

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	APPELLANT’S MOTION FOR
<i>Appellee,</i>	)	ENLARGMENT OF TIME (FIRST)
	)	
v.	)	
	)	Before Panel 1
Major (O-4)	)	
Brandon S. Jastal,	)	No. ACM 40823
United States Air Force,	)	
<i>Appellant.</i>	)	10 July 2025

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for a first enlargement of time to file his brief. Appellant’s case was docketed on 21 May 2025. Appellant’s brief is currently due on 21 July 2025.¹ Appellant requests an enlargement for a period of sixty days, which will expire on **19 September 2025**.

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

¹ Rule 18(d)(1) of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals provides that for automatic appeals under Article 66(b)(3), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(3), an “appellant’s brief shall be filed no later than 60 days after” docketing. Appellant’s sentence included a dismissal, thus making his case an automatic appeal. *See* Trial Tr. at 1468; Convening Authority Decision on Action – *United States v. Major Brandon S. Jastal*, ¶ 2 (24 Feb. 2025) (“I take no action on the sentence in this case.”); Entry of Judgment (8 Mar. 2025). Sixty days from the date of docketing is Sunday, 20 July 2025. Rule 15 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals provides that when the “last day of” a period prescribed by the Joint Rules, order of a Court of Criminal Appeals, or applicable statute “is a Saturday, Sunday, or legal holiday, or a day on which the Court is closed,” the “period runs until the end of the next day that is not a Saturday, Sunday, holiday, or day on which the Court is closed.” Thus, Appellant’s brief is currently due on Monday, 21 July 2025.

Respectfully submitted,

Dwight H. Sullivan
Appellate Defense Counsel

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 July 2025

Respectfully submitted,

Dwight H. Sullivan
Appellate Defense Counsel

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
	)	OF TIME
v.	)	
	)	
	)	Before Panel No. 1
Major (O-4)	)	
BRANDON S. JASTAL,	)	No. ACM 40823
United States Air Force,	)	
<i>Appellant.</i>	)	
	)	11 July 2025

**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]

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel

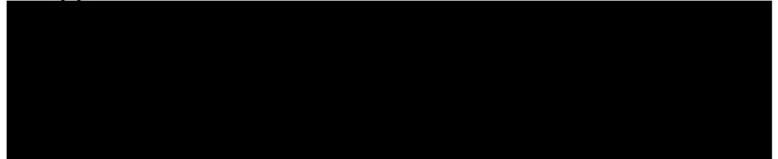
[REDACTED]

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 11 July 2025.



VANESSA BAIROS, Maj, USAF
Appellate Government Counsel



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

UNITED STATES	)	No. ACM 40823
<i>Appellee</i>	)	
	)	
v.	)	
	)	ORDER
Brandon S. JASTAL	)	
Major (O-4)	)	
U.S. Air Force	)	
<i>Appellant</i>	)	Panel 1

On 10 July 2025, counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 days to submit Appellant’s assignments of error.

In his motion, Appellant’s counsel incorrectly noted the projected due date for Appellant’s brief: “Appellant requests an enlargement for a period of sixty days, which will expire on 19 September 2025.” We note that having Appellant’s due date being 19 September 2025 would have the brief due 61 days after the brief currently is due. Appellant’s counsel explains that his current due date would end on a non-business day, 20 July 2025, and his requested due date is the next business day plus sixty days. Appellant’s counsel cites Rule 15 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals (Joint Rules) as the basis for requesting a delay of more than 60 days. In its opposition to the motion, the Government did not comment on Appellant’s calculations of time.

Joint Rule 15 states:

In computing any period of time prescribed or allowed by these rules, order of the Court, or any applicable statute, the day of the act, event or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, or a day on which the Court is closed when the act to be done is the filing of a paper with the Court, in which event the period runs until the end of the net day that is not a Saturday, Sunday, holiday, or day on which the Court is closed. Unless specified otherwise, “day” indicates calendar day, and shall end at 2359 Eastern Time.

JT. CT. CRIM. APP. R. 15. Appellant's counsel cites similar rules from other jurisdictions.

Rule 23.3 of this court's Rules of Practice and Procedure provides that an "appellant's first motion for enlargement may be granted for up to 60 calendar days." A. F. CT. CRIM. APP. R. 23.3(m)(2).

The court has considered Appellant's motion, the Government's opposition, the Joint Rules, and this court's Rules of Practice and Procedure. Sixty calendar days after the brief currently is due is 18 September 2025. Appellant requests an extension of more than 60 days from the current due date of 20 July 2025 to file a brief. We decline Appellant's request to set a due date for an enlargement which is longer than 60 calendar days. Instead, in the interest of clarity, we set a due date that is anticipated to be a business day.

Accordingly, it is by the court on this 15th day of July, 2025,

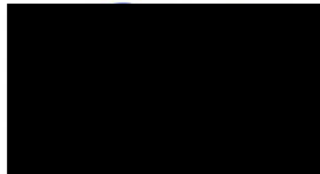
ORDERED:

Appellant's Motion for Enlargement of Time (Seventh) is **GRANTED IN PART**. Appellant shall file any assignments of error not later than **18 September 2025**.

Each request for an enlargement of time will be considered on its merits. Appellant's counsel is advised that any subsequent motions for enlargement of time shall include, in addition to matters required under this court's Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time.



FOR THE COURT



SEAN J. SULLIVAN, Maj, USAF
Acting Clerk of Court

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

UNITED STATES	)	No. ACM 40823
<i>Appellee</i>	)	
	)	
v.	)	
	)	ORDER
Brandon S. JASTAL	)	
Major (O-4)	)	
U.S. Air Force	)	
<i>Appellant</i>	)	Panel 3

On 10 July 2025, counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 days to submit Appellant’s assignments of error. On 11 July 2025, the Government opposed the motion requesting this court “deny Appellant’s enlargement motion.” On 15 July 2025, the court granted the motion in part.

On 14 August 2025, counsel for Appellant submitted a Motion for Reconsideration and Suggestion for Reconsideration En Banc to reconsider its 15 July 2025 order granting Appellant’s Enlargement of Time (First). While no participating judge voted to reconsider Appellant’s motion for reconsideration *en banc*, the panel granted Appellant’s motion for reconsideration of its 10 July 2025 motion for a first enlargement of time. This order replaces the vacated 15 July 2025 order.

The court has reconsidered Appellant’s motion, the Government’s opposition of 11 July 2025, case law, the Joint Rules of Appellate Procedure, and this court’s Rules of Practice and Procedure.

Accordingly, it is by the court on this 5th day of September 2025,

ORDERED:

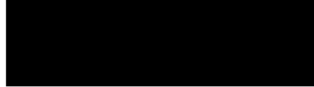
Appellant’s Motion for Enlargement of Time (First) is **GRANTED IN PART**. Appellant shall file any assignments of error not later than **18 September 2025**.

Appellant’s counsel is advised that any subsequent motions for enlargement of time shall include, in addition to matters required under this court’s Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant’s right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel’s progress on Appellant’s case, (3)

whether Appellant was advised of the request for an enlargement of time, and
(4) whether Appellant agrees with the request for an enlargement of time.



FOR THE COURT



CAROL K. JOYCE
Clerk of the Court

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

UNITED STATES	)	No. ACM 40823
<i>Appellee</i>	)	
	)	
v.	)	
	)	NOTICE OF PANEL CHANGE
Brandon S. JASTAL	)	
Major (O-4)	)	
U.S. Air Force	)	
<i>Appellant</i>	)	

It is by the court on this 4th day of August, 2025,

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Panel 1 and referred to Panel 3 for appellate review.

This panel letter supersedes all previous panel assignments.



FOR THE COURT



AGNIESZKA M. GAERTNER, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	APPELLANT’S MOTION FOR
	)	RECONSIDERATION AND
	)	SUGGESTION FOR
<i>Appellee,</i>	)	RECONSIDERATION EN BANC
	)	
v.	)	
	)	Before Panel 3
Major (O-4)	)	
Brandon S. Jastal,	)	No. ACM 40823
United States Air Force,	)	
<i>Appellant.</i>	)	14 August 2025

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

Pursuant to Rules 27 and 31 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals (JRAP), Appellant, by and through his undersigned counsel, hereby moves for reconsideration of this Court’s order of 15 July 2025 and suggests reconsideration en banc.

The Court’s order makes several errors that warrant correction. First, the order purports to grant in part “Appellant’s Motion for Enlargement of Time (Seventh),” when Appellant’s motion was for a first enlargement of time. *Compare United States v. Jastal*, No. ACM 40823, slip op. at 2 (July 15, 2025) (order) (hereinafter *Jastal* Order), with Appellant’s Motion for Enlargement of Time (First), 10 July 2025 (hereinafter Appellant’s Motion for EOT 1).

Second, the order states that “Appellant’s counsel cites [rules similar to JRAP 15] from other jurisdictions.” *Id.* However, Appellant’s motion cited no computation of time rules other than JRAP 15. Appellant’s Motion for EOT 1. The order’s reference to purported citations that were not included in Appellant’s motion raises a question as to whether this Court was examining the same motion on which it ruled.

Third, the order miscalculates the initial due date of Appellant’s brief. JRAP 18(d)(1) provides the number of days for filing an appellant’s brief in an automatic appeal case such as

this one, while JRAP 15 prescribes how those days are to be counted. The JRAP are a superior source of authority compared to this Court’s rules; this Court has no discretion to depart from the JRAP except as the JRAP expressly authorize. *United States v. Gilley*, 56 M.J. 113 (C.A.A.F. 2001); *United States v. Muller*, 79 M.J. 359 (C.A.A.F. 2020). JRAP 18(d)(1) provides that “[a]n appellant’s brief shall be filed no later than 60 days after the Court has received the record of trial pursuant to Article 65(b).” JRAP 15 provides that in counting those 60 days, the last day is not counted if it falls on a Saturday, Sunday, holiday, or day on which the court is closed, in which event day 60 will be the next day the court is open. JRAP 15. That is the plain, unambiguous meaning of JRAP 15: “In computing any period of time prescribed . . . by these rules [such as JRAP 18(d)(1)’s 60-day period] . . . [t]he last day of the period so computed is to be included, *unless* it is a Saturday, Sunday, or legal holiday, or day on which the Court is closed” JRAP 15 (emphasis added).

