No. _____

IN THE

Supreme Court of the United States

JONATHAN T. DANIEL,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Ballew v. Georgia*, 435 U.S. 223, 98 S.Ct. 1029 (1978), this Honorable Court ruled that the Fourteenth Amendment was offended when the State of Georgia permitted criminal defendants facing misdemeanor charges to be tried by a jury of five members, even though the verdict was required to be unanimous. This Court explained that as panels get smaller, they begin to suffer from a myriad of structural barriers which render their decisions unreliable. *Id.*, 435 U.S. at 232-36, 98 S.Ct. at 1035-37. The following year, in *Burch v. Louisiana*, 441 U.S. 130, 99 S.Ct. 1623 (1979), this Court expounded upon *Ballew* and ruled that "the additional authorization of nonunanimous verdicts" amplifies the problem of small panels to the point that even a six-member jury could offend the Constitution. *Burch*, 441 U.S. at 139, 99 S.Ct. at 1628.

The question presented is whether all federal criminal courts should be bound by the *Ballew* and *Burch* holdings, consistent with the preference for civilian standards of due process and modern efforts to align military judicial processes with those employed by the Article III courts. Was Petitioner denied due process of law under the Fifth Amendment when he was tried by a court-martial consisting of six members who were not required to be unanimous in their verdict?

CITATION TO REPORTS OF OPINIONS BELOW

The United States Court of Appeals for the Armed Forces granted review and summarily affirmed the United States Air Force Court of Criminal Appeals at *United States v. Daniel*, No. 14-0638/AF, 2014 CAAF LEXIS 911 (C.A.A.F. 5 September 2014). The unpublished decision of the Air Force Court is available at *United States v. Daniel*, No. ACM 38322, 2014 CCA LEXIS 224 (A.F.C.C.A. 1 April 2014). The unpublished Report of the Result of Trial for the general court-martial is located in Volume 1 of the Record of Trial.

JURISDICTION

The Court of Appeals for the Armed Forces granted review and affirmed on 5 September 2014 (amended order dated 9 September 2014). This Court has jurisdiction under 10 U.S.C. § 867a (1994).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix reproduces the Constitution's Rules for the Government of Land and Naval Forces clause (U.S. Const. Art. I § 8 cl. 14) and the Due Process Clause (U.S. Const. Amend. V). Also reproduced are federal statutes regarding the number of members required for a court-martial (10 U.S.C. § 816 (2001)), qualifications to serve as a member (10 U.S.C. § 825 (1986)), and number of votes required to convict (10 U.S.C. § 852 (1968)).

STATEMENT OF THE CASE

On 22-25 January 2013, Petitioner was tried by a panel of six members at Altus Air Force Base,

Oklahoma. R. 8.1-8.4, 159. The court was convened under 10 U.S.C. § 822(a) (2006) and exercised jurisdiction under 10 U.S.C. § 802(a)(1) (2009). Petitioner was convicted, contrary to his plea, of one allegation of abusive sexual contact upon a sleeping person in violation of 10 U.S.C. § 920 (2011). He was acquitted of sexual assault alleged to be in violation of the same statute and against the same person during the same course of conduct. R. 8.1-8.4, 48, 650. He was sentenced to reduction to the lowest enlisted grade, 12 months of confinement, and a dishonorable discharge. R. 706. On 22 March 2013 the convening authority approved the findings and sentence. Action, Record of Trial, Volume 5.

Petitioner was accused of assaulting LMK by touching her inner thigh with his penis and digitally penetrating her vagina, in one course of conduct, as she slept in a hotel room in Oklahoma City, Oklahoma, on 15 July 2012. R. 226-43, 277-81, 304-05, 307. LMK's testimony was the only direct evidence. The members were shown that LMK's in-trial testimony concerning where Petitioner's penis touched her body differed substantively from statements she made to responding police officers and witnesses (R. 304, 307, 375, 395), and from a third variation she testified to at the pretrial hearing (R. 277-81). The members also heard testimony from two other individuals who were in the hotel room with LMK and Petitioner during the alleged offense, but witnessed no contact between them. R. 226-43.

During findings deliberations, the members requested and received instructions for reconsidering their verdict. R. 646. The panel acquitted Petitioner of the digital penetration allegation but convicted

him of touching LMK's inner thigh with his penis. R. 650.

