IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5), **ANDREW M. DADDARIO,** United States Air Force, *Appellant.*	)	No. ACM 40351
	)	20 January 2023

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

Pursuant to Rule 23.3(m)(2), 23.3(m)(3) and 23.3(m)(6)[1] of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **30 March 2023**. The record of trial was docketed with this Court on 29 September 2022. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 182 days will have elapsed.

The reason why this request for enlargement of time has an atypical number of days elapsed and number of days that will have elapsed by the end of the extension request is, by memorandum of the Clerk of Court on 1 December 2022, "Appellant's brief shall be due not later than 60 days after 30 November 2022."

[1] Out of an abundance of caution, Appellant is perhaps including more information in this motion than is necessary. Rule 23.3(m)(2) applies because this is the first request for an extension of time. That does not require a showing of good cause. Rule 23.3(m)(6) also applies because more than 180 days will have elapsed since docketing if this motion is granted. By its own terms, Rule 23.3(m)(3) does not apply because the motion is not a "subsequent motion;" however, Rule 23.3(m)(6)—which Appellant must follow because at least 180 days have elapsed since docketing—necessarily incorporates the provisions of Rule 23.3(m)(3) with the language, ". . . in addition to the above-referenced information. . . ." Therefore, Appellant will comply with all three rules.

On 24 May 2022, Appellant was convicted, consistent with his pleas, by a general court-martial composed of a military judge alone, at Hill Air Force Base, Utah, one charge and two specifications of assault consummated upon a spouse or other intimate partner, in violation of Article 128, Uniform Code of Military Justice (UCMJ), and one charge and two specifications of domestic violence, in violation of Article 128b, UCMJ. Record (R.) at 57. Other charges and specifications were dismissed pursuant to a plea agreement. R. at 56. The military judge sentenced Appellant to a reprimand, reduction to E-1, 24 months total confinement, and a dishonorable discharge. R at 76.

The record of trial consists of three volumes. The transcript is 77 pages. There are four Prosecution Exhibits, no Defense Exhibits, and five Appellate Exhibits. Appellant is currently in confinement.

Counsel is currently assigned 19 cases; 7 cases are pending initial AOEs before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and yet to complete review of Appellant's case. Accordingly, an enlargement of time is necessary to fully review Appellant's case and advise Appellant regarding potential issues. Seven cases have priority over the present case:

1. *United States v. Lake*, ACM 40168: The record of trial consists of 17 volumes. The transcript is 1,418 pages. There are 101 Prosecution Exhibits, 14 Defense Exhibits, and 135 Appellate Exhibits. This Court remanded on 7 December 2022. Because this Court has granted 12 extensions of time prior to the remand, it will be counsel's first priority case upon re-docketing.
2. *United States v. Smith*, ACM 40202: The record of trial consists of 10 volumes. The transcript is 1,415 pages. There are 22 Prosecution Exhibits, 21 Defense Exhibits, and

76 Appellate Exhibits. Counsel filed the Brief on Behalf of Appellant on 20 December 2022. Counsel expects the Government to file its Answer in early February, with a Reply Brief to follow.

3. *United States v. Nestor*, ACM 40250: The record of trial consists of six volumes. The transcript is 838 pages. There are 25 Prosecution Exhibits, 25 Defense Exhibits, one Court Exhibit, and 38 Appellate Exhibits. Counsel is finalizing Appellant's brief for filing with this Court.
4. *United States v. Hernandez*, ACM 40287: The record of trial consists of five volumes. The transcript is 226 pages. There are seven Prosecution Exhibits, 27 Defense Exhibits, and 10 Appellate Exhibits. Counsel is currently reviewing the record.
5. *United Stats v. Portillos*, ACM 40305: The record of trial consists of three volumes. The transcript is 124 pages. There are four Prosecution Exhibits, eight Defense Exhibits, 17 Appellate Exhibits, and one Court Exhibit. Counsel is currently reviewing the record.
6. *United States v. Gonzalez-Hernandez*, ACM S32732: The record of trial consists of five volumes. The transcript is 249 pages. There are three Prosecution Exhibits, one Defense Exhibit, 31 Appellate Exhibits, and two Court Exhibits. Counsel is currently reviewing the record.
7. *United States v. Gause-Radke*, ACM 40343: The record of trial consists of eight volumes. The transcript is 1,167 pages. There are 14 Prosecution Exhibits, two Defense Exhibits, 42 Appellate Exhibits, and four Court Exhibits. Counsel is currently reviewing the record.

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

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

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 20 January 2023.

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

23 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ANDREW M. DADDARIO, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40351 Panel No. 2

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.

[redacted]

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

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 23 January 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5), **ANDREW M. DADDARIO,** United States Air Force, *Appellant.*	)	No. ACM 40351
	)	22 March 2023

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

Pursuant to Rule 23.3(m)(3) and 23.3(m)(6)[1] of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his second enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **29 April 2023**. The record of trial was docketed with this Court on 29 September 2022. From the date of docketing to the present date, 174 days have elapsed. On the date requested, 212 days will have elapsed.

The reason why this request for enlargement of time has an atypical number of days elapsed and number of days that will have elapsed by the end of the extension request is, by memorandum of the Clerk of Court on 1 December 2022, "Appellant's brief shall be due not later than 60 days after 30 November 2022." On 25 January 2023, this Court granted Appellant's first request for an enlargement of time until 30 March 2023.

On 24 May 2022, Appellant was convicted, consistent with his pleas, by a general court-martial composed of a military judge alone, at Hill Air Force Base, Utah, one charge and two specifications of assault consummated upon a spouse or other intimate partner, in violation of

[1] Whereas Rule 23.3(m)(6) ordinarily does not apply for a second request for an EOT, it does here because more than 180 will have elapsed by the end of the requested extension.

Article 128, Uniform Code of Military Justice (UCMJ), and one charge and two specifications of domestic violence, in violation of Article 128b, UCMJ. Record (R.) at 57. Other charges and specifications were dismissed pursuant to a plea agreement. R. at 56. The military judge sentenced Appellant to a reprimand, reduction to E-1, 24 months total confinement, and a dishonorable discharge. R at 76.

The record of trial consists of three volumes. The transcript is 77 pages. There are four Prosecution Exhibits, no Defense Exhibits, and five Appellate Exhibits. Appellant is currently in confinement.

Counsel is currently assigned 19 cases; 7 cases are pending initial AOEs before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and yet to complete review of Appellant's case. Accordingly, an enlargement of time is necessary to fully review Appellant's case and advise Appellant regarding potential issues. Five cases have priority over the present case:

1. *United States v. Nestor*, ACM 40250: Counsel is drafting a Reply Brief for this Court.
2. *United States v. Hernandez*, ACM 40287: The record of trial consists of five volumes. The transcript is 226 pages. There are seven Prosecution Exhibits, 27 Defense Exhibits, and 10 Appellate Exhibits. Counsel is finalizing the Brief on Behalf of Appellant.
3. *United States v. Portillos*, ACM 40305: The record of trial consists of three volumes. The transcript is 124 pages. There are four Prosecution Exhibits, eight Defense Exhibits, 17 Appellate Exhibits, and one Court Exhibit. Counsel is currently reviewing the record.
4. *United States v. Gause-Radke*, ACM 40343: The record of trial consists of eight volumes. The transcript is 1,167 pages. There are 14 Prosecution Exhibits, two

Defense Exhibits, 42 Appellate Exhibits, and four Court Exhibits. Counsel is currently reviewing the record.

5. *United States v. Leipart*, ACM 39711/Misc. Dkt. No. 2021-03: The appellant's petition for grant of review is due to the Court of Appeals for the Armed Forces on 1 May 2023.

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

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

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 22 March 2023.

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

23 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ANDREW M. DADDARIO, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40351 Panel No. 2

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.

[redacted]

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

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 23 March 2023.

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, 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,*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5), **ANDREW M. DADDARIO,** United States Air Force, *Appellant.*	)	No. ACM 40351
	)	21 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 23.3(m)(6)[1] of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his third enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **29 May 2023**. The record of trial was docketed with this Court on 29 September 2022. From the date of docketing to the present date, 204 days have elapsed. On the date requested, 242 days will have elapsed.

The reason why this request for enlargement of time has an atypical number of days elapsed and number of days that will have elapsed by the end of the extension request is, by memorandum of the Clerk of Court on 1 December 2022, "Appellant's brief shall be due not later than 60 days after 30 November 2022." On 25 January 2023, this Court granted Appellant's first request for an enlargement of time until 30 March 2023. On 24 March 2023, this Court granted Appellant's second request for an enlargement of time until 29 April 2023.

On 24 May 2022, Appellant was convicted, consistent with his pleas, by a general court-martial composed of a military judge alone, at Hill Air Force Base, Utah, one charge and two

[1] Whereas Rule 23.3(m)(6) ordinarily does not apply for a third request for an EOT, it does here because more than 180 will have elapsed by the end of the requested extension.

specifications of assault consummated upon a spouse or other intimate partner, in violation of Article 128, Uniform Code of Military Justice (UCMJ), and one charge and two specifications of domestic violence, in violation of Article 128b, UCMJ. Record (R.) at 57. Other charges and specifications were dismissed pursuant to a plea agreement. R. at 56. The military judge sentenced Appellant to a reprimand, reduction to E-1, 24 months total confinement, and a dishonorable discharge. R at 76.

The record of trial consists of three volumes. The transcript is 77 pages. There are four Prosecution Exhibits, no Defense Exhibits, and five Appellate Exhibits. Appellant is currently in confinement.

Counsel is currently assigned 20 cases; 7 cases are pending initial AOEs before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and yet to complete review of Appellant's case. Accordingly, an enlargement of time is necessary to fully review Appellant's case and advise Appellant regarding potential issues. Three cases have priority over the present case:

1. *United States v. Leipart*, ACM 39711/Misc. Dkt. No. 2021-03: The appellant's petition for grant of review is due to the Court of Appeals for the Armed Forces on 1 May 2023.
2. *United States v. Gause-Radke*, ACM 40343: The record of trial consists of eight volumes. The transcript is 1,167 pages. There are 14 Prosecution Exhibits, two Defense Exhibits, 42 Appellate Exhibits, and four Court Exhibits. Counsel is currently reviewing the record.
3. *United States v. McLeod*, ACM 40374: The record of trial consists of eight volumes. The transcript is 533 pages. There are 43 Prosecution Exhibits, two Defense Exhibits, and 42 Appellate Exhibits. Counsel is currently reviewing the record.

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

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

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 21 April 2023.

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

21 April 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ANDREW M. DADDARIO, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40351 Panel No. 2

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.

[redacted]

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

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 21 April 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5), **ANDREW M. DADDARIO,** United States Air Force, *Appellant.*	)	No. ACM 40351
	)	19 May 2023

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

Pursuant to Rule 23.3(m)(3) and 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fourth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **28 June 2023**. The record of trial was docketed with this Court on 29 September 2022. From the date of docketing to the present date, 232 days have elapsed. On the date requested, 272 days will have elapsed.

The reason why this request for enlargement of time has an atypical number of days elapsed and number of days that will have elapsed by the end of the extension request is, by memorandum of the Clerk of Court on 1 December 2022, "Appellant's brief shall be due not later than 60 days after 30 November 2022." On 25 January 2023, this Court granted Appellant's first request for an enlargement of time until 30 March 2023. On 24 March 2023, this Court granted Appellant's second request for an enlargement of time until 29 April 2023. On 24 April 2023, this Court granted Appellant's third request for an enlargement of time until 29 May 2023.

On 24 May 2022, Appellant was convicted, consistent with his pleas, by a general court-martial composed of a military judge alone, at Hill Air Force Base, Utah, one charge and two specifications of assault consummated by a battery upon a spouse or other intimate partner, in

violation of Article 128, Uniform Code of Military Justice (UCMJ), and one charge and two specifications of domestic violence, in violation of Article 128b, UCMJ. Record (R.) at 57. Other charges and specifications were dismissed pursuant to a plea agreement. R. at 56. The military judge sentenced Appellant to a reprimand, reduction to E-1, 24 months total confinement, and a dishonorable discharge. R at 76.

The record of trial consists of three volumes. The transcript is 77 pages. There are four Prosecution Exhibits, no Defense Exhibits, and five Appellate Exhibits. Appellant is currently in confinement.