This Court described exactly how JRAP 15 operates in *United States v. Vongphachanh*, No. ACM 40741 (A.F. Ct. Crim. App. Feb. 12, 2025) (order) (included in contemporaneously filed motion to attach document):

Sixty calendar days after docketing this case is Saturday, 15 February 2025. However, based on JT. CT. CRIM. APP. R. 18(d)(1), the 60th day after docketing is computed as 18 February 2025, because 15–17 February 2025 comprise a weekend and a federal holiday. Therefore, we agree with Appellant that his initial assignment of error brief is due to this court on 18 February 2025.

Id. at 2.

This case was originally docketed with this Court on 21 May 2025. AFCCA Court Docket, available at <https://afcca.law.af.mil/docket.html>. The sixtieth calendar day from that date was Sunday, 20 July 2025. However, just as this Court noted in *Vongphachanh*, JRAP 15 commands that that Sunday not be included in the 60-day count. Accordingly, when excluding “the last day

of” JRAP 18(d)(1)’s 60-day period because it falls on a Sunday, day 60 is Monday, 21 July 2025. That was the original due date for Appellant’s brief. Under JRAP 15’s plain language, a due date can never occur on a weekend.

In direct contravention of JRAP 15, this Court’s order states that “[s]ixty calendar days after the brief currently is due is 18 September 2025.” *Jastal* Order at 2. Sixty calendar days before 18 September 2025 was Sunday, 20 July 2025. Thus, the order treated Appellant’s initial brief as being due on that date in violation of JRAP’s express, unambiguous provision that that Sunday not be counted when computing “any period of time prescribed . . . by these rules”—including JRAP 18(d)(1)’s due date.

Fourth, the order erroneously states that “Appellant’s counsel incorrectly noted the projected due date for Appellant’s brief.” *Jastal* Order at 1. Appellant’s enlargement motion correctly stated that when computed pursuant to JRAP 15, “Appellant’s brief is currently due on Monday, 21 July 2025.” Appellant’s Motion for EOT 1 at 1 n.1. It is unfortunate that this Court’s order would erroneously state that “Appellant’s counsel incorrectly” calculated a date; that phrase carries the risk of diminishing an appellant’s trust in his or her government-provided counsel. It is especially unfortunate when, as demonstrated above, the enlargement motion computed “the projected due date for Appellant’s brief” in precisely the same manner that this Court correctly computed the projected due date for the appellant’s brief in *Vongphachanh*. This Court should not suggest to appellants that their counsel erred by following this Court’s guidance.

Fifth, the order erroneously states that the enlargement motion “requests to set a due date for an enlargement which is longer than 60 calendar days.” *Jastal* Order at 2. It did not. It requested a delay of exactly sixty calendar days from the brief’s original due date of 21 July 2025. Appellant’s Motion for EOT 1 at 1.

In light of those errors, reconsideration is appropriate.

Additionally, reconsideration en banc is warranted. This Court has been inconsistent in its application of JRAP 15. As noted above, the order in this case directly conflicts with an order by another panel in *Vongphachanh*. Moreover, this Court regularly applies JRAP 15 to accept as timely Government answers filed more than thirty days from the filing of an appellant's brief when the thirtieth day would land on a Saturday or Sunday. For example, the day before this Court issued its erroneous order in this case, this Court accepted the Government's answer in *United States v. Vongphachanh*, No. ACM 40741, which was filed thirty-one days after Appellant's brief, without a motion for enlargement of time or motion to file out of time. That action was correct; the Government's answer was timely filed in accordance with JRAP 15. But that approach is wholly inconsistent with calculating a Sunday, 20 July due date for Appellant's brief instead of a Monday, 21 July due date. This Court applied two different interpretations of JRAP 15 on two consecutive days.

En banc reconsideration is also appropriate to ensure that this Court construes the JRAP's computation of time rule in the same way this Court's two superior courts construe their analogous rules. Both the Court of Appeals for the Armed Forces and the United States Supreme Court construe their computation of time rules in the manner that this Court did in *Vongphachanh* and not the manner it did so here.

Consider, for example, the case of *United States v. Dawson*, USCA Dkt. No. 25-0156/AF. The Court of Appeals for the Armed Forces docketed Senior Airman Dawson's case on 5 May. *United States v. Dawson*, __ M.J. __, No. 25-0156/AF, 2025 CAAF LEXIS 353 (C.A.A.F. May 5, 2025) (mem.) (docketing notice). Rule 19(a)(5)(A) of that court's rules allows an appellant's counsel to move for leave to file a supplement subsequent to a petition for grant of review.

C.A.A.F. R. 19(a)(5)(A). That rule continues, “If granted, the supplement must be filed within twenty-one days of the order.” *Id.* Senior Airman Dawson filed such a motion, which the Court granted. *Dawson*, No. 25-0156/AF, 2025 CAAF LEXIS 351 (C.A.A.F. May 5, 2025) (mem.). Twenty-one days from the date of that order was the federal Memorial Day holiday. In keeping with its computation of time rule, C.A.A.F. R. 34, the court extended the supplement deadline by twenty-two days—to Tuesday, 27 May. *Dawson*, 2025 CAAF LEXIS 351. It did not indicate that the filing deadline was the date that was twenty-one days after the order granting the extension—which would have been Monday, 26 May—because, pursuant to C.A.A.F. Rule 34(a), when the last day of the period computed is a federal holiday, that day is not included in the count. Tuesday, 27 May was day twenty-one as counted in accordance with C.A.A.F. R. 34(a).

The Supreme Court of the United States applies its computation of time rule in a similar fashion. For all computation of time purposes, the Supreme Court uses the “final filing date” as that date is determined under Rule 30.1—the Supreme Court’s computation of time rule, which is almost identical in relevant respects to JRAP 15. The leading treatise on Supreme Court practice explains:

To use an example supplied by the Clerk’s Office, when the 90th day for filing a petition is a Sunday, the “final filing date” is Monday. Thus, the preceding 10-day period should be computed from that Monday. Likewise, if the 10th day before the “final filing date” is a Saturday, a Sunday, or a federal legal holiday, the applicant will satisfy the 10-day provision by ensuring that the application is filed on the next business day.

STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, *SUPREME COURT PRACTICE* 6-33 (11th ed. 2019). This Court should be particularly wary of adopting a legal interpretation that conflicts with that of its superior courts.

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

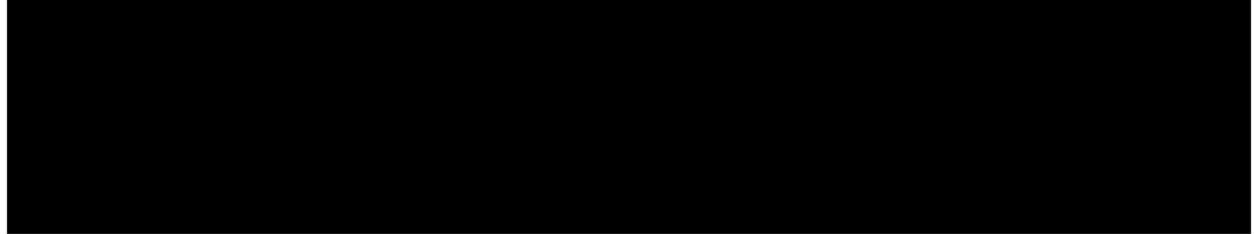
Respectfully submitted,



Dwight H. Sullivan
Appellate Defense Counsel



JORDAN L. GRANDE, Maj, USAF
Air Force Appellate Defense Counsel



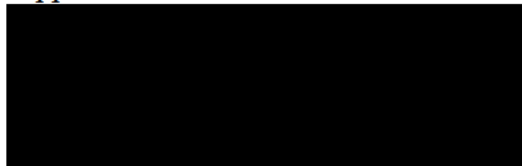
CERTIFICATE OF FILING AND SERVICE

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 14 August 2025

Respectfully submitted,



Dwight H. Sullivan
Appellate Defense Counsel



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	APPELLANT’S MOTION FOR
<i>Appellee,</i>	)	ORAL ARGUMENT
	)	
v.	)	
	)	Before Panel 3
Major (O-4)	)	
Brandon S. Jastal,	)	No. ACM 40823
United States Air Force,	)	
<i>Appellant.</i>	)	14 August 2025

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

Pursuant to Rule 25 of the Joint Rules of Appellate Practice for Courts of Criminal Appeals, Appellant, by and through his undersigned counsel, hereby moves for oral argument on his motion for reconsideration and suggestion for en banc reconsideration of this Court’s order ruling on Appellant’s motion for first enlargement of time. *United States v. Jastal*, No. ACM 40823 (July 15, 2025) (order).

As discussed more fully in the accompanying motion for reconsideration and suggestion for en banc reconsideration, this Court has adopted inconsistent interpretations of Rule 15 of the Joint Rules of Appellate Practice for Courts of Criminal Appeals (JRAP), which governs computation of time. For example, this Court’s order in *United States v. Vongphachanh*, No. ACM 40741 (A.F. Ct. Crim. App. Feb. 12, 2025) (order) (included in contemporaneously filed motion to attach document), discussed JRAP 15 and explained why a brief that would otherwise be due on a Saturday, Sunday, or federal holiday is, instead, due on the next day this Court is open. In this case, however, this Court’s order granting in part Appellant’s motion for first enlargement of time adopted a contrary view without explaining why JRAP 15 did not compel the same result as that reached in *Vongphachanh*. En banc oral argument would help ensure

uniformity in this Court's enlargement motion practice, which has significant impact on this Court's docket.

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

Respectfully submitted,

[REDACTED]

Dwight H. Sullivan
Appellate Defense Counsel

JORDAN L. GRANDE, Maj, USAF
Air Force Appellate Defense Counsel

[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 14 August 2025

Respectfully submitted,

[REDACTED]

Dwight H. Sullivan
Appellate Defense Counsel

[REDACTED]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	APPELLANT’S MOTION TO ATTACH
<i>Appellee,</i>	)	DOCUMENT
	)	
v.	)	
	)	Before Panel 3
Major (O-4)	)	
Brandon S. Jastal,	)	No. ACM 40823
United States Air Force,	)	
<i>Appellant.</i>	)	14 August 2025

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

Pursuant to Rule 23.3(b) of this Honorable Court’s Rules of Practice and Procedure, Appellant Major Brandon S. Jastal, by and through his undersigned counsel, hereby moves to attach a document.

