	**OF ERROR OUT OF TIME**[1]
Appellee,	)	
	)	
v.	)	ACM 40223
	)	
Senior Airman (E-4)	)	Panel No. 1
JOHN K. BRASSIL-KRUGER, USAF,	)	
United States Air Force	)	
	)	
Appellant.	)	

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

SARAH L. MOTTERN, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations
United States Air Force
[redacted]

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

[1] The United States has good cause for making this filing out of time. *See* Motion for Leave to File Out of Time, dated July 25, 2022.

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TABLE OF AUTHORITIES

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**BRIEF OF BEHALF OF THE**
	)	**UNITED STATES**
Appellee,	)	
	)	
v.	)	ACM 40223
	)	
Senior Airman (E-4)	)	Panel No. 1
JOHN K. BRASSIL-KRUGER, USAF,	)	
	)	
Appellant.	)	

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

ISSUES PRESENTED

I.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ALLOWING THE GOVERNMENT TO CHOOSE TO WITHDRAW A SPECIFICATION PRIOR TO ENTRY OF PLEAS?

II.

WHETHER THE MILITARY JUDGE ERRED BY INCORRECTLY INSTRUCTING THE COURT MEMBERS REGARDING CONSENT?

III.

WHETHER THE MILITARY JUDGE ERRED BY GRANTING THE GOVERNMENT'S MOTION TO ADMIT EVIDENCE PURSUANT TO MIL. R. EVID. 412?

IV.

WHETHER THE MILITARY JUDGE ERRED BY DENYING THE DEFENSE'S MOTION TO ADMIT EVIDENCE PURSUANT TO MIL. R. EVID. 412?

V.

WHETHER TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT BY COMMENTING ON APPELLANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT?

VI.

WHETHER THE GOVERNMENT CAN PROVE BEYOND A REASONABLE DOUBT THAT THE MILITARY JUDGE'S FAILURE TO INSTRUCT THE PANEL THAT A GUILTY VERDICT MUST BE UNANIMOUS WAS HARMLESS BEYOND A REASONABLE DOUBT?

VII.

WHETHER THE GOVERNMENT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS WHEN IT CHARGED HIM WITH SEXUAL ASSAULT UNDER A THEORY OF WITHOUT CONSENT, BUT CONVICTED HIM UNDER A DIFFERENT THEORY?

VIII.

WHETHER THE EVIDENCE IS FACTUALLY AND LEGALLY SUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS?

IX.

WHETHER THE CUMULATIVE ERROR DOCTRINE REQUIRES RELIEF?

STATEMENT OF THE CASE

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

STATEMENT OF FACTS[2]

Testimony from the Party-Goers and the Victim

At findings, the United States presented testimony from the following witnesses: Special Agent (SA) DE, Specialist (SPC) CB, Captain (Capt) CF, Ms. MB, Mr. JH, SPC KH, and Airman First Class (A1C) AR. (R. at 288, 340, 412, 442, 466, 505, 551.) These witnesses testified on a number of issues including the events leading up to the sexual assault, interactions between Appellant and SPC CB prior to and on the evening of the sexual assault, Appellant's and SPC CB's levels of intoxication, events following the sexual assault, and statements made by Appellant.

According to Appellant, SPC CB, and Mr. JH, Appellant and SPC CB did not know knew each other prior to the sexual assault, which occurred on or about August 7, 2020, nor did they have any extensive or meaningful interactions on the evening of the sexual assault. (R. at 342-346, 359, 485; App. Br. at 3.) That is, the two did not interact together at American Lake, nor did they share a follow-on ride to the after-party despite traveling to and from the same locations. (R. at 342-44.) Moreover, once at the after-party, which appears to have been a large gathering of 20 to 25 people, there is no evidence that the two interacted there either. (R. at 345.) Rather, SPC CB' interacted with Mr. JH, who was also her ride, and with SPC KH, with whom she had a romantic interest and requested to sleep next to on the evening of the sexual assault. (R. at 344, 347, 485, 512.) Importantly, SPC CB and SPC KH shared a kiss earlier in the evening. (R. at 347.)

[2] The United States generally accepts Appellant's statement of facts and includes additional facts for this Court's consideration.

Additionally, the evidence showed that SPC CB became tired and intoxicated as the night progressed. SPC CB testified that she consumed a total of four beers over the course of eight hours. (R. at 343, 346, 365.) Moreover, she testified to feeling intoxicated and several party-goers, namely SPC KH and Mr. JH, also testified that SPC CB appeared intoxicated. (R. at 346, 487, 512-13.) During his interview with AFOSI, Appellant himself also acknowledged that SPC CB was intoxicated and that she was under the legal drinking age. (Pros. Ex. 1, 1mp4 at 27:23.) In fact, Mr. JH offered his truck to SPC CB if she felt "uncomfortable." (R. at 490.) As to her fatigue, SPC CB testified that she normally goes to bed at around 2030 to 2100 hours and that on the evening of the sexual assault, she recalled telling Mr. JH that she was "tired." (R. at 347, 351, 512.) Importantly, this statement to Mr. JH was SPC CB's last memory before being sexually assaulted. (R. at 347, 351.) It was at this point that SPC KH made a makeshift bed for himself and SPC CB in the common area of the residence near the kitchen. (R. at 347-49, 512, 519; Pros. Ex. 9.) Significantly, SPC CB was the only female in the apartment by this time and the makeshift bed, constructed by SPC KH, was partially enclosed by a beer pong table which SPC KH had flipped on its side. (R. at 517-18.) After lying down, SPC CB fell asleep, in a manner of 10 to 15 minutes, in the makeshift bed. (R. at 351-52, 513.)

Mr. JH checked on SPC CB, at around 0230 hours, and tried to wake her but she didn't want to move. (R. at 468.) Appellant was in the apartment during this encounter. (Pros. Ex. 1, 1mp4 at 35-02-36:28; R. at 307, 468-69.) Moreover, by this time there were as many as 10 to 12 people asleep in the general vicinity. (R. at 468-69, 498.) Mr. JH and Appellant then took "one last shot" of alcohol and returned to their respective vehicles to sleep. (Pros. Ex. 1, 1mp4 at 35-02-36:28; R. at 307.) According to SPC CB, she then *awoke* to Appellant penetrating her vagina with his fingers and his mouth. (R. at 351-52 354-55.) Importantly, SPC CB testified that she did

not consent to the sexual assault or otherwise conveyed any interest, prior to or during the sexual assault, that she wished to engage in sexual activity with Appellant. (R. at 346, 354-55, 359.)

During the sexual assault, SPC CB feigned that she needed to use the bathroom, got up, bypassed the bathroom, and immediately departed the residence. (R. at 355-56.) After the sexual assault, her first stop was to Mr. JH's vehicle, just as he had instructed, where she cried hysterically, and used her phone to contact a civilian friend, Mr. MG. (R. at 356, 492.) Mr. JH recalled seeing this at around 0400 hours; however, he fell back asleep and woke at 0800 hours to see that SPC CB was gone. (R. 493.) During this time, Mr. MG called an Uber ride for SPC CB and she rode to Mr. MG's residence. (R. at 356-57.) The following day, SPC CB formally reported the sexual assault to 1Lt Tobey Yates. (R. at 358.)

Statements Appellant Made to Law Enforcement

On August 9, 2020, two days after the sexual assault, Appellant waived his Article 31(b), Uniform Code of Military Justice (UCMJ), rights and agreed to talk with the Air Force Office of Special Investigations (AFOSI). (Pros. Ex. 1, 1mp4 at 8:25; R. at 297.) Appellant initially denied the sexual encounter for the first 26 minutes of his interview by saying, "I don't even know this girl from Adam" and "I didn't make any advances or sexual advances on her, or anything like that…". (Pros. Ex. 1, 1mp4 at 11:05-12:14, 23:00-24:25; R. at 299, 304.) However, when confronted on the inconsistencies in his story, Appellant spontaneously brought up DNA and said that the "...the sexual assault kits, I can already guarantee you it's gonna come back with my DNA, like it's gonna be me, because that did happen." (Pros. Ex. 1, 1mp4 at 27:34-29:13; R. at 305.)

After that, Appellant changed his story and acknowledged that he did in fact return to the residence and that he laid on the ground next to two people who were already asleep, namely SPC

CB and SPC KH. (Pros. Ex. 1, 1mp4 at 35:02-36:28; R. at 307.) Further, he told the agents that he assisted SPC CB in taking her pants off, and he penetrated her vagina with his fingers. (Pros. Ex. 1, 1mp4 at 27:35-29:13; R. at 306.) Upon further questioning, Appellant's story changed again, and he acknowledged that he also "ate her out for a little bit." (Pros. Ex. 1, 1mp4 at 35:02-36:28; R. at 307-08.) However, Appellant also asserted that the encounter was consensual in that it followed his unsolicited placing of his arm around SPC CB, and SPC CB "cuddling up" to him. (Pros. Ex. 1, 1mp4 at 26:30-26:55; R. at 309.) Appellant also apologized to the agents for not being initially truthful with them. (Pros. Ex. 1, 4mp4 at 1:48-1:58.)

