IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,	Appellee	**BRIEF ON BEHALF OF APPELLANT**
v.		Docket No. ARMY 20210647
Staff Sergeant (E-6) **ISAC D. MENDOZA** United States Army,	Appellant	Tried at Fort Riley, Kansas, on 20 September and 6-8 December 2021, before a general court-martial appointed by the Commander, 1st Infantry Division and Fort Riley, Lieutenant Colonel Ryan W. Rosauer, military judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignments of Error

I.

WHETHER APPELLANT'S CONVICTION FOR SPECIFICATION 1 OF THE CHARGE IS FACTUALLY SUFFICIENT.

II.

WHETHER THE MILITARY JUDGE ERRED BY FAILING TO INSTRUCT THAT A FINDING OF GUILTY REQUIRED A UNANIMOUS VOTE BY THE MEMBERS, SO THAT APPELLANT WAS DENIED A MEANINGFUL OPPORTUNITY TO MAKE A FORUM SELECTION. *See United States v. Anderson*, 2022 CAAF LEXIS 529 (C.A.A.F. 2022); *but see United States v. Pritchard,* 2022 CCA LEXIS 349 (Army Ct. Crim. App. 9 June 2022).

PANEL NO. 4

Statement of the Case

On 8 December 2021, a military judge sitting as a general court-martial found appellant, Staff Sergeant (SSG) Isac D. Mendoza, contrary to his pleas, guilty of one specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice [UCMJ]. (R. at 279; Statement of Trial Results [STR]). On the same day, the military judge sentenced appellant to reduction to the grade of E-1, confinement for thirty months, and a dishonorable discharge (R. at 376; STR). On 6 January 2022 the convening authority elected to take no action on the findings or sentence. (Action). The military judge entered judgment on 12 January 2022. (Judgment of the Court). This court docketed Appellant's case on 31 March 2022.

I. Whether appellant's conviction for Specification 1 of the Charge is factually sufficient.

Statement of Facts

Miss [redacted] who was a Specialist (SPC) in the Army at the time, and SPC [redacted] were close friends who worked together and interacted daily. (R. at 137). On 11 July 2020, then-SPC [redacted] and SPC [redacted] went out with friends. (R. at 139, 154). While out, [redacted] had dinner, drinks, and ate again at McDonald's later in the evening. (R. at 154). When [redacted] and SPC [redacted] returned to the barracks, ten to twenty people, including Soldiers from their unit, were outside

near the smoke pit, talking, drinking, and hanging out. (R. at 139-40). Several people saw [redacted] outside the barracks that evening and interacted with her.

Drinking and hanging out outside.

Sergeant (SGT) [redacted] was hanging out in front of the barracks with a group of Soldiers, kicking a beach ball around, when he saw [redacted] (R. at 119). Sergeant [redacted] saw [redacted] ask to kick the ball and join in. (R. at 120). [redacted] moved normally and kicked the ball back and forth on different side of the barracks building. (R. at 124-125). [redacted] even ran around while kicking the ball, without tripping or falling. (R. at 125).

Specialist [redacted] was hanging out with people outside when SGT [redacted] eventually arrived with a bottle of Bacardi rum. (R. at 111). Specialist [redacted] drank some Bacardi rum, as did [redacted] and SPC [redacted] (R. at 111).

Specialist [redacted] noticed [redacted] and appellant together with their arms around each other. (R. at 141-42, 148). They were leaning towards each other with their faces close. (R. at 155). This concerned Specialist [redacted] because [redacted] was married. (R. at 142). When he approached [redacted] and appellant outside, they were sharing the bottle of Bacardi and both appeared intoxicated. (R. at 155).

Around 2300, SPC Byrd saw [redacted] and SPC [redacted] talking outside the barracks. (R. at 96). [redacted] was holding the Bacardi rum bottle, which was nearly empty. (R. at 96, 98). SPC [redacted] told SPC [redacted] that [redacted] had almost finished

that bottle on her own (although nothing in the record indicates how SPC [redacted] knew that). (R. at 96).

Specialist [redacted] testified he thought [redacted] behavior was inappropriate for a married woman. (R. at 142-43, 148, 155). Around 0145 he told [redacted] that she needed to call her spouse and escorted her to her room on the second floor. (R. at 51, 143, 145). He then went back to his room. (R. at 143). Two minutes after going into her room, [redacted] came back out and rejoined the group. (R. at 51).

