IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 1
Airman First Class (E-3) **NICHOLAS A. BYRNE** United States Air Force *Appellant*	)	No. ACM 40391 10 February 2023

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Airman First Class Nicholas A. Byrne, the Appellant, hereby moves for a first enlargement of time to file an Assignment of Errors brief. A1C Byrne requests an enlargement for a period of 60 days, which will end on **19 April 2023**. The record of trial was docketed with this Court on 20 December 2022. From the date of docketing to the present date, 52 days have elapsed. On the date requested, 120 days will have elapsed.

WHEREFORE, A1C Byrne respectfully requests this Honorable Court grant this requested first enlargement of time for the submission of an Assignment of Errors brief.

Respectfully submitted,

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 10 February 2023.

Respectfully submitted,

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604

13 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) NICHOLAS A. BYRNE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40391 Panel No. 1

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

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

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

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 February 2023.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND) (OUT OF TIME)**
v.	)	Before Panel No. 1
Airman First Class (E-3) **NICHOLAS A. BYRNE** United States Air Force *Appellant*	)	No. ACM 40391 13 April 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Airman First Class Nicholas A. Byrne, Appellant, hereby moves for a second enlargement of time, out of time, to file an Assignments of Error brief. Appellant requests an enlargement for a period of 30 days, which will end on **19 May 2023**. The record of trial was docketed with this Court on 20 December 2022. From the date of docketing to the present date, 114 days have elapsed. A previous motion for a second enlargement of time filed on time on 12 April 2023 misidentified the number of days that will have elapsed on the date requested as 180 days. The correct number is 150 days. Appellant withdraws the previous filing. This filing is submitted out of time to remedy the error, which is attributable to undersigned counsel and not to Appellant.

On 1 March 2022, at a general court-martial convened at Luke Air Force Base, Arizona and comprised of officer and enlisted members, Appellant pled not guilty to twelve specifications of assault consummated by battery in violation of Article 128,

UCMJ, 10 U.S.C. § 928[1] (ten preferred under Charge I and two preferred under the Additional Charge), and one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (Charge II). ROT Vol. 1, Entry of Judgment, 30 March 2022; R. at 262. On 4 March 2022, he was acquitted of five specifications under Charge I and one specification of the Additional Charge; he was convicted of: the five remaining specifications under Charge I[2], the one remaining specification of the Additional Charge, the specification of Charge II, and Charge I, Charge II, and the Additional Charge. ROT Vol. 1, Entry of Judgment, 30 March 2022; R. at 878. On 5 March 2022, the court-martial members sentenced Appellant to a dishonorable discharge, confinement for five years, total forfeitures of all pay and allowances, reduction to the lowest enlisted grade, and a reprimand. ROT Vol. 1, Entry of Judgment, 30 March 2022. The convening authority took no action on the findings or sentence of the court-martial and denied Appellant's requests for the deferment of his reduction in rank and forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum, 22 March 2022. Appellant is currently confined at Military Correctional Facility Miramar, San Diego, California.

The trial transcript is 945 pages long and the record of trial is comprised of eight volumes consisting of five prosecution exhibits, six defense exhibits, seventy-four appellate exhibits, and one court exhibit. This case is counsel's sixth priority case before this Court. Through no fault of Appellant, his counsel has been unable to review the

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[1] All references to the UCMJ are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.).

[2] Appellant was found guilty of one of these five specifications under Charge I by exceptions and substitutions.

record of trial and prepare and Assignments of Error brief, and will be unable to do so before this Court's current deadline.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this requested second enlargement of time, out of time, for the submission of an Assignments of Error brief for good cause shown.

Respectfully submitted,

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 13 April 2023.

Respectfully submitted,

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604

13 April 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) NICHOLAS A. BYRNE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME – OUT OF TIME ACM 40391 Panel No. 1

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

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

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

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 April 2023.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 1
Airman First Class (E-3) **NICHOLAS A. BYRNE** United States Air Force *Appellant*	)	No. ACM 40391 13 April 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Airman First Class Nicholas A. Byrne, Appellant, hereby moves for a third enlargement of time to file an Assignments of Error brief. Appellant requests an enlargement for a period of 30 days, which will end on **18 June 2023**. The record of trial was docketed with this Court on 20 December 2022. From the date of docketing to the present date, 141 days have elapsed. On the date requested, 180 days will have elapsed.

On 1 March 2022, at a general court-martial convened at Luke Air Force Base, Arizona and comprised of officer and enlisted members, Appellant pled not guilty to twelve specifications of assault consummated by battery in violation of Article 128, UCMJ, 10 U.S.C. § 928[1] (ten preferred under Charge I and two preferred under the Additional Charge), and one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (Charge II). ROT Vol. 1, Entry of Judgment, 30 March 2022; R.

[1] All references to the UCMJ are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.).

at 262. On 4 March 2022, he was acquitted of five specifications under Charge I and one specification of the Additional Charge; he was convicted of: the five remaining specifications under Charge I[2], the one remaining specification of the Additional Charge, the specification of Charge II, and Charge I, Charge II, and the Additional Charge. ROT Vol. 1, Entry of Judgment, 30 March 2022; R. at 878. On 5 March 2022, the court-martial members sentenced Appellant to a dishonorable discharge, confinement for five years, total forfeitures of all pay and allowances, reduction to the lowest enlisted grade, and a reprimand. ROT Vol. 1, Entry of Judgment, 30 March 2022. The convening authority took no action on the findings or sentence of the court-marital and denied Appellant's requests for the deferment of his reduction in rank and forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum, 22 March 2022. Appellant is currently confined at Military Correctional Facility Miramar, San Diego, California.

The trial transcript is 945 pages long and the record of trial is comprised of eight volumes consisting of five prosecution exhibits, six defense exhibits, seventy-four appellate exhibits, and one court exhibit. This case is undersigned counsel's fourth priority case before this Court, behind 1. *United States v. Doroteo* (No. ACM 40363; 2,149 pages/14 volumes), 2. *United States v. Csiti* (No. ACM 40386; 633 pages/7 volumes), and 3. *United States v. Akaka* (No. ACM S32744, 181 pages/3 volumes). Through no fault of Appellant, his counsel has been unable to review the record of trial and prepare and Assignments of Error brief, and will be unable to do so before this

[2] Appellant was found guilty of one of these five specifications under Charge I by exceptions and substitutions.

Court's current deadline.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this requested third enlargement of time for the submission of an Assignments of Error brief for good cause shown.

Respectfully submitted,

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 10 May 2023.

Respectfully submitted,

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604

10 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) NICHOLAS A. BYRNE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40391 Panel No. 1

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

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

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

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 10 May 2023.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 1
Airman First Class (E-3) **NICHOLAS A. BYRNE** United States Air Force *Appellant*	)	No. ACM 40391 9 June 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Airman First Class Nicholas A. Byrne, Appellant, hereby moves for a fourth enlargement of time to file an Assignments of Error brief. Appellant requests an enlargement for a period of 30 days, which will end on **18 July 2023**. The record of trial was docketed with this Court on 20 December 2022. From the date of docketing to the present date, 171 days have elapsed. On the date requested, 210 days will have elapsed.

On 1 March 2022, at a general court-martial convened at Luke Air Force Base, Arizona and comprised of officer and enlisted members, Appellant pled not guilty to twelve specifications of assault consummated by battery in violation of Article 128, UCMJ, 10 U.S.C. § 928[1] (ten preferred under Charge I and two preferred under the Additional Charge), and one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (Charge II). ROT Vol. 1, Entry of Judgment, 30 March 2022; R. at 262. On 4 March 2022, he was acquitted of five specifications under Charge I and

[1] All references to the UCMJ are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.).

one specification of the Additional Charge; he was convicted of: the five remaining specifications under Charge I[2], the one remaining specification of the Additional Charge, the specification of Charge II, and Charge I, Charge II, and the Additional Charge. ROT Vol. 1, Entry of Judgment, 30 March 2022; R. at 878. On 5 March 2022, the court-martial members sentenced Appellant to a dishonorable discharge, confinement for five years, total forfeitures of all pay and allowances, reduction to the lowest enlisted grade, and a reprimand. ROT Vol. 1, Entry of Judgment, 30 March 2022. The convening authority took no action on the findings or sentence of the court-marital and denied Appellant's requests for the deferment of his reduction in rank and forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum, 22 March 2022. Appellant is currently confined at Military Correctional Facility Miramar, San Diego, California.

The trial transcript is 945 pages long and the record of trial is comprised of eight volumes consisting of five prosecution exhibits, six defense exhibits, seventy-four appellate exhibits, and one court exhibit. Counsel currently represents fifteen clients with twelve matters before this Court. This case is undersigned counsel's fourth priority case before this Court, behind 1. *United States v. Doroteo* (No. ACM 40363; 2,149 pages/14 volumes), 2. *United States v. Csiti* (No. ACM 40386; 633 pages/7 volumes), and 3. *United States v. Akaka* (No. ACM S32744, 181 pages/3 volumes). Counsel is currently preparing Reply briefs in *United States v. McAlhaney* (No. ACM 39979 (rem)) and *United States v. Estep* (No. ACM 40336) while also preparing an

[2] Appellant was found guilty of one of these five specifications under Charge I by exceptions and substitutions.

Assignments of Error brief in *Doroteo*. Through no fault of Appellant, his counsel has been unable to review the record of trial and prepare and Assignments of Error brief, and will be unable to do so before this Court's current deadline.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this requested fourth enlargement of time, out of time, for the submission of an Assignments of Error brief for good cause shown.

Respectfully submitted,

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 9 June 2023.

Respectfully submitted

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100

9 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) NICHOLAS A. BYRNE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40391 Panel No. 1

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

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

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

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 9 June 2023.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

**IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

Before Panel 1

UNITED STATES *Appellee* v. Nicholas A. BYRNE Airman First Class (A1C) U. S. Air Force *Appellant*	**NOTICE OF APPEARANCE** No. ACM 40391 10 July 2023

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

The undersigned has been retained to represent the Appellant before this Court.

Respectfully submitted,

Philip D. Cave
Cave & Freeburg, LLP
1318 Princess St.
Alexandria, VA 22314

CERTIFICATE OF FILING AND SERVICE

I certify that this document was emailed to the Court's electronic filing address on 10 July 2023, that military counsel has been directed to upload a copy into the Court's case management system, and that a copy of the foregoing was emailed to the Chief, Government Appellate Division.

Philip D. Cave
Civilian Appellate Counsel

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 1
Airman First Class (E-3) **NICHOLAS A. BYRNE** United States Air Force *Appellant*	)	No. ACM 40391 11 July 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Airman First Class Nicholas A. Byrne, Appellant, hereby moves for a fifth enlargement of time to file an Assignments of Error brief. Appellant requests an enlargement for a period of 30 days, which will end on **17 August 2023**. The record of trial was docketed with this Court on 20 December 2022. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 1 March 2022, at a general court-martial convened at Luke Air Force Base, Arizona and comprised of officer and enlisted members, Appellant pled not guilty to twelve specifications of assault consummated by battery in violation of Article 128, UCMJ, 10 U.S.C. § 928[1] (ten preferred under Charge I and two preferred under the Additional Charge), and one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (Charge II). ROT Vol. 1, Entry of Judgment, 30 March 2022; R.

[1] All references to the UCMJ are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.).

at 262. On 4 March 2022, he was acquitted of five specifications under Charge I and one specification of the Additional Charge; he was convicted of: the five remaining specifications under Charge I[2], the one remaining specification of the Additional Charge, the specification of Charge II, and Charge I, Charge II, and the Additional Charge. ROT Vol. 1, Entry of Judgment, 30 March 2022; R. at 878. On 5 March 2022, the court-martial members sentenced Appellant to a dishonorable discharge, confinement for five years, total forfeitures of all pay and allowances, reduction to the lowest enlisted grade, and a reprimand. ROT Vol. 1, Entry of Judgment, 30 March 2022. The convening authority took no action on the findings or sentence of the court-marital and denied Appellant's requests for the deferment of his reduction in rank and forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum, 22 March 2022. Appellant is currently confined at Military Correctional Facility Miramar, San Diego, California.

The trial transcript is 945 pages long and the record of trial is comprised of eight volumes consisting of five prosecution exhibits, six defense exhibits, seventy-four appellate exhibits, and one court exhibit. Counsel currently represents fifteen clients with twelve matters before this Court. This case is undersigned counsel's fourth priority case before this Court, behind 1. *United States v. Doroteo* (No. ACM 40363; 2,149 pages/14 volumes), 2. *United States v. Csiti* (No. ACM 40386; 633 pages/7 volumes), and 3. *United States v. Akaka* (No. ACM S32744, 181 pages/3 volumes). Counsel is currently preparing an Assignments of Error brief in *Doroteo*. Through no

[2] Appellant was found guilty of one of these five specifications under Charge I by exceptions and substitutions.

fault of Appellant, his counsel has been unable to review the record of trial and prepare and Assignments of Error brief, and will be unable to do so before this Court's current deadline.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this requested fifth enlargement of time for the submission of an Assignments of Error brief for good cause shown.

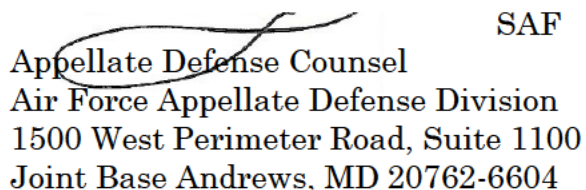
Respectfully submitted,

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 11 July 2023.

Respectfully submitted



SAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604

13 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) ADAM C. PRATSCHLER, USAF *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32743 Panel No. 1

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

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

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

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 July 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40391**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Nicholas A. BYRNE	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 11 July 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 14th day of July, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **17 August 2023**.

Any subsequent motions for enlargement of time shall, in addition to the matters required under this court's Rules of Practice and Procedure, include a statement as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was advised of the request for an enlargement of time, and (3) whether Appellant agrees with the request for an enlargement of time.

FOR THE COURT

FLEMING E. KEEFE, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman First Class (E-3) **NICHOLAS A. BYRNE,** United States Air Force *Appellant*	))))))))))	**CONSENT MOTION TO EXAMINE SEALED MATERIALS** Before Panel No. 1 Case No. ACM 40391 7 August 2023

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and Rules 3.1, 23.1(b), and 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves this Court to permit appellate counsel for the Appellant and the Government to examine Appellate Exhibits XXXI-XXXIV and pages 98-151 and 190-233 of the verbatim transcript.

Facts

On 1 March 2022, at a general court-martial convened at Luke Air Force Base, Arizona, having elected trial by a panel of officers and enlisted members, the Appellant pled not guilty to 12 specifications of assault consummated by battery in violation of Article 128, UCMJ, 10 U.S.C. § 928[1] (ten preferred under Charge I and two preferred under the Additional Charge), and one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (Charge II). ROT Vol. 1, Entry of Judgment, 30 March 2022; R. at 262. On 4 March 2022, he was acquitted of five specifications under Charge I and one specification of the Additional Charge; he was convicted

[1] All references to the UCMJ, the R.C.M., and the Military Rules of Evidence (Mil. R. Evid.) are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

of: the five remaining specifications under Charge I[2], the one remaining specification of the Additional Charge, the specification of Charge II, and Charge I, Charge II, and the Additional Charge. ROT Vol. 1, Entry of Judgment, 30 March 2022; R. at 878. On 5 March 2022, the court-martial members sentenced the Appellant to a dishonorable discharge, confinement for five years, total forfeitures of all pay and allowances, reduction to the lowest enlisted grade, and a reprimand. ROT Vol. 1, Entry of Judgment, 30 March 2022. The convening authority took no action on the findings or sentence of the court-marital and denied the Appellant's requests for the deferment of his reduction in rank and forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum, 22 March 2022.

During the proceedings, the military judge sealed the following materials:

1) Appellate Exhibit XXXI, Defense Motion to Elicit Evidence under Mil. R. Evid. 412, dated 8 February 2022, 63 pages (R. at 25);
2) Appellate Exhibit XXXII, Government Response to Defense Noticed Motion to Elicit Evidence under Mil. R. Evid. 412, dated 15 February 2022, 14 pages (R. at 25);
3) Appellate Exhibit XXXIII, Victim KB Supplemental Response to Defense Motion to Elicit Evidence Under M.R.E. 412, dated 28 February 2022, 12 pages (R. at 26);
4) Appellate Exhibit XXXIV, Ruling on Mil. R. Evid. 412 Motion, dated 1 March 2022, 8 pages (R. at 265);

The military judge also ordered the following portions of the transcript sealed: pages 98-151 and 190-233, wherein the court was closed to discuss the defense's Mil. R. Evid. 412 motion with

[2] The Appellant was found guilty of one of these five specifications under Charge I by exceptions and substitutions.

respect to the named victim, as well as evidence involving sexual behavior of a Mil. R. Evid. 413 witness. R. at 97, 188-189.

Law

Appellate counsel may examine materials presented or reviewed at trial and sealed, as well as materials reviewed *in camera*, released to trial or defense counsel, and sealed, upon a colorable showing to the appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities under the UCMJ, the *MCM*, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional conduct. R.C.M. 1113(b)(3)(B)(i).

Air Force regulations governing professional duties and conduct of appellate defense counsel impose upon counsel, *inter alia*, a duty to provide "competent representation,"[3] perform "reasonable diligence,"[4] and to "give a client his or her best professional evaluation of the questions that might be presented on appeal…[to] consider all issues that might affect the validity of the judgment of conviction and sentence…[to] advise on the probable outcome of a challenge to the conviction or sentence...[and to] endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance."[5] These requirements are consistent with those imposed by the state bar to which counsel belong.[6]

[3] Air Force Instruction (AFI) 51-110, *Professional Responsibility Program*, Attachment 2: Air Force Rules of Professional Conduct, Rule 1.1 (11 Dec. 2018).
[4] *Id*. at Rule 1.3.
[5] AFI 51-110, Attachment 7: Air Force Standards for Criminal Justice, Standard 4-8.3(b).
[6] Undersigned counsel is licensed to practice law in Maryland.

This Court may grant relief "on the basis of the entire record" of trial. Article 66, UCMJ, 10 U.S.C. § 866. Appellate defense counsel detailed by the Judge Advocate General shall represent accused servicemembers before this Court. Article 70, UCMJ, 10 U.S.C. § 870. This Court's "broad mandate to review the record unconstrained by appellant's assignments of error" does not reduce "the importance of adequate representation" by counsel; "independent review is not the same as competent appellate representation." *United States v. May,* 47 M.J. 478, 481 (C.A.A.F. 1998).

The contents of a record of trial shall include a substantially verbatim recording of the court-martial proceedings except sessions closed for deliberation and voting. R.C.M. 1112(b)(1). A record of trial is substantially incomplete if it does not include a substantially verbatim recording of the court-martial proceedings. *United States v. Valentin-Andino*, 83 M.J. 537, 541 (A.F. Ct. Crim. App. 2023).

Analysis

The sealed exhibits identified in paragraphs (1) through (4) in the fact section above are a motion filed by the trial defense counsel, responses filed by the Government and counsel for the named victim, and a ruling issued by the military judge. Additionally, all parties would have been present for the closed sessions contained within the requested transcript pages. Thus, it is evident the parties "presented" and "reviewed" the sealed materials at trial.

It is reasonably necessary for Appellant's counsel to review these sealed exhibits and transcript pages for counsel to competently conduct a professional evaluation of Appellant's case and to uncover all issues which might afford him relief. Because examination of the materials in question is reasonably necessary to the fulfillment of counsel's Article 70, UCMJ duties, and

because the materials were made available to the parties at trial, Appellant has provided the "colorable showing" required by R.C.M. 1113(b)(3)(B)(i) to permit his counsel's examination of sealed materials and has shown good cause to grant this motion.

The Government consents to both parties viewing the sealed materials detailed above.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this consent motion.

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 7 August 2023.

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40391**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Nicholas A. BYRNE	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 7 August 2023, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials. Requesting both parties be allowed to examine Appellate Exhibits XXXI–XXXIV and pages 98–151 and 190–233 of the verbatim transcript.

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities." Rule for Courts-Martial 1113(b)(3)(B)(i), *Manual for Courts-Martial*, *United States* (2019 ed.).

The court finds Appellant has made a colorable showing that review of sealed materials is reasonably necessary for a proper fulfillment of appellate defense counsel's responsibilities. This court's order permits counsel for both parties to examine the materials.

Accordingly, it is by the court on this 7th day of August, 2023,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view Appellate Exhibits XXXI–XXXIV and pages 98–151 and 190–233 of the verbatim transcript, subject to the following conditions:

To view the sealed materials, counsel will coordinate with the court.

No counsel granted access to the materials may photocopy, photograph, reproduce, disclose, or make available the content to any other individual without the court's prior written authorization.

FOR THE COURT

FLEMING E. KEEFE, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 1
Airman First Class (E-3) **NICHOLAS A. BYRNE** United States Air Force *Appellant*	)	No. ACM 40391 7 August 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Airman First Class Nicholas A. Byrne, Appellant, requests a sixth enlargement of time to file an Assignments of Error brief. The Appellant requests an enlargement for a period of 30 days, which will end on **16 September 2023**. The record of trial was docketed with this Court on 20 December 2022. From the date of docketing to the present date, 230 days have elapsed. On the date requested, 270 days will have elapsed.

On 1 March 2022, at a general court-martial convened at Luke Air Force Base, Arizona, having elected trial by a panel of officers and enlisted members, the Appellant pled not guilty to 12 specifications of assault consummated by battery in violation of Article 128, UCMJ, 10 U.S.C. § 928[1] (ten preferred under Charge I and two preferred under the Additional Charge), and one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (Charge II). ROT Vol. 1, Entry of Judgment, 30

[1] All references to the UCMJ are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.).

March 2022; R. at 262. On 4 March 2022, he was acquitted of five specifications under Charge I and one specification of the Additional Charge; he was convicted of: the five remaining specifications under Charge I[2], the one remaining specification of the Additional Charge, the specification of Charge II, and Charge I, Charge II, and the Additional Charge. ROT Vol. 1, Entry of Judgment, 30 March 2022; R. at 878. On 5 March 2022, the court-martial members sentenced the Appellant to a dishonorable discharge, confinement for five years, total forfeitures of all pay and allowances, reduction to the lowest enlisted grade, and a reprimand. ROT Vol. 1, Entry of Judgment, 30 March 2022. The convening authority took no action on the findings or sentence of the court-marital and denied the Appellant's requests for the deferment of his reduction in rank and forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum, 22 March 2022. The Appellant is currently confined.

The trial transcript is 945 pages long and the record of trial is comprised of eight volumes consisting of five prosecution exhibits, six defense exhibits, 74 appellate exhibits, and one court exhibit. Only the transcript is in digital format.

Military Counsel

The successor military counsel's first full day in the office was . The previously assigned counsel transferred to a new duty station with a new assignment, and the undersigned counsel was assigned this case on . Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), the undersigned military counsel represents 21 clients; 12 cases are pending brief before this Court or before the Court of Appeals for the

[2] The Appellant was found guilty of one of these five specifications under Charge I by exceptions and substitutions.

Armed Forces. This case is counsel's fifth priority case, behind:

1. *United States v. McAlhaney*, No. ACM 39979 (rem). The Appellant's petition for grant of review is due to the Court of Appeals for the Armed Forces (CAAF) on 21 August 2023.
2. *United States v. Doroteo*, No. ACM 40363. The trial transcript is 2,149 pages long and the record of trial is comprised of 14 volumes containing 19 prosecution exhibits, three defense exhibits, 151 appellate exhibits, and two court exhibits. Counsel is reviewing the record of trial.
3. *United States v. Csiti*, No. ACM 40386. The trial transcript is 633 pages long, and the record of trial is comprised of seven volumes containing nine prosecution exhibits, 10 defense exhibits, 33 appellate exhibits, and one court exhibit. Counsel has not yet begun her review of the record of trial.
4. *United States v. Akaka*, No. ACM S32744. The trial transcript is 181 pages long, and the record of trial is comprised of three volumes containing three prosecution exhibits, nine defense exhibits, six appellate exhibits, and two court exhibits. Counsel has not yet begun her review of the record of trial.

Civilian Counsel

During the current enlargement, counsel has been unavailable for eight days because of surgical procedures and recovery. In addition, counsel has completed the trial in *United States v. Rosser*, Eastern Dist. of Virginia, and completed (as co-counsel) a petition for a writ of certiorari in *Lattin v. United States*. Counsel has briefs in *United States v. Ramirez* and *United States v. Henderson* to file before the Appellant's. However, counsel has completed several reviews of the record and completed drafts of

legal and *Grostefon* issues.

Through no fault of the Appellant, his counsel are unable to complete and file an Assignments of Error brief before this Court's current deadline. Counsel have advised the Appellant on his right to speedy appellate review, and the Appellant is aware of and agrees with this request for an enlargement of time.

Certification

, counsel met with the Appellant at the Naval Consolidated Brig Miramar, California. Discussed at that meeting were (1) a current draft of legal and *Grostefon* issues, (2) a potential Declaration of the Appellant, (3) re-advice about the constitutional and statutory[3] right to have the effective assistance of military counsel at this stage of his appeals, (4) military counsel's workload and assignment of work within the "team,"[4] (5) the request for an extension of time to file a brief. Counsel have advised Appellant on his right to speedy appellate review, and Appellate is aware of and agrees with this request for an enlargement of time.

---

[3] *See See Evitts v. Lucey*, 469 U.S. 387 (1985); Article 70, UCMJ, 10 U.S.C. §870.

[4] Counsel's practice is to assign military counsel the initial draft of a factual sufficiency argument and to review drafts of legal and *Grostefon* issues. Thus, the military counsel's review of the record is necessary to ensure the team's effective assistance to the Appellant. *Cf. United States v. Boone*, 42 M.J. 308, 313 (C.M.A. 1995); *United States v. Golston*, 53 M.J. 61, 67 (C.A.A.F. 2000) (Gierke, J., and Cox, S.J., concurring).

WHEREFORE, the Appellant respectfully requests this Honorable Court grant this requested enlargement of time.

Respectfully submitted,

PHILIP D. CAVE
Cave & Freeburg, LLP

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 7 August 2023.

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

7 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) NICHOLAS A. BYRNE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40391 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to the Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 7 August 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**MOTION FOR WITHDRAWAL**
Appellee,	)	**OF APPELLATE DEFENSE**
	)	**COUNSEL**
v.	)	
	)	Before Panel No. 1
Airman First Class (E-3),	)	
NICHOLAS A. BYRNE	)	No. ACM 40391
United States Air Force,	)	
Appellant.	)	22 August 2023

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

Pursuant to Rules 12(b), 12.4, and 23.3(h) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel respectfully requests to withdraw as counsel in the above-captioned case. The Judge Advocate General has reassigned undersigned counsel from the Air Force Appellate Defense Division to Headquarters Air Force. Accordingly, undersigned counsel is no longer detailed under Article 70, Uniform Code of Military Justice (UCMJ) to represent Appellant. Capt Megan R. Crouch has been detailed to represent Appellant in undersigned counsel's stead and made her notice of appearance in this case. Counsel have completed a thorough turnover of the record.

Appellant has been advised of this motion to withdraw as counsel and consents to undersigned counsel's withdrawal. A copy of this motion will be delivered to Appellant following its filing.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant this motion.

Respectfully submitted,

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
1500 W. Perimeter Rd., Ste. 1100
Joint Base Andrews NAF, MD 20762

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that I filed an electronic copy of the foregoing with the Court and on the Government Trial and Appellate Operations Division on 22 August 2023.

Respectfully submitted.

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
1500 W. Perimeter Rd., Ste. 1100
Joint Base Andrews NAF, MD 20762

Counsel for Appellant

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 1
Airman First Class (E-3) **NICHOLAS A. BYRNE** United States Air Force *Appellant*	)	No. ACM 40391 6 September 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Airman First Class Nicholas A. Byrne, Appellant, requests a seventh enlargement of time to file an Assignments of Error brief. The Appellant requests an enlargement for a period of 30 days, which will end on **16 October 2023**. The record of trial was docketed with this Court on 20 December 2022. From the date of docketing to the present date, 260 days have elapsed. On the date requested, 300 days will have elapsed.

On 1 March 2022, at a general court-martial convened at Luke Air Force Base, Arizona, having elected trial by a panel of officers and enlisted members, the Appellant pled not guilty to 12 specifications of assault consummated by battery in violation of Article 128, UCMJ, 10 U.S.C. § 928[1] (ten preferred under Charge I and two preferred under the Additional Charge), and one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (Charge II). ROT Vol. 1, Entry of Judgment, 30 March 2022; R. at 262. On 4 March 2022, he was acquitted of five specifications under Charge I and one specification of the Additional Charge; he was convicted of:

[1] All references to the UCMJ are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.).

the five remaining specifications under Charge I[2], the one remaining specification of the Additional Charge, the specification of Charge II, and Charge I, Charge II, and the Additional Charge. ROT Vol. 1, Entry of Judgment, 30 March 2022; R. at 878. On 5 March 2022, the court-martial members sentenced the Appellant to a dishonorable discharge, confinement for five years, total forfeitures of all pay and allowances, reduction to the lowest enlisted grade, and a reprimand. ROT Vol. 1, Entry of Judgment, 30 March 2022. The convening authority took no action on the findings or sentence of the court-marital and denied the Appellant's requests for the deferment of his reduction in rank and forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum, 22 March 2022. The Appellant is currently confined.

The trial transcript is 945 pages long and the record of trial is comprised of eight volumes consisting of five prosecution exhibits, six defense exhibits, 74 appellate exhibits, and one court exhibit. Only the transcript is in digital format.

Military Counsel

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel provides that she represents 18 clients and is presently assigned 10 cases pending brief before this Court. This case is counsel's fifth priority case, behind:

1. *United States v. Falls Down*, No. ACM 40268. The appellant's petition for grant of review is due to the Court of Appeals for the Armed Forces (CAAF) on 2 October 2023.
2. *United States v. Doroteo*, No. ACM 40363. The trial transcript is 2,149 pages long and the record of trial is comprised of 14 volumes containing 19 prosecution exhibits, three defense exhibits, 151 appellate exhibits, and two court exhibits.
3. *United States v. Csiti*, No. ACM 40386. The trial transcript is 633 pages long, and the record

[2] The Appellant was found guilty of one of these five specifications under Charge I by exceptions and substitutions.

of trial is comprised of seven volumes containing nine prosecution exhibits, 10 defense exhibits, 33 appellate exhibits, and one court exhibit.

4. *United States v. Akaka*, No. ACM S32744. The trial transcript is 181 pages long, and the record of trial is comprised of three volumes containing three prosecution exhibits, nine defense exhibits, six appellate exhibits, and two court exhibits.

Since Appellant's last request for an enlargement of time, undersigned counsel has filed a petition and supplement for grant of review in *United States v. McAlhaney* (Dkt. No. 23-0234/AF, No. ACM 39979 (rem)) before the United States Court of Appeals for the Armed Forces (C.A.A.F.). Counsel also reviewed two records of trial and advised the members regarding their opportunity to appeal directly to the Air Force Court of Criminal Appeals. Additionally, she was also out of the office for five duty days

Civilian Counsel

During the current enlargement, counsel filed in *United States v. Hansen* before the Army Court of Criminal Appeals (ACCA), in which the court finaled a fourth enlargement for the appellant who was not confined. Counsel has a brief for *United States v. Henderson* to file before the Appellant's. Counsel is also working on *United States v. Rudometikin*, an ongoing case post-remand from the C.A.A.F to the ACCA.

Through no fault of the Appellant, his counsel are unable to complete and file an Assignments of Error brief before this Court's current deadline. Counsel have advised the Appellant on his right to speedy appellate review, and the Appellant is aware of and agrees with this request for an enlargement of time.

WHEREFORE, the Appellant respectfully requests this Honorable Court grant this requested enlargement of time.

Respectfully submitted

PHILIP D. CAVE
Cave & Freeburg, LLP

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 6 September 2023.

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

7 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) NICHOLAS A. BYRNE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40391 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 300 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 8 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 7 September 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Panel No. 1
Airman First Class (E-3) **NICHOLAS A. BYRNE** United States Air Force *Appellant*	)	No. ACM 40391 3 October 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Airman First Class Nicholas A. Byrne, Appellant, requests an eighth enlargement of time to file an Assignments of Error brief. The Appellant requests an enlargement for a period of 30 days, which will end on **15 November 2023**. The record of trial was docketed with this Court on 20 December 2022. From the date of docketing to the present date, 287 days have elapsed. On the date requested, 330 days will have elapsed.

On 1 March 2022, at a general court-martial convened at Luke Air Force Base, Arizona, having elected trial by a panel of officers and enlisted members, the Appellant pled not guilty to 12 specifications of assault consummated by battery in violation of Article 128, UCMJ, 10 U.S.C. § 928[1] (ten preferred under Charge I and two preferred under the Additional Charge), and one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (Charge II). ROT Vol. 1, Entry of Judgment, 30 March 2022; R. at 262. On 4 March 2022, he was acquitted of five specifications under Charge I and one specification of the Additional Charge; he was convicted of:

[1] All references to the UCMJ are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.).

the five remaining specifications under Charge I,[2] the one remaining specification of the Additional Charge, the specification of Charge II, and Charge I, Charge II, and the Additional Charge. ROT Vol. 1, Entry of Judgment, 30 March 2022; R. at 878. On 5 March 2022, the court-martial members sentenced the Appellant to a dishonorable discharge, confinement for five years, total forfeitures of all pay and allowances, reduction to the lowest enlisted grade, and a reprimand. ROT Vol. 1, Entry of Judgment, 30 March 2022. The convening authority took no action on the findings or sentence of the court-marital and denied the Appellant's requests for the deferment of his reduction in rank and forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum, 22 March 2022. The Appellant is currently confined.

The trial transcript is 945 pages long and the record of trial is comprised of eight volumes consisting of five prosecution exhibits, six defense exhibits, 74 appellate exhibits, and one court exhibit. Only the transcript is in digital format.

Military Counsel

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel provides that she represents 19 clients and is presently assigned 10 cases pending brief before this Court. This case is counsel's fourth priority case, behind:

1. *United States v. Doroteo*, No. ACM 40363. The trial transcript is 2,149 pages long and the record of trial is comprised of 14 volumes containing 19 prosecution exhibits, three defense exhibits, 151 appellate exhibits, and two court exhibits. Undersigned counsel is finishing her review of the record.
2. *United States v. Davis*, No. ACM 40370. On 2 October 2023, undersigned counsel was detailed to represent SrA Tyrion Davis at this court's ordered oral arguments in

[2] The Appellant was found guilty of one of these five specifications under Charge I by exceptions and substitutions.

November 2023. The record of trial is comprised of 11 volumes containing 40 prosecution exhibits, 20 defense exhibits, 69 appellate exhibits, and one court exhibit; the transcript is 1258 pages. Counsel is beginning her review of the record and preparation for oral argument.

3. *United States v. Csiti*, No. ACM 40386. The trial transcript is 633 pages long, and the record of trial is comprised of seven volumes containing nine prosecution exhibits, 10 defense exhibits, 33 appellate exhibits, and one court exhibit.

Since Appellant's last request for an enlargement of time, undersigned counsel has filed a petition and supplement for grant of review in *United States v. Falls Down* (No. ACM 40268) before the United States Court of Appeals for the Armed Forces (C.A.A.F.), and advised one member regarding his opportunity to appeal directly to the Air Force Court of Criminal Appeals. Additionally, counsel was out of the office on leave for two duty days.

Civilian Counsel

During the current enlargement, counsel filed a brief in *United States v. Hansen* before the Army Court of Criminal Appeals (ACCA). Counsel is also working on *United States v. Rudometkin*, an ongoing case post-remand from the C.A.A.F to the ACCA. A1C Byrne's case is civilian's counsels second priority, after completion of *United States v. Henderson* (AFCCA).

Through no fault of the Appellant, his counsel are unable to complete and file an Assignments of Error brief before this Court's current deadline. Counsel have advised the Appellant on his right to speedy appellate review, and the Appellant is aware of and agrees with this request for an enlargement of time.

WHEREFORE, the Appellant respectfully requests this Honorable Court grant this requested enlargement of time.

Respectfully submitted,

PHILIP D. CAVE
Cave & Freeburg, LLP
1318 Princess St.
Alexandria, VA 22314

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 3 October 2023.

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

4 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) NICHOLAS A. BYRNE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40391 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 330 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 7 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 4 October 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Airman First Class (E-3) **NICHOLAS A. BYRNE** United States Air Force *Appellant*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)** Before Panel No. 1 No. ACM 40391 6 November 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Airman First Class Nicholas A. Byrne, Appellant, requests an enlargement of time to file an Assignments of Error brief. The Appellant requests an enlargement for a period of 30 days, which will end on **15 December 2023**. The record of trial was docketed with this Court on 20 December 2022. From the date of docketing to the present date, 321 days have elapsed. On the date requested, 360 days will have elapsed.

On 1 March 2022, at a general court-martial convened at Luke Air Force Base, Arizona, having elected trial by a panel of officers and enlisted members, the Appellant pled not guilty to 12 specifications of assault consummated by battery in violation of Article 128, UCMJ, 10 U.S.C. § 928[1] (ten preferred under Charge I and two preferred under the Additional Charge), and one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (Charge II). ROT Vol. 1, Entry of Judgment, 30 March 2022; R. at 262. On 4 March 2022, he was acquitted of five specifications under Charge I and one specification of the Additional Charge; he was convicted of:

[1] All references to the UCMJ are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.).

the five remaining specifications under Charge I,[2] the one remaining specification of the Additional Charge, the specification of Charge II, and Charge I, Charge II, and the Additional Charge. ROT Vol. 1, Entry of Judgment, 30 March 2022; R. at 878. On 5 March 2022, the court-martial members sentenced the Appellant to a dishonorable discharge, confinement for five years, total forfeitures of all pay and allowances, reduction to the lowest enlisted grade, and a reprimand. ROT Vol. 1, Entry of Judgment, 30 March 2022. The convening authority took no action on the findings or sentence of the court-marital and denied the Appellant's requests for the deferment of his reduction in rank and forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum, 22 March 2022. The Appellant is currently confined.

The trial transcript is 945 pages long and the record of trial is comprised of eight volumes consisting of five prosecution exhibits, six defense exhibits, 74 appellate exhibits, and one court exhibit. Only the transcript is in digital format.