Counsel is currently assigned 20 cases; 8 cases are pending initial AOEs before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and yet to complete review of Appellant's case. Accordingly, an enlargement of time is necessary to fully review Appellant's case and advise Appellant regarding potential issues. Four cases have priority over the present case:

1. *United States v. Leipart*, ACM 39711/Misc. Dkt. No. 2021-03: The appellant's petition for grant of review is due to the Court of Appeals for the Armed Forces on 22 May 2023.
2. *United States v. Gause-Radke*, ACM 40343: The record of trial consists of eight volumes. The transcript is 1,167 pages. There are 14 Prosecution Exhibits, two Defense Exhibits, 42 Appellate Exhibits, and four Court Exhibits. Counsel is drafting the Brief on Behalf of Appellant.
3. *In Re HVZ*, Misc. Dkt. No. 2023-03: As counsel for the real party in interest, a brief is due to this Court on 8 June 2023.

4. *United States v. McLeod*, ACM 40374: The record of trial consists of eight volumes. The transcript is 533 pages. There are 43 Prosecution Exhibits, two Defense Exhibits, and 42 Appellate Exhibits. Counsel is currently reviewing the record.

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

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

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 19 May 2023.

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

22 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ANDREW M. DADDARIO, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40351 Panel No. 2

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.

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

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 22 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,*	)	**MOTION TO ATTACH**
v.	)	Before Panel No. 2
Staff Sergeant (E-5), **ANDREW M. DADDARIO,** United States Air Force, *Appellant.*	)	No. ACM 40351
	)	7 June 2023

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

Pursuant to Rule 23 and 23.3(b) of this Honorable Court's Rules of Practice and Procedure, Appellant, Staff Sergeant (SSgt) Andrew M. Daddario, respectfully moves to attach the following documents to the record of trial:

A. A one-page declaration of SSgt Daddario, dated 30 May 2023.

B. A one-page declaration of Ms. McKenna Garner, dated 6 June 2023.

These declarations are relevant and necessary for this Court's resolution of an Ineffective Assistance of Counsel Assignment of Error raised in the *Grostefon* appendix. In that claim, SSgt Daddario personally alleges that the area defense counsel was ineffective for misadvising him about the confinement credit SSgt Daddario would earn for post-trial confinement time served in county jail before being transferred to a military facility.

This Court is permitted to receive these declarations and attach them to the record. *See United States v. Jessie*, 79 M.J. 437, 442 (C.A.A.F. 2020) (holding Courts of Criminal Appeals may consider affidavits when doing so is necessary for resolving issues raised by materials in the record). Ineffective assistance of counsel is explicitly authorized in the *Jessie* opinion under the exception to the general rule prohibiting extra-judicial declarations on appeal. *Id*.

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

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

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 7 June 2023.

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

ANDREW M. DADDARIO
Staff Sergeant (E-5),
United States Air Force,
Appellant.

No. ACM 40351

BRIEF ON BEHALF OF APPELLANT

DAVID L. BOSNER, Maj, USAF
Air Force Appellate Defense Division
[redacted]

Counsel for Appellant

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 2
Staff Sergeant (E-5), **ANDREW M. DADDARIO,** United States Air Force, *Appellant*.	)	No. ACM 40351
	)	Filed on: 7 June 2023

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

Assignments of Error[1]

I.

WHETHER THE MILITARY JUDGE ERRED WHEN HE ADMITTED A VICTIM UNSWORN STATEMENT AS COURT EXHIBIT C WHEN THE VICTIM WAS NOT PRESENT AT THE HEARING AND THE STATEMENT WAS OFFERED BY THE TRIAL COUNSEL INSTEAD OF VICTIM'S COUNSEL OR APPOINTED DESIGNEE?

II.

WHETHER TRIAL DEFENSE COUNSEL WERE INEFFECTIVE: (1) IN SENTENCING, FOR FAILING TO OBJECT TO THE ADMISSION OF A VICTIM UNSWORN STATEMENT ON THE GROUNDS THE VICTIM WAS NOT PRESENT AT THE COURT-MARTIAL; AND (2) POST-TRIAL, FOR REFERENCING THE WRONG LAW AND ASKING FOR RELIEF THE CONVENING AUTHORITY HAD NO POWER TO PROVIDE IN THE SUBMISSION OF MATTERS?

[1] Appellant raises one additional issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). *See* Appendix A.

Statement of the Case[2]

On 24 May 2022, Staff Sergeant (SSgt) Andrew Daddario (Appellant) was convicted, consistent with his pleas, by a general court-martial composed of a military judge alone, at Hill Air Force Base, Utah, of one charge and two specifications[3] of assault consummated by a battery upon a spouse or other intimate partner, in violation of Article 128, Uniform Code of Military Justice (UCMJ), and one charge and two specifications[4] of domestic violence, in violation of Article 128b, UCMJ. Record (R.) at 57. Other charges and specifications[5] were dismissed, with prejudice, pursuant to a plea agreement.[6] R. at 56. The military judge sentenced Appellant to a reprimand, reduction to E-1, 24 months total confinement, and a dishonorable discharge. R at 76.

The convening authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT) Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant Andrew Daddario*, dated 27 July 2022 (Decision on Action). The convening authority waived automatic forfeitures for the benefit of a dependent. *Id*. The military judge entered judgment accordingly. *See* ROT Vol. 1, *Entry of Judgment in the case of Staff Sergeant Andrew M. Daddario*, dated 18 August 2022 (EOJ).

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[2] The charged time frame for Specification 1 of Charge IV occurred "on or about 14 January 2018." As such, the punitive article in effect at that time is found in the *Manual for Courts-Martial, United States* (2016 ed.) (*2016 MCM*). All other references to the UCMJ and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.) (*2019 MCM*).

[3] Charge IV, Specifications 1 and 3.

[4] Charge V, Specifications 1 and 3.

[5] Charge I and its Specification (spoiling non-military property); Charge II and its Specification (child endangerment); Charge III and its Specification (sexual assault); Specification 2 of Charge IV (assault consummated upon a battery upon a child); Specification 2 of Charge V (domestic violence); and Charge VI and its Specifications (animal abuse).

[6] *See* Appellate Exhibit (App. Ex.) II.

Statement of Facts

Appellant pleaded guilty to, and was convicted of, four offenses: two assaults and two domestic violence offenses. *See generally* Prosecution Exhibit (Pros. Ex. 1). Three individuals (SD, TD, and KR) were the named victims of those offenses. *See* ROT Vol. 1, Charge Sheet at 3. The court-martial considered unsworn statements from all three. *See* Court Exhibit (Ct. Ex.) A, B, C.

Court Exhibit A was SD's unsworn statement; it was admitted without objection. R. at 61. Court Exhibit B was TD's unsworn statement; it was admitted without objection. R. at 62. Court Exhibit C was KR's unsworn statement. The defense counsel objected to certain content of this statement. R. at 64. The objections are annotated with a highlighter in an appellate exhibit. App. Ex. IV. The Government joined objections highlighted in blue; the military judge sustained the objection. R. at 64-65. The Defense withdrew its objections to the content highlighted in yellow. R. at 64.

KR was not present at the court-martial. R. at 63. She was not represented by counsel. *Id*. The record does not indicate she was appointed a victim's designee. The military judge asked trial counsel if they had "something that would reflect a desire that she be heard in this proceeding through this written statement?" *Id*. Responding affirmatively, the trial counsel provided Appellate Exhibit III to the court, an email chain between trial counsel and KR. It reads backwards to front, with the last page earliest in time and the first page the most recent. *See* App. Ex. III. The first email from trial counsel to KR provides a status update on the plea agreement. *Id*. at 2. KR responded, asking if she needed to do anything. *Id*. Trial counsel requested a victim impact

statement.[7] *Id*. at 1. KR next replied a few days later, saying "Here is the statement for the case. Let me know if you could access the document." *Id*. KR never specifically asked trial counsel to offer the document. She did, however, express concern that Appellant would read her statement. *Id*. ("Would [Appellant] read my statement? I would be extremely uncomfortable if he can."). She concluded the possibility of him reading it "scares [her] to the core." *Id*.

Argument

I.

THE MILITARY JUDGE ERRED WHEN HE ADMITTED A VICTIM UNSWORN STATEMENT AS COURT EXHIBIT C WHEN THE VICTIM WAS NOT PRESENT AT THE HEARING AND WAS NOT REPRESENTED BY A COUNSEL OR APPOINTED DESIGNEE.

Standard of Review

A military judge's interpretation of R.C.M. 1001A is a question of law this Court reviews *de novo*, while a military judge's decision to admit an unsworn statement is reviewed for an abuse of discretion. *United States v. Edwards*, 82 M.J. 239, 243 (C.A.A.F. 2022) (citations omitted).[8] Where no objection is made, this Court reviews for plain error. *United States v. Day*, 83 M.J. 53, 57 (C.A.A.F. 2022) (citations omitted). "To establish plain error, an appellant has the burden to demonstrate: (1) there was error; (2) the error was clear or obvious; and (3) the error materially prejudiced a substantial right of the accused." *Id*.

[7] Trial counsel wrote "It can be as in depth or not as you want it to be, just something describing how [Appellant's] choices have impacted you." App. Ex. III at 1. This "advice" is not in accordance with R.C.M. 1001(c). As noted above, a significant portion of Court Exhibit C was not considered because it went outside the scope of the rule. App. Ex. IV; R. at 64-65.

[8] Although *Edwards* analyzed R.C.M. 1001A as codified in a prior version of the MCM, the current rule—R.C.M. 1001(c) (*2019 MCM*)—should be reviewed under the same standard.

Law

A victim has a right to be reasonably heard at a sentencing hearing. Article 6b(a)(4)(B), UCMJ. The President has determined it is reasonable to offer an unsworn statement during the sentencing proceedings in a non-capital case. R.C.M. 1001(c)(2)(D)(ii). The unsworn statement can be oral, written, or both. R.C.M. 1001(c)(5)(A). "At the beginning of the presentencing proceedings, the military judge shall announce that any crime victim *who is present* at the presentencing proceeding has the right to be reasonably heard...." R.C.M. 1001(a)(3)(A) (emphasis added). R.C.M. 1001(c)(5)(B) states that "[u]pon good cause shown, the military judge may permit the crime victim's counsel, if any, to deliver all or part of the crime victim's unsworn statement." A victim who elects to be provide an unsworn statement "shall be called by the court-martial." R.C.M. 1001(c)(1).

"All of the procedures in R.C.M. 1001A contemplate the *actual participation* of the victim, and the statement being offered by the victim or through her counsel." *United States v. Barker*, 77 M.J. 377, 383 (C.A.A.F. 2018) (emphasis added). "The right belongs to the victim, and is separate and distinct from the government's right to offer victim impact statements in aggravation, under R.C.M. 1001(b)(4)." *Id*. at 378. "[T]he introduction of statements under this rule is prohibited without, at a minimum, either the presence or request of the victim [], the special victim's counsel [], or the victim's representative []." *Id*. at 382 (internal citations omitted). Because the statements were not offered by the victim or her counsel in that case, the Court of Appeals for the Armed Forces (CAAF) concluded that the military judge abused his discretion in admitting the statements. *Id*. at 383-84.

This Court has found clear and obvious error when a trial counsel verbally read an unsworn statement into the record as opposed to offering a written version of the same. *See United States*

v. Bailey, No. ACM 39935, 2021 CCA LEXIS 380, at *14-15 (A.F. Ct. Crim. App. 30 Jul. 2021) (unpub. op.).

If sentencing evidence was erroneously admitted, this Court considers "(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; [and] (4) the quality of the evidence in question." *Barker*, 77 M.J. at 384.

Analysis

The military judge plainly erred by admitting Court Exhibit C because KR was not present at the hearing and trial counsel impermissibly offered the document, as opposed to a victim's counsel or designee. This situation is practically the same as in *Bailey*, where this court found clear and obvious error for trial counsel reading the statements into the record. *Bailey*, unpub. op. at *14-15. In that case, this Court heavily relied upon *Barker*'s forceful holding; this case is no different and this Court should not change course in finding plain and obvious error. KR was not at the court-martial. R. at 63. She had no victim's counsel. *Id*. She had no designee. The trial counsel offered the statement. *Id*. It was clear or obvious error.

The military judge's only pause was to ask whether there was something reflecting a "a desire that she be heard in this proceeding through this written statement." *Id*. But Appellate Exhibit III—the purported answer to that question—does not indicate a desire for the statement to be offered. KR never asks for the statement to be offered; she only remarked, "Here is the statement." App. Ex. III at 1. Her comments right after this are telling. She is concerned Appellant would read the statement, so much that it "scare[d] her to the core." *Id*. All counsel and the military judge would reasonably know Appellant would read the statement. The rules require disclosure of the statement to the Defense. R.C.M. 1001(c)(5)(B). Knowing this, it would appear KR's desire would be to *not* have the statement introduced at the court-martial. The trial counsel

never dissuaded KR of her fear that Appellant would read her statement. This means her desire for the statement not to be offered was ever-more likely than an affirmative indication she wanted to exercise her right to be heard at the court-martial.