When Appellant talked about how the sexual encounter ended, Appellant offered several explanations as follows: "she was still half asleep or whatever and didn't understand it" and "[m]aybe she just wasn't into it because of her level of intoxication." (Pros. Ex. 1, 1mp4 at 27:35-29:31; R. at 306.)

Following the sexual assault, Appellant said that he left the residence to sleep in his vehicle. (Pros. Ex. 1, 1mp4 at 35:02-36:28; R. at 308.) Appellant claimed that he initially re-entered the apartment, prior to the sexual assault, to sleep because he was cold sleeping in his vehicle. (Pros. Ex. 1, 1mp4 at 35:02-36:28; R. at 307.)

Forensic Evidence

On August 8, 2020, SPC CB submitted to a Sexual Assault Nurse Examination (SANE). (Pros. Ex. 3.) Samples were collected from her vagina, cervix, pubic mound, inner thighs, and left and right breasts. (Pros. Ex. 3; R. at 415, 420-21.) Samples were also collected from Appellant's fingernails as part of a Sexual Assault Forensic Examination (SAFE). (R. at 290-91.) Subsequent DNA testing showed Appellant's DNA was present on SPC CB's pubic mound. (Pros. Ex. 5; R. at 452.) Prior to her SANE, SPC CB had already taken a shower. (R. at 358.)

ARGUMENT

I.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY ALLOWING THE GOVERNMENT TO WITHDRAW A SPECIFICATION PRIOR TO ENTRY OF PLEAS AS A REMEDY TO A MOTION RAISED BY APPELLANT.

Additional Facts

Among other offenses, Appellant was charged with one charge and two specifications of sexual assault via contact between Appellant's mouth and SPC CB's vulva. (R. at Vol. 1, Entry of Judgment.) Specification 1 alleged that SPC CB was asleep during the sexual assault, while Specification 2 alleged that the sexual assault was done with bodily harm and without the consent of SPC CB. (Id.). Appellant filed a timely motion to Motion to Dismiss and argued for the dismissal of Specification 2 on the grounds that it was multiplicious under R.C.M. 906(b)(12), and a merger of all remaining specifications for purposes of findings and sentencing on the grounds that the four specifications represented an unreasonable multiplication of charges. (R. at Vol. II, Appellate Exhibit (App. Ex.) IV.) Although the United States opposed Appellant's motion, it appears that their written filing conceded to a "reasonable merger in *sentencing only* to be argued after the announcement of findings." (R. at Vol. II, App. Ex. V at 1) (no emphasis added.) During argument on this motion, Appellant modified his position by withdrawing his argument that Specifications 3 and 4 were multiplicious and asked only that they be merged for sentencing. (R. at Vol. II, App. Ex. X at 3; R. at 81, 91-92.) The parties agreed to this and also agreed to reserve the possible merger remedy for sentencing. (R. at 92.) This appeared to narrow the issue to be decided by the military judge as follows: whether Specifications 1 and 2 were

multiplicious and whether the remaining specifications represented an unreasonable multiplication of charges for purposes of findings. (R. at Vol. II, App. Ex. X at 3-4.)

Although the military judge did not find Specifications 1 and 2 to be multiplicious, he nevertheless granted Appellant's motion in part and found that Specifications 1 and 2 represented an unreasonable multiplication of charges as to findings. (R. at Vol. II, App. Ex. X at 3, 5; *see also* R. at 88, 90.)

As cited in Appellant's brief, the military judge had a lengthy discussion with trial counsel regarding the factual interplay of Specifications 1 and 2. (App. Br. at 7.) The discussion continued with the military judge asking trial counsel the following:

> **Military Judge:** You agreed that there isn't a scenario where someone could be found guilty of Spec 1, but not guilty of Spec 2, right. If someone is asleep they're not consenting. So couldn't you say, or shouldn't you say that Spec 1 is necessarily included as a lesser offense of Spec 2?

(R. at 88.)

The trial counsel agreed and the military judge continued his discussion; this time he focused on how a merger or a dismissal of one of the specifications would impact the presentation of the government's case:

> **Military Judge:** … What does the government lose if the one or–of those specifications is dismissed or merged with the other? What's the harm to the government's case?
>
> **Assistant Trial Counsel:** I think the harm to the government, Your Honor, is making it difficult to display to the members what actually took place that evening. So, currently how the charges [sic] are laid out, it lays out all of the criminal acts, and all of the separate decisions that the defense [sic] made that evening. And so, dismissing one or merging the charges [sic] together doesn't fully display the full criminal acts and behavior of the defendant.

> **Military Judge:** How do you anticipate a factual limitation of your evidence presentation if that merger occurs? What are you concerned about?
>
> **Assistant Trial Counsel:** Our concern, Your Honor, would just be the difference in the facts between the victim being asleep, which is obviously a sexual assault without someone's consent is one thing, but being sexually assaulted while someone is sleeping is a completely separate offense, it's more vulnerable, it's–I mean, it's more egregious, and I think that would be taken away if the government weren't allowed to show the–or if these specifications were dismissed or merged.

(R. at 88-89, 91.)

Before ending the motions hearing on the issue of multiplicity and unreasonable multiplication of charges, the military judge questioned trial defense counsel on the impact of a dismissal to possible instructions as follows:

> **Military Judge:** Alright, I do have one more question for you. You heard me talk about with Trial Counsel the potential of giving an instruction that a person who is asleep cannot consent. And I will ask you this, I'm not locking you in at this point, but I wanna–well, I guess I kind of am, but I will ask you again obviously at the point where we will get to instructions, if that's a relevant piece that we need to get to on this particular specification, which is; if I grant your dismissal to the sleep specification and leave the specification with regards to without consent, would you object to an instruction where it was essentially, a person who is asleep cannot consent?
>
> **Defense Counsel:** Consent, as I understand, Your Honor, and it's been a second since I've been in a 120, but as I understand, the normal instructions to the jury include instructions on consent, which do include an instruction generally that when you're asleep you can't consent. If the government adequately raises the issue of the alleged victim being asleep then, no, defense is not gonna object to that.

(R. at 93-94.)

Relying on United States v. Cardenas, 80 M.J. 420 (C.A.A.F. 2021), the military judge granted trial counsel leave of the court to decide whether to proceed on Specification 1 or 2. (R. at Vol. II, App. Ex. X at 5.) The United States then indicated that it preferred a dismissal of

Specification 1. (R. at 103.) In accordance with Rule for Courts-Martial (R.C.M.) 906(b)(12)(A), the military judge ordered the dismissal of Specification 1 prior to the entry of pleas. (R. at Vol. II, App. Ex. X at 5; R. at 103.)

During the pre-sentencing phase of the trial, the military judge then asked trial defense counsel if there were additional matters that needed to be taken up with regard to his deferred ruling on unreasonable multiplication of charges and possible sentencing relief. (R. at 708.) Trial defense counsel indicated that additional action was not needed. (Id.). After discussing the maximum possible sentence, trial defense counsel then raised the issue of unreasonable multiplication of charges. (R. at 716-17.) The military judge applied the Quiroz[3] factors and merged the two remaining specifications for purposes of sentencing, thus reducing Appellant's potential term of confinement from 60 years to 30 years. (R. at 716, 718-19.)

Standard of Review

"A military judge's decision to deny relief for unreasonable multiplication of charges is reviewed for an abuse of discretion." United States v. Campbell, 71 M.J. 19, 22 (C.A.A.F. 2012) (*citing* United States v. Pauling, 60 M.J. 91, 95 (C.A.A.F. 2004)). "An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact. United States v. Becker, 81 M.J. 483, 488 (C.A.A.F. 2021) (internal citation and quotations omitted).

Law and Analysis

According to Appellant's brief, it does not appear that he is arguing that the military incorrectly applied the Quiroz factors, but rather, that the military judge applied an incorrect legal principle in fashioning a remedy. (App. Br. at 9.) On this narrow issue, R.C.M. 906(b)(12)(A)

[3] United States v. Quiroz, 55 M.J. 334 (C.A.A.F. 2001).

dictates that the appropriate remedy "shall be dismissal of the lesser offenses or merger of the offenses into one specification."

A. The military judge did not abuse his discretion in forgoing a merger and instead dismissing the lesser offense in granting relief for Appellant's motion.

As to merger, although Appellant initially raised the remedy in his written filing, merger did not appear to be the remedy he sought in argument; moreover, this does not appear to be the relief that Appellant is presently seeking. *Compare* R. at Vol. II, App. Ex. IV at 5 *with* R. at 93. When the merger option was proposed by the military judge, the United States appeared to conflate the concepts of merger and dismissal and simply responded that such a remedy would limit its presentation of evidence. (R. at 91.) However, a fair response to the military judge would be that neither party would have benefited from a merger, and that such a remedy would likely have confused the members. Practically speaking, this left but one remedy: dismissal of the lesser offense.