The dayroom.

Around 2330, the group moved inside the barracks to the dayroom to continue drinking. (R. at 103, 104, 112, 113, 120). The group included [redacted] SPC [redacted], SGT [redacted] SPC [redacted] SPC [redacted] and appellant. (R. at 103). In the dayroom, [redacted] started to flirt with, rub, and touch members of the group, including SPC [redacted] (R. at 104, 113). This made SPC [redacted] uncomfortable. (R at 113). To him, [redacted] was normally introverted and kept to herself. (R. at 104). That evening, she was uncharacteristically outgoing and flirtatious. (R. at 104, 110). He had never seen [redacted] act that way before. (R. at 104).

[redacted] also flirted with appellant. (R.at 113). Sergeant [redacted] saw appellant sitting at the table shoulder to shoulder, with [redacted] both whispering into and kissing and licking his ear. (R. at 121, 126, 129). This made appellant jump up and say, "I

don't do that" and "I'm married." (R. at 121, 192). Appellant looked generally uncomfortable. (R. at 127).

Private First Class [redacted] also saw [redacted] leaning into and whispering into appellant's ear. (R. at 132, 134). When PFC [redacted] came back to his room, he mentioned this to SPC [redacted] because he knew [redacted] and [redacted] were close. (R. at 132). However, SPC [redacted] who had already walked [redacted] back to her room previously around 0145, did not return to the dayroom again to retrieve [redacted] (R. at 155-56).

[redacted] also flirted with SGT [redacted] (R. at 113). She leaned into him and kissed the back of his head. (R. at 122, 128). Sergeant [redacted] did not know [redacted] very well, felt uncomfortable, and moved away from her. (R. at 122, 128, 192).

At one-point, appellant told SPC [redacted] that [redacted] was "getting really flirty," she was "just too intoxicated," and he would send [redacted] to her room. (R. at 105, 114). However, [redacted] approached them and began to flirt with SPC [redacted] leaning on him and touching him. (R. at 114). [redacted] reached out to hold SPC [redacted] hand and leaned her face very closely into his face, so much so that it looked like [redacted] was trying to kiss him. (R. at 114-115). About 45 minutes later, SPC [redacted] saw [redacted] walking down the hallway with her hands on someone's shoulders. (R. at 106, 115, 116).

[redacted] claimed to not remember several things she did while she was intoxicated.

[redacted] later testified that her memory from that evening was severely limited. (R. at 33). She recalled returning to the barracks after dinner, seeing "a whole bunch of people out front drinking and whatnot," and drinking vodka that a noncommissioned officer (NCO) from her unit shared with her around 2300. (R. at 33). The next thing she remembered was appellant knocking on her door the following morning to return her shoes. (R. at 34).

[redacted] claimed not to remember hours of drinking, socializing, kicking around a beach ball, and sitting next to appellant with her arms around his waist, kissing his ear, and sharing a bottle of vodka. (R. at 49). [redacted] also did not remember flirting with appellant, SGT [redacted] or SGT [redacted] or speaking with others in the dayroom. (R. at 50).

[redacted] has no memory of SPC [redacted] walking her back to her room around 0145, and she did not remember leaving her room two minutes later and returning to the dayroom. (R. at 51). [redacted] did not remember touching appellant and continuing to talk to him. (R. at 51).

The incident.

Around 0200, [redacted] left the dayroom and went to appellant's room. (R. at 52). [redacted] waited for appellant for almost forty-five seconds and then went back to

the dayroom to retrieve him. (R. at 52, 266). In the hallway, she touched appellant's arm and smiled at him. (R. at 52, 90).

When they reached appellant's door, appellant reached down and touched [redacted] groin outside her pants. (R. at 264, 270). [redacted] turned to him and smiled. (R. at 270). Then [redacted] and appellant entered appellant's room. (R. at 262).

Once inside appellant's room, the two had consensual sex with [redacted] on top of appellant. (R. at 53). [redacted] claimed no memory of having sex with appellant nor appellant escorting her back to her room afterwards. (R. at 54).

The following morning.

The next morning, appellant returned [redacted] shoes to her room, then later stopped by a second time to ask if she was okay. (R. at 34). After appellant's second visit, [redacted] claimed to realize, though she did not recall the night before, she was not wearing underwear and her tampon was pushed up far inside her. (R. at 35). Concerned about her inability to recall a potential sexual event, [redacted] removed the tampon and saved it in a plastic bag. (R. at 45).