To be clear, even if KR had expressed a firm desire in this email to be heard without her presence, it still would not satisfy the rule-based and case law requirements for her to be present at the court-martial or have an authorized representative offer the statement for good cause shown. But to the extent this email is even evaluated, it does not pass muster. At bottom, this is clear and obvious error under *Barker* and R.C.M. 1001(c).

Turning to prejudice, Appellant recognizes that the confinement adjudged for Specification 3 of Charge V (domestic violence against KR) was 18 months, which is not Appellant's total confinement because the military judge adjudged 24 months confinement for Specification 1 of the same charge (domestic violence of SD), with confinement terms to run concurrently. R. at 76. Therefore, Appellant's *total* time in confinement was not upwards-adjusted because of this error. That being said, Article 66(d), UCMJ, places upon this Court the *de novo* responsibility to ensure each component of the sentence is not inappropriately severe. ("The Court may affirm only such findings of guilty, and the sentence or *such part or amount of the sentence*, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved.") (emphasis added). As such, the appropriate prejudice analysis in this assignment of error looks to whether the erroneous victim impact statement had any effect on the 18 months confinement adjudged for *that specification*. It did.

The trial counsel specifically mentioned this unsworn statement when discussing the appropriate sentence for Specification 3 of Charge V. *See* R. at 71. It is reasonable to conclude it affected the military judge's calculus on the amount of confinement adjudged for the convicted

offense. Without the statement, the military judge would have been none-the-wiser about the harm Appellant caused KR, which could be a valid point of consideration for sentencing. Looking at the matters before him during deliberations, Court Exhibit C is far lengthier and more vivid than the other two combined. Neither the Government nor Defense put much evidence of value in front of the sentencing authority; the victim unsworn statements loomed large in the deliberations. In a situation where assessing prejudice is far more difficult in sentencing than findings (*Edwards*, 82 M.J. at 247), Appellant has met his burden under these circumstances.

WHEREFORE, Appellant respectfully requests this Honorable Court reassess Appellant's sentence to confinement for Specification 3 of Charge V.

II.

TRIAL DEFENSE COUNSEL WERE INEFFECTIVE.

Additional Facts

In his submission of matters, the area defense counsel wrote, "Pursuant to Article 60a(b), UCMJ, as applied to this case and sentence, you are permitted to reduce the amount of confinement time of [Appellant]." ROT Vol. 3, Submission of Clemency Matters dated 2 June 2022 (Clemency). He requested confinement be reduced from 24 months to 12 months. *Id*.

Standard of Review

A claim of ineffective assistance involves a mixed question of law and fact. *United States v. Paxton*, 64 M.J. 484, 488 (C.A.A.F. 2007) (citation omitted). This Court reviews ineffective assistance claims *de novo*. *United States v. Palacios Cueto*, 82 M.J. 323, 327 (C.A.A.F. 2022).

Law and Analysis

A. Ineffective Assistance of Counsel.

"A military accused is entitled under the Constitution and Article 27(b), [UCMJ], to the effective assistance of counsel." *Denedo v. United States*, 66 M.J. 114, 127 (C.A.A.F. 2008) (internal citations omitted), *aff'd and remanded by United States v. Denedo*, 556 U.S. 904 (2009); *United States v. Scott*, 24 M.J. 186, 187–88 (C.M.A. 1987) (internal citations omitted). When reviewing ineffective assistance of counsel claims, this Court applies the two-part test outlined by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Scott*, 24 M.J. at 188. Under *Strickland*, the appellant has the burden of demonstrating: (1) a deficiency in counsel's performance that is so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment; and (2) that the deficient performance prejudiced the defense through errors was so serious as to deprive the defendant of a fair trial. *See* 466 U.S. at 687.

Interpreting *Strickland*, the CAAF has established a three-part test to determine if the evidence overcomes the presumption that defense counsel are competent. Specifically, this Court must determine:

> 1. Are appellant's allegations true; 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"?
>
> 3. If defense counsel was ineffective, is there "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) (citations omitted).

Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. *Loving v. United States*, 64 M.J. 132, 141–42 (C.A.A.F. 2006). However, the Supreme Court has recognized "an attorney's ignorance of a point of law

that is fundamental to the case combined with the failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014).

Trial defense counsel were ineffective for failing to object to Court Exhibit C on the basis that KR was not present at the court-martial and trial counsel was not authorized to offer it on KR's behalf. *Barker* was well-known binding case law of the CAAF at the time of this court-martial. *Bailey* provided ample persuasive authority from this Court to argue by analogy that if it is impermissible for trial counsel to read a statement into the record, it is impermissible to offer a written version of the same into the record. *Bailey*'s unpublished status provides no safe haven; trial defense counsel cited another unpublished case of this Court as justification for withdrawing an objection to the content of this statement at issue. R. at 64 (referencing *United States v. Halter*, No. ACM. S32666 (f rev), 2022 CCA LEXIS 254 (A.F. Ct. Crim. App. 4 May 2022) (unpub. op.)). For the reasons explained above in Issue I, this error constituted deficient performance and prejudiced Appellant.

B. Post-trial and clemency authority.

The version of Article 60, UCMJ, in effect on the date of the earliest offense of which the accused was found guilty shall apply to convening authority to the extent Article 60 requires action by the convening authority on the sentence or authorizes the convening authority to approve, disapprove, commute, or suspend a sentence in whole or in part. *See United States v. Brubaker-Escobar*, 81 M.J. 471, 474 (C.A.A.F. 2021) (per curiam). The version of Article 60, UCMJ, as codified in the *2016 MCM*, states that "[a]ction on the sentence of a court-martial shall be taken by the convening authority." Article 60(c)(2)(A), UCMJ (*2016 MCM*) (emphasis added). That statute does not permit the convening authority to disapprove, commute, or suspend in whole or in

part an adjudged sentence of confinement for more than six months or a dishonorable discharge. Article 60(c)(4)(A), UCMJ (*2016 MCM*).

There is no Article 60a(b), UCMJ, in the *2016 MCM*. Article 60a(b), UCMJ, in the *2019 MCM* places limitations on the convening authority's power to take action on the sentence, including restricting the convening authority from acting on a sentence including "a sentence of confinement, if the total period of confinement imposed for all offenses involved, running consecutively, is greater than six months." Article 60a(b)(1)(A), UCMJ (*2019 MCM*). The statute provides two exceptions to this general rule—recommendation by the military judge and substantial assistance by the trial counsel—neither of which are applicable in this case. Article 60a(c)-(d), UCMJ (*2019 MCM*).

The charging window for the earliest convicted offense is "on or about 14 January 2018." ROT Vol. 1, Charge Sheet at 3. Therefore, Article 60, UCMJ (*2016 MCM*), governed the convening authority's actions in this case, not Article 60a, UCMJ (*2019 MCM*). The area defense counsel cited the wrong statute governing the clemency decision when he cited Article 60a, UCMJ (*2019 MCM*). ROT Vol. 2 at Clemency. Article 60a, UCMJ (*2019 MCM*) did not even exist in the governing *2016 MCM*.

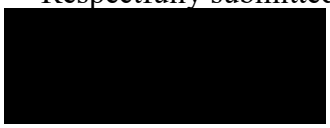
Even looking at the statute the counsel did cite, it does not support the requested relief. A convening authority cannot act on confinement greater than six months, unless the military judge recommends suspension, or an accused provides substantial assistance. Article 60a(b)-(d), UCMJ (*2019 MCM*). This notwithstanding, the area defense counsel requested the convening authority reduce confinement from 24 to 12 months. *See* Clemency. It is deficient performance to: (1) cite the wrong law; and (2) apply the incorrect law incorrectly. The area defense counsel should have been using Article 60 from the *2016 MCM* and asked for something the convening authority could

have actually done, i.e., disapprove the reprimand or reduction to the grade of E-1. He failed on both fronts. This is deficient performance.

Turning to prejudice, there is a reasonable probability of a different result had the area defense counsel's memorandum been legally correct. The convening authority's Decision on Action Memorandum states that he considered Appellant's matters and consulted with the Staff Judge Advocate. Decision on Action at 2. The SJA surely would have advised the convening authority the defense counsel's memorandum was legally erroneous and, as a matter of law, he *could not* give the relief the counsel requested. As with most commanders, if they get incorrect information as part of a briefing, they are likely to discount the entire message from that messenger. The SJA likely advised the convening authority to disregard the memorandum in its entirety. This would have precluded a legally permissible, and reasonable request, to disapprove the reduction in grade and reprimand. It appears the convening authority was amenable to at least some post-trial relief because he granted a waiver of automatic forfeitures. As such, a reasonable request for disapproving a reduction in grade or a reprimand may have received positive treatment. New post-trial processing with conflict-free defense counsel will ensure the convening authority has the benefit of hearing from Appellant the relief he desires, consistent with the law.

WHEREFORE, Appellant requests the following relief: (1) for the IAC in sentencing, Appellant requests this Court reassess the sentence; (2) for the post-trial IAC, remand for new post-trial processing to be accomplish by conflict-free defense counsel.

Respectfully submitted,



DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

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 7 June 2023.

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

APPENDIX A

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

III.[1]

WHETHER THE AREA DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE ADVISED APPELLANT THAT APPELLANT WOULD AUTOMATICALLY EARN 2:1 CREDIT FOR EACH DAY SPENT IN CIVILIAN CONFINEMENT?

Statement of Facts[2]

Capt Wiebenga advised Appellant that he would automatically receive 2:1 credit for time served at Weber County Jail in Utah. This advice was rendered in front of multiple witnesses. Appellant believed his counsel's advice and relied upon it for all five months he spent at Weber County Jail.

Argument

THE AREA DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE ADVISED APPELLANT THAT APPELLANT WOULD AUTOMATICALLY EARN 2:1 CREDIT FOR EACH DAY SPENT IN CIVILIAN CONFINEMENT.

Standard of Review

See Issue II.

Law

See Issue II.

[1] Appellant raised Issue II through counsel; this assignment of error also alleges IAC, but for a different reason.

[2] The factual basis for the assignment of error is contained in the appendices to Appellant's Motion to Attach, dated 7 June 2023.

Analysis

It is plainly defective to advise a client that he is going to automatically receive confinement credit when there is no basis in law to believe that is the case. No statute, rule, or directive would have indicated to Capt Wiebenga that this was legally valid advice. There is no basis in law for Capt Wiebenga to have believed such credit would automatically accrue. Even if Capt Wiebenga had former clients who did receive that credit, that surely does not mean Appellant would be entitled to it. Moreover, it is questionable why legal advice was being rendered to a client outside the confines of a confidential setting; the presence of McKenna Garner, Ethan Garner, and Brad Garner would have prevented the privilege from attaching. McKenna's declaration and Appellant's declaration each support the factual predicate that the faulty advice was given. If called upon, Ethan Garner and Brad Garner would say the same thing.

This advice prejudiced Appellant. He was left to believe that each day at Weber County Jail Counted for triple, that he would earn ten months credit on top of the five months actually served there. That would mean that his time in confinement would have already concluded as of the time this brief was filed. Furthermore, the declarations support the assertion that Appellant relied on this advice, that his time at Weber County Jail was horrendous, and only knowing that such time served would end in early release from confinement overall got him through the approximately 150 days at that facility.

WHEREFORE, Appellant personally asks this Honorable Court to disapprove ten months of confinement.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' MOTION TO COMPEL DECLARATIONS**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **ANDREW M. DADDARIO** United States Air Force *Appellant.*	)	No. ACM 40351 15 June 2023

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

Pursuant to Rule 23.3(e) of this Honorable Court's Rules of Practice and Procedure, the United States hereby requests this Court compel each of Appellant's trial defense counsel, Maj Aaron Brynildson and Capt Nathan Wiebenga, to provide an affidavit or declaration in response to Appellant's allegations of ineffective assistance of counsel (IAC). In his assignments of error, Appellant claims, "[t]rial defense counsel were ineffective for failing to object to Court Exhibit C on the basis that KR was not present at the court-martial and trial counsel was not authorized to offer it on KR's behalf." (App. Br. at 10.) He also claims, trial counsel were ineffective because they cited the wrong law in the submission of matters and requested clemency relief that was unavailable to Appellant. (App. Br. at 11.) Finally, in his assignment of error filed under United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982), Appellant claims trial defense counsel were ineffective because they advised him he would receive 2:1 credit for each day he spent in confinement. (App. Br. Appx. A. at 2.)