The facts suggest that Specification 2 represented the greater offense, and that the dismissal of the lesser offense, Specification 1, was not an abuse of discretion because it resulted in the same outcome to Appellant had the military judge strictly complied with R.C.M. 906(b)(12)(A) and not deferred to trial counsel. Here, despite the United States' best efforts, the military judge sided with Appellant and found that the two specifications criminalized the same and continuous behavior, albeit under two different theories of liability. (R. at Vol. II, App. Ex. X at 4, para. 18 ("the evidence indicates that the oral sex began while CB was asleep and continued uninterrupted while she was awake and in shock.").) The military judge then suggested that Specification 1 was in fact a lesser offense to Specification 2 to the extent that there would never be a situation, according to the facts of this case, where a person is convicted of Specification 1 and not also convicted of Specification 2. (R. at 83, 89-90.) Following this

discussion on the record, the military judge deferred to trial counsel to decide which theory of liability to proceed on, and the United States proposed proceeding on Specification 2, arguably the greater offense under these facts. (R. at Vol. II, App. Ex. X at 5; R. at 103.) Importantly, trial defense counsel did not object to this proposed remedy. (Id.). In sum, this would have been the same outcome had the military judge strictly complied with R.C.M. 906(b)(12)(A) and dismissed what appears to have been the lesser offense based on these facts, Specification 1, without deference to trial counsel.

However, even if the outcome was different, and trial counsel instead wanted to dismiss the greater offense and to proceed on the lesser offense, the military judge's deference to trial counsel on the question of charging still fails to meet the abuse of discretion standard. First, deference to trial counsel on questions of charging recognizes that the United States, as the purveyor of justice, ultimately decides who is charged, what is charged, how it is charged, and most importantly, bears the burden of proof on each and every single element of an offense. *See* Ball v. United States, 470 U.S. 856, 859 (1985) ("This Court has long acknowledged the Government's broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case"). Second, there is persuasive authority that deference to the government is appropriate when it comes to remediation of unreasonable multiplication of charges. *See*, *e.g.*, Cardenas, 80 M.J. at 424 (where CAAF deferred to the CCA in deciding which conviction to dismiss in remedying a multiplicity error first recognized on appeal). To the extent that the military judge grounded his decision on well-settled precedent and persuasive authority, there is no abuse of discretion.

B. The timing of the military judge's dismissal was not an abuse of discretion as it was based on a fair and reasonable interpretation of R.C.M. 906(b)(12)(A).

Appellant's second contention that the specification should have been dismissed *after the entry of findings i*s also without merit as there is no requirement to do so under the law, and Appellant has made no showing that such a remedy would have benefited him, or alternatively, that the failure to do so prejudiced him. Taking first the legal argument, the language in the Discussion section of R.C.M. 906(b)(12) is non-binding and discretionary as it uses the word, "should," instead of "shall" or "must." R.C.M. 906(b)(12) Discussion ("A ruling on this motion ordinarily should be deferred until after findings are entered."). Additionally, it is unclear whether the Discussion applies to rulings made under subsection (A), which deals with unreasonable multiplication of charges at *findings*, as well as subsection (B), which deals with unreasonable multiplication of charges at *sentencing*. A reasonable argument is that the Discussion section of R.C.M. 906(b)(12) is more aptly applied to subset (B), or sentencing, so as to avoid confusion and to promote judicial economy. Put differently, when an offense is found to be an unreasonable multiplication for findings, it is most economical and least confusing to dismiss the said offense prior to entry of findings. Here, the military judge's ruling was that Specifications 1 and 2 represented an unreasonable multiplication of charges in *findings*. (R. at Vol. II, App. Ex. X at 4, para. 16.) As a result, the military judge dismissed what appeared to be the lesser offense prior to its presentation to the members in findings. Under these facts, the military judge's interpretation and application of R.C.M. 906(b)(12)(A) was not an abuse of discretion.

C. Even assuming error, Appellant's claim fails because there was no prejudice.

As to prejudice, or Appellant's third argument, Appellant asserts that the United States had the benefit of arguing that SPC CB was incapable of consenting without having to prove that Appellant reasonably should have known that she was asleep or otherwise incapable of

consenting. (App. Br. at 10.) However, this argument is also without merit as Appellant implicitly acknowledged such an argument was possible and even likely, as a reasonable consequence to his multiplicity motion, when he conceded that "a sleeping person cannot consent" would likely be an appropriate instruction under the expected facts *even if* Specification 1 was dismissed.[4] (R. at 93-94.) This topic was then addressed again in the course of an oral motion that Appellant made requesting special instruction and a limitation of the trial counsel's argument. (R. at 592-96.) In response to that motion, the military judge made the following statement to Appellant regarding the interplay of the multiplicity motion and possible instructions:

> **Military Judge:** We'll, let's–hold on, Counsel. Let's be very clear how that played out. You raised a motion to dismiss one of the specifications arguing that they were multiplicious. The court found that they were not multiplicious but that they were an unreasonable multiplication of charges, and therefore, required the government to dismiss one or the other based on the unreasonable multiplication of charges. So I just wanted to make sure that we're all understanding exactly how that played out.

(R. at 592-93.) In making this statement, the military judge implicitly reminded Appellant of his earlier concession on instructions (i.e., "a sleeping person cannot consent"[5]) and his acknowledgment of expected facts (i.e., that "the evidence indicates that the oral sex began while CB was asleep and continued uninterrupted while she was awake and in shock"[6]).

In sum, Appellant cannot show prejudice. Just the opposite is true. That is, Appellant partially won his motion and was successful in having one of the specifications dismissed in

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[4] The United States has additional arguments that also address Appellant's prejudice claim in Sections II and VII. The United States has limited its position in Section I to arguments that specifically speak to Appellant's claim of prejudice as it relates to its improper remedy argument under R.C.M. 906(b)(12). (App. Br. at 10.)
[5] R. at 93-94.
[6] R. at Vol. II, App. Ex. X at 4, para. 18.

findings, and the two remaining specifications merged in sentencing. (R. at Vol. II, App. Ex. X at 5; R. at 103, 716, 718-19.) Additionally, Appellant's claim of prejudice is further undermined by evidence on the record that suggests that Appellant anticipated both the military judge's instruction and trial counsel's argument as probable results of his motion. (R. at 93-94.) Third, Appellant's claimed prejudice, that the United States had the benefit of arguing that SPC CB was incapable of consenting without having to prove that Appellant reasonably should have known that she was asleep, doesn't even seem to stem from the judge's decision to dismiss and merge specification. This would have been the reality even if the United States had only charged Specification 2, which was within its prerogative to do. Since the military judge did not abuse his discretion in crafting an appropriate remedy to Appellant's motion, this Court should affirm Appellant's sentence and findings and deny his first assignment of error.

II.

THE MILITARY JUDGE DID NOT ERR IN GIVING HIS CONSENT INSTRUCTION.

Additional Facts

Trial defense counsel requested the following instruction: "SPC CB's level of intoxication and the fact that she might have been asleep, as it pertains to her ability to consent, is not relevant to the charge." (R. at Vol. II, App. Ex. XXXII (sealed).) Before denying Appellant's requested instruction, the military judge and trial defense counsel continued[7] their lengthy discussion on the applicability of the "sleeping person cannot consent" instruction as follows:

> **Military Judge:** All right, so if I'm looking in the definition of consent in the statute, I'm not talking about the pocket part notes, the further explanation set forth, that is not part of the statute, I'm talking about the statute itself that is defining consent. Section B, a sleeping,

[7] This discussion initially started in the course of the multiplicity motion raised by Appellant. (R. at 93-94.)

> unconscious, or incompetent person cannot consent. Please describe for the court how when they put in there "without consent," with that language in the statute, that you were not on notice, that your client was not on notice that he needed to defend against an evidence and theory that the victim was sleeping, unconscious, or incompetent? I'm not talking about intoxication, I'm not talking about incapable of consenting, because that's what we had when we talked about the specification that was withdrawn and dismissed. I'm talking about sleeping, unconscious, or incompetent. How was the defense not on notice that that is encompassed within the element, without consent as defined by statute?
>
> …
>
> **Defense Counsel:** … [W]e were on notice of that, that is the statutory provision…

(R. at 595.)

Following this exchange, the military judge denied Appellant's requested instruction and gave the first sentence of the statutory provision that a "sleeping, unconscious, or incompetent person cannot consent." *Compare* Art. 120(g)(7)(b) *to* R. at 592-94, 596, 609. Further, the military judge also instructed the members that "all surrounding circumstances are to be considered in determining whether a person gave consent." (R. at 609.)

In the course of trial counsel's nearly 16-page closing argument, she focused almost equally on Appellant's inconsistent statements and on the fact that SPC CB was "asleep" at the start of the sexual assault. (R. at 616-32.) Trial counsel made approximately nine references to Appellant's inconsistent statements, and she made 10 references to SPC CB being asleep. (Id.). With nearly every reference to "sleep," trial counsel used SPC CB's condition to help establish the element of lack of consent and to undermine any mistake of fact as to consent argument. *See, e.g.*, R. at 625 ("[s]he wasn't even awake when it started.") *and* R. at 628 ("…she drank and she fell asleep at a party in public…") *and* R. at 629 ("...now magically awake from just that touch, she says yes.") *and* R. at 630 ("…get consent magically when she's just asleep…"). SPC CB's

condition, relevant to the element of consent, was then reinforced with Appellant's inconsistent statements, third-party observations of SPC CB, and testimony from SPC CB that she did not consent. (R. at 616-32.) In response, trial defense counsel made a standing objection to trial counsel's statement that, "[s]he was not a competent person, she could not give consent." (R. at 619.) The military judge overruled the objection. (Id.).