Military Counsel

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel provides that she represents 20 clients and is presently assigned 14 cases pending brief before this Court. This case is counsel's fourth priority case, behind:

1. *United States v. Davis*, No. ACM 40370. The record of trial is comprised of 11 volumes containing 40 prosecution exhibits, 20 defense exhibits, 69 appellate exhibits, and 1 court exhibit; the transcript is 1258 pages. Undersigned counsel has completed her review of the transcript and record of trial and is preparing to travel for and give oral argument on 15 November 2023.
2. *United States v. Doroteo*, No. ACM 40363. The trial transcript is 2,149 pages long and the

[2] The Appellant was found guilty of one of these five specifications under Charge I by exceptions and substitutions.

record of trial is comprised of 14 volumes containing 19 prosecution exhibits, three defense exhibits, 151 appellate exhibits, and two court exhibits. Undersigned counsel has completed her review of the transcript. Mr. Scott Hockenberry is lead counsel on this case.

3. *United States v. Csiti*, No. ACM 40386. The trial transcript is 633 pages long, and the record of trial is comprised of seven volumes containing nine prosecution exhibits, 10 defense exhibits, 33 appellate exhibits, and one court exhibit. Undersigned counsel has completed her review of the record of trial.

Since Appellant's last request for an enlargement of time, undersigned counsel completed a review of the transcript for *United States v. Doroteo* (No. ACM 40363). On 2 October 2023, undersigned counsel was detailed to represent SrA Tyrion Davis at this Court's ordered oral argument (*United States v. Davis,* No. ACM 40370). She was not the original counsel who prepared the written briefs, nor had she reviewed the record of trial or the written filings prior to being detailed to represent SrA Davis. On 5 October 2023, this Court notified the parties for *United States v. Davis* that the oral argument would take place on 15 November 2023. As a result, undersigned counsel shifted *United States v. Davis* to her number one priority case and moved *United States v. Doroteo* to her number two priority case. Counsel completed her review of the unsealed transcript, record of trial, and written filings for *United States v. Davis* on 17 October 2023. She also prepared for, and participated in, two moot oral arguments for JAJA colleagues (*United States v. Driskill* and *United States v. Rocha*) and her own moot oral argument for *United States v. Davis*, and she advised one member regarding his opportunity to appeal directly to the Air Force Court of Criminal Appeals.

On 18 October 2023, undersigned counsel began reviewing the transcript for *United States v. Csiti* (No. ACM 40386).

She then attended the

Appellate Judges Education Institute 2023 Summit . She has a second moot oral argument scheduled for *United States v. Davis* on 9 November 2023. Undersigned counsel will be in Chicago, IL, from 13-15 November to represent SrA Davis at oral argument before this Court.

Civilian Counsel

During the current enlargement, counsel returned from an overseas vacation and filed a Motion for Reconsideration in *United States v. Shafran* (Coast Guard Court of Criminal Appeals). He filed a Reply in *United States v. Dine* (Army Court of Criminal Appeals) and has the following pending cases before this Court: *Henderson*, *Byrne*, *Hennessy*, and *Ramirez*. Additionally, before the Army Court of Criminal Appeals, he has *Rudometkin*, *Nieves*, and *Hansen*. Finally, he is completing trial in *United States v. Rosser* in the Eastern District of Virginia.

Through no fault of the Appellant, his counsel are unable to complete and file an Assignments of Error brief before this Court's current deadline. Counsel have advised the Appellant on his right to speedy appellate review, and the Appellant is aware of and agrees with this request for an enlargement of time.

WHEREFORE, the Appellant respectfully requests this Honorable Court grant this requested enlargement of time.

Respectfully submitted,

PHILIP D. CAVE
Cave & Freeburg, LLP

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 6 November 2023.

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

8 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) NICHOLAS A. BYRNE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40391 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 360 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities. While it appears one of Appellant's counsel has reviewed the Record of Trial in this case, it appears the other may have taken on an appellate case load across the various services that will prevent him from doing such for a significant period of time.

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

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 8 November 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TENTH)**
v.	)	Before Panel No. 1
Airman First Class (E-3) **NICHOLAS A. BYRNE** United States Air Force *Appellant*	)	No. ACM 40391 8 December 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Airman First Class Nicholas A. Byrne, Appellant, requests an enlargement of time to file an Assignments of Error (AOE) brief. The Appellant requests an enlargement for a period of 30 days, which will end on **14 January 2024**. The record of trial was docketed with this Court on 20 December 2022. From the date of docketing to the present date, 353 days have elapsed. On the date requested, 390 days will have elapsed.

On 1 March 2022, at a general court-martial convened at Luke Air Force Base, Arizona, having elected trial by a panel of officers and enlisted members, the Appellant pled not guilty to 12 specifications of assault consummated by battery in violation of Article 128, UCMJ, 10 U.S.C. § 928[1] (ten preferred under Charge I and two preferred under the Additional Charge), and one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (Charge II). ROT Vol. 1, Entry of Judgment, 30 March 2022; R. at 262. On 4 March 2022, he was acquitted of five specifications under Charge I and one specification of the Additional Charge; he was convicted of:

[1] All references to the UCMJ are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.).

the five remaining specifications under Charge I,[2] the one remaining specification of the Additional Charge, the specification of Charge II, and Charge I, Charge II, and the Additional Charge. ROT Vol. 1, Entry of Judgment, 30 March 2022; R. at 878. On 5 March 2022, the court-martial members sentenced the Appellant to a dishonorable discharge, confinement for five years, total forfeitures of all pay and allowances, reduction to the lowest enlisted grade, and a reprimand. ROT Vol. 1, Entry of Judgment, 30 March 2022. The convening authority took no action on the findings or sentence of the court-marital and denied the Appellant's requests for the deferment of his reduction in rank and forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum, 22 March 2022. Appellant is currently confined.

The trial transcript is 945 pages long and the record of trial is comprised of eight volumes consisting of five prosecution exhibits, six defense exhibits, 74 appellate exhibits, and one court exhibit.

Military Counsel

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), counsel currently represents 24 clients and is presently assigned 16 cases pending brief before this Court. This case is counsel's fourth priority case, behind:

1. *In re Banker*, Misc. Dkt. No. 2022-01. The transcript of the *DuBay* hearing is 311 pages and the record is two volumes. Mr. Banker's writ-appeal petition is due to the Court of Appeals for the Armed Forces (C.A.A.F.) on 14 December 2023.
2. *United States v. Doroteo*, No. ACM 40363. The trial transcript is 2,149 pages long and the record of trial is comprised of 14 volumes containing 19 prosecution exhibits, three defense exhibits, 151 appellate exhibits, and two court exhibits. SrA Doroteo's AOE is due to this

[2] The Appellant was found guilty of one of these five specifications under Charge I by exceptions and substitutions.

Court on 27 December 2023. Mr. Scott Hockenberry is the lead counsel on this case.

3. *United States v. Csiti*, No. ACM 40386. The trial transcript is 633 pages long, and the record of trial is comprised of seven volumes containing nine prosecution exhibits, 10 defense exhibits, 33 appellate exhibits, and one court exhibit. Undersigned counsel has completed her review of the record of trial.

Since Appellant's last request for an enlargement of time, undersigned counsel prepared for, and participated in, an oral argument ordered by this Court for *United States v. Davis*, No. ACM 40370, in Chicago, IL. She prepared for, and participated in, seven moot oral arguments for her colleagues for *United States v. Cole*, USCA Dkt. No. 23-0162/AF, *In re H.V.Z.*, USCA Dkt. No. 23-0250/AF, *United States v. Palik*, USCA Dkt. No. 23-0206/AF, and *In re R.W.*, Misc. Dkt. 2023-08. Additionally, she prepared a Writ-Appeal Petition for *In re Banker*, Misc. Dkt. No. 2022-01, and assisted her co-counsel in preparing an AOE, consisting of 11 issues, for *United States v. Doroteo*, No. ACM 40363.

During this requested enlargement of time, undersigned counsel will finish and file the Writ-Appeal Petition for *In re Banker*. She will also finish and file the AOE for *United States v. Doroteo*. Counsel will begin drafting the AOE for *United States v. Csiti*.

Civilian Counsel

During the current enlargement, civilian counsel completed a 77-page draft AOE for Appellant. Additionally, he met with Appellant and discussed potential *Grostefon* issues Appellant may want to raise in his AOE. Appellant's case is civilian counsel's number one priority.

Through no fault of the Appellant, his counsel are unable to complete and file an Assignments of Error brief before this Court's current deadline. Counsel have advised the Appellant on his right to speedy appellate review, and the Appellant is aware of and agrees with this request

for an enlargement of time.

WHEREFORE, the Appellant respectfully requests this Honorable Court grant this requested enlargement of time.

Respectfully submitted,

PHILIP D. CAVE
Cave & Freeburg, LLP

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 8 December 2023.

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

12 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) NICHOLAS A. BYRNE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40391 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 390 days in length. Appellant's year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 5 months combined for the United States and this Court to perform their separate statutory responsibilities. While it appears one of Appellant's counsel has reviewed the Record of Trial in this case, it appears the other may have taken on an appellate case load across the various services that will prevent him from doing such for a significant period of time.

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

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 12 December 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

United States Air Force Court of Criminal Appeals

UNITED STATES	)	**No. ACM 40391**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Nicholas A. BYRNE	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 8 December, counsel for Appellant submitted a Motion for Enlargement of Time (Tenth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 12th day of December, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Tenth) is **GRANTED**. Appellant shall file any assignments of error not later than **14 January 2024**.

Appellant's counsel is advised that given the number of enlargements granted thus far, any further requests for an enlargement of time may necessitate a status conference.

FOR THE COURT

FLEMING E. KEEFE, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Airman First Class (E-3) **NICHOLAS A. BYRNE** United States Air Force *Appellant*	))))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (ELEVENTH)** Before Panel No. 1 No. ACM 40391 5 January 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Airman First Class Nicholas A. Byrne, Appellant, requests an enlargement of time to file an Assignments of Error (AOE) brief. The Appellant requests an enlargement for a period of 30 days, which will end on **13 February 2024**. The record of trial was docketed with this Court on 20 December 2022. From the date of docketing to the present date, 381 days have elapsed. On the date requested, 420 days will have elapsed.

On 1 March 2022, at a general court-martial convened at Luke Air Force Base, Arizona, having elected trial by a panel of officers and enlisted members, the Appellant pled not guilty to 12 specifications of assault consummated by battery in violation of Article 128, UCMJ, 10 U.S.C. § 928[1] (ten preferred under Charge I and two preferred under the Additional Charge), and one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (Charge II). ROT Vol. 1, Entry of Judgment, 30 March 2022; R. at 262. On 4 March 2022, he was acquitted of five specifications under Charge I and one specification of the Additional Charge; he was convicted of:

[1] All references to the UCMJ are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.).

the five remaining specifications under Charge I,[2] the one remaining specification of the Additional Charge, the specification of Charge II, and Charge I, Charge II, and the Additional Charge. ROT Vol. 1, Entry of Judgment, 30 March 2022; R. at 878. On 5 March 2022, the court-martial members sentenced the Appellant to a dishonorable discharge, confinement for five years, total forfeitures of all pay and allowances, reduction to the lowest enlisted grade, and a reprimand. ROT Vol. 1, Entry of Judgment, 30 March 2022. The convening authority took no action on the findings or sentence of the court-marital and denied the Appellant's requests for the deferment of his reduction in rank and forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum, 22 March 2022. Appellant is currently confined.

The trial transcript is 945 pages long and the record of trial is comprised of eight volumes consisting of five prosecution exhibits, six defense exhibits, 74 appellate exhibits, and one court exhibit.

Military Counsel

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), counsel currently represents 20 clients and is presently assigned 15 cases pending brief before this Court. This case is counsel's second priority case, behind:

1. *United States v. Csiti*, No. ACM 40386. The trial transcript is 633 pages long, and the record of trial is comprised of seven volumes containing nine prosecution exhibits, 10 defense exhibits, 33 appellate exhibits, and one court exhibit. Undersigned counsel has completed her review of the record of trial and has begun drafting SSgt Csiti's AOE brief, which is due on 24 January 2024.

Since Appellant's last request for an enlargement of time, undersigned counsel filed a Writ-

[2] The Appellant was found guilty of one of these five specifications under Charge I by exceptions and substitutions.

Appeal Petition for *In re Banker*, Misc. Dkt. No. 2022-01, with the Court of Appeals for the Armed Forces, and filed an AOE brief, consisting of 11 issues, for *United States v. Doroteo*, No. ACM 40363, with this Court. She also prepared for, and participated in, four moot oral arguments for her colleagues for *In re R.W.*, Misc. Dkt. 2023-08, *United States v. Leipart*, USCA Dkt. No. 23-0163/AF, and *United States v. Smith*, USCA Dkt. No. 23-0207/AF. Finally, counsel began drafting the AOE brief for *United States v. Csiti*, No. ACM 40386.

Civilian Counsel

During the current enlargement, civilian counsel completed a 77-page draft AOE for Appellant. Additionally, he met with Appellant and discussed potential *Grostefon* issues Appellant may want to raise in his AOE. Appellant's case is civilian counsel's number one priority.

Civilian counsel has the following matters pending: *Byrne* (AFCCA); *Hennessy* (AFCCA); *Ramirez* (AFCCA) (not confined); *Shafran* (CGCCA) (not confined); *Rudometkin* (ACCA); and several Article 32, UCMJ, hearings to be scheduled. Counsel awaits a Government Answer in *Henderson* (AFCCA) and *Hansen* (ACCA).

During the current enlargement, civilian counsel submitted an additional assignment of error in *Shafran* (CGCCA) subsequent to the grant of a motion to reconsider their en banc decision; submitted additional assignments of error and *Grostefon* errors in *Rudometkin* (ACCA) subsequent to the Court of Appeals for the Armed Forces remand for a full Article 66, UCMJ, review; and completed a personal visit to appellants at Naval Consolidated Brig, Miramar, CA.

Through no fault of the Appellant, his counsel are unable to complete and file an Assignments of Error brief before this Court's current deadline. Counsel have advised the Appellant on his right to speedy appellate review, and the Appellant is aware of and agrees with this request for an enlargement of time.

WHEREFORE, the Appellant respectfully requests this Honorable Court grant this requested enlargement of time.

Respectfully submitted.

PHILIP D. CAVE
Cave & Freeburg, LLP

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 5 January 2024.

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

5 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) NICHOLAS A. BYRNE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40391 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 420 days in length. Appellant's year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 4 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 5 January 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S MOTION**
Appellee	)	**FOR ENLARGEMENT OF TIME**
	)	**(TWELTH)**
	)	
v.	)	Before Panel No. 1
	)	
Airman First Class (E-3)	)	No. ACM 40391
NICHOLAS A. BYRNE	)	
United States Air Force	)	5 February 2024
Appellant	)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Airman First Class Nicholas A. Byrne, Appellant, requests an enlargement of time (EOT) to file an Assignments of Error (AOE) brief. The Appellant requests an enlargement for a period of 30 days, which will end on **14 March 2024**. The record of trial was docketed with this Court on 20 December 2022. From the date of docketing to the present date, 412 days have elapsed. On the date requested, 450 days will have elapsed.

On 1 March 2022, at a general court-martial convened at Luke Air Force Base, Arizona, having elected trial by a panel of officers and enlisted members, the Appellant pled not guilty to 12 specifications of assault consummated by battery in violation of Article 128, UCMJ, 10 U.S.C. § 928[1] (ten preferred under Charge I and two preferred under the Additional Charge), and one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (Charge II). ROT Vol. 1, Entry of Judgment, 30 March 2022; R. at 262. On 4 March 2022, he was acquitted of five specifications under Charge I and one specification of the Additional Charge; he was convicted of:

[1] All references to the UCMJ are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.).

the five remaining specifications under Charge I,[2] the one remaining specification of the Additional Charge, the specification of Charge II, and Charge I, Charge II, and the Additional Charge. ROT Vol. 1, Entry of Judgment, 30 March 2022; R. at 878. On 5 March 2022, the court-martial members sentenced the Appellant to a dishonorable discharge, confinement for five years, total forfeitures of all pay and allowances, reduction to the lowest enlisted grade, and a reprimand. ROT Vol. 1, Entry of Judgment, 30 March 2022. The convening authority took no action on the findings or sentence of the court-marital and denied the Appellant's requests for the deferment of his reduction in rank and forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum, 22 March 2022. Appellant is currently confined.

The trial transcript is 945 pages long and the record of trial is comprised of eight volumes consisting of five prosecution exhibits, six defense exhibits, 74 appellate exhibits, and one court exhibit. Military appellate counsel completed her review of the record of trial. During the requested enlargement of time, military counsel will be assisting Appellant's civilian counsel with drafting remaining issues and finalizing Appellant's AOE brief.

Military Counsel

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), counsel currently represents 17 clients and is presently assigned 13 cases pending brief before this Court. This case is counsel's number one priority case for the Air Force Court of Criminal Appeals. Counsel will also be working, simultaneously, a Petition and Supplement to the Court of Appeals for the Armed Forces for *United States v. Davis*, No. ACM 40370.

Since Appellant's last request for an enlargement of time, undersigned counsel completed her review of the records of trial for Appellant's case and *United States v. McCartney*, No. ACM

[2] The Appellant was found guilty of one of these five specifications under Charge I by exceptions and substitutions.

40414. She also filed an AOE brief, consisting of three issues, for *United States v. Csiti*, No. ACM 40386, and filed a motion for withdrawal from appellate review in *United States v. McCartney*, No. ACM 40414. Finally, she also prepared for, and participated in, two moot oral arguments for her colleague for *United States v. Stradtmann*, USCA Dkt. No. 23-0223/AF.

Civilian Counsel

Since Appellant's last request for an enlargement of time, civilian counsel completed a Reply Brief in *United States v. Hansen* (ACCA); submitted a Reply Brief in *Shafran* (CGCCA); reviewed a Reply Brief in *Henderson* and an additional Reply Brief in *Rudometkin* (ACCA).

Through no fault of the Appellant, his counsel are unable to complete and file an Assignments of Error brief before this Court's current deadline. Barring any unforeseen circumstances, both military and civilian appellate counsel anticipate this will be the last requested EOT. Counsel have advised the Appellant on his right to speedy appellate review, and the Appellant is aware of and agrees with this request for an enlargement of time.

WHEREFORE, the Appellant respectfully requests this Honorable Court grant this requested enlargement of time.

Respectfully submitted,

PHILIP D. CAVE
Cave & Freeburg, LLP
1318 Princess St.
Alexandria, VA 22314

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 5 February 2024.

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

5 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) NICHOLAS A. BYRNE, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40391 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 450 days in length. Appellant's over a year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 3 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 5 February 2024.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40391**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Nicholas A. BYRNE	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 5 February 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Twelfth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 7th day of February, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Twelfth) is **GRANTED**. Appellant shall file any assignments of error not later than **14 March 2024**

Appellant's counsel is advised that given the nature of this case and the number of enlargements granted thus far, absent exceptional circumstances, no further enlargement of time will be granted.

FOR THE COURT

FLEMING E. KEEFE, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**NOTICE OF APPEARANCE**
Appellee	)	
	)	Before Panel No. 1
	)	
v.	)	No. ACM 40391
	)	
Airman First Class (E-3)	)	
NICHOLAS A. BYRNE	)	
United States Air Force	)	29 February 2024
Appellant	)	

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

Pursuant to Rule 12 of this Court's Rules of Practice and Procedure, undersigned counsel files this written notice of appearance as counsel for Appellant, A1C Nicholas A. Byrne, U.S. Air Force.

Respectfully submitted,

MEGAN P. MARINOS
Senior Counsel
Air Force Appellate Defense Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 29 February 2024.

MEGAN P. MARINOS
Senior Counsel
Air Force Appellate Defense Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Airman First Class (E-3) **NICHOLAS A. BYRNE** United States Air Force *Appellant*	))))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRTEENTH)** Before Panel No. 1 No. ACM 40391 7 March 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Airman First Class Nicholas A. Byrne, Appellant, requests an enlargement of time (EOT) to file an Assignments of Error (AOE) brief. The Appellant requests an enlargement for a period of 30 days, which will end on **13 April 2024**. The record of trial was docketed with this Court on 20 December 2022. From the date of docketing to the present date, 443 days have elapsed. On the date requested, 480 days will have elapsed.

On 1 March 2022, at a general court-martial convened at Luke Air Force Base, Arizona, having elected trial by a panel of officers and enlisted members, the Appellant pled not guilty to 12 specifications of assault consummated by battery in violation of Article 128, UCMJ, 10 U.S.C. § 928[1] (ten preferred under Charge I and two preferred under the Additional Charge), and one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (Charge II). ROT Vol. 1, Entry of Judgment, 30 March 2022; R. at 262. On 4 March 2022, he was acquitted of five specifications under Charge I and one specification of the Additional Charge; he was convicted of:

[1] All references to the UCMJ are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.).

the five remaining specifications under Charge I,[2] the one remaining specification of the Additional Charge, the specification of Charge II, and Charge I, Charge II, and the Additional Charge. ROT Vol. 1, Entry of Judgment, 30 March 2022; R. at 878. On 5 March 2022, the court-martial members sentenced the Appellant to a dishonorable discharge, confinement for five years, total forfeitures of all pay and allowances, reduction to the lowest enlisted grade, and a reprimand. ROT Vol. 1, Entry of Judgment, 30 March 2022. The convening authority took no action on the findings or sentence of the court-marital and denied the Appellant's requests for the deferment of his reduction in rank and forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum, 22 March 2022. Appellant is currently confined.

The trial transcript is 945 pages. The record of trial is comprised of eight volumes consisting of five prosecution exhibits, six defense exhibits, 74 appellate exhibits, and one court exhibit.

Military Counsel

Ms. Megan Marinos, Air Force Senior Appellate Defense Counsel, was detailed as military counsel to represent A1C Byrne on 23 February 2024 after A1C Byrne communicated his decision to release his prior military counsel, Major Megan Crouch, U.S. Air Force. Ms. Marinos filed a Notice of Appearance with this Court on 29 February 2024, in accordance with Rule 12. Major Crouch filed a Motion for Withdrawal of Appellate Defense Counsel that same day.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), military counsel currently has one additional active case—*United States v. McLeod*. SrA McLeod also has civilian counsel. Military counsel anticipates filing a Reply in *United States v. McLeod* on or before 18 March 2024. A1C Byrne's case is military counsel's number one priority.

Military counsel has worked diligently to review the record while also performing her

[2] The Appellant was found guilty of one of these five specifications under Charge I by exceptions and substitutions.

supervisory duties as the Air Force Senior Appellate Defense Counsel. Since being detailed to this case, military counsel participated in one moot in *United States v. Wells*, sat at counsel's table for CAAF oral argument in *United States v. Wells* on 6 March 2024, and reviewed and provided substantive edits on four pleadings—two CAAF supplements and two AFCCA AOE briefs. Military counsel was out of the office on .

Military counsel has not completed her review of the record of trial. During the requested enlargement of time, military counsel will review the record of trial, review what was previously drafted by both civilian counsel and prior military counsel, and assist civilian counsel with drafting remaining issues.

Civilian Counsel

Significant portions of the assignments of error have been prepared and are being edited. In addition, counsel is working with the Appellant who has a very long list of *Grostefon* issues he wishes raised. Since the Appellant's last request for an enlargement of time, civilian counsel has been completing a Reply in *Hennessy* (AFCCA), completing a response to Defense Counsel declarations in *United States v. Hansen* (ACCA), reviewing the decision in *Shafran* (CGCCA) for a petition, and working on a request for reconsideration in *Rudometkin* (ACCA).

Conclusion

Counsel are unable to complete and file an Assignments of Error brief before this Court's current deadline. Counsel have advised the Appellant on his right to speedy appellate review, and the Appellant is aware of and agrees with this request for an enlargement of time.

Counsel and Appellant are aware of the Court's order of 7 February 2024, specifying that "absent exceptional circumstances, no further enlargement of time will be granted." Counsel and Appellant believe that Appellant's decision to release his prior military counsel, and the detailing of new military counsel only thirteen days prior to this filing, are exceptional circumstances warranting

an enlargement of time to ensure all counsel have reviewed the entire record, the client has been properly advised, and all assignments of error and *Grostefon* issues are effectively raised with the Court.

WHEREFORE, the Appellant respectfully requests this Court grant this requested enlargement of time.

Respectfully submitted,

PHILIP D. CAVE
Cave & Freeburg, LLP

MEGAN P. MARINOS
Senior Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 7 March 2024.

Respectfully submitted,

.
MEGAN P. MARINOS
Senior Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

8 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) NICHOLAS A. BYRNE, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40391 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 480 days in length. Appellant's over a year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 2 months combined for the United States and this Court to perform their separate statutory responsibilities. It appear that Appellant's military counsel has not completed review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 8 March 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman First Class (E-3) **NICHOLAS A. BYRNE,** United States Air Force *Appellant*	))))))))))	**MOTION FOR WITHDRAWAL OF APPELLATE DEFENSE COUNSEL** Before Panel No. 1 Case No. ACM 40391 29 February 2024

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

Pursuant to Rules 12(b), 12.4, and 23.3(h) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel respectfully requests to withdraw as counsel for Airman First Class (A1C) Nicholas Byrne, Appellant, in the above-captioned case. A1C Byrne has been advised of this motion to withdraw and consents to this request; in fact, it is his desire. A1C Byrne released undersigned counsel as he no longer wishes to be represented by her.

Ms. Megan Marinos, the Air Force Appellate Defense Division's Senior Counsel, has been detailed s successor counsel to represent A1C Bryne, and her notice of appearance was filed with this Court on 29 February 2024. Maj Crouch and Ms. Marinos have completed a thorough turnover of the record. Mr. Cave remains as A1C Byrne's civilian appellate defense counsel.

Undersigned counsel confirms that A1C Byrne provided limited authorization to disclose that which was necessary to satisfy this Court's rules. A copy of this motion will be delivered to A1C Byrne following its filing.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant this motion.

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 29 February 2024.

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTEENTH) OUT OF TIME**
v.	)	Before Panel No. 1
Airman First Class (E-3) **NICHOLAS A. BYRNE** United States Air Force *Appellant*	)	No. ACM 40391 10 April 2024

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

Pursuant to Rules 23.3 and 18.5 of this Honorable Court's Rules of Practice and Procedure, Airman First Class Nicholas A. Byrne, Appellant, requests an enlargement of time (EOT) to file an Assignments of Error (AOE) brief. The Appellant requests an enlargement for a period of 10 days, which will end on **23 April 2024**. The record of trial was docketed with this Court on 20 December 2022. From the date of docketing to the present date, 477 days have elapsed. On the date requested, 490 days will have elapsed.

On 1 March 2022, at a general court-martial convened at Luke Air Force Base, Arizona, having elected trial by a panel of officers and enlisted members, the Appellant pled not guilty to 12 specifications of assault consummated by battery in violation of Article 128, UCMJ, 10 U.S.C. § 928[1] (ten preferred under Charge I and two preferred under the Additional Charge), and one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (Charge II). ROT Vol. 1, Entry of Judgment, 30 March 2022; R. at 262. On 4 March 2022, he was acquitted of five specifications under Charge I and one specification of the Additional Charge; he was convicted of:

[1] All references to the UCMJ are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.).

the five remaining specifications under Charge I,[2] the one remaining specification of the Additional Charge, the specification of Charge II, and Charge I, Charge II, and the Additional Charge. ROT Vol. 1, Entry of Judgment, 30 March 2022; R. at 878. On 5 March 2022, the court-martial members sentenced the Appellant to a dishonorable discharge, confinement for five years, total forfeitures of all pay and allowances, reduction to the lowest enlisted grade, and a reprimand. ROT Vol. 1, Entry of Judgment, 30 March 2022. The convening authority took no action on the findings or sentence of the court-marital and denied the Appellant's requests for the deferment of his reduction in rank and forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum, 22 March 2022. Appellant is currently confined.

The trial transcript is 945 pages long. The record of trial is comprised of eight volumes consisting of five prosecution exhibits, six defense exhibits, 74 appellate exhibits, and one court exhibit.

Civilian Counsel

Civilian counsel has completed drafting his portions of the AOE brief and is working with the Appellant to finalize the many *Grostefon* issues he wishes raised. In addition, civilian counsel is working with the Appellant to draft a Declaration, that is necessary to support his *Grostefon* issues. Civilian counsel will return from travel OCONUS .

Military Counsel

Ms. Megan Marinos, Air Force Senior Appellate Defense Counsel, was detailed as military counsel to represent A1C Byrne on 23 February 2024 after A1C Byrne communicated his decision to release his prior military counsel, Major Megan Crouch, U.S. Air Force. Ms. Marinos filed a notice of appearance with this Court on 29 February 2024, in accordance with Rule 12. Major Crouch

[2] The Appellant was found guilty of one of these five specifications under Charge I by exceptions and substitutions.

filed her notice of withdrawal that same day.

A1C Byrne's case is Counsel's number one priority. Military counsel currently has no active deadlines in other cases. Military counsel has worked diligently to review the record while also performing her supervisory duties as the Air Force Senior Appellate Defense Counsel. Since filing the last enlargement of time request, military counsel filed a Reply in *United States v. McLeod*, participated in four moots, sat second chair at two oral arguments,[3] and edited 17 substantive filings.

Good cause exists for why this filing is out of time. Military counsel believed she would complete her portions of the brief prior to the current deadline, but due to unanticipated medical appointments, she encountered last-minute delays. It was also just brought to military counsel's attention that she will be responsible for drafting an additional portion of the AOE brief that she was not originally responsible for drafting. Military counsel filed this motion as soon as she determined more time would be necessary to ensure effective representation.

Military counsel must still review the sealed portions of the record of trial. She intends to do so tomorrow, 11 April 2024. Military counsel does not anticipate that this review will result in additional delay, but she must complete this review to fulfill her Article 70, UCMJ, responsibilities. During the requested enlargement of time, military appellate counsel will complete her review of the record of trial, complete her portions of the AOE brief, and edit the entire brief.

Through no fault of the Appellant, his counsel are unable to complete and file an Assignments of Error brief before this Court's current deadline. Counsel have advised the Appellant on his right to speedy appellate review, and the Appellant is aware of and agrees with this request for an enlargement of time.

The requested 10-day enlargement of time is necessary to ensure both counsel have sufficient time to complete and edit the entire AOE brief, consult their incarcerated client, and ensure the

[3] This includes the AFCCA outreach oral argument in *United States v. Arroyo* on 10 April 2024.

multiple identified issues (and those raised pursuant to *Grostefon*) are properly and effectively raised with this Court.

WHEREFORE, the Appellant respectfully requests this Court grant this requested enlargement of time.

Respectfully submitted,

PHILIP D. CAVE
Cave & Freeburg, LLP

MEGAN P. MARINOS
Senior Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 10 April 2024.

Respectfully submitted,

MEGAN P. MARINOS
Senior Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

11 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) NICHOLAS A. BYRNE, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40391 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 490 days in length. Appellant's over a year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves less than 2 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's military counsel has not completed review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 11 April 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Airman First Class (A1C) Nicholas A. BYRNE United States Air Force *Appellant*	**BRIEF ON BEHALF OF APPELLANT** Before Panel No. 1 No. ACM 40391 23 April 2024

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

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Senior Counsel
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Counsel for Appellant

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Assignments of Error

I.

WHETHER THE EVIDENCE IS FACTUALLY SUFFICIENT TO SUSTAIN FINDINGS OF GUILTY FOR ASSAULT CONSUMMATED BY A BATTERY ON A SPOUSE AND AGGRAVATED ASSAULT AS CHARGED IN SPECIFICATIONS 3, 5, 6, 7, 10 OF CHARGE I.

II.

WHETHER THE EVIDENCE IS LEGALLY SUFFICIENT TO SUSTAIN A FINDING OF GUILTY FOR ASSAULT CONSUMMATED BY A BATTERY ON A SPOUSE AS CHARGED IN SPECIFICATION 6 of CHARGE I.

III.

WHETHER THE EVIDENCE IS LEGALLY OR FACTUALLY SUFFICIENT TO SUSTAIN A FINDING OF GUILTY FOR SEXUAL ASSAULT AS CHARGED IN THE SOLE SPECIFICATION OF CHARGE II.

IV.

WHETHER THE EVIDENCE IS FACTUALLY SUFFICIENT TO SUSTAIN A FINDING OF GUILTY FOR ASSAULT CONSUMMATED BY A BATTERY AS CHARGED IN SPECIFICATION 1 OF THE ADDITIONAL CHARGE.

V.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO SUPPRESS A1C BYRNE'S STATEMENTS TO INVESTIGATORS.

VI.

WHETHER THE MILITARY JUDGE ERRED BY LIMITING CROSS-EXAMINATION OF B.P. ABOUT HIS PENDING DISCIPLINARY ACTION.

VII.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO SEVER THE ADDITIONAL CHARGE FROM THE INITIAL CHARGES.

VIII.

WHETHER AN ACCUMULATION OF PROSECUTOR ERRORS PREJUDICE THE APPELLANT ON FINDINGS AND SENTENCING.

IX.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING A DEFENSE CHALLENGE TO FIRST LIEUTENANT H , WHO SAT IN JUDGMENT OF THE APPELLANT.

Statement of Statutory Jurisdiction

This Court has jurisdiction under UCMJ Art. 66, 10 U.S.C. § 866 because the Appellant was sentenced to a punitive discharge and five years of confinement.[1] (R. at 943.)

Statement of the Case

On 5 March 2022, a panel of officers and enlisted members convicted the Appellant of five specifications of assault and battery involving his spouse (Specifications 3, 5-7, 10),[2] one sexual act to abuse, humiliate, harass, or degrade his spouse, and an additional specification of assault and battery on B.P., (Entry of Judgment, 30 March 2022; R. at 878.) The panel found him not guilty of five assaults against his spouse and an assault against B.P. *Id*.

The military judge merged Specifications 5 and 6 for sentencing, and the members sentenced the Appellant to a dishonorable discharge, five years confinement, total forfeitures of all

[1] Specification 1 of the additional Charge happened after 1 January 2021.
[2] The allegations of Charge I happened after 1 January 2019.

pay and allowances, reduction to pay-grade E-1, and a reprimand. (Entry of Judgment, 30 March 2022; R. at 943, Appellate Ex. LXXI.) The convening authority took no action on the findings or sentence of the court-martial and denied the Appellant's requests to defer his rank reduction and forfeitures. (Convening Authority Decision on Action Memorandum, 22 March 2022.)

The Appellant was sentenced on 5 March 2022, the Entry of Judgment is dated 30 March 2022, the trial transcript was authenticated on 7 October 2022, and the Appellant's case was docketed with the court on 20 December 2022.

Statement of Facts

A. A1C Byrne and K.D. married after knowing each other only three months.

A1C Byrne and K.D. met at tech school in March 2019. (R. at 473-74.) After knowing each other for approximately three months, the two married on 21 June 2019. (R. at 473-74.) After graduation, they moved to Germany. (R. at 474.)

B. K.D. began an affair with A.T. while A1C Byrne was deployed.

K.D. was not happy with the husband that A1C Byrne turned out to be. She complained that A1C Byrne did not regularly shower, was a bad cook, did not do the dishes, did not sweep or mop, and always played video games. (R. at 560.)

Dissatisfied with her marriage, K.D., an active-duty   , began a sexual relationship with A.T., an active-duty   , while A1C Byrne was deployed to Africa. (R. at 542, 547, 560-61.) Soon after beginning her affair with A.T., K.D. became pregnant with A.T.'s child. (R. at 547-49.)

C. K.D. told A1C Byrne she wanted a divorce.

Around November 2020, while A1C Byrne was deployed, K.D. told A1C Byrne that she wanted a divorce. (R. at 539-40.) During this time, despite claims that she did not want the

marriage to "end badly," (R. at 542) K.D. would send unkind text messages to A1C Byrne: "Hey, dumb ass." "You're fucking, mentally ill." "You're disgusting." (R. at 561.) On 28 November 2020, while communicating about the pending divorce, K.D. threatened A1C Byrne, stating, "Just tread lightly. This can all go however you want." (R. at 552.)

D. K.D. reported allegations of domestic abuse against A1C Byrne and OSI opens an investigation.

Around the time that K.D. got pregnant, she first reported that A1C Byrne had assaulted her. (R. at 539-41.) She made this report to an intermittent First Sergeant in her unit. (R. at 540-41.) The First Sergeant then reported the incident through the proper channels as an unrestricted report. (R. at 541.)

K.D. was interviewed by an agent with the Air Force Office of Special Investigation (OSI) around 15 December 2020. (R. at 563, 558, 752.) K.D. reported multiple instances of alleged assault spanning her marriage to A1C Byrne and provided OSI with pictures of physical injuries allegedly caused by A1C Byrne. (R. at 488-502; Pros. Ex. 1.) None of the pictures provided to OSI contain time or date information because K.D. did not permit OSI to do a full extraction of her cell phone containing the images of her alleged injuries. (R. at 56-57.). So OSI effectively took screenshots of the pictures. (R. at 728-29.) Screenshots do not contain metadata—embedded information, including the location and dates of when a photo was originally captured. (R. at 728-29.)

As part of the investigation, OSI Special Agent N.C. went to K.D. and A1C Byrne's home to take photos and to determine if there was anything in the home to corroborate evidence that was provided during K.D.'s interview. (R. at 751-53.) But Agent N.C. did not see any damage to the residence, including no damaged furniture, no damaged windows, and no holes in the walls. (R. at 753.)

E. The Government initially charged A1C Byrne with 11 specifications.

On 11 May 2021, the Government charged A1C Byrne with nine specifications of assault consummated by a battery on his spouse, one specification of aggravated assault (strangulation), and one specification of sexual assault. Charge Sheet, 11 May 2021.

F. Prior to arraignment, the Government charged A1C Byrne with two additional specifications.

A1C Byrne was involved in a physical altercation with B.P. while at a club on 14 November 2021. (R. at 774-75.) Despite evidence of self-defense, the Government charged A1C Byrne with two additional specifications of assault consummated by a battery. Charge Sheet, 11 Jan 2022.

G. At trial, K.D. was the Government's primary witness.

K.D. testified about multiple instances of alleged physical assault spanning from August 2019 to September 2020. (R. at XX.) K.D. also testified about a single instance of alleged sexual abuse. (R. at XX.) Throughout her testimony she struggled with timelines and was attempting to estimate when offenses occurred and when she took photographs that she claimed captured injuries sustained during the alleged assaults. (R. at XX.)