REASONS FOR GRANTING THE PETITION

The Air Force Court ruled that this Court's decisions in *Burch* and *Ballew*, concerning the required size and unanimity of juries, were inapplicable to the military jurisdiction. *Daniel*, 2014 CCA LEXIS 224, 10. The United States Court of Appeals for the Armed Forces granted review and summarily affirmed. *Daniel*, 2014 CAAF LEXIS 911. As such, "a United States court of appeals has decided an important issue of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c), Rules of the Supreme Court of the United States (2013).

Further, this Court should settle the question presented because non-unanimous convictions by court-martial panels of six are likely to recur. 10 U.S.C. § 816 permits convening authorities to detail as few as three members to a special court-martial. In deciding whom to detail, 10 U.S.C. § 825 does not require convening authorities to consider the total number of members detailed. Finally, per 10 U.S.C. § 852, a 2/3 majority vote will sustain a conviction in non-capital cases. Convening authorities are thus statutorily permitted to ignore *Ballew* and *Burch*.

ARGUMENT

This Court has settled that a six-member jury's verdict is constitutional only if it is also required to be unanimous. *Burch*, 441 U.S. 130, 99 S.Ct. 1623. Had prosecutors elected to try this case

in any American jurisdiction other than a trial by court-martial, then that rule would have had unquestionable and absolute effect. The due process-based reasons for the rule were explained by this Court in detail in *Ballew*, 435 U.S. 223, 98 S.Ct. 1029. Empirical data regarding group dynamics proves that progressively smaller juries are "less likely to foster effective group deliberation" and are prone to "inaccurate fact-finding and incorrect application of the common sense of the community to the facts." *Id.*, 435 U.S. at 232, 98 S.Ct. at 1035.

Additionally, individual members in smaller panels are "less likely . . . to make critical contributions necessary for the solution of a given problem," and "as juries decrease in size . . . they are less likely to have members who remember each of the important pieces of evidence or argument." *Id.*, 435 U.S. at 233, 98 S.Ct. at 1035. Further, "the smaller the group, the less likely it is to overcome the biases of its members to obtain an accurate result." *Id.* In contrast, larger panels benefit from "increased motivation and self-criticism." *Id.*

Also, "statistical studies suggest that the risk of convicting an innocent person . . . rises as the size of the jury diminishes." *Id.*, 435 U.S. at 234, 98 S.Ct. at 1036. "[T]he data suggest that the verdicts of jury deliberation in criminal cases will vary as juries become smaller, and that the variance amounts to an imbalance to the detriment of one side, the defense." *Id.*, 435 U.S. at 236, 98 S.Ct. at 1037.

The above *Ballew* due process concerns with small group decision-making led to the rule in *Burch*: a six member criminal verdict is too unreliable to be trusted unless it is also required to be unanimous.

No jurisdiction is inoculated from the *Ballew* infirmities which naturally plague small groups, and, per *Burch*, are amplified without unanimity. Therefore, the military should not exempted from the due process-based *Burch* requirement of unanimity for six-member panels.

In disregarding *Burch* and *Ballew*, the Air Force Court relied upon Congress' power to govern and regulate the land and naval forces (U.S. Const. Art. I § 8 cl. 14). *Daniel*, 2014 CCA LEXIS 224, 10. The court failed to acknowledge that "Congress itself in the exercise of the war power is subject to constitutional limitations. It is therefore not freed from the requirements of due process of the Fifth Amendment." *Burns v. Wilson*, 346 U.S. 137, 149, 73 S.Ct. 1045, 1052, (1953). "In determining whether the Due Process Clause requires [a six member court-martial panel to be unanimous, this Court should ask] whether the factors militating in favor of [such] are so extraordinarily weighty as to overcome the balance struck by Congress [between the rights of service members and the needs of the military]." *Weiss v. United States*, 510 US 163, 178, 114 S. Ct. 752, 761 (1994).

There are few, if any, factors which could be considered more extraordinarily weighty to an accused – or to a system of justice – than having a reliable fact-finder determine guilt. A trial before an unreliable fact-finder is not a fair trial. In turn, "[i]t is elementary that a fair trial in a fair tribunal is a basic requirement of due process." *Id*, 510 U.S. at 178, 114 S. Ct. at 761. There are no correspondingly weighty government interests present justifying denial of such "a basic requirement of due process" as

a reliable fact-finder. Even if forcing an accused to endure the *Ballew* infirmities could be justified in another case by unconquerable military exigencies, such is not true here. There was no armed conflict in Oklahoma at the time of trial, and there was nothing uniquely military about the offenses Petitioner was accused of committing.

