IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**BRIEF ON BEHALF OF APPELLANT**
v.	Docket No. ARMY 20220432
Specialist (E-4) **RODRIGO L. URIETA** United States Army, Appellant	Tried at Fort Stewart, Georgia, on 22 April, 20 July and 22-25 August 2022, before a general court-martial appointed by the Commander, 3d Infantry Division and Fort Stewart, Lieutenant Colonel Albert G. Courie III., Military Judge, presiding.

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

Assignments of Error

I. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY DENYING THE DEFENSE CHALLENGE FOR CAUSE AGAINST [redacted], WHO BELIEVED A SOLDIER WHO HIRED A CIVILIAN DEFENSE COUNSEL DID NOT BELIEVE IN HIS DEFENSE

II. WHETHER APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED WHERE APPELLANT WAS CHARGED WITH COMMITTING SEXUAL ASSAULT AND ABUSIVE SEXUAL CONTACT WITHOUT CONSENT, BUT THE GOVERNMENT EVIDENCE AND THEORY WAS SEXUAL ASSAULT AND ABUSIVE SEXUAL CONTACT WHILE ASLEEP.[1]

[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant personally requests this court consider those matters set forth in the Appendix.

Statement of the Case

On 25 August 2022, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual assault without consent, one specification of abusive sexual contact without consent, and false official statement, in violation of Article 120 and 107 Uniform Code of Military Justice [UCMJ], 10. U.S. C. § 920 and 907. (Statement of Trial Results). The military judge sentenced appellant to eight months confinement and a dishonorable discharge. (Statement of Trial Results). On 14 October 2022, the convening authority approved the adjudged sentence.[2] (Action).

Facts Relevant to Assignment of Error I

During his arraignment, the military judge advised appellant of his right to representation by a civilian defense counsel at no cost to the government. (R. at 4). Appellant hired [redacted] as civilian defense counsel. (R. at 27).

During group voir dire, appellant's defense counsel asked if "anyone here ever heard it said that if a soldier hires civilian defense counsel, it must mean the

[2] The Convening Authority Action incorrectly lists the date waiver of automatic forfeitures began as 25 August 2022. The waiver began on the date of the Entry of Judgment – 14 October 2022.

soldier is guilty?" (R. at 275). Only [redacted] answered in the affirmative. (R. at 275).

The defense requested individual voir dire of [redacted], based in part because "he had some negative impression of civilian defense counsel." (R. at 286). [redacted] believed that "hiring an outside civilian lawyer means that you don't trust your defense very much." (R. at 382). When [redacted] was pressed on whether he would hold appellant's decision to hire civilian defense counsel against his military defense counsel, [redacted] said, "wouldn't hold it against you, no – it's just of perception." [redacted] was sure there is a perception issue with hiring civilian defense counsel. (R. at 382).

[redacted] further explained his attitude regarding civilian defense counsel.

> "In my experience, I have only ever seen people hire civilian counsel after they have already been through the trial and their lawyers had let them down – I wouldn't say let them down. They didn't get the outcome they were looking for, so they went to retrial with a civilian lawyer, instead of a military [defense counsel]."

(R. at 383).

The military judge tried to clarify [redacted]'s statements:

> MJ. You said that you believe that hiring a civilian counsel means that you don't trust your defense very much.
>
> [redacted]. I did.
>
> MJ. When you say, "your defense," do you mean your defense counsel, as in the attorneys? Or do you mean the defense as in the case that you're going to present?
>
> [redacted]. *All of it.*

(emphasis added). (R. 385).

The trial counsel attempted to rehabilitate [redacted], but [redacted] was adamant that when an accused hires a civilian counsel it means the accused does not trust the military justice system. (R. at 386). Even though [redacted] believed civilian counsel's involvement indicated that an accused was guilty and did not trust his military counsel or the military justice system, [redacted] said he would consider only the facts of the case when deciding appellant's guilt or innocence. (R. at 386).