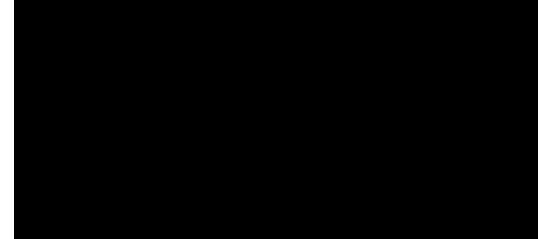
Appellant moves to attach this Court’s order in *United States v. Vongphachanh*, No. ACM 40741 (A.F. Ct. Crim. App. Feb. 12, 2025) (order). That order interpreted Rule 15 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals (JRAP) in a manner inconsistent with the order in this case that is the subject of Appellant’s contemporaneously filed motion for reconsideration and suggestion for reconsideration en banc. Attaching and considering this Court’s order in *Vongphachanh* is appropriate both for the order’s analysis of how JRAP 15 should be construed and to establish that different panels of this Court have interpreted JRAP 15 differently, thereby indicating the appropriateness of this Court’s en banc resolution of the issue.

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

Respectfully submitted,



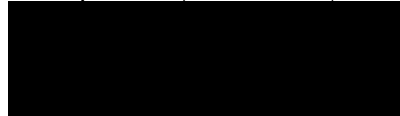
Dwight H. Sullivan
Appellate Defense Counsel



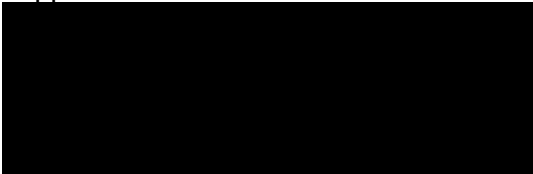
CERTIFICATE OF FILING AND SERVICE

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 14 August 2025

Respectfully submitted,



Appellate Defense Counsel



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	BRIEF ON BEHALF OF
<i>Appellee,</i>	)	APPELLANT
	)	
v.	)	
	)	Before Panel 3
Major (O-4)	)	
Brandon S. Jastal,	)	No. ACM 40823
United States Air Force,	)	
<i>Appellant.</i>	)	18 September 2025

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

Assignments of Error

I.

The special trial counsel committed prosecutorial misconduct during closing argument by vouching for the credibility of the only named alleged victim to testify.

II.

The military judge committed plain error in this members sentencing case by admitting into evidence an unsworn victim impact statement opining that the accused “should not be an Airman,” asking for a sentence that shows “that there are consequences—severe ones—for committing violence against his family,” and alleging abuse over a three-and-a-half year period preceding any offense resulting in a conviction.

III.

The evidence supporting Charge II, Specification 1 is factually insufficient to prove the offense beyond a reasonable doubt given the absence of any physical evidence corroborating the allegation; Major Jastal’s immediate, adamant denial of having committed the offense; and his explanation that the alleged victim advanced the allegation in an effort to “gaslight” him.

IV.

Maj Jastal's constitutional rights were violated when he was convicted of offenses with no requirement that the court-martial panel (the functional equivalent of the jury) vote unanimously that he is guilty.¹

Statement of the Case

At a general court-martial held on 10 June 2024 and 6 and 13 to 17 January 2025, a panel of officer members convicted Appellant, Major (Maj) Brandon S. Jastal, contrary to his pleas, of two specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice (UCMJ), and one specification of drunk and disorderly conduct of a nature to bring discredit upon the armed forces in violation of Article 134, UCMJ. Trial Tr. 189, 1363. Consistent with Maj Jastal's pleas, the court-martial found him not guilty of two specifications of assault consummated by battery in violation of Article 128, UCMJ, and one specification of domestic violence in violation of Article 128b, UCMJ. *Id.* at 189, 1363. The members sentenced Maj Jastal to a dismissal, confinement for thirty days, and a reprimand. *Id.* at 1468. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, Feb. 24, 2025. The convening authority waived all automatic forfeitures for a period of one month or until Maj Jastal's release from confinement or expiration of term of service, whichever occurred first, with the total pay and allowances to be paid to Maj Jastal's wife for the benefit of her and Maj Jastal's dependent children. *Id.*

Statement of Facts

Two of Maj Jastal's three findings of guilty arose from events on the night of 11–12 February 2023. Charge Sheet, Charge II, Specification 1; Charge III, Specification; Trial Tr. 1363. At the time, Maj Jastal, his wife (HC), and their son (CJ) lived in military housing on Ford Island,

¹ The defense raises this assignment of error for issue preservation purposes.

Oahu, Hawaii. Trial Tr. 653–54. On the evening of Saturday, 11 February 2023, Maj Jastal and HC attended a neighborhood gathering around a firepit. *Id.* at 669.

Maj Jastal behaved appropriately early in the evening. *Id.* at 897. At one point, he left the firepit with his neighbor Lieutenant Commander (LCDR) JBC, U.S. Navy, to get a whiskey drink from LCDR JBC’s house. *Id.* at 917. While they were gone, someone changed the music that Maj Jastal had previously been playing over his Bluetooth speaker. *Id.* at 671, 917. Upon returning to the firepit, Maj Jastal responded to the changed music by yelling at some of the gathering’s attendees, including his wife, and “said a bunch of fuck yous to the people and the wives around the firepit.” *Id.* at 918; *see also id.* at 671–72. Witnesses testified that Maj Jastal was drunk at the time. *Id.* at 670, 919, 925, 935, 964, 973, 1033. The Jastals’ neighbor Major (MAJ) JDK, U.S. Army, hosted that neighborhood firepit gathering. *Id.* at 969. He testified that he did not think Maj Jastal’s behavior upon returning to the firepit “was appropriate, but I also don’t think that by itself would have necessitated some sort of UCMJ response.” *Id.* at 974. He explained, “It just seemed like the guy had too much to drink and I need [to] talk him back down so he could go to bed.” *Id.*

Maj Jastal’s wife, HC, went home soon after Maj Jastal’s outburst. *Id.* at 674. She was seven months pregnant at the time. *Id.* at 677. HC and Maj Jastal exchanged text messages after HC left. *Id.* at 674; Pros. Ex. 2. In one message, HC informed Maj Jastal that she had locked the doors. Pros. Ex. 2 at 1. HC texted MAJ JDK’s wife, Ms. KK, to ask if Maj Jastal could sleep at the Ks’ house. *Id.* at 740. The Ks responded that he could. *Id.* HC texted a message to Appellant that he could sleep at the Ks’ house. Pros. Ex. 2 at 4.

After initially going to the Ks’, Maj Jastal left and went to his own house. *Id.* at 675, 978–79. According to HC, Maj Jastal banged on a window. *Id.* at 741. When HC did not let him in, Maj Jastal broke out a panel at the bottom of the back door and entered the house. *Id.* at 676, 741; Pros.

Ex. 4. HC claimed that once inside, Maj Jastal slapped her face and spit in her hair. *Id.* at 676–79, 745. She characterized the slap as “a quick slap” and agreed that it caused “no apparent injuries.” *Id.* at 745. She testified that rather than physically injuring her, the slap “[a]nnoyed” her. *Id.* at 734.

HC and Maj Jastal engaged in another text exchange that night about what happened. In response to HC texting “You slapped me” and “And spit on me,” Maj Jastal responded, “No I didn’t[.]” Def. Ex. A. When HC replied, “Brandon in the heat of the moment you did,” he again responded, “No I didn’t[.]” *Id.* He subsequently added, “And now you are trying to gaslight me.” *Id.*

No one contacted law enforcement that evening. Law enforcement became involved months later when SR, one of HC’s neighbors, reported to the Family Advocacy Program allegations HC made in a neighborhood group chat concerning Maj Jastal. *Id.* at 727–28, 737, 774, 1112–14, 1123.

The events on the night of 11 February 2023 led to Maj Jastal’s conviction for domestic violence by slapping and spitting on HC and drunk and disorderly conduct of a nature to bring discredit upon the armed forces. Charge Sheet, Charge II, Specification 1; Charge III, Specification; Trial Tr. 1363.

Ms. KK went to the Jastal residence soon after the alleged domestic violence offense. Trial Tr. 945. Ms. KK testified that HC was “crying hysterically, holding her face.” *Id.* at 946; *see also id.* at 965. HC told Ms. KK that Maj Jastal had slapped her. *Id.* Ms. KK did not notice any marks or bruises on HC, although she described HC’s face as red from crying. *Id.* at 958. Ms. KK did not see any spit on HC. *Id.* Ms. KK provided inconsistent testimony about whether HC told her Maj Jastal had spat on her. On cross-examination, the defense counsel asked, “And during that

conversation, she did not report Major Jastal spitting on her, did she?” *Id.* Ms. KK answered, “She didn’t say that, no.” *Id.* On redirect examination, Ms. KK testified that HC told her that Maj Jastal “slapped her and was spitting at her and he was screaming at her.” *Id.* at 964. On recross examination, she testified that HC told her “that he slapped and spit on her.” *Id.* at 966. Another neighbor and friend of HC’s, Ms. JC, testified that HC sent her a text stating that Maj Jastal “broke down the door, came inside the house, yelled at her, spit on her, and then slapped her.” *Id.* at 891.

Conflicting testimony was presented as to Maj Jastal at one point saying either he slapped his wife or he snapped. *Contrast id.* at 1103 (testimony of Master Sergeant (MSgt) MAY that Maj Jastal admitted to him and MSgt ARD that he slapped his wife on one occasion), *with id.* at 1226, 1246 (testimony of MSgt ARD that Maj Jastal “said he snapped once”).