Standard of Review

"Questions pertaining to the substance of a military judge's instructions, as well as those involving statutory interpretation, are reviewed *de novo*." United States v. Voorhees, 79 M.J. 5, 15 (C.A.A.F. 2019) (internal citations and quotations omitted). The standard of review for denial of a defense-requested instruction is an abuse of discretion. United States v. Carruthers, 64 M.J. 340, 345-46 (C.A.A.F. 2007).

Law and Analysis

A. The military judge did not abuse his discretion in giving an instruction on "sleep" and consent, because such facts were raised by the evidence and the basis for the instruction was grounded in law.

Appellant's first argument, that the military judge abused his discretion in giving the instruction that "a sleeping, unconscious, or incompetent person cannot consent," is without merit since such an instruction is well-supported by statutory authority and this Court's recent decision in United States v. Williams, No. ACM 39746, 2021 CCA LEXIS 109 (A.F. Ct. Crim. App. 12 March 2021) (unpub. op.). As to statutory authority, the argument is simple. Consent was an element of the offense and the military gave the statutory definition of consent. *See* Art. 120(b)(2)(A), *and* Art. 120(g)(7)(b).[8]

[8] It is also worth noting that the greater instruction on "consent" is separated from the greater instruction on "incapable of consent," and that the instruction on "sleep" is specifically included under the heading of "consent," not "incapable of consent." This statutory arrangement is some

In addition to this statutory authority, the United States also relies on Williams as persuasive authority on the issue of instruction. Although Williams dealt more specifically with issues related to scope argument, due process, and notice, (issues discussed in Section VII of this brief), the case also stood for the premise that it was permissible for trial counsel to argue evidence presented at trial *even though* such evidence appeared to support a different theory of liability than what was charged. Williams, 2021 CCA LEXIS 109 at *53-54, *58. In Williams, the evidence tended to show that the victim was incapable of consenting due to intoxication pursuant Article 120(b)(3)(A); here, the evidence tended to show that SPC CB was incapable of consenting due to being asleep pursuant Article 120(b)(2)(B). *Compare* Williams, 2021 CCA LEXIS 109 at *53-54 *to* R. at 593-94, 596. In both cases, however, the United States charged sexual assault by bodily harm, and successfully argued that the victim's condition, (whether it be asleep or intoxicated), was relevant on the ultimate issue of consent. *Compare* Williams, 2021 CCA LEXIS 109 at *53-58 *to* R. at 619.

Given that this was a permissible use of the evidence under Williams, to the extent that it was part of the surrounding circumstances, it was not an abuse of discretion for this military judge to instruct on it. Williams, 2021 CCA LEXIS 109 at *57-58 ("we conclude evidence tending to show a person *could not consent* to the conduct at issue may be considered as part of the surrounding circumstances in assessing whether a person *did not consent*…") (emphasis added). This position is further supported by this Court's recognition that "there is a degree of logical evidentiary overlap in the Article 120, UCMJ, offenses…". Williams, 2021 CCA LEXIS 109 at *58; *see also* United States v. Burnett, No. ACM 39999, 2022 CCA LEXIS 342, at *12 (A.F. Ct.

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indication that the drafters intended to include the sleep instruction within the definition of consent rather than the definition of incapable of consent. *Compare* Art. 120(g)(7), *to* Art. 120(g)(8).

Crim. App. June 10, 2022) (where this Court specifically considered the fact that a sleeping person cannot consent). Lastly, as to Appellant's point that Williams is distinguishable due to the fact that the military judge did not give an instruction on capacity or competency and this judge did give an instruction on sleep, it is only fair to clarify that no instruction was given in Williams because no such instruction was requested. *Compare* Williams, 2021 CCA LEXIS 109 at *53 *with* R. at 595. For these reasons, the military judge's instruction on sleep and consent was not an abuse of discretion.

B. The military judge did not abuse his discretion in denying the defense-requested instruction.

In reviewing whether a military judge erred by not providing a requested instruction in a specific case, this Court uses a three-pronged test: "(1) the requested instruction is correct; (2) the main instruction given does not substantially cover the requested material; and (3) the instruction is on such a vital point in the case that the failure to give it deprived [the accused] of a defense or seriously impaired its effective presentation." United States v. Bailey, 77 M.J. 11, 14 (C.A.A.F. 2017) (*citing* Carruthers, 64 M.J. at 346). All three prongs must be satisfied for there to be error. Bailey, 77 M.J. at 14 (*citing* United States v. Barnett, 71 M.J. 248, 253 (C.A.A.F. 2012)). When this analysis is applied to the present case, Appellant's claim fails the first prong, so there is no need to analyze the others. Here, trial defense counsel requested the following instruction: "SPC CB's level of intoxication and the fact that she might have been asleep, as it pertains to her ability to consent, is not relevant to the charge." (R. at Vol. II, App. Ex. XXXII (sealed).)

In applying the first prong of the Carruthers test, the proposed instruction fails because it is a clear misstatement of the law. Specifically, it disregards this Court's recent holding in Williams and appears to contradict the statutory definition of consent–the same two arguments made in the previous section. However, it is also worth addressing Appellant's contention that

denial of the requested instruction created confusion and allowed the United States to pursue a "blended theory of criminality." (App. Br. at 14.) In making such an argument, Appellant again side-steps the holding in Williams and conflates "blended theory of criminality" with fair argument on circumstantial evidence. (Id.).

In both Williams and in the present case, the military judge gave the instruction that "all surrounding circumstances are to be considered in determining whether a person gave consent." *Compare* Williams, 2021 CCA LEXIS 109 at *52-53 *to* R. at 609. And in both cases, trial counsel made such arguments. *Compare* Williams, 2021 CCA LEXIS 109 at *52-53 (where trial counsel argued that the victim was "unaware and unable to resist" and "unable to consent") *to* R. at 619 (where trial counsel argued "she falls asleep, and he wakes her up…[pointing at the accused]. She was not a competent person, she could not give consent."). When comparing the facts of this case to the facts from Williams, Williams appears to make a better argument for confusion as the military judge in Williams declined to give any additional instruction on "capacity," "competency," or "intoxication," arguably three more confusing terms than "sleeping." (Id.). In this regard, Appellant's argument that denial of the requested instruction created confusion is simply without any merit. (App. Br. at 14.)

The proposed instruction also contradicts the military judge's instruction to consider "all surrounding circumstances…in determining whether a person gave consent." *Compare* R. at Vol. II, App. Ex. XXXII (sealed) *with* R. at 609. Besides being circumstantial evidence on the ultimate issue of consent, however, evidence of SPC CB's intoxication and fatigue was also relevant to SPC CB's overall memory, perception, recollection, and credibility. These were issues explored by both parties in the course of trial. Moreover, the military judge specifically instructed the members to consider such evidence (i.e., intoxication and fatigue) in other portions

of his instruction: voluntary intoxication (R. at 610-11), circumstantial evidence generally (R. at 611), and credibility of witnesses (R. at 612.) Had the military judge given Appellant's proposed instruction, there would have been a real risk that the members at best would have been confused, and at worst would have incorrectly applied the instructions.

In sum, Appellant's proposed instruction failed the first prong of the Carruthers test in that it amounted to a misstatement of the law and contradicted other portions of the military judge's instruction. *See, e.g.*, Bailey, 77 M.J. at 15 (where C.A.A.F. denied appellant's proposed instruction because it was an incorrect statement of the law and failed the first prong of the Carruthers test). For these reasons, the military judge did not abuse his discretion in denying it. This Court should deny Appellant's second assignment of error and affirm the findings and sentence. ***(Sections III and IV were filed under seal)***

A.

B.

C.

A.

B.

V.

THE TRIAL COUNSEL DID NOT COMMIT PROSECUTORIAL MISCONDUCT IN ARGUING FACTS FAIRLY PRESENTED IN COURT; MOREOVER, TRIAL COUNSEL DID NOT COMMENT ON APPELLANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT.

Standard of Review

Claims of improper argument are reviewed *de novo*. United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019) (internal citation omitted). Since trial defense counsel did not make an improper argument objection at trial,[11] trial counsel's argument is reviewed for plain error, consistent with the standard described in Voorhees, 79 M.J. at 9. The United States rejects Appellant's position that trial counsel's actions rise to the level of constitutional error necessitating the application of the "harmless beyond a reasonable doubt standard." *See*, United States v. McBee, No. ACM 35346, 2005 CCA LEXIS 25, at *9 (A.F. Ct. Crim. App. Jan. 28, 2005) (unpub. op.) (*citing* United States v. Walker, 57 M.J. 174, 178 (C.A.A.F. 2002)). However, should this Court find trial counsel's statement rises to the level of being a constitutional violation, any error was "harmless beyond a reasonable doubt."