H. The members convicted K.D. of seven specifications and sentenced him to 5 years' confinement.

The members convicted K.D. of four specifications of assault consummated by a battery on his spouse, one specification of assault consummated by a battery on B.P., one specification of aggravated assault, and one specification of sexual assault. (R. at 878.) The members sentenced A1C Byrne to be reprimanded, reduced to the grade of E-1, total forfeitures, five years' confinement, and a dishonorable discharge. (R. at 943.)

Additional relevant facts are included below in the applicable Assignments of Error.

Argument

I.

THE EVIDENCE IS FACTUALLY INSUFFICIENT TO SUSTAIN FINDINGS OF GUILTY FOR ASSAULT CONSUMMATED BY A BATTERY AND AGGRAVATED ASSAULT AS CHARGED IN SPECIFICATIONS 3, 5, 6, 7, 10 OF CHARGE I.

Standard of Review

This Court reviews issues of factual and legal sufficiency de novo. 10 U.S.C. § 866; *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law and Analysis

A. Courts of Criminal Appeal ensure evidence is factually sufficient to support convictions.

This Court "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c), UCMJ. The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [this Court is] convinced of the accused's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. In doing so, this Court "applies neither a presumption of innocence nor a presumption of guilt." *Washington*, 57 M.J. at 399.

B. K.D., the complaining witness and backbone of the Government's case, is uncredible.

The Government only called five witnesses on the merits. (R. at 472-713.) To prove the elements of the Article 128, UCMJ, violations contained in Charge I, the Government relied almost exclusively on the testimony of K.D. But the evidence adduced at trial demonstrates K.D.'s lack of credibility, such that this Corut cannot be convinced of A1C Byrne's guilt beyond a reasonable doubt.

1. K.D. lied under oath.

During cross examination, K.D. admitted that her testimony on direct contradicted her prior sworn testimony (R. at 550-51) and that she committed perjury (R. at 581). K.D. acknowledged that she had previously testified that one of the reasons she felt pressured to report the accusations against A1C Byrne was because she thought he was going to report her pregnancy. (R. at 550; 580-81.) She said she was "retracting [her] statement" from that day, after "further discussion with [her] own people." (R. at 550.) While K.D. claimed she was "for the truth," her version of the truth changed in a matter of a few days. (R. at 550, 581.) K.D. proved she could not be trusted, effectively eradicating the value of her testimony.

2. K.D. had a motive to fabricate.

While her husband, A1C Byrne was deployed, K.D., an active-duty , began a sexual relationship with A.T., an active-duty . (R. at 542, 547.) Soon after beginning this affair, K.D. became pregnant with A.T.'s child. (R. at 547-49.) It was right around this same time that K.D. first reported the alleged domestic abuse incidents memorialized in Charges I and II. (R. at 539-41.) She needed a way out of her marriage with A1C Byrne. And she needed to avoid disciplinary action for her extramarital affair with A.T. Accusing A1C Byrne of battery, strangulation, and sexual assault enabled K.D. to change the narrative from unfaithful wife to victim. No one would fault K.D. for leaving A1C Byrne if he was physically and sexually assaulting her, and people would understand why she quickly coupled with another man.

K.D.'s memory was conveniently hazy at times, seemingly to hide her motive. K.D. knew she took a pregnancy test around 16 December 2020. (R. at 549, 553.) But K.D. could not recall when she reported the allegations of abuse to her First Sergeant or when she interviewed with the Office of Special Investigations. (R. at 552-53, 563). After speaking with "[her] people," however, she was now sure that she "did not know that [she] was pregnant" when she reported the allegations

against A1C Byrne. (R. at 550.) K.D. knew that a clear timeline demonstrating that she had learned of the pregnancy prior to reporting would damage her credibility and make her claims of domestic abuse unbelievable.

K.D. could no longer hide her affair with A.T., nor could she continue to hide being pregnant with A.T.'s child. K.D. needed to deflect from her own indiscretions and misconduct, so she turned the attention toward the person she had grown dissatisfied with and betrayed—her husband, A1C Byrne.

3. K.D. threatened A1C Byrne.

While K.D. paints A1C Byrne as the sole aggressor throughout her testimony, she admitted to threatening A1C Byrne when seeking a divorce. (R. at 552.) On 28 November 2020, K.D. told A1C Byrne, "Just tread lightly. This can all go however you want." (R. at 552.) K.D. was implying that if this did not go how she wanted, she would do "something" to A1C Byrne. We now know that this "something" was making allegations of domestic abuse against A1C Byrne.

4. K.D. sent intimate photographs of herself to A1C Byrne throughout the entirety of their marriage.

K.D. claimed that A1C Byrne sexually assaulted her and physically assaulted her multiple times during their marriage, beginning in August 2019. (R. 475-544). But K.D. sent intimate photographs of herself to A1C Byrne throughout their marriage until approximately September 2020. (R. at 554-55). Some of these photographs had loving, intimate messages on them, and many of them are images of K.D. nude. (R. at 555, 556). None of the photographs depicted any of the injuries K.D. allegedly sustained from the convicted offenses. (R. at 556). This information, taken together with the information above, is another example of why K.D.'s testimony at trial was not credible, such that this Court cannot be convinced of A1C Byrne's guilt beyond a reasonable doubt.

C. The OSI investigation was subpar, collecting photographs of alleged injuries from the complaining witness's phone without any time or date identifiers.

K.D. controlled the OSI investigation. She did not permit OSI to do a full extraction of her cell phone containing the images of her alleged injuries because she "just wasn't comfortable giving them everything that [she]'d ever had on [her] phone." (R. at 56-57.) K.D. "didn't think that it was relevant at the time." (R. at 57.) So K.D., not law enforcement, was making determinations as to what was or was not relevant to the investigation. K.D. was deciding how evidence was collected. The individual with a motive to lie was calling the shots. This investigation and the evidence it yielded—images of alleged injuries cause by A1C Byrne—should have been given little to no weight by the factfinder. And this Court should not be convinced beyond a reasonable doubt of any of the Charge I convictions.

K.D.'s testimony could not clean up this shoddy investigation. The photographs contained in Prosecution Exhibit 1, which allegedly depicted injuries sustained by A1C Byrne, were not time or date stamped. While K.D. attempted to provide context to the photographs in Prosecution Exhibit 1, she could not do much more than estimate when the photos were taken.

D. OSI found no evidence of damage to the home where the alleged domestic altercations occurred.

OSI Special Agent N.C. went to K.D. and A1C Byrne's home to take photos and to determine if anything in the home corroborated evidence that was provided during K.D.'s interview. While K.D. claims she put a hole in a wall during one of the alleged assaults, Agent N.C. found no such hole. (R. at 752-53.) In fact, Agent N.C. found no damage to the residence that corroborated K.D.'s statements. (R. at 753.) And Agent N.C. clarified that he had "no knowledge or indication of [the hole] being repaired." (R. at 755.)

E. The Government relied on alleged statements of A1C Byrne that came from untrustworthy sources.

The Government relied on testimony from A.K. and J.M. to admit statements allegedly made by A1C Byrne about physically abusing K.D. But A.K. is untruthful as demonstrated by the testimony of multiple witnesses (R. at 744, 747), and her testimony should be given little to no weight. Further, A.K. was in contact with K.D. (R. at 605-606), who had a clear motive to fabricate to secure a conviction and deflect from her own misconduct.

J.M. testified about unrecorded statements allegedly made by A1C Byrne while he was sitting in a law enforcement interrogation room. J.M. demonstrated that her memory was unclear. In J.M.'s statement as part of an incident report on 14 November 2021, she wrote, "He also mentioned something along the lines of 'I've hit my wife before.'" But in response to questioning at trial she stated that A1C Byrne said he was "in trouble for beating his wife." (R. at 706.) Later in her testimony she again recharacterized this statement claiming A1C Byrne said, "Oh, I've hit my wife before, so it's no problem." (R. at 706.) J.M. acknowledged that she was not entirely sure what A1C Byrne said about his wife. (R. at 706, 708.) J.M.'s inconsistencies and inability to recall what was said makes this extraordinarily weak evidence that should be given little to no weight by this Court.

Considering the weakness of the evidence in support of the Government's case, this Court should not be convinced beyond a reasonable doubt of A1C Byrne's guilt for the Charge I convictions.

WHEREFORE, A1C Byrne requests that this Court set aside, with prejudice, the findings of guilty to Charge I, Specifications 3, 5, 6, 7, and 10, and authorize a sentence rehearing.

II.

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUSTAIN A FINDING OF GUILTY FOR ASSAULT CONSUMMATED BY A BATTERY ON A SPOUSE AS CHARGED IN SPECIFICATION 6 of CHARGE I.

Standard of Review

This Court reviews issues of factual and legal sufficiency de novo. 10 U.S.C. § 866; *Turner*, 25 M.J. 324; *Washington*, 57 M.J. at 399.

Law and Analysis

A. Courts of Criminal Appeal ensure evidence is legally sufficient to support convictions.

When testing for legal sufficiency, this Court looks at whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. *United States v. Roderick*, 62 M.J. 425, 428 (C.A.A.F. 2006).

B. The Government failed to present evidence that A1C Byrne struck K.D. in "on her face" and "on her buttock" on multiple occasions.

As charged under Charge I, Specification 6, the Government had to prove that A1C Byrne: (1) "that on divers occasions between on or about 1 May 2020, and on or about 31 May 2020, at or near Ramstein-Miesenbach, German, the accused did bodily harm to [K.D.] by striking her on the face, on her buttocks, and on her leg with his hand"; (2) "that the bodily harm was done unlawfully"; (3) "that the bodily harm was done with force or violence"; and (4) "that [K.D.] was then the spouse of [A1C Byrne]." (R. at 795-96.) The Military Judge defined "divers" as meaning "two or more occasions." (R. at 798.)

C. The evidence does not support that A1C Byrne struck K.D. on the face with his hand.

The Government even recognized their failure to prove this portion of the specification as demonstrated by their request for a variance for findings by exceptions and substitutions. (R. at

794.) The Findings Worksheet was adjusted to include the option to except the words "on her face." (App. Ex. LXII at 2.)

During her testimony, K.D. never expressly stating that A1C Byrne hit her in the face during that altercation. And when K.D. addressed a picture of a bruise on her eye, she said "it just happened within the – within the fight. I don't remember anything direct happening to my eye, but I'm sure it was possible, with me trying to get his arms off of me." (R. at 518.) She never said A1C Byrne caused the bruise to her eye. She never said A1C Byrne struck her eye with his hand. She never said A1C Byrne struck her face with his hand. Additionally, while K.D. addressed pictures of her lip, she again never said A1C hit her lip with his hand. (R. at 517-18.)

This evidence is legally insufficient.

D. The evidence does not support that A1C Byrne struck K.D. on the buttock with his hand on divers occasions.

K.D. testified that she had marks on her buttock after being struck by A1C Byrne, but she never said he struck her buttock on more than one occasion. K.D. explained, "He's came in, and I kind of knew he was going to catch me – or, like, tried to catch me, and he reached for me when I was on the bed, and I kicked at him, and he punched me in my leg and then he slapped me. . . . So that's how I'd gotten the marks on my butt and the side of my leg, from being punched and slapped on them." (R. at 513.) When reviewing a picture of her buttock she said, "That's from him smacking me on my butt. It's [welts] of his, like, fingers." (R. at 518.) She does not say that he slapped her buttock multiple times. Meanwhile, when testifying about the marks on her thigh, she explained, "that's on the outside of my thigh. That's where he had punched and slapped multiple times." (R. at 518.) At most, during this altercation, A1C Byrne struck K.D. only one time on her buttock with his hand.

WHEREFORE, A1C Byrne requests that this Court set aside, with prejudice, the finding of guilty to Charge I, Specifications 6, as it pertains to A1C Byrne hitting K.D. on her face on divers occasions and A1C Byrne hitting K.D. on her buttocks on divers occasions, and authorize a sentence rehearing.

III.

THE EVIDENCE IS NOT LEGALLY OR FACTUALLY SUFFICIENT TO SUSTAIN A FINDING OF GUILTY FOR SEXUAL ASSAULT AS CHARGED IN THE SOLE SPECIFICATION OF CHARGE II.

Standard of Review

This Court reviews issues of factual and legal sufficiency de novo. 10 U.S.C. § 866; *Turner*, 25 M.J. 324; *Washington*, 57 M.J. at 399.

Law & Analysis

A. Courts of Criminal Appeal ensure evidence is legally and factually sufficient to support convictions.

The applicable legal and factual sufficiency standards are explained above. *See supra* pages 6, 11.

B. The Government failed to present sufficient evidence to prove the act of penetration.

To convict A1C Byrne of sexual assault, the members had to find beyond a reasonable doubt that (1) "between on or about 1 November 2019, and on or about 25 December 2019, at or near Kaiserslautern, Germany, the accused committed a sexual act upon [K.D.] by penetrating her vulva with his fingers with the intent to abuse, humiliate, harass, or degrade her"; and (2) the accused did so without the consent of [K.D.]." (R. at 799.)

During K.D.'s vague and inconsistent testimony, she described an argument that developed into a physical altercation. But the logistics of that altercation are confusing. K.D. described A1C Byrne crawling on top of her. (R. at 482-83.) She said that he was positioned at her feet and that

she had "turned on [her] back, because it was like a scramble, and [her] feet were kind of placed . . . on his shoulders, and he was clawing at [her] vagina." (R. at 483.) She further explained, "And then somehow that went from him being there to being on top of me." (R. at 483).

Trial counsel attempted to clarify some of the details, but K.D.'s responses were still insufficient to demonstrate penetration:

> Q: And this is when you said he grabbed you and clawed at your vagina?
>
> A: Yes, sir.
>
> Q: Could you describe what you mean by that to the panel members?
>
> A: I was wearing men's boxers. They're very loose. They were oversized, and I did not have underwear on. It was nighttime, so I was wearing pajamas. I wasn't expecting to leave or anything. . . . So he was clawing at my vagina and, like, squeezing, essentially.
>
> Q: Do you know, did he penetrate your vagina with his – with his hands?
>
> A: Through the shorts, yes. It was scraping my vagina.
>
> Q: How do you know that?
>
> A: Because I felt it.
>
> Q: What did that feel like?
>
> A: Painful. Shocking. Weird.

(R. at 483-84.)

During cross examination, K.D. explained that she could not see A1C Byrne's hands when he was allegedly clawing at her vagina. But she testified, "I could only feel it. I could feel fingernails, and I could feel squeezing and scratching." (R. at 562.) She further reiterated that this was all over the boxer shorts that she was wearing. (R. at 562.)

C. Assuming the evidence was sufficient to prove penetration, it is unclear what part of A1C Byrne allegedly penetrated K.D.

The Government specifically charged that A1C Byrne penetrated K.D. with his *fingers*. Charge Sheet (emphasis added). They did not charge penetration with A1C Byrne's *hand*, generally. And when Trial Counsel attempts to make K.D.'s story "crystal clear," the way he phrased his question only leads to greater confusion about what part of A1C Byrne's body, if any, penetrated K.D.:

> Q: Understood. Going back to when defense counsel was asking you about the clawing at your vagina incident. I just want to make it crystal clear. That was over the clothing, correct?
>
> A: Yes, sir.
>
> Q: Did Airman Bryne's *hands or fingers* penetrate your vagina?
>
> A: Yes, with the shorts.
>
> Q: So the shorts were pushed up as well?
>
> A: Yes, sir.
>
> Q: And how do you know that?
>
> A: I felt it.

(R. at 579 (emphasis added).) Arguably, this merely established penetration of the "vagina" with the "shorts" that K.D. was wearing. While A1C Byrnes may have caused the shorts to be pushed up resulting in penetration, it is unclear what if any part of A1C Byrne penetrated K.D.

Assuming this portion of testimony clarifies penetration with some part of A1C Byrne's body, it does not clarify what part of A1C Byrne's body actually penetrated K.D.'s vagina. Had the Government elected to charge "hand," perhaps this testimony would have sufficed to prove the element beyond a reasonable doubt. But as charged, the Government failed to prove the offense.

At no point during her testimony about this alleged assault did K.D. state that A1C Byrne penetrated her vulva with his fingers. Thus, the specification is legally insufficient (or, at a minimum, factually insufficient).

D. The evidence is also factually insufficient to support a conviction of sexual assault because K.D. was an uncredible witness and the investigation was substandard.

See argument contained *supra* in AOE I at pages 6-10.

WHEREFORE, A1C Byrne requests that this Court set aside, with prejudice, the finding of guilty to Charge II and its sole Specification and authorize a sentence rehearing.

IV.

THE EVIDENCE IS FACTUALLY INSUFFICIENT TO SUSTAIN A FINDING OF GUILTY FOR ASSAULT CONSUMMATED BY A BATTERY AS CHARGED IN SPECIFICATION 1 OF THE ADDITIONAL CHARGE.

Standard of Review

This Court reviews issues of factual and legal sufficiency de novo. 10 U.S.C. § 866; *Turner*, 25 M.J. 324; *Washington*, 57 M.J. at 399.

Law & Analysis

A. Courts of Criminal Appeal ensure evidence is factually sufficient to support convictions.

The applicable legal and factual sufficiency standards are explained above. *See supra* pages 6, 11.

B. The Government failed to prove beyond a reasonable doubt that the defense of self-defense did not exist.

The Government had to prove beyond a reasonable doubt that (1) "on or about 14 November 2021, at or near Landstuhl, German, the accused did bodily harm to [B.P.] by striking P on his head with his hand"; (2) "the bodily harm was done unlawfully"; (3) "the bodily harm was done with force or violence." (R. at 801.)

The defense of self-defense was at issue, and once raised, the Government bore the burden of proving the defense did not exist beyond a reasonable doubt. R.C.M. 916(b)(1). The Military Judge correctly instructed the members on self-defense. (R. at 762.) But the Government failed to overcome that defense, based on the evidence. The evidence adduced at trial demonstrates B.P.'s lack of credibility, such that this Court cannot be convinced of A1C Byrne's guilt beyond a reasonable doubt.

1. B.P. confronted A1C Byrne.

B.P. had multiple drinks throughout the night. (R. at 648-52.) At the end of the night, when this altercation occurred, B.P. was drunk. (R. at 660.) According to B.P., A1C Byrne was "looking at [him] the wrong way in the dark," and B.P. wanted to correct him in private. (R. at 657-58.) B.P. admitted that he confronted A1C Byrne and said, "what the f***, dude?" when B.P. saw A1C Byrne in the hallway (R. at 623, 657.) These facts create reasonable doubt as to how the altercation began and who threw the first punch. It is at best unclear who started the fight.

2. B.P. hit A1C Byrne.

Multiple witness testimony contradicts B.P.'s claim that he never hit A1C Byrne. C.H. testified that he saw B.P.'s hands on A1C Byrne. (R. at 777.) He stated, "They both did have their hands on each other." (R. at 777.) C.H. explained that there was "fighting effort" and that B.P. and A1C Byrne were "basically fighting . . . both of them [were] on the ground." (R. at 777.) C.H. had to "break[ ] up [the] fight." (R. at 777.) Additionally, J.A. testified about an injury she saw on A1C Byrne after the altercation—A1C Byrne had a red mark by his eye. (R. at 712.) Her description is consistent with B.P. having hit A1C Byrne.

3. B.P. had a motive to lie.

B.P. had a substantial motive to lie and shift the blame to A1C Byrne. As a Senior Noncommissioned Officer, with nearly 15 years of service in the United States Army, B.P. had

everything to lose from the altercation with A1C Byrne. (R. at 615-16; 668-69.) B.P. wanted to retire when he reached 20 years of service. (R. at 668.) And B.P. admitted that when he returned to his unit after the trial, he was facing disciplinary action because of the altercation with A1C Byrne. (R. at 669.) This motive to lie about the altercation with A1C Byrne calls into question B.P.'s credibility and his testimony.

These facts create reasonable doubt as to who started the fight, as well as B.P.'s credibility as a witness. The Government failed to overcome the defense of self-defense.

WHEREFORE, A1C Byrne requests that this Court set aside, with prejudice, the finding of guilty to Specification 1 of the Additional Charge and authorize a sentence rehearing.

V.

THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO SUPPRESS A1C BYRNE'S STATEMENTS TO INVESTIGATORS.

Standard of review

A military judge's ruling on a motion to suppress is reviewed for an abuse of discretion. *United States v. Nelson*, 82 M.J. 251 (C.A.A.F. 2021).

Law

"A military judge abuses his discretion if 'his findings of fact are clearly erroneous or his conclusions of law are incorrect.'" *United States v. Olson*, 74 M.J. 132, 134 (C.A.A.F. 2015) (quoting *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014)). Whether the Appellant was in custody is a question of law reviewed de novo. *United States v. Catrett*, 55 M.J. 400, 404 (C.A.A.F. 2008).

Article 31(b), UCMJ, 10 U.S.C. § 831(b) requires that an arrested servicemember be advised of his rights.

Upon timely motion, the military judge must exclude evidence derived from a "statement obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment, Article 31," or obtained by coercion, unlawful influence, or unlawful inducement. Mil. R. Evid. 304(a)(1)(A). If the military judge finds, by a preponderance, that the statement was lawfully obtained, it may be admitted. Mil. R. Evid. 304(b), (f)(6)-(7).

Analysis

The defense timely moved to suppress statements made to J.M. (R. at 24, App. Ex XXVII.) The military judge heard testimony from J.M. on the motion.

J.M. was an active-duty security forces officer subject to the Uniform Code of Military Justice. (R. at 160; App. Ex. XLVII at 2.) When speaking to the Appellant on 14 November 2021, J.M. was acting in a law enforcement capacity—she had training in conducting interrogations and was the arresting officer. (R. at 161.) She knew the Appellant was suspected of an assault. (R. at 692-93.)[3] When she "arrested" him (placed him in custody), she did not advise him of his rights to silence and counsel. Any questioning by her was custodial, as the military judge found. (App. Ex. XLVII at 6.)

At the base police station, she was told to "ask him if he consented to a breathalyzer, *as well as* a written 1168," the standard Air Force Form for witnesses and suspects. (R. at 163.) But she did not inform the Appellant of his rights orally. The form lays out a suspect's rights advice. The Appellant did *not* consent to either request. (R. at 164.)

J.M. offered the Appellant's supposed alcohol state as a less than credible excuse for not advising him of his rights. She was not concerned about the Appellant's physical or mental

[3] This testimony undercuts the prosecution assertion in its response to the motion that the Appellant wasn't in custody and no rights advice was required; and supports the military judge's finding of custody. (Gov. Reply to Def. Motion to Suppress at Appellate Ex. XXVII at 4.)

condition when she first encountered him; rather, she allowed him time to smoke a cigarette. The Appellant was coherent, not slurring his speech, not boisterous, not a problem while being handcuffed, and not falling over. (R. at 166, 168-69.) On the merits, J.M. added that the Appellant's "eyes were just bloodshot, and [he] smelled of alcohol. (R. at 693.) This Court should be skeptical of how quickly the Appellant became sober enough in the short time between his being taken into custody and his ability to understand his right to refuse a breathalyzer and consent to giving a sworn statement. Thus, this Court should find this to be a sham excuse, and any finding of the military judge to the contrary is erroneous. It is not unreasonable to interpret J.M.'s actions as a ploy to see if the Appellant would make any "voluntary" statements when responding to the inquiry about his "injury" and hand that was "pretty messed up." (R. at 171, 694.) A reasonable person may be expected to respond more completely to such an inquiry, including how the hand was hurt. *See United States v. Ruiz*, 54 M.J. 138, 141 (C.A.A.F. 2000).

The defense included a portion of the relevant police report in its motion, which explains: "BYRNE was asked to submit a breathalyzer test via AF FM 1364, which he refused to consent and stated he will not sign anything without prior coordination with his la[w]yer." (App. Ex. XXVII at 33.)

The Military Judge's Ruling on the motion found that "While in the interview room, one of the active-duty Security Forces officers, JM, asked the Accused if he would consent to a breathalyzer test and if he was willing to provide a written statement on an Air Force IMT 1168. The Accused declined, stating he would not sign anything without his lawyer present." (App. Ex. XLVII at 2.)

While J.M. expressed a medical concern, she effectively interrogated him about the cause. She did not express concern when he was taken into custody and could have been taken to

the clinic on his way to the station, nor did she express concern when he was first taken into the interrogation room. On the merits, she testified that when she first saw the Appellant that night, his hand was wrapped, but she was unsure why. (R. at 693.) Also, there is no report of a blood alcohol level taken shortly after he was taken to Landstuhl Regional Medical Center.

J.M.'s testimony on the motion is ambiguous about what the Appellant said to her when she talked with him. The defense demonstrated that. (R. at 705-707.) J.M. said she was "not a hundred percent sure how it went. It could have either been him going into about him getting in trouble for the mosh pitting (sic), or I could have been the one to mention the hand injury." (R. at 176.) Skepticism is appropriate—did the Appellant make a spontaneous statement, or was it the result of J.M.'s questioning?[4]

The Appellant was prejudiced. During opening statements, the prosecution led off with one of the statements,

> I've hit my wife before." Those are the words after assaulting his latest victim."

(R. at 449.)[5] Similarly, during closing argument, the prosecution began with,

> "I've hit my wife before." Those are the words of the accused, Airman First Class Airman First Class Nicholas Byrne. "I'm going to hurt K more than I ever have before."

(R. at 813.) An admission or confession is often considered the most compelling evidence against an accused because of its powerful psychological effect on the court members. *See, e.g., United States v. Haney*, 64 M.J. 101, 109 (C.A.A.F. 2006) (Crawford, J., dissenting); *Bruton v. United States*, 391 U.S. 123, 140 (1968) (White, J., dissenting) (defendant's confession is probably the

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[4] Looking at the totality of J.M.'s testimony, it is noteworthy the lack of certainty and inconsistency comparing her merits testimony and her own AF Form 1168 with that on the motion. (R. at 705, et. seq.)

[5] The opening comment is also relevant to the motion for severance because the prosecutor here implies a predisposition to assault which would be prohibited under Mil. R. Evid. 404.

most probative and damaging evidence that can be admitted against him.). Hearing the accused's admission of guilt can be highly persuasive, making it difficult to believe a claim of innocence. The admission allows the prosecution to avoid relying entirely on circumstantial evidence. No other evidence gets closer to the crime than the perpetrator's admission. It reflects their knowledge of the details and intent, eliminating possibilities of mistaken identity or innocent involvement.

If this court agrees the military judge abused his discretion, then that leads to the critical question of the impact on the findings. The prosecution paid significant attention to the statements in their opening sentence in the opening statement and the findings argument. The known trial concept of primacy and recency compels this court finding that those damning statements would be seared into the members' brains as they began to hear evidence and for retrieval during deliberations. *See, e.g.,* Greene, Prepscius, and Levy, *Primacy versus recency in a quantitative model: activity is the critical distinction*. 7 LEARN MEM. 48 (2000).[6] The American Psychological Association definition suggests that the primacy effect can "result in a first-impression bias, in which the first information gained about a person has an inordinate influence on later impressions and evaluations of that person."[7]

WHEREFORE, this court should set aside the findings and the sentence.

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[6] Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC311322/#:~:text=Following%20a%20single%20exposure%20to,(Glanzer%20and%20Cunitz%201966).

[7] APA Dictionary of Psychology, available at https://dictionary.apa.org/primacy-effect.

VI.

THE MILITARY JUDGE ERRED BY LIMITING CROSS-EXAMINATION OF B.P. ABOUT HIS PENDING DISCIPLINARY ACTION

Standard of review

Restrictions on cross-examination are reviewed for an abuse of discretion. *United States v. Pyron*, 83 M.J. 59 (C.A.A.F. 2022).

Law

> "When such a specific act of misconduct is, in and of itself, directly probative of the witness's truthfulness, a military judge must allow it because, by definition, it is always relevant to the issue of that witness' credibility." Such a conclusion is not limited to instances occurring while under oath. A lie outside a courtroom may be equally probative as one made under oath. When the defense offers this evidence, it may deny confrontation rights or exclude it. (Sixth Amend. Confrontation requires the chance to show a prosecution witness' bias). [B]ias or prejudice [can] be shown through examination of witnesses "or by evidence otherwise adduced."

United States v. Boone, 17 M.J. 567 (A.F.C.M.R. 1983), *pet. denied*, 17 M.J. 438 (C.M.A. 1984).

Analysis

The uncontradicted defense proffer was that B.P. knew it was alleged he hit the Appellant first, would be offered Article 15 punishment, and would have expressed an intent to refuse nonjudicial punishment. His trial testimony was directly linked to how his Article 15 or court-martial might proceed. He had a lot to lose. He was in trouble for fighting with a junior enlisted person in a civilian establishment. The pressure to maintain a spotless record and the high stakes in a military career can create a powerful incentive to lie. With that in mind, he had every incentive to make the Appellant the instigator and the first to throw a punch. (R. at 637, 668.) Thus, the disciplinary jeopardy and its underlying reasons were admissible under Mil. R. Evid. 803(1). The information was not offered for the truth that he was the initiator, and a limiting instruction would have been appropriate to ensure the members knew the limited purpose of the questions.

WHEREFORE, the court should set aside the guilty finding to the Additional Charge and Specification and reassess the sentence.

VII.

THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO SEVER THE ADDITIONAL CHARGE FROM THE INITIAL CHARGES

Standard of review

The denial of severance is reviewed for an abuse of discretion. *United States v. Southworth*, 50 M.J. 74 (C.A.A.F. 1999); *United States v. Nazario*, 56 M.J. 572 (A.F. Ct. Crim. App. 2001).

Law

Convening authorities can refer two or more offenses against an accused to the same court-martial. R.C.M. 601(e)(2). Yet military judges are authorized to sever offenses "to prevent manifest injustice." R.C.M. 906(b)(10). Three factors help to determine if there has been an abuse of discretion in applying the "manifest injustice" test under the Rule: (1) would the evidence of one offense be admissible proof of the other(s)? (2) did the military judge provide a proper limiting instruction, and (3) did the findings reflect an impermissible crossover? *United States v. Curtis*, 44 M.J. 106, 128 (C.A.A.F. 1996), *rev'd as to sentence on recon.*, 46 M.J. 129 (1997).

Analysis

Charges I and II involved acts of assault by the Appellant against his spouse. The additional charge involved an assault against another after the allegations by the Appellant's spouse. The defense moved to sever the additional charge from the initial charges, which was denied. (R. at 24, Appellate Ex XXX.) The military judge's *Southworth* analysis was erroneous. (Appellate Ex. LXIX.)

Of primary concern was the likelihood that the members would convict the Appellant based on a propensity to engage in assaultive behavior. The Appellant's case presents an exception to the general principle that different offenses and victims can be tried together while avoiding an unfair trial. Here, the Appellant was charged with multiple instances of violent behavior. There was a heightened risk that the evidence would merge into the Appellant having a general propensity for violence.

In that light, the military judge assumed that the charged assaults on the Appellant's spouse could not be used to prove the assault on P., or vice versa. He disagreed on whether the result would reflect any "impermissible crossover." He determined that a spillover instruction would be adequate and, as an additional curative measure, directed the prosecution "to present their evidence, argument, and examinations for each offense along clear lines, separating the offenses and not impermissibly arguing crossover between the offenses." (Appellate Ex. LXIX.) *See, e.g., United States v. Streete*, ACM 36757, 2009 CCA LEXIS 329 *23 (A.F. Ct. Crim. App. Sep. 2, 2009) pet. denied 69 M.J. 169 (C.A.A.F. 2010).

The military judge reviewed his proposed instructions with the parties before their arguments. (R. at 783.) The parties had no significant objections to the instructions, and he read them to the panel. (R. at 792, 812.) The transition between instructing on the spousal assaults to the one on P. was smooth, so smooth that it is reasonable to think that the members made a connection between the two "cases" and did consider the Appellant's propensity for violence. He did not put a limiting instruction as a break between the two "cases." The standard spillover language did not come until some time later. (R. at 809.)

> An accused may be convicted based only on evidence before the court, not on evidence of a general criminal disposition. Each offense must stand on its own, and you must keep the evidence of each offense separate. Stated differently, if you find or believe that the accused is guilty of one offense, you may not use that finding or

> belief as a basis for inferring, assuming, or proving that he committed any other offense.
>
> If evidence has been presented that is relevant to more than one offense, you may consider that evidence with respect to each offense to which it is relevant.

(R. at 809.)

The military judge did not give a special or crafted instruction using language found in ¶7-13-1, MILITARY JUDGE'S BENCHBOOK (electronic).[8]

During the prosecution argument, they first addressed the spouse assaults and then shifted to that against SFC P. (R. at 824.) However, there was a smooth transition between the two "cases," and no language was used to break or separate the allegations involving two different victims under two different circumstances. Like the military judge's instructions, the transition was so smooth that it is reasonable to think that the members made a connection between the two "cases" and did consider the Appellant had a propensity for violence.

Further, the Appellant was prejudiced because of how the prosecution argued in their opening statement.

The Appellant was prejudiced in a second way—a restraint on his ability to testify about the events surrounding the interactions with B.P. In the Appellant's Declaration, he outlines what he would have testified to about the assault charge. If believed, that testimony would substantially contradict that of B.P. and enhance the self-defense defense.

The Appellant could have testified for the limited purpose of challenging B.P.'s testimony. First, the defense would inform the military judge that he was limiting his testimony to the one charge but retaining his right to counsel for Charges I and II. Second, the Appellant would give tailored testimony to avoid opening the door to questions about Charges I and II. It would be

[8] Neither party objected to the instructions or requested a special instruction.

improper for the prosecution to ask questions about those charges to which he exercised his Fifth Amendment right to silence, knowing it would cause the Appellant to exercise that right in front of the members. However, that approach would lead to a perception on the part of the members that the Appellant was avoiding testifying about the other charges because he was guilty or that damaging admissions may come out. A limiting instruction would not suffice in this situation. Instead, a limiting instruction might highlight the Appellant's unwillingness to explain the other charges and cast the Appellant in a negative light.

Limiting or curative instructions, including spillover, are presumed to be effective measures to avoid improper use of evidence. However, significant research shows that this is a different reality.

VIII.

AN ACCUMULATION OF PROSECUTOR ERRORS PREJUDICE THE APPELLANT ON FINDINGS AND SENTENCING

Standard of review

The issue(s) are reviewed for plain error when there is no objection at trial. *United States v. Schroder*, 65 M.J. 49, 57-58 (C.A.A.F. 2007).

Law

An improper argument is a question of law reviewed de novo. *United States v. Witt*, 83 M.J. 282 (C.A.A.F. 2023).

Analysis

A. Violence as propensity.

During opening statements, the prosecution led off with one of the Appellant's out-of-court statements.

> “I've hit my wife before.” Those are the accused's words after assaulting *his latest victim*, talking about his now ex-wife [K.D.]. Your Honor, president, members, in this trial *you're going to learn a lot about the accused*, A1C Nicholas Byrne. You're going to *hear a lot about his aggression and his repeated abuse*.

(R. at 449.) (Emphasis added.) Those words are the functional equivalent of asking the members to convict the Appellant based on a predisposition to be violent. Similarly, the prosecution's closing argument led with, “I've hit my wife before,” and “I’m going to hurt K more than I ever have before.” (R. at 813.) In addressing the additional charge, the prosecution argued, “You also heard testimony; you saw evidence that just a few months ago, the accused aggressively attacked B.P.” (R. at 824.) That such testimony was not objected to does not excuse the error. *Cf. United States v. Thompkins*, 58 M.J. 61, 67 (C.A.A.F. 2000) (it’s not the error it’s the effect on the fairness of the trial).

When asked by the prosecution if her marriage was a “good” one, K.D. replied, “It was very sexually driven, controlling and possessive.” (R. at 475.) She also testified about A1C Byrne’s alleged past “aggressive” conduct. (R. at 477-78.) The testimony was not relevant or acceptable under Mil. R. Evid. 404(b) for any purpose and would not have survived a Mil. R. Evid. 403 balancing test. If the government intended to offer the testimony under Mil. R. Evid. 404(b), they failed to provide notice and an opportunity for the defense to litigate the issue (and the military judge an opportunity to rule). The tone and manner of eliciting the testimony establish it was intentional and not a slip by the prosecutor or witness. *See also* R. at 477-478, where the witness is referencing multiple incidents of misconduct not charged. Along the same lines, the prosecution made various efforts to introduce speculation. (R. at 480.) The cumulative effect of these errors was to create a situation not unlike *Hills*, where the prosecution was effectively pursuing a profile-propensity case against the Appellant.

While testifying about the strangling allegation, the prosecutor asked:

Q. And was this part of the incident that you just described?
A. No, sir.

Q. It was a separate incident?
A: Yes, sir.

(R. at 492-503.) The prosecution did not follow up to relate the other incident to one charged, leaving the matter open of uncharged misconduct being introduced for a propensity purpose. Notably, the Appellant's ex-wife said I'm not sure, I guess, not that I recall, I don't know, I don't remember, I don't recall, not sure, probably, and I think; twenty–seven (27) times in response to the prosecutor and I don't know, I don't recall, I think, I'm retracting my statement, and I guess; twenty-nine (29) different times during cross-examination. When the defense objected to the various pictures, the military judge overruled the objection, contributing to the potential confusion. (R. at 503.)

B. Stealing drinks.

Having failed to provide a notice under Mil. R. Evid. 404(b), the prosecutor asked SSgt C.J. if he saw the Appellant stealing "other people's drinks?" (R. at 682.) The prosecutor then made a spurious proffer that the question was relevant as "res gestae" brought about by the defense cross-examination. B.P. had not testified or suggested that the tension between him and the Appellant was caused by stealing drinks. Having sustained the objection, the military judge told the members to disregard the question. (R. at 687.) Yet the damage was done, and the members were left to wonder if the Appellant was disposed to violence and stealing. "The government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." *Bruton v. United States*, 391 U.S. 123, 128-29 (1968). "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction[.]" *Id.* at 128-29.