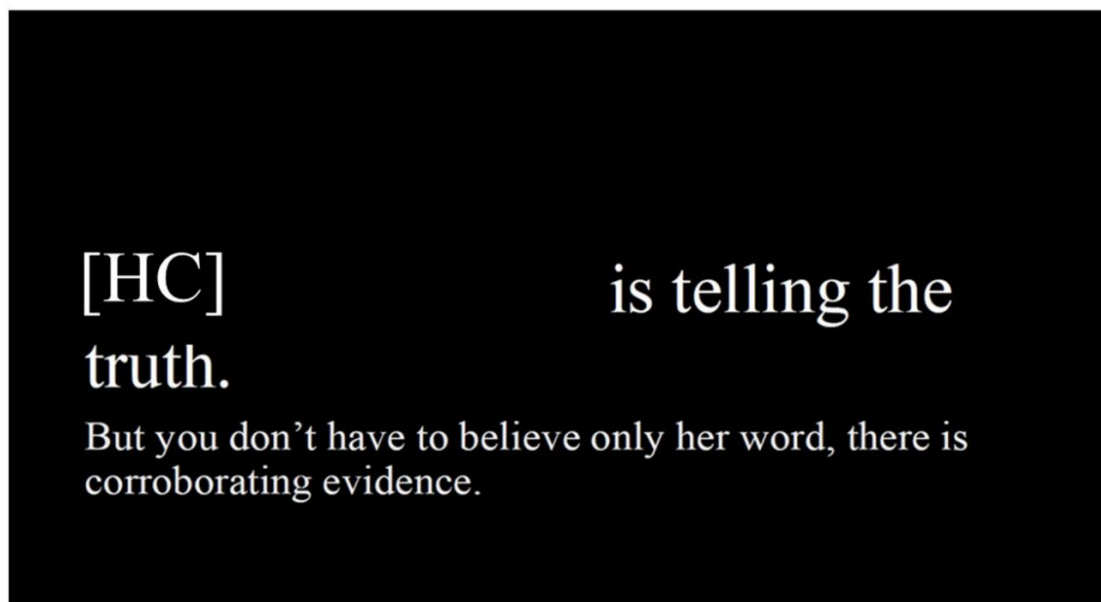
Maj Jastal was also convicted of shoving his son CJ sometime in early 2023. *Id.* at 1363. He, HC, and CJ were at the home of LCDR JEF, U.S. Navy, and Ms. KSF. *Id.* at 666. CJ was around eighteen months old at the time. *See id.* at 665. At one point while Maj Jastal was leaning over CJ, their heads accidentally collided when CJ suddenly stood up. *Id.* at 667, 1063. Maj Jastal then pushed CJ, causing CJ to fall down. *Id.* at 667, 769–70, 1060, 1063–64. CJ was not injured. *Id.* at 667. HC acknowledged that the incident “appeared to be an accident.” *Id.* at 770. That event led to Maj Jastal’s conviction for domestic violence by “shoving [CJ] with his hand.” Charge Sheet, Charge II, Specification 3; Trial Tr. 1363.

HC testified during the prosecution’s case in chief; understandably given his age, CJ did not. Trial Tr. 653–864. HC’s testimony, excluding Article 39(a) sessions, spanned 143 pages of the trial transcript. *Id.* at 653–85, 687–708, 718–50, 757–86, 789–90, 794–97, 826–40, 861–64. The next-longest prosecution witness’s testimony covered fifty-one transcript pages. *Id.* at 1024–74 (testimony of Ms. KSF). HC was the only person to provide eyewitness testimony describing

the event that led to the finding of guilty to Charge II, Specification 1, which alleged that Maj Jastal slapped and spat on her.

During the defense’s cross-examination of HC, she admitted that during a pretrial interview with defense counsel, she made an incorrect statement about the circumstances leading up to Charge II, Specification 1. *Id.* at 743. The defense also demonstrated that her in-court testimony sometimes conflicted with her previous out-of-court statements. *E.g., id.* at 757–59. On cross-examination of HC, the defense also established her awareness that if Maj Jastal were convicted, she would be entitled to victims’ transitional compensation. *Id.* at 786.

During the prosecution’s closing argument, the special trial counsel displayed this slide:



App. Ex. XXIX at 4 (altered by substituting HC’s initials for her first and last names, which appear in full on the original slide). The special trial counsel also orally told the members, “[HC] is telling the truth here” Trial Tr. 1277. Later in the prosecution’s closing argument, the special trial counsel stated, “The truth of the matter is that she isn’t lying. She’s telling the truth.” *Id.* at 1279. The defense did not object to the prosecution’s slides, *id.* at 1258, or lodge an objection during the

closing argument. Nor did the military judge interrupt the special trial counsel’s closing argument.

During the presentencing proceedings, the military judge asked if a crime victim wished to be heard. Trial Tr. 1395. HC’s victims’ counsel replied that she would like to make an unsworn statement. *Id.* at 1395–96. During a subsequent colloquy with counsel, the military judge stated, “And understanding the rules. I will just state that they have changed.” *Id.* at 1396.

HC delivered an oral unsworn victim impact statement to the members. *Id.* at 1397. HC told the members that she “endured” “abuse . . . throughout the course of our marriage,” which began in July 2019—more than three-and-a-half years before any offense of which Maj Jastal was convicted. Ct. Ex. A; Trial Tr. 654.² HC also told the members that Maj Jastal’s behavior when they “started dating . . . was the beginning of his abuse.” Ct. Ex. A. She called on the members to remove Maj Jastal from the Air Force, telling them:

I married Brandon when he was a Captain in the United States Air Force in 2019. I was 24 years old. Both of my parents served in the U.S. Army and I grew up thinking that a member of our United States Armed Forces meant that they were disciplined, honorable, and understood how to treat those they cared about. I still believe that. And that is why Brandon should not be an Airman.

Id.

HC also asked the members to impose “severe” consequences on Maj Jastal, imploring them to “take into consideration the struggles and trauma I have endured as a result of his actions. Please give him a sentence that might actually get through to him and show that there are consequences—severe ones—for committing violence against his family.” *Id.*

Immediately after HC delivered her oral unsworn victim impact statement, the military

² The members found Maj Jastal not guilty of two specifications alleging that he committed assaults consummated by battery against HC in March to August 2020 and December 2020. Charge Sheet, Charge I, Specifications 1, 2; Trial Tr. 1363.

judge stated in front of the members, “Just so it is clear, I did admit Court Exhibit A into evidence as Court Exhibit A.” Trial Tr. 1397 (omitting court reporter’s bracketed addition). The defense did not object to the content of the victim impact statement or its admission into evidence.

The military judge then held an Article 39(a) session to discuss with counsel whether a written copy of the unsworn statement would be provided to the members. *Id.* at 1398–99. During that Article 39(a) session, apparently referring to R.C.M. 1001(c)(5)(A)’s statement that a victim’s “unsworn statement may be oral, written, or both,” the military judge stated to the defense counsel, “That would seem to imply that it goes back to the members. Would you agree? After being admitted into evidence?” Trial Tr. 1398. When the members returned to the courtroom, the military judge stated, “Victims’ Counsel, you may provide the victim impact statement, Court Exhibit A, to the members.” *Id.* at 1400. The military judge then directed the victims’ counsel “to hand it to” the one of the court-martial members, who will “hand it back to the other individuals.” *Id.*

Argument

Assignment of Error I.

The special trial counsel committed prosecutorial misconduct during closing argument by vouching for the credibility of the only named alleged victim to testify.

Standard of Review and Applicable Legal Test

Military appellate courts review de novo issues of prosecutorial misconduct and improper argument. *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019). Where no objection is made at trial, a military appellate court reviews the issue under a plain error standard. *Id.* Under plain error review, the appellant bears the burden to demonstrate error that is clear or obvious and results in material prejudice to the appellant’s substantial rights. *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014). “[T]he lack of a defense objection is ‘some measure of the minimal impact of a

prosecutor’s improper comment.”” *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001) (quoting *United States v. Carpenter*, 51 M.J. 393, 397 (C.A.A.F. 1999)).

Analysis

A. Court of Appeals for the Armed Forces caselaw emphatically establishes the impermissibility of vouching for witnesses’ credibility during closing argument.

The Court of Appeals for the Armed Forces has held that it is improper for a trial counsel to “vouch[] for government witnesses.” *Voorhees*, 79 M.J. at 11. Vouching is a particularly prejudicial form of prosecutorial misconduct because, as the Court of Appeals for the Armed Forces has observed, it “places the prestige of the government behind a witness through personal assurances of the witness’s veracity.” *United States v. Fletcher*, 62 M.J. 175, 180 (C.A.A.F. 2005) (quoting *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993)). Vouching is “plain and obvious” error. *Id.* at 184. The court has specifically identified “claiming that [a witness] was telling the truth” as a form of such improper vouching. *United States v. Norwood*, 81 M.J. 12, 18–19, 20 (C.A.A.F. 2021). The court emphasized that vouching is “a method of argument that we have explicitly prohibited.” *Id.* at 20 (citing *Voorhees*, 79 M.J. at 11–12; *Fletcher*, 62 M.J. at 180). In a 2021 opinion, the court chastised prosecutors who violated that prohibition: “Trial counsel ‘are military officers and should conduct themselves accordingly,’ a standard that these trial counsel failed to meet under our precedent regarding improper argument.” *Id.* (quoting *Voorhees*, 79 M.J. at 14). Yet, in an argument delivered almost four years after the Court of Appeals for the Armed Forces delivered that stinging rebuke, the special trial counsel in this case engaged in prosecutorial misconduct by thrice improperly vouching for the truthfulness of the most important witness in the trial.

In one instance of violating the Court of Appeals for the Armed Forces' express prohibition against vouching, the special trial counsel displayed a PowerPoint slide telling the members, in large type, "[HC] is telling the truth." App. Ex. XXIX at 4. That violation was the product of careful planning; the PowerPoint slide deck was obviously prepared before the special trial counsel gave her closing argument.

In addition to her PowerPoint display visually vouching for HC's truthfulness, the special trial counsel orally vouched for HC. The special trial counsel told the members, "[HC] is telling the truth here" Trial Tr. 1277. Not content to have improperly vouched for HC's truthfulness once in writing and then once orally, the special trial counsel did so yet again by assuring the members, "The truth of the matter is that she isn't lying. She's telling the truth." *Id.* at 1279. That was plain and obvious error, as *Fletcher*, *Voorhees*, and *Norwood* clearly establish.

B. The special trial counsel's improper vouching prejudiced the defense.

Maj Jastal bears the burden to show that the improper argument materially prejudiced a substantial right of the accused. *Voorhees*, 79 M.J. at 9. A prejudice analysis in this context "weigh[s] three factors to determine whether trial counsel's improper arguments were prejudicial: '(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction.'" *Voorhees*, 79 M.J. at 12 (quoting *United States v. Andrews*, 77 M.J. 393, 402 (C.A.A.F. 2018) (quoting *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017))).