Law and Analysis

Appellant alleges trial counsel's sentencing argument was improper and that trial counsel committed prosecutorial misconduct when she commented on Appellant's right to remain silent. (App. Br. at 26). Since this was not objected to by trial defense counsel, or addressed, *sua sponte*, by the military judge, trial counsel's argument is reviewed for plain error. Voorhees, 79 M.J. at 9; R. at 617. "Plain error occurs when (1) there is error, (2) the error is clear or obvious, and (3)

[11] Trial defense counsel made a standing objection to trial counsel's statement, "[s]he was not a competent person, she could not give consent." (R. at 619.) It does not appear that trial defense counsel objected to any reference to Appellant's right to remain silent.

the error results in material prejudice to a substantial right of the accused." Voorhees, 79 M.J. at 9 (internal quotations omitted). To demonstrate "material prejudice" Appellant "must 'show a reasonable probability that, but for the error,' the outcome of the proceeding would have been different." Molina-Martinez, 578 U.S. 189, 194 (2016) (internal citation omitted). Here, trial counsel's alleged improper statements do not constitute plain error, and, even assuming error, Appellant fails to demonstrate material prejudice. Lastly, should this Court find trial counsel's statement rises to the level of being a constitutional violation, such an error was nonetheless "harmless beyond a reasonable doubt." Each of these arguments will be addressed in turn.

A. Trial counsel properly commented on evidence in the record.

In argument, "the trial counsel is at liberty to strike hard, but not foul blows." United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000). In doing so, "trial counsel may argue the evidence of the record, as well as all reasonable inferences fairly derived from such evidence." United States v. Halpin, 71 M.J. 477, 479 (C.A.A.F. 2013) (internal quotations omitted). This is precisely what occurred in Appellant's case.

In the course of trial counsel's roughly 16-page argument, she characterized evidence that SPC CB[12] was asleep as being "uncontroverted." (R. at 617.) Following this statement, trial counsel then stated that Appellant admitted to AFOSI that SPC CB was asleep. (Id.). Appellant alleges that these statements were tantamount to trial counsel commenting on Appellant's constitutional right to remain silent. (App. Br. at 28.) However, this isolated and obscure

[12] The United States disagrees with Appellant's characterization of this evidence, at App. Br. 28, that it was 'uncontroverted' that *everyone* was asleep. A more accurate reading of the trial counsel's statement is that trial counsel was specifically referring to SPC CB when she said, "[i]t's uncontroverted that *she* was asleep in there…". (R. at 617) (emphasis added.) Moreover, SPC CB was the only female present at the party at or near the time of the sexual assault. (R. at 517-18.)

reference was not error, let alone a clear or obvious error, to the extent that it was a fair comment on the evidence properly before the members. Moreover, this statement was presumably based on testimony from SPC CB, Mr. JH, and SPC KH who all reported that SPC CB was tired and went to sleep in the common area of the residence prior to the sexual assault. (R. at 347-49, 351-52, 468, 512-13, 517-19; Pros. Ex. 9.) In fact, no witness testified that this was not the case. The members even had the benefit of Appellant's version of events in the form of the OSI interview. Trial counsel's "uncontroverted" statement was in reference to *all the evidence presented*, including Appellant's version of events. No reasonable member would take this as a comment on Appellant not testifying, especially when Appellant's version was already before them. As such, this was a fair and proper argument not rising to the level of being plain or obvious error.

The same is true for Appellant's contention that it was improper for trial counsel to argue that it was "uncontroverted" that Appellant placed his mouth on SPC CB's vulva. Here, trial counsel was describing the element of the sexual act, not the element of consent, as such, trial counsel's statement was not plain or obvious error but rather, was fair comment on the evidence before the members. Lastly, Appellant has failed to cite any case law to suggest that the use of the word "uncontroverted" in this manner was improper.[13]

However, even if a panel member had somehow latched onto the statement and inferred that the trial counsel was commenting on Appellant's constitutional right to remain silent, any impact would have been blunted by the military judge's instructions to the members which specifically addressed Appellant's decision not to testify. (R. 613-14.) In sum, after reviewing

[13] Outside from the CCAs, the Circuits have addressed the use of the word "uncontroverted" in the following opinions and have found no error: United States v. Palacios, 612 F.2d 972 (5th Cir. 1980); United States v. Jennings, 527 F.2d 862 (5th Cir. 1976); Garcia v. United States, 315 F.2d 133 (5th Cir. 1963); Rallo v. Newton-Embry, No. 11-CV-0612-CVE-PJC, 2015 U.S. Dist. LEXIS 19747 (N.D. Okla. Feb. 19, 2015).

the argument as a whole, trial counsel made an appropriate and fair comment on evidence properly before the court; furthermore, these statements did not constitute improper argument, and they do not rise to the level of plain or obvious error.

B. Assuming error, Appellant fails to demonstrate material prejudice, or alternatively, such error was harmless beyond a reasonable doubt.

Even if error is assumed, Appellant's claim still fails because he cannot demonstrate material prejudice, or alternatively, the United States has established that the error was harmless beyond a reasonable doubt. Taking first the material prejudice argument, prejudice is assessed by considering "the cumulative impact of any prosecutorial misconduct on the [Appellant's] substantial rights and the fairness and integrity of his trial." Voorhees, 79 M.J. at 11 (internal quotations omitted). Three factors are balanced when determining whether improper argument resulted in prejudice: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the [result]." Halpin, 71 M.J. at 480 (internal quotations omitted).

Regarding the severity of the misconduct, perhaps the best evidence that trial counsel's statement was minimally prejudicial is the fact that neither trial defense counsel, nor the military judge, objected to the statement. (R. at 617.) United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001) ("the lack of defense objection is relevant to a determination of prejudice because the lack of a defense objection is some measure of the minimal impact of a prosecutor's improper comment.") (internal quotations omitted).

Second, the balance and bulk of trial counsel's argument focused on other matters: SPC CB's lack of consent (R. at 619), Appellant's inconsistent statements (R. at 617-18, 620-25, 628-29, 631), third-party observations of SPC CB (R. at 619, 625-27), Appellant fleeing the scene (R. at 617), near immediate reporting of the sexual assault (R. at 627), forensic evidence (R. at 618),

and SPC CB's credibility and consistent statements (R. at 620, 628.) In other words, trial counsel did not have to dwell on minor obscure references to Appellant's constitutional right because there was overwhelming evidence of Appellant's guilt from which to draw from. *See, e.g.,* Gilley, 56 M.J. at 123 (where C.A.A.F. found no material prejudice despite trial counsel's repeated references to appellant's right to counsel, as the references went without objection and were countered by overwhelming evidence of appellant's guilt).

Lastly, even if this Court applies the harmless beyond a reasonable doubt standard, Appellant's argument still fails given that trial counsel made possibly two obscure references, all references went without objection, and the references were otherwise balanced by overwhelming evidence of Appellant's guilt. United States v. Moran, 65 M.J. 178, 186 (C.A.A.F. 2007) (internal quotations and citation omitted) ("if a statement was an isolated reference to a singular invocation of rights it may be harmless in the context of the entire record."). Here, Appellant argues such error was not harmless beyond a reasonable doubt in light of the "relative weakness of the government's evidence" and points to the lack of injuries, screams, or signs of a struggle. (App. Br. at 29.) However, in making this assertion, Appellant completely sidesteps the strengths in the United States' case, chief among them are Appellant's inconsistent statements, his improbable story, and his admitted lie to AFOSI. (R. at 617-18, 620-25, 628-29, 631.) In conclusion, the weight of the evidence supporting Appellant's conviction should leave this Court convinced that any singular statement from trial counsel did not affect the fairness or impartiality of Appellant's trial. *See*, United States v. Upshaw, 81 M.J. 71, 74 (C.A.A.F. 2021) (explaining that this standard is met "where a court is confident that there was no reasonable possibility that the error might have contributed to the conviction"). For these reasons, this Court should deny

Appellant's fifth assignment of error, affirm the findings and sentence, and find that trial counsel's statements were fair and appropriate arguments.

VI.

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

Standard of Review

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

Law and Analysis

At the time of Appellant's court-martial, Article 52, UCMJ, required the concurrence of three-fourths of the panel members for a conviction. At trial, the military judge instructed the members as such. (R. at 666.) Appellant made no objection to this at his trial which was completed on September 23, 2021. (Id.) Appellant now argues, in light of the Supreme Court's decision in Ramos v. Louisiana, 140 S. Ct. 1390 (2020), the Sixth Amendment and the Fifth Amendment rights to due process and equal protection required a unanimous verdict by the court-martial panel. (App. Br. at 32.)

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

The Court recently addressed the applicability of Ramos to courts-martial in United States v. Anderson, No. ACM 39969, 2022 CCA LEXIS 181, at *55-56 (A.F. Ct. Crim. App. Mar. 25, 2022):

> Ramos does not purport, explicitly or implicitly, to extend the *scope* of the Sixth Amendment right to a jury trial to courts-martial; nor does the majority opinion in Ramos refer to courts-martial at all. Accordingly, after Ramos, this court remains bound by the plain and longstanding precedent from our superior courts that the Sixth Amendment right to a jury trial does not apply to trial by courts-martial—and, by extension, neither does the unanimity requirement announced in Ramos.
>
> …
>
> This court has repeatedly held that Fifth Amendment due process does not require unanimous verdicts in courts-martial.