CONCLUSION

Accordingly, Petitioner prays this Honorable Court grant this petition for a writ of certiorari.

Very Respectfully Submitted,

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APPENDIX A

United States Court of Appeals
for the Armed Forces
Washington, D.C.

UNITED STATES, Appellee
v.
Jonathan T. DANIEL, Appellant

USCA Dkt. No. 14-0638/AF
Crim.App. No. 38322

ORDER

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is, by the Court, this 5th day of September, 2014, ORDERED:

That said petition is hereby granted; and,

That the decision of the United States Air Force Court of Criminal Appeals is affirmed.*

For the Court,

/s/ William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (SHURE)
Appellate Government Counsel (BRUCE, Esq.)

*It is noted that the military judge neglected to seal the portion of the record and the exhibits pertinent to an MRE 412 closed hearing. Accordingly, the Clerk

is directed to seal Appellate Exhibits I-IV and pages 11-46 of the transcript.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES
v.
Senior Airman JONATHAN T. DANIEL
United States Air Force

ACM 38322

01 April 2014

Sentence adjudged 25 January 2013 by GCM convened at Altus Air Force Base, Oklahoma. Military Judge: J. Wesley Moore.

Approved Sentence: Dishonorable discharge, confinement for 12 months, and reduction to E-1.

Appellate Cousnel for the Appellant: Captain Isaac C. Kennen.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; and Gerald R. Bruce, Esquire.

Before

HELGET, WEBER, and MITCHELL
Appellate Military Judges

OPINION OF THE COURT

HELGET, Senior Judge:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of one specification of abusive sexual contact, in violation of Article 120, UCMJ, 10 U.S.C. § 920.[1] The members sentenced the appellant to a dishonorable discharge, confinement for 12 months, and reduction to E-1. The convening authority approved the adjudged sentence.

Before this Court, the appellant raises two assignments of error: (1) Whether the Government violated the appellant's Fifth Amendment[2] right to due process of law by prosecuting him before a court-martial panel of six members whose verdict did not have to be unanimous; and (2) Whether the evidence at trial was factually and legally sufficient to prove the conviction beyond a reasonable doubt. Finding no error that materially prejudices a substantial right of the appellant, we affirm.

Background

On 14 July 2012, the victim in this case, Staff Sergeant (SSgt) LK, and her friend, SSgt JM, who were both assigned to Altus Air Force Base,

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[1] Consistent with his pleas, the appellant was found not guilty of one specification of sexual assault, in violation of Article 120, UCMJ, 10 U.S.C. § 920.
[2] U.S. Const. amend. V.

Oklahoma, decided to go to Oklahoma City to spend a night out on the town. SSgt LK had previously planned that they would meet up with Senior Airman (SrA) RM, who was one of her male friends.

Shortly after checking into their hotel room, at approximately 1600, SSgt LK and SSgt JM went to SrA RM's room, which by coincidence ended up being just across the hall. Upon entering SrA RM's room, SSgt LK and SSgt JM were introduced to the appellant and Airman First Class (A1C) CB, who were staying with SrA RM. SSgt LK had not previously met the appellant. While in SrA RM's room, SSgt LK drank about half a shot of Grey Goose vodka. At approximately 1830, SSgt LK and SSgt JM went with the appellant, SrA RM, and A1C CB to a local restaurant. They drove together in SrA RM's vehicle.

While at the restaurant, SSgt LK drank approximately one mixed drink and four to five shots of various kinds of alcohol. At some point during dinner SSgt LK and the appellant went outside to smoke, and the appellant informed her that SrA RM was attracted to her. SSgt LK responded that she was not interested in starting a relationship with SrA RM or anyone else that night, as she was in the process of starting a relationship with someone else.

After dinner, the appellant drove the entire group back to the hotel. Between 2200-2230, they all took a shuttle to downtown Oklahoma City and eventually ended up at the CityWalk club. While at the CityWalk, SSgt LK danced with the appellant and at some point he rubbed her feet for a few minutes, but

according to her nothing romantic happened between them.