1. The special trial counsel's prosecutorial misconduct was severe.

Here, the misconduct was severe. The Court of Appeals for the Armed Forces has sharply criticized this very practice, observing that prosecutors who improperly vouch "fail[] to meet" their obligation to "conduct themselves" as "military officers." *Norwood*, 81 M.J. at 20. The

preplanning that necessarily preceded the written PowerPoint vouching makes that instance particularly troubling. And the special trial counsel enhanced the message’s memorability—and hence persuasiveness—by presenting it not only orally but also in writing, which humans are much better at remembering than messages they receive aurally. *See, e.g., James Bigelow & Amy Poremba, Achilles’ Ear? Inferior Human Short-Term and Recognition Memory in the Auditory Modality*, 9 PLOS ONE, Feb. 2014, at 1, available at <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0089914&type=printable>.

It is especially disturbing that a special trial counsel committed this violation. By statute, special trial counsel must be “well-trained, experienced, highly skilled, and competent in handling cases involving covered offenses.” 10 U.S.C. § 1044f(a)(4). One of two things must be true. Either the special trial counsel deliberately violated the fundamental prohibition against vouching or the special trial counsel was not well-trained to avoid engaging in a form of prosecutorial misconduct that the Court of Appeals for the Armed Forces had sharply denounced less than four years earlier. Whichever of those two possibilities is correct, it exacerbates the misconduct’s severity.

2. The military judge failed to take adequate curative measures.

In this case, just as in *Fletcher*, “[t]he military judge’s curative efforts were minimal and insufficient to overcome the severity of the trial counsel’s misconduct.” 62 M.J. at 185. Before closing arguments began, the military judge instructed the members that “[y]ou have the duty to determine the believability of the witnesses.” Just as in *Fletcher*, “[t]his instruction was not a targeted, curative response as it was given before the findings arguments rather than in response to a given statement or at the end of the argument.” *Id.* After closing arguments were completed, the military judge instructed the members, “Argument by counsel is not evidence. Counsel are not witnesses. If the facts as you remember them differ from the way counsel states the facts, it is your

memory of the facts that control.” Trial Tr. 1347. But the military judge did not provide any curative instruction concerning the special trial counsel’s written and oral assurances that HC’s testimony was truthful.

Most significantly, the military judge failed to interrupt the special trial counsel’s argument when she vouched for HC’s truthfulness. As the Court of Appeals for the Armed Forces has emphasized, a trial judge should interrupt a trial counsel’s impermissible argument because “[c]orrective instructions at an early point might have dispelled the taint of the initial remarks.” *Fletcher*, 62 M.J. at 185 (quoting *United States v. Knickerbocker*, 2 M.J. 128, 129 (C.M.A. 1977)). Just as in *Fletcher*, the military judge’s failure to give curative instructions supports finding prejudice.

The military judge’s failure to take corrective measures concerning the special trial counsel’s improper vouching sharply contrasts with his proactive response to the special trial counsel arguing a fact not in evidence concerning the softness of CJ’s head at the time of the Charge II, Specification 2 incident. Notwithstanding the absence of a defense objection, the military judge raised the issue during an R.C.M. 802 conference and then an Article 39(a) session before giving a curative instruction to the members. Trial Tr. at 1295–97. He erred by failing to take similar curative measures concerning the special trial counsel’s improper vouching.

3. The relatively light weight of the evidence supporting the finding of guilty to Charge II, Specification 1 rendered the prosecutorial misconduct particularly prejudicial.

Maj Jastal’s immediate reaction when HC accused him of slapping and spitting on her is significant. In a private email exchange, Maj Jastal denied the allegation and indicated his understanding that HC was deliberately fabricating a false narrative. *See* Def. Ex. A.

After HC texted “You slapped me” and “And spit on me,” Maj Jastal responded, “No I didn’t[.]” *Id.* When HC replied, “Brandon in the heat of the moment you did,” he again responded, “No I didn’t[.]” *Id.* He subsequently added, “And now you are trying to gaslight me.” *Id.* To gaslight means “to grossly mislead or deceive (someone) especially for one’s own advantage.” *Gaslight*, entry 2, Meriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/gaslight#h2>, last accessed 28 Aug. 2025. If Maj Jastal is right that HC was attempting to gaslight him, then what Ms. KK characterized as HC “crying hysterically,” Trial Tr. at 946, 965, and HC’s statements to others that her husband hit and spat on her do not corroborate her claim, as they would be part of the same gaslighting endeavor. “[S]omeone who repeats the same story over and over is not necessarily likely to be more truthful than someone who says the same thing just once. A lie often repeated does not become the truth.” *United States v. McCaskey*, 30 M.J. 188, 191 (C.M.A. 1990) (quoting STEPHEN SALTZBURG, LEE SCHINASI & DAVID SCHLUETER, *MILITARY RULES OF EVIDENCE MANUAL* 614 (2d ed. 1986)). Consistent with the possibility that HC fabricated the allegation, when Ms. KK met with HC soon after the alleged domestic violence, Ms. KK saw no physical evidence that HC had been slapped or spat upon. Trial Tr. 958.

The defense counsel emphasized Maj Jastal’s “[a]damant denials” when HC texted that he had slapped and spat on her. *Id.* at 1312. The members had to weigh those denials against HC’s testimony to decide whether the latter proved *beyond a reasonable doubt* that Maj Jastal’s immediate, adamant denials of her allegations were false. The special trial counsel’s improper vouching “place[d] the prestige of the government behind” HC’s veracity as the members decided that crucial issue. *Fletcher*, 62 M.J. at 180 (quoting *Necoechea*, 986 F.2d at 1276). That is prejudicial error.

During closing argument, the defense forcefully challenged HC's credibility. *Id.* at 1310–12, 1313, 1317. For example, the defense counsel argued, “[Y]ou also saw that [HC] was impeached several times; several times. That at the very least shows that she’s got a tendency to embellish, that she’s not credible, that she is not believable, right?” *Id.* at 1311. The defense’s argument that HC embellished in a manner that makes her testimony unreliable is supported by three eyewitnesses’ testimony concerning Maj Jastal pushing CJ on 7 March 2023. Both LCDR JEF and Ms. KSF testified that CJ was standing on the floor at the time of the push, fell down, and hit his head on the floor. *Id.* at 1029–30, 1062, 1088–89. Yet HC testified that Maj Jastal pushed CJ “off the couch,” causing CJ’s back and head to hit a coffee table—both a different and more alarming version than that provided by the other two eyewitnesses who testified. *Id.* at 667. There is more than a reasonable possibility that LCDR JEF’s and Ms. KF’s testimony was accurate and HC’s was inaccurate. If that reasonable possibility is true, then there are deficiencies in HC’s perception, memory, or truthfulness. Regardless of which of those explanations is correct, it provides a basis for reasonably doubting her account of the incident on the night of 11–12 February 2023 that was contradicted by Maj Jastal’s immediate, adamant denials. But the members’ credibility assessment was tainted by the special trial counsel’s improper vouching.

Like a Houston Astro signaling a batter by banging on a trashcan, the special trial counsel violated the governing standards by improperly vouching for HC’s truthfulness.³ Just like the Astros’ cheating affected the integrity of each at bat during which signals were passed to the batter, the special trial counsel’s violation of the governing standards affected the integrity of Maj Jastal’s

³ See generally Major League Baseball Commissioner Robert D. Manfred, Jr., Statement of the Commissioner, Jan. 13, 2020, available at <https://img.mlbstatic.com/mlb-images/image/upload/mlb/cglrhmlrwwbkacty2717.pdf> (discussing Houston Astros players and bench coach using a center field camera to see opposing catchers’ signs during the 2017 season and banging on a trashcan to relay the expected pitch to the Houston batter).

trial. But the consequences here—including the lifelong stigma of a federal conviction for domestic violence—are far more significant than the outcome of a baseball game.

As a remedy, this Court should set aside the finding of guilty to Charge II, Specification 1, set aside the sentence, and remand the case to the convening authority with authorization to conduct a rehearing on that specification and the sentence. *See* UCMJ art. 66(f)(1)(A), 10 U.S.C. § 866(f)(1)(A).

Assignment of Error II.

The military judge committed plain error in this members sentencing case by admitting into evidence an unsworn victim impact statement opining that the accused “should not be an Airman,” asking for a sentence that shows “that there are consequences—severe ones—for committing violence against his family,” and alleging abuse over a three-and-a-half year period preceding any offense resulting in a conviction.

Standard of Review and Applicable Legal Test

An appellate court reviews a military judge’s decision permitting the introduction of a victim impact statement for an abuse of discretion. *United States v. Hamilton*, 78 M.J. 335, 340 (C.A.A.F. 2019). A military judge commits an abuse of discretion by “permitting the introduction of victim impact statements that did not comply with” the governing Rule for Courts-Martial (R.C.M.). *Id.* Absent an objection at trial, this Court reviews a claim that a military judge erroneously permitted the introduction “of an unsworn victim impact statement for plain error, where 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. Arroyo*, No. ACM 40321 (f rev), 2024 CCA LEXIS 242, at *12 (A.F. Ct. Crim. App. June 18, 2024) (quoting *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007) (citations omitted)).

Analysis

Introduction: The law governing admissibility of victim impact statements

When this court-martial was tried, R.C.M. 1001(c)(3) provided that sworn and unsworn victim impact statements “may only include victim impact and matters in mitigation. The statement may not include a recommendation of a specific sentence.” R.C.M. 1001(c)(3), *Manual for Courts-Martial, United States (MCM)* (2019 ed.). R.C.M 1001(c) defined the term “victim impact”: “For purposes of this subsection, victim impact includes any financial, social, psychological, or medical impact on the crime victim *directly relating* to or arising from the offense of which the accused has been found guilty.” R.C.M. 1001(c)(2)(B) (emphasis added).