On 13 June 2023, Appellant's trial defense counsel responded to undersigned counsel stating that they would only provide an affidavit or declaration pursuant to an order from this Court. To prepare an answer under the test set out in United States v. Polk, 32 M.J. 150, 153

(C.M.A. 1991), the United States requests that this Court compel trial defense counsel to provide an affidavit or declaration. Appellant is alleging his trial defense counsel failed to object to a victim's unsworn statement provided to the court by trial counsel, but no strategic inputs about the failure to object were provided. Appellant also alleges trial defense counsel cited to incorrect law, and a statement from trial defense counsel can resolve the reasons for the clemency request and citations. Appellant claims trial defense counsel provided advice about confinement credit, but he does not expand on the context of the advice counsel provided to him. Only trial defense counsel can explain the context of the confinement credit discussion.

A statement from Appellant's counsel is necessary because the record is insufficient to determine the strategy trial defense counsel used during the presentation of the victim's unsworn and when submitting clemency for Appellant. Thus, the United States requires statements from both trial defense counsel to adequately respond to Appellant's brief. *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 statements from both trial defense counsel. *See* Rose, 68 M.J. at 237; Melson, 66 M.J. at 347.

Accordingly, the United States respectfully requests this Court order each trial defense counsel to provide a declaration, containing specific and factual responses to Appellant's allegations of ineffective assistance of counsel, within 30 days of this Court's order.

[redacted]
JOCELYN Q. WRIGHT, Capt, USAF
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Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
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NAOMI P. DENNIS, Colonel, USAF
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FOR

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

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 15 June 2023.

JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**OPPOSITION TO GOVERNMENT MOTION COMPEL DECLARATIONS**
v.	)	Before Panel No. 2
Staff Sergeant (E-5), **ANDREW M. DADDARIO,** United States Air Force, *Appellant.*	)	No. ACM 40351
	)	15 June 2023

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

Pursuant to Rule 23.2 of this Honorable Court's Rules of Practice and Procedure, Appellant, Staff Sergeant (SSgt) Andrew M. Daddario, respectfully opposes the Government motion to compel declarations, in part. Appellant does not contest this Court compelling declarations but does contest the requested time frame requested for the declarations to be returned to this Court.

On 15 June 2023, the Government filed two motions in Appellant's case. It filed a motion to compel declarations of trial defense counsel (MTC) and a motion for extension of time (Gov. EOT). The motion to compel declarations requested 30 days from this Court's order to complete a declaration responsive to Appellant's ineffective assistance of counsel (IAC) claims. *See* MTC at 2. The motion for enlargement of time asked for an additional 14 days to file an Answer with this Court after this Court's receipt of a declaration or affidavit from trial defense counsel. *See* Gov. EOT at 1. Appellant is separately challenging the Government Motion for EOT.

Appellant's chief concern is that this motion is but the first of many delays that will be requested by an understaffed Appellate Government Division. Major Bosner's last month in the Appellate Defense Division is August 2023, so further delay will potentially impede his ability to

author a reply brief. He, therefore, requests this Court's order to compel declarations require they be returned to the Court within 14 days, instead of the 30 days requested by the Government. Appellant notes that his claims of IAC claims are discrete and focused, one addressing a sentencing issue and two post-trial issues. Major Brynildson is only relevant to the sentencing issue; Capt Wiebenga is relevant for all three.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the Government motion in part and deny it in part.

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

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 15 June 2023.

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **ANDREW M. DADDARIO** United States Air Force *Appellant.*	)	No. ACM 40251 15 June 2023

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

Pursuant to Rule 23.3(m)(5), the United States respectfully requests that it be given 14 days after this Court's receipt of a declaration or affidavit from trial defense counsel to submit its answer so that it may request reservist assistance to file the United States' answer brief and incorporate statements provided by Appellant's trial defense counsel in response to the specified ineffective assistance of counsel issues. This case was docketed with the Court on 29 September 2022. Since docketing, Appellant has been granted four enlargements of time. This is the United States' first request for an enlargement of time. As of the date of this request, 259 days have elapsed.

There is good cause for the enlargement of time in this case. Appellant has raised two assignments of error in which he claims his trial defense counsel were ineffective. The United States cannot prepare its answer to the allegations of ineffective assistance of counsel without a statement from trial defense counsel. An enlargement of time is necessary to ensure trial defense counsel have time to review the allegations before they draft and submit their statements to the Court, and to give the United States sufficient time to incorporate trial defense counsels'

statements into its answer. The additional time will permit counsel to incorporate the changes and accommodate for the drafting and supervisory review before the United States files its answer.

Undersigned counsel is the only active-duty attorney in Air Force Appellate Government office who is not scheduled to transition out of the office this summer. Due to the separations of two counsel, and the permanent changes of station and assignment for two other counsel, no other attorney is available to complete this brief. Accordingly, the Government seeks a short extension of time to obtain reservist support to allow the United States to respond fully to Appellant's brief.

WHEREFORE, the United States respectfully requests this Honorable Court grant this motion for an enlargement of time.

[redacted]
JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

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NAOMI P. DENNIS, Colonel, USAF
Director
Government Trial and
Appellate Operations Division
United States Air Force
Joint Base Andrews, MD 20762
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FOR

[redacted]
MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
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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 15 June 2023.

JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**OPPOSITION TO GOVERNMENT MOTION FOR ENLARGEMENT OF TIME**
v.	)	Before Panel No. 2
Staff Sergeant (E-5), **ANDREW M. DADDARIO,** United States Air Force, *Appellant.*	)	No. ACM 40351
	)	15 June 2023

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

Pursuant to Rule 23.2 of this Honorable Court's Rules of Practice and Procedure, Appellant, Staff Sergeant (SSgt) Andrew M. Daddario, respectfully opposes the Government motion for an enlargement of time.

On 15 June 2023, the Government filed two motions in Appellant's case. It filed a motion to compel declarations of trial defense counsel (MTC) and a motion for extension of time (Gov. EOT). The motion to compel declarations requested 30 days from this Court's order to complete a declaration responsive to Appellant's ineffective assistance of counsel (IAC) claims. *See* MTC at 2. The motion for enlargement of time asked for an additional 14 days to file an Answer with this Court after this Court's receipt of a declaration or affidavit from trial defense counsel. *See* Gov. EOT at 1.

Capt Jocelyn Wright wrote and filed these motions. Yet, she does not purport to be the attorney of record at the Government Appellate Defense Division who will answer Appellant's claims. Capt Wright wrote, "Undersigned counsel is the only active-duty attorney in Air Force Appellate Government office who is not scheduled to transition out of the office this summer. Due to the separations of two counsel, and the permanent changes of station and assignment for two

other counsel, no other attorney is available to complete this brief. Accordingly, the Government seeks a short extension of time to obtain reservist support to allow the United States to respond fully to Appellant's brief." Gov. EOT at 2.

This is not in compliance with this Court's rules. Rule 23.3(m)(5) states, ". . . if counsel's workload is cited as the reason for the delay, [counsel shall provide] an explanation of counsel's other duties since the assignment of error brief was filed." Rules 23.3(m)(6) states, "A motion for an enlargement that, if granted, will expire more than 180 days after docketing in the case of an appellant or more than 240 days in the case of an appellee will contain, in addition to the above-referenced information, the following: a detailed explanation of the number and complexity of counsel's pending cases; a statement of other matters that have priority over the subject case; and a statement as to progress being made on the subject case (whether the record has been reviewed, whether a brief has been drafted, etc.)."

The Government has seemingly not detailed an attorney to this case. As such, it cannot be in compliance with Rules 23.3(m)(5) or (m)(6). Generic representations of the Government Appellate Division's manpower status is insufficient. Capt Wright, now as counsel of record pursuant to her signature on the motion, needed to include the requisite information. *See* R. 12(a), 14. Even if she had, though, it is hard to understand how that information can help this Court assess the motion when Capt Wright is not the one who will answer Appellant's brief. The Government must detail an appellate attorney, active duty or reservist, and this individual must comply with Rules 23.3(m)(5) and (m)(6).

Appellant's chief concern is that this motion is but the first of many delays that will be requested by an understaffed Appellate Government Division. Major Bosner's last month in the

Appellate Defense Division is August 2023, so further delay will potentially impede his ability to author a reply brief.

WHEREFORE, Appellant respectfully requests that this Honorable Court deny the Government motion.

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

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 15 June 2023.

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40351**
Appellee	)	
	)	
	)	
v.	)	**ORDER**
	)	
	)	
Andrew M. DADDARIO	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 7 June 2023, Appellant, through counsel, submitted an assignments of error brief in which Appellant raises two issues: (1) that the military judge erred in admitting KR's unsworn statement (Court Exhibit C) when KR was not present at the court-martial and the statement was offered by the trial counsel instead of victim's counsel or appointed designee, and (2) that his trial defense counsel were ineffective.

As to Appellant's second issue, Appellant claims his trial defense were ineffective for three reasons: (1) Appellant's trial defense counsel failed to object to the admission of Court Exhibit C on the grounds that the victim was not present at his court-martial; (2) Appellant's trial defense counsel referenced the wrong law in the submission of matters and requested clemency relief the convening authority had no power to provide in the submission of matters; and (3) Appellant's trial defense counsel wrongfully advised him that he "would automatically earn 2:1 credit each day spent in civilian confinement" before being transferred to a military confinement facility.

On 15 June 2023, the Government filed a Motion to Compel Declarations and contemporaneously filed a Motion for Enlargement of Time. The Government requests this court compel Appellant's trial defense counsel, Major (Maj) Aaron Brynildson and Captain (Capt) Nathan Wiebenga, to provide affidavits or declarations in response to the claimed ineffective assistance of counsel. According to the Government, Appellant's trial defense counsel indicated they would only provide an affidavit or declaration upon order by this court. In the Motion for Enlargement of Time, the Government requests 14 days after the court's receipt of declarations or affidavits to submit its answer. Appellant responded to both motions. Appellant opposes the motion for enlargement of time but does not oppose the motion to compel.

The court has examined the claimed deficiencies and finds good cause to compel a response from Appellant's trial defense counsel with regards to Appellant's claims. The court cannot fully resolve Appellant's claims without piercing the privileged communications between Appellant and trial defense counsel. Moreover, in light of the court's order, it finds good cause to grant the Government's requested enlargement based on the justification that an enlargement of time is needed "to incorporate trial defense counsels' statements into its answer." However, as to the Government's workload justification, we agree with Appellant's counsel that the Government's motion fails to comply with the court's rules and, consequently, it has not been considered.

Accordingly, after considering the Government's motions, Appellant's opposition to the Government's motions, and the deficiencies alleged by Appellant, it is by the court on this 23d day of June, 2023,

ORDERED:

The Government's Motion to Compel Declarations is **GRANTED**. Maj Aaron Brynildson and Capt Nathan Wiebenga are each ordered to provide an affidavit or declaration to the court that is a specific and factual response to Appellant's claim that trial defense counsel were ineffective.

A responsive affidavit or declaration by each counsel will be provided to the court not later than **20 July 2023.** The Government shall deliver a copy of the responsive affidavits or 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 **3 August 2023**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	ANSWER TO ASSIGNMENTS OF
Appellee,	)	ERROR
	)	
v.	)	Before Panel No. 2
	)	
Staff Sergeant (E-5)	)	No. ACM 40351
ANDREW M. DADDARIO	)	
United States Air Force	)	3 August 2023
Appellant.	)	

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

ISSUES PRESENTED

I.

WHETHER THE MILITARY JUDGE ERRED WHEN HE ADMITTED A VICTIM UNSWORN STATEMENT AS COURT EXHIBIT C WHEN THE VICTIM WAS NOT PRESENT AT THE HEARING AND THE STATEMENT WAS OFFERED BY THE TRIAL COUNSEL INSTEAD OF VICTIM'S COUNSEL OR APPOINTED DESIGNEE?

II.

WHETHER TRIAL DEFENSE COUNSEL WERE INEFFECTIVE: (1) IN SENTENCING, FOR FAILING TO OBJECT TO THE ADMISSION OF A VICTIM UNSWORN STATEMENT ON THE GROUNDS THE VICTIM WAS NOT PRESENT AT THE COURT-MARTIAL; AND (2) POST-TRIAL, FOR REFERENCING THE WRONG LAW AND ASKING FOR RELIEF THE CONVENING AUTHORITY HAD NO POWER TO PROVIDE IN THE SUBMISSION OF MATTERS?