It is common to argue that curative or limiting instructions unring the bell or cleanse the stink of a skunk thrown in the jury box, but there is sufficient information available that curative instructions do not work or worsen the situation. The issue is quality and not quantity. The more significant the error, the more prejudicial it is. *See, e.g., Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962); Diamond Shari Seidman, and Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857 (2001); Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135, 175-78 (1989) ("[t]he empirical research demonstrates that jurors are deeply affected by prejudicial comments and evidence and that curative instructions tend to increase the prejudice rather than decrease it. Moreover, the research shows that the impact is much greater in weak cases than in strong ones."). *See also* Daniel M. Wegner, Ironic Processes of Mental Control. 101 PSYCH. REV. 34 (1994).[9]

C. Disparaging the defense counsel and, impliedly, the Appellant.

In rebuttal to the defense findings argument, the prosecution argued that the defense argument was a "wild conspiracy theory." (R. at 845.) That argument is over-the-top in terms of fair and reasonable arguments. *Cf. United States v. Holmes*, 413 F.3d 770 (8th Cir. 2005); *United States v. Rivas*, 493 F.3d 131 (3rd Cir., 2007); Disparaging remarks about defense counsel may "cause the jury to believe that the defense's characterization of the evidence should not be trusted, and, therefore, that a finding of not guilty would conflict with the facts of the case." *United States v. Xiong*, 262 F.3d 672, 675 (7th Cir. 2001). In addition, derogatory comments about opposing counsel can "detract from the dignity of judicial proceedings." *Id. See generally*, *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005).

[9] Available at https://tinyurl.com/ktrb79tf.

D. Misleading argument implying the Appellant knew B.P.'s rank.[10]

The frequent misleading references to B.P.'s rank were bound to influence the sentencing, if not the merits. During the case, the prosecution referred to the witness as a

or senior non-commissioned officer 16 times. During their arguments, the prosecution emphasized B.P.'s rank. (E.g., R. at 824-825.) That was a misstatement of the evidence and was irrelevant in this case. B.P. did not say he told the Appellant his rank on the merits, and there is no evidence that the Appellant knew of his rank at the time of the bar incident. The prosecution emphasized the rank during sentencing. B.P. testified:

> I don't think he knew I was a senior NCO. (R. at 621.)
>
> *[M]y thinking was* I *was going to* go tell him that, "Listen, I'm a senior NCO. Knock off whatever it is you're instigating." (R. at 623.)
>
> I don't think he thought I was a senior NCO either. (R. at 657.)

The defense did not object. However, the frequent misleading references to B.P.'s rank were bound to affect the sentencing. Here, the court cannot be "confident that [the appellant] was sentenced on the basis of the evidence alone." *United States v. Pabelona*, 76 M.J. 9, 12 (C.A.A.F. 2017).

"Where improper argument occurs during the sentencing portion of the trial, we determine whether or not we can be confident that [the appellant] was sentenced on the basis of the evidence alone." *United States v. Pabelona*, 76 M.J. 9, 12 (C.A.A.F. 2017). "[I]t is not a 'fair inference' to argue that a member's duty position aggravates the offense unless the evidence of record demonstrates some reasonable linkage or manner in which the offense was facilitated by the duty position

[10] The Appellant raises this issue in accordance with *United States v. Grostefon*, 12 M.J. 421 (C.M.A. 1992), and it is placed here so that both assigned and Grostefon errors can be reviewed together.

or the duty position was somehow compromised by the offense.” *United States v. Zimmermann*, No. ACM 40267, 2023 CCA LEXIS 429, at *54 (A.F. Ct. Crim. App. Oct. 11, 2023).

WHEREFORE, this court should set aside the findings and sentence.

IX.

THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING A DEFENSE CHALLENGE TO FIRST LIEUTENANT H , WHO SAT IN JUDGMENT OF THE APPELLANT

Standard of review

“Although [the] standard of review is abuse of discretion for challenges based on actual bias as well as those based on implied bias, [the court] give[s] less deference to the military judge when implied bias is involved. *See generally United States v. White*, 36 M.J. 284 (C.M.A. 1993).” *United States v. Minyard*, 46 M.J. 229, 231 (C.A.A.F. 1997).

Law

A prospective member can be challenged for (1) actual and (2) implied bias. Article 41, UCMJ, 10 U.S.C. § 841; *United States v. Velez*, 48 M.J. 220 (C.A.A.F. 1998); R.C.M. 912(f)(1)(N). *See also United States v. Elfayoumi*, 66 M.J. 354, 356 (C.A.A.F. 2008).

The test for implied bias is objective. Viewed through the eyes of the public, what would its perception of fairness be in the military justice system? A disclaimer of bias by a prospective member is irrelevant when most people in the same position as the member would be prejudiced. The court simply asks if there is “too high a risk that the public will perceive” a less than fair, impartial, equal member. We review rulings on challenges for implied bias under a standard that is less deferential than abuse of discretion but more deferential than de novo review. *United States v. Moreno*, 63 M.J. 129, 134 (C.A.A.F. 2006) (citations omitted). Addressing implied bias requires

the military judge also to consider the liberal grant mandate established in *United States v. White*, 284, 287 (C.M.A. 1993).

> Implied or presumed bias is "conclusively presumed as a matter of law." It is attributed to a prospective juror regardless of actual partiality. [T]he focuses on whether the record at voir dire supports a finding that the juror was, in fac the issue for implied bias is whether an average person in the position of the juror in controversy would be prejudiced. And in determining whether a prospective juror is impliedly biased, "his statements upon voir dire [about his ability to be impartial] are totally irrelevant."
>
> For this reason, a finding of implied bias does not rely on any questioning by the trial judge as to the prospective juror's assessment of his or her partiality. Accordingly, in the limited cases in which bias is properly presumed, the judge does not have to ask the juror if he or she could faithfully apply the law.

United States v. Torres, 128 F.3d 38, 45 (2d Cir. 1997) (citation omitted).

Analysis

A. Panel stacking. [11]

The Appellant points out that of the 20 members detailed to the court-martial, 16 had personal experiences with domestic violence or sexual assault--the very offenses Airman Byrne was accused of. (R. at 268.) The Appellant's point is especially appropriate when the military judge considered the "liberal grant" mandate from *United States v. White*, 36 M.J. 284 (C.M.A. 1993) and its progeny. And the court may wish to consider the effect of "[eight] panel members in these circumstances sitting on the same panel together. *United States v. Commisso*, 76 M.J. 315, 320 (C.A.A.F. 2017).

[11] Airman Byrne personally requests this court determine whether there was sufficient evidence in the record to establish "stacking" of the panel or to support a claim that his counsel was ineffective for failing to conduct reasonable discovery to determine whether the convening authority had engaged in stacking the panel; and if appropriate, order a post-trial hearing in accordance with *United States v. Dubay*, (C.M.A. 1967). *See United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1992).

B. First Lieutenant H and Implied Bias.[12]

First Lieutenant (1st Lt) H has a familial history of alcohol-fueled abuse by his grandparents. The defense counsel did not follow up when he learned about this bias. Further, 1st Lt H does not drink alcohol because he learned that alcoholism runs in his family about seven years before trial, and he has abstained since. (R. at 393.) So, he has no recent experience with the personal effects of alcohol on the memory and behavior of a witness. In his voir dire, the military judge asked a series of questions that received merely a yes or no answer. (*Id.*) The military judge did not ask the lieutenant to expand his answers. But the trial counsel did not ask a single question about that. (R. at 395.) In response to defense questions, the lieutenant expanded his explanation to discuss how his great-grandfather was abusive to his wife. (R. at 396.)

When it came to the defense challenge of the lieutenant, they pointed out that it appeared the family alcohol abuse had affected the lieutenant and that some of the allegations arose at a time when the Appellant was "intoxicated." (R. at 432.) They were concerned he would "oversympathiz[e] with the victim or even B.P." and pointed to potential similarities with the charges and his own life experiences. (*Id.*)

In stating his reason for the challenge, the military judge noted that "The type of abuse that the grandfather ––great-grandfather-grandfather may have committed was not clearly identified to the extent that that was a motivating factor for a defense counsel challenge. *It could have been elicited in more depth; it wasn't*." (R. at 434.) Rather than stop, recall the lieutenant, and engage on the points further, the military judge denied the challenge for both actual and implied bias. Yet, he had earlier noted this was "not a particularly close call . . . even applying the liberal grant mandate."

[12] His individual voir dire begins at page 392 of the Record. The military judge's discussion and ruling on the challenge is at page 431.

The military judge plainly erred in not recalling 1st Lt H when he saw a potential issue. His comment shows that he ignored any concern when he told counsel that "it could have been elicited in more depth; it wasn't." (R. at 434.) They need more depth, but it was not a particularly close call, is inconsistent, and gives the appearance of a perfunctory voir dire and decision.[13] Also, the military judge seems to have relied heavily on the lieutenant's own statements that he would not be biased, which would be inconsistent with *Moreno infra* and a misapplication of the law on implied bias challenges.

WHEREFORE, the Appellant asks this court to find that the military judge erred in denying both challenges and set aside the findings and sentence.

CONCLUSION

The Appellant respectfully requests that this Honorable Court grant the relief sought.

Respectfully submitted,

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[13] While the military judge did not choose to recall the lieutenant for more voir dire, the defense counsel did not take advantage of a recall and further questioning opportunity.

APPENDIX A

In accordance with *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Nicholas Byrne, through appellate defense counsel, personally requests that this Court consider the following matters:[1]

X.

THE MILITARY JUDGE WAS BIASED AGAINST THE APPELLANT AND IN FAVOR OF THE PROSECUTION.

Standard of review

"[W]hen a military judge's impartiality is challenged on appeal, "the test is whether taken as a whole in the context of this trial, a court-martial's legality, fairness, and impartiality were put into doubt by the military judge's actions." The court "consider[s any such] risk objectively, *i.e.*, "any conduct that would lead a reasonable [person] knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned." With no objection at trial, a review is for plain error. *United States v. Martinez*, 70 M.J. 154, 158-159 (C.A.A.F. 2011).

Facts

The Appellant declares that specific instances of the military judge's conduct demonstrated bias in favor of the prosecution and against him and his counsel. In addition to rulings on motions that aid the prosecution, he also asserts that the military judge was not giving counsel enough time to properly voir dire the members. For example, (1) the judge was biased in denying the expert toxicology assistance, (2) during litigation of the speedy trial motion the military judge was helping the prosecution perfect their arguments (R. at 15-22, 79), (3) that the resolution of the speedy trial motion showed bias because he was not allowing the defense sufficient time to prepare (R. at 92-

[1] Counsel has filed a separate Motion to Attach the Appellant's Declaration supporting the ineffectiveness of counsel claims.

95), (4) at various points the military judge's expressed a negative attitude to defense counsel, for example, when litigating the "412 motion" the military judge asked if the defense had any caselaw to support their position. When they said no, he told them "We are not going to pause overnight while you investigate" (R. at 596).

Law

"An accused has a constitutional right to an impartial judge." *United States v. Butcher*, 56 M.J. 87, 90 (C.A.A.F. 2001). R.C.M. 902 gives two bases for the disqualification of a military judge and gives a general rule of disqualification for appearances of partiality. *See United States v. Quintanilla*, 56 M.J. 37, 45 (C.A.A.F. 2001). Because not every judicial disqualification requires reversal, CAAF follows the *Liljeberg* standards to determine if a military judge's conduct warrants [a] remedy to vindicate public confidence in the military justice system. *Liljeberg v. Health Svcs. Acquisition Corp.,* 486 U.S.847 (1988); 70 M.J. at 157-58.

Analysis

The Appellant alleges actual bias and the appearance of bias. The Appellant alleges that the first part of the test—specific injury and injustice in the military judge's rulings and giving aid to the prosecution, is satisfied. The Appellant alleges that the third part of the test is more than satisfied with a negative public perception of the trial judge's lack of impartiality.

WHEREFORE: The Appellant asks the court to set aside the findings and sentence.

XI.

THE MILITARY JUDGE ERRED WHEN GIVING A VARIANCE INSTRUCTION TO THE DATES IN CHARGE I, SPECIFICATION 7.

Standard of review

Variance questions are reviewed de novo. *United States v. Treat*, 73 M.J. 331, 335 (C.A.A.F. 2014).

Law

The Appellant must show a material and substantially prejudicial variance: (1) a substantial change like the offense, (2) an increase in the seriousness of the offense, or (3) increased punitive exposure. Two questions address prejudice: (1) was the accused misled so that he was unable adequately to prepare for trial, and (2) is the accused fully protected against [double jeopardy]." *United States v. Lee,* 23 U.S.C.M.A. 384 (1975).

Analysis

The prosecution first raised the variance while discussing instructions; they asked to change the dates in Charge I, Specification 7. The defense objected. (R. at 764-65.) The military judge gave the variance instruction. (R. at 785.) On review, the court should consider that the trial was before a panel of members rather than a military judge, and there were many other specifications of the same or similar ilk about which the members could have become confused.

"On or about" is treated with such liberality that it calls into question the existence of any boundary to the variance rule. This is most true when a variance is allowed for weeks, months, or years. The conclusion is that courts no longer require reasonable specificity in charging. The difference here was not just a few days. *See, e.g., United States v. Barner*, 56 M.J. 131, 137 (C.A.A.F. 2001) (citations omitted). The Appellant urges that September is not reasonably near to May. This court should consider the government's failure to identify the variance at the Article 32 preliminary hearing or in the referral process. The record suggests that the variance request surprised the defense but not the prosecution.

The record is unclear as to why the prosecution did not (1) disclose the date inconsistency to the defense before the trial began and (2) why they did not move to amend the specification before trial in accordance with RCM 603(c).

The correct and adequate pleading of the dates of an offense is essential to put the defense on notice and allow the opportunity to investigate—for an alibi defense, for example. Here, the military judge focused only on the event, not how the dates may have affected the defense preparation and strategy.

The prejudice is the defense's inability to investigate additional evidence and defenses at the end of the evidence presentation and just before instructions.

WHEREFORE: The Appellant asks the court to set aside the guilty finding to Charge I, Specification 7.

XII.

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED THE DEFENSE MOTION TO DISMISS WITHOUT PREJUDICE UNDER R.C.M. 707.

Standard of review

Denial of a speedy trial motion is reviewed de novo. *United States v. Harrington*, 81 M.J. 184, 188-89 (C.A.A.F. 2021). A decision to grant a continuance rendering a period of delay excludable is reviewed for an abuse of discretion. *United States v. Guyton*, 82 M.J. 146, 151 (C.A.A.F. 2022) (citations omitted).

Additional facts

The Appellant moved to dismiss, without prejudice (R. at 85), Charges I and II because (1) he had not been arraigned within 120 after the preferral of charges, (2) there were no approved delays pre-arraignment, and (3) the additional charge resulted in delays beyond the scheduled trial date in January 2022. (Appellate Ex. XXIII, AE XXIV (R. at 23), Appellate Exs. XL-XXXVII, Appellate Ex. XXXVIII, Appellate Ex. XXXIX, (R. at 70), Appellate Exhibit XLVIII.) A Chronology is at Appellate Ex. XXIV, Attach. 2 at 8.) Contrary to the trial counsel's assertion, the

defense had made several demands for a speedy trial. (R. at 93.) (Appellate Ex. XXIV at 1, ¶10 at 3.) Two examples are found in the "ADC to TC" memorandum of 16 Feb. 2022, Defense Discovery Request and Demand for Speedy Trial; 22 Feb. 2022, the trial counsel sent "Response the Fifth Defense Discovery Request and Demand for Speedy Trial. (Appendix VIII, at 86.) Similarly, Appellate Ex. XXXIX indicates that it is a Demand for Speedy Trial.

The Appellant was arraigned on 28 February 2022 on charges that had been preferred on 11 May 2021 and referred to trial on 14 July 2021. (Charge Sheet; R. at 88.) There were no requested delays in the Article 32, UCMJ, 10 U.S.C. § 832, preliminary hearing. (¶d., PHO Report at 16.) There is no evidence that the convening authority was asked to exclude delay while processing the allegations of the additional charge or before arraignment.

The prosecution was ready for trial on 27 September 2021, and the defense on 27 January 2022. (CCMJ Memo of 25 Aug. 21, *see also* CCMJ Memo of 14 Dec. 21.) The CCMJ memorandum excluded 27 September 2021 to 10 January 2022 and 22 February to 27 February 2022. The delay between 27 January and 7 February 2022 was because the victim's counsel was unavailable, so the prosecution effectively asserted their witness wasn't available. (R. at 82.) But this meant the defense was not ready on 7 February 2022. (*Id*.)

The military judge discussed the CCMJ Memorandum and counsel's representations regarding their availability and proposed trial dates (R. at 80-81.) The military judge notes that there was no request for an earlier arraignment independent of the trial date, which would stop the "707 clock," nor did he schedule one (R. at 89-90.) Regardless of the calculation, 28 February 2022 was more than 120 days since the preferral of charges (R. at 86.)

Law

Deference is given to the military judge's findings of fact unless clearly erroneous. *United States v. Mizgala*, 61 M.J. 122 (C.A.A.F. 2005). An accused shall be brought to trial-- arraigned-- within 120 days of, in this case, the preferral of charges. RCM 707(a)(1), (b)(1). When, as here, there are multiple charges preferred at different times, a separate "clock" runs. R.C.M. 707(b)(2). Excludable delay can be approved either by the convening authority pre-referral or the military judge after that. R.C.M. 707(c).

Analysis

The Appellant argues that the military judge abused his discretion in excluding time and deciding whether the government had proceeded with reasonable diligence. In accounting for the delay, "the issue is not which party is responsible for the delay but whether the decision of the officer granting the delay was an abuse of discretion." *United States v. Lazauskas*, 62 M.J. 39, 41-42 (C.A.A.F. 2005). Yet a party's fault can cause a granted exclusion to be an abuse of discretion. *See* 62 M.J. at 45 (Baker, J., concurring). This court should consider Judge Baker's nuanced interpretation. Judge Maggs takes on when "the Government through either misconduct or even gross negligence permits those witnesses to go on leave." It should not follow that the availability of the SVC should be treated differently. The CAAF has adopted the nuanced fault argument. *See United States v. Guyton*, 82 M.J. 146, 151 (C.A.A.F. 2022) (citations omitted). *Thompson* is before the Appellant's trial and *Guyton* was decided several days before the Appellant's trial. The court should consider a no-fault rule literally applied allows gamesmanship or the appearance of such when the defense, out of necessity, must ask for a continuance or additional time. When that happens, the delay should not be excluded from the "clock."

This Court should find the military judge abused his discretion in several ways. First, the prosecution proffered some delay because their primary witness was unavailable. Her special

victim's counsel was not available. The evidence suggests the witness was available. This Court in *In re KK*, Misc. Dkt. No. 2022-13, 2023 CCA LEXIS 31 (A.F. Ct. Crim. App. Jan. 24, 2023) addressed the military judge's continuance denial under similar circumstances to the Appellant's. This Court concluded that "the Government had failed to establish, by a preponderance of the evidence, that either the circuit trial counsel or Petitioner was unavailable for the court-martial dates, and that Petitioner's victims' counsel's unavailability did not operate to render Petitioner unavailable." *Id*. at 2023 CCA LEXIS 31, at *4. In the Appellant's case, there is no evidence that the victim's rights under Article 6b, UCMJ, 10 U.S.C. § 806b, would be adversely affected. *Cf. In re VM*, Misc. Dkt. No. 2023-04, 2023 CCA LEXIS 290, at *7 (A.F. Ct. Crim. App. July 11, 2023). Therefore, The Appellant asks the court to consider that the judge abused his discretion by excluding the delay because of the SVC's unavailability.

Second, the military judge excluded the time after 7 February 2022 from the prosecution accountability. This delay was caused by the prosecution's failure to comply with Mil. R. Evid. 413(b).[2] The prosecution should not have been allowed to profit from their failure to follow a clear rule of notice and disclosure. The prosecution served a Mil. R. Evid. 413 "notice" with the defense on 14 January 2022. Because of the prosecution's failure, the defense was required to submit a *fourth* discovery request on 26 January 2022. There was a further defense request on 1 February 2022. *See* Appellate Ex. XII, Def. Motion to Compel at 2.15-16. The prosecution did not respond to that request, and it was not until 8 February 2022 that the prosecution deigned to provide the defense and court with a proffer of expected testimony. *See* Appellate Ex. XXII, Gov. Response

[2] In evaluating the prosecution's diligence in proceeding with trial, it may wish to consider the failure to provide the Mil. R. Evid. 404(b) notice of stealing drinks. The prosecution's cavalier attitude to notice rules and responding to correspondence is relevant to whether the exclusion of delays is an abuse of discretion.

to Def. Motion to Exclude, of 8 February 2022 at 1.3 et. seq.[3] *See also*, Appellate Ex. XII, Defense Motion to Compel Investigative Reports of 23 February 2022, at 15-20. Further, the prosecution objected to the discovery requested by the defense that was generated because of the flawed Mil. R. Evid. 413 notice. *See* Appellate Ex. XVI, Government Reply to Discovery Request of 25 February 2022 at 1.a.[4]

WHEREFORE: The Appellant asks the Court to set aside the findings and sentence as to Charges I and II because of the failure to accord the Appellant right to a speedy trial.

XIII.

THE MILITARY JUDGE ERRED BY LIMITING CROSS-EXAMINATION OF B.P. ABOUT HIS PENDING DISCIPLINARY ACTION.

Standard of review

The military judge's ruling is reviewed for an abuse of discretion. *United States v. Pyron*, 83 M.J. 59 (C.A.A.F. 2022).

Facts

The defense made an uncontradicted proffer that B.P. knew that he was alleged to have hit the Appellant first, that he would be offered an Article 15, and that he intended to refuse that. (R. at 636-37.)

Law

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[3] The prosecution's reply does not adequately explain why their notice was deficient, why they did not respond to the defense motion stimulated by the notice, or why there was a delay in compliance. Further, that delay would have impacted on the defense preparations.

[4] The Army CID is an agency of the Department of Defense, a government entity. The prosecution had the tools available to compel timely production of any Army CID report. *And see* Attachment 5, Appellate Ex. XVI. That they didn't do so is evidence of dilatory behavior.

A military judge abuses his discretion by erroneously applying the law or clearly errs in making findings of fact. *United States v. Smith*, 83 M.J. 350, 355 (C.A.A.F. 2023) (citation omitted). In *United States v. Boone*, 17 M.J. 567 (A.F.C.M.R. 1983), *pet. denied*, 17 M.J. 438 (C.M.A. 1984), this court opined that "When such a specific act of misconduct is, in and of itself, directly probative of the witness's truthfulness, a military judge must allow it because, by definition, it is always relevant to the issue of that witness' credibility." *Id.* at 569. That conclusion is not limited to instances occurring while under oath. A lie outside a courtroom may be equally probative as one made under oath. *Cf. United States v. Toro*, 37 M.J. 313 (C.M.A. 1993). When the defense offers this evidence, it may deny confrontation rights to exclude it. *See, e.g., Davis v. Alaska*, 415 U.S. 308 (1974). Mil. R. Evid. 608(c) allows bias or prejudice to be shown by examining witnesses "or by evidence otherwise adduced."

Analysis

The court should consider that a panel of members decided the Appellant's fate. Thus, a more critical view of a military judge's ruling is appropriate. There was a clear nexus between his career jeopardy and B.P.'s trial testimony. He had a strong motive to lie and put all the onus of that night on the Appellant to avoid the disciplinary consequences of his belligerent actions. He had engaged in a public argument and assaulted another patron; there was contradictory evidence that he was the first to throw a punch. He had every incentive to make the Appellant the instigator and the one first to throw a punch. (R. at 637, 668.)

The defense was trying to challenge B.P.'s state of mind when testifying to see if he was influenced by factors such as self-preservation. Thus, the underlying reasons for concern were admissible under Mil. R. Evid. 803(1). Judgments of credibility belong to the members as factfinders, not the military judge. "[T]he jury's core function [is] making credibility

determinations in criminal trials. A fundamental premise of our criminal trial system is that "the *jury* is the lie detector." *United States v. Scheffer*, 523 U.S. 303, 312-13 (1998); *United States v. Harrington*, 83 M.J. 408, 415 n.4 (C.A.A.F. 2023) (credibility determinations uniquely the province of the trier of fact).

The military judge's restriction hampered the defense in presenting a full picture of SFC B.P.'s lack of credibility—that was material prejudice.

WHEREFORE: The Appellant asks the court to set aside the guilty finding to the additional charge and reassess the sentence.

XIV.

DEFENSE COUNSELS' REPRESENTATION FELL BELOW THE STANDARD FOR EFFECTIVE ASSISTANCE OF COUNSEL FOR AN ACCUMULATION OF REASONS.

Standard of review

Claims of ineffective assistance are reviewed de novo. *United States v. Palacios Cueto*, 82 M.J. 323 (C.A.A.F. 2022).

Law

Defense counsel is presumed competent and acting "within the wide range of reasonable professional assistance." "A challenger must demonstrate "a reasonable probability that, but for counsel's [deficient performance], the result of the proceeding would have been different." *Id*. at 327. The Appellant bears the heavy burden of establishing an error and that the error prejudiced him. CAAF has consistently demanded "the highest degree of professional competency" from defense counsel. *United States v. Horne*, 26 C.M.R. 381, 384 (C.M.A. 1958).

Appellant's assertions of error

The Appellant asserts the following deficiencies in counsels' representation.

a. *Counsel conceded the general accuracy of at least one of the statements to J.M. and effectively conceded the Appellant's guilt*.

> And members, Airman Byrne was not suicidal. He knew—he knew he screwed up. Nobody in this courtroom knows more than Airman Byrne that *he screwed up*. But let's think about this; "I should just bleed out and die." He was not suicidal. It was a poor attempt at dark humor, trying to make light of a bad situation because, yeah, he was already under investigation.

(R. at 837.) The prosecution reminded the members of that statement and returned to it in its findings rebuttal argument. "[He] knew *he screwed up*. *He screwed up for saying, for admitting, for telling people he hit his wife*." "*He screwed up*, because he lost control of [K.D.], and she got free, and she finally reported him." (R. at 845.) The Appellant pled not guilty. There is no evidence in the record that the defense counsel consulted with the Appellant on the possible effect of the concession.

Unlike *Larson*, the concession went to all the substantial accusations in Charges I and II against the Appellant. Larson was charged with very serious offenses and misuse of a government computer. *United States v. Larson*, 66 M.J. 212, 213 (C.A.A.F. 2008). Larson alleged his counsel were ineffective for conceding guilt to the relatively minor charge of misuse of a government computer. Further, in *Larson*, the CAAF did not directly answer the question of error when the defense counsel concedes guilt in an opening statement. The court "assume[d] deficient performance of counsel for failure to consult" with the client and moved on to the prejudice analysis. 66 M.J. at 219 (citations omitted).

An analogy may be to counsel who argues for a punitive discharge in sentencing and the need to have a "*Blunk* letter" in the counsel's file. *See United States v. Qualls*, No. 201600149, 2016 CCA LEXIS 727 (N-M Ct. Crim. App. Dec. 20, 2016); *United States v. Blunk*, 37 C.M.R. 422 (C.M.A. 1967).

b. *Members selection*. The issue is reviewed for plain error because of a forfeiture. *United States v. King*, 83 M.J. 115, 120 (C.A.A.F. 2023). *United States v. Crawford*, 15 C.M.A. 31

(C.M.A. 1964), was the law for the Appellant's trial, which permitted a convening authority (CA) to affirmatively consider race (and potentially gender) when detailing members. That changed in *United States v. Jeter*, 84 M.J. 68 (C.A.A.F. 2023). Significant concerns that victims are not treated fairly at court-martial and a low conviction rate are common knowledge. Accordingly, like race and gender, personal "experience" with domestic violence (DV) and sexual assault (MSA) may be a CA's consideration in detailing members. On the one hand, it could be a way to ensure sensitivity to victims as much as the accused; on the other hand, a CA might yield to the pressures for convictions. *Crawford* was not abrogated until after the Appellant's trial. On such a significant matter as a fair "jury," the Appellant claims he is entitled to relief based on *Jeter* and an extension of its reasoning because his case remains on appeal.

b. *Panel stacking*.

Counsel failed to perform a reasonable investigation into potential panel stacking, where 16 of 20 prospective members had personal experience with domestic violence and sexual assaults. A reasonable first step would be discovery. *See United States v. Jeter*, 84 M.J. 68 (C.A.A.F. 2023) (Maggs, J., dissenting). It appears more than coincidental that such a large percentage of the panel had personal experiences or significant knowledge about DV and MSA cases. As a percentage of the Force, the suspected incidence of DV and MSA situations is small. Yet up to 80% of the detailed members here had some noteworthy DV or MSA experiences.

The Appellant also asks the court to consider that counsel failed to adequately challenge the members on the "appearance of unfairness" standard found in RCM 912(f)(1)(N). *See United States v. Ai*, 49 M.J. 1, n.4 (C.A.A.F. 1998).

c. *Voir dire*.

Counsel failed to fully explore with 1st Lt H any effect his family's alcoholism might have on his decision-making in this case. The defense counsel did not follow up when told about the abuse of his great-grandparents due to alcohol. If the defense was concerned about alcohol and the abuse related to the charges, then they needed to flesh out whether his family experiences would affect his evaluation of the evidence as it relates to alcohol or alcohol abuse. Had they done that, it's possible the challenge against 1st Lt H would have been granted.

d. *Counsel failed to articulate a public perception challenge as a component of the implied bias component of challenges*.

Counsel failed to adequately challenge the members on the "appearance of unfairness" standard found in R.C.M. 912(f)(1)(N). *See United States v. Ai*, 49 M.J. 1, n.4 (C.A.A.F. 1998). While a component of implied bias, the concept is also relevant to the liberal grant mandate.

e. *Challenges not made*.

Counsel did not challenge Lt Col S , Maj F , Maj B , and MSgt C , each of whom sat as members. (R. at 443-44.) Not addressed in the arguments to the military judge was the possibility that bias might seep into the member's deliberations despite statements to the contrary. This court noted that possibility in *United States v. Covitz*, ACM 40193, 2022 CCA LEXIS 563 *31, 2022 WL 4592087 (A.F. Ct. Crim. App. Sept. 30, 2022) (pressure from "both conscious and unconscious biases.").[5]

Specifically: (1) *Lt Col S* , failure to follow up on the impact the Secretary of the Air Force message may have had on his ability to be fair. (R. 324.) He was involved in disciplinary

[5] Should the court determine the missed challenge is worthy of review, it is reviewed for plain error. *See United States v. Witt*, ACM 36785(reh), 2021 CCA LEXIS 625, 202 WL 5411080 (A.F. Ct. Crim. App. Nov. 19, 2021) aff'd on other grounds, 83 M.J. 282 (C.A.A.F. 2023).

action of an airman for domestic violence that led to an Article 15 and separation of the Air Force with a general discharge. (2) *Major F* had dealt with one assault and two sex assaults in his command that ended with actions on each, and "one went to court-martial." (R. at 342-43.) (3) Major B had something important to say. (R. at 308.) His wife is a long-time clinical social worker who is involved in these types of cases. When she comes home, she's often distraught. (R. at 346-47.) Because of some voir dire questions it caused him to "harken back" on some of the conversations" he'd had with his wife about her experiences, "she might be very upset. She might be in tears. (R. at 350.) There was a likelihood that the evidence would cause him to "harken back" on his wife's experiences and apply them in findings. The possibility existed of those thoughts intruding in his deliberations; (4) *Master Sergeant C ,* the defense failed to follow up on the impact the Secretary of the Air Force missive may have had on his ability to be fair; plus, his mother was a victim of physical domestic violence that he admitted he saw with his own eyes at the age of 13 describing, "I mean it hurt her." (R. at 399.) When asked how often it enters his mind, he said not often, meaning sometimes it does, an incident that happened 24 years prior. Later, he said, "I didn't like to see my mother going through that," he denied that his experiences affected his perception of domestic violence. (R. 402-404.) It was more than possible those thoughts would intrude in his deliberations.

f. *Failed to call the Appellant to testify on the motion to suppress*.

Had the Appellant testified, he would have cast doubt on the statements of J.M. that there was limited interaction, that she "broke the ice" by asking about his injury, and that she misrepresented or did not recite the whole conversation with the Appellant.

g. *Failed to object or seek a limiting instruction because of the prosecution's opening lines to the members, which characterized the Appellant as a violent character and put the Appellant's propensity for violence before the members*.

> "I've hit my wife before." Those are the accused's words after assaulting *his latest victim*, talking about his now ex-wife K D . Your Honor, president, members, in this trial *you're going to learn a lot about the accused*, A1C Nicholas Byrne. You're going to *hear a lot about his aggression and his repeated abuse*.

(R. at 449.) (Emphasis added.) The prosecution's first words in the closing argument were similar. The prosecution was making an argument based on propensity—the profile of a violent person, a form of character evidence not permitted in this case. *See, e.g.*, *United States v. Quezada*, 82 M.J. 54 (C.A.A.F. 2021) (propensity evidence is a generally impermissible form of character evidence in which members prove a person's character to show the person acted in accordance with the character). The military judge's spillover instruction came too late after the damage was done and was inadequate here. The prosecution did little to ensure the two "cases" were treated separately, as the trial counsel did in *Streete*, *infra*.

h. *Failed to object to the testimony that*

1. "we often got in fights when I was attempting to get ready to go anywhere." (R. at 531.)

2. He had punched me in the arm, and he told one of his friends he punched me in the arm, and I had left and went to stay with friends to kind of, like, calm down." (R. at 532.)

3. Was this a— just a constant abusive relationship throughout the marriage? It was a consistently abusive relationship, but it's just, like, the cycle of abuse. (R. at 541-42.) This testimony was about inadmissible character and propensity and also violative of Mil. R. Evid. 403. The members were charged with findings as to several specific instances. This propensity evidence invited the members to disregard their duty to examine each specification and consider that he must have done all.

4. "I had been accused and belittled the entire time I was with Nick. I felt like he owned me and distorted my reality of myself, as well as everyone else. And I just

wanted to belong to myself and do something I wanted to do." (R.at 542.) The testimony is irrelevant on the merits. This testimony was inadmissible as propensity and character and also violative of Mil. R. Evid. 403.

5. "So from the beginning, when I had first met with the people that were there to help me, my SVC and, like, the other counsel people that you meet with, they had told me if I was to that you meet with, they had told me if I was to give a statement and say that nothing happened, they were still going to interview Nick." (R. at 544.)

i. *Failed to confront K.D.*

(1) Even after the alleged offenses, she tried to get the Appellant to treat her out-of-wedlock child as his own. Such admissions on her part would contradict her being in fear of the Appellant and any fear that he would mistreat her child. (2) In November, she changed her name to Byrne from D . She did this on official records (*see* Charge Sheet) and her driver's license. She was visiting family in Indiana, and they and the Appellant were with her when she changed her name. (Appellant's Declaration.) (3) In the closed session, K.D. testified she was pregnant when she made the allegations but testified that she was not pregnant when she made the allegations. (R. at 58-81.) (4) That K.D. and her paramour were allowed to escape responsibility for their adultery and conceiving a child out of wedlock as a result of the allegations.

j. *Failed to obtain discovery of K.D.'s Facebook messages about the Appellant, which would be pretrial statements of her as a witness.*

A.K. said that messages between her and K.D. were texts on Instagram, but K.D. says she reached out to A.K. on "Facebook," not Instagram. Those messages were not provided in discovery, and the defense counsel did not make sufficient efforts to get them. (R. at 605, 609.)

k. *Failure to object to the prosecution's erroneous and misleading arguments about B.P.'s rank and glossing over the fact that the Appellant did not know the rank.*

The prosecution argued and placed heavy emphasis on B.P.'s rank. (R. at 824.) That was a mischaracterization of the evidence. B.P. did not say he told the Appellant his rank on the merits and emphasized it for sentencing. The witness testified: "I don't think he knew I was a senior NCO." (R. at 621.) "*[M]y thinking was* I *was going to* go tell him that, 'Listen, I'm a senior NCO. Knock off whatever it is you're instigating.]'" (R. at 623.) But he could not say anything about his rank (R. at 623). There was no defense objection to the prosecution's arguments about rank. However, the frequent misleading references to B.P.'s rank were bound to affect the sentencing. The Appellant was not charged with assault on an NCO in violation of Article 9x, UCMJ, nor was the rank relevant under the circumstances of this case. The defense counsel failed to seek a limiting instruction during the argument or when discussing the sentencing instructions. We don't know how much of the confinement sentence was attributed to this assault. However, it is more probable than not that there was some sentence enhancement for an assault on a senior NCO. Some sentence relief is warranted for the error.

l. *Failure to use a bathroom diagram provided by the Appellant to challenge the accuracy of the one put in evidence and to challenge B.P.'s testimony on the events in the bathroom.*

In his Declaration, with the diagram attached, the Appellant asserts that the diagram used at trial was inaccurate, that his counsel knew that, and they failed to use the more accurate one he provided.[6] His counsel had visited the bar. Still, the bar owner refused to let them take photographs. There is no indication the defense sought the assistance of the prosecution or Army CID to get photographs of the bathroom.

[6] A motion to attach the Appellant's Declaration has been filed separately.

m. *Failure to request tailored procedural instruction on self-defense*.

The military judge correctly gave self-defense instructions for the additional charge. (R. at 802.) However, when the military judge gave his procedural instructions, he did not give the order to vote regarding self-defense defense. The military judge correctly instructed the members that the prosecution has the burden to prove that the Appellant did not act in self-defense beyond a reasonable doubt. (R. at 802.) Thus, the members should have been told to vote on the existence of self-defense before determining whether the specifications were also proven beyond reasonable doubt.

n. *Failed to adequately challenge B.P. on his inconsistent and self-serving testimony or confront him*.

B.P. stated that he was the first one to enter the restroom so that the Appellant would have been behind him, not when "he first hit him he was looking at me." This means the mirrors were to the left of his face, to the right of the Appellant. B.P.'s response after the hit to his left eye was, "I turned to my right." His back was to the opposite wall of the mirror in the small hallway. Then he states that the Appellant hit him in the back of his right head and that after that, he was completely turned around. But this meant that his back, which had been against the opposite wall with the mirror, was now on the inside, making his face closest to the opposite wall of the mirrors. But at R. 624, he states, "At this point in time, my back was completely to [the Appellant]. He grabbed my head and threw it into the mirror, which then cut me." This means that the Appellant had to turn his head to face the opposite wall of the mirrors, which caused the cut on his right eye. That scenario is nonsensical.

o. *Failed to call K. for various purposes, including the impeachment of B.P.*

The defense could have used K.'s statement to impeach the sequence of events further. K. said that B.P. mentioned to him that "BYRNE struck him with a closed

right fist, causing PATTERSONS's head to strike the mirror, which then shattered, causing the above injuries to PATTERSON." That would contradict the Appellant throwing his head into the mirror. *See also* AF Form 3545A, Appellate Ex. XXVII, Appellant's Motion to Suppress, Attachments at 15 of 45.[7]

At R. 626, B.P. said that the Appellant "grabbed my head and slammed it to the mirrors to my right." But to his right would be the opening to the urinals, where there were no wall mirrors. He then goes on to say that he got dizzy, stumbled, and tried to catch himself on the sink, to which counsel could have confronted him with it being the Appellant who helped him to the ground. At R. 627, B.P. states, "Of all places that I could fall, I had to fall under the urinals. Great place." Looking at the diagram, that is impossible because the urinals are off to the side.