The defense challenged [redacted] for actual and implied bias.[3] Specifically, the defense counsel argued [redacted] "not only would hold [the hiring of civilian defense counsel] against the defense team, he would hold it against the accused

[3] The defense also challenged [redacted] for cause, and the military judge also denied that challenge. (R. at 394). The defense used their sole preemptory challenge on [redacted]. (R. at 401).

having to think that, hey, I don't have a good case, so I'm going to go here and hire this defense counsel and try to change things up." (R. at 398). The defense counsel added, "I don't think any member of the public looking at this hearing, someone say they basically don't think somebody should hire a Civilian Defense Counsel, that they're going to think that [redacted] is open to the evidence that's been presented to him." (R. at 398). The government objected to the challenge for cause, stating "that it is more of a perception that [redacted] believes," but [redacted] had said he would not take that belief with him into deliberations. (R. at 398-99).

The military judge denied the motion.

> "The challenge is denied. My notes are also that, when pressed on it, he said – considered what the government said – it was an outside perception that he believes that the public or others have, not that he personally holds that perception. And when specifically asked if he would hold it in any way against the accused, he said, not at all, he would just look at the facts of the case."

(R. at 399).

After the defense announced they had no other challenges, the military judge offered the blanket statement, "I did consider the liberal grant mandate in

all of those when I considered both the actual and implied bias of each of the challenges." (R. at 400).

Standard of Review

Appellate courts generally review a military judge's ruling on a challenge for cause for an abuse of discretion. *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002). However, implied bias challenges are reviewed "pursuant to a standard that is less deferential than abuse of discretion, but more deferential than de novo review." *United States v. Dockery*, 76 M.J. 91, 96 (C.A.A.F. 2017). "Less deference is given to the military judge's determination when this Court is reviewing a finding on implied bias because it is objectively 'viewed through the eyes of the public.'" *United States v. Napolitano*, 53 M.J. 162, 166 (C.A.A.F. 2000) (quoting *United States v. Warden*, 51 M.J. 78, 81 (C.A.A.F. 1999)).

While a "military judge's ruling on a challenge for cause is given great deference," that deference may be afforded to a greater or lesser degree based on the reasoning the military judge puts on the record. *Dockery*, 76 M.J. at 96 (quoting *United States v. Rolle*, 53 M.J. 187, 191 (C.A.A.F. 2000)). The C.A.A.F. has repeatedly noted that "[a]lthough it is not required for a military judge to place his or her implied bias analysis on the record, doing so is highly favored and

warrants increased deference from appellate courts." *Id*. (quoting *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007)).

This analysis need not amount to a "dissertation," but should contain something more than "a mere incantation of the legal test for implied bias without analysis . . . ." *Dockery*, 76 M.J. at 96 (quoting *Clay*, 64 M.J at 277 and *United States v. Peters*, 74 M.J. 31, 34 (C.A.A.F. 2015)) (internal quotation marks omitted). Accordingly, the military judge is entitled to more deference if his reasoning is in the record. *Downing*, 56 M.J. at 422. However, if a military judge fails to "perform an implied bias analysis on the record, [appellate courts'] review of [his or] her analysis will move more toward a de novo standard of review." *United States v. Rogers*, 75 M.J. 270, 273 (C.A.A.F. 2016).

Recently, this court found the standard of review is closer to de novo when the military judge defines implied bias, but the analysis only considers actual bias. *United States v. Hernandez*, 2022 CCA LEXIS 529, at *14 (Army Ct. Crim. App. 2022)(mem. op.)

Law

"As 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. Commisso*, 76

M.J. 315, 321 (C.A.A.F. 2017) (internal quotations omitted) (quoting *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001)). This constitutional right to impartial court-members is "*sine qua non* for a fair court-martial." *United States v. Modesto*, 43 M.J. 315, 318 (C.A.A.F. 1995).