III.[1]

WHETHER THE AREA DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE ADVISED APPELLANT THAT APPELLANT WOULD AUTOMATICALLY EARN 2:1 CREDIT FOR EACH DAY SPENT IN CIVILIAN CONFINEMENT?

STATEMENT OF CASE

The United States generally agrees with Appellant's statement of the case.

STATEMENT OF FACTS

Appellant physically assaulted three different intimate partners over the course of two and a half years. (Pros. Ex. 1.) SD was Appellant's wife when he kicked her in the face and pointed a firearm at her. (Id.) TD, a military member, was his girlfriend when he strangled her. (Id.) And KR, a civilian, was his girlfriend when he forcefully grabbed her by the wrists and pushed her on the bed. (Id.)

Pursuant to a plea agreement, Appellant pleaded guilty to Specification 1 of Charge IV (assault consummated by a battery against SD), Specification 3 of Charge IV (assault consummated by a battery against KR), Specification 1 of Charge V (domestic violence against SD), and Specification 3 of Charge V (domestic violence against TD). (*Entry of Judgment*, dated 24 May 2022, ROT, Vol. 1; R. at 11; App. Ex. II.) The military judge, sitting alone, found Appellant guilty of the offenses to which he pleaded guilty. (R. at 57; *Entry of Judgment*, ROT, Vol. 1.)

KR's Victim Impact Statement

During the presentencing proceeding, the military judge noted that "several individuals qualifying as crime victims desire to be heard." (R. at 60.) As a civilian who was not married

[1] Appellant raised Issue III under United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

to a service member, KR was neither entitled to representation by a victim's counsel nor represented by victim's counsel. (R. at 3, 61-63; Pros. Ex. 1.)[2] But both SD and TD were represented by victim's counsel. (R. at 3.)

SD's counsel admitted her written victim impact statement as a court exhibit on her behalf, and then SD read it verbatim for the court. (R. at 61; Court Ex. A.) TD's counsel admitted her written victim impact statement as a court exhibit on her behalf, but she did ***not*** read it on the record. (R. at 62; Court Ex. B.)

In email correspondence and during a pretrial phone conversation with trial counsel, KR expressed her desire to be heard via a written victim impact statement. (App. Ex. III.; Capt Quinn M. Randell Declaration, dated 1 August 2023 at 1.) KR was not physically present at the proceeding, but chose, to exercise her right to be heard and submitted a victim impact statement to facilitate that desire. (R. at 62-63; Court Ex. C.) Trial counsel moved to admit KR's written victim impact statement on her behalf as a court exhibit. (R. at 3, 62; Court Ex C.) Trial counsel did ***not*** read KR's victim impact statement on the record. (R. at 62.)

When trial counsel moved to admit KR's statement to the court, trial defense counsel first objected to the substance of some of KR's victim impact statement. (R. at 62-63.) Circuit defense counsel highlighted KR's statement in yellow and blue. (App. Ex. IV.) He explained, "There is yellow, which is our initial objections, then there is blue, which is, my understanding, are agreed-upon redactions by the trial counsel and defense counsel." (R. at 64.) Trial counsel agreed to redact the blue portions of KR's statement. (Id.) Circuit defense counsel explained:

[2] Department of the Air Force Instruction 51-207, *Victim and Witness Rights and Procedures*, para 3.2.2.3, establishes which victims are entitled to victim counsel services. KR, as a civilian, was not eligible. (Pros. Ex. 1.)

> I have since had a chance to review an unpublished opinion, US v. Halter, an Air Force Court opinion, and so I'm actually going to rescind my objections that are in yellow at this time, and both parties will maintain the blue not be considered by the court.

(R. at 64; App. Ex. IV.) Trial defense counsel did not object to KR's statement on any other basis. Trial defense counsel neither objected to how KR's statement was provided to the court nor to KR's absence in the courtroom. The military judge admitted KR's victim impact statement as Court Exhibit C. (R. at 65.)

Adjudged Sentence

The parties agreed the maximum punishment authorized by law based solely on the appellant's guilty plea was a reduction to E-1, total forfeitures of all pay and allowances, and confinement for 16.5 years, and a dishonorable discharge. (R. at 41-42.) The plea agreement limited Appellant's punitive exposure to a mandatory dishonorable discharge and a maximum of 24 months confinement with all confinement running concurrently so that Appellant would spend no more than 24 months in confinement. (App. Ex. III.) Each specification also required a mandatory minimum amount of confinement. (Id.) Appellant was sentenced to a reprimand, reduction in grade to E-1, a dishonorable discharge, and 24 months total confinement. (*Entry of Judgment*, ROT, Vol. 1.) Appellant received 4 months confinement for Specification 1 of Charge IV (assault consummated by a battery against SD). (Id.) He received 12 months confinement for Specification 3 of Charge IV (assault consummated by a battery against KR) – the minimum confinement available for the specification under the plea agreement. (Id.; App. Ex. III.) He received 24 months confinement for Specification 1 of Charge V (domestic violence against SD). (*Entry of Judgment*, ROT, Vol. 1.) And he received 18 months confinement for Specification 3 of Charge V (domestic violence against TD). (Id.)

ARGUMENT

I.

THE MILITARY JUDGE DID NOT ERR IN ADMITTING KR'S VICTIM IMPACT STATEMENT.

Standard of Review

A military judge's interpretation of R.C.M. 1001A[3] is a question of law reviewed de novo. United States v. Barker, 77 M.J. 377, 382 (C.A.A.F. 2018). Courts review a military judge's decision to admit evidence or victim impact statements for an abuse of discretion. Id.; United States v. Edwards, 82 MJ 239, 243 (C.A.A.F. 2022). "In the absence of an objection at trial, [courts] review claims of erroneous consideration of a victim unsworn statement for plain error." United States v. Halter, 2022 CCA LEXIS 254, *10-11 (A.F. Ct. Crim. App. 4 May 2022.) (unpub. op.). Under that standard, an appellant must show "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." United States v. Erickson, 65 M.J. 221, 223 (C.A.A.F. 2007) (internal quotation marks and citations omitted).

Law and Analysis

Congress has granted crime victims the right to be "reasonably heard" during any sentencing hearing related to that offense for which they are a victim. Article 6b(a)(4)(B), UCMJ. A victim under Article 6b is defined as "an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under this chapter." Article 6b(b), UCMJ. A crime victim has the right to make a sworn or unsworn statement. R.C.M. 1001(c)(4) and R.C.M. 1001(c)(5). The content of the unsworn statement may include

[3] R.C.M. 1001A was redesignated as R.C.M. 1001(c) with the enactment of the Military Justice Act of 2016. Executive Order No. 13,825 § 3(a), 83 Fed. Reg. 9889 (8 March 2018).

victim impact or matters in mitigation. R.C.M. 1001(c)(3). "Victim impact" is defined as "any financial, social, psychological, or medical impact on the victim directly relating to or arising from the offense of which the accused has been found guilty." R.C.M. 1001(c)(2)(B).

After trial counsel's presentation at presentencing, "a crime victim of an offense of which the accused has been found guilty has the right to be reasonably heard at the presentencing proceeding relating to that offense." R.C.M. 1001(c)(1). During a presentencing hearing the military judge must announce to any crime victim who is present that they have the right to reasonably be heard, including the right to make a written statement, and to ensure, prior to the conclusion of the presentencing proceeding, that any such crime victim was afforded the opportunity to be reasonably heard. R.C.M. 1001(a)(3)(A). The President established R.C.M. 1001(c) as the procedure used for the right to be reasonably heard. A victim's unsworn statement may be oral, written, or both oral and written. R.C.M. 1001(c)(5)(C). Under the rule, if a crime victim elects to provide an unsworn statement, she "shall provide a written proffer of the matters that will be addressed in the statement to trial counsel and defense counsel. Upon good cause shown, the military judge may permit the crime victim's counsel, if any, to deliver all or part of the crime victim's unsworn statement." Id.

Appellant argues, for the first time on appeal, that "[t]he military judge plainly erred by admitting Court Exhibit C because KR was not present at the hearing and trial counsel impermissibly offered the document, as opposed to a victim's counsel or designee." (App. Br. at 6). Appellant's claim is two-fold. First, he argues that KR was not present and did not request the admission of her statement, thus the military judge erred in admitting it. And second, trial counsel improperly admitted KR's statement, and only KR, her counsel, or a court appointed designee could have admitted it. Both arguments fail for the following reasons.

KR's Absence from the Courtroom

This Court and our superior Court have both recognized that the rules do not require a victim to be physically present to offer their unsworn statements. The Court of Appeals for the Armed Forces (CAAF) in Barker, and again in Hamilton, explained that "the introduction of statements under [R.C.M. 1001A(a)] is prohibited without, at a minimum, either the presence or *request* of the victim. Barker, 77 M.J. at 382 (emphasis added); *see also* Hamilton, 78 M.J. at 341. Although KR was hesitant about submitting a victim impact statement, KR *requested* that trial counsel submit her victim impact statement on her behalf. (Capt Randell Declaration at 1.) Capt Randell explained, "[KR] shared her concerns [her fear of Appellant] with me, and I let her know the statement is completely voluntary and only needs to be as much as she wants it to be. She ultimately decided to submit a statement." (Id.) But the military judge had no need at trial to delve further into the details of KR's desire to submit a statement, because Appellant did not object on those grounds.

Further, this Court held in United States v. Clark-Bellamy, a child pornography case, that the plain language of R.C.M. 1001A(e) did not require a victim's "physical presence . . . to present or offer a victim impact statement to the court, and that telephonic or other reliable means is sufficient to meet the intent of R.C.M. 1001A(e)[4]." ACM 39709, 2020 CCA LEXIS 391 at *19 (A.F. Ct. Crim. App. 27 October 2020) (unpub. op.). There, this Court explained that it rejected

> the argument that Congress, in providing rights for victims, also meant to add to their emotional, psychological, and potentially financial burden by requiring their physical presence in every case, where re-victimization has no limitation geographically or

[4] There was no material change to the rule when R.C.M. 1001A was redesignated as R.C.M. 1001(c) with the enactment of the Military Justice Act of 2016 that would affect this Court's analysis.

> temporally, and a victim's right to make a statement would be hidden behind an impractical barrier of constantly being at the beck and call of prosecutors, rendering inconsequential the statutes and rules that are specifically designed to give them a voice.

Id. at *17. Although the victim here did not offer her statement over the phone, the reliability of her written statement is not in question. Trial defense counsel never objected to KR's statement based on authentication or as unreliable. Nor is Appellant arguing on appeal that the written statement is unreliable. But KR did make it clear that she did not want to interact with Appellant. (App. Ex. III.) By requesting trial counsel admit the exhibit on KR's behalf, KR avoided an "impractical barrier" and protected herself from revictimization while exercising her right under Article 6b, UCMJ. Clark-Bellamy, ACM 39709, 2020 CCA LEXIS 391 at *17.

If this Court reads a presence requirement into the plain language of the rule, this Court creates a situation in which victims that do not want to be physically present for fear of their attacker, but desire to be heard at sentencing, cannot submit a victim impact statement in a court-martial. In addition, a presence requirement would be contrary to how CAAF handled the issue in Barker, 77 M.J. at 382, and Hamilton, 78 M.J. at 341. CAAF has explained that if a victim is not present at a court-martial, then the victim must express her intent to be heard at the sentencing hearing. Id. In light of these cases, it was not plain error for the military judge to admit the statements without KR being present.

Trial Counsel's Involvement in Admitting the Statement

Appellant cites United States v. Bailey for the proposition that it is "clear and obvious error" for "a trial counsel [to] verbally read an unsworn statement into the record as opposed to offering a written version of the same." No. ACM 39935, 2021 CCA LEXIS 380, at *14-15 (A.F. Ct. Crim. App. 30 Jul. 2021) (unpub. op.). But the trial counsel in Bailey read the victim

impact statement into the record. Not so here. Trial defense counsel only offered the written unsworn statement to the court and conveyed that KR – an unrepresented victim – desired to be heard via the written victim impact statement. (R. at 63.) This was not a situation in which trial counsel tried to "appropriate the rights of a victim in order to admit Government evidence in its aggravation case." United States v. Shoup, 79 M.J. 668, 671 (A.F. Ct. Crim. App. 2019) (citing Hamilton, 78 M.J. at 342). The only vessel available in the courtroom to offer KR's statement to the sentencing authority was trial counsel. KR was not entitled to victim's counsel as a civilian who was unaffiliated with the military, and she did not qualify for a designee because she was not under 18 years of age, incompetent, incapacitated, or deceased. *See* AFI 51-207, *Victim and Witness Rights and Procedures*, para 3.2.2.3; Article 6b(c), UCMJ. And forcing a victim to be physically present before her assailant to provide her victim impact statement has not been previously required. The military judge did not err by allowing trial counsel to provide KR's written statement to the court because trial counsel did so in a limited capacity without commandeering KR's statement and without objection from trial defense counsel.