Skepticism is necessary when evaluating B.P.'s testimony that he never hit the Appellant. (R. at 634.) The subsequent events belie such a statement, including photographs of his hands. (R. at 666-67, Defense Ex. B.) In this regard, the defense failed to call K. to testify about the taking of photographs, and as noted in his report, "he noticed what appeared to me being bruised knuckles on both hands and a small cut on PATERSON's right-hand middle finger. That testimony would have impeached B.P. significantly. *See* AF Form 3545A, Appellate Ex. XXVII, Appellant's Motion to Suppress, Attachments at 15 of 45; ¶j.(1), (4), Article 32, UCMJ, 10 U.S.C. 832, report at page 25, 33 of 34.

(2) The defense could have called K. to establish the foundation for admission of Defense Exhibit C. (R. at 675.)

[7] Even if not introduced as evidence in trial for sufficiency purposes, the report is relevant to the issue of a defense failure to call a witness and may be considered for that purpose.

p. *Failure to develop and litigate as a sufficient evidentiary basis to compel the toxicologist's assistance*.[8]

The defense filed a motion to compel a forensic toxicologist to assist them prepare for trial. (R. at 21, 51, Appellate Ex's. XIXVII, XVIII.)[9] The Appellant asserts a significant basis to compel a toxicology consultant because it was reasonably probable the toxicologist would be of material assistance pretrial—therefore, the assistance was reasonably necessary to pretrial preparations.

B.P. was given a breathalyzer at the military police station approximately 2.5 hours after the alleged assault. The breathalyzer showed a level of 0.12. (R. at 70-71.) Working backward—a back extrapolation—the toxicologist could have estimated the alcohol level at the time of the assault and, from that, estimated the effects on memory and behavior. (R. at 72.) However, the military judge found that the defense counsel had not provided sufficient detail to justify the appointment of a consultant. (R. at 73.) Denial of expert assistance is reviewed for an abuse of discretion. *United States v. Hennis*, 79 M.J. 370 (C.A.A.F. 2019). "[W]here "necessary for an adequate defense." Expert assistance should be provided. RCM 703(d)(2)(A)(ii); *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986). The courts follow the combined test from *United States v. Freeman*, 65 M.J. 451 (C.A.A.F. 2008) and *United States v. Gonzalez*, 39 M.J. 459 (C.M.A. 1991).

The Army Court has made clear that requests for assistance are treated differently than witnesses. See United States v. Cannon, 74 M.J. 746, 751 (Army Ct. Crim. App. 2015), rev. denied 75 M.J. 48 (C.A.A.F. 2015).

Yet the military judge indicated that it was not his "common understanding" about back extrapolations and that the defense had not produced evidence to show how they are performed.

---

[8] The Appellant acknowledges there was an insufficient basis to compel testimony based on the record. But that may have been corrected had the expert assistance been made available.

[9] The request for a digital forensics expert was resolved and is not an issue.

(R. 73.) He also found an inadequate basis or foundation for ordering a toxicologist's assistance (R. at z.) It may be that once the pretrial evaluation was done, there was no reasonable basis to testify, and the assistance would be terminated. But, if the defense has a reasonable belief that testimony can assist the defense, then the issue becomes that of compelled expert testimony.

A toxicologist can give a meaningful estimate of a person's level of intoxication and can relate that to the effects of that level on memory and actions. If testified to, what weight should be given to that estimate for the factfinder to decide, not the military judge? To begin, the toxicologist works with the defense counsel to gather all relevant information from the investigative reports, witness statements, witness interviews, and medical records. The availability of a blood alcohol concentration report is only one of the factors. Factors include the person's weight and gender, the amount and type of alcohol consumed, the time since alcohol consumption ended, and other individual factors (e.g., metabolism, food intake, and medications). Once the information is gathered and examined, the toxicologist can estimate the effects, such as impaired memory, decreased coordination and balance, and decreased social disinhibition.

While the defense can gather information, they are not sufficiently skilled to make scientific deductions, and they cannot testify as witnesses.

The military judge abused his discretion because he erroneously interpreted the information necessary to compel an expert. He failed to apply the law to allow admission of back extrapolation testimony correctly. He put the cart before the horse. His questions of the defense went to the weight of the testimony, not its admissibility. Any expert testimony would be relevant to P.'s memory and to his level of intoxication—both of which became issues at trial. (R. at 73.)

While it is always appropriate that the parties provide appellate case law to support their position, the military judge and parties were unfamiliar with *United States v. Moore*, *Alton*,

Freeman, and other cases. Rather than accept the general acceptance of back extrapolations, the military judge unreasonably required the defense to prove the effectiveness of any such testimony. In several cases, the prosecution has used back extrapolations to prove their case.

> At trial, Dr. Luckie testified that forensic toxicologists use the Widmark Formula to extrapolate approximately how many drinks a person has consumed based on their BAC, gender, and weight and that the formula is commonly accepted within their field. Moreover, the Widmark Formula has been used throughout American courts for many years. *See, e.g., Willis v. City of Fresno*, 2013 U.S. Dist. LEXIS 166722 (E.D. Cal., Nov. 21, 2013); *United States v. Tsosie*, 791 F. Supp. 2d 1099 (D.N.M. 2011); *Shea v. Royal Enters.*, 2011 U.S. Dist. LEXIS 63763 (S.D.N.Y. Jun. 16, 2011). The expert testimony in this case satisfied the test outlined in *Houser*, and for that reason we find that the judge did not commit plain error in admitting Dr. Luckie's testimony.

United States v. Freeman, No. NMCCA 201300102, 2014 CCA LEXIS 275, at *16 (N-M Ct. Crim. App. Apr. 30, 2014) aff'd 74 M.J. 181 (C.A.A.F. 2014). "[A] forensic toxicologist from the Armed Forces Medical Examiner System (AFMES) testified [for the prosecution] that . . . that he was able to perform a retrograde extrapolation to show a potential BAC of .17 to .22 at 2030 hours, about one hour after Appellant stopped driving." *United States v. Moore*, No. ACM S32477, 2018 CCA LEXIS 560, at *7 (A.F. Ct. Crim. App. Dec. 11, 2018) rev. denied 79 M.J. 44 (C.A.A.F. 2019). "According to Dr. ES, the forensic toxicologist who testified [for the prosecution] at trial, . . . By extrapolation, estimated that Appellant's peak blood alcohol concentration earlier on the night of 6 June 2020 might have been approximately 0.143-gram percent. *United States v. Bousman*, No. ACM 40174, 2023 CCA LEXIS 66, at *10 (A.F. Ct. Crim. App. Feb. 8, 2023); The military judge found "the science of retrograde and anterograde extrapolation can be reliable in a given case." United States v. Alton, No. ACM 40215, 2023 CCA LEXIS 184, at *23 (A.F. Ct. Crim. App. Apr. 28, 2023).

q. *Failed to request a limiting sentencing instruction that P's rank was irrelevant on sentencing.*

The Appellant did not know B.P.'s military rank at the time of the offenses, nor was he charged with assaulting an NCO in the execution of his duties. Therefore, the victim's rank was irrelevant to sentencing. Yet, beginning with opening statements, the presentation of evidence, and the findings argument, the prosecution stressed rank. For example, during the findings argument, the prosecution stressed the victim's rank.

> "You heard P, a senior NCO, talk . . ."
>
> " P, again, the senior NCO, . . ."
>
> " P described . . . how he was attacked, a senior noncommissioned officer."
>
> "Panel members, the accused, just a few months ago, attacked a senior noncommissioned officer."

(R. at 824-25.) The prosecution did not aggressively argue for an increased sentence based on rank; that argument was unnecessary because they had already firmly and aggressively planted that point in the members' minds—something they were likely to remember and consider. The rank was irrelevant to sentencing because (1) the Appellant did not know that at the time of the offense, (2) an increased sentence based on rank would be improper on the facts, and (3) on the facts, RCM 1001(b) does not apply.

The events occurred in a civilian bar, and all involved wore civilian clothes. Despite his intent, the victim never made his military rank known to the Appellant. Further, there is no evidence that the victim was in some way involved in the execution of his office.

r. *Failed to object to the testimony that the Appellant didn't apologize*. (R. at 509.)

The appellant was prejudiced at sentencing, and this court should reassess the sentence as a remedy.

XV.

CUMULATIVE ERROR INFECTED THE APPELLANT'S TRIAL SO MUCH THAT HE DID NOT RECEIVE A FAIR TRIAL.

Whether an accumulation of errors deprived an appellant of a fair trial is reviewed de novo. *United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011). Under the doctrine, "several errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding." *United States v. Banks*, 36 M.J. 150, 170-71 (C.M.A. 1992) (citation and quotation marks omitted).

The Appellant argues that the military judge's bias, the voir dire and challenge errors, the erroneous rulings on motions, the prosecutorial errors, and the errors of his counsel combine to show that the Appellant did not receive a fair trial; a trial in which the public also could be assured he received a fair trial.

WHEREFORE, the Appellant asks the court to set aside the findings and sentence.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 23 April 2024.

Philip D. Cave
Civilian Appellate Counsel

Megan P. Marinos
Senior Counsel
Air Force Appellate Defense Division

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Airman First Class (A1C) Nicholas A. BYRNE United States Air Force *Appellant*	**MOTION TO ATTACH APPELLANT'S DECLARATION** Before Panel No. 1 No. ACM 40391 23 April 2024

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

In accordance with Rule 23 of this Court's Rules of Practice and Procedure (2020 ed.), the Appellant moves to attach his Declaration.

In that declaration, the Appellant sets out various issues he has with the effectiveness of his defense counsel at trial.

WHEREFORE, the Appellant respectfully asks this Court to grant the motion.

Respectfully submitted,

PHILIP D. CAVE
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Air Force Appellate Defense Division
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 23 April 2024.

Philip D. Cave
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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) **NICHOLAS A. BYRNE**, USAF, *Appellant.*	))))))))	UNITED STATES' MOTION TO COMPEL DECLARATIONS No. ACM 40391 Before Panel No. 1 25 April 2024

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

Pursuant to Rule 23.3(e) of this Court's Rules of Practice and Procedure, the United States hereby requests this Court order Appellant's trial defense counsel, Mr. E.G., Maj N.A., and Maj D.B., to each provide a declaration in response to Appellant's alleged ineffective assistance of counsel claims.

Mr. E.G., Maj N.A., and Maj D.B. represented Appellant at his trial. Appellant filed his Assignments of Error and his Motion to Attach his declaration with this Court on 23 April 2024, alleging in Issue XIV and the declaration approximately 19 ways in which his trial defense counsel were ineffective. The United States has requested a declaration from each counsel to address the alleged ineffective assistance of counsel, and they so indicated they would not do so without an order from this Court.

The United States requires a declaration from Mr. E.G., Maj N.A., and Maj D.B. to adequately respond to Appellant's brief and to Appellant's ineffective assistance of counsel claim. *See* United States v. Rose, 68 M.J. 236, 236 (C.A.A.F. 2009); United States v. Melson, 66 M.J. 346, 347 (C.A.A.F. 2008). In fact, this Court cannot grant Appellant's ineffective assistance of counsel claim without first obtaining a declaration from trial defense counsel. *See* Rose, 68 M.J. at 237; Melson, 66 M.J. at 347. Declarations are necessary in this case because the allegations of ineffective assistance of counsel

involve strategic decisions regarding the following: obtaining discovery of electronic application messages; obtaining photographic evidence; conducting voir dire and court member selection; Appellant's decision to not testify at the suppression hearing; defense positions regarding, and cross-examination of, government witnesses; obtaining toxicologist assistance; not calling a defense witness to contradict a particular government witness; not objecting to certain victim testimony; seeking a tailored self-defense instruction; objecting to, and seeking a limiting instructions regarding, witness testimony and prosecution statements and arguments. Only Appellant's trial defense counsel can explain such decisions that Appellant now challenges.

Accordingly, the United States respectfully requests this Court order Mr. E.G., Maj N.A., and Maj D.B. each to provide a declaration with specific, factual responses to Appellant's claim of ineffective assistance of counsel within 30 days of the Court's order.

WHEREFORE, the United States requests this Court grant this Motion to Compel Declarations.

STEVEN R. KAUFMAN, Col, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 25 April 2024 via electronic filing.

STEVEN R. KAUFMAN, Col, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	))	UNITED STATES' MOTION FOR ENLARGEMENT OF TIME
	)	
v.	)	No. ACM 40391
	)	
Airman First Class (E-3) **NICHOLAS A. BYRNE**, USAF, *Appellant.*	)))	Before Panel No. 1 25 April 2024

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

Pursuant to Rule 23.3(m) of this Court's Rules of Practice and Procedure, the United States hereby requests an enlargement of time to adequately respond to Appellant's Assignment of Error in which he alleges ineffective assistance of counsel against his trial defense counsel. Filed in conjunction with this motion, the United States filed a Motion to Compel Declarations and asked this Court to order Appellant's trial defense counsel, Mr. E.G., Maj N.A., and Maj D.B., to each provide a declaration in response to Appellant's alleged ineffective assistance of counsel claims. The United States seeks a fourteen-day enlargement of time following the submission of Mr. E.G.'s, Maj N.A.'s, and Maj D.B.'s declarations to respond properly and completely to Appellant's brief.

The United States' Answer to Appellant's Assignment of Errors brief is currently due to the Court on 23 May 2024. Undersigned counsel will require a reasonable amount of time after the submission of declarations to address properly Appellant's ineffective assistance of counsel claims. Good cause exists to grant this request. Undersigned counsel needs this additional time to address properly Appellant's ineffective assistance of counsel claims, which cannot be analyzed until Mr. E.G.'s, Maj N.A.'s, and Maj D.B.'s declarations are received. Barring unforeseen

circumstances, the United States believes fourteen days is sufficient to prepare a proper and responsive brief for this Honorable Court on this issue once the ordered declarations are received.

This case was docketed with the Court on 20 December 2022. Appellant filed his Assignments of Error brief with this Honorable Court on 23 April 2024, 490 days after docketing. This is the United States' first request for an enlargement of time. As of the date of this request, 492 days have elapsed since docketing.

WHEREFORE, the United States requests this Court grant this Motion for Enlargement of Time.

STEVEN R. KAUFMAN, Col, USAF
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Military Justice and Discipline Directorate
United States Air Force

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 25 April 2024 via electronic filing.

STEVEN R. KAUFMAN, Col, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40391**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Nicholas A. BYRNE	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 23 April 2024, Appellant, through counsel, submitted an assignments of error brief alleging, *inter alia*, that trial defense counsel were ineffective in that their "representation fell below the standard for effective assistance of counsel for an accumulation of reasons."* On 23 April 2024, in support of this issue, Appellant submitted a Motion to Attach Appellant's Declaration, which was unopposed and granted on 7 May 24.

In his assignments of error brief, Appellant alleges approximately 18 deficiencies in the performance of his three trial defense counsel, which this court summarizes or rewords in part here. Appellant claims his trial defense counsel were deficient in that they:

(a) "conceded the general accuracy of at least one of the statements" to JM and they "effectively conceded" Appellant's guilt;

(b) failed to secure a fair and impartial panel for Appellant's court-martial;

(c) failed to adequately explore the effect of a panel member's family history of alcoholism;

(d) failed "to articulate a public perception challenge as a component" of challenges for implied bias;

(e) failed to challenge four named panel members;

(f) failed have Appellant testify "on the motion to suppress;"

(g) failed to object to certain argument by trial counsel with regard to Appellant's character for violence or propensity to commit acts of violence, or "seek a limiting instruction;"

---

* Appellant files this assignment of error in accordance with *United State v. Grostefon*, 12 M.J. 431 (C.MA. 1982).

(h) failed to object to certain quoted testimony;

(i) failed to adequately impeach or cross-examine KD;

(j) failed to obtain discovery of KD's Facebook messages relating to Appellant;

(k) failed to object to argument by trial counsel relating to BP's rank and "glossing over the fact" that Appellant was unaware of BP's rank;

(l) failed "to use a bathroom diagram" that Appellant provided in order to challenge evidence and testimony related to the bathroom;

(m) failed to request "tailored procedural instruction on self-defense;"

(n) failed to confront or "adequately challenge" BP on "inconsistent and self-serving testimony;"

(o) "failed to call K. for various purposes," to include impeaching BP;

(p) failed to provide a sufficient evidentiary basis for compelling the production of a consultant in toxicology;

(q) failed to request a limiting instruction with regard to BP's rank and the sentencing phase of Appellant's court-martial; and

(r) failed to object to testimony relating to Appellant's failure to apologize.

On 25 April 2024, the Government filed a Motion to Compel Declarations and a Motion for Enlargement of Time. The Government requests this court compel Appellant's trial defense counsel, Mr. E G , Major A , and Major D B , to provide declarations in response to the claimed ineffective assistance of counsel. According to the Government, Appellant's trial defense counsel collectively indicated they would not provide declarations without an order by this court. In its motion for an enlargement of time, the Government requests 14 days after the court's receipt of declarations to submit its answer. Appellant did not file a response to the motions.

The court has examined the claimed deficiencies and finds good cause to compel declarations. The court cannot fully resolve Appellant's claims without piercing the privileged communications between Appellant and trial defense counsel. Considering that Government has not had an opportunity to conduct discovery of the facts and circumstances underlying the claims—because trial defense counsel have stated they would not provide information except by an order from this court—the court is not disposed to require Government to answer on an expedited timeframe.

Accordingly, after considering the Government's motions and the deficiencies alleged by Appellant, it is by the court on this 7th day of May, 2024,

ORDERED:

The Government's Motion to Compel Declarations is **GRANTED**. Mr. G , Major N A , and Major D B are each ordered to provide a declaration to the court that is a specific and factual response to each of Appellant's stated claims, as listed *supra*, that they were ineffective.

A responsive declaration by each counsel will be provided to the court not later than **6 June 2024.** The Government shall deliver a copy of the responsive declarations to Appellant's counsel.

It is further ordered:

The Government's Motion for Enlargement of Time is **GRANTED**. The Government's answer to Appellant's assignments of error brief will be filed not later than **14 days** after Government has received a declaration from each trial defense counsel that is responsive to this order.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) **NICHOLAS A. BYRNE**, USAF, *Appellant.*	))))))))	UNITED STATES' MOTION TO ATTACH DOCUMENTS No. ACM 40391 Before Panel No. 1 6 June 2024

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

Pursuant to Rule 23(b) of this Court's Rules of Practice and Procedure and the Court's 7 May 2024 Order granting the United States' 25 April 2024 Motion to Compel Declarations, the United States hereby submits this Motion to Attach Documents, that is, the declarations of Appellant's three trial defense counsel: Major N A Major D B , and Mr. E G . These declarations are responsive to this Court's Order and essential for the Court to adjudicate Appellant's multiple claims of ineffective assistance of said counsel.

Because the declarations include the full last name of court members and a law enforcement witness, we are concurrently filing those documents in unredacted and redacted separate attachments marked as "sensitive," pursuant to Rules 17.1(e), 17.2(c), and 17.2(d) of this Court's Rules of Practice and Procedure.

WHEREFORE, the United States requests this Court grant this Motion to Attach Documents.

STEVEN R. KAUFMAN, Col, USAF
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and Appellate Operations Division
Military Justice and Discipline Directorate

United States Air Force

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, the Air Force Appellate Defense Division, and civilian defense counsel on 6 June 2024 via electronic filing.

STEVEN R. KAUFMAN, Col, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee,	))	**UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR**
	)	
v.	)	No. ACM 40391
	)	
Airman First Class (E-3) **NICHOLAS A. BYRNE**, USAF, *Appellant.*	)))	Before Panel No. 1 21 June 2024

<u>TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS</u>

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	))	UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR
v.	)))	No. ACM 40391
Airman First Class (E-3) **NICHOLAS A. BYRNE**, USAF, *Appellant.*	)))	Before Panel No. 1 21 June 2024

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

ASSIGNMENTS OF ERROR

I.

[WHETHER] THE EVIDENCE IS FACTUALLY INSUFFICIENT TO SUSTAIN FINDINGS OF GUILTY FOR ASSAULT CONSUMMATED BY A BATTERY AND AGGRAVATED ASSAULT AS CHARGED IN SPECIFICATIONS 3, 5, 6, 7, 10 OF CHARGE I.

II.

[WHETHER] THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUSTAIN A FINDING OF GUILTY FOR ASSAULT CONSUMMATED BY A BATTERY ON A SPOUSE AS CHARGED IN SPECIFICATION 6 of CHARGE I.

III.

[WHETHER] THE EVIDENCE IS NOT LEGALLY OR FACTUALLY SUFFICIENT TO SUSTAIN A FINDING OF GUILTY FOR SEXUAL ASSAULT AS CHARGED IN THE SOLE SPECIFICATION OF CHARGE II.

IV.

[WHETHER] THE EVIDENCE IS FACTUALLY INSUFFICIENT TO SUSTAIN A FINDING OF GUILTY FOR ASSAULT CONSUMMATED BY A BATTERY AS CHARGED IN SPECIFICATION 1 OF THE ADDITIONAL CHARGE.

V.

[WHETHER] THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO SUPPRESS A1C BYRNE'S STATEMENTS TO INVESTIGATORS.

VI.

[WHETHER] THE MILITARY JUDGE ERRED BY LIMITING CROSS-EXAMINATION OF B.P. ABOUT HIS PENDING DISCIPLINARY ACTION.

VII.

[WHETHER] THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO SEVER THE ADDITIONAL CHARGE FROM THE INITIAL CHARGES.

VIII.

[WHETHER] AN ACCUMULATION OF PROSECUTOR ERRORS PREJUDICE THE APPELLANT ON FINDINGS AND SENTENCING.

IX.[1]

[WHETHER] THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING A DEFENSE CHALLENGE TO FIRST LIEUTENANT C.H., WHO SAT IN JUDGMENT OF THE APPELLANT.

X.[2]

[WHETHER] THE MILITARY JUDGE WAS BIASED AGAINST THE APPELLANT AND IN FAVOR OF THE PROSECUTION.

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[1] Appellant raised the first of two sub-issues (panel stacking) in this assignment of error pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

[2] Appellant raised this assignment of error pursuant to Grostefon.

XI.[3]

[WHETHER] THE MILITARY JUDGE ERRED WHEN GIVING A VARIANCE INSTRUCTION TO THE DATES IN CHARGE I, SPECIFICATION 7.

XII.[4]

[WHETHER] THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED THE DEFENSE MOTION TO DISMISS WITHOUT PREJUDICE UNDER R.C.M. 707.

XIII.[5]

[WHETHER] THE MILITARY JUDGE ERRED BY LIMITING CROSS-EXAMINATION OF B.P. ABOUT HIS PENDING DISCIPLINARY ACTION.

XIV.[6]

[WHETHER] DEFENSE COUNSELS' REPRESENTATION FELL BELOW THE STANDARD FOR EFFECTIVE ASSISTANCE OF COUNSEL FOR AN ACCUMULATION OF REASONS.

XV.[7]

[WHETHER] CUMULATIVE ERROR INFECTED THE APPELLANT'S TRIAL SO MUCH THAT HE DID NOT RECEIVE A FAIR TRIAL.

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[3] Appellant raised this assignment of error pursuant to Grostefon.

[4] Appellant raised this assignment of error pursuant to Grostefon.

[5] Appellant raised this assignment of error pursuant to Grostefon.

[6] Appellant raised this assignment of error pursuant to Grostefon.

[7] Appellant raised this assignment of error pursuant to Grostefon.

STATEMENT OF THE CASE

The United States generally accepts Appellant's statement of the case. Additionally, the court-martial proceedings took place on 28 February and 1 through 5 March at Luke Air Force Base, Arizona.[8]

STATEMENT OF FACTS

Appellant and Ms. K.D. Meet and Marry

Ms. K.D. was a member of the Air Force from January 2019 to 24 January 2022. (R. at 472.) She met Appellant in tech school in March 2019 and had known him for three months when they married on 21 June 2019. (R. at 473-74.) In August 2019, K.D. and Appellant were stationed in Germany. (R. at 474-75.)

Charge I, Specification 1: Assault Consummated by a Battery[9]

On one occasion in temporary lodging, during which K.D. joked with Appellant about him doing something that could cause her to hit him, he aggressively told her to hit him, and then used her hands by holding her wrists and using her feet to hit him. (R. 476-79.) They subsequently moved from temporary lodging to an apartment in Kaiserslautern, Germany. (R. at 479.)

Charge I, Specification 3 (Assault Consummated by a Battery); and Charge II (Sexual Act to Abuse Humiliate, Harass, or Degrade)[10]

During an argument about buying things for their Kaiserslautern house, Appellant took the mattress and pillows out of bedroom and into hallway. (R. at 481.) K.D. walked into hallway, Appellant followed and pulled a pillow out from under her feet, causing her body to hit the floor.

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[8] There are two minor typographical errors regarding the dates of the proceeding. That is, on pages 611 and 612 of the transcript, the date of 6 June 2022 was incorrected cited, instead of the correct date of 3 March 2022.

[9] Appellant was found not guilty of Charge I, Specification 1.

[10] Appellant was found guilty of Charge I, Specification 3, and Charge II.

(Id.) As a result, K.D. suffered bruises on her knees and breast. (R. at 482.) Appellant crawled on top of her and said things about her "fucking someone else." (Id.) K.D. was on her back with her feet on his shoulders. (R. at 483.) Appellant "clawed" at and penetrated her vagina, and she called to Siri to call the person to whose house she was going. (Id. at 483-4, 562; *see* Charge Sheet, Charge II.) During her court-martial testimony, K.D. described it as "Painful. Shocking. Weird." (R. at 484.) Then Appellant choked K.D. by her neck with both of his hands. (R. at 485; *see* Charge Sheet, Charge I, Specification 3.) Appellant was on top of K.D. between her hips and abdomen, straddling her. (R. at 486.) K.D. had bruises like "blood speckles" on her neck. (R. at 487.) K.D. also had bruises on one of her arms, under her breast, to her wrists, and her knee. She took photographs from this series of assaults and others. (R. at 488-504; see Pros. Ex. 1, pp. 1-5.)

Charge I, Specification 2: Assault Consummated by a Battery[11]

While living in the Kaiserslautern house, K.D. told Appellant his mother was a "bitch," and he chased her onto the bed, twisted her arm like in a "police restraint" and bent it towards her shoulder, while challenging her to say again that his mother is a bitch. (R. at 506.) Then, Appellant got on top of K.D. and was smashing her face into the mattress, suffocating her. (R. at 507.) To escape, K.D. reached back, grabbed his testicles, and squeezed. (R. at 508.) She tried to do a backward head-butt to get him off her. (Id.) It did not work, and Appellant head-butted her twice "very, very hard" in the back of her head. (R. at 504, 509; *see* Charge Sheet, Charge I, Specification 2.) She had swelling like a "goose egg" on her head. (Id.) She thought her skull was broken and she screamed as loud as she could. (Id.)

[11] Appellant was found not guilty of Charge I, Specification 2.

Charge I, Specification 4: Assault Consummated by a Battery[12]

In December 2019, in a hardware store in Kaiserslautern, K.D. and Appellant had a fight about replacing the door, and Appellant backhanded K.D. with his hand, hitting her eyebrow with his wedding ring. (R. at 510-12; Pros. Ex. 1, p. 6; *see* Charge Sheet, Charge I, Specification 4.)

Charge I, Specifications 5 and 6: Assault Consummated by a Battery[13]

Appellant and K.D. moved into a house next to Ramstein Air Base in February or March 2020. (R. at 512.) In May 2020, during an argument in the bedroom of their house, Appellant punched K.D. in the leg and slapped her. (R. at 513; *see* Charge Sheet, Charge I, Specification 6.) Appellant choked K.D. from behind with his arm around her neck and her throat in the crook of his elbow. (R. at 514; *see* Charge Sheet, Charge I, Specification 5.) She tried to keep on her tippy toes to get air as he continued to squeeze and raise her up. (Id.) However, K.D. lost consciousness as she struggled to get free. (R. at 515.) She thought, "[T]is is going to be the time that he accidentally kills me." (Id.) K.D. took the photos the next day of her injuries from this assault in pages 7 through 12 of Prosecution Exhibit 1. (R. at 517-18.)

Charge I, Specification 7: Assault Consummated by a Battery[14]

During another argument, in the summer of 2020, Appellant hit K.D. with an attic stick, like a wooden broomstick with a hook at one end. (R. at 523-25; *see* Charge Sheet, Charge I, Specification 7.) She had pointed the stick at Appellant to keep him away, but Appellant twisted the stick out of her hands and jabbed it into her shoulder. (Id.) K.D. took photos of her injuries in

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[12] Appellant was found not guilty of Charge I, Specification 4.

[13] Appellant was found guilty of Charge I, Specifications 5 and 6, but the military judge merged the sentences for the two specifications for sentencing as an unreasonable multiplication of charges. (R. at 886; App. Ex. LXIX.)

[14] Appellant was found guilty of Charge I, Specification 7.

pages 13 and 14 of Prosecution Exhibit 1 on 7 September 2020, three days after the assault. (R. at 497, 526.) The date of the photograph was based on the timestamp. (R. at 497.) K.D. testified that timestamps on some photographs in evidence were different than the date she took the original photograph because she sent them for safekeeping to her mother, who sent them back to K.D., who then saved the images. (R. at 543.) Moreover, defense witness C.P., a digital forensic expert, testified that metadata can be modified and that screenshots of a photograph will have a new date. (R. at 724-32.)

Charge I, Specifications 8 and 9: Assault Consummated by a Battery[15]

Another assault also took place "towards the September 2020 timeframe." (R. at 527.) K.D. was in a towel, doing her hair, when Appellant nudged open the door, smacked her in the face with his hand, and pushed her over a wooden chair, and caused the door to run over her foot. (Id.) K.D. took photos of her injuries in pages 15 and 16 of Prosecution Exhibit 1. (R. at 531; *see* Charge Sheet, Charge I, Specification 8.) And, at around the same time, there was another fight during which Appellant punched K.D. in the arm. (R. at 532; Pros. Ex. 1, p. 17; *see* Charge Sheet, Charge I, Specification 9.)

Charge I, Specification 10: Assault Consummated by a Battery[16]

There was another fight over Appellant's upcoming deployment (R. at 532-35.) They were supposed to go out to brunch with friends. (Id.) Appellant said K.D. was going to have sex with someone else when he deployed. (Id.) Appellant smacked K.D. in the mouth and, when she went back towards the bedroom, he threw an aerosol can at her, hitting her in the back. (Id.; Pros. Ex. 1, pp. 18-20; *see* Charge Sheet, Charge I, Specification 10.) Then, Appellant threw an iron

[15] Appellant was found not guilty of Charge I, Specifications 8 and 9.

[16] Appellant was found guilty of Charge I, Specification 10.

and hit K.D. in the back of her leg. (R. at 532-35; Pros. Ex. 1, p. 21.) K.D. took photos of her injuries in pages 18 through 21 of Prosecution Exhibit 1. (R. at 536-38.)

K.D. Had an Extramarital Affair and Told Appellant She Wanted a Divorce

K.D. kept her other relationship, with A.T., which started when Appellant was deployed to Africa, secret in the end of November or December 2020. (R. at 547-49, 553.) She gave birth to their child 25 August 2021. (Id.) K.D. had told Appellant she wanted a divorce around November 2020. (R. at 539-40.) On 28 November 2020, she sent Appellant a text, "Just tread lightly. This can all go however you want." (R. at 552.)

K.D. Reported Appellant's Abuse and AFOSI Investigated Him

K.D. reported the assaults to the AFOSI on 15 December 2020 and interviewed with AFOSI on 28 December 2020 and provided them with the 21 photographs in Prosecution Exhibit 1, which showed bruising from the various assaults. (R. at 542, 553, 563.) That was after her extramarital affair started in the end of November 2020. (Id.) K.D. notified leadership of the pregnancy after getting a positive result on 1 Jan 2021 from a pregnancy test on 16 December 2020. (R. at 547-49.)

AFOSI Special Agent N.C. conducted a crime scene search of the residence and did not see any damage to the wall at which K.D. indicated the iron was thrown or elsewhere in the residence. (R. at 753.) However, the search took place three to four months after the assault, and SA N.C. had "no knowledge or indication of it being repaired." (R. at 755.)

On cross-examination, K.D. "retracted" her prior day's testimony that she reported Appellant's abuse of her because she thought Appellant was going to report her for being pregnant from adultery. (R. at 549-50.) Instead, she clarified, took the pregnancy test around 16 December 2020, and it was confirmed on 1 January 2021, so she did not know she was pregnant until after

reporting the assaults. (Id.) K.D. explained under cross-examination that she had further discussion (after the pretrial testimony) with her "people" (possibly victim's counsel) who reminded her that she did not know she was pregnant when she reported Appellant. (Id.)

Appellant Made An Incriminating Statement to a Third Party

A.K. worked at Landstuhl Regional Medical Center, Germany. (R. at 603.) She met Appellant through a mutual friend in April 2021, and saw him every day until August 2021. (R. at 604.) Appellant told her that, after his court-martial, "if he ever got in any trouble regarding this issue, that he would hurt [K.D.] more than he has ever hurt her before." (Id.) A.K. admitted she lied to field grade officers and NCOs and turned in fake paperwork, and she was counseled for forgery. (R. at 605.) Major J.T., the officer in charge of A.K.'s unit during the incidents alleged in this case, testified that her opinion of A.K.'s character for truthfulness was "low." (R. at 744.) Ms. V.R., A.K.'s supervisor during the incidents alleged in this case, testified that A.K. was not a truthful person. (R. at 747.)

Assault Consummated by Battery upon B.P. (Additional Charge, Specifications 1 and 2)[17]

The evening of 13 November into the morning of 14 November 2021, B.P., was in Landstuhl, Germany, celebrating a friend's birthday. (R. at 616.) Because he knew he would be drinking, he reserved a hotel room. (R. at 617.) He went to two bars and had four drinks before arriving at the Candy Shop, where he had champagne. (R. at 617, 649.)

An acquaintance of B.P. was a dancer at the Candy Shop. (R. at 617-18.) B.P. was speaking with that acquaintance and another person, older man, and Appellant started to interject repeatedly into the conversation. (R. at 618-20.) Later, as B.P. was walking to see

[17] Appellant was found guilty of Specification 1 of the Additional Charge but not guilty of Specification 2 of the Additional Charge.

his friend, he saw Appellant staring at him with a "snarl look." (R. at 622.) As B.P. got up to where Appellant was starting at him, B.P. asked, "What the fuck, dude? Why are you staring at me this whole time?" (R. at 623.) Appellant said, "Well, let's go in the bathroom and talk about it." (Id.) When they got inside the bathroom, B.P. turned around, and Appellant was inches from him. (Id.) B.P. put his hands up with his palms facing out and took a step back, and Appellant punched him in his left eye. (Id.; Additional Charge, Specification 1.) B.P. tried to guard himself, and Appellant hit him a second time, in the back of his head. (Id.)

B.P.'s back was to Appellant, who grabbed B.P.'s head and threw it into the mirror, which cut him on his right eye. (R. at 624.) B.P. got dizzy, stumbled, tried to catch himself on the sink, and went down to the ground. (Id.) Appellant kicked B.P. on the left buttocks and tried to stomp him, while B.P. tried to block with his left forearm. (Id.; Additional Charge, Specification 2.) Another bigger man grabbed Appellant and took him away. (Id.) Prosecution Exhibit 2 includes three photographs taken of B.P. the night of the assault and one taken a day or two later. (R. at 631.)

SSgt C.J., Appellant's colleague and friend, went out with Appellant and a couple of other people, eventually to the Candy Shop. (R. at 677-78.) SSgt C.J. observed Appellant and B.P. interacting with some animosity and, at some point, they both left towards the hallway area. (R. at 679, 681-2.) After the altercation was over, SSgt C.J. went near the bathroom and saw broken glass from a mirror, and saw Appellant being escorted outside. (R. at 680, 688.) Outside the club, Appellant appeared inebriated. (R. at 687.) SSgt C.J. saw injuries to B.P.'s forehead. (R. at 688.)

C.H., Appellant's colleague and friend from Security Forces, was "club-hopping" with Appellant the evening of the Candy Shop assault. (R. at 774-75.) As C.H. was about to leave the Candy Shop, he heard shouting and a mirror crack in the bathroom and saw Appellant

and another individual "going at it." (R. at 775-76.) C.H. and another airman broke up the fight, which had gone to the floor. (R. at 776.) During cross-examination, C.H. said he did not see who started the fight, who was on top of whom on the ground, or the throwing of any punches by either assailant. (R. at 779.) However, he pulled Appellant away from the fight. (Id.)

Appellant's Interview with Law Enforcement

J.M. was on duty with law enforcement on the night of the assault of B.P., 14 November 2021, and was dispatched to Appellant's residence. (R. at 692.) Because Appellant was not there, the desk sergeant learned Appellant was at a friend's house, so the desk sergeant directed J.M. to the friend's house. (Id.) J.M. was with her law enforcement partner. (R. at 693.) They allowed Appellant to smoke a cigarette before putting him in handcuffs, searching him, and taking him back to the Vogelweh police station. (Id.) Appellant's friend came outside and told him not to say anything. (Id.) Appellant's eyes were bloodshot, and he smelled of alcohol. (Id.) When J.M. and her partner were taking Appellant out of the vehicle, he said he "was already in so much shit," he was "better off dead." (Id.) J.M. asked Appellant if he would consent to make a statement and to use of a breathalyzer, and he declined. (Id.)

At the station, J.M.'s partner took off Appellant's handcuffs and place him in a room. (R. at 694.) He stayed with Appellant because the cameras were not working that day. (Id.) J.M. briefed her desk sergeant and took Appellant's belongings to the desk. (Id.) J.M. went into the interview room to sit with Appellant while her partner went to the bathroom. (Id.) She explained that she was sitting with him because the cameras were down, he had been in trouble with previous things, and he had suicidal ideations in the past. (Id.) Appellant said the Army member from the assault was a "bitch" and "had to go tell [on Appellant]." (Id.) Appellant showed J.M. his hand, and she asked if he was certain he did not want medical attention. (Id.)