SrA RM decided to leave the club early and returned to the hotel. The rest of the group stayed at the CityWalk until around 0130 on 15 July 2012. On the way back to the hotel the appellant and A1C CB could not reach SrA RM and, as a result, did not have a place to stay for the night. According to SSgt LK, she discussed the issue with SSgt JM and they agreed to allow the appellant and A1C CB to stay in their room as they were both Airmen. SSgt LK's understanding was that the male Airmen were going to sleep on the floor, but SSgt JM understood that they were just going to work something out with them. On the walk back to the hotel, the appellant gave SSgt LK his shoes, because her feet were hurting from wearing heels, and he also carried her for part of the way. According to SSgt LK, the appellant made no sexual advances toward her on the way back to the hotel.

Upon arrival to the hotel, the appellant and A1C CB stayed downstairs to smoke while SSgt LK and SSgt JM went upstairs to their room and proceeded to get ready for bed. SSgt LK changed into her pajamas consisting of a V-cut shirt and a pair of black drawstring shorts. She was also wearing a bra and underwear. There were two beds in the room, and SSgt LK decided to sleep on the bed closest to the door and furthest from the bathroom. She remembered only SSgt JM and A1C CB in the room when she went to sleep. She understood that the appellant would be sleeping on the floor.

For her part, SSgt JM testified that after she changed into her pajamas, she came out of the bathroom and saw SSgt LK, the appellant, and A1C CB all standing at the foot of the beds. She then went back into the bathroom to wash her face. When she came back out, everyone was lying down in the beds and appeared to be asleep. A1C CB was in one bed, and SSgt LK and the appellant were in the other bed closest to the door, under the covers. SSgt JM did not witness anything romantic occur between SSgt LK and the appellant.

SSgt LK testified that the next thing she remembered was waking up with the appellant's fingers in her vagina.[3] She also felt the appellant's penis on her left leg inside her upper thigh near her genitalia. Her shirt was pulled down and her right breast was exposed. Her shorts and underwear had

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[3] The appellant was found not guilty of the Charge that alleged, as a violation of Article 120, UCMJ, the appellant "commit[ted] a sexual act upon Staff Sergeant [LK], by penetrating the vulva of the said Staff Sergeant [LK] with his finger when he knew or reasonably should have known that the said Staff Sergeant [LK] was asleep, with an intent to gratify the sexual desire of [the appellant]." The appellant was convicted, in violation of Article 120, UCMJ, of the Additional Charge, for "touch[ing] directly the inner thigh of Staff Sergeant [LK] when [the appellant] knew or reasonably should have known that the said Staff Sergeant [LK] was asleep, with an intent to gratify the sexual desire of the [appellant]."

also been pulled down to her thighs. She immediately jumped out of bed and started screaming, "Where the f[**]k is the light[?] Where the f[**]k is the light[?]" She was mad and scared. When someone turned on the lights, she saw the appellant on the opposite side of SSgt JM's bed pulling up his pants and putting his shoes on. SSgt JM and A1C CB were sitting up in the other bed and asked what was happening. SSgt LK looked at A1C CB and stated, "Why does your friend think it is okay to f[**]kin stick his fingers inside me when I was sleeping?" SSgt JM then told the appellant to leave. As the appellant started to leave, SSgt LK punched him four to five times in his chest and back and yelled at him to leave. The appellant departed without saying a word.

SSgt JM testified that SSgt LK pounded on the wall, yelled for someone to turn on the lights, and yelled at the appellant, "I never invited you into my bed. Get out of my bed. You had your fingers inside my vagina. You were trying to put your penis inside my vagina."
SSgt LK then went into the bathroom with SSgt JM. While in the bathroom, SSgt LK cried hysterically and tried to tell SSgt JM what happened. She then decided to call her friend, Special Agent JH, Air Force Office of Special Investigations, and at his direction she called 911 and reported the incident.

SrA RM testified that he woke up at approximately 0400 to the appellant banging on the door. The appellant told SrA RM that the girls had kicked him out of the room and proceeded to go to bed.