"Actual bias is personal bias that will not yield to the military judge's instructions and the evidence presented at trial." *United States v. Woods*, 74 M.J. 238, 243 (C.A.A.F. 2015) (citing *United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2012)). Rule for Court Martial [R.C.M.] 912(f)(1)(N) sets the basis for an implied bias challenge. "Implied bias exists when most people in the same position as the court member would be prejudiced." *United States v. Elfayoumi*, 66 M.J. 354, 356 (C.A.A.F. 2008). Differing from the test for actual bias, appellate courts apply an objective standard in determining whether implied bias exists. *Dockery*, 76 M.J. at 96; *Peters*, 74 M.J. at 34. "The core of that objective test is the consideration of the public's perception of fairness in having a particular member as part of the court-martial panel." *Peters*, 74 M.J. at 34.

In determining whether a prospective panel member is impliedly biased, or holding a "perception or appearance of fairness of the military justice system," *United States v. Dale*, 42 M.J. 384, 386 (C.A.A.F. 1995), appellate courts look to

the totality of the factual circumstances. *United States v. Bragg*, 66 M.J. 325, 327 (C.A.A.F. 2008) (citing *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004)). "The core of that objective test is the consideration of the public's perception of fairness in having a particular member as part of the court-martial panel." *Dockery*, 76 M.J. at 96 (quoting *United States v. Peters*, 74 M.J. 31, 34 (C.A.A.F. 2015)). Furthermore, military judges are *mandated* to err on the side of granting a challenge. *Peters*, 74 M.J. at 35. (stating "this mandate stems from a long-standing recognition of certain unique elements of the military justice system including limited peremptory rights and the manner of appointment of court-martial members [that] presents perils that are not encountered elsewhere"). Put differently, the liberal grant mandate commands military judges that if it is even a close question, the challenge must be granted. *Id*. The mere "[i]ncantation of the legal test [for implied bias] without analysis is rarely sufficient in a close case." *Dockery*, 76 M.J. 91, 96.

A military judge further errs when a panel member holds a misunderstanding of the law and those misunderstandings go uncorrected by the military judge. *See Hernandez*, 2022 CCA LEXIS 529, at *16-17.

Where the military judge fails to apply the liberal grant mandate and denies an implied bias challenge in a "close case," such error prejudices an appellant's substantial right to an impartial trial and mandates reversal under Article 59(a), UCMJ, without any requirement for the accused to demonstrate prejudice. *United States v. Clay*, 64 M.J. 274, 278 (C.A.A.F 2007) (holding that the military judge abused his discretion by "not applying the liberal grant mandate" to the challenge, with no requirement of a showing of prejudice).

Argument

In a system with only one peremptory challenge available to an accused, the liberal grant mandate exists to ensure that panel members, selected by the convening authority, are wholly free of actual or implied bias. A panel member believing that only a guilty person hires a civilian defense attorney denies an accused the presumption of innocence as well as his statutory right to be represented by counsel of his choosing.

[redacted] was actually and impliedly biased. The military judge abused his discretion by denying the challenge for cause against him for three reasons. Let's briefly discuss three reasons. First, the military judge conducted almost no analysis. In fact, the military judge's entire analysis was the

bare conclusion that "*when pressed*" he believed [redacted] would not personally hold appellant's decision to hire a civilian attorney against appellant. (R. at 399) (emphasis added).

[redacted] had an actual and implied bias against individuals who hire civilian defense counsel. When the military judge provided the opportunity to [redacted] to walk back his concerns about civilian counsel involvement, [redacted] did just the opposite. He doubled down, saying not only hiring civilian counsel indicates a soldier doesn't trust his defense attorneys, but also that he doesn't believe he has a defense. He did not equivocate. He said he meant "*All of it."* (R. at 385) (emphasis added).

The military judge never disabused [redacted] of his flawed reasoning. He never firmly instructed [redacted] that he may not hold appellant's decision to retain civilian counsel against him. *Hernandez*, 2022 CCA LEXIS 529, at *16-17. Because he failed to do so, and because he wholly accepted [redacted]'s bare conclusion that he would only consider the evidence presented, this court must "move more toward a de novo standard of review." *Rogers*, 75 at 273.

The military judge did exactly what the Court of Appeals of the Armed Forces cautioned against in *Dockery*, 76 M.J. at 96. He gave nothing more than "a

mere incantation of the legal test for implied bias without analysis . . . ." *Dockery*, 76 M.J. at 96. In fact, the implied bias analysis was limited to an after-the-fact, cover-your-bases announcement that he considered the liberal grant mandate for all the defense's challenges for cause. (R. at 400). The military judge failed to conduct any implied bias analysis specific to the challenge to [redacted].