Appellant also told J.M. "something along the lines of, 'Oh, I've hit my wife before, so it's no problem….'" (R. at 695.) Police took photographs of Appellant's right hand, which had a fresh laceration. (R. at 697; Pros. Ex. 3.)

ARGUMENT

I.

THE EVIDENCE IS ACTUALLY SUFFICIENT TO SUSTAIN FINDINGS OF GUILTY FOR ASSAULT CONSUMMATED BY A BATTERY AND AGGRAVATED ASSAULT AS CHARGED IN SPECIFICATIONS 3, 5, 6, 7, 10 OF CHARGE I.

Standard of Review

This Court reviews issues of factual sufficiency *de novo*. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the court is convinced of the [appellant]'s guilt beyond a reasonable doubt. United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000) (internal citation omitted).

Analysis

In this case, the evidence from, among other things, sworn testimony of the victim, photographs of her injuries, and testimony of two witnesses who heard incriminating statements from Appellant proved beyond a reasonable doubt that Appellant committed assault consummated by a battery as alleged in Specifications 3, 6, 7, 10 of Charge I and aggravated assault (strangulation) as alleged in Specification 5 of Charge I.

Appellant's assignment of error hinges upon his argument, which he made at trial, that victim K.D. is uncredible. (App. Br. at 6 *et. seq*.) He claims, "the Government relied almost exclusively on the testimony of K.D." (App. Br. at 6.) However, his brief's "Statement of the Facts" recount only the following from K.D.'s lengthy testimony:

> K.D. testified about multiple instances of alleged physical assault spanning from August 2019 to September 2020. (R. at XX [sic].) K.D. also testified about a single instance of alleged sexual abuse. (R. at XX [sic].) Throughout her testimony she struggled with timelines and was attempting to estimate when offenses occurred and when she took photographs that she claimed captured injuries sustained during the alleged assaults. (R. at XX [sic].)

(App. Br. at 5 (missing citations to the record of trial in original).)

Throughout his assignment of error, Appellant fails to acknowledge or address K.D.'s detailed testimony that supported the convictions, other than to summarize, "K.D. claimed that A1C Byrne sexually assaulted her and physically assaulted her multiple times during their marriage, beginning in August 2019. (R. 475-544)." (App. Br. at 8.) However, as described in this Answer's "Statement of Facts" section, above, K.D. testified about, and provided evidence supporting all the elements of, every specification in Charges I and II for which the court members found him guilty. Her testimony covered approximately 108 pages of transcript. (R. at 472-519, 523-44, and 547-584.)

K.D. testified about Appellant grabbing her by the neck with his hand in August 2019 (Specification 3 of Charge I) (R. at 485-87); about Appellant strangling her with his arm and striking her on divers occasions on the face and buttocks with his hand in May 2020 (Specifications 5 and 6 of Charge I) (R. at 513-18); about Appellant striking her on the body with a wooden (attic) rod in September 2020 (Specification 7 of Charge I, with exceptions and substitutions) (R. at 523-

26); and about Appellant striking her on the body with an aerosol can and with an iron in September 2020 (Specification 10 of Charge I) (R. at 532-38).

Appellant argues that K.D. "lied under oath." (App. Br. at 7.) This was the defense team's theme for the court-members throughout trial. They made it abundantly clear, during cross-examination and closing argument, that K.D. had changed her explanation for reporting Appellant's crimes; that is, she initially testified that she thought Appellant was going to report her for being pregnant with another man's child, but then "retracted" it in subsequent testimony when she realized that she did not know she was pregnant until after reporting the crimes. (R. at 550-51, 829-31, 834.) Defense counsel made K.D. confirm her prior in-court statement, made her commit to having made the statement under oath, and then confronted her with her changed testimony. (Id.) She clarified and explained that she made her report to protect herself from future assaults, which became only more important later when she learned she was pregnant. (R. at 550-51.) The court members not only heard that cross-examination and explanation, but in finding her testimony credible regarding the offenses of conviction, they also heard throughout the testimony her tone and pace of speaking, saw her facial expressions and body language, and considered other non-verbal aspects of her testimony that this Court is unable to consider.

Moreover, the court members considered the military judge's instruction about how they could use K.D.'s earlier statement if they deemed it inconsistent with her subsequent trial testimony:

> You have also heard evidence that before this trial, Ms. [K.D.] made a statement at prior hearing that may have been inconsistent with her testimony at trial. If you believe Ms. [K.D.] made a statement at a prior hearing and the statement was inconsistent with her testimony in this court-martial, you may consider the prior statement both in deciding whether to believe Ms. [K.D.]'s in-court testimony and you also may consider the substance of that prior statement along with all the other evidence in this case.

> In this example, if you believed Ms. [K.D.] had testified here in this court-martial that a traffic light was green, and you believed Ms. [K.D.] had made a prior statement at a prior hearing that the light was red, you may consider her prior statement as evidence both that the light was, in fact, red, as well as to determine what weight to give her in-court testimony.

R. at 808.

Appellant argues that K.D. "had a motive to fabricate." (App. Br. at 7-8.) He argues that K.D. began a sexual relationship with A.T., and became pregnant, while Appellant was deployed, and she "needed a way out of her marriage with [Appellant]" and "to avoid disciplinary action for her extramarital affair with A.T." (App. Br. at 7.) He posits, "No one would fault K.D. for leaving A1C Byrne if he was physically and sexually assaulting her, and people would understand why she quickly coupled with another man." (Id.) However, that is completely consistent with Appellant's crimes and K.D.'s reporting them. Because Appellant was deployed, K.D. could finally report the crimes and seek safety without the fear of Appellant seeking immediate retribution. Although Appellant challenges K.D.'s memory as "conveniently hazy at times" regarding timing of events (App. Br. at 7), that is consistent with trying to recount facts during traumatic, repeated assaults and not consistent with a person who has gone to the effort of devising a false story to further a divorce proceeding or avoid discipline. Ultimately, trial defense counsel made the same arguments at trial (R. at 831-32), and the members found them unpersuasive.

Appellant argues, "K.D. threatened [Appellant]." (App. Br. at 8.) That she sent a message to him to "tread lightly" does not show she made up a false story. To the contrary, it demonstrates that they had a common understanding of what Appellant had in fact done to K.D. and, if he refused to let her out of the marriage, she would have to air what he had done to her.

Appellant emphasizes intimate photos K.D. sent to Appellant. (App. Br. at 8.) He argues that if Appellant injured K.D., those intimate photos would have shown the injuries. However, K.D. did take photos of her injuries, which were admitted into evidence. And as K.D. explained well about the intimate photos during cross-examination:

> Sir, it's all about an angle. So if I'm looking at the front of you, you're not going to see a bruise on the side. There's also no way of telling if whenever I sent the photo, whenever he saved it, nobody knows when he chose to save it for one. Also, some of those photos had filters on them. So I don't know if you're familiar with filters, but they do a lot.

R. at 556.

Appellant argues the AFOSI investigation was "subpar" because the photographs they collected from K.D. of her injuries did not include metadata, which could have proven when the photographs were taken. (App. Br. at 9). Importantly, Appellant did not at trial and is not now challenging the authenticity of the images of injuries in the photographs. Thus, the concern is limited to that of timing of the injuries in the photographs, and there was sufficient testimony from K.D. regarding the photographs to find they were taken at the time periods charged and based on Appellant's assaults. Appellant also notes AFOSI found no damage to the residence. (Id.) However, their search was a few months after the assault during which the broken iron was thrown, so it does not contradict the testimony the assault took place. It is possible that the wall was repaired in the interim.

Although K.D.'s testimony was factually sufficient to convict Appellant, the United States' evidence went well beyond that. The court members heard corroborating testimony from A.K. and J.M. Appellant now argues they were "untrustworthy sources." (App. Br. at 10.) However, it was reasonable for the court members to credit A.K.'s testimony about Appellant's admission about "hurting" K.D. in the past and potentially doing so in the future, despite Maj J.T.'s

and V.R.'s brief testimony about A.K.'s untrustworthiness. (R. at 604; 744, 747.) After all, J.M., an unbiased witness, also testified about Appellant making incriminating statements, such as, "Oh, I've hit my wife before…." (R. at 695.) Even if J.M. was not completely certain of the wording Appellant used, it was clear to J.M. that Appellant was conveying that he hit his wife.

Despite Appellant's similar arguments at trial as those on appeal regarding his assaults of K.D., the court members found Appellant guilty beyond a reasonable doubt of Specifications 3, 5, 6, 7, 10 of Charge I. Demonstrating their careful consideration of the evidence and the military judge's instructions, the court members found Appellant not guilty beyond a reasonable doubt of the allegations in Specifications 1, 2, 4, 8, and 9 of Charge I.

The findings of guilt for assault consummated by a battery and aggravated assault in Specifications 3, 5, 6, 7, 10 of Charge I were factually sufficient, and the Court should affirm them.

II.

THE EVIDENCE IS LEGALLY SUFFICIENT TO SUSTAIN A FINDING OF GUILTY FOR ASSAULT CONSUMMATED BY A BATTERY ON A SPOUSE AS CHARGED IN SPECIFICATION 6 OF CHARGE I.

Standard of Review

This Court reviews issues of legal sufficiency *de novo*. Art. 66(d), UCMJ, 10 U.S.C. § 866(c); Washington, 57 M.J. at 399.

Law

The test for legal sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal citations omitted). This test does not require a court to ask whether it believes the

evidence established guilt beyond a reasonable doubt, but rather whether any rational factfinder could do so. United States v. Acevedo, 77 M.J. 185, 187 (C.A.A.F. 2018). The term reasonable doubt, however, does not mean that the evidence must be free from conflict. United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018). In resolving questions of legal sufficiency, the Court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution. United States v. Plant, 74 M.J. 297, 301 (C.A.A.F. 2015). The test for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1973)). As a result, the standard for legal sufficiency involves a very low threshold to sustain a conviction. King, 78 M.J. at 221.

Analysis

Appellant argues that the evidence was legally insufficient to prove Appellant struck K.D. on divers occasions on her face and on her buttocks. (App. Br. at 11-12.) He emphasizes his victim's inability to remember every blow-by-blow detail. However, K.D.'s testimony, corroborated by contemporaneously-taken photographs and statements Appellant later made to two other witnesses, demonstrated beyond a reasonable doubt that he hit her in her eye and on her buttocks, and did so on divers occasions, so his assignment of error is without merit.

Appellant argues the prosecution's request for a possible variance to the Findings Worksheet demonstrated the government "recognized their failure to prove this portion of the specification [that alleged Appellant struck K.D. on the face with his hand]." (App. Br. at 11-12.) However, even though the military judge gave the court members the option to except the words "on her face," they found the evidence proved beyond a reasonable doubt that Appellant struck

K.D. on her face. While K.D. did not have the ability during Appellant's assault to discern his specifically and intentionally hitting her eye, the circumstantial evidence clearly demonstrated that his striking her eye was a reasonable and foreseeable result of the assault. As Appellant had to acknowledge in his Assignment of Errors, K.D. had a visible bruise on her eye, in the photographs in Prosecution Exhibit 1, that she testified was a result of Appellant assaulting her, "[I]t just happened within the – within the fight . . . with me trying to get his arms off of me." (App. Br. at 12 (citing R. at 518).)

One of the other divers occasions on which Appellant struck K.D. on her face was in her testimony about Appellant striking K.D. in her mouth. As she testified, regarding Prosecution Exhibit 1, pages 7 through 12, "So my lip was kind of fat, and I had, like, little rings of blood, like, popped around my mouth." (R. at 517.)

Appellant appears to concede that the evidence demonstrates Appellant struck K.D. on her buttocks; however, he argues, "At most, during this altercation, A1C Byrne struck K.D. only one time on her buttock with his hand." (App. Br. at 12.) As K.D. testified, "[H]e punched me in my leg and then he slapped me. . . . So that's how I'd gotten the marks on my butt and the side of my leg, from being punched and slapped on them." (R. at 513.) Moreover, K.D. also testified, regarding one of the photos in evidence from the assault, "That's from him smacking me on my butt. It's welps [welts] of his, like, fingers." (R. at 518; see Pros. Ex. 1, pp. 11, 12.) She also testified regarding another part of the exhibit, "That's on the outside of my thigh. That's where he had punched and slapped multiple times. Welps [welts] and bruises." (Id.) That satisfied the language in Specification 6 of Charge I ("on divers occasions … unlawfully strike [K.D.] on her face, on her buttocks, and on her left leg with his hand").

After viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found, and in this case did find, the essential elements of the crime beyond a reasonable doubt. Thus, the Court should affirm the finding of guilt for assault consummated by a battery on divers occasions upon K.D.'s face, buttocks, and leg in September 2020 as charged in Specification 6 of Charge I.

III.

THE EVIDENCE IS LEGALLY AND FACTUALLY SUFFICIENT TO SUSTAIN A FINDING OF GUILTY FOR SEXUAL ASSAULT AS CHARGED IN THE SOLE SPECIFICATION OF CHARGE II.

Standard of Review

The standards of review for factual and legal sufficiency are stated in Issues I and II, respectively.

Law

The law regarding factual and legal sufficiency are stated in Issues I and II, respectively.

Analysis

Appellant argues his conviction for sexual assault in the Specification of Charge II is legally and factually insufficient, because, he asserts, there was insufficient proof of penetration by Appellant's fingers. (App. Br. at 13-16.)[18] The evidence was clear that Appellant "clawed" into K.D.'s vagina, so his assignment of error is without merit.

Appellant writes that he found K.D.'s detailed description of the body positioning during the sexual assault as "confusing." However, the testimony was clear. After pulling the pillow out from under her, causing her to fall to the floor, K.D. was on her back with her feet up and against

[18] Appellant does not contest that such conduct was done with an intent to abuse, humiliate, harass, or degrade K.D. or without her consent.

Appellant's shoulders as he got on top of her. (R. at 481-83.) Then, Appellant "clawed" at K.D.'s vagina, through her boxers. (R. at 484.) Trial counsel specifically asked, "Do you know, did he penetrate your vagina with his – with his hands?" K.D. responded definitively, "Through the shorts, yes. It was scraping my vagina." (Id.) Trial counsel followed up, "How do you know that?" and K.D. replied, "Because I felt it." (Id.) "What did that feel like?" "Painful. Shocking. Weird." There was no testimony contradicting that Appellant penetrated K.D.'s vagina, albeit through the boxers' material, with his hand.

K.D.'s testimony that she could not see Appellant's hand further disproves that she was making up a false story. If she was making up a false story, she would have made it as incriminating as possible and would not have admitted she could not see his hand. However, there was never a doubt that K.D. knew what it felt like to have her vagina penetrated. Appellant's argument that he might have used something other than the fingers on his hand to "claw" at and into K.D.'s vagina or that her own shorts alone might have penetrated her vagina (App. Br. at 15) is nonsensical. The court members used their common sense and knowledge of the ways of the world to conclude Appellant penetrated K.D.'s vagina with his fingers. A reasonable fact finder could have found this element beyond a reasonable doubt, and this Court should be similarly convinced.

The Specification of Charge II was legally and factually sufficient, and the Court should affirm it.

IV.

THE EVIDENCE IS FACTUALLY SUFFICIENT TO SUSTAIN A FINDING OF GUILTY FOR ASSAULT CONSUMMATED BY A BATTERY AS CHARGED IN SPECIFICATION 1 OF THE ADDITIONAL CHARGE.

Standard of Review

The standard of review for factual sufficiency is stated in Issue I.

Law

The law regarding factual sufficiency is stated in Issue I.

Additionally, regarding self-defense:

> It is a defense to any assault … that the accused: (A) Apprehended, upon reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused; and (B) Believed that the force that accused used was necessary for protection against bodily harm, provided that the force used by the accused was less than force reasonably likely to produce death or grievous bodily harm.

R.C.M. 916(e)(3). See R. at 802-803.

Analysis

Appellant argues the prosecution failed to disprove beyond a reasonable doubt Appellant's claim of self-defense from B.P. (App. Br. at 16.) Because the evidence demonstrated Appellant was the aggressor and struck B.P. without physical provocation, Appellant's claim of self-defense failed, and the evidence supporting his conviction was factually sufficient.

Appellant repeatedly interjected himself in B.P.'s conversation with another person and was messing with him, mocking him. (R. at 618-21, 654.) Then, after B.P. tried to diffuse the situation, and Appellant walked away, Appellant continued to stare at B.P. in an intimidating way with a "snarl look." (R. at 622.) When B.P. verbally confronted Appellant for staring at him, Appellant told him to go into the bathroom to discuss it. (R. at 623.)

In the bathroom, Appellant went on the attack. Appellant got within inches from B.P., who put his hands up facing out in a defensive posture and took a step back, and Appellant punched him in his eye. (R. at 623.) When B.P. tried to protect himself, Appellant hit him a second time in his head. (Id.) Appellant continued to attack B.P., grabbing his head and throwing it

into the mirror, cutting B.P. on his right eye. (R. at 624.) B.P. got dizzy, stumbled, tried to catch himself on the sink, and went down to the ground. (Id.) Appellant kicked B.P. on the left buttocks and tried to stomp him, while B.P. tried to block with his left forearm. (Id.) Another bigger man grabbed Appellant and took him away. (R. at 623, 688, 775-76, 779.)

B.P. did not strike Appellant other than, possibly, his left hand might have brushed against Appellant when he initially put his hands up in a defensive posture. (R. at 625.) Appellant struck B.P. repeatedly.

Appellant misses the mark when he emphasizes on appeal, as he did at trial, B.P.'s alleged motive to lie involving his anticipated Article 15 and its impact on his ability to retire at 20 years of service. (App. Br. at 17-18.) As was made clear to the court members, B.P. was "most likely" going to be offered Article 15 paperwork. (R. at 669.) However, as anybody familiar with that process knows, the offering of an Article 15 is not a conclusion of guilt. That is why the military judge permitted the question on cross-examination about the expected Article 15 but did not permit testimony that the commander suspected SFC B.P. had attacked Appellant first.

B.P. testified under oath. He is a senior non-commissioned officer, Army with a decade and a half of service. (R. at 615-16.) B.P. had multiple significant bruising and/or cuts to both eyes. (See Pros. Ex. 2, pp. 1-3.) His account of the events was logical, and the court members were rational and reasonable in crediting his testimony. There was absolutely no testimony that B.P. struck Appellant first. Moreover, the military judge provided a thorough instruction on the defense of self-defense, including the government's burden of disproving it beyond a reasonable doubt. (R. at 802-05.) Appellant's friend, C.J., a biased witness, provided vague, after-the-fact conclusions about where there had been a mutual affray. However, he did not see who started the fight, did not see any punches thrown, and pulled Appellant away from the

top of the resulting scuffle. (R. at 779.) The trial testimony and photographs established that Appellant, who was intoxicated, interjected into B.P.'s conversation with another person, was rude to B.P., did not respond appropriately to B.P.'s attempts at deflecting Appellant's inflammatory comments, "stared down" B.P. later in the hallway of the club, and, when B.P. tried to have a conversation with Appellant, Appellant hit B.P. in the eye and broke a mirror and injured him before he could defend himself. The court members correctly found, based on the evidence, that Appellant did not act in self-defense. Appellant did not have a reasonable belief that B.P. was about to cause him bodily harm. Even if, for argument's sake, Appellant believed B.P. was going to hit him, he could not have believed the high level of force he used against B.P. -- striking him in the eye, smashing his head into a mirror, throwing him onto the ground, and continuing to beat him -- was a reasonable amount of force to use under the circumstances.

Making allowances for not having personally observed the witnesses as the court members did, this Court should find the evidence supporting Appellant's conviction for Specification I of the Additional Charge was factually sufficient.

V.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY DENYING APPELLANT'S MOTION TO SUPPRESS HIS ADMISSIONS TO INVESTIGATORS.

Additional Facts

Appellant moved to suppress his statements to J.M. (App. Ex. XXVII.) The United States responded in opposition and included, as one of the attachments, J.M.'s sworn statement in her AF Form 1168. (App. Ex. XXVIII.) J.M. stated during her testimony that the earlier, written sworn statement was accurate. (R. at 176.)

During the hearing on Appellant's suppression motion, J.M. testified that she was a member of the security police. (R. at 160.) In November 2021, she and her partner apprehended Appellant from his friend's home and took him to the Vogelweh police station. (R. at 161, 173.) The apprehension was delayed because they allowed Appellant to smoke a cigarette. (Id.)

Appellant waited in an interview room while J.M. did paperwork and back-briefed her desk sergeant. (R. at 162.) The desk sergeant consulted with the Staff Judge Advocate, but Appellant did not consent to a breathalyzer or provide a statement. (R. at 163.) J.M. left the room for 10 to 15 minutes, leaving her partner with Appellant. (R. at 174.)

J.M. checked on Appellant every 15 minutes because he was clearly intoxicated, and he made a suicidal statement that he's "already in so much shit he is better off dead." (R. at 164-65, 168.) J.M. only asked Appellant about his hand to see if he wanted medical attention. (R. at 165.) She didn't read Appellant his rights because he was intoxicated. (R. at 166.) Appellant mentioned that he was in trouble previously with OSI and, when J.M. asked him about his hand injury, he said, "Well, I hope it bleeds out so that I pass out and don't wake up." (R. at 167.) Then Appellant mentioned something about hitting his wife. (Id.) Appellant also said the guy [B.P.] was a "bitch" and that he "had to go tell [on Appellant]." (Id.)

J.M. continued to do safety checks on Appellant in the interview room, because the police station's camera system was not functioning. (R. at 170.) The order of Appellant's statements, which were not the result of being questioned, was "that the Army guy that he assaulted was a bitch," then about Appellant's hand injury and medical attention, and then about Appellant's wife. (R. at 171, 175.) Afterwards, Appellant was transported to Landstuhl for medical care. (Id.)

In the military judge's ruling, he made a finding of fact that Appellant made a spontaneous statement, not in response to questioning, in addressing B.P, "After JM returned, the Accused

initiated a conversation with JM, stating "that guy isn't shit, he got his ass beat and he had to go tell." (App. Ex. XLVII, paras. 13 and 45.) The military judge then found that, after J.M. asked Appellant how his hand was doing; he showed her his hand; she said, "Damn dude your hand's messed up, are you 100% sure that you don't want us to get you medical attention?"; and Appellant responded, "I hope my hand bleeds out so much that I pass out and don't wake up." (Id., paras. 14, 15, and 46.) The military judge also found that, soon after Appellant responded to SrA J.M.'s question about his hand injury, which was not an interrogation, as follows:

> [Appellant] stated "I've hit my wife before," or words to that effect, that he had been in trouble before with "Polizei" for "mosh pitting" at Nachtschicht, and that he had been in the interview room for a past suicidal ideation. These statements were made spontaneously and were not made in response to any questioning by any law enforcement personnel.

(Id., paras. 16 and 48.)

The military judge summarized, "The Accused spontaneously and voluntarily made the statements the Defense seeks to suppress. The statements were not made in response to law enforcement interrogation and, therefore, the statements will not be suppressed." (Id., para. 49.)

Standard of Review

A military judge's ruling on a motion to suppress is reviewed for an abuse of discretion. United States v. Nelson, 82 M.J. 251 (C.A.A.F. 2021). "An abuse of discretion occurs when a military judge's decision is based on clearly erroneous findings of fact or incorrect conclusions of law." United States v. Hernandez, 81 M.J. 432, 437 (C.A.A.F. 2021) (citation omitted). "To reverse for an abuse of discretion involves far more than a difference in . . . opinion. . . . The challenged action must . . . be found to be arbitrary, fanciful, clearly unreasonable, or clearly erroneous in order to be invalidated on appeal." United States v. Hyppolite, 79 M.J. 161, 166 (C.A.A.F. 2019) (citation omitted).

Law

Article 31 rights advisements are required when a person subject to the code interrogates or requests a statement from a person suspected of an offense and the statements regard the offense of which the person questioned is suspected. United States v. Jones, 73 M.J. 357, 361 (C.A.A.F. 2014). However, spontaneous statements, even though incriminating, are not within the purview of Article 31. United States v. Lichtenhan, 40 M.J. 466, 469 (C.M.A. 1994) (citing United States v. Vitale, 34 M.J. 210, 212 (CMA 1992)); United States v. Kerns, 75 M.J. 783, 790 (A.F. Ct. Crim. App. 2016) (citing Lichtenhan and Vitale).

Analysis

The military judge's factual finding that Appellant's statements to J.M. were spontaneous statements was not clearly erroneous, and his ruling was not an abuse of discretion.

The military judge heard and observed the sworn testimony of J.M. and concluded that she was credible when testifying that she did not initiate conversation with Appellant and did not intend to elicit incriminating statements when checking on Appellant's hand. This credibility determination was well within the military judge's discretion and was not clearly erroneous. It was clear that J.M. was concerned primarily with Appellant's injured hand and his general wellbeing, especially in his intoxicated state and after making suicidal statements.

Appellant's case is unlike the facts in United States v. Ruiz, 54 M.J. 138, 141 (C.A.A.F. 2000). In Ruiz, an AAFES investigator told the appellant, "There seems to be some AAFES merchandise that hasn't [sic] been paid for," and the appellant said, "Yes," took the merchandise from under his coat and placed them on the table, and said, "You got me." Id. Clearly, the investigator intended the appellant to respond in manner similar to the way he did. In this case, on the other hand, Appellant was not asked about his injury. Rather, he was merely asked if he

wanted to get medical attention. The military judge found the questions was a reasonable question for health and wellbeing and not intended to obtain a response regarding the suspected assault. That finding was not clearly erroneous.

Because Appellant made spontaneous statements, Article 31 does not apply, and this Court should affirm the denial of Appellant's motion to suppress.

VI.

THE MILITARY JUDGE DID NOT ERR IN LIMITING CROSS-EXAMINATION OF B.P. ABOUT HIS PENDING DISCIPLINARY ACTION.

Additional Facts

After the direct examination of B.P. and before cross-examination, the military judge held a hearing outside of the presence of the court members pursuant to Article 39(a). (R. at 636.) Trial defense counsel forecasted:

> [W]e would like to elicit that, after this trial, [B.P.] knows that he will be receiving an Article 15, that his understanding is it's for striking Airman First Class Byrne first.
>
> And s B.P. also revealed to us during these interviews that he intends on turning down the Article 15 and asking for a court-martial. And we believe that that information falls under M.R.E. 608(c) and it is a motive to fabricate.
>
> Your Honor, I would also add that he was specifically told by his command that he would be receiving this Article 15 when he returns.

(R. at 637.) Circuit trial counsel responded:

> The basis [for the United States' objection] would be relevance, Your Honor. The – a collateral proceeding, pending adjudication, has no bearing on this court. It's not 608(c) material. Questioning him about he could get in trouble for this, that's perfectly permissible questioning. That is 608(c) material. But the existence or nonexistence of any as yet decided – or, as yet undecided collateral consequences would just be extrinsic evidence that the defense is trying to get into impermissibly.

> And the evidence would have come to him, presumably, through hearsay. He would have been informed that he's going to get the Article 15 offer, that it was communicated to him that someone had said that he hit first. Your Honor, we're getting into all these out-of court statements that should not be proffered before this court.
>
> If the defense wants to produce evidence from witnesses to show that the accused – or, that [B.P.] was the one who struck first, they are perfectly free to do so. They can't get it in to this end run around.

R. at 638. Later in the discussion between the military judge and the parties, circuit trial counsel also invoked M.R.E. 403. (R. at 641.)

The military judge ultimately ruled:

> The court will permit – is going to overrule that objection to this extent; Defense Counsel, you can get into the fact that this accused – or pardon me, that this – [B.P.] is aware of the fact that he is facing nonjudicial punishment when he gets back and that he intends to turn that down and go into court-martial. The court does find that to be proper M.R.E. 608(c) evidence because it could serve as a means to motivate his testimony here in this courtroom, potentially under the defense theory that he would be fabricating that testimony.
>
> However, the court does share the trial counsel's 403 concerns about – I guess it would be item two, that the command believes he struck first, which is why they are giving the 15. The court does find that to invade the province of the panel to not have any particular relevance in this court-martial, and any amount of relevance to be substantially outweighed by the danger of unfair prejudice by inserting some third party's opinion about what happened into this courtroom, which would unfairly confuse the issue and misguide the panel.
>
> So I will allow you to get into the fact that he knows he's facing some process, some judicial process for his involvement, and that he might turn that down and go to court, and how that might impact his testimony, but not anything about what his command believes happened.
>
> Trial – And just so I finish my thought here – Trial Counsel, should you desire a limiting instruction about how this evidence can be considered, you can submit one. I'll be open to reviewing that. Please submit it to the defense counsel as well if you think a limiting instruction might be necessary. If you would like the opportunity to do that now before the evidence is received so that the limiting

> instruction can be given to the panel, let me know. If you just want that to be given to the panel or to have the ability to evaluate that and potentially given to the panel as part of the findings instructions, let me know that as well, so we can continue to proceed.

(R. at 641-42.)

The military judge then proposed the following limiting instruction, to which trial defense counsel did not object:

> You have just heard testimony from – that [B.P.] may be facing an Article 15 and/or court-martial when he returns to his unit. You may consider that fact for the limited purpose of its tendency, if any, to demonstrate a motive by [B.P.] to fabricate his testimony. You may not consider that evidence for any other purpose and may not conclude from that evidence that [B.P.] is a bad person, has general criminal tendencies, nor that he committed any offense.

(R. at 644-45.)

During cross-examination, the defense asked B.P., "And you understand and you know that when you get back from this trial, that you will be receiving an Article 15; isn't that true?" (R. at 669.) SFC B.P. replied, "Most likely, sir, yes." (Id.) The military judge then provided the limiting instruction. (Id.)

During pre-deliberation jury instructions, the military judge instructed the court members on the defense of self-defense. (R. at 802-05.)

Standard of Review

A military judge's ruling on the admissibility of evidence, including a restriction on cross-examination, is reviewed for an abuse of discretion. United States v. McElhaney, 54 M.J. 120, 129 (C.A.A.F. 2000); United States v. Pyron, 83 M.J. 59 (C.A.A.F. 2022). The challenged action must be "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous." McElhaney, 54 M.J. at 130 (citations omitted).

Law

A military accused has a constitutional right to confrontation of his or her accusers, including the right to cross-examination. McElhaney, 54 M.J. at 129-30 (citation omitted). However, this right is not absolute, and a military judge has "broad discretion to impose reasonable limitations . . . 'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" Id. Further, a military judge has the power to "exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to . . . protect witnesses from harassment or undue embarrassment." Mil. R. Evid. 611(a).

Analysis

Appellant asserts the military judge erred by limiting cross-examination of B.P. about his "pending disciplinary action." (App. Br. at 23.) However, he fails to state in his brief what more he would have asked B.P. on cross-examination. That said, Appellant's trial defense counsel wanted to ask B.P. if he had been told by his command that he would be receiving an Article 15 for striking Appellant first[19] and to confirm that he planned to turn it down and request a court-martial. The prosecution objected to eliciting the statement and determination of the command on the grounds of relevance, hearsay, and undue prejudice. (R. at 638.)

As the military judge explained, injecting the commander's determination of B.P.'s guilt would not only be premature; it would invade the fact-finding role of the court members; and any relevance of the testimony's would be substantially outweighed by the danger of unfair prejudice and would unfairly confuse the issue and misguide the court-martial panel. (R. at 641-

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[19] Trial defense counsel stated in their opening statement, "But [B.P.] will admit that when he gets back to Germany after this trial, he'll be facing a field grade Article 15, charged with striking Airman First Class Byrne first." (R. at 462.)

42.) This was within the reasonable range of choices available to the military judge and was not an abuse of discretion.

The military judge did, however, permit the defense to ask B.P. about his understanding of whether he would be offered an Article 15, and what B.P. might do in response, which enabled the defense to demonstrate and argue potential bias. Ultimately, trial defense counsel decided to not ask B.P. what he would do in response to receive the offer of an Article 15.

Moreover, the defense was free to call any witnesses who could have established that B.P. threw the first punch and that Appellant acted in self-defense. They appeared to call SSgt C.J. and C.H. for that purpose, but even those witnesses failed to provide evidence to further that defense. That is, both witnesses saw the aftermath of the assault, but neither of the defense witnesses saw the start of the fight. As a result, the only testimony the court members heard about what led to the assault was B.P.'s testimony that Appellant was the first aggressor and Appellant did not act in self-defense.

Even if the military judge abused his discretion, Appellant was not prejudiced by the exclusion of testimony about B.P.'s commander's supposed conclusion that B.P. had thrown the first punch. There was no non-hearsay testimony to support such a conclusion, and the testimony and photographs of B.P.'s injuries proved that he was the victim of the assault.

Because the military judge allowed the defense to ask B.P. about the Article 15 he would "likely" be receiving for the altercation with Appellant, the military judge did not abuse his discretion, and Appellant's assignment of error is without merit.

VII.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY DENYING APPELLANT'S MOTION TO

SEVER THE ADDITIONAL CHARGE FROM THE INITIAL TWO CHARGES.

Additional Facts

Pre-trial, trial defense counsel moved to dismiss the charges, because, the averred, "Charges I and II, as related to the Additional Charge, involve different witnesses, wholly different evidence, and, a totally different set, of circumstances and timeframe." (App. Ex. XXIX.) However, they did not request an Article 39(a) hearing on the issue. (Id.) The United States responded in opposition. noting that it was Appellant who linked the charges involving K.D. and those involving B.P., when Appellant made spontaneous statements to J.M. about the assaults against both victims. (App. Ex. XXX.)

In denying the defense motion, the military judge's ruling cited to R.C.M. 602(e)(2) , 906(b)(10), and the case of United States v. Southworth, 50 M.J. 74, 76 (C.A.A.F. 1999), as well as five other cases in which multiple assaults were tried in a single court-martial. (App. Ex. XLVI, paras. 5-8, 10.)

During pre-deliberation instructions, the military judge provided the court members with the "spillover" instruction:

> An accused may be convicted based only on evidence before the court, not on evidence of a general criminal disposition. Each offense must stand on its own and you must keep the evidence of each offense separate. Stated differently, if you find or believe that the accused is guilty of one offense, you may not use that finding or belief as a basis for inferring, assuming, or proving that he committed any other offense.
>
> If evidence has been presented which is relevant to more than one offense, you may consider that evidence with respect to each offense to which it is relevant. For example, if a person were charged with stealing a knife and later using that knife to commit another offense, evidence concerning the knife, such as that person being in possession of it, or that person's fingerprints being found on it, could be considered with regard to both offenses. But the fact that a person's guilty of stealing the knife – pardon me, but the fact that a

> person's guilt of stealing the knife may have been proven is not evidence that the person is also guilty of any other offense.
>
> The burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt. Proof of one offense carries with it no inference that the accused is guilty of any other offense.

(R. at 802-05.) Trial defense counsel did not object to the instruction. (R. at 765, 783-84.)

Standard of Review

This Court reviews a military judge's ruling on a motion to sever for an abuse of discretion. United States v. Giles, 59 M.J. 374, 378 (C.A.A.F. 2004); Southworth, 50 M.J. at 76. "A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law." United States v. Roberts, 59 M.J. 323, 326 (C.A.A.F. 2004).

Law

R.C.M. 601(e)(2), *Joinder of offenses*, states:

> In the discretion of the convening authority, two or more offenses charged against an accused may be referred to the same court-martial for trial, whether serious or minor offenses or both, regardless whether related. Additional charges may be joined with other charges for a single trial at any time before arraignment if all necessary procedural requirements concerning the additional charges have been complied with.

"Ordinarily all known charges should be referred to a single court-martial." *Discussion,* R.C.M. 601(e)(2).

R.C.M. 906(b)(10)(A), *Severance of offenses*, provides, "Offenses may be severed, but only to prevent manifest injustice."

On appeal, "the appellant must demonstrate more than the fact that separate trials would have provided a better opportunity for an acquittal[;]" he must demonstrate "the ruling caused actual prejudice by preventing the appellant from receiving a fair trial." Giles, 59 M.J. at 378.

Appellate courts review such rulings by applying the following factors: (1) whether the evidence of one offense would be admissible proof of the other; (2) whether the military judge has provided a proper limiting instruction; and (3) whether the findings reflect an impermissible crossover. Southworth, 50 M.J. at 76; Giles, 59 M.J. at 378 (citation omitted).

Court members are presumed to follow the military judge's instructions in the absence of evidence to the contrary. United States v. Nash, 71 M.J. 83 (C.A.A.F. 2012); United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000) (citations omitted).

Analysis

Appellant claims the military judge abused his discretion in refusing to sever the Charges related to Appellant's assaults of K.D. from the Additional Charge related to Appellant's assault of B.P. (App. Br. at 24-27.) Because there is a presumption of joinder and no manifest injustice resulted from the joint trial, Appellant's assignment is without merit.

The military judge found the first Southworth prong – whether the evidence of one offense would be admissible proof of the other -- weighed in favor of the defense severance request but noted that it was not dispositive. (App. Ex. XLVI, para. 12.) The government disagrees with that finding, because J.M.'s testimony about Appellant's incriminating spontaneous statements made after Appellant's altercation with B.P. applied to all the charges. Thus, any weight in favor of the defense is minimal.

Next, the military judge addressed the second and third Southworth prongs. He noted that an appropriately tailored spillover instruction would prevent the panel from improperly using any charged offenses to prove other charged offenses and noted there is "no significant danger of impermissible spillover" because of the differences in the two sets of charges, and again emphasized the spillover instruction would cure any danger of impermissible crossover. (App.

Ex. XLVI, paras. 13 and 14.) Additionally, the military judge warned the prosecution to present their case in a manner to not impermissibly argue crossover between the offenses, and they did so. Id., para. 14. The prosecution heeded the military judge's warning. They presented testimony, exhibits, and argument related to victim K.D. and Charges I and II in one grouping, and then the same for the Additional Charge related to victim B.P. separately. The charges of spousal assault were quite different from the charges involving a bar fight. They were also less egregious than the charges of other cases in which motions to sever have been denied. For example, in Southworth, the charges the appellant had wanted severed involved one of rape of a Navy enlisted woman and the second of rape of a 13-year-old daughter of a senior chief petty officer the very next day. 50 M.J. at 75.