The military judge did not err when he admitted KR's victim impact statement because case law does not require a victim's physical presence to admit her unsworn statement, and the law does not prohibit a victim from requesting that her unsworn statement be admitted even in her absence. R.C.M. 1001(c); *see* Barker, 77 M.J. at 382; *see also* Hamilton, 78 M.J. at 341. Trial counsel procedurally offered the statement to the military judge – because no other individual was available to do so – but trial counsel did not appropriate the statement for the benefit of the government's aggravation case. Appellant has not met his burden by showing an error occurred, let alone that any error was "plain or obvious." Erickson, 65 M.J. at 223.

Prejudice

Even if error is assumed in Appellant's case, his claim should still be denied because the admission of KR's unsworn statement did not prejudice Appellant's substantial rights. United States v. Lopez, 76 M.J. 151, 156 (C.A.A.F. 2017). The erroneous admission of sentencing evidence is tested for prejudice, and this court evaluates "whether the error substantially influenced the adjudged sentence." Hamilton, 78 M.J. at 343 (citing to United States v. Sanders, 67 M.J. 344, 346 (C.A.A.F. 2009). Courts consider four factors in determining whether an error substantially influenced a sentence, "(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question." Barker, 77 M.J. at 385.

Appellant erroneously claims that "the confinement adjudged for Specification 3 of Charge V (domestic violence against KR) was 18 months." (App. Br. at 7.) But TD is the named victim of Specification 3 of Charge V, not KR. The specification naming KR as a victim is Specification 3 of Charge IV. (*Charge Sheet*, ROT, Vol 1.) And the military judge adjudged the *minimum* confinement available under the plea agreement – 12 months. (*Entry of Judgment*, ROT, Vol 1.)

"Military judges are presumed to know the law and to follow it absent clear evidence to the contrary." Erickson, 65 M.J. at 225 (citing United States v. Mason, 45 M.J. 483, 484 (C.A.A.F. 1997)). Appellant points only to the incorrect specification and corresponding sentence to overcome this presumption with respect to the content of KR's unsworn statement. Appellant cannot claim KR's victim impact statement prejudiced him because there is no indication the military judge was emotionally swayed by the victim impact statement. The military judge only adjudged the minimum permitted per the plea agreement

– to which Appellant is a signatory.

First, the strength of the Government's case was extremely strong, despite Appellant's claim that "[n]either the Government nor Defense put much evidence of value in front of the sentencing authority; the victim unsworn statements loomed large in the deliberations." (App. Br. 8.) While the assertion about the defense's sentencing case is true, the government's evidence included Appellant's own admissions in the stipulation of fact and in the Care[5] inquiry that he physically assaulted multiple women and injured them. (Pros. Ex. 1; R. at 18-41.) During his Care inquiry, Appellant agreed that he used enough force during the physical assault against KR that "[i]t would have hurt," and he "left red marks on her wrists." (R. at 24-25.) The stipulation of fact also stated Appellant threw a picture frame at KR, and KR said Appellant used "force of 7 out of 10." (Pros. Ex. 1.) Appellant's conduct, on its own, and the undeniable affect it had on the women he hurt establishes the strength of the Government's case.

In contrast, Appellant's sentencing case was weak. Appellant read an unsworn statement to the court in which he discussed some mitigating factors like his use of mental health care to better himself. (R. at 65-67.) But he did not provide any more evidence in mitigation beyond the unsworn and pleading guilty to the four offenses.

Additionally, even though the content of the victim's unsworn statements was material for sentencing purposes, it did not have the quality to affect Appellant's sentence. First, while Appellant places weight on the fact that trial counsel cited the victim impact statements in her sentencing argument, that was only a brief sentence of the argument. (App. Br. at 7; R. at 71.) Instead, and more persuasively, trial counsel focused her argument on the specific facts of the

[5] United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).

physical assault against KR rather than spending a long time reiterating KR's unsworn statement. (R. at 70-71.) Second, Appellant was sentenced by military judge alone and a judge, while human, "is generally less apt to be emotionally swayed by the facts of the crime" than a panel. (R. at 57.); Lynch v. Fla. Dep't of Corr., 776 F.3d 1209, 1230 n.17 (11th Cir. 2015).

Third, and finally, while Appellant faced a maximum of 16.5 years of confinement, he agreed to a minimum of 12 months confinement and a maximum of 24 months confinement. (R. at 42; App. Ex. II.) He was sentenced to the minimum available under the plea agreement for the specification that named KR as a victim. (*Entry of Judgment*, ROT, Vol. 1; R. at 76.) He agreed to the minimum confinement term and then received it. KR's statement did not sway the military judge to move beyond the minimum required per Appellant's own agreement with the convening authority. Appellant does not dispute the fairness of the agreement, and even if he did, an appellant's willingness to agree to a plea agreement is "some indication of the fairness and appropriateness of [an appellant's] sentence." United States v. Perez, No. ACM S32637 (f rev), 2021 CCA LEXIS 501, at *7 (A.F. Ct. Crim. App. 28 Sep. 2021) (unpub. op.). When Appellant was going to be sentenced to at least 12 months of confinement regardless of whether KR's statement was admitted, there could be no prejudice.

In sum, the military judge did not commit a clear or obvious error or abuse his discretion by admitting KR's victim impact statement. Any presumed error did not prejudice Appellant. Thus, this Court should deny Appellant's claim and affirm the findings and sentence in this case.

II.

WHETHER TRIAL DEFENSE COUNSEL WERE INEFFECTIVE: (1) IN SENTENCING, FOR FAILING TO OBJECT TO THE ADMISSION OF A VICTIM UNSWORN STATEMENT ON THE GROUNDS THE VICTIM WAS NOT PRESENT AT THE COURT-MARTIAL; AND (2) POST-TRIAL, FOR REFERENCING THE WRONG LAW AND ASKING FOR RELIEF THE CONVENING AUTHORITY HAD NO POWER TO PROVIDE IN THE SUBMISSION OF MATTERS?

Additional Facts

Victim Impact Statement

Circuit defense counsel stated in his declaration to this Court, that he strategically chose not to object to KR's entire victim impact statement. (Maj Aaron Brynildson Declaration, dated 20 July 2023.) He explained:

> If I were to object, I believed that the legal office could and would find a way to correct the foundational defects mentioned by appellate defense counsel. If the legal office were to in fact provide live testimony or additional foundation, such testimony would be more impactful than the unsworn statement as provided.

(Id.)

Submission of Matters

In trial defense counsel's declaration to this Court, he recognized he mistakenly cited the wrong version of Article 60, UCMJ, when he requested clemency from the convening authority. (Capt Nathan M. Wiebenga Declaration, dated 19 July 2023 at 1.) He erroneously thought because Appellant elected to be sentenced under the pre-Military Justice Act[6] rules those rules

[6] The dates of the offense Appellant was convicted of occurred before and after 1 January 2019, and they straddled the implementation of the Military Justice Act of 2016. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 5001-5542 (23 Dec. 2016). (*Charge* Sheet, ROT, Vol. 1; R. at 9-10.) Appellant elected to be sentenced under the rules in place before the Act's implementation. (R. at 9-10.)

applied during clemency. (Id.) In the submission of matters, trial defense counsel cited to Article 60a(b), UCMJ (2016 ed.), and asked the convening authority to reduce Appellant's adjudged confinement. (*Submission of Matters*, dated 3 June 2022, ROT, Vol. 2 at 1.)

Although Appellant's submission of matters address deferments of confinement, forfeitures, or reduction in grade, SD requested deferments of forfeitures and reduction in grade in her submission of matters. (*Victim's Submission of Matters*, dated 1 June 2022, ROT, Vol. 2 at 2.). The convening authority granted SD's request in part. The convening authority wrote:

> Victim S.D. requested deferment of adjudged rank reduction to the extent necessary to sustain the monthly support payments of $976.20 per month she currently receives from the Accused. With the adjudged rank reduction, SSgt Daddario will still receive $1,883 per month, therefore, I did not defer the adjudged rank reduction.

(*Convening Authority Decision on Action*, dated 27 June 2022, ROT, Vol. 1 at 1.) The convening authority granted SD's request for waiver of automatic forfeitures:

> While the Accused did not request waiver of automatic forfeitures, Victim S.D. requested waiver of automatic forfeitures on 1 June 2022. All of the automatic forfeitures are hereby waived for a period of 6 months, or release from confinement, or expiration of term of service, whichever is sooner, with the waiver commencing on the date of this decision on action. The total pay and allowances is directed to be paid to Ms. [SD], spouse of the Accused, for the benefit of herself and the Accused's dependent child, [DD].

(*Convening Authority Decision on Action*, dated 27 June 2022, ROT, Vol. 1 at 1.)

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. United States v. Datavs, 71 M.J. 420, 424 (C.A.A.F. 2012) (citing United States v. Gutierrez, 66 M.J. 329, 330-31 (C.A.A.F. 2008)).

Law

The Sixth Amendment guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; United States v. Gilley, 56 M.J. 113, 124 (C.A.A.F. 2001). In assessing the effectiveness of counsel, courts apply the standard from Strickland v. Washington, 466 U.S. 668, 687 (1984), and begin with the presumption of competence announced in United States v. Cronic, 466 U.S. 648, 658 (1984).

"In order to prevail on a claim of ineffective assistance of counsel, 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). The Strickland standard is "stringent." United States v. Rose, 71 M.J. 138, 144 (C.A.A.F. 2012).

The Court can decide an ineffective assistance claim on either of these two elements without consideration of the other. Strickland, 466 U.S. at 697. So, this Court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [appellant] as a result of the alleged deficiencies." Id.

Military courts apply the following three-part test in assessing 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 were ineffective, is there 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) (alteration and omission in original) (quoting United States v.

Polk, 32 M.J. 150, 153 (C.M.A. 1991)). The burden is on Appellant to prove both deficient performance and prejudice. Datavs, 71 M.J. at 424.

To establish the element of deficiency, the appellant must first overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. In cases involving attacks on defense counsel's trial tactics, an appellant must show specific defects in counsel's performance that were "unreasonable under prevailing professional norms." United States v. Mazza, 67 M.J. 470, 475 (C.A.A.F. 2009).

"Disaffected clients seeking to assign blame for their predicament often blame their lawyers for their predicament rather than themselves. For this reason, the law presumes that counsel is effective, and places upon an appellant the burden of establishing ineffectiveness." United States v. Thompson, ACM 32630, 1998 CCA LEXIS 163, at *7 (A.F. Ct. Crim. App. 5 February 1998) (unpub. op.).

To show prejudice, Appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 698; Loving v. United States, 68 M.J. 1, 6-7 (C.A.A.F. 2008). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

An appellant who claims ineffective assistance of counsel "must surmount a very high hurdle." United States v. Alves, 53 M.J. 286, 289 (C.A.A.F. 2000) (citations and quotation marks omitted). Judicial scrutiny of a defense counsel's performance must be "highly deferential and should not be colored by the distorting effects of hindsight." Id. (citing Strickland, 466 U.S. at 689).

This Court does "not look at the success of a criminal defense attorney's trial theory, but rather whether counsel made an objectively reasonable choice in strategy from the alternatives available at the time." Thompson, 1998 CCA LEXIS at *7-8. "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).

Analysis

A. Trial defense counsel were effective in sentencing and strategically chose not to object to KR's written victim impact statement on the grounds the victim was not present at the court-martial.

The Court evaluates ineffective assistance of counsel using the three-part test set out in Gooch. First, Appellant's allegations are true – trial defense counsel did not object to the entire victim impact statement because she was not present. (R. at 64.) But trial defense counsel provided "a reasonable explanation for counsel's actions." Circuit defense counsel explained he chose not to object to the victim impact statement on foundation and authentication. In his declaration he stated:

> If I were to object, I believed that the legal office could and would find a way to correct the foundational defects mentioned by appellate defense counsel. If the legal office were to in fact provide live testimony or additional foundation, such testimony would be more impactful than the unsworn statement as provided.

(Maj Aaron Brynildson Declaration, dated 20 July 2023.) Choosing to withhold an objection is "within the wide range of reasonable professional assistance" when a different form of the same evidence would have more emotional impact. Strickland, 466 U.S. at 689. KR's live testimony could have left a stronger impression on the fact finder than her written words, and avoiding that

emotional impact was a reasonable choice to ensure Appellant was not punished more harshly for his actions.