Fifth Amendment Right to Due Process

The appellant contends that the Government violated his Fifth Amendment right to due process of law because he was prosecuted by a court-martial panel consisting of only six members whose verdict did not have to be unanimous. The appellant relies on the Supreme Court's rulings in *Ballew v. Georgia*, 435 U.S. 223, 98 S. Ct. 1029, 55 L. Ed. 2d 234 (1978), and *Burch v. Louisiana*, 441 U.S. 130, 99 S. Ct. 1623, 60 L. Ed. 2d 96 (1979), to support his position that he was entitled to a jury with at least six members and that he could only be found guilty by a unanimous vote. In *Ballew*, the Supreme Court held that a trial consisting of a jury of less than six persons deprives a defendant of the right to trial by a jury as contemplated by the Sixth Amendment.[4] 435 U.S. at 245. The decision was based on empirical studies showing that "the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members." Id. at 239. Subsequently, in *Burch*, the Court held that conviction by a non-unanimous six-member jury also fails to comply with the Sixth Amendment, saying:

> [M]uch the same reasons that led us in Ballew to decide that use of a five-member jury threatened the fairness of the proceeding and the proper role of the jury, lead us to conclude now that

[4] U.S. Const. amend. VI.

> conviction for a nonpetty offense by only five members of a six-person jury presents a similar threat to preservation of the substance of the jury trial guarantee and justifies our requiring verdicts rendered by six-person juries to be unanimous.

441 U.S. at 138.

In *O'Callahan v. Parker*, 395 U.S. 258, 89 S. Ct. 1683, 23 L. Ed. 2d 291 (1969), overruled on other grounds by *Solorio v. United States*, 483 U.S. 435, 107 S. Ct. 2924, 97 L. Ed. 2d 364 (1987), the Supreme Court explained:

> The Constitution gives Congress power to "make Rules for the Government and Regulation of the land and naval Forces," and it recognizes that the exigencies of military discipline require the existence of a special system of military courts in which not all of the specific procedural protections deemed essential in Art. III trials need apply. The Fifth Amendment specifically exempts "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger" from the requirement of prosecution by indictment and from the right to trial by jury. The result has been the establishment and development of a system of military justice with fundamental differences from the practices in the civilian courts.

Id. at 261-62 (citation and emphasis omitted).

If the case does not arise in the land or naval forces, then the accused gets, first, the benefit of an indictment by a grand jury and, second, a trial by jury before a civilian court as guaranteed by the Sixth Amendment and by Article III, Section 2, of the Constitution,[5] which provides, in part:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

While the Sixth Amendment requires trial by jury in Federal criminal cases, and that jury's composition must be a representative cross-section of the community, courts-martial have never been considered subject to the jury-trial demands of the Constitution. *United States v. McClain*, 22 M.J. 124, 128 (C.M.A.1986); see also *O'Callahan*, 395 U.S. at 261-62. Our superior court recently re-emphasized that the Sixth Amendment right to a jury trial does not apply to courts-martial. *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012) (citing *Ex parte Quirin*, 317 U.S. 1, 39, 63 S. Ct. 2, 87 L. Ed. 3 (1942); *United States v. Wiesen*, 57 M.J. 48, 50 (C.A.A.F. 2002)).

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[5] U.S. Const. art. III, § 2.

We find the authorities cited by appellant to buttress his claim of a due process violation, *Ballew* and *Burch*, do not in any way limit the power of Congress to create rules for courts-martial pursuant to Article I, Section 8 of the Constitution.[6] Consistent with our superior court's precedent, courts-martial are not subject to the same jury requirements as other criminal trials. Accordingly, this issue is without merit.

Legal and Factual Sufficiency

The appellant asserts that the evidence at trial was not factually and legally sufficient to prove the conviction for abusive sexual contact. We review issues of factual and legal sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

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, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987), quoted in *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the

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[6] U.S. Const. art. I, § 8.

evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

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." *Turner*, 25 M.J. at 324, quoted in *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002). "[I]n resolving questions of legal sufficiency, we are 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) (citing *United States v. Rogers*, 54 M.J. 244, 246 (C.A.A.F. 2000); *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991)). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

The elements of abusive sexual contact, in violation of Article 120, UCMJ, as instructed by the military judge, are:

> (1) That at or near Oklahoma City, Oklahoma, on or about 15 July 2012, the accused committed sexual contact upon [SSgt LK], to wit: touching directly the inner thigh of [SSgt LK]; and
>
> (2) That the accused did so when he knew or reasonably should have known that [SSgt LK] was asleep.

The military judge further instructed the members that "sexual contact" means:

> (A) touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate or degrade any person; or
>
> (B) any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body.