Finally, the military judge failed to sufficiently analyze the "effect the panel member's presence will have on the public's perception of whether the appellant's trial was fair." *Peters,* 74 M.J. at 35. To the extent there was any analysis, it focused almost entirely on [redacted]'s *actual* bias and whether he personally held a false perception about civilian attorneys. (R. at 399)

The liberal grant mandate is a mandate, not a mere suggestion or preference. On a number of occasions, military appellate courts have reminded military judges that any challenge that is a "close call" must be granted. *See e.g. Peters*, 74 M.J. at 37 (finding the military judge abused his discretion by not erring "on the side of caution" by granting a challenge to a panel member who had a close working relationship with the trial counsel); *Woods*, 74 M.J. at 245 (finding the challenge against a panel member who expressed beliefs contrary to the law was "at minimum, a close question," and setting aside the findings and sentence).

Here, whether [redacted] was actually or impliedly biased was at best a "close call." [redacted] had a negative impression of civilian defense counsel. He equivocated, saying he didn't "*think* [hiring civilian counsel] is an admission of guilt," but "it is *unusual to me*." (R. at 385-86) (emphasis added). A panel member cannot sit when he believes an accused exercising his right to retain civilian counsel is "unusual," and believes there is a perception the accused is only hiring civilian counsel because he is guilty. The military judge had the opportunity to correct [redacted]'s flawed beliefs but failed to do so. The military judge should have firmly instructed [redacted] that not only is it not unusual to hire civilian counsel, but it is his right and cannot be used against him. *Hernandez*, 2022 CCA LEXIS 529, *16-17.

By ignoring the liberal grant mandate, the military judge abused his discretion. No prejudice analysis is required. *Clay*, 64 M.J. at 277. This court must set aside appellant's convictions and the sentence.

II. WHETHER APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED WHERE APPELLANT WAS CHARGED WITH COMMITTING SEXUAL ASSAULT AND ABUSIVE SEXUAL CONTACT WITHOUT CONSENT, BUT THE GOVERNMENT EVIDENCE AND THEORY WAS SEXUAL ASSAULT AND ABUSIVE SEXUAL CONTACT WHILE ASLEEP

Facts Relevant to Assignment of Error II

In Specifications 1 and 2 of Charge I, appellant is accused of sexual acts against [redacted] without the consent of [redacted]. (Charge Sheet).

In its opening statement, the government promised the panel it would hear "everything was fine until she decided to go to sleep." (R. at 407). The trial counsel continued, "We are here because the accused groped [redacted] while she was sleeping, penetrated her vagina with his finger while she was sleeping, and put his penis in her vagina while she was sleeping, after she told him to stop."

[redacted] testified that each sexual act happened while she was asleep. (R. at 422 – 425). The government introduced a statement from appellant, "I tried to insert my penis at least three times while she was asleep." (Pros Ex. 3).

At closing, the government argued both [redacted] and appellant agreed that [redacted] was asleep when the sexual acts occurred. (R. at 625-26). They focused on the instruction "a sleeping person cannot consent. They can't they're asleep. . . ." (R. at 628).

Before findings trial defense counsel asked the military judge to provide an instruction which would account for the difference between the way the case was charged – without consent, and the way the government sought to prove their case – that [redacted] was asleep. (R. at 586). The defense sought an instruction which

would inform the panel that if his mistake of fact defense as to [redacted] being awake was reasonable then he is not guilty of the offense. (R. at 586-87). The government objected, claiming "the defense [wa]s trying to create a new defense to this charged offense. Reasonable belief she was awake is not enough." (R. at 587).

Ultimately, the military judge instructed the panel:

> A sleeping, unconscious, or incompetent person cannot consent. All the surrounding circumstances are to be considered in determining whether a person gave consent. The evidence has raised the issue of where the [redacted] consented to the sexual conduct listed in Specifications 1, 2, and 3 of Charge I. All of the evidence concerning consent to the sexual conduct is relevant and must be considered in determining whether the government has proven the elements of the offense beyond a reasonable doubt. Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven every element of the offenses.
>
> The evidence has raised the issue of mistake of fact in relation to the offenses of sexual assault and abusive sexual contact as alleged and Specifications 1, 2 and 3 of Charge I. There has been evidence tending to show that, at the time of the alleged offenses, the accused mistakenly believed [redacted] consented to the sexual conduct alleged concerning these offenses, if you believe that [redacted] was asleep during any of the alleged sexual conduct. There has been also been [sic] evidence tending to show

> that, at the time of the alleged offenses, the accused mistakenly believed [ ] was awake. Mistake of fact is a defense to those charged offenses. (R. at 613-614).

Law and Argument

"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. The Due Process Clause of the Fifth Amendment also does not permit convicting an accused of an offense with which he has not been charged." *United States v. Tunstall*, 72 M.J. 191, 192 (C.A.A.F. 2013). In accordance with the Fifth and Sixth Amendments, "each specification will be found constitutionally sufficient only if it alleges, 'either expressly or by necessary implication,' 'every element' of the offense, 'so as to give the accused notice [of the charge against which he must defend] and protect him against double jeopardy.'" *United States v. Turner*, 79 M.J. 401, 403 (C.A.A.F. 2020) (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)).

Not consenting and being incapable of consenting due to being asleep are two separate and distinct legal concepts. Sexual assault without consent criminalizes committing a sexual act upon another person "without the consent of the other person." Article 120(b)(2)(A), UCMJ. Sexual assault while asleep

criminalizes a sexual act upon another person "when the other person is asleep, unconscious or otherwise unaware, and that the accused knows or should have known the person was asleep. Article 120(b)(2)(B), UCMJ.

In *Riggins*, the Court of Appeals for the Armed Forces warned that the government's requirement to prove a set of facts that resulted in an alleged victim's legal inability to consent was *not* the equivalent of the government bearing the responsibility to prove the alleged victim did not, *in fact*, consent. *United States v. Riggins*, 75 M.J. 78, 84 (C.A.A.F. 2016).

To prove sexual assault without consent, the government was required to show 1) appellant committed a sexual act upon [redacted]; and 2) appellant did so without the consent of [redacted]. 10. U.S.C. § 920(b)(2)(a). The government did not charge, and therefore did not notify appellant, of an offense of sexual assault while asleep. This uncharged offense would require the government to prove: 1) appellant committed a sexual act upon [redacted]; 2) [redacted] was asleep when appellant did the sexual act; and 3) appellant knew or reasonably should have known [redacted] was asleep during the sexual act. 10. U.S.C. § 920(b)(2)(b).

In *Roe*, this court concluded Roe's due process rights were not violated under similar circumstances. *United States v. Roe*, ARMY 20200144, 2022 CCA

LEXIS 248, at *14 (Army Ct. Crim. App. 27 Apr. 2022) (mem. op.). The majority, over a dissent from Senior Judge Walker, found charging *without consent* does not preclude the government from introducing intoxication evidence as circumstantial evidence of the lack of actual consent. *Id*. at 16. However, the majority deferred on deciding whether *without consent* "can be proved *solely* through showing an inability to consent because of intoxication or some other reason." *Id*. at 17 (emphasis in original).

Finding the government's presentation of its case and theory focused on intoxication and lack of memory of the victim, [redacted] found a due process violation because:

> sexual assault charged by lack of consent requires affirmative proof of lack of consent beyond any evidence of a legal inability to consent. To hold otherwise renders the other theories of liabilities outlined in Article 120, UCMJ, as merely superfluous, would eviscerate the need for any other theories of liability, and runs contrary to our superior court precedent.

Id. at 26, 29 (citing *United States v. Sager*, 76 M.J. 158 (C.A.A.F. 2017)) (Walker, J., dissenting).

Further, the mistake of fact instruction issued by the military judge in appellant's case compounded this error. (R. at 614). The government should have

been required to prove all elements of sexual assault on someone who is asleep beyond a reasonable doubt. The instruction "*if* you believe [redacted] was asleep" (R. at 614) (emphasis added) lowered the burden of proof for the government from mandatory to discretionary. It took a required element – that appellant reasonably should have known [redacted] was asleep – and turned it into a mere mistake of fact defense.

This erroneous permissive instruction is similar to the error in *Prather*, where the instructions on the "affirmative defense of consent" unconstitutionally shifted the burden to the defense.

> [T]he instruction the military judge provided on how the panel should treat the evidence of the affirmative defense, we note that military judge instructed the panel that they "*may"* consider the evidence "*if they found it relevant*." This permissive instruction is inconsistent with both *Martin* and *Neal,* which held that where there is an overlap between the evidence pertinent to an affirmative defense and evidence negating the prosecution's case, there is no due process violation when instructions: "convey to the jury that all of the evidence, including the evidence going to [the affirmative defense], *must* be considered in deciding whether there was a reasonable doubt about the sufficiency of the State's proof of the elements of the crime.

United States v. Prather, 69 M.J. 338, 344 (C.A.A.F. 2011) (citing *United States v. Neal*, 68 M.J. at 299 (C.A.A.F 2010) (quoting *Martin v. Ohio*, 480 U.S. 228, 234

(1987)) (emphasis supplied). The instruction here did not *clearly convey* to the members that they *must* decide if [redacted] was awake or asleep. Rather than mandate the panel conclusively decide the issue, the instruction allowed them to decide if that fact was important or not. The military judge's instruction failed to cure the unconstitutional burden shift to appellant.

This court should find charging appellant with sexual assault *without consent* but relying on evidence of [redacted] being *asleep* violated appellant's due process rights. Both the majority and dissent in *Roe* agree that the government bears the burden to affirmatively prove the victim did not consent for a charge of sexual assault *without consent*. Unlike in *Roe,* however, the evidence of [redacted] being asleep does not circumstantially support a finding of affirmative non-consent. Instead, the government proceeded throughout trial on the theory that [redacted] did not consent because she was asleep, and therefore, the charged sexual act was implicitly without consent. This tactic, in the context of appellant's case, resulted in appellant's conviction without the government having to prove affirmative non-consent or the additional knowledge element for asleep, unconscious or otherwise unaware.

The government prosecuted appellant on an uncharged theory that the alleged victim was asleep, but the government only notified appellant of actual, affirmative non-consent. As a result, this violated appellant's due process right to fair notice.

Conclusion

Wherefore, appellant respectfully requests this Court provide the relief requested.

[redacted]

MATTHEW S. FIELDS
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division

[redacted]

MITCHELL D. HERNIAK
Major, Judge Advocate
Branch Chief
Defense Appellate Division

[redacted]

AUTUMN R. PORTER
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division

[redacted]

PHILIP S. STATEN
Colonel, Judge Advocate
Chief
Defense Appellate Division

APPENDIX

Appendix: Matters Submitted Pursuant to *United States v. Grostefon*

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

1. Whether appellant's admissions in Prosecution Exhibit 3, 4 and 6 were obtained through coercive tactics in violation of the Fifth Amendment to the United States Constitution's prohibition on self- incrimination.
2. Whether the military judge abused his discretion by allowing [redacted] to testify about other men she often had in her room in violation of Mil. R. Evid. 412. (R. at 421)
3. Whether the findings are fatally ambiguous because the military judge had to correct the panel president three times the findings were not in the proper order. It is unclear from the record what the panel originally intended to find appellant guilty or not guilty of. (R. at 653-656).
4. Whether the evidence is legally and factually sufficient, considering [redacted] continued to go back to sleep each time appellant allegedly assaulted her. She did not kick appellant out of the room nor was she angry with appellant.

The text day she texted appellant to hang out. This is not the behavior indicative of a person who was sexually assaulted.

5. Whether Appellant was denied the right to a unanimous verdict

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on August 2, 2023.

[redacted]

MICHELLE L.W. SURRATT
Paralegal Specialist
Defense Appellate Division
[redacted]