[redacted] went to SPC [redacted] room and knocked on his door. (R. at 149). When SPC [redacted] opened the door, [redacted] was upset and crying, and seemed confused. (R. at 150-51). Afterwards, [redacted] went to the Charge of Quarters, SGT [redacted] and told her "what she thought happened[.]" (R. at 162). Sergeant [redacted] called SFC [redacted], the brigade's sexual assault prevention

representative. (R. at 36, 163). [redacted] filed a report at SFC [redacted] office and later completed a sexual assault forensic exam at the Troop Medical Clinic (TMC). (R. at 37).

Accusations against appellant.

After speaking with [redacted] the following morning, SPC [redacted] notified his NCO, SGT [redacted] (R. at 151). Unable to find [redacted] SPC [redacted] and SGT [redacted] decided to confront appellant. (R. at 151-52). Appellant said [redacted] was in his room last night and had slept in his bed. (R. at 151). When SPC [redacted] and SGT [redacted] decided to see [redacted] at the TMC, appellant joined them. (R. at 152). While in the TMC parking lot, appellant encountered a Special Agent (SA) from the Criminal Investigation Division (CID) who was conducting canvassing interviews. (R. at 169). Appellant, who was not a suspect, volunteered to the agent that [redacted] was in his room the night before, though he did not know why. (R. at 170).

The U.S. Army Criminal Investigation Division investigation.

Special Agent (SA) [redacted] conducted appellant's interrogation at CID. (R. at 184). He was aggressive in his questioning and confronted appellant repeatedly about having sex with [redacted] (R. at 184-85). Appellant first denied, but later admitted to, having sex with [redacted] (R. at 177). During the interrogation, despite his earlier denial, appellant consistently maintained that [redacted] flirted with him that night, whispered in and kissed his ear, and came on to him. (R. at 185, 188).

When the two went to his room, [redacted] kissed appellant, who kissed her back. (R. at 186). Appellant asked, "is this okay" and she responded, "show me what you've got." (R. at 186). They undressed and [redacted] voluntarily performed oral sex on appellant. (R. at 187). During intercourse, [redacted] was on top of appellant at least twice. (R. at 187, 189). Afterward, they each dressed themselves. (R. at 187). Seeing that [redacted] put on her shirt backwards, appellant assisted [redacted] to put it on correctly. (R. at 188).

Prior to appellant's interview, SA[redacted] reviewed some, but not all, of the Closed-Circuit Television (CCTV) footage from 11-12 July. (R. at 194). Based on this limited review, SA [redacted] suggested throughout the interview that [redacted] was "overly intoxicated," "incoherent," and "not in the right mental state." (R. at 189, 194). Special Agent [redacted] ultimately told appellant that [redacted] was "incapable of consenting." (R. at 189). Special Agent [redacted] then typed these conclusions into appellant's written statement. (R. at 189).

Special Agent [redacted] conducted the initial interview with [redacted] on the morning of 12 July at the TMC. (R. at 64). After reviewing the interview notes, his supervisory agent, SA [redacted], instructed him to reinterview [redacted] to fill in certain information gaps. (R. at 91, 92). SA[redacted] instructed SA [redacted] to find out, *as soon as possible*, more information about why [redacted] was able to control her body and perform oral sex on appellant. (R. at 93). Neither SA [redacted], nor any other CID

agent, ever followed up and conducted a second interview. (R. at 93). No agent inquired further about the evidence of [redacted] sexually touching SGT [redacted] SPC [redacted] and appellant throughout the evening of 11 July. (R. at 193). Additionally, another agent reviewing the case file suggested obtaining a cleansing statement from appellant about his canvassing interview statement, but that never happened either. (R. at 193-94).

Miscellaneous facts.

Photos of [redacted] room depicted her sports bra and underwear, which she allegedly wore the previous evening but woke up without wearing. (R. at 44). There was also beer in her room that she could not explain. (R. at 45). Additionally, when [redacted] woke up, she was wearing the same outer pants she had been wearing the previous night. (R. at 59).

On 11 July 2020, [redacted] was married. (R. at 57). After the incident, [redacted] told her spouse that she was sexually assaulted. (R. at 58). [redacted] was certain that, if a sexual incident occurred, it must have been nonconsensual, because she "would never have sex with a tampon in" while on her period. (R. at 60). [redacted] did not recall when she inserted her tampon. (R. at 60).