This Court also found no Fifth Amendment equal protection right to a unanimous verdict. Id. See *also*, United States v. Monge, No. ACM 39781, 2022 CCA LEXIS 396, at *30-31 (A.F. Ct. Crim. App. July 5, 2022) (holding that Appellant's unanimous verdict claim did not warrant discussion or relief). This Court should apply the same reasoning from Anderson to this case. Appellant did not have a Fifth or Sixth Amendment right to a unanimous jury. Accordingly, this Court should deny his requested relief.

VII.

THE UNITED STATES DID NOT VIOLATE APPELLANT'S RIGHT TO DUE PROCESS IN PROSECUTING APPELLANT, *AS CHARGED*, FOR SEXUAL ASSAULT.

Standard of Review

This Court reviews matters of statutory interpretation *de novo*. United States v. Hiser, 82 M.J. 60, 64 (C.A.A.F. 2022) (*citing* United States v. Gay, 75 M.J. 264, 267 (C.A.A.F. 2016)).

Law and Analysis

A. Prosecuting Appellant as charged was not a Due Process violation.

Following the persuasive reasoning in Williams, Appellant was not convicted under a different legal theory from which he was charged, and as a result, there was no Due Process violation. Williams directly addressed this same Due Process argument and held that appellant was not denied Due Process even though the evidence presented at trial appeared to also support a different theory of liability than what was charged. Williams, 2021 CCA LEXIS 109 at *53-54, *58.[14] Although appellant was charged under a theory of sexual assault by bodily harm, the evidence presented in Williams appeared to suggest that the victim was incapacitated due to alcohol as she "was just lying there on the floor…her arms were sprawled out to the sides of her…[a]nd her eyes were closed." Id. at *7. Importantly, the victim in Williams was unable to testify on the issue of consent even though the United States had charged a sexual assault by bodily harm, thus making consent a critical element of the offense. Id. at *54. As a result, the trial counsel in Williams relied "nearly exclusively" on the victim's "apparent inability to consent" as based on witness observations of the victim's "non-responsiveness." Id. at *54-55. In holding that there was no Due Process violation, this Court reasoned that "evidence tending to show a person *could not consent* to the conduct at issue may be considered as part of the *surrounding circumstances* in assessing whether a person *did not consent*…" and that there was a

[14] Decided six months prior to Williams and by a separate court, United States v. Weiser, 80 M.J. 635, 641-42 (C.G. Ct. App. 2020), addressed a nearly identical Due Process argument when the evidence tended to show that the victim was either asleep or intoxicated at the time of the assault, (i.e., her head was to the side, her eyes were shut, and her hair was strewn about her face and didn't move), but where appellant was nonetheless convicted on sexual assault by bodily harm. Weiser, 80 M.J. at 641. In finding no Due Process violation, the appellate court relied on a number of factors including (i) the "record as a whole," (ii) trial counsel's disavowing of other theories of liability, (iii) sister court precedent, and (iv) proper instruction and the presumption that the members followed the law. Id. at 641-42.

"degree of logical evidentiary overlap in the Article 120, UCMJ, offenses." Williams, 2021 CCA LEXIS 109 at *57-58 (emphasis added); *see also* United States v. Weiser, 80 M.J. at 635, 641-42 (C.G. Ct. Crim. App. 2020) (reasoning that the combination of the victim's alcohol consumption, intoxication, and fatigue were not intended to prove incapacity, but rather, were relevant "surrounding circumstances" on the element of consent).

Compared to Williams, the present case is a much weaker argument for a Due Process violation, given that SPC CB testified that she did not consent, and trial counsel was not forced to rely on an inference to meet this element of the offense. *Compare* R. at 616-32 to Williams, 2021 CCA LEXIS 109 at *54. Although trial counsel made the argument that SPC CB was asleep when the sexual assault began, she nonetheless used SPC CB's testimony, as well as the inconsistencies in Appellant's statement to AFOSI, to meet her burden on the element of lack of consent. *Compare* R. at 616-32[15] to Williams, 2021 CCA LEXIS 109 at *54. This was no surprise to Appellant who conceded that he was in fact on notice of having to possibly defend against the statutory definition of "consent," which included language that a "sleeping, unconscious, or incompetent person cannot consent." (R. at 596-96.) Further, Appellant's contention that the military judge and the trial counsel conflated "legally unable" and "lack of consent" is also without merit, since the military judge clarified this distinction when discussing instructions. (R. at 595 ("...I'm not talking about incapable of consenting, because that's what we had when we talked about the specification that was withdrawn and dismissed. I'm talking about sleeping, unconscious, or incompetent")). As a result, the record as a whole demonstrates that

[15] Specific examples of the trial counsel doing this include the following: "…she drank and she fell asleep at a party in public…" (R. at 628); "...now magically awake from just that touch, she says yes" (R. at 629); "…get consent magically when she's just asleep…" (R. at 630); "she's just asleep, and he's gonna be able to wake her up, even though he doesn't know her, and there's no indications of attraction.". (R. at 630.)

Appellant was convicted for the offense for which he was charged, namely sexual assault by bodily injury, as established by *all* of the *circumstantial evidence surrounding the act*[16] including (i) SPC CB's testimony that she did not consent, (ii) evidence from third-party witnesses that SPC CB was tired and intoxicated, (iii) evidence that SPC CB was not attracted to Appellant, but rather, was attracted to SPC KH, (iv) inconsistent and improbable statements Appellant made to AFOSI, and, (v) the fact that SPC CB testified that she was asleep when the sexual assault started.

Appellant makes two additional arguments based on our sister courts' decisions in Weiser and Gomez that are not persuasive. Appellant contends that trial counsel should have disavowed alternate theories of liability similar to the trial counsel in Weiser, and/or that the military judge should have limited the trial counsel's argument similar to what was done in United States v. Gomez, 2018 CCA LEXIS 167, *8-9 (N-M Ct. Crim. App. 4 April 2018) (unpub. op.). (App. Br. at 49). However, these arguments are without merit as such a requirement–whether it be a self-imposed disavowal or a judge-imposed limitation–was only one factor among many in holding there was no Due Process violation in both Weiser and Gomez. *Compare* Weiser, 80 M.J. at 641-42 *to* Gomez, 2018 CCA LEXIS 167 at *8-9, 12-18. Other factors included, among others, (i) the factual basis for the charge, (ii) judge-imposed limitation on the issue of incapacity, (iii) the appellant's admission, (iv) the manner in which the case was contested[17], and (v) the defense

[16] This is consistent with the military judge's instructions. (R. at 609.)

[17] One of Appellant's Due Process arguments is that the United States should have charged this case in the alternative, presumably under two competing theories of liability, namely Articles 120(b)(2)(A) and (b)(2)(B). (App. Br. at 51-52.) However, this argument is curious in that the United States did in fact charge two theories, and subsequently dismissed one of the theories after Appellant won his unreasonable multiplication of charges motion on the issue. (R. at Vol. II, App. Ex. X at 3, 5; *see also* R. at 88, 90.) In this regard, Appellant's argument is similar to the argument raised in Gomez where the CCA took issue with appellant raising a Due Process violation after using facts that appeared to support an alternative theory of conviction in his favor at trial. (Gomez, 2018 CCA LEXIS 167 at *16-17 (appellant used the victim's intoxication, memory gaps, and pre-sexual encounter behavior to support his mistake of fact as to consent

counsel's recognition that the victim's competence was implicated by relevant statutory definitions. Gomez, 2018 CCA LEXIS 167 at *10-18. Importantly, the judge-imposed limitation in Gomez still permitted the United States to argue all surrounding circumstances on the issue of consent, which included the victim's intoxication. Gomez, 2018 CCA LEXIS 167 at *9, *13 ("[ra]ther than focus on RMR's ability–or lack of ability–to consent, [trial counsel] highlighted RMR's physical and verbal resistance.").

B. A finding of "no due process violation" does not render the remaining statutory language superfluous and insignificant.

Although the United States generally agrees with Appellant's interpretation of United States v. McDonald, 78 M.J. 376 (C.A.A.F. 2019), and United States v. Sager, 76 M.J. 158, 162 (C.A.A.F. 2016), these cases are less helpful than Williams, Weiser, and Gomez in that they fail to directly address the alleged Due Process violation raised by Appellant. To the extent that McDonald and Sager are pertinent to Appellant's Due Process argument, their relevancy is limited to the issue of statutory interpretation and the implication of superfluous and insignificant language. (App Br. at 48, 50-51.) On this point, the military judge's instruction and the trial counsel's argument did not render the language in Article 120.a.(b)(2)(B) and (b)(3)(A) superfluous and insignificant because the instruction and argument was not a matter of statutory interpretation as was the case in Sager, but rather, was authorized by separate statutory authority, namely 120(g)(7)(b), under the greater heading of "consent." *Compare* App. Br. at 48 *to* R. at 595 *and* Sager, 76 M.J. at 162. Put differently, the military judge did not do any interpretation; rather, he simply read the statutory instruction for consent. Moreover, the military judge's

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argument). Thus, as to this case, the manner in which this case was contested, i.e., dismissal of the competing theory of liability on motion of Appellant, cuts in favor of the United States on the issue of notice and Due Process.

instruction and trial counsel's argument did nothing to change the two remaining, and very much distinct, theories of liability for sexual assault. Williams, 2021 CCA LEXIS 109 at *51-52; *see also* Weiser, 80 M.J. at 641 ("[t]his distinction is not blurred by the statutory admonition that a 'sleeping, unconscious, or incompetent person cannot consent,' because that speaks to a legal inability to consent, not actual lack of consent."). For these reasons, Appellant's Due Process allegation is without merit and warrants no relief. This Court should deny this assignment of error.