Second, defense counsel's level of advocacy did not "fall measurably below the performance… [ordinarily expected] of fallible lawyers" because his choice not to object was a strategic one. Gooch, 69 M.J. at 362. Circuit defense counsel understood the ramifications that could arise – a more emotionally damaging oral statement by KR – and he strategically chose to avoid that scenario by agreeing to the admissibility of KR's written statement. Thus, his strategic choice after thorough investigation of the facts is "virtually unchallengeable." Dewrell, 55 M.J. at 133.

Third, and finally, if this Court determined defense counsel were ineffective, there is not a "reasonable probability that, absent the errors," there would have been a different result. Gooch, 69 M.J. at 362. Appellant was not prejudiced by the admission of KR's victim impact statement. Appellant received the minimum confinement available per Appellant's plea agreement – 12 months. (*Entry of Judgment*, ROT, Vol. 1; App. Ex. II at 2.) If KR's statement had been excluded due to her absence in the courtroom, the confinement time could not have been any lower than adjudged – because only the minimum required per the plea agreement was adjudged. (*Entry of Judgment*, ROT, Vol. 1; App. Ex. II at 2.) Appellant has failed to show "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Circuit trial counsel was not ineffective, and Appellant was not prejudiced by circuit trial counsel's strategic decision. This assignment of error should be denied.

B. Although trial defense counsel erred in post-trial by referencing the wrong law in Appellant's submission of matters, Appellant did not suffer any prejudice.

Appellant's allegation is true – trial defense counsel cited the wrong law in Appellant's submission of matters. (*Submission of Matters*; ROT, Vol 1; Capt Wiebenga Declaration at 1.)

Citing the wrong law may constitute a level of advocacy that falls "measurably below the performance… [ordinarily expected] of fallible lawyers." Gooch, 69 M.J. at 362. But even so, Appellant fails to prove prejudice. This Court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [appellant] as a result of the alleged deficiencies." Id. This Court should evaluate prejudice first and find none exists.

To prove prejudice, Appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 698; Loving, 68 M.J. at 6-7. Appellant fails to prove prejudice because he was granted the same relief through SD's submission of matters that he could have requested himself in his own submission of matters.

Appellant was sentenced to a reprimand, reduction in grade to E-1, a dishonorable discharge, and 24 months total confinement. (*Entry of Judgment*, ROT, Vol. 1.) The convening authority had limited authority to act on the sentence in a case in which the Appellant received more than six months confinement. *See* Article 60a(a)(1)(A)-(B), UCMJ. If Appellant's submission of matters had referenced Article 60a(a), UCMJ (2019 ed.), the convening authority could have (1) disapproved the reprimand; (2) disapproved or suspended the reduction in rank; (3) approved deferment of the reduction in rank under Article 57(b)(1), UCMJ, and (4) waived the automatic forfeitures for a period of six months to allow for Appellant's dependents to receive financial support pursuant to Article 58b, UCMJ. *See* RCM 1103(h). But Appellant did not indicate in his declaration to this Court that had his counsel cited the correct law, he would have requested the available relief. Since Appellant has not shown that but for his counsel's error in citing the law, he would have made a different request in clemency, he similarly cannot show that but for his counsel's error the result of the proceeding would have been different.

Although Appellant did not request any of the available relief in his submission of matters, SD did. (*Victim Submission of Matters*, ROT, Vol 2.) SD requested waiver of automatic forfeitures and deferment of the adjudged rank reduction to ensure she still received the "to the extent necessary to sustain the monthly support payments of $976.20 per month." (*Victim Submission of Matters*, ROT, Vol. 2 at 2.) The convening authority granted the waiver of adjudged forfeitures but did not grant the requested deferment of rank reduction because "[w]ith the adjudged rank reduction, [Appellant] will still receive $1,883 per month." (*Convening Authority Decision on Action*, ROT, Vol 1.) The convening authority ordered that the total pay and allowances be paid directly to SD for her benefit and that of DD, Appellant's daughter. (Id.)

Appellant and his family benefited from the mercy of the convening authority even though Appellant's submission of matters cited the wrong law. Appellant suffered no prejudice, and this Court should deny this assignment of error.

III.[7]

WHETHER THE AREA DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE ADVISED APPELLANT THAT APPELLANT WOULD AUTOMATICALLY EARN 2:1 CREDIT FOR EACH DAY SPENT IN CIVILIAN CONFINEMENT?

Additional Facts

Capt Wiebenga stated in his declaration to this court, "I believe I did advise SSgt Daddario that if his conditions were bad enough, he could potentially receive additional credit for time served, and I believe I did use 2-for-1 credit as an ***example***." (Capt Wiebenga Declaration at 1) (emphasis added). Trial defense counsel caveated his statement by saying "I

[7] Appellant raised Issue III under United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

explained my understanding of 2-for-1 credit meant that for every 1 day of confinement he could get 2 days of credit ***if*** his conditions at Weber County were bad enough or in violation of Air Force or Department of Defense Standards." (Id.)(emphasis added).

Standard of Review

The standard of review for this issue is the same as Issue II above.

Law

The United States incorporates the law from Issue II above here.

Analysis

This Court applies the three-part test set out in Gooch for claims of ineffective assistance of counsel. 69 M.J. at 362.

Truth of the Allegation

Appellant fails the first prong laid out in Gooch which requires an appellant to show his allegations are true. Id. Appellant alleges trial defense counsel told Appellant he would "automatically receive confinement credit." (App. Br., Appx. at 2.) This allegation is untrue. Trial defense counsel did ***not*** state Appellant would "automatically" receive confinement credit. He had multiple conversations with Appellant and discussed "numerous ways in which [Appellant] might receive additional credit for his time in confinement." (Capt Wiebenga Declaration at 1.) But trial defense counsel did not guarantee Appellant would receive any credit. (Id.)

Appellant argues that "[e]ven if Capt Wiebenga had former clients who did receive that credit, that surely does not mean Appellant would be entitled to it." (App. Br., Appx. at 2.) But again, Capt Wiebenga made no guarantees that credit would be granted, instead he was using examples of what he had seen in previous cases. (Capt Wiebenga Declaration at 1.)

Level of Advocacy

Appellant's allegation fails the second prong of the Gooch test – that if the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance … [ordinarily expected] of fallible lawyers." If this Court determines Appellant's allegation is true – that in front of Appellant and three witnesses trial defense counsel stated Appellant would automatically receive confinement credit – Appellant still fails. Trial defense counsel's advocacy did not "fall measurably below" the expected level of performance because before Appellant pleaded guilty or was sentenced, confinement credit was discussed and caveated in a confidential setting. Trial defense counsel explained:

> During my representation of SSgt Daddario, we had many discussions about confinement and the calculation of time. Largely these conversations took place inside the confines of the attorney-client relationship. We discussed numerous ways in which he might receive additional credit for his time in confinement. We discussed the credit he would receive for "good behavior" and my understanding that for every eight days he served in confinement he would receive one day of credit as long he did not have any misconduct or behavioral issues.

(Capt Wiebenga Declaration at 1.) Even if trial defense counsel misspoke once in front of Appellant's family, trial defense counsel correctly advised Appellant on the topic multiple times in a privileged setting before Appellant pleaded guilty. (Id.) Even if trial defense counsel erred in that moment with Appellant's family, one unqualified statement does not negate trial defense counsel's many and properly caveated conversations on the same topic before trial.

Prejudice

Even if this Court believes Appellant's allegation is true and finds trial defense counsel ineffective, Appellant fails to show prejudice. To prove prejudice, Appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." Strickland, 466 U.S. at 698; Loving, 68 M.J. at 6-7. Appellant fails to prove prejudice because he cannot show but for trial defense counsel's discussion about confinement "the outcome of the proceeding would have been different." Strickland, 466 U.S. at 698; Loving, 68 M.J. at 6-7.

Appellant argues "[h]e was left to believe that each day at Weber County Jail counted for triple, that he would earn ten months credit on top of the five months actually served there." (App. Br., Appx. at 2.) And he claims "that his time at Weber County Jail was horrendous, and only knowing that such time served would end in early release from confinement overall got him through the approximately 150 days at that facility." (Id.) But he provides no proof of those conditions.

Although confinement may be mentally taxing, Appellant fails to provide this Court with any legal avenue to confinement credit. He does not allege specific issues with the facility's conditions, and he makes no claims of cruel and unusual punishment that could warrant relief. Trial defense counsel provided Appellant with a post-trial and appellate rights advisement that explained in relevant part "how to get relief" from poor confinement conditions. (App. Ex. V at 3.) Appellant neither addressed confinement conditions with the convening authority in his submission of matters nor in conversations with his attorney after being confined. (*Submission of Matters*, ROT, Vol. 1; Capt Wiebenga Declaration at 2.)

Trial defense counsel said, "I remember his concerns generally being the normal concerns that most clients have: when he would be transferred, to what facility, whether or not his family would be able to visit, etc." (Capt Wiebenga Declaration at 2.) In his submission of matters, Appellant stated he had "a large support network that is in place to ensure his success and his rehabilitation." (*Submission of Matters*, ROT, Vol 1 at 1.) A support network would be

available to alleviate Appellant's stress in confinement through phone calls and visits – the facility was near Hill Air Force Base, UT.

Appellant essentially claims that he detrimentally relied on trial defense counsel's alleged statements about confinement credit, but he failed to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 698; Loving, 68 M.J. at 6-7. The statements about confinement credit with which Appellant takes issue occurred after the proceeding, and the statements would not have affected the voluntariness of his plea or his sentence. Trial defense counsel did not have any control over the credit Appellant received. Instead, Appellant controlled the amount of credit he received by following the rules of the facility. What's more, trial defense counsel does not control or calculate confinement credit – the confinement NCO does. "The ***confinement NCO*** computes sentences by determining good conduct time (GCT), earned time (ET), and special acts abatement (SAA)." Air Force Manual (AFMAN) 31-115, *Department of the Air Force Corrections System*, Vol 1., para. 5.6 (22 December 2020) (emphasis added). Relief from this Court must be predicated on material prejudice to a substantial right. Article 59(a). Even if trial defense counsel's statements incorrectly gave Appellant false hope about the length of confinement he would serve, Appellant did not rely on the statements in making any decisions. Having one's hopes for a shorter stay in confinement dashed is not the type of prejudice to a substantial right contemplated by Article 59(a).

Appellant has not surmounted the "very high hurdle" to prove ineffective assistance of counsel. Alves, 53 M.J. at 289 (C.A.A.F. 2000). Rather, Appellant is a "[d]isaffected client[]" and he is seeking to blame his predicament on his lawyers rather than himself. Thompson, ACM 32630, 1998 CCA LEXIS 163, at *7. Trial defense counsel was not ineffective when he

discussed possible avenues of confinement credit with Appellant. Even if trial defense counsel was ineffective, Appellant did not suffer any prejudice. This Court should deny this assignment of error.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the findings and sentence in this case.

JOCELYN Q. WRIGHT, Capt, 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 3 August 2023.

JOCELYN Q. WRIGHT, 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*,	)	UNITED STATES' MOTION TO ATTACH DOCUMENT
v.	)	
	)	Before Panel No. 2
Staff Sergeant (E-5) **ANDREW M. DADDARIO**, USAF *Appellant.*	)	No. ACM 40351
	)	3 August 2023

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States moves the Court to attach the following document to this motion:

- Appendix – Captain Quinn M. Randell Declaration, dated 1 August 2023 (26 pages)

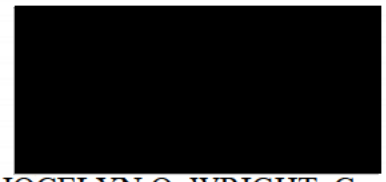
Appellant argues in Issue I of his assignments of error that KR's request to be heard when she was not present in the courtroom is unclear. (App. Br. 6.) Trial counsel admitted KR's victim impact statement on her behalf, and the military judge asked whether there was something that reflected KR's "desire that she be heard in this proceeding through this written statement." (R. at 63.) Trial counsel offered Appellate Exhibit III, an email between KR and assistant trial counsel discussing her victim unsworn statement, as evidence of KR's desire to be heard by the court-martial even though she was not present in the courtroom. (R. at 63.) Appellant did not object to the admissibility of the unsworn statement on the grounds that KR had to be present in the courtroom in order to offer her unsworn statement. Thus, the military judge conducted no further inquiry into the matter.