Appellant asserts he was prejudiced because he could have testified for the limited purpose of challenging B.P.'s testimony, but that would have led the court members to perceive Appellant was avoiding testifying about the charges involving K.D. (App. Br. at 25-26.) However, the defense never made that request of the military judge, and the military judge could have given a limiting instruction on such bifurcated testimony that would have removed any negative perception.

As the military judge pointed out, this Court and the Court of Appeals for the Armed Forces have affirmed when appellants have challenged joinder of charges involving multiple assaults in a single court-martial. Southworth, *supra*; United States v. Simpson, 56 M.J. 462 (C.A.A.F. 2002); United States v. Allen, 54 M.J. 854 (A.F. Ct. Crim. App. 2001); United States v. Duncan, 53 M.J. 494 (C.A.A.F. 2000); United States v. Rodriguez, No. ACM 38519, 2016 CCA LEXIS 416 (A.F. Ct. Crim. App. 13 July 2016) (unpub. op.); United States v. Silvernail, No. ACM 39618, 2021 CCA LEXIS 427 (A.F. Ct. Crim. App. 25 Aug. 2021) (unpub. op.). *See also* United States v.

Brown, No. ACM 39728, 2021 CCA LEXIS 414 (A.F. Ct. Crim. App. 16 Aug. 2021) (unpub. op.); United States v. Hudgins, No. ACM 38305, 2014 CCA LEXIS 227 (A.F. Ct. Crim. App. 3 Apr. 2014) (unpub. op.); United States v. Sentance, No. ACM 34693, 2004 CCA LEXIS 27 (A.F. Ct. Crim. App. 7 Jan. 2004) (unpub. op.).

Finally, the court members' findings demonstrated they were not impacted by any spillover. To the contrary, the court members acquitted Appellant of Specifications 1, 2, 4, 8, and 9 of Charge I involving K.D. and Specification 2 of the Additional Charge involving B.P. The mixed finding show that the members evaluated the evidence carefully and that no impermissible crossover occurred.

For the foregoing reasons, the military judge properly found no manifest injustice in denying severance, and that ruling in favor of joinder was not an abuse of discretion, so that ruling should be upheld.

VIII.

THERE WERE NO PROSECUTOR ERRORS, LET ALONE AN ACCUMULATION OF ERRORS PREJUDICING THE APPELLANT ON FINDINGS AND SENTENCING.

Standard of Review

Errors are reviewed for plain error where there is no objection at trial. United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019).

Law

An appellate court can order a rehearing based on the accumulation of errors not reversible individually. The Court of Appeals has adopted the First Circuit Court of Appeals, which requires:

> [Consider] each such claim against the background of the case as a whole, paying particular weight to factors such as the nature and number of the errors committed; their interrelationship, if any, and combined effect; how the [trial] court dealt with the errors as they

> arose (including the efficacy -- or lack of efficacy -- of any remedial efforts); and the strength of the government's case. The run of the trial may also be important; a handful of miscues, in combination, may often pack a greater punch in a short trial than in a much longer trial.

United States v. Dollente, 45 M.J. 234, 242 (C.A.A.F. 1996) (citations omitted).

Courts are far less likely to find cumulative error "where evidentiary errors are followed by curative instructions" or when a record contains overwhelming evidence of a defendant's guilt. Id.

Prosecutorial misconduct occurs when a prosecutor oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense. United States v. Fletcher, 62 M.J. 175, 178 (C.A.A.F. 2005). The conduct of the "trial counsel must be viewed within the context of the entire court-martial . . . not [just] on words in isolation." United States v. Baer, 53 M.J. 235, 238 (C.A.A.F. 2000) (citation omitted).

Analysis

Appellant claims the prosecution (1) posed in opening statement that Appellant had a propensity for violence; (2) raised the possibility that Appellant stole others' drinks at the Candy Shop; (3) disparaged defense counsel and Appellant; and (4) mislead the court members by implying Appellant knew B.P:.'s rank.[20] (App. Br. at 27-32.)

Trial Counsel Did Not Argue Propensity

Appellant emphasizes the prosecution's opening statement in which assistant trial counsel said, "[Y]ou're going to learn a lot about the accused, A1C Nicholas Byrne. You're going to hear a lot about his aggression and his repeated abuse." (App. Br. at 28 (citing R. at 449).) The

[20] Appellant raised the fourth subsection of this assignment of error pursuant to Grostefon.

prosecution was not arguing propensity; he was referring to charged conduct, as demonstrated by the next part of the opening statement:

> He first took out his aggression on the person that was closest to him, his now ex-wife [K.D.], and when [K.D.] finally got away and was safe from the accused, his aggression was directed towards another. You're going to hear in this trial about another victim, an Army victim, [B.P.], a victim of assault.

(R. at 449.) Trial defense counsel did not object. (Id.)

Similarly, the prosecution's use in closing argument of his words, "I've hit my wife before… I'm going to hurt [K.D.] more than I ever have before" (R. at 813), was Appellant's confession in which he referred to charged misconduct in Charges I and II and their specifications. When trial counsel argued, "You also heard testimony; you saw evidence that just a few months ago, the accused aggressively attacked B.P." (R. at 824), that also referred to charged misconduct, in the Additional Charge and its specifications, as demonstrated by trial counsel immediately talking about the assault at the bar.

Even if any of those comments were error, the lack of defense objection demonstrates their lack of significance. Appellant was not prejudiced, because they were isolated comments in otherwise lengthy opening and closing, and the testimonial and photographic evidence supporting Appellant's convictions was strong. *See* United States v. Leipart, No. ACM 39711, 2023 CCA LEXIS 39, *74 (A.F. Ct. Crim. App. 26 Jan. 2023) (unpub. op.) (finding "isolated comment," even where evidence was "not overwhelming," weighs against prejudice). When K.D. testified her marriage to Appellant was "very sexually drive, controlling and possessive" (R. at 475), trial defense counsel did not object. Even if he had objected, that testimony was relevant background about the relationship and not "crimes, wrongs, or other acts" that were used to show propensity, so Military Rule of Evidence 404(b) does not apply. And even if M.R.E. 404(b) applied, the

testimony should have been admitted as non-propensity “pattern” evidence. United States v. Williamson, No. ACM 40211, 2023 CCA LEXIS 219, *31-31 (A.F. Ct. Crim. App. 22 May 2023) (unpub. op.). In any event, it was not prejudicial plain error for K.D. to provide that brief generalization, since the court members made their own conclusions about the marriage based on the testimony, photographs, and other evidence presented to support 11 specifications of assault over their two years of marriage.

Regarding the short excerpt of K.D.’s testimony Appellant cites about the strangulation, (App. Br. at 28-29 (citing R. at 492-503)), and to which trial defense counsel did not object, the “separate incident” was also charged misconduct. That is, the incident was when Appellant backhanded K.D., hitting her eyebrow with his wedding ring, as charged in Specification 4 of Charge I.

Trial Counsel’s Question regarding “Stealing Drinks” Was Never Answered, and the Military Judge Provided the Court Members Curative Instructions

Appellant also takes issue with the prosecutor asking SSgt C.J. about Appellant “stealing other people’s drinks,” (App. Br. at 29 (citing R. at 682)) but he acknowledges the military judge prevented the answer to the question, and the military judge instructed the court members to disregard the question. (Id. (citing R. at 687)). The military judge also instructed the members at the start of the trial, “The rules of evidence control what can be received into evidence. As I indicated, questions of witnesses are subject to objection. During the trial when I sustain an objection, please disregard the question and the answer.” (R. at 274.) And he reminded the members later during the trial, “So when I – and this is a reminder, panel members, when I sustain an objection, please disregard the question and any answer you may have heard.” (R. at 478.) There were several other occasions when the military judge sustained objections to other testimony, and he instructed the court members to disregard the testimony or portions thereof. (R.

at 479, 480, 487, 506, 574, 628, 630, 681.) Because court members are presumed to follow the military judge's instructions to ignore the "stealing drinks" question, and nothing in the record indicates they did anything to the contrary, any error was harmless.

In Appellant's argument that a curative instruction cannot "cleanse the stink of a skunk thrown in the jury box," he cites to one case, the 1962 Fifth Circuit opinion in Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962). (App. Br. at 30.) In Dunn, the court found that the government improperly admitted evidence that was effectively a confession, and they made statements in their opening and in closing argument that were plain error. 307 F.2d at 886. Thus, the egregious facts of Dunn are clearly distinguishable from those in Appellant's case, where the prosecutor asked a single question about "stealing drinks" but no answer was given and there were curative instructions to the court members. Moreover, as this Court has repeated and recently held, a curative instruction can remedy the presentation of inadmissible evidence. *See, e.g.,* United States v. McCoy, No. ACM 40119 (f rev), 2024 CCA LEXIS 105, *37 (A.F. Ct. Crim. App. 12 March 2024) (unpub. op.); United States v. Stafford, No. ACM 40131 (f rev), 2023 CCA LEXIS 497, *55 (A.F. Ct. Crim. App. 30 Nov. 2023) (unpub. op.). Here, the curative instruction prevented any prejudice to Appellant from the unanswered question.

Trial Counsel Properly Addressed the Defense Conspiracy Theory and Did Not Malign the Defense or Appellant Personally

Although Appellant now claims the prosecution's closing argument, in which he called the defense theory a "wild conspiracy theory," he did not object at trial. (App. Br. at 30; R. at 844-45.) It was clear that the prosecution was simply addressing the defense theory that K.D. had made up false allegations of assault, took photographs of injuries that Appellant did not cause, and alerted law enforcement, and then conspired with A.K. to lie as well.

At the beginning of the defense closing argument, counsel stated:

> Mr. President, members of the panel, at the beginning of this case, before the taking of any evidence, before we heard from any government witnesses, I said this was a case about deception. And contrary to government counsel's assertions, that's still exactly what this case is about; deception.

(R. at 828.)

Defense counsel then referred to " A.K, a witness who was collaborating with Ms. [K.D.] before this trial." (Id.) The defense later furthered their argument that K.D. and A.K. had conspired:

> [The prosecution represented they would] bring someone to support Ms. [K.D.]'s case. Here lets — here let's call [A.K.]. Really? The one person, not even to corroborate, but to try to provide some support, is [A.K.]? Who's been talking to Ms. [K.D.] about this trial.

(R.at 836.)

Later, defense counsel argued K.D. and A.K. were "Two peas in a pod." (R. at 837.) In sum, characterizing the defense argument as a "conspiracy theory" was accurate. In calling it a "wild conspiracy theory," the prosecutor was making a fair response to the defense theory of the case, and was not addressing defense counsel or Appellant personally. *See* United States v. Bessmertnyy, No. ACM 39322, 2019 CCA LEXIS 255, *74 (A.F. Ct. Crim. App. 14 June 2019) (unpub. op.) (finding prosecution's closing argument referring to appellant's "ridiculous" account of the events was permissible commentary). The statement was not plain and obvious error.

Trial Counsel Did Not Imply Appellant Knew B.P.'s Rank[21]

Finally, there was nothing wrong with the prosecution referring to B.P. by his rank or his status as a non-commissioned officer. As Appellant acknowledged, B.P. testified that

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[21] Appellant raised this fourth sub-issue pursuant to Grostefon.

Appellant probably did not know his rank. (App. Br. at 31 (quoting R. at 621, 623, 657).) There was no indication in the record, and no argument by the prosecution, that Appellant was aware of B.P.'s rank. Thus, the statements were not plain error. Further, military members are commonly referred to by their rank, and there was little danger that the members would convict Appellant or sentence Appellant more harshly based on B.P.'s rank rather than on the evidence.

No Prejudice and No Plain Error

Even if, for argument's sake, the Court finds any of the trial counsel or witness statements were plain and obvious error, the lack of trial counsel objection demonstrates they were insignificant and, thus, not prejudicial. Moreover, the statements were passing in nature and not repeated or made a major part of the government's case. Finally, the evidence of Appellant's guilt was strong, based on corroborated victims' testimony and photographic evidence of their injuries. Thus, any arguable error did not prejudice Appellant. His assignment of error is without merit and should be denied.

IX.[22]

THE CONVENING AUTHORITY DID NOT STACK THE COURT PANEL, AND THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING A DEFENSE CHALLENGE TO COURT-MARTIAL MEMBER FIRST LIEUTENANT C.H.

Additional Facts

The parties conducted individual *voir dire* of 1st Lt C.H. (R. at 301, 303, 391-97.) He stated he abstains from alcohol. (R. at 303.) He stated his stepfather was a retired Colorado

[22] Appellant raised the first of his two arguments under this assignment of error (panel stacking) pursuant to Grostefon.

Springs police officer, but they did not discuss cases, and he would not give the testimony of law enforcement witnesses any greater weight or credibility. (R. at 392.) Lt C.H. said he discovered seven years prior that alcoholism runs in his family but said he would not weigh the testimony of a witness differently if they drank alcohol. (Id.) He confirmed he would follow the military judge's instructions on the law and would base his decision only on the evidence presented at trial and not on his own personal experiences. (Id.)

Defense counsel elicited more details from 1st Lt C.H. about his deceased great-grandfather having abused his (C.H.'s) deceased great grandmother. (R. at 393.)

In denying trial defense counsel's motion to strike for cause, the military judge ruled:

> The court does not find this to be a particularly close call, so even applying the liberal grant mandate finds this not to rise to a level requiring a granted challenge for cause. The court would note that in terms of actual bias, no actual bias was elicited nor was [1st Lt C.H.] challenged on that basis by the defense counsel, and the court having had the opportunity to observe his demeanor in answering questions and having discussions with counsel, found him to be open, honest, credible, easily answering questions, no hesitation in answering questions, and no difficulty on his part in addressing the topics that we addressed.
>
> * * *
>
> As pointed out by the trial counsel, [1st Lt C.H.] didn't raise his hand to say that any family members or someone close to him had been involved in similar offenses to those charged in this case. He was asked that multiple times, both by the court and by counsel. So there's no, at least in this court's mind, reason that counsel would've connected the abuse he was talking about to something similar in this case.
>
> * * *
>
> He can fairly and impartially evaluate all the evidence in this case, even to the extent it might involve some alcohol consumption. Persuasively, maybe most persuasively, the impact that he said – or, the incident didn't have a significant impact on him. It just motivated his decision not to want to drink.
>
> * * *

> The court finds that in the eyes of the public, his continued participation, even with those personal circumstances, would not do injury to the perception of the appearance of fairness in the military justice system. Even applying the liberal grant mandate, the defense challenge for cause is denied."

(R. at 433-435.)

Ultimately, when given the opportunity to use a peremptory strike against 1Lt C.H., the defense instead used the peremptory strike against another court member. (R. at 443.)

Appellant did not raise at any time during trial an allegation that the general court-martial convening authority (GCMCA) had "stacked" the court-martial panel with individuals who "had personal experiences with" domestic violence or sexual assault.

Standard of Review

Whether a prospective juror is biased has traditionally been determined through *voir dire* culminating in a finding by the trial judge concerning the prospective juror's state of mind. United States v. Hennis, 79 M.J. 370, 384 (C.A.A.F. 2020) (quoting Wainwright v. Witt, 469 U.S. 412, 428 (1985)). "[S]uch a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." Witt, 469 U.S. at 428. "It is plainly a question of historical fact; did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed." Hennis, 79 M.J. at 384. (internal quotation omitted). "[T]he trial court's resolution of such questions is entitled, even on direct appeal, to 'special deference.'" Patton v. Yount, 467 U.S. 1025, 1038 (1984); *see* United States v. Dockery, 76 M.J. 91, 96 (C.A.A.F. 2017) (granting great deference to the military judge's ruling on challenges for cause).

A military judge's resolution of challenges founded in implied bias receive slightly less deference, that is, "under a standard less deferential than abuse of discretion but more deferential

than *de novo*." United States v. Keago, 2024 CAAF LEXIS 256, *9, __ M.J. __ (C.A.A.F. 2024) (citations omitted). This standard recognizes that implied bias deals with the public's objective perception of the fairness of the military justice system, and not simply the military judge's assessment of whether a challenged member can serve in a fair and impartial manner. United States v. Elfayoumi, 66 M.J. 354, 356 (C.A.A.F. 2008). "[The Court evaluates] implied bias objectively, through the eyes of the public, reviewing the perception or appearance of fairness of the military justice system." United States v. Townsend, 65 M.J. 460, 463 (C.A.A.F. 2008) (citations and internal quotation marks omitted).

The Court gives greater deference where a military judge puts on the record his analysis and basis for denying a defense challenge for cause and indicates that he considered the liberal grant mandate. United States v. Rogers, 75 M.J. 270, 273 (C.A.A.F. 2016); United States v. Clay, 64 M.J. 274, 277 (C.A.A.F. 2007). "Although 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." Dockery, 76 M.J. at 96 (citation omitted). This is because it provides a "vantage point of a military judge observing members in person and asking the critical questions that might fill any implied bias gaps left by counsel." Clay, 64 M.J. at 277.

Law

The test for implied bias takes into account, among other distinct military factors, the confidence appellate courts have that military members will be able to follow the instructions of military judges and thus, while it will often be possible to "rehabilitate" a member on a possible question of actual bias, questions regarding the appearance of fairness may nonetheless remain. United States v. Woods, 74 M.J. 238, 243 (C.A.A.F. 2015). The issue, then, is whether the risk

that the public will think the accused received anything less than a fair trial is "too high." Id. at 243-44 (citation omitted).

"[A] prior connection to a crime similar to the one being tried before the court-martial is not per se disqualifying to a member's service." United States v. Terry, 64 M.J. 295, 297 (C.A.A.F. 2007) (upholding military judge's determination of no actual or implied bias where court member's wife had been sexually abused before they met, and rarely discussed it). *See also* United States v. Davis, No. ACM 40370, 2024 CCA LEXIS 37 (A.F. Ct. Crim. App. 26 Jan. 2024) (upholding denial of motion to strike for implied bias in sexual assault case where one court member's husband had been sexually assaulted as a child 20 years prior and it impacted their marriage, she was pregnant during court-martial. and she was involved in processing appellant's promotion propriety action based on the offense charged).

Analysis

Appellant challenges the court-martial panel as having been "stacked" against him, and he challenges the denial of the defense challenge to 1Lt C.H. as a court-martial member. (App. Br. at 32-35.) Those arguments are without merit.

The Convening Authority Did Not Stack the Court Panel

First, in his one-paragraph argument pursuant to Grostefon, he claims the general court-martial convening authority (GCMCA) stacked the court martial panel, because 16 of 20 members details to the panel "had personal experiences with" domestic violence or sexual assault. (App. Br. 33.) Six panel members indicated they had a person close to them who had been a victim of an offense similar to those charged. (R. at 285, 300.) The other 10 panel members were only "involved" in a professional role. Three panel members indicated they had previously served as a panel member or juror on another case involving domestic violence or sexual assault. (R. at 295.)

Another three panel members had taken disciplinary action or provided input on disciplinary action for a domestic violence offense. (R. at 295-96.) None had received advanced or specialized training about domestic violence or sexual assault other than normal training all Air Force members received. (R. at 296.) One panel member had been involved in addressing a situation involving domestic violence or sexual assault, such as a counselor, a Sexual Assault Response Coordinator, a First Sergeant, law enforcement officer, family advocacy member, or in some other capacity. (R. at 296.)

An objection to the court member selection process must be made before trial or it is forfeited, absent plain error. R.C.M. 905(e); United States v. Aho, 8 M.J. 236, 237 (C.M.A. 1980). Additionally, there is a "strong presumption" that the convening authority performs his duties as a public official without bias. United States v. Hagen, 25 M.J. 78, 84 (C.M.A. 1987). Here, Appellant did not raise the court stacking objection at trial.

Ultimately, Appellant cites no evidence that the GCMCA selected potential court members with the intent to seat members with personal experiences related to the charged offenses or acted in any with bias against Appellant. That six members might have such personal experiences, and another 10 members had to be involved in the discipline or prevention of such crimes, is just a sad reality of the modern world; that is, domestic violence and sexual assault are pandemic in society. Appellant has not shown plain error on appeal.

The Military Judge Properly Denied Appellant's Challenge for Cause

Appellant's second allegation is that 1st Lt C.H. had implied bias because the officer had a "familial history of alcohol-fueled abuse by his grandparents." (App. Br. at 34.) However, as the military judge noted in his detailed findings and conclusions regarding the motion to strike for cause, the alcohol abuse was old family history, which apparently preceded 1st Lt C.H.'s life; the

fact was not in the forefront of his mind; he did not think of the alcohol use in relation to domestic violence; and he confirmed that he would be fair and impartial. (R. at 433-435.) As a matter of law, the military judge deserves greater deference in this case, because he put on the record his analysis and basis for denying Appellant's challenge for cause, and he indicated he considered the liberal grant mandate. Thus, the standard of review falls closer on the spectrum to abuse of discretion than to *de novo*. However, even if the Court were to apply the stricter standard of review, it should uphold the military judge's denial of Appellant's challenge for cause based on implied bias, because 1st Lt C.H.'s continue presence as a court member would not have caused the public to perceive Appellant's panel as less than fair and impartial.

X.[23]

THE MILITARY JUDGE WAS NOT BIASED AGAINST APPELLANT AND IN FAVOR OF THE PROSECUTION.

Standard of Review

The Court reviews a military judge's decision whether to recuse herself for an abuse of discretion. United States v. Sullivan, 74 M.J. 448, 453 (C.A.A.F. 2015) (citations omitted). "A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." United States v. Ellis, 68 M.J. 341, 344 (C.A.A.F. 2010) (citation omitted). However, when an appellant does not raise the issue of disqualification until appeal, the Court examines the claim under the plain error standard of review. United States v. Martinez, 70 M.J. 154, 157 (C.A.A.F.

[23] Appellant raised this assignment of error pursuant to Grostefon.

2011) (citation omitted). Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice. Id.

Law

"An accused has a constitutional right to an impartial judge." United States v. Wright, 52 M.J. 136, 140 (C.A.A.F. 1999) (citations omitted). R.C.M. 902 governs disqualification of the military judge. R.C.M. 902(b) sets forth five specific circumstances in which a "military judge shall [ ] disqualify himself or herself." In addition, R.C.M. 902(a) requires disqualification "in any proceeding in which th[e] military judge's impartiality might reasonably be questioned." Disqualification pursuant to R.C.M. 902(a) is determined by applying an objective standard of "whether a reasonable person knowing all the circumstances would conclude that the military judge's impartiality might reasonably be questioned." Sullivan, 74 M.J. at 453 (citation omitted).

"There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle . . . ." United States v. Quintanilla, 56 M.J. 37, 44 (C.A.A.F. 2001) (citation omitted). "Although a military judge is to 'broadly construe' the grounds for challenge, he should not leave the case 'unnecessarily.'" Sullivan, 74 M.J. at 454 (quoting R.C.M. 902(d)(1), Discussion).

Analysis

Appellant alleges the military judge was biased against him and his counsel by denying the expert toxicology assistance, helping the prosecution with their arguments during the hearing on Appellant's speedy trial motion, prohibiting the defense sufficient time to prepare for the speedy trial motion hearing, and at various points in the proceedings, expressing a negative attitude to defense counsel. (App.Br., Appendix, a-b.)

Appellant failed to raise any question about the military judge's impartiality until on appeal, so his challenge is reviewed for plain error. Moreover, there is a "strong presumption" that a judge is impartial. Quintanilla, 56 M.J. at 44. Rulings and comments made by a judge do not constitute bias or partiality, unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Id. (internal citation omitted).

Appellant does not allege bias based on the military judge's background; rather, he claims bias because of rulings or other judicial actions with which Appellant simply disagrees. However, the military judge properly denied Appellant's request at trial for expert toxicology assistance (App. Ex. LII), he did not help the prosecution with arguments, he provided the defense with sufficient time to prepare for motions hearings, and he did not express negative attitudes towards counsel.

Regarding the toxicology expert, the defense wanted to conduct a "back extrapolation" and opine that B.P.'s blood alcohol concentration (BAC) was a certain amount higher at the time of the assault than the 0.12 BAC from the reading taken from the breathalyzer later that morning and, as a result, B.P. would have had certain symptoms. (R. at 71-72.) However, the defense admitted they did not present information in their filing that a forensic toxicologist could conduct such a back extrapolation. (R. at 73.)

Regarding prosecutor arguments, it is unclear from the pages in the record Appellant references (App. Br., Appx., p. a (citing R. at 15-22, 79)) how the military judge was "helping the prosecution perfect their arguments" on the defense speedy trial motion. Appellant cites no language from the transcript, and the only reference to the speedy trial motion even close to that page range is the mere marking of the defense motion and government response as appellate exhibits (R. at 23), and the clarification of the parties' trial ready dates and agreed-upon exclusions

of time from the speedy trial clock (R. at 80). Similarly, the pages of transcript Appellant cites, in arguing the military judge refused the defense sufficient time to prepare for the hearing on their speedy trial motion, include the military judge seeking accurate clarification from the defense about trial ready dates. (R. at 92-94.)

Finally, Appellant asserts the military judge "expressed a negative attitude to defense counsel" when, for example, he would not allow counsel a pause overnight to cite caselaw supporting their position. (App. Br., Appx., page b (citing R. at 596).) However, trial defense counsel should have been prepared to support their assertion, and the military judge effectively gave the defense the opportunity to find legal support for their position at a later time:

> As a reminder, all rulings of this court can be – you can ask for reconsideration of the ruling. To the extent you find some new law that you want to bring to this court's attention, you can always at any point request reconsideration for this court to consider any new law. Just so that that is clear.

(R. at 596.)

Appellant cannot demonstrate the military judge was biased against him, and any arguable error was not plain error, so his challenge on appeal should be denied.

XI.[24]

THE MILITARY JUDGE DID NOT ERR BY PROVIDING A VARIANCE INSTRUCTION TO THE DATES IN CHARGE I, SPECIFICATION 7.

Additional Facts

During the testimony of Ms. K.D., she described Appellant striking her on her shoulder with an attic stick, leaving bruising. (R. at 497-98, 523-27, 558.) She identified photographs of

[24] Appellant raised this assignment of error pursuant to Grostefon.

her bruises in Prosecution Exhibit 1, pages 13 and 14, which were taken on 7 September 2020, three days after the assault. (R. at 526-27, 558.)

During a hearing pursuant to Rule 39(a), the United States requested a variance instruction regarding the dates of offense in Specification 7 of Charge I, what was called the "attic stick" incident; that is, they requested excepting the words "1 May 2020" and "31 May 2020" and replacing them with "1 September 2020" and "30 September 2020," respectively. (R. at 764.) Circuit defense counsel objected to the variance instruction, asserting the time frame was not a minor variance. (R. at 765-66.)

The military judge explained:

> As detailed in the case law interpreting this issue, absent unique circumstances or a significant shift to the time frame charge, allowing reasonable changes to a charged timeframe does not change the nature of the offense, 1 and is therefore a permissible finding by exceptions and substitutions.
>
> This is particularly true where the government has used "on or about" language for their dates and pleadings, where time is not of the essence for the offense, and the date change maintains the offense within in the statute of limitations and before the charge was filed.
>
> Such is the case here. The proposed finding by exceptions and substitutions for Charge I, Specification 7, does not unreasonably shift the date range of the offense, does not change the identity of the offense, increase the seriousness of the offense, nor increase the maximum punishment of the offense. The location of the offense, manner of the offense, parties involved in the offense, relationship between the parties involved in the offense, seriousness of the offense, and maximum punishment will remain the same if the date change proposed occurs.
>
> The court would also note that the general timeframe of this offense would remain substantially the same, allegedly occurring when the couple lived in Ramstein-Miesenbach, Germany, as a married couple prior to the deployments to Africa. The government did not charge the offense as occurring on a specific date. Instead they utilized "on or about" language, and charged the offense as occurring over a date range, and that date range is not central to nor essential to the offense.

> Finally, the defense has shown that they would be prejudice by this change, nor that they misunderstood the offense they needed to defend against at trial. As acknowledged both parties, the offense described by Specification 7 is unique in the charging scheme, because it's the only offense in which the accused has alleged to have used a very specific type of wooden rod to strike the victim, his spouse at the time.
>
> The defense 1 acknowledged they understood that this was the specific offense they had to defend against, and both sides demonstrated a clear understanding of this event during their questioning at trial.
>
> As such, the court finds the panel may modify the date range in Specification 7 of Charge I, as proposed by trial counsel, pursuant to R.C.M. 918, because such a change would not change the nature of the offense, and the change would not cause any prejudice to the defense in this case.

R. at 784-86.

Standard of Review

Whether there was a fatal variance is a question of law reviewed *de novo*. United States v. Treat, 73 M.J. 331, 335 (C.A.A.F. 2014).

Law

Rule 918, *Finding*, states:

> (a) General findings. The general findings of a court-martial state whether the accused is guilty of each charge and specification. . . .
>
> (1) As to a specification. General findings as to a specification may be:
>
> (A) guilty;
>
> * * *
>
> (C) guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any;
>
> * * *
>
> (E) not guilty.
>
> Exceptions and substitutions may not be used to substantially change the nature of the offense or to increase the seriousness of the offense or the maximum punishment for it.

Discussion

> *Exceptions and substitutions*. One or more words or figures may be excepted from a specification and, when necessary, others substituted, if the remaining language of the specification, with or without substitutions, states an offense by the accused which is punishable by court-martial. Changing the date or place of the offense may, but does not necessarily, change the nature or identity of an offense.

R.C.M. 918.

"To prevail on a fatal variance claim, an appellant must show both that the variance was material and that he was substantially prejudiced thereby." United States v. Marshall, 67 M.J. 418, 420 (C.A.A.F. 2009) (citations omitted). Examples of a "material" variance include those that substantially change the nature of the offense, increase the seriousness of the offense, or increase the punishment for the offense. Id. (citation omitted). A variance can prejudice an appellant by (1) putting him at risk of another prosecution for the same conduct, (2) misleading him to the extent that he has been unable adequately to prepare for trial, or (3) denying him 'the opportunity to defend against the charge. Id.

Analysis

Appellant claims the variance prejudiced the defense's ability to investigate additional evidence and defenses at the end of the evidence presentation and just before instructions. (App. Br., Appendix, c-d.) This is similar to the claim defense counsel made at trial, where they argued the change in time period prejudiced Appellant because it shifted the alleged assault in relation to the timing of other assaults. (R. at 766-68.) Appellant's assignment of error is without merit.

Specification 7 of Charge I involved a distinct event, with a clearly identifiable weapon, the wooden attic stick. There was no chance of misunderstanding which event was alleged in that Specification. The only change was a minor one; that is, the variance was just to move the one-month date range of the crime, which Appellant committed approximately one and a half years

earlier, by just four months. Therefore, the variance was not material, and he was not substantially prejudiced thereby.

In United States v. Hunt, 37 M.J. 344 (C.A.A.F. 1993), the Court of Appeals for the Armed Forces found a variance not material and not prejudicial, where a rape alleged in the charge sheet to have taken place "on or about 20 October 1989" actually, according to trial testimony, took place approximately three weeks earlier, even where the appellant provided a pretrial notice of alibi. Id. at 347.

As the military judge found in Appellant's case, the variance did not change the nature of the offense. He correctly pointed out the United States used "on or about" language in the Charge Sheet and time was not of the essence for the offense. The variance was merely a four-month shift of the monthlong period in which Appellant committed the crime. It did not increase the seriousness of the offense, did not increase the punishment for the offense, did not put him at risk of another prosecution for the same conduct, did not mislead him to the extent that he was unable to prepare adequately for trial, and did not deny him the opportunity to defend against the charge. The military judge found the location of the offense, manner of the offense (with the unique wooden rod used to assault K.D.), parties involved in the offense, relationship between the parties involved in the offense, seriousness of the offense, and maximum punishment remained the same with the date change. Because the military judge found, correctly, that Appellant suffered no prejudice, Appellant's assignment of error is without merit and the military judge's minor variance instruction should be upheld.

XII.[25]

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE DENIED THE DEFENSE MOTION TO DISMISS WITHOUT PREJUDICE UNDER R.C.M. 707.

Additional Facts

The charges were preferred on Appellant on 11 May 2021. Charge Sheet. That established the speedy trial date, but for excusable delay, as 8 September 2021. (R. at 89.) Appellant's arraignment was on 28 February 2022, which is day 294, other than excludable delay.

On 7 May 2021, the United States requested the defense's earliest availability for an Article 32 hearing. (App. Ex. XXIII, Atch. 1.) The defense responded that its earliest availability would be "the first two weeks of June." (Id.) The United States ultimately scheduled the Article 32 hearing for 3 June 2021 based on defense counsel availability but did not then request exclusion of time for the delay due to defense unavailability. (App. Exs. XXIII, Atch. 3, and XXIV.)

On 25 August 2021, in docketing the case for trial, the prosecution indicated it would be ready for trial on 27 September 2021 and the defense indicated it would be ready on 27 January 2022, so the Chief Circuit Military Judge excluded 27 September 2021 to 10 January 2022 (106 days) from the speedy trial clock. (App. Ex. XXIII, Atchs. 5 and 6.) Additionally, because of availability and trial ready dates, the parties agreed to exclude 7 to 28 February 2022 (22 days), because K.D.'s special victim's counsel was scheduled to be deployed 20 January 2022 to 7 February 2022 and defense counsel was unavailable for trial from 7 to 28 February. (App. Ex. XXIII, Atch. 6; R. at 82.)

Appellant moved pretrial on 4 February 2022 to dismiss the charges against him without prejudice. App. Br. XXIII. The United States responded in opposition. (App. Ex. XXIV.) In the

[25] Appellant raised this assignment of error pursuant to Grostefon.

response, the United States emphasized their efforts to secure the testimony of material witness K.D., who gave birth to her child on 26 August 2021 and was unavailable before and after giving birth, causing the prosecution's trial ready date to be pushed back to 27 September 2021. (Id.)

During the Article 39(a) hearing on the motion, the United States requested the military judge exclude 25 August 2021[26] to 6 February 2022 (166 days) because of defense and SVC unavailability, in addition to 7 to 27 February 2022 (22 days) as agreed between the parties. (R. at 94-95.) Those 188 days excluded from the 294-day total, would bring the tally down to 106 days for R.C.M. 707 speedy trial purposes.

The military judge's ruling granted delays from docketing on 25 August 2021 until the day prior to trial, 27 February 2022, and denied Appellant's motion to dismiss:

> The delay is being granted after-the-fact, based upon each side's availability to try this case and the parties' joint agreement on the current trial date of 28 February 2022. The Court finds the delay to be reasonable because the Defense was not available to try this case from 25 August 2021 to 27 January 2022 and the parties were not jointly available to try this case prior to 28 February 2022. Additionally, as was confirmed by the parties during the motion hearing, the parties jointly agreed to the current trial date based on their joint availability on 25 August 2021. Based on that approved delay and accompanying exclusion of time under R.C.M. 707, the Accused has been brought to trial within 120 days of preferral of Charges I and 2, as required by R.C.M. 707, and no speedy trial violation under that rule has occurred.

(App. Ex. XLVIII, para. 10.)

Standard of Review

The Court conducts a *de novo* review of speedy trial claims; however, the Court reviews decisions granting delay under R.C.M. 707, thereby rendering that time excludable for speedy trial

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[26] Despite repeated correct references to 25 August 2021 as the date of docketing discussions (R. at 86, 87, 89, 90, 92, 93), the CTC and military judge each mistakenly referenced 15 August 2021 once. (R. at 94, 95.)

purposes, for an abuse of discretion. United States v. Guyton, 82 M.J. 146, 151 (C.A.A.F. 2022) (citations omitted).

Law

The Rule requires an accused to be brought to trial within 120 days of preferral of charges. R.C.M. 707(a)(1). For purposes of R.C.M. 707, an "accused is brought to trial . . . at the time of arraignment." R.C.M. 707(b)(1). The convening authority prior to referral, or the military judge after referral, may grant requests for pretrial delay, and such approved delays "shall be excluded when determining whether the [120-day clock] has run." R.C.M. 707(c). Notably, R.C.M. 707 does not preclude after-the-fact approval of a delay' by the military judge or convening authority. Guyton, 82 M.J. at 151.

"The decision to grant or deny a reasonable delay is a matter within the sole discretion of the convening authority or a military judge . . . based on the facts and circumstances then and there existing." R.C.M. 707(c)(1), Discussion. However, this Court requires "good cause" for the delay and also requires that the length of time requested be "reasonable" based on the facts and circumstances of each case. Guyton, 82 M.J. at 151 (citations omitted).

Analysis

Appellant argues the military judge abused his discretion in excluding time and deciding the prosecution had proceeded with reasonable diligence. (App. Br., Appendix, d-h.) Appellant claims he was not arraigned within 120 days of preferral, there were no approved delays pre-arraignment, and the Additional Charge resulted in delays beyond the scheduled trial date in January 2022. However, that is contrary to the facts in the record.

During the 25 August 2021 docketing discussion, the defense indicated their trial ready date was 27 January 2022. Then, SVC unavailability was a reasonable basis for the military judge

to exclude the days from 28 January until 6 February 2022, because the parties agreed to exclude 7 to 27 February 2022.

Appellant cites In re KK, Misc. Dkt. No. 2022-13, 2023 CCA LEXIS 31 (A.F. Ct. Crim. App. 24 Jan. 2023) (unpub. op.), to try to argue an SVC's unavailability does not render the victim unavailable for trial such that a motion to continue must be granted. However, the opinion in KK does not preclude a military judge from considering an SVC's availability in making scheduling decisions. To the contrary, this Court in KK stated, "[It is] a factor for the military judge to consider in balancing competing interests and making scheduling decisions." Id. at *16. Here, excluding a 9-day delay to ensure SVC availability was a reasonable choice by the military judge and not an abuse of discretion.

Appellant argues that some of the pretrial delay, after 7 February 2022, was due to the government's failure to comply with R.C.M. 413(b). (App. Br., Appx., p. g-h.) However, as the military judge found as fact in his ruling, well before 7 February 2022, that is, on 25 August 2021, Appellant had already stated his unavailability for trial for several months, and agreed with the government to set the 28 February 2022 trial date based on their joint availability. (App. Ex. XLVIII, p. 3.) Any alleged failure to comply with R.C.M. 413(b) is irrelevant, because it was after Appellant had agreed to the 28 February 2022 date.