Executive Order 14103 of July 28, 2023, amended R.C.M. 1001(c) to provide that sworn or unsworn victim impact statements “[m]ay only include victim impact and matters in mitigation, except that, in a noncapital case, the victim may recommend a specific sentence.” Exec. Order No. 14103 of July 28, 2023, Annex 3, ¶ (i), 88 Fed. Reg. 50535, 50706 (Aug. 2, 2023). That provision, however, does not apply to this case. Executive Order 14103 provided that its Annex 3—of which that amendment to R.C.M. 1001(c) was a part—“shall take effect on December 27, 2023, and shall apply in accordance with section 539E(f) of the NDAA FY 2022 (10 U.S.C. 853 note)” *Id.*, § 3, 88 Fed. Reg. at 50535. The effective date that section 539E(f) of the National Defense Authorization Act for Fiscal Year 2022 prescribed is 27 December 2023, with application limited “to sentences adjudged in cases in which all findings of guilty are for offenses that occurred after” that date. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539E(f), 135 Stat. 1541, 1706 (2021). Thus, Executive Order 14103’s amendment of the victim impact statement rule is directly tied to sentencing reforms that include judge-alone sentencing in all non-capital general and special courts-martial. *Id.*, § 539E(a)(1), 135 Stat. at 1700 (codified at UCMJ

art. 53(b)(1), 10 U.S.C. § 853(b)(1)). It does not apply in this case, where all three findings of guilty were for conduct that predated 27 December 2023.

A. The military judge erroneously allowed clearly impermissible portions of HC's victim impact statement to go before the members.

“[T]he military judge has an obligation to ensure the content of a victim’s unsworn statement comports with the parameters of victim impact or mitigation as defined by” the R.C.M.s. *United States v. Tyler*, 81 M.J. 108, 112 (C.A.A.F. 2021). The military judge failed to fulfill that obligation in this case. Portions of HC’s victim impact statement clearly violated R.C.M. 1001(c)(3). Her statement that “Brandon should not be an Airman,” Ct. Ex. A, is neither “victim impact” nor a “matter[] in mitigation.” R.C.M. 1001(c)(3). It was, therefore, plainly inadmissible. Additionally, because the only manner in which the members could remove Maj Jastal from the Air Force was by adjudging a dismissal, that statement was a prohibited recommendation of a specific sentence. *Id.*; *see also* Trial Tr. 1439 (military judge instructing the members that a dismissal “is the only type of discharge this court is authorized to adjudge in this case”). Military law has long recognized that the “use of euphemisms” such as “‘He should be separated’; or the like are just other ways of saying, ‘Give the accused a punitive discharge.’ A court-martial has no other discharge available to it.” *United States v. Ohrt*, 28 M.J. 301, 305 (C.M.A. 1989). Thus, the military judge’s error of permitting HC’s statement that “Brandon should not be an Airman” to go before the members was doubly plain.

HC’s plea to the members to impose “severe” consequences was similarly plain error. Like her declaration that “Brandon should not be an Airman,” that plea for sentence severity was neither “victim impact” nor a “matter[] in mitigation.” R.C.M. 1001(c)(3). Accordingly, it was plainly impermissible to include that plea for severity in her victim impact statement.

HC's victim impact statement also included portions that plainly did not "directly relat[e] to or aris[e] from the offense[s] of which [Maj Jastal had] been found guilty," R.C.M. 1001(c)(2)(B), by alleging years of unspecified and uncharged "abuse." Maj Jastal was found guilty of a single specification for which HC was the victim: an act of domestic violence by slapping her and spitting on her on 11 February 2023. Charge Sheet, Charge II, Specification 1; Trial Tr. 1363. Yet HC's victim impact statement referred to the "shame and abuse that I endured throughout the course of our marriage." Ct. Ex. A. She had previously testified that she and Maj Jastal were married in July of 2019. Trial Tr. 654. Her victim impact statement also referred to Maj Jastal's behavior when they "started dating" as "the beginning of his abuse." Ct. Ex. A. Thus, her victim impact statement referred to events starting more than three-and-a-half years before any offense of which Maj Jastal was convicted.

The introduction of a victim impact statement encompassing allegations of abuse not directly related to "the offense of which the accused has been found guilty" is plainly erroneous. R.C.M. 1001(c)(2)(B). As the Court of Appeals for the Armed Forces has held, "[A]ccusations of uncharged conduct were not 'victim impact' within the meaning of R.C.M. 1001(c)(2)(B) and . . . including these accusations in the unsworn statement violated R.C.M. 1001(c)(3)." *United States v. Campos*, 85 M.J. 310, 315 (C.A.A.F. 2025). While the Court of Appeals for the Armed Forces decided *Campos* the month after the military judge admitted Court Exhibit A into evidence, plain error is assessed under the law at the time of appeal rather than the time of trial. *See, e.g., United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008). Court Exhibit A's violation of R.C.M. 1001(c)(2)(B) by referring to matters that occurred years before any offense resulting in a conviction should have been apparent to the military judge even before *Campos*. That opinion

makes the military judge's error in allowing the members to hear that statement even more plain and obvious.

B. The military judge appeared to be influenced by an erroneous view of what law was in effect for the admissibility of victim impact statements at the time of Maj Jastal's sentencing hearing.

When he allowed multiple impermissible portions of HC's victim impact statement to go before the members, the military judge appeared to be influenced by an erroneous view of the law. Referring to the rules governing victim impact statements, the military judge observed, "I will just state that they have changed." Trial Tr. 1396. The most recent change to the *MCM*'s victim impact statement rule was made by Executive Order 14103 of July 28, 2023. Before that, the R.C.M. governing victim impact statements had not changed since Executive Order 13825 of March 1, 2018, 83 Fed. Reg. 9889, 10009 (Mar. 8, 2018). Thus, the military judge's reference to a change in the rule was probably referring to Annex 3 of Executive Order 14103, which expressly permitted victims to "recommend a specific sentence." Exec. Order No. 14103 of July 28, 2023, Annex 3, ¶ (i), 88 Fed. Reg. at 50706. As discussed above, however, that change does not apply to this case.

C. The military judge erroneously admitted HC's victim impact statement into evidence, thereby enhancing the prejudicial effect of its impermissible portions.

The military judge further erred by admitting HC's victim impact statement into evidence. As the Court of Appeals for the Armed Forces has expressly observed, "unsworn victim statements are not made under oath, and are thus not evidence." *Tyler*, 81 M.J. at 112; *accord Campos*, 85 M.J. at 314. Nevertheless, the military judge stated in front of the members, "Just so it is clear, I did admit Court Exhibit A into evidence as Court Exhibit A." Trial Tr. 1397 (omitting court reporter's bracketed addition). This was no slip of the tongue; again during an Article 39(a) session, the military judge referred to having admitted Court Exhibit A into evidence. *Id.* at 1398.

The military judge gave the victim impact statement additional weight by incorrectly anointing it as admitted evidence in front of the members. *Id.* at 1397.

D. Maj Jastal was prejudiced by the members hearing and receiving the impermissible portions of HC's victim impact statement.

“When the content of a victim impact statement does not comport with R.C.M. 1001(c) and is introduced during sentencing proceedings, ‘the test for prejudice is whether the error substantially influenced the adjudged sentence.’” *Arroyo*, 2024 CCA LEXIS 242, at *12–13 (quoting *United States v. Barker*, 77 M.J. 377, 384 (C.A.A.F. 2018) (internal quotation marks and citation omitted)). This Court makes that determination “by evaluating ‘(1) the strength of the Government’s case; (2) the strength of the [D]efense[’s] case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question.” *Id.* (alterations in original) (quoting *Barker*, 77 M.J. at 384 (internal citation omitted)). Here, those factors strongly support finding prejudice.

First, the prosecution’s sentencing case was limited to three document compilations and one witness, who provided extremely limited testimony. Pros. Exs. 6–8; Trial Tr. 1376–79, 1395 (testimony of Lieutenant Colonel SHL).

The defense sentencing case was far more extensive. It included the testimony of three witnesses. A Military Family Support Center clinical counselor who had provided individual counseling to Maj Jastal testified that he had “moderate to high” rehabilitative potential in society. Trial Tr. 1405. A master sergeant who had worked closely with Maj Jastal at a previous duty station testified that “he has a high potential for rehabilitation” as a member of society. *Id.* at 1408. Another master sergeant, who was the acting first sergeant of Maj Jastal’s unit at the time of trial, testified that he has high rehabilitative potential. *Id.* at 1414. The defense also presented extensive documentary evidence concerning his service record. Def. Exs. E–G. Additionally, the defense

introduced nine character letters into evidence. Def. Exs. I–Q. Maj Jastal also made an unsworn statement to the members in which he apologized “for my actions that have ultimately led me to this moment.” Trial Tr. 1422; Def. Ex. Q.

Some of the improper portions of the victim impact statement were material to the central issue during the sentencing proceeding: whether to impose a dismissal. During sentencing argument, Maj Jastal’s counsel suggested a sentence of confinement for six months with no dismissal, then told the members that “if you find yourself stuck between whether more confinement is appropriate or a dismissal is appropriate, then you should certainly go with the side of more confinement over giving a dismissal.” Trial Tr. 1446. After discussing the severe consequences of a dismissal, the defense counsel added, “[I]f you are absolutely determined that a dismissal is absolutely necessary in this case, then in that situation no confinement should be adjudged. But again, between the two, members, more confinement is appropriate than providing a dismissal.” *Id.* at 1447. The defense counsel ended his closing argument with a similar plea to the members to impose lengthier confinement rather than a dismissal. *Id.* at 1451.

HC’s euphemistic call for a dismissal and her express entreaty for “severe” consequences went directly to whether the members would heed the defense counsel’s plea or impose a dismissal. *See* Ct. Ex. A. Ultimately, after seeking reconsideration instructions from the military judge, the members announced a sentence including a dismissal. Trial Tr. 1461–64, 1468.

The victim impact statement further prejudiced the defense by essentially multiplying a one-time domestic violence offense against HC more than a thousand-fold into a 1,277-day continuing offense. *See* Ct. Ex. A. That grossly magnified the scale of the misconduct for which the members should have sentenced Maj Jastal. Thus, the improperly introduced portions of the victim impact statement were highly material.

The quality of the improper statements was particularly prejudicial. The members both heard the victim impact statement and received it in writing. *Id.* at 1397, 1400; Ct. Ex. A. The military judge gave it even more heft than it was entitled to by stating, in front of the members, that he had admitted it into evidence. Trial Tr. 1397.