Expert testimony.

At trial, Dr. [redacted], a forensic psychologist, testified about how a person experiencing an alcohol-induced blackout will try to fill memory gaps based on

what they typically *might* do. (R. at 241). Oftentimes, reconstructing the missing pieces of memory and what exactly happened, and finding out through someone else, is not what the blacked out person expects because of the involvement of alcohol. (R. at 242). Not remembering the missing memories can bring on trauma, and [redacted] behavior during her testimony was consistent with being traumatized from a lack of memory. (R. at 241-42).

The expert also testified that people are "notoriously bad" at determining who is or is not intoxicated. (R. at 242). She specifically referred to a study conducted with police officers which showed that, despite being trained at recognizing signs of intoxication in strangers, they are "pretty bad" at estimating blood alcohol levels. (R. at 242). Someone who is drinking would have difficulty estimating another person's level of intoxication. (R. at 242-43).

Closing arguments.

The government's theory at trial was that appellant was a sexual predator that targeted [redacted] (R. at 253). And once appellant and [redacted] were in appellant's room, appellant gave [redacted] more alcohol. (R. at 254). Appellant controlled the situation by telling her to sit up so she would *not* fall asleep. (R. at 264). Government also argued that appellant took [redacted] clothes off, and had sex with her while her tampon is still in. (R. at 254). Afterwards, appellant took [redacted] back to her room, then made a second trip to drop off her hat, underwear, and bra. (R. at

255). Even after the military judge sustained defense's objection about facts not in evidence regarding [redacted] underwear (which was found in [redacted] room, not appellant's), trial counsel continued to argue about the underwear to conclude that appellant must have committed sexual assault. (R. at 255-58).

Further, as proof of [redacted] lack of consent considering her lack of memory over an eight-hour span, the government argued relying on [redacted] adamant personal belief that she *would not* have had sex while on her period, and prior competent use of a tampon. (R. at 259-60).

Then the government focused on portions of appellant's interview and statement, which reflected the definitions provided earlier by SA [redacted]. (R. at 264-65, 267).

In its closing, the defense focused on [redacted] physical acts toward SPC [redacted] SGT [redacted] and appellant.[1] (R. at 266). Also, the defense pointed out the likelihood that, after returning to her room, [redacted] drunkenly inserted a tampon, undressed herself, and went to bed. (R. at 267). There is no evidence that [redacted] had a tampon in during sex or that she left her underwear in his room (and appellant had to bring it back separately). (R. at 267). In fact, the U.S. Army Criminal Investigation Laboratory never tested the tampon or her underwear. (R. at 267).

[1] There is direct evidence of these acts, which technically in their own right are acts of abusive sexual contact *as committed by* [redacted]

Standard of Review

In accordance with Article 66, UCMJ, this court reviews factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

It is not illegal for an intoxicated person, even a *heavily* intoxicated person, to engage in sexual activity. It is also not illegal for *two* heavily intoxicated persons to have sex. It is only illegal if one person is *so* intoxicated that they cannot consent, *and* the other person knew or should have known that. It is solely the government's burden to prove these facts beyond a reasonable doubt.

The test for factual sufficiency is whether the court is itself convinced of appellant's guilt beyond a reasonable doubt. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The court must take a "fresh, impartial look" at the evidence presented at trial and give "no deference to the decision of the trial court on factual sufficiency beyond the admonition in Article 66(c), UCMJ, to take into account the fact that the trial court saw and heard the witnesses." *Id*. The evidence must leave no fair and reasonable hypothesis other than appellant's guilt. *United States v. Billings*, 58 M.J. 861, 869 (Army Ct. Crim. App. 2003).

This Court need not believe appellant to reverse this conviction. It is "not required to determine categorically whether appellant or [the complaining witness's] testimony is true, or even whether their testimony is more likely true

than not." *United States v. Whisenhunt*, ARMY 20170274, 2019 CCA LEXIS 244, at *6 (Army Ct. Crim. App. 3 Jun. 2019) (summ. disp.). Convictions are not reviewed under a "preponderance of the evidence" standard—rather, this Court "may only affirm convictions that we are ourselves convinced have been proven beyond a reasonable doubt." *Id*. If the defense, at trial or on appeal, lays out a scenario that leaves this Court with a fair and rational hypothesis other than guilt, Article 66, UCMJ, mandates this Court *must* set aside and dismiss the findings of guilt. *Id*.