Appellant's allegation that "Appellate Exhibit III—the purported answer to that question—does not indicate a desire for [KR's] statement to be offered." (App. Br. at 6.) The

attached declaration is responsive to Appellant's allegation because Capt Quinn Randell, the assistant trial counsel on the case, provides additional context to Appellate Exhibit III and KR's desire to be heard on the record.

Our Superior Court held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court concluded that "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442 (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)). Whether KR requested trial counsel to admit her statement on her behalf without her presence in the courtroom was directly raised in the record when the military judge asked about whether she desired to be heard. (R. at 63.) Then trial counsel submitted Appellate Exhibit III to show KR's desire to be heard. (*See* App. Ex. III.) Since Appellant did not object on these grounds, the record contains no further information about KR's desire to be heard. Accordingly, since Appellant is allowed to raise this forfeited issue under plain error review, the attached documents are relevant and necessary to provide full context so this Court can address Appellant's assignment of error.

WHEREFORE, the United States respectfully requests this Court grant this Motion to Attach the Document.



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MARY ELLEN PAYNE
Associate Chief
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 3 August 2023.

JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME TO FILE REPLY BRIEF**
v.	)	Before Panel No. 2
Staff Sergeant (E-5), **ANDREW M. DADDARIO,** United States Air Force, *Appellant.*	)	No. ACM 40351
	)	3 August 2023

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

Today, 3 August 2023, Government counsel filed an answer to Appellant's Assignments of Error, filed on 7 June 2023. Government counsel also filed a motion to attach. Pursuant to Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file a reply to the Government's Answer.

Appellant intends to oppose the Government's motion to attach. This Court's rules permit seven days to do so. Whether this Court ultimately grants or denies the Government's motion is going to significantly alter the scope and substance of Appellant's reply brief. Thus, Appellant requests an extension of time to file the reply brief, by order the Court, to be set seven days after this Court's action on the Government motion to attach.

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

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

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 3 August 2023.

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

4 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ANDREW M. DADDARIO, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME TO FILE REPLY BRIEF ACM 40351 Panel No. 2

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 opposes Appellant's Motion for Enlargement of Time to file a Reply Brief. Appellant does not need to wait for this Court's ruling on the government's Motion to Attach before filing a reply brief. Appellant can easily draft his reply brief in a way to address both possible contingencies: either the Court grants or does not grant the Motion to Attach. Granting Appellant's enlargement request in this case would set a bad precedent. The parties before this Court frequently file and oppose each other's motions to attach. If briefing was delayed in every such case, it would significantly slow down this Court's ability to provide timely appellate review.

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

[redacted]

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

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 August 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

ANDREW M. DADDARIO
Staff Sergeant (E-5),
United States Air Force,
Appellant.

No. ACM 40351

REPLY BRIEF ON BEHALF OF APPELLANT

DAVID L. BOSNER, Maj, USAF
Air Force Appellate Defense Division
[redacted]

Counsel for Appellant

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel 2
Staff Sergeant (E-5), **ANDREW M. DADDARIO,** United States Air Force, *Appellant*.	)	No. ACM 40351
	)	Filed on: 10 August 2023

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

COMES NOW, Appellant, Staff Sergeant (SSgt) Andrew M. Daddario (Appellant), by and through his undersigned counsel pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, and files this reply to Appellee's Answer [hereinafter Gov. Ans.], filed on 3 August 2023. Appellant primarily rests on the arguments contained in the Brief on Behalf of Appellant [hereinafter App. Br.], filed on 7 June 2023, but submits the following additional matters for this Court's consideration.

I.

THE MILITARY JUDGE ERRED WHEN HE ADMITTED A VICTIM UNSWORN STATEMENT AS COURT EXHIBIT C WHEN THE VICTIM WAS NOT PRESENT AT THE HEARING AND WAS NOT REPRESENTED BY A COUNSEL OR APPOINTED DESIGNEE.

The Government correctly notes that Appellant's opening brief incorrectly indicated the specification involving KR was Specification 3 of Charge V when it was actually Specification 3 of Charge IV. Gov. Ans. 10. Appellant stands corrected and this reply brief takes ownership of that typographical error. The difference between the two, however, is of little practical importance in resolution of the issue before the Court.

A. The military judge's error was plain or obvious.

1. *The Government's motion to attach.*

The Government filed a motion to attach on 3 August 2023, attempting to attach a 26-page appendix, consisting of a trial counsel declaration and six emails. This Court should deny the Government's motion for the reasons articulated in Appellant's opposition, dated 7 August 2023. In the event the Court grants the Government motion, it should still elect to substantively non-consider the Appendix. Whether or not the military judge plainly erred, as alleged in Issue I, is fixed in time based on what the military judge knew at the time he admitted Court Exhibit C. This Court cannot find "no plain error" based on things the military judge did not know. Consider the consequences of evaluating the attached material. For *any* error alleged by an appellant before this Court, under the Government's logic, it could toss in additional matters for consideration on appeal to buttress an argument the military judge did not abuse his discretion on a certain issue or did not plainly err on another. Certainly, it is unthinkable for a military judge to author a post-trial affidavit averring, for instance, "If this Court finds the argument improper, I did not consider it. In any event, I was not unduly swayed by the argument." Though an extreme example, the case presented here is not much different at its core.

As the proponent of the document—or at least the entity offering the document—the trial counsel had an affirmative obligation to satisfy Rule for Courts-Martial (R.C.M.) 1001(c) and the case law interpreting it. The trial counsel could have spoken into the record everything he wrote in his affidavit now presented to this Court. The other six emails could have been Appellate Exhibits (App. Ex.) IV-IX. Trial counsel's failure to put these matters on the record at the time fixed the factual landscape for the military judge at trial. This Court should only review whether Appellate Exhibit III satisfied R.C.M. 1001(c) and the case law interpreting it.

2. *KR's presence.*

Appellate Exhibit III was the only document before the trial court speaking to KR's supposed desire to be heard. In the email chain, there are four emails—two emails each from KR and the trial counsel. App. Ex. III at 1-3. The first email is from the trial counsel, altering KR to the intent to proceed with a plea agreement and asking her if she still supported it. *Id*. at 2. KR only says, "Thank you for the update. Do I need to do anything at this point." *Id*. At this point, the trial counsel tells KR about a potential victim impact statement. *Id*. at 1. KR replies, "Here is the statement for this case. Let me know if you could access the document." *Id.* She immediately launches into a discussion about whether Appellant would read the statement because she was scared he would "come for [her]." *Id*. KR never says she will not be present at the court-martial. Her reasons for being absent are similarly not included in this email chain. She never asks the trial counsel to offer the statement.

This document is woefully inadequate to establish the reasons for KR not being in the courtroom, or more fundamentally, that she even wanted the statement considered once she learned Appellant would surely read it. Perhaps tellingly, she never gets an answer to her question. Maybe her answer would have been an express "no," had she learned Appellant would read it. Regardless, the state of the record on this point is thin, at best. There was no "good cause" shown for her non-attendance or for trial counsel to put in this document on her behalf. *Cf*. R.C.M. 1001(c)(5)(B) (discussing when a victim's counsel can read an unsworn statement). Based on Appellate Exhibit III and that alone, there the military judge clearly erred by accepting Court Exhibit C.

3. *A victim, a victim's counsel, or victim's designee.*

There is a second aspect of this error. The law requires the statement be offered by the victim, victim's counsel, or victim's designee, or by request of one of those three. "[T]he

introduction of statements under this rule is prohibited without, at a minimum, either the *presence or request* of the victim [], the special victim's counsel [], or the victim's representative []." *Barker*, 77 M.J. 377, 382 (C.A.A.F. 2018) (emphasis added).

The Government, on appeal, argues because KR had no victim's counsel or representative, the trial counsel *must* be the one to vindicate KR's rights. Gov. Ans. at 9. But that is wrong. The Government's calculation misses one crucial option: KR. KR could have been at the hearing and offered her own statement. That she was not present is the source of the error as discussed in subsection (2) above. Just because KR had no counsel or designee does not mean trial counsel gets to offer the document. *Barker* is clear. It says "presence or request" of the victim, special victim's counsel, or the victim's representative. 77 M.J. at 382. There was no presence or request by any of these three individuals. That is error, clear and obvious. *Barker* is now five years old and well-settled.

B. Prejudice.

There is one point of law the Government does not mention in its Answer related to prejudice this Court should consider. In a section called, "Prejudice," the Government writes, "Military judges are presumed to know the law and to follow it absent clear evidence to the contrary." Gov. Ans. at 10. But this military judge presumption goes to the error, not prejudice. *See United States v. Hukill*, 765 M.J. 219, 223 (C.A.A.F. 2017) ("[The] government's argument before this court that the error was harmless due to this presumption is not a prejudice argument. The presumption is that military judges will correctly follow the law, which would normally result in no legal error, not that an acknowledged error is harmless. The presumption cannot somehow rectify the error or render it harmless."). Appellant's argument is that the judge plainly erred; if this Court finds the error plain or obvious in nature, it cannot then use a presumption the military

judge was uninfluenced by the error in the prejudice analysis. Instead, this Court should use a traditional prejudice analysis without endorsing a presumption of "no prejudice" because a military judge sentenced Appellant.

One final point. Regardless of whether this Court finds prejudice, Appellant respectfully requests this Court not assume error and dispose of the claim on prejudice grounds. Appellant explicitly requests this Court resolve the underlying error for the benefit of case law development.

WHEREFORE, Appellant respectfully requests this Honorable Court reassess Appellant's sentence.

II.

TRIAL DEFENSE COUNSEL WERE INEFFECTIVE.

A. Failure to object to KR's statement on the basis she was not present.

The Government relies on Major Brynildson's affidavit, where he decided not to object in order to thwart "testimony [that] would be more impactful that the unsworn statement as provided" from being offered. Gov. Ans. at 13. That explanation does not suffice.

Consider the possible ways the situation would have progressed had trial defense counsel objected. Trial counsel may have provided sufficient basis to demonstrate good cause for lack of presence and an affirmative request to have the statement considered. If so, the statement that already erroneously got in front of the military judge would be in front of him properly. The statement would not be any "worse." It would be the same document. However, if the trial counsel could not meet the task, the statement would not have come in at all, which would have been beneficial for Appellant. The other way this could have gone is, in the face of the military judge rejecting Court Exhibit C, the Government would have either called KR as a witness or abandon the effort. The latter is far more likely. KR was not there. She was not going to be there. The

case was not going to be continued in the middle of the presentencing session for her attendance. KR also was unlikely to testify telephonically. According to Appellate Exhibit III, she was worried of the possibility Appellant would *read* her statement; she would be ever more so concerned knowing Appellant would *hear* her testimony. It is also unlikely she would choose to be cross-examined. Thus, faced with this choice, the benefits to a sustained objected far outweigh the risk of objecting. As such, even if this decision is labeled "strategic" or "tactical" it is unreasonable, and the presumption of competence should be overcome.

B. Citing the wrong law in the submission of matters.

As a starting point, the Government appropriately concedes—as Capt Wiebenga did—that he got the law wrong in the submission of matters. Gov. Ans. at 13. This falls measurably below the standard expected of even fallible counsel. When it comes to prejudice in this post-trial action, this Court should not speculate as to what the convening authority would have done had he been properly advised. *See United States v. Valentin-Andino*, 83 M.J. 537, 542 (A.F. Ct. Crim. App. 2023) ("If an appellant makes some colorable showing of possible prejudice, the court will give that appellant the benefit of the doubt and will not speculate on what the convening authority might have done if defense counsel had been given an opportunity to comment."). In that case, it was about the "opportunity to comment;" here, it is about the opportunity to comment in a legally correct fashion.

This Court should remand for a new opportunity for clemency with conflict-free defense counsel. *See United States v. Gonzalez*, No. ACM 39125, 2018 CCA LEXIS 145, at *31-40 (A.F. Ct. Crim. App. 22 Mar. 2018) (unpub. op). (remanding for new post-trial processing with conflict free defense counsel); *United States v. Simmons*, No. ACM 39342, 2019 CCA LEXIS 156 (A.F.

Ct. Crim. App. 9 Apr. 2019) (unpub. op.) *reversed and remanded in part by United States v. Simmons*, 82 M.J. 134 (C.A.A.F. 2022) (same).

WHEREFORE, Appellant requests the following relief: (1) for the IAC in sentencing, Appellant requests this Court reassess the sentence; (2) for the post-trial IAC, remand for new post-trial processing to be accomplish by conflict-free defense counsel.

Respectfully submitted,

[redacted]

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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 Appellate Government Division on 10 August 2023.

Respectfully submitted,

[redacted]

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