None of the three offenses of which Maj Jastal was convicted was so serious that a dismissal was inevitable. As the military judge instructed the members, a dismissal “should be reserved for those who, in the opinion of the court, should be separated under conditions of dishonor after conviction of serious offenses of a civil or military nature warranting such severe punishment.” Trial Tr. 1439; *accord* Dep’t of the Army, Pam. 27-9, Legal Services: Military Judges’ Benchbook 114 (July 29, 2025). Charge III and its specification, which alleged that Maj Jastal was drunk and disorderly and that his conduct was of a nature to bring discredit upon the armed forces, certainly did not allege such a “serious offense of a civil or military nature.” For an enlisted member, a punitive discharge is not even authorized for that offense. Pt. IV, ¶ 98.d.(3)(b), *MCM* (2019 ed.).⁴ The members had also heard the testimony of MAJ JDK, a witness to Maj Jastal’s behavior at the firepit, who opined that he did not “think that by itself” it “would have necessitated some sort of UCMJ response.” Trial Tr. at 974.

Maj Jastal was also found guilty of two domestic violence specifications. *Id.* at 1363. One was for “shoving” his roughly eighteen-month-old son CJ “with his hand.” Charge Sheet, Charge II, Specification 2; Trial Tr. 665 (establishing month of CJ’s birth). HC—whose testimony was generally hostile to the defense—expressly acknowledged that CJ did not suffer any injury from the offense. Trial Tr. 667. She also acknowledged that the incident as “appeared to be an accident.”

⁴ A commissioned officer, however, may be sentenced to a dismissal upon conviction of any offense resulting in a finding of guilty at a general court-martial. R.C.M. 1003(c)(2)(A)(iv).

Id. at 770. LCDR JEF, U.S. Navy, in whose house the incident occurred, testified that CJ “just appeared startled” by it. *Id.* at 1089. A dismissal is hardly inevitable for such a push that resulted in no injury.

The final offense of which Maj Jastal was convicted was “unlawfully slapping [HC’s] face with his hand and unlawfully spitting on her.” Charge Sheet, Charge II, Specification 1; Trial Tr. 1363. HC’s testimony indicates that rather than physically injuring her, the slap merely “[a]nnoyed” her. *Id.* at 734. She also characterized it as a “quick slap” and agreed that it caused “no apparent injuries.” *Id.* at 745. Again, a dismissal is far from inevitable for a “quick slap” and spitting resulting in no injuries. Neither individually nor collectively did the offenses of which Maj Jastal was convicted demand a dismissal. HC’s improper plea for Maj Jastal’s removal from the Air Force better explains the members’ decision to impose a punitive discharge than the severity of the offenses of which Maj Jastal was convicted.

A final factor weighs strongly in favor of finding prejudicial error. Both the Court of Appeals for the Armed Forces and this Court have emphasized that when analyzing the effect of an improper victim impact statement, the identity of the sentencing authority is highly relevant. *Barker*, 77 M.J. at 384; *Hamilton*, 78 M.J. at 343; *Arroyo*, 2024 CCA LEXIS 242, at *13. If a military judge is the sentencing authority, courts are loathe to find prejudicial error. Conversely, it is significant that, in this case, members were the sentencing authority. That greatly magnifies the danger that the improper portions of HC’s victim impact statement affected the adjudged sentence.

Thus, on balance, the improper portions of the victim impact statement “substantially influenced the sentence.” *Campos*, 85 M.J. at 316. This Court can eliminate that prejudice by either affirming a sentence that does not include a dismissal or setting aside the sentence and remanding for a new sentencing hearing untainted by an improper victim impact statement.

Assignment of Error III.

The evidence supporting Charge II, Specification 1 is factually insufficient to prove the offense beyond a reasonable doubt given the absence of any physical evidence corroborating the allegation; Major Jastal’s immediate, adamant denial of having committed the offense; and his explanation that the alleged victim advanced the allegation in an effort to “gaslight” him.

Standard of Review and Applicable Legal Test

This Court reviews issues of factual sufficiency de novo. *United States v. Cabuhat*, 83 M.J. 755, 770 (A.F. Ct. Crim. App. 2023) (en banc), *petition denied*, 84 M.J. 275 (C.A.A.F. 2024).

This case—in which all findings of guilty were for offenses allegedly committed between on or about 1 January and 1 March 2023—is subject to this Court’s factual sufficiency review authority under the version of Article 66(d)(1)(B), UCMJ, enacted by section 542(b) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (NDAA for FY 2021), Pub. L. No. 116-283, 134 Stat. 3388, 3611–12 (2021).⁵ Under that provision, this Court may conduct a factual sufficiency review “upon request of the accused if the accused makes a specific showing of a deficiency in proof.” UCMJ art. 66(d)(1)(B), 10 U.S.C. § 866(d)(1)(B). Appellant makes such a request as to Charge II, Specification 1, and, as demonstrated below, makes a specific showing of deficiency of proof that he engaged in the conduct alleged by that specification.

⁵ The amendment of Article 66 enacted by section 539E of the National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539E, 135 Stat. 1541, 1700 (2021), applies only to cases in which all findings of guilty are for offenses occurring after December 27, 2023. *Id.* at § 539E(f), 135 Stat. at 1706. Hence, that amendment is inapplicable to this case. The amendment of Article 66 enacted by section 544 of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 did not affect subsection (d)(1). Pub. L. No. 117-263, § 544, 136 Stat. 2395, 2582 (2022).

Analysis

Maj Jastal’s immediate reaction when HC accused him of the acts alleged by Charge II, Specification 1 raises a reasonable doubt as to whether he committed those acts. Responding to two texts from HC alleging that he slapped and spat on her, his response was unequivocal: “No I didn’t[.]” Def. Ex. A. In response to HC’s assertion that “in the heat of the moment you did,” his response was again unequivocal: “No I didn’t[.]” *Id.* Apparently trying to make sense of why HC would make such untrue allegations, he subsequently texted, “And now you are trying to gaslight me.” *Id.*

People sometimes concoct allegations of crimes that never occurred. *See, e.g., City of Chicago v. Smollett*, 421 F. Supp. 3d 565 (N.D. Ill. 2019); *Runaway Bride Enters Plea and Is Sentenced to Probation*, N.Y. TIMES, June 3, 2005, at A14; GERHARD FALK, THE AMERICAN CRIMINAL JUSTICE SYSTEM 56–58 (2010) (cataloging several intentionally false criminal allegations). Given Maj Jastal’s adamant response to HC’s allegations and the lack of any physical corroborating evidence, there is a “real possibility”⁶ that she did so in this case.

HC did not report the alleged slapping and spitting incident to law enforcement. Her allegations had a narrower audience: her neighbors. HC may have invented the story to win her neighbors’ sympathy when they might have otherwise been critical of her for locking her husband out of his own house and refusing his repeated entreaties to let him in. *See* Def. Ex. A.

The members’ implicit assessment of HC’s credibility merits no deference. When conducting a factual sufficiency review, this Court must give “*appropriate* deference to the fact

⁶ *See United States v. Meeks*, 41 M.J. 150, 157 n.2 (C.M.A. 1994) (approvingly citing Federal Judicial Center, Pattern Criminal Jury Instructions 17–18 (1987)); *United States v. McClour*, 76 M.J. 23, 26 (C.A.A.F. 2017). *See also United States v. Lewis*, No. 201900049, 2020 CCA LEXIS 199, at *25 (N-M. Ct. Crim. App. June 8, 2020) (“If we believe there is a ‘real possibility’ that he is not guilty, there is reasonable doubt, and we cannot affirm Appellant’s conviction.”).

that the trial court saw and heard the witnesses and other evidence.” UCMJ art. 66(d)(1)(B)(ii)(I), 10 U.S.C. § 866(d)(1)(B)(ii)(I) (emphasis added). In this case, as discussed in Assignment of Error I, above, the members’ assessment of HC’s credibility was tainted by the special trial counsel’s improper vouching during closing argument. App. Ex. XXIX at 4; Trial Tr. 1277, 1279. That improper argument impermissibly “place[d] the prestige of the government behind [HC] through personal assurances of [her] veracity.” *Fletcher*, 62 M.J. at 180 (quoting *Necoechea*, 986 F.2d at 1276). Because of the resulting distortion of the members’ credibility determination, in this case, the “appropriate deference” to the members’ opportunity to see and hear HC is none.

The real possibility that, consistent with Maj Jastal’s immediate adamant denials, HC concocted the slapping and spitting allegation precludes concluding beyond a reasonable doubt that Maj Jastal is guilty of Charge II, Specification 1. This Court should, therefore, set aside the finding of guilty to Charge II, Specification 1 and dismiss that specification with prejudice.

After setting aside the finding of guilty to that specification, this Court should reassess the sentence by setting aside the dismissal. After “dismissing a charge,” a Court of Criminal Appeals “may reassess the sentence and that sentence must be equal to or no greater than a sentence that would have been imposed if there had been no error.” *United States v. Moffeit*, 63 M.J. 40, 41 (C.A.A.F. 2006). Here, this Court cannot “determine to its satisfaction” that, absent the finding of guilty to Charge II, Specification 1, the members would have adjudged a dismissal. *Id.* (quoting *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986)). Without the finding of guilty to Charge II, Specification 1, the members would have sentenced Maj Jastal for only two offenses. One was drunk and disorderly conduct of a nature to bring discredit upon the armed forces, a minor infraction that the members almost certainly would not have considered a “serious” offense warranting the severe punishment of a dismissal. *See* Trial Tr. 1439. The other was “shoving” his

eighteen-month-old son “with his hand,” an offense that caused no injury and that his estranged wife testified “appeared to be an accident.” *Id.* at 770. This Court cannot be confident that, without the finding of guilty to Charge II, Specification 1, the members would have adjudged a dismissal. A reassessed sentence, therefore, may not include a dismissal. *See Sales*, 22 M.J. at 308. Accordingly, after setting aside the finding of guilty to Charge II, Specification 1 and dismissing that specification, this Court should reassess the sentence and affirm only so much of it as provides for confinement for 30 days.⁷

Assignment of Error IV.

Maj Jastal’s constitutional rights were violated when he was convicted of offenses with no requirement that the court-martial panel (the functional equivalent of the jury) vote unanimously that he is guilty.