"In sum, to sustain appellant's conviction, [this Court] must find that the government has proven all essential elements and, taken together as a whole, the parcels of proof credibly and coherently demonstrate that appellant is guilty beyond a reasonable doubt." *United States v. Gilchrist*, 61 M.J. 785, 793 (Army Ct. Crim. App. 2005) (*citing United States v. Roukis*, 60 M.J. 925, 930 (Army Ct. Crim. App. 2005)). The term "reasonable doubt" does not mean the evidence must be free from conflict. *United States v. Reed*, 51 M.J. 559, 562 (N-M. Ct. Crim. App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). However, it does mean that the government must prove guilt on every element beyond "an honest, conscientious doubt" and beyond "mere conjecture." Rule for Courts-Martial [R.C.M.] 918c, Discussion.

Mistake of fact is a defense to sexual assault where appellant "held, as a result of ignorance or mistake, an incorrect belief" that the victim consented to the sexual conduct. Rule for Courts-Martial [R.C.M.] 916(j)(1). Appellant's belief must be "both subjectively honest and objectively reasonable under the circumstances." *United States v. Baxter*, 72 M.J. 507, 513 (Army Ct. Crim. App. 2013) (citing *United States v. Jones*, 49 M.J. 85, 91 (C.A.A.F. 1998)). The government has the burden to prove beyond a reasonable doubt that appellant did not have an honest and reasonable mistake of fact as to an alleged victim's consent. R.C.M. 916(b)(1); *United States v. McDonald*, 78 M.J. 376, 379 (C.A.A.F. 2019).

Argument

This case involves two drunk adults having consensual sexual intercourse – which is not a crime. A drunk person can consent to sex. Contrary to the trial counsel's arguments, appellant did not prey on [redacted] On the contrary, throughout the evening, [redacted] flirted with and made sexual advances toward several men, finally arriving at appellant's room. While there, she voluntarily and purposefully participated in sex.

Appellant's conviction is factually insufficient for three reasons. First, multiple eyewitness accounts and CCTV footage of [redacted] flirtatious and physically intimate conduct toward appellant leading up to their sexual intercourse is strong

evidence [redacted] consented or appellant's reasonable belief that she did. Second, because [redacted] completely lacks any memory as to the eight hours prior to her waking up on the morning of 12 July, speculation as to [redacted] lack of consent fails to meet the burden of proof. Third, both appellant and [redacted] had motives to lie about having sexual intercourse, making their statements unreliable.

Strong evidence of consent or a mistake of fact as to consent.

All of the independent, third-party evidence in this case demonstrated [redacted] overt sexual aggression and desire for intimacy with appellant or other soldiers present that night. Multiple witnesses testified being hit on by [redacted] Multiple witnesses saw [redacted] touch and hold appellant in her arms. All of the evidence, including appellant's "admission" to CID, demonstrated that [redacted] either consented to sex, or at the very least interacted with appellant in such a way as to establish an honest and reasonable mistake of fact as to her consent.

Speculation is insufficient circumstantial evidence.

The government produced zero evidence that [redacted] did not, in fact, consent to sex with appellant. Nor did they establish in any way that appellant's belief that [redacted] consented was anything but honest and reasonable, based on the facts and circumstances surrounding the sex. There were no eyewitnesses to the sexual intercourse. Without [redacted] ability to recount the incident *at all*, the government was forced to rely solely on circumstantial evidence to prove that [redacted] did not

consent. As the most important basis of its theory, they tried to use the fact of [redacted] tampon on proof. But [redacted] self-serving insistence that she *would never* have had sex with her tampon in is insufficient. First, this is speculation on her part – describing what she believes she *would* or *would not* do – not an actual memory of what she *did* or *did not* do. [redacted] cannot remember when she put the tampon in. If we take [redacted] at her word, and it were earlier in the afternoon/evening, before the sexual event, it is more likely than not that it would have been before she became intoxicated and she would have been able to remember inserting it. The fact that she cannot strongly indicates that she inserted the tampon, if at all, after the event while still intoxicated. After all, all of the independent third-party evidence indicated that [redacted] was acting out of character all night. Second, the government could have possibly resolved this issue one way or the other had it tested the tampon for the presence of appellant's DNA, but it did not do so.

[redacted] assertions about the tampon raise more questions than answers. Was this tampon inside her at the time of intercourse? What would the government have found if they tested the tampon? How can we trust what [redacted] claims she normally *would have* done, if sober, when she acted so out of character that night? This court cannot answer such questions without moving into an arena of pure speculation.