The military judge did not abuse his discretion in granting the delay that reduced excludable delays below 120 days from preferral to arraignment; thus, Appellant's speedy trial rights under R.C.M. 707 were not violated, his assignment of error should be rejected, and the findings and sentence should be affirmed.

XIII.[27]

THE MILITARY JUDGE DID NOT ERR BY LIMITING CROSS-EXAMINATION OF B.P. ABOUT HIS PENDING DISCIPLINARY ACTION.

Analysis

It appears this assignment of error is the same as the one alleged in Issue VI, above. We therefore rely on the additional facts, standard of review, applicable law, and analysis from that prior issue.

XIV.[28]

DEFENSE COUNSELS' REPRESENTATION OF APPELLANT WAS NOT CONSTITUTIONALLY INEFFECTIVE.

Additional Facts

Trial defense counsel have provided declarations, which the United States submitted with its Motion to Attach Documents filed on 6 June 2024 pursuant to the Court's 7 May 2024 Order granting the United States' 25 April 2024 Motion to Compel Declarations. Those declarations prove that all of Appellant's claims of ineffective assistance of counsel (IAC) are without merit.

Standard of Review

Allegations of ineffective assistance are reviewed *de novo*. United States v. Palacios-Cueto, 82 M.J. 323, 327 (C.A.A.F. 2022) (citations omitted).

Law

The Sixth Amendment guarantees an accused the right to effective assistance of counsel. U.S. CONST. Amend. VI; United States v. Strickland, 466 U.S. 668, 686 (1984). "In order to

[27] Appellant raised this assignment of error pursuant to Grostefon.

[28] Appellant raised this assignment of error pursuant to Grostefon.

prevail on a claim of ineffective assistance of counsel (IAC), an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing Strickland, 466 U.S. at 698). "Appellate courts do not lightly vacate a conviction in the absence of a serious incompetency which falls measurably below the performance… of fallible lawyers." United States v. DiCupe, 21 M.J. 440, 442 (C.M.A. 1986) (citation and quotations omitted). If an appellant has made an "insufficient showing" on even one of the elements, this Court need not address the other. Strickland, 466 U.S. at 697. "When a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion…, an appellant must show that there is a reasonable probability that such a motion would have been meritorious." United States v. McConnell, 55 M.J. 479, 482 (C.A.A.F. 2001) (internal citation omitted).

In assessing the effectiveness of counsel, courts "*must* indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 671 (emphasis added); *see also* Harrington v. Richter, 562 U.S. 86, 105 (2011) ("Even under de novo review, the standard for judging counsel's representation is a most deferential one."). Counsel's performance is not deficient "when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so." United States v. Datavs, 71 M.J. 420, 424 (C.A.A.F. 2012). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." United States v. Dewrell, 55 M.J. 131, 133 (C.A.A.F. 2001) (quoting Strickland, 466 U.S. at 690).

Military courts use a three-part test to determine whether the presumption of competence has been overcome: (1) are appellant's allegations true, and if so, is there a reasonable explanation for counsel's actions; (2) if the allegations are true, did defense counsel's level of advocacy fall

measurably below the performance ordinarily expected of fallible lawyers; and (3) if defense counsel was ineffective, whether there is a reasonable probability that, absent the errors, there would have been a different result. United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (citation and quotations omitted). "A reasonable probability is one sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Analysis

Appellant claims his trial defense counsel were constitutionally ineffective for 18 reasons. (App. Br., Appendix.) For the reasons discussed below, Appellant's claims of ineffective assistance of counsel are without merit because they fail both prongs of the Strickland test; that is, (1) his counsel competently represented him and their performance was not deficient; and (2) even assuming *arguendo* that counsel's performance was deficient, there is no prejudice because Appellant has failed to establish a reasonable probability that, had there been no such error, his trial would have resulted in an acquittal.

The following are Appellant's 18 sub-claims that his trial defense counsels were ineffective in assisting him, as well as independent but consistent summaries of his trial defense counsels' Declarations addressing the same:

(a) "conceded the general accuracy of at least one of the statements" to J.M. and "effectively conceded" Appellant's guilt;

Defense counsel did not concede the accuracy of Appellant's statements to J.M. or concede his guilt. (Declarations of Maj A , Maj B , Mr. G .) Appellant's statement that he had "screwed up" was not, from the defense perspective, an admission of guilt to the charged offenses. Rather, it was an acknowledgement that he was in a bad situation after the fight in the bathroom with B.P., even if it was based on self-defense, because he was "trying to make light of a bad situation, because … he was already under investigation [for charges involving

K.D.].” (Id.; R. at 837.) Moreover, defense counsel challenged J.M.’s reliability in recounting incriminating statements, based on testimony during which she “struggled so much.” (Id.) Therefore, defense counsel’s performance was not deficient. To the contrary, it was a reasonable strategic decision to take control of the narrative and humanize Appellant by showing he had a sense of humor despite the trouble he was obviously having.

(b) failed to secure a fair and impartial panel for Appellant’s court-martial;

Defense counsel confirmed in their declarations that they scrutinized every member data sheet and asked Appellant for his opinion on each one. (Declarations of Maj A , Maj B , Mr. G .) None of them caused the defense to believe the members had been picked for a particular reason. (Declarations of Maj A , Maj B .) Moreover, even though several members had experience with domestic violence, they were “several steps removed” from it, and those members confirmed during group and individual *voir dire* that they were able to be fair and impartial. (Id.) Prior to making their challenges, defense counsel consulted with Appellant, addressed the members’ backgrounds with sexual assault or domestic violence, solicited his input, and made those challenges accordingly. (Declarations of Maj A , Maj B , Mr. G .) Finally, where the defense did not challenge members, it was for the strategic reason that they would be favorable overall to the defense. (Declarations of Maj A , Maj B .) Therefore, their strategic decisions were reasonable and they did not fall measurably below the performance ordinarily expected of fallible lawyers.

(c) failed to adequately explore the effect of a panel member’s family history of alcoholism

Although Lt C.H. had a family history that included alcoholism and domestic violence, it involved an alcoholic great-grandparent on one occasion. Trial defense counsel did probe the details during *voir dire*, but they were strategically sensitive in how much follow-up they

conducted into the topic, so they could maintain a rapport with the member, especially since the member had confirmed that he could be a fair and impartial member. (Declarations of Maj A , Maj B .) As a result, the defense was able to lodge a challenge for cause, albeit unsuccessfully, without alienating Lt C.H. if he became a court member. Counsel provided effective assistance in this regard.

(d) failed "to articulate a public perception challenge as a component" of challenges for implied bias

When trial defense counsel stated, in relation to the challenge for cause of Lt C.H., "there would be unfair prejudice, and viewed objectively through the eyes of the public, that there would be substantial doubt about the fairness of the accused's court-martial panel," (R. at 432), and "our position that objective observers would have substantial doubts about the fairness of the proceedings, if that's the case." R. 437. In doing so, trial defense counsel was referring to the public's perception of Lt C.H. sitting on the panel and articulated the standard in R.C.M. 912(f)(1)(N). Trial defense counsel also addressed public perception for challenges of other members. (R. at 422-23, 427-28, 432, 437.) Trial defense counsel understood the law and were not ineffective in this regard.

(e) failed to challenge four named panel members

Trial defense counsels' declarations explain that, based on the way the members answered questions during extensive *voir dire*, their demeanor in doing so, the defense made the strategic decision that they would have been favorable overall to the defense. (Declarations of Maj A Maj B , Mr. G .) Additionally, trial defense counsel discussed challenges with, and obtained approval from, Appellant before doing so. (Id.) These strategic decisions did not fall measurably below the standard expected for fallible attorneys.

(f) failed have Appellant testify "on the motion to suppress"

The declarations acknowledge that, while Appellant would have denied making the statements to J.M., his credibility would have been questionable because of his level of intoxication when he made the statements. (Declarations of Maj A , Maj B , Mr. G .) Trial defense practiced mock direct and cross-examinations with Appellant in preparation for the motions hearing and trial, and his versions of events were inconsistent. (Id.) Strategically, the defense did not want to make him to appear uncredible to the military judge before the trial on the merits even started, as it could have impacted the rest of the trial, and they believed cross-examining J.M. for her inconsistent statements was the better strategy. (Id.) This was sound strategy and well within reasonable standards of performance.

(g) failed to object to certain argument by trial counsel with regard to Appellant's character for violence or propensity to commit acts of violence, or "seek a limiting instruction"

Trial defense counsel reasonably interpretated the prosecutor's references to "aggression and repeated abuse" to charges involving K.D. and the "latest victim" reference to charged offenses involving B.P. (Declarations of Maj Al , Maj B .) Trial defense counsel was reasonable in not objecting because it would have called attention to the terms, solidifying them in the court member's recollection if the military judge overruled the objections, as he certainly would have done. Moreover, the military judge instructed the members on spillover. (R. at 802-05.) Again, trial defense counsel's choices were within accepted standards of competence.

(h) failed to object to certain quoted testimony

In their declarations, trial defense counsel all insist that they made objections where necessary and that, had they objected to the testimony quoted in Appellant's Brief, it would have been poor strategy, highlighting unfavorable information to the court members about the

repeatedly abuse relationship between Appellant and K.D. (Declarations of Maj A , Maj B , Mr. G .) Moreover, the quoted testimony involved isolated, fleeting comments that were part of larger answers about the charged offenses, or were otherwise not detrimental to the defense. Thus, trial defense counsel used sound strategy in objecting where they did but not objected where they declined to do so.

(i) failed to adequately impeach or cross-examine K.D.

Trial defense counsels emphasize in their declarations that their cross-examination of K.D. highlighted the critical points of the defense strategy to show her bias, motive to fabricate, and lack of credibility. (Declarations of Maj A , Maj B , Mr. G .) She had a motive to fabricate allegations once she was pregnant with another person's child, so they highlighted the timing of her allegations. (Id.) Additionally, according to trial defense counsel, during K.D.'s motions hearing testimony, they were able to get her to admit effectively that she had committed perjury. (Declarations of Maj A , Maj B .) Trial defense counsel's impeachment of K.D. demonstrated the competence expected of fallible lawyers and was not ineffective.

(j) failed to obtain discovery of KD's Facebook messages relating to Appellant

A significant part of the defense's strategy in the case was to call into question the authenticity of photographs K.D. presented. (Declarations of Maj A , Maj B , Mr. G .) The way K.D. claimed she received the photographs back from her mother, and had deleted them from her own phone, thus destroying the metadata, gave the defense the opportunity to call into question the veracity of all of the photographs as fabricated or misrepresented. (Declaration of Maj B .) Had the defense requested the underlying Facebook messages or data, it might have provided corroborating evidence to the government that it did not

have. (Declarations of Maj A , Maj B , Mr. G .) This was a reasonable strategic choice by trial defense counsel and was not ineffective.

(k) failed to object to argument by trial counsel relating to BP's rank and "glossing over the fact" that Appellant was unaware of BP's rank

The defense concluded B.P.'s rank was irrelevant based on the allegations. (Declarations of Maj A , Maj B , Mr. G) During B.P.'s testimony he said, "I don't think he knew that I was a senior NCO." (R. at 621.) Moreover, the defense strategically decided to not object on such a minor matter, because it would not look good in front of the court members and, in any event, witnesses are referred to by rank. (Id.) At no point did the government argue Appellant's sentence should be impacted by B.P.'s rank. Trial defense counsel correctly declined to object and kept the focus of the case consistent with their theory and strategy. Such a strategic decision is entitled to deference on appeal.

(l) failed "to use a bathroom diagram" that Appellant provided in order to challenge evidence and testimony related to the bathroom

Trial defense counsel did not recall Appellant providing them with a separate diagram for use at trial. (Declarations of Maj A , Maj B s.) Even if he had done so, the diagram Appellant provided on appeal exaggerates certain dimensions of the club, and B.P.'s diagram did not have inaccuracies that rendered his explanation of the event impossible. (Id.) The two military trial defense counsel visited, with Appellant, the location of the assault, but employees refused to allow the defense to take photographs. (Id.) Thus, the defense made the strategic decision to focus on the witness testimony to establish self-defense or a mutual affray. This choice was not ineffective assistance of counsel.

(m) failed to request "tailored procedural instruction on self-defense"

The defense concluded there was no need for a tailored instruction on self-defense. (Declarations of Maj A d, Maj B , Mr. G .) The military judge provided the instruction from the Military Judge's Benchbook, which was consistent with the law on point and which made clear the burden of proof beyond a reasonable doubt on the government. (R. at 802-03.) Agreeing that the military judge should give an instruction from the Benchbook was not ineffective.

(n) failed to confront or "adequately challenge" BP on "inconsistent and self-serving testimony"

The photographs in evidence showed B.P.'s significant injuries from the assault. Those, combined with the injuries to Appellant's hand, lent credibility to B.P.'s account of Appellant striking him in the face. (Declarations of Maj A , Maj B .) However, the defense laid the foundation for Appellant's self-defense claim by eliciting B.P.'s admissions to having been intoxicated and having perceived Appellant as having been disrespectful and mocking towards him. (Id.) The defense also raised B.P.'s motivation to fabricate a story that he was assaulted, because he did not want to harm his chances of receiving a retirement in as few as 5 more years. (Declaration of Maj A .) The defense made adequate efforts to attack B.P.'s credibility. The fact that they ultimately proved unsuccessful does not make those efforts ineffective assistance of counsel.

(o) "failed to call K. for various purposes," to include impeaching BP

Although the defense team considered calling K. as a witness, and asked the government to produce him, they made the strategic decision to not call him at trial. (Declarations of Maj A , Maj B , Mr. G .) -5 K. was not present during the incident, and any inconsistencies with B.P.'s testimony were minor. (Declarations of Maj A , Maj B s.)

In fact, -5 K. would have corroborated much of B.P.'s testimony and could have testified about Appellant's level of intoxication during the incident. (Declaration of Maj B .) Defense counsel did call other witnesses who were more beneficial to the defense case. (Id.) This strategic decision was not ineffective.

(p) failed to provide a sufficient evidentiary basis for compelling the production of a consultant in toxicology

The trial defense team made as solid an argument in favor of obtaining a toxicologist as could have been made with the evidence available. (Declarations of Maj A , Maj B , Mr. G .) Their motion included several attachments and facts supporting the motion. (Declarations of Maj A , Maj B s.) The military judge, as the gatekeeper of the evidence, simply denied the defense motion, but defense counsel's performance was reasonable and did not fall measurably below what is expected of fallible lawyers.

(q) failed to request a limiting instruction with regard to BP's rank and the sentencing phase of Appellant's court-martial

Based on the reasons for the mentions at trial of B.P.'s rank, it did not appear the government was using his rank in an improper way. (Declarations of Maj A , Maj B , Mr. G .) Witnesses are addressed by rank, and the reference to "senior non-commissioned officer" was appropriate for Air Force court members to understand Army enlisted rank. (Declarations of Maj A , Maj B , Mr. G .) A limiting instruction, where the government did not attempt to use rank as a basis for increasing punishment, could have backfired against the defense. (Declarations of Maj A , Maj B , Mr. G .) Trial defense counsel made a reasonable choice in not requesting a limiting instruction, and that choice was not ineffective.

(r) failed to object to testimony relating to Appellant's failure to apologize

Appellant was adamant with his trial defense team against apologizing for his actions, and any objection about a reference to failing to apologize was unimportant and could have frustrated the court members and backfired. (Declarations of Maj A , Maj B , Mr. G .) Thus, it was sound strategy to not object.

Appellant Has Shown No Prejudice

For each allegation of IAC, Appellant makes no attempt to meet his burden of showing that there is a reasonable probability that, but for the alleged errors, the result of his trial would have been different. As a result, Appellant cannot establish ineffective assistance of counsel under the Strickland test.

For the foregoing reasons, this Court should be unpersuaded that Appellant received constitutionally ineffective assistance of counsel, and it should deny his assignments of error.

XV.[29]

APPELLANT RECEIVED A FAIR TRIAL WITHOUT CUMULATIVE PREJUDICIAL ERROR.

Standard of Review

Whether an accumulation of errors deprived an appellant of a fair trial is reviewed *de novo*. United States v. Pope, 69 M.J. 328, 335 (C.A.A.F. 2011).

Analysis

Appellant argues in his two-paragraph assignment of error that "the military judge's bias, the *voir dire* and challenge errors, the erroneous rulings on motions, the prosecutorial errors, and

[29] Appellant raised this assignment of error pursuant to Grostefon.

the errors of his counsel combine to show that the Appellant did not receive a fair trial; a trial in which the public also could be assured he received a fair trial." (App. Br., Appendix, x.)

Because none of those claims, all which Appellant raised in other assignments of error, have any merit, there was no cumulative error.

CONCLUSION

The United States respectfully requests this Honorable Court deny the relief Appellant requests and, instead, affirm the findings and sentence.

STEVEN R. KAUFMAN, Col, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 21 June 2024 via electronic filing.

STEVEN R. KAUFMAN, Col, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) **NICHOLAS A. BYRNE**, USAF, *Appellant.*	))))))))	UNITED STATES' MOTION TO EXCEED PAGE LIMITS No. ACM 40391 Before Panel No. 1 21 June 2024

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

Pursuant to Rules 17.3 and 23.3(q) of the United States Air Force Court of Criminal Appeals Rules of Practice and Procedure, the United States moves to file its Answer to Appellant's Assignments of Error in excess of the length limitations in Rule 17.3. This Answer requires the United States to exceed this Court's length and word limitations due to the nature and number of issues raised by Appellant in his Assignments of Error brief. Appellant's 65-page brief (including the Appendix with issues raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)) raises a total of 15 issues, some with as many as 18 sub-issues, that require in-depth discussion of the facts, motions rulings, applicable law, and witness testimony.

WHEREFORE, the United States requests this Court grant this Motion to Exceed Page Limits in its Answer.

STEVEN R. KAUFMAN, Col, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, the Air Force Appellate Defense Division, and civilian defense counsel on 21 June 2024 via electronic filing.

STEVEN R. KAUFMAN, Col, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S MOTION**
Appellee	)	**FOR ENLARGEMENT OF TIME FOR**
	)	**REPLY (FIRST)**
	)	
v.	)	Before Panel No. 1
	)	
Airman First Class (E-3)	)	No. ACM 40391
NICHOLAS A. BYRNE	)	
United States Air Force	)	26 June 2024
Appellant	)	

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

Pursuant to Rules 23.3 and 18.5 of this Honorable Court's Rules of Practice and Procedure, Airman First Class Nicholas A. Byrne, Appellant, requests an enlargement of time (EOT) to file a Reply. The Government filed its Answer on 21 June 2024 along with a Motion to Exceed Page Limits. This Court granted the Government's Motion to Exceed Page Limits on 26 June 2024. Appellant requests an enlargement for a period of 30 days, which will end on **26 July 2024**. The record of trial was docketed with this Court on 20 December 2022. From the date of docketing to the present date, 554 days have elapsed. On the date requested, 584 days will have elapsed.

On 1 March 2022, at a general court-martial, Appellant pleaded not guilty to 12 specifications of assault consummated by battery, and one specification of sexual assault, in violation of Articles 120 and 128, UCMJ, 10 U.S.C. §§ 920, 928. On 5 March 2022, a panel of members with enlisted representation convicted Appellant of six specifications of assault consummated by battery and one specification of sexual assault. Entry of Judgment, 30 March 2022; R. at 878. The members sentenced Appellant to a dishonorable discharge, five years' confinement, total forfeitures of all pay and allowances, reduction to the lowest enlisted grade, and a reprimand. Entry of Judgment, 30 March 2022. The convening authority took no action on the

findings or sentence and denied Appellant's requests for the deferment of his reduction in rank and forfeitures. Convening Authority Decision on Action Memorandum, 22 March 2022. Appellant is confined.

The trial transcript is 945 pages long. The record of trial is comprised of eight volumes consisting of five prosecution exhibits, six defense exhibits, 74 appellate exhibits, and one court exhibit.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), counsel provides the following information. Military counsel currently has two additional active case—*United States v. Daniels* and *United States v. McLeod*.

- *United States v. Daniels* – 39407 (rem) – Appellant was tried at a general court-martial by a panel of officer members. Contrary to his pleas, Appellant was convicted of one specification of dereliction of duty, one specification of rape, and four specifications for conduct unbecoming of an officer, in violation of Article 92, 120, and 133, UCMJ. Lt Col Daniels was sentenced to a reprimand, three years of confinement, and a dismissal. On 18 June 2019, this Court set aside Appellant's conviction for rape and the sentence pursuant to *United States v. Mangahas*, 77 M.J. 220 (C.A.A.F. 2020). *United States v. Daniels III*, No. ACM 39407, 2019 CCA LEXIS 261, at *6, *23–24 (A.F. Ct. Crim. App. Jun. 18, 2019). This Court also set aside a portion of the findings for being factually insufficient. As a result of the Supreme Court's decision in *United States v. Briggs*, 141 S. Ct. 467 (2020), the CAAF reversed this Court's holding in Lt Col Daniels's case as it related to his rape conviction and remanded the case. *United States v. Daniels*, No. 19-0345, 2021 CAAF LEXIS 42 (C.A.A.F. Jan. 25, 2021). On 16 February 2021, the case was re-docketed with this Court. On 9 August 2022, this

Court again reviewed Appellant's raised issues and affirmed the findings and sentence. *United States v. Daniels*, ACM 39407 (rem), 2022 CCA LEXIS 472 (A.F. Ct. Crim. App. Aug. 9, 2022). Lt Col Daniels petitioned CAAF for review, and on 25 August 2023 it affirmed the findings but set aside the sentence, ordering remand. *United States v. Daniels*, No. 23-0004/AF (C.A.A.F. 25 Aug. 2023). Lt Col Daniels's case is currently pending before this Court. The record of trial consists of 25 prosecution exhibits, 23 defense exhibits, and 75 appellate exhibits; the transcript is 1123 pages. Lt Col Daniels is not currently confined. Ms. Marinos was recently detailed to this case and is still reviewing the Record.

- *United States v. McLeod* – 40374 – SrA McLeod was tried by a general court-martial composed of a military judge alone. Consistent with his pleas, SrA McLeod was convicted of ten specifications of various attempts, in violation of Article 80, UCMJ; and one specification of obstruction of justice, in violation of Article 131b, UCMJ. Contrary to his pleas, the military judge found SrA McLeod guilty of an additional six specifications of attempt. The military judge sentenced SrA McLeod to a reprimand, reduction to E-1, a total of 35 years' confinement, and a dishonorable discharge. The record of trial consists of eight volumes. The transcript is 533 pages. There are 43 Prosecution Exhibits, two Defense Exhibits, and 38 Appellate Exhibits. SrA McLeod is currently confined. SrA McLeod raised two assignments of error and one error pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 198) to the Air Force Court of Criminal Appeals. SrA McLeod's CAAF Supplement to Petition for Grant of Review is due on 30 June 2024 (extension pending).

Airman Byrne's Reply is currently military counsel's second priority behind SrA

McLeod's CAAF Supplement. Military Counsel is scheduled to be on annual leave 1-5 July 2024 followed by military leave 8-19 July 2024 to complete her annual tour in the U.S. Navy Reserve. Military counsel has read the Government's 72-page Answer but has not begun researching or drafting the Reply.

Civilian counsel has an active docket with two cases pending before this Court, three cases pending before the Army Court of Criminal Appeals, and one case with a Supplement to a Petition pending before the Court of Appeals for the Armed Forces. *United States v. Rudometkin* has a Supplement due on 8 July. The case has complex, meritorious issues and a significant list of claimed *Grostefon* matters. Appellant's case is next in priority.

Counsels' other case priorities, Military Counsel's annual and military leave, the complexity of this case, the length of the Government's Answer, and the limitations imposed by the confinement facility on counsel communicating with their client, justify this 30-day enlargement of time. Appellant received a copy of the Government's Answer on 25 June 2024, but Counsel needs time to communicate with the client to ensure he has an opportunity to assist with his Reply, particularly given the significant number of *Grostefon* issues raised by Appellant. The requested enlargement is necessary to allow sufficient time for counsel to review and research the Government's 72-page Answer, for coordination between military and civilian appellate defense counsel, to effectively advise Appellant, and to file a thorough Reply.

Through no fault of the Appellant, his counsel are unable to complete and file a Reply brief before this Court's current deadline. Counsel have advised the Appellant on his right to speedy appellate review, and the Appellant is aware of and agrees with this request for an enlargement of time.

WHEREFORE, the Appellant respectfully requests this Court grant this requested

enlargement of time.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 26 June 2024.

Respectfully submitted,

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28 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) NICHOLAS A. BYRNE, USAF, *Appellant.*	)))))))))	UNITED STATES' PARTIAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME FOR REPLY BRIEF ACM 40391 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its partial opposition to Appellant's Motion for Enlargement of Time to file a reply brief. The United States objects to any enlargement of time over 7 days, because Appellant has not articulated good cause to take over 4 times the normal time allotted to file a reply brief – especially since Appellant already received 5 additional days to work on its reply brief while the Court considered the United States' Motion to Exceed Page Limits.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 28 June 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S REPLY BRIEF**
	)	Before Panel No. 1
v.	)	No. ACM 40391
Airman First Class (E-3) **NICHOLAS A. BYRNE** United States Air Force *Appellant*	)	26 July 2024

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

Appellant, Airman First Class (A1C) Nicholas A. Byrne, pursuant to Rule 18(d) of this Court's Rules of Practice and Procedure, files this Reply to the Government's Answer. In addition to the arguments in his opening brief, A1C Byrne submits the following arguments.

II.

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUSTAIN A FINDING OF GUILTY FOR ASSAULT CONSUMMATTED BY A BATTERY ON A SPOUSE AS CHARGED IN SPECIFICATION 6 OF CHARGE I.

The Government charged A1C Byrne as follows: "In that Airman First Class Nicholas A. Byrne . . . did . . . on divers occasions, between on or about 1 May 2020 and on or about 31 May 2020, unlawfully strike [K.D.] on her face, on her buttock, and on her leg with his hand." Breaking this down, the Government charged A1C Byrne with (1) striking K.D. on her face with his hand, on divers occasions, (2) striking K.D. on her buttock with his hand, on divers occasions, and (3) striking K.D. on her leg with his hand, on divers occasions.

A. At most, the Government presented evidence that A1C Byrne struck K.D. on her buttock on a single occasion.

K.D. described the alleged incident: "I don't remember exactly what we were fighting about, but it was another instance where I had tried to get on the bed. He'd came in, and I kind of

knew he was going to catch me – or, like, tried to catch me, and he reached for me when I was on the bed, and I kicked at him, and he punched me in my leg and then he slapped me. I couldn't get off the bed because of the way that the room was set up. So I was essentially pinned in the room. He's much faster than me, so I tried to stay up there, but he could – he could reach across the bed either way. So that's how I'd gotten the marks on my butt and the side of my leg, from being punched and slapped on them." (R. at 513.)

When describing images that she claimed she took the following day documenting injuries or markings sustained during that alleged altercation, K.D. testified as follows:

> Q: What about that photo in the middle?
>
> A: That's from him smacking me on my butt. It's whelps [sic] of his, like, fingers.
>
> Q: And the photo all the way to the right?
>
> A: That's on the outside of my thigh. That's where he had punched and slapped multiple times. Whelps [sic] and bruises.

(R. at 518.) Unlike K.D.'s claims related to her thigh, at no time did K.D. allege that A1C Byrne struck her on her buttock *multiple times* during that altercation. The thigh is part of the leg, not the buttock. K.D.'s testimony related to her thigh was presumably offered as evidence in support of the specification as it charged A1C Byrne with striking K.D. on her *leg*. It is not evidence that A1C Byrne struck K.D. on her *buttock*. It is unclear why the Government relied on this portion of K.D.'s testimony as evidence that A1C Byrne struck K.D.'s buttocks with his hand on multiple occasions, but any such reliance is misplaced. (Gov. Ans. 19.)

B. The evidence does not support that A1C Byrne struck K.D. on her face with his hand.

K.D. claims these batteries occurred during an altercation that also involved an alleged strangulation. (R. 513-18.) When describing images that K.D. claimed she took the following

day documenting injuries or markings sustained during the alleged May 2020 altercation, K.D. testified as follows:

> Q: Ms. [K.D.], what is being depicted on the left hand side of the screen there?
>
> A: So my lip was kind of fat, and I had, like, little rings of blood, like popped around my mouth.
>
> . . .
>
> Q: Okay. What's being depicted on this – the left side of the screen there?
>
> A: Bruise on my eye and the blood speckles and the little, like, busted part of my lip. And then –
>
> Q: And what's the bruise on your eye from?
>
> A: It just happened within the – within the fight. I don't remember anything direct happening to my eye, but I'm sure it was possible, with my trying to get his arms off me.

(R. at 517-18.)

Even if, as the Government claims, "the circumstantial evidence . . . demonstrated that his striking her eye was a reasonable and foreseeable result of the assault," there is no evidence, not even circumstantial evidence, to suggest that this was accomplished by A1C Byrne's hand. K.D.'s description of the alleged assault involved A1C Byrne putting his arm around her neck and using his forearm and bicep to apply pressure. (R. at 514-15.) K.D. also recalled "smacking his arm" and "trying to move [her] head and dig [her] hands . . . between [her] neck and his arm." How K.D. sustained the alleged injuries to her face is unclear from her testimony and the images.

The Government choose to charge A1C Byrne with striking K.D. on her face with his hand on divers occasions. The Government was required to offer sufficient evidence to prove each element of that offense beyond a reasonable doubt. The Government failed to present

legally sufficient evidence and the findings of guilty to the portion of the specifications should be set aside.

While not expressly raised in his opening brief, A1C Byrne requests that the Court exercise its power to review his case for factual sufficiency, pursuant to Article 66, UCMJ, to include whether Specification 6 of Charge I is factually sufficient. A1C Byrne does not concede that he committed any of the offenses of which he stands convicted.[1]

Respectfully submitted,

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[1] On page 5 of A1B Byrnes opening brief, there was a paragraph that was inadvertently missing proper citations to the Record. The Record citations are provided here:

> K.D. testified about multiple instances of alleged physical assault spanning from August 2019 to September 2020. (R. at 475-582.) K.D. also testified about a single instance of alleged sexual abuse. (R. at 483-85.) Throughout her testimony she struggled with timelines and was attempting to estimate when offenses occurred and when she took photographs that she claimed captured injuries sustained during the alleged assaults. (R. at 473-582.)

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 26 July 2024.

Respectfully submitted,

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Appendix

In accordance with *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Nicholas Byrne, through appellate defense counsel, personally requests that this Court consider the following matters in addition to those matters raised in Appendix A of his opening brief.

X.

THE MILITARY JUDGE WAS BIASED AGAINST THE APPELLANT AND IN FAVOR OF THE PROSECUTION.

In its Answer, the Government highlighted that A1C Byrne failed to cite any language from the transcript to demonstrate the military judge's bias. (Gov. Ans. 51.) A1C Byrne provides the following portions of the record to establish this bias.

When litigating the defense's motion for a digital forensic expert, the military judge effectively fed government counsel their argument:

> ATC: Your Honor, it's the government's position that the defense does not need a digital forensic expert in regarding cross examining, as well as attacking the victim's credibility in this case, or to present additional evidence through other witnesses, such as calling an OSI agent, who has at a least a limited capability of testifying to the Cellebrite and metadata points. An expert is also not needed to put on evidence to say that an extraction was never done in this case and that metadata does not exist.
>
> . . .
>
> MJ: I just want to ensure I am understanding the government's position. You do not believe that the defense has met their burden to show that the testimony that they are requesting is relevant and necessary, and they've met the *Houser* factors for the digital forensic examiner in this case? You don't believe they've met their initial burden to even warrant compelling a witness with that capability?
>
> ATC: That's correct, Your Honor.

(R. at 75-76.) After trial counsel failed to effectively make the argument, the military judge made it for them. The military judge improperly put himself in the prosecutor's seat, demonstrating a bias in favor of the Government and against A1C Byrne.

The military judge again improperly took on the role of prosecutor when he made arguments not made by trial counsel related to the Defense motion to dismiss for violating R.C.M. 707.

MJ: Alright, you're talking about the exclusion of time. I do want to ensure I understand. There are two periods of time included in paragraph four of that memo that were specifically excluded from speedy trial computation under 707. Where [sic] those two periods of time excluded by joint agreement of the parties?

CTC: Yes, Your Honor.

. . .

CTC: Yes, Your Honor. Thank you. Your Honor, primarily I do rest on my written filing in this matter. I have not supplemented – I have not provided the court any supplemental information. I will – I will just note that this was more or less a problem of doing the math incorrectly. I referenced, Your Honor, a discussion about having bifurcated arraignment motions hearing. The parties did discuss that at the docketing conference. It was determined to be not necessary because of the – there would be agreed upon exclusions of time. That ended up not being the case, and the government concedes that the accused was not brought to arraignment before 120 days.

MJ: I'm going stop you there, and I do want to get some points of clarification—

CTC: Yes, Your Honor.

. . .

MJ: Okay. So when you're conceding – well, let me ask you this – and I'm not trying to – I want to ensure I understand what the government's position is. There is a – from the date that the trial is set, from the referral of charges – let's see which occurs – the referral of charges occurs on the 14th of July 2021. Are there any specific time periods from there, 14 July 2021, until yesterday, 27 February 2022, that you are requesting this court grant a delay and exclude from 707 computation?

CTC: No, Your Honor. Nothing further that what's in the confirmation memo that's already been excluded.

MJ: Alright, so I'm just going to back up and make sure we'll [sic] all on the same page. 707 is not a fault based rule, it doesn't matter, right? 707 doesn't care about fault, it's just whether or not specific authorities with

approve – that are able to approve delays have granted those delays and excluded the time under 707; not a fault based rule. As long as those delays were reasonable and not an abuse of discretion, generally upheld and not an issue.

. . .

MJ: Counsel, I'm trying to make sure I understand your position. You are asking for denial of the defense motion. You are not asking that this court grant a delay and exclude any delays post referral. You acknowledge, then, that – and I'm just going off whatyou told me now, your positions don't necessarily to be in stone, but I want to make sure I'm understanding each side's position. You are not making a request that time be excluded. You are acknowledging that it's over 120, but you're still asking for denial. What would be the basis of the denial of the defense's motion at this point?

. . .

CTC: Your Honor, I may have misspoken when I said that I was not requesting that this court not exclude any time post referral, to grant excludable delay. There is a – a period of time between 10 January and 27 January that, it appears, was just an oversight; it was not excluded by the parties and the military judge initially, but it – that would have been a period of unavailability from the defense. But, Your Honor, the ultimate position is that that still is not going to get under the 120 days.

. . .

MJ: Counsel, I don't want to spend too much time on this or force anybody's hand here; I'm going to hear from both sides on this. But I'm a little bit confused why I even have this motion before me and I'll let you know why. It appears that the moment that this case – the trial date is set, Defense, you are not available for a significant period of time from that date until the trial date was actually set, all the way up until January. Then it appears that the remaining portion of time was based on government's ability to get witnesses, your ability to be ready, and then a joint date was set. Why, at all, isn't that just excludable delay based on joint party availability from the date of 25 August 2021?

. . .

DC: Your Honor, the government's position was they're not ready for trial until 27 September.

MJ: Does that matter? Is it a fault based rule that request that if the government is not ready to try it and it's a granted delay, does that matter?

DC: No, it is not. Your Honor. It's not a fault based rule, but I think that it's important that if – the question then becomes what is the reason for the purpose of the exclusion of time. And I don't think the government has provided the court with any justification as to what is a reasonable exclusion from the time that charges were referred until when the government was ready for trial.

MJ: If it's not a fault based rule, you're not ready for trial, you're not ready for trial all the way until January, and then there – the – there's some negotiation between when both sides are going to be jointly ready, why is this even a motion before me? Why should you get the windfall simply because the government, at this point, doesn't seem to be able to understand that this isn't a fault based rule and if we – you need to delay the case, for both – for joint party availability, that's generally excludable delay.

And I will note this for counsel's understanding, just because in case it is not clear. Judges – when the chief judge sets the trial date, the reason they only grant excluded agreed upon delays is because they're not presiding over the case and they're not going to be making those other determinations outside of an agreement between the parties. Other than that, once it gets to the trial judge, themselves, the trial judge has the ability to grant an excludable delay, a delay that was necessitated by the availability of the parties, all the way from the referral to the actual trial date.

What I don't want to do is create an issue based on counsel's misunderstanding of the rule or create an unnecessary issue. So I will ask you to help me understand how I'm missing anything. But as of the date that the trial gets set, 25 August 2021, was your availability, the defense availability, first availability in order to try this case, 27 January 2022?

. . .

DC: Yes, sir. I believe that is correct, Your Honor, based off of our availability for trial. I think, Your Honor, though —

. . .

DC: Your Honor, I think that the rule still requires that the government bring the accused to trial within 120 days, and if they are not able to do so, then a justification has to be made in order to show that – at least the representation for excludable time. I think that – I'm sorry, Your Honor, may I have just a moment?

. . .

DC: Your Honor, I think we – the idea that charges were initially preferred in

this case on 11 May, and so I don't know if it's – in looking at the time that the government finally decides to get docketing in order to start requesting when parties are available for trial, had the government moved faster, e 1 arlier in the process, our first available date may not have been 27 January.

. . .

MJ: So don't exclude any of that time. From 25 August on, you're not available until January and then the ultimate trial date is set in agreement of the parties based on joint availability. Why am I – why is this motion before me? Again, it's not a fault based rule, you're claiming that there's any prejudice that occurred, it's just purely a clock time, just purely a 120 day mark, that from the moment that the case is docketed appears to be in large part driven by your unavailability.

Now, I understand defense counsel have many cases that you have preside over, many cases that you have to try, difficult availability, balancing different cases and different clients, so no fault on your end. But you guys were not available to try this case until January. The government couldn't get one of their witnesses in January. Based on agreement, then, between the parties of when everyone is going to be ready the trial date gets set. Why isn't that all excludable delay and this isn't even an issue?

(R. at 81-95.) The Government was floundering, so the military judge came to their rescue, improperly stepping into the role of prosecutor and making arguments on the Government's behalf. The Military Judge continued to highjack the Government's argument after the Government conceded that it violated R.C.M. 707. The military judge improperly put himself in the role of the prosecutor and made the argument to exclude time that trial counsel had not requested be excluded. Ultimately, the trial counsel adopted the military judge's argument and requested to exclude time, but only after the military judge had done the work for them. This demonstrated the judge's bias for the Government and against A1C Byrne.