VIII.

THE EVIDENCE IS FACTUALLY AND LEGALLY SUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS.

Standard of Review

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

Law and Analysis

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." United States v. Turner, 25 M.J. 324, 324 (C.M.A. 1987) (internal citation omitted). In resolving questions of legal sufficiency, this Court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001) (internal citations omitted). Thus, legal sufficiency is a very low threshold and the government is free to meet its burden with circumstantial evidence. United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal citations and quotations omitted).

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, [this Court is] convinced of the [appellant]'s guilt beyond a reasonable doubt." Turner, 25 M.J. at 325. In performing this review, this Court takes "a fresh, impartial look at the evidence," and applies "neither a presumption of innocence nor a presumption of guilt" to "make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." Washington, 57 M.J. at 399.

In order to find Appellant guilty of sexual assault, in violation of Article 120, UCMJ, as alleged in Specification 1 of the Charge, the panel members were required to find the following beyond a reasonable doubt: (1) that at or near Tacoma, Washington, on or about 7 August 2020, Appellant committed a sexual act upon SPC CB by causing contact between Appellant's mouth and SPC CB's vulva; and (2) that he did so without her consent. *See* Manual for Courts-Martial, United States (2019 ed.) (2019 MCM), pt. IV, para. 60.

In order to find Appellant guilty of sexual assault, in violation of Article 120, UCMJ, as alleged in Specification 2 of the Charge, the panel members were required to find the following beyond a reasonable doubt: (1) that at or near Tacoma, Washington, on or about 7 August 2020, Appellant committed a sexual act upon SPC CB by penetrating SPC CB's vulva with his body part, to wit: his finger, with an intent to gratify Appellant's sexual desire; and (2) that he did so without SPC CB's consent. *See* 2019 MCM, pt. IV, para. 60.

Appellant maintains that this case is legally and factually insufficient because the United States was unable to prove the absence of consent, or alternatively, was unable to prove that there was not a reasonable mistake of fact as to consent. (App. Br. at 57, 59.) However, in making this

argument, Appellant exaggerates SPC CB's credibility issues, grossly overvalues Appellant's statements to AFOSI, and entirely disregards several key pieces of evidence.

Although SPC CB may have provided inconsistent statements on several collateral facts, as Appellant aptly pointed out, she was nonetheless consistent and unwavering in saying that she did not consent to the sexual acts. This salient fact–*lack of consent*–was then supported by circumstantial evidence including SPC CB's near-immediate reporting of the sexual assault (R. at 358), third-party observations of SPC CB's level of fatigue and intoxication immediately prior to the sexual assault (R. at R. at 619, 625-27), the sleeping arrangements (i.e., the creation of a semi-enclosed sleeping area for the sole woman at the party) (R. at 347-49, 512, 519; Pros. Ex. 9), the fact that SPC CB had no interactions with Appellant prior to the sexual assault (R. at 342-346, 359, 485), and the fact that SPC CB was perhaps more interested in SPC KH, the person she slept next to the evening of her sexual assault (R. at 344, 347, 485, 512.) When looking at the facts in their entirety, including SPC CB's minor inconsistencies, this Court should be convinced beyond a reasonable doubt that SPC CB did not consent to the sexual assaults.

Appellant, on the other hand, makes much of the mistake of fact as to consent argument, but he does so at his own peril. (App. Br. at 58.) In accepting this argument, this Court would have to overlook Appellant's initial denial that the sexual encounter occurred (Pros. Ex. 1, 1mp4 at 11:05-12:14, 23:00-24:25; R. at 299, 304), his ever-changing story to investigators (R. at 300, 305, 307-09), the improbability of the encounter as described by Appellant (Pros. Ex. 1, 1mp4 at 26:30-26:55; R. at 309), and the fact that Appellant fled to his car immediately following the alleged consensual experience (Pros. Ex. 1, 1mp4 at 35:02-36:28; R. at 307) – all facts to suggest that the encounter was not consensual. Put differently, these are not the actions a person takes after partaking in consensual sexual experience; rather, these acts suggest culpability, shame,

consciousness of guilt, and lack of credibility. In this assignment of error, Appellant is asking this Court to believe the statements of an admitted liar, namely Appellant, while simultaneously ignoring circumstantial evidence that further diminishes his credibility.

Lastly, Appellant asks this Court to leverage the military judge's instruction regarding a sleeping person and consent, to find the conviction legally and factually insufficient. This argument too carries little weight as the military judge did not abuse his discretion in fashioning an instruction that was based on facts in the record and grounded in statute and law[18]. Since the military judge properly instructed the members, Appellant's final argument for legally and factually insufficiency also fails. Evidence that SPC CB was asleep is part of the totality of the circumstances and tends to show that SPC CB did not consent to Appellant's acts, since under the law, a sleeping person cannot consent to a sexual act.

In sum, viewing the evidence in the light most favorable to the United States and drawing every reasonable inference from the record in favor of the prosecution, this Court should conclude that a reasonable fact-finder could have found all the elements of both sexual assault specifications beyond any reasonable doubt. Moreover, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this Court should be convinced of Appellant's guilt beyond any reasonable doubt. This Court should deny this assignment of error.

IX.

THE CUMULATIVE ERROR DOCTRINE IS INAPPLICABLE TO APPELLANT'S CASE, AND RELIEF IS UNWARRANTED.

[18] *See* Answer to Assignments of Error, Argument, Section II.

Standard of Review

"The cumulative effect of all plain errors and preserved errors is reviewed *de novo*." United States v. Pope, 69 M.J. 328, 335 (C.A.A.F. 2011).

Law and Analysis

The cumulative error doctrine is inapplicable to Appellant's case. The doctrine is premised on "the existence of errors, 'no one perhaps sufficient to merit reversal, [yet] in combination [they all] necessitate the disapproval of a finding' or sentence." United States v. Gray, 51 M.J. 1, 61 (C.A.A.F. 1999) (*quoting* United States v. Banks, 36 M.J. 150, 170-71 (C.M.A. 1992)) (alterations in original). In this case, each one of Appellant's claims is without merit, so the cumulative error doctrine is inapplicable because "[a]ssertions of error without merit are not sufficient to invoke this doctrine." Gray, 51 M.J. at 61.

Even if some error is found by this Court, relief under this doctrine is only warranted if cumulative errors "denied Appellant a fair trial." Pope, 69 M.J. at 335. As discussed above, the weight of the evidence against Appellant precludes any finding that Appellant was denied a fair trial. *See* Id. (declining to disapprove a finding where "there was overwhelming evidence of Appellant's guilt" and the alleged errors did not "materially prejudice[] Appellant's substantial rights"). Appellant received a fair trial, and both his conviction and the resultant punishment are commensurate with the gravity of his crimes. This Court should find no cumulative error.

CONCLUSION

WHEREFORE, this Court should affirm the findings and sentence.

[redacted]

SARAH L. MOTTERN, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
United States Air Force
[redacted]

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 25 July 2022 via electronic filing.

SARAH L. MOTTERN, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**NOTICE OF APPEARANCE**
	)	Before Panel No. 1
v.	)	
	)	No. ACM 40223
Senior Airman (E-4) **JOHN K. BRASSILKRUGER,** United States Air Force	)	22 July 2022
Appellant	)	

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

Pursuant to Rule 12 of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby files this written notice of appearance.

Respectfully submitted,

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
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Joint Base Andrews NAF, MD 20762
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 22 July 2022.

[redacted]

MATTHEW L. BLYTH, Maj, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION TO FILE UNDER SEAL**
v.	)	Before Panel No. 1
Senior Airman (E-4) **JOHN K. BRASSIL-KRUGER,** United States Air Force *Appellant*	)	No. ACM 40223 11 August 2022

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

Pursuant to Rule 13.2(b), 17.2(b), and 23.3(o) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves to file portions of his reply brief under seal. Specifically, pages 4-9 of his reply brief, which respond to the Government's Answer for Assignments of Error III and IV, discuss sealed materials. Consequently, these pages require filing under seal.

WHEREFORE, Appellant respectfully requests this motion be granted.

Respectfully Submitted,

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
[redacted]

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 11 August 2022.

Respectfully Submitted,

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[redacted]

Counsel for Appellant

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Senior Airman (E-4) **JOHN K. BRASSIL-KRUGER,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S REPLY BRIEF** Before Panel No. 1 No. ACM 40223 11 August 2022

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

Appellant, Senior Airman (SrA) John K. Brassil-Kruger, by and through his undersigned counsel and pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this Reply to the Appellee's Answer (Ans.), dated 25 July 2022. SrA Brassil-Kruger stands on the arguments in his opening brief, filed on 2 June 2022 (App. Br.), and submits additional arguments for the issues listed below.