While [redacted] may not be inclined to have sex while wearing a tampon while sober, she may have been while intoxicated. That an intoxicated person would have consensual intercourse while wearing a tampon is not as far-fetched a notion as government or [redacted] would propose. She may have been so intoxicated that she forgot she was using a tampon. Furthermore, she may have inserted the tampon after the sex, or (as discussed *infra*), she may have lied about the presence of the tampon at all. The tampon's presence, without any forensic testing, does not even prove that they had sex. It certainly does not prove whether [redacted] consented (even if she was drunk), and it does not disprove appellant's honest and reasonable belief that she consented.

Similarly, the presence of [redacted] underwear in *her own* room is likewise not evidence that appellant sexually assaulted [redacted] in *his* room and then tried to cover it up. There was no CCTV footage indicating that appellant transported the underwear or the bra from his room to hers the morning after. The government cannot prove that [redacted] was not wearing these when she returned to her room. Yet, it must insist on speculation to form these conclusions because they desire to explain these details and to depict [redacted] as too impaired to dress and undress herself. A far more likely explanation is that [redacted] able to fully participate in the sex in appellant's room, undressed and dressed herself in preparing to go to sleep in her bed. That

would corroborate the theory that she may have inserted the tampon after returning to her own room.

Married people have motives to lie about cheating on their spouses.

Appellant and his wife, who was his high school sweetheart, were in a loving marriage. (R. at 296). Appellant was a well above-average noncommissioned officer who attained the rank of Staff Sergeant within five years of enlisting. (R. at 307, 353). Multiple witnesses came forwarding during presentencing to speak on appellant's outstanding military record and character. (R. at 307-08, 313, 316, 322, 326, 329, 332, 336, 338). The strongest validation of their testimony comes from the government in their very limited cross-examination of these witnesses.

It is reasonable that appellant, who never had cause to be disciplined or even negatively counseled, would consider cheating on his wife with a junior enlisted Soldier to be a significant and terrible incident, endangering his family and career. On 12 July, after telling his wife about the affair, his first question was whether she wanted a divorce. (R. at 299). Appellant's shame about the adultery and the fraternization overwhelmed him. Being human, he minimized and was not immediately forthcoming about the sexual intercourse. In this case, given his high valuation of his career and family, the panic at his moral failing and actions deriving from such is not proof that he lied about a sexual assault. It is proof that

he is a flawed human being who reacted in a very natural human way. As defense counsel pointed out in closing argument, appellant's consciousness of guilt is *deep* as to his adultery and fraternization. He had, and has, *no* guilt for a sexual assault that did not occur.

[redacted] own motive to lie or reconcile her memory gaps in a dignifying manner similarly stems from her own shame. [redacted] was ordinarily a quiet and introverted person who was also married. [redacted] voluntarily drank a lot of alcohol one night and did many things that would embarrass herself. This embarrassment is amplified by her alleged inability to remember hours of her own behavior. [redacted] then heard about how she "acted a fool" (R. at 144) from a trusted friend the morning after.

That total loss of control and manufactured recollection then became a traumatic experience, and she was unable to face the reality that she did what millions of young people do every weekend: she got drunk and did many things that she might not otherwise do. [redacted] may think twice about having sex with a passing acquaintance while sober. But people frequently do things under the influence of alcohol that they otherwise would not and wished they had not. That is nothing more than "buyer's remorse" or regret, but regret is not proof of a lack of consent. It is just regret, and in some cases such as this, such regret is a strong motive to, at best, fill in the blanks with supposition or, at worst, to fabricate.

Appellant's conviction for sexual assault rests solely on [redacted] regret and her attendant speculation, so this court must set aside the finding of guilty.

II. Whether the military judge erred by failing to instruct that a finding of guilty required a unanimous vote by the members, so that appellant was denied a meaningful opportunity to make a forum selection.

Appellant presents no argument, but raises the issue here for preservation due to the pending status of *United States v. Anderson*, 2022 CAAF LEXIS 529 (C.A.A.F. 2022). *But see United States v. Pritchard,* 2022 CCA LEXIS 349 (Army Ct. Crim. App. 9 June 2022).

Conclusion

WHEREFORE, the appellant respectfully requests this honorable court set aside the finding and sentence.

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Army Court and Government Appellate Division on 27 September 2022.

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