In support of his claim of legal and factual insufficiency, the appellant essentially attacks the credibility of SSgt LK and argues that no reasonable factfinder could have found her testimony sufficient to establish guilt beyond a reasonable doubt. The appellant highlights differences between her Article 32, UCMJ, 10 U.S.C. § 832, testimony and her in-court testimony, primarily concerning the location of the appellant's penis on her body.

We have reviewed and considered the entire record of trial and find that although there are some relatively minor inconsistencies concerning SSgt LK's testimony, her recounting of what happened on the night of 14-15 July 2012 was very consistent with the

testimony of the other witnesses who were present that evening. The evidence shows that she was not romantically interested in the appellant, she fell asleep and did not invite him to join her in bed, and she awoke with the appellant's penis touching her inner thigh.

We have considered the evidence in the light most favorable to the prosecution. We have also made allowances for not having personally observed the witnesses. Having paid particular attention to the matters raised by the appellant, we find the evidence factually and legally sufficient to support his conviction for abusive sexual contact.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and sentence are

AFFIRMED.

APPENDIX C

1. Article I, Section 8 of the United States Constitution provides in relevant part:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;
>
> ***
>
> To make Rules for the Government and Regulation of the land and naval Forces;
>
> ***
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

2. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,

liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. Article 16, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 816 (2001), provides:

§816. Art. 16. Courts-martial classified

The three kinds of courts-martial in each of the armed forces are--

(1) general courts-martial, consisting of--

> (A) a military judge and not less than five members or, in a case in which the accused may be sentenced to a penalty of death, the number of members determined under section 825a of this title (article 25a); or
>
> (B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves;

(2) special courts-martial, consisting of—

> (A) not less than three members; or
>
> (B) a military judge and not less than three members; or

(C) only a military judge, if one has been detailed to the court, and the accused under the same conditions as those prescribed in clause (1) (B) so requests; and

(3) summary courts-martial, consisting of one commissioned officer.

4. Article 25, UCMJ, 10 U.S.C. § 825 (1986), provides:

§825. Art. 25. Who may serve on courts-martial

(a) Any commissioned officer on active duty is eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.

(b) Any warrant officer on active duty is eligible to serve on general and special courts-martial for the trial of any person, other than a commissioned officer, who may lawfully be brought before such courts for trial.

(c)

(1) Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial, but he shall serve as a member of a court only if, before the conclusion of a session called

by the military judge under section 839(a) of this title (article 39(a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused, the accused personally has requested orally on the record or in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If such members cannot be obtained, the court may be assembled and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

(2) In this article, "unit" means any regularly organized body as defined by the Secretary concerned, but in no case may it be a body larger than a company, squadron, ship's crew, or body corresponding to one of them.

(d)

(1) When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade.

(2) When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

(e) Before a court-martial is assembled for the trial of a case, the convening authority may excuse a member of the court from participating in the case. Under such regulations as the Secretary concerned may prescribe, the convening authority may delegate his authority under this subsection to his staff judge advocate or legal officer or to any other principal assistant.

5. Article 52, UCMJ, 10 U.S.C. § 852 (1968), provides:

§852. Art. 52. Number of votes required

(a)

(1) No person may be convicted of an offense for which the death penalty is made mandatory by law, except by the concurrence of all the members of the court-martial present at the time the vote is taken.

(2) No person may be convicted of any other offense, except as provided in section 845(b) of this title [10 USCS § 845(b)] (article 45(b)) or by the concurrence of two-thirds of the members present at the time the vote is taken.

(b)

(1) No person may be sentenced to suffer death, except by the concurrence of all the members of the court-martial present at the time the vote is taken and for an offense in this chapter expressly made punishable by death.

(2) No person may be sentenced to life imprisonment or to confinement for more than ten years, except by the concurrence of three-fourths of the members present at the time the vote is taken.

(3) All other sentences shall be determined by the concurrence of two-thirds of the members present at the time the vote is taken.

(c) All other questions to be decided by the members of a general or special court-martial shall be determined by a majority vote, but a determination to reconsider a finding of guilty or to reconsider a sentence, with a view toward decreasing it, may be made by any lesser vote which indicates that the reconsideration is not opposed by the number of votes required for that finding or sentence. A tie vote on a challenge disqualifies the member challenged. A tie vote on a motion for a finding of not guilty or on

a motion relating to the question of the accused's sanity is a determination against the accused. A tie vote on any other question is a determination in favor of the accused.