Standard of Review and Applicable Legal Test

The standard of review for questions of constitutional law is *de novo*. *United States v. Busch*, 75 M.J. 87, 91 (C.A.A.F. 2016). “To succeed in a due process challenge to a statutory court-martial procedure, an appellant must demonstrate that “the factors militating in favor of [a different procedure] are so extraordinarily weighty as to overcome the balance struck by Congress.”” *United States v. Anderson*, 83 M.J. 291, 298 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 1003 (2024) (quoting *Weiss v. United States*, 510 U.S. 163, 177–78, 181 (1994) (quoting *Middendorf v. Henry*, 425 U.S. 25, 44 (1976))).

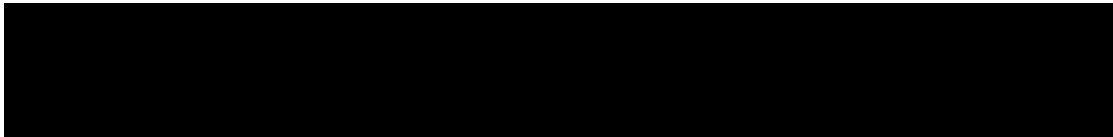
Analysis

In *United States v. Anderson*, the Court of Appeals for the Armed Forces held that non-unanimous findings of guilty do not violate a court-martial accused’s constitutional rights. 83 M.J.

⁷ Because the reprimand refers to the conduct alleged by Charge II, Specification 1, *see* Convening Authority Decision on Action, Feb. 24, 2025, this Court should decline to affirm that portion of the sentence.

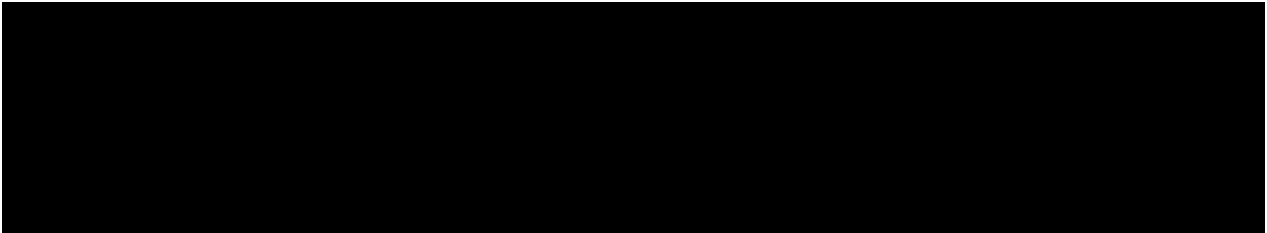
at 302. Appellant acknowledges that, absent intervening Court of Appeals for the Armed Forces or Supreme Court caselaw, this Court is bound by the *Anderson* opinion. Nevertheless, Appellant maintains that *Anderson* was wrongly decided and expressly preserves this issue for further appellate review.

Respectfully submitted,



Dwight H. Sullivan
Appellate Defense Counsel

JORDAN L. GRANDE, Maj, USAF
Air Force Appellate Defense Counsel

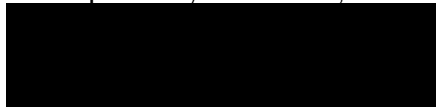


Counsel for Appellant

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 Air Force Government Trial and Appellate Operations Division on 18 September 2025.

Respectfully submitted,



Dwight H. Sullivan
Air Force Appellate Defense Division

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

UNITED STATES	)	No. ACM 40823
<i>Appellee</i>	)	
	)	
v.	)	
	)	ORDER
Brandon S. JASTAL	)	
Major (O-4)	)	
U.S. Air Force	)	
<i>Appellant</i>	)	Panel 3

On 14 August 2025, in a Motion for Reconsideration and Suggestion for Reconsideration En Banc, Appellant moved this court to reconsider its 15 July 2025 order which granted Appellant’s request for a first enlargement of time. Specifically, Appellant avers that “the [c]ourt’s order makes several errors that warrant correction.” On this same date, in a Motion for Oral Argument, Appellant moved this court to grant Appellant oral argument on its motion for reconsideration and suggestion *en banc* reconsideration. In furtherance of these motions, also on 14 August 2025, Appellant filed a Motion to Attach a previous order from another case by this court dated 12 February 2025. The Government did not file any opposition or responses to Appellant’s motions.

As to Appellant’s Motion for Reconsideration and Suggestion for Reconsideration En Banc and his Motion for Oral Argument, and in accordance with Rule 27(c) of The Joint Rules of Appellate Procedure for Courts of Criminal Appeals, Appellant’s motions were transmitted to each judge of the court who was present for duty and not disqualified from participation due to a conflict of interest. No participating judge voted to reconsider the 15 July 2025 order *en banc*.

The panel voted 3–0 in favor of panel reconsideration. As for Appellant’s motion for oral argument, the panel declines to hear argument on the motion for reconsideration.

The panel does not find relevant the order dated 12 February 2025 to reconsider the application of the rule in this case and therefore denies Appellant’s motion to attach.

Accordingly, it is by the court on this 5th day of September, 2025,

ORDERED:

Appellant’s motion for reconsideration *en banc* is **DENIED**.

Appellant's motion for reconsideration by the panel is **GRANTED**. Pursuant to A.F. CT. CRIM. APP. R. 31.2(c), this court's order issued on 15 July 2025 is **VACATED** and a new order will be issued in due course.

Appellant's motion for oral argument is **DENIED**.

Appellant's motion to attach is **DENIED**.



FOR THE COURT



CAROL K. JOYCE
Clerk of the Court

UNITED STATES,	)	UNITED STATES’ MOTION
<i>Appellee,</i>	)	FOR AN ENLARGEMENT OF
	)	TIME (FIRST)
v.	)	
	)	Before Panel 3
Major (O-4)	)	
BRANDON S. JASTAL,	)	No. ACM 40823
United States Air Force,	)	
<i>Appellant.</i>	)	8 October 2025

Pursuant to Rule 23.3(m)(5), the United States respectfully requests a 14-day enlargement of time to respond in the above-mentioned case which will end on **3 November 2025**.

The case was originally docketed with the Court on 21 May 2025. Since docketing, this Court has granted Appellant one (1) enlargement of time. Appellant filed his brief with this Court on 18 September 2025. This is the United States’ first request for an enlargement of time. As of the date of this request, 140 days have elapsed since docketing. The United States’ brief is currently due 20 October 2025. If the enlargement of time is granted, 166 days will have elapsed by the time of filing.

There is good cause for the enlargement of time in this case. Undersigned counsel is an activated reservist who arrived in the office on 7 October 2025. Undersigned counsel is tasked with training 6 District Trial Counsel, filing in for the civilian associate chief who is on leave 9-14 October 2025, and was appointed to a SAF/MR Warrior Ethos Implementation Tiger Team at the Secretary of War's direction. Further, JAJG will be closed on Friday 10 October 2025 and 13 October 2025 for the Columbus Day holiday. JAJG has four oral arguments scheduled at the

United States Court of Appeals for the Armed Forces (CAAF) on 21-22 October 2025, limiting JAJG's leadership's ability to conduct supervisory review prior to 20 October 2025. This case is undersigned counsel's first priority case.

The Air Force Appellate Operations Division (JAJG) currently has 16 briefs pending with this Court and 1 brief pending before CAAF. JAJG currently only has 6 active duty appellate attorneys, 1 active duty division chief, and one civilian associate chief. JAJG's director of operations, Lt Col Liabenow, was reassigned out of the office in August 2025, which means that JAJG has one less supervisory attorney to conduct supervisory review of briefs. Her replacement is not inbound until 20 October 2025.

A 14-day enlargement of time is warranted. Appellant filed a 28-page brief with 4 assignments of error. The electronic record of trial contains almost 3,000 pages. The enlargement of time to 3 November 2025 is necessary to provide ample time for counsel to effectively represent the United States before this Court. Due to office workload and although JAJG is marshalling reserve support, there is no other appellate government counsel who can work on the brief sooner. The enlargement of time also allows sufficient time for supervisory review and will ensure that the division can file the most thorough, helpful brief possible.

WHEREFORE, the United States respectfully requests this Court grant the United States' motion.

[REDACTED]

MORGAN R. CHRISTIE, Maj, USAF
Appellate Government Counsel

[REDACTED]

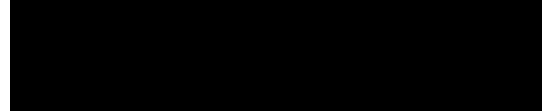
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MATTHEW D. TALCOTT, Col, USAF
Chief
Government Trial and

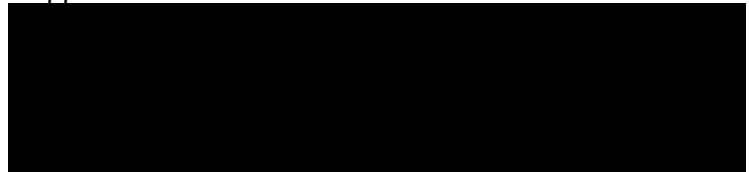
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate
Defense Division on 8 October 2025.



MORGAN R. CHRISTIE, Maj, USAF
Appellate Government Counsel



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	
<i>Appellee,</i>	)	UNITED STATES' ANSWER TO
	)	ASSIGNMENTS OF ERROR
v.	)	
	)	
Major (O-4)	)	Before Panel 3
BRANDON S. JASTAL, USAF	)	
<i>Appellant.</i>	)	No. ACM 40823

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

ISSUES PRESENTED

I.

**WHETHER THE SPECIAL TRIAL COUNSEL
COMMITTED PROSECUTORIAL MISCONDUCT DURING
CLOSING ARGUMENT BY VOUCHING FOR THE
CREDIBILITY OF THE ONLY NAMED ALLEGED VICTIM
TO TESTIFY?**

II.

**WHETHER THE MILITARY JUDGE COMMITTED PLAIN
ERROR IN THIS MEMBERS SENTENCING CASE BY
ADMITTING INTO EVIDENCE AN UNSWORN VICTIM
IMPACT STATEMENT OPINING THAT THE ACCUSED
"SHOULD NOT BE AN AIRMAN," ASKING FOR A
SENTENCE THAT SHOWS "THAT THERE ARE
CONSEQUENCES—SEVERE ONES—FOR COMMITTING
VIOLENCE AGAINST HIS FAMILY," AND ALLEGING
ABUSE OVER A THREE-AND-A-HALF YEAR PERIOD
PRECEDING ANY OFFENSE RESULTING IN A
CONVICTION?**