ARGUMENT

II.

THE MILITARY JUDGE ERRED BY INCORRECTLY INSTRUCTING THE COURT MEMBERS REGARDING CONSENT.

The Government minimizes the importance of this instructional issue, which reflects a broader problem in this case: the disconnect between the charged offenses and the methods of proof at trial. (Ans. at 17–21.) The military judge's denial of the

Defense-requested instruction sowed confusion about the permissible theories of SrA Brassil-Kruger's guilt.

The Government relies heavily on *United States v. Williams*, No. ACM 39746, 2021 CCA LEXIS 109 (A.F. Ct. Crim. App. 12 Mar. 2021) (unpub. op.) to validate the military judge's decision. (Ans. at 18–20.) Reliance on *Williams* is misplaced. First, this Court need not follow that unpublished case. Second, as noted in the opening brief, *Williams* is distinguishable because the military judge in that case never gave the problematic instruction that "a sleeping, unconscious, or incompetent person cannot consent." (App. Br. at 14–15 (citing *Williams*, unpub. op. at *52–53).).

The Government also claims the military judge's instructions simply applied the statutory definition of consent. (Ans. at 17.) But instructing the members is not so straightforward. First, a military judge must "tailor[] [instructions] to fit the circumstances of the case." Rule for Courts-Martial (R.C.M.) 920(a), Discussion.[1] In a case where the parties vigorously contested the valid theories of liability, it was crucial for the instruction to place appropriate boundaries on precisely how the members could find SrA Brassil-Kruger guilty. The military judge's actions here—denying the Defense-requested instruction—ran counter to his pretrial decision to limit the Government to a single charged theory. (*See* App. Br. at 10.) The denied instructions essentially allowed the resurrection of the "sleeping" theory of liability, despite the sole remaining charge being sexual assault without consent.

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

Second, the Military Judges' Benchbook reflects the need for tailoring. The instruction that a "sleeping, unconscious, or incompetent person" cannot consent is an optional instruction, as denoted by parentheses. *Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9 at 1379 (29 Feb. 2020). This helps explain why the military judge in *Williams* did not issue the instruction that a sleeping person cannot consent—it was not required. In fact, the Benchbook puts *all* of the elements of consent in Article 120(g)(7)(B), 10 U.S.C. § 920(g)(7)(B)[2] in parentheses as non-mandatory instructions. *Id.* at 1379–80. This belies the Government's argument that this is a simple matter of applying the statutory definition; if this were true, the contents of Article. 120(g)(7)(B) would be mandatory in every case, but they are not. *Id.*

The military judge's actions created the problematic situation where the members received some, but not all, of the instructions related to sexual assault while a victim is asleep. Notably, the Government declines to address this problem. If the charged theory was that SPC CB was asleep, then the members would have received instructions on an additional element of the offense; namely, that SrA Brassil-Kruger either had to know, or reasonably should have known, that she was asleep. *See MCM*, pt. IV, ¶ 60.b.(2)(e). In a sense, the military judge's instructions relieved the Government of proving this element. Stated differently, the instructions enabled the

[2] Article 120(g)(7)(B) contains three parts: (1) "A sleeping, unconscious, or incompetent person cannot consent"; (2) "A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious"; and (3) "a person cannot consent while under threat or in fear or under the circumstances described in subparagraph (B) or (C) of subsection (b)(1)."

members to convict SrA Brassil-Kruger if they determined SPC CB was asleep without placing the burden on the Government to prove, beyond a reasonable doubt, that he knew, or reasonably should have known, that she was asleep.

Ultimately, the instructions enabled the trial counsel to give a muddled findings argument that blended theories of SPC CB being asleep, intoxicated, fatigued, or non-consenting, but which relied most heavily on SPC CB being asleep. (R. at 616–32.) At findings, the charged offenses rested on lack of consent, and the military judge should have tailored the instructions accordingly. He did not, to SrA Brassil-Kruger's prejudice. This abuse of discretion warrants setting aside the findings and sentence.

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

Portions of pages 4 and 9, and all of pages 5-8 are filed under seal.

VII.

THE GOVERNMENT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS WHEN IT CHARGED HIM WITH SEXUAL ASSAULT UNDER A THEORY OF WITHOUT CONSENT, BUT CONVICTED HIM UNDER A DIFFERENT THEORY.

The Government seeks to cabin key Court of Appeals for the Armed Forces (CAAF) cases, placing emphasis instead on persuasive authority in unpublished or sister-service cases. But this shift in focus cannot eliminate the due process violation—the members convicted SrA Brassil-Kruger of a different theory of liability than the remaining charged offenses.

The Government asks this Court to focus on three persuasive cases to resolve this assignment of error.[5] In so doing, it minimizes the importance of CAAF cases on point. To begin, the Government strains to distinguish *United States v. McDonald*, 78 M.J. 376 (C.A.A.F. 2019), and *United States v. Sager*, 76 M.J. 158, 162 (C.A.A.F. 2016). In the Government's telling, these cases are only relevant to the question of statutory interpretation; since the military judge only issued instructions (rather

[5] Ans. at 45–48 (citing *Williams*, 2021 CCA LEXIS 109; *United States v. Weiser*, 80 M.J. 635 (C.G. Ct. Crim. App. 2020); *United States v. Gomez*, No. 20160331, 2018 CCA LEXIS 167 (N-M. Ct. Crim. App. 4 Apr. 2018) (unpub. op.)).

than interpreted the statute), the cases have no force. Due process, however, is not so easily dismissed.

While the military judge's instructions were part of the problem, they were raised as a separate assignment of error because the due process issue sweeps more broadly. The fundamental problem is that the only remaining theory of liability was sexual assault without SPC CB's consent. *See* Charge Sheet, ROT Vol. 1; R. at 607–08. While the members were tasked with assessing guilt on this theory *only*, the Government secured its conviction by relying most prominently on SPC CB being asleep. (R. at 616–32.) In this situation, the question of whether the distinct statutory theories are interchangeable is paramount to the due process analysis. This is more than the military judge's mechanical application of instructions.

Because the Government does not find *McDonald* and *Sager* relevant, it declines to engage in a meaningful way. Respectfully, this Court should recognize that *Sager* and *McDonald* are critical here. For instance, in *McDonald*, the CAAF highlighted the difference in *mens rea* between sexual assault charged as "without consent" vice "asleep." 78 M.J. at 380. The CAAF wrote: "Congress provided an explicit mens rea that the accused 'knows or reasonably should know' certain facts: that the victim is unaware of the sexual act or incapable of consenting to it. By contrast, under Article 120(b)(1)(B) [2012],[6] it is an offense simply to commit a sexual

[6] *McDonald* addressed the 2012 version of Article 120. 78 M.J. at 377. The theory of liability in *McDonald* was sexual assault by causing bodily harm, while in this case the theory is committing a sexual act without consent. *Compare* Article 120(b)(1)(B), UCMJ, 10 U.S.C. § 920(b)(1)(B) (2012) *with* Art. 120(b)(2)(A), UCMJ, 10 U.S.C. § 920(b)(2)(A) (2019). The statutory distinction does not change the analysis.

act without consent." *Id.* The offenses cannot be interchangeable where they contain different elements.

Sager's embrace of the surplusage cannon also resonates here. 76 M.J. at 162. In *Sager*, the CAAF made clear that it would not interpret a statute to render "or" mere surplusage. *Id.* The relevant theories here are set forth in Article 120(b)(2), which defines a sexual assault as when a person:

> (2) commits a sexual act upon another person—
>
> (A) without the consent of the other person;
>
> *or*
>
> (B) when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring[.]

The CAAF in *Sager* cautioned against ignoring "or" when interpreting the statute. The same issue is present here. When the military judge instructed that a sleeping person cannot consent, and the trial counsel argued that SPC CB did not consent because she was asleep, this led to SrA Brassil-Kruger's conviction based on the theory that SPC CB was asleep, which is charged under Article 120(b)(2)(B), not Article 120(b)(2)(A). All that remained for the members, however, were the specifications under Article 120(b)(2)(A). The military judge thus set the stage for SrA Brassil-Kruger's conviction for a different offense; it does not matter that the military judge was not specifically interpreting a statute.

While SrA Brassil-Kruger admits that, broadly speaking, *Williams*, *Gomez*, and *Weiser* are contrary to his position, those cases did not adequately grapple with

the implications of *Sager* and *McDonald*. Additionally, those cases are distinguishable for the reasons expressed in the opening brief. (App. Br. at 13–15, 49.)

Finally, this Court cannot exercise its independent "awesome, plenary, and de novo power" under Article 66(d), UCMJ, to review SrA Brassil-Kruger's record for factual and legal sufficiency, and to substitute its judgment for that of the court below, if this Court cannot determine which legal theory he was convicted under. *See United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990); *United States v. Chin*, 75 M.J. 220, 222 (C.A.A.F. 2016).

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

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 11 August 2022.

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