IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	Docket No. ARMY 20230655
Specialist (E-4) **MARIANO J. ROSENDO,** United States Army, Appellant	Tried at Fort Carson, Colorado, on 21 February, 28 June, and 11-13 December 2023, before a general court-martial appointed by the Commander, Headquarters, Fort Carson, Colonel Jacqueline L. Emanuel, Colonel Gregory R. Bockin, military judges, presiding.

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

Assignment of Error I

WHETHER APPELANT'S CONVICTION IS FACTUALLY SUFFICIENT

Argument

Appellant does not merely "disagree" with the verdict, but rather has provided this Court with specific evidence (or lack of) that shows a deficiency of proof. (Gov't Br. 10).

A. [redacted] Was an Active Participant

The government has argued that [redacted] was "not an active participant" (Gov't Br. 9), yet Prosecution Exhibit 3 and statements from other participants specifically show [redacted] consensually engaging with appellant in sexual

activities. While this Court must give "appropriate deference" to the fact finder under Article 66, it may also look to other evidence adduced at trial to weigh against a witness's credibility (and give no deference to the fact finder when it comes to physical evidence like photos). *United States v. Harvey,* 85 M.J. 127, 129 (C.A.A.F. 2024). This is precisely the type of case that Article 66 contemplates – a witness's testimony was directly controverted by picture-proof. The photos introduced in Prosecution Exhibit 3 explicitly minimize [redacted] credibility as to how she described the events. As such, her testimony should be given no deference by this Court.

[redacted] did not merely "pretend to be asleep" and have her jaw "opened" by appellant (R. at 209) as she testified; rather, the photos show *she* placed her hand on appellant's genitals. Rarely, if ever, does this Court have photo proof of the sexual congress later claimed to be assault. But in this case, this Court has such evidence. Therefore, this Court can give full weight to the photographic evidence and specifically see that [redacted] testimony that she was pretending to be asleep is categorically false.

And while the government relies heavily on the notion that [redacted] outcries corroborate her version of events (Gov't Br. 11-12), the argument is misplaced. Based on the photos, it is apparent that the corroboration is only to her

own inconsistent testimony – not the truth. What is corroborated is appellant's version of events, done so by the statements of [redacted] and [redacted]. That version is consistent with the photo proof.

B. Mistake of Fact

Further, the government did not disprove appellant's mistake of fact defense. The photos show appellant's reasonable and objective mistake of fact as to consent. While the government may not subjectively understand appellant's mindset, that does not mean that the government disproved appellant's mistake of fact beyond a reasonable doubt.

It is not a fanciful reason how appellant came to believe [redacted] wanted to engage in sex. He was informed by his friend that [redacted] wanted the group sexual encounter, he walked in on another friend already engaged in sex with her, [redacted] appeared to be fully participating in that encounter, [redacted] moved positions on her own accord and was not "asleep" on her back, and when appellant approached [redacted], she placed her hands on appellant's genitals. (Pros. Exs. 3, 5).

Rule for Courts-Martial 916 is clear that a full defense to sexual assault is a mistake or ignorance, so long as that mistake is reasonable. The government must prove beyond a reasonable doubt that appellant's mistake of fact was not

reasonable. The government failed to do so. Appellant was under the reasonable belief, based on the surrounding circumstances and [redacted] observable conduct, that [redacted] was willingly engaged in—and willing to continue to engage in—consensual sex. For both reasons, appellant's conviction is factually insufficient.

Assignment of Error II

WHETHER THE MILITARY JUDGE ERRED BY NOT AWARDING ADDITIONAL CONFINEMENT CREDIT

Argument

The military judge did not place detailed findings on the record, as such, he is afforded minimal deference as to his ruling that appellant was not improperly confined between the announcement of findings and sentence. *United States v. Finch,* 79 M.J. 389, 397 (C.A.A.F. 2020).

A. Command's Actions Were Illegal Pre-Trial Punishment

What was agreed upon by all parties, including the military judge, was that appellant was in confinement, as he was given one day of *Allen* credit. (R. at 469; Gov't Br. 21-29). But at no point did the government at trial provide a reason, supported by evidence, that amounted to a non-punitive reason to place appellant in confinement at the Provost Marshall's Office [PMO]. The commander merely relied on the vague notions of appellant's "safety" and that a finding had been adjudged. (R. at 455).

The commander could not point to any evidence that appellant was a danger to himself or the community. Rather he relied on an anecdote about another Soldier who previously committed suicide off-post, but it was not even in regard to a court-martial. Rather, that Soldier was going to in-patient treatment (i.e. mental health concerns). (R. at 456). Nor could the commander provide evidence that appellant would commit serious misconduct or that he would abscond (R. at 457) – a finding of at least one of those pre-requisites is a requirement for pre-trial confinement pursuant to R.C.M. 305. In fact, appellant had freely and willingly appeared at every stage of the court-martial. Given the lack of evidence to support the commander's decision to place appellant in the detention cell – essentially a locked cage (R. at 452-53) – this Court should find an intent to punish.

The reliance on the court-martial's finding of guilt to put appellant in confinement also belies an intent to punish. No sentence had yet been adjudged. No minimum sentence was required in this case. Most certainly this Court would find punishment by the command should appellant have been placed in confinement and the court-martial later adjudged no confinement. The same could be said had the command immediately ripped appellant's rank from his uniform if no rank reduction had been adjudged. Or for example, immediately withheld pay but no forfeitures were then adjudged. Any punishment, prior to the

announcement of sentence, is improper. This Court should find illegal pre-trial punishment pursuant to Article 13.

B. Rule for Court-Martial 305(k) Still Applies

While appellant maintains this Court should find an intent to punish under Article 13 as the battalion commander provided no legitimate reason to confine appellant, this Court can still find the military judge abused his discretion in not awarding appellant credit under Rule for Courts-Martial [R.C.M.] 305(k). Where a commander confined an appellant between findings and sentencing without justification, the CAAF has upheld a ten-for-one credit. *United States v. Tilghman,* 44 M.J. 493, 495 (C.A.A.F. 1996). In *Tilghman,* the military judge awarded appellant twenty days of credit for appellant's overnight placement in confinement pursuant to R.C.M. 305(k). The same applies here – appellant should be awarded twenty days of credit under the crediting scheme upheld in *Tilghman,* as he spent the evening of 12 December and the morning of 13 December in confinement.

Conclusion

Wherefore, this Court should set aside the findings and the sentence. In the alternative, this Court should award additional confinement credit.

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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 7 November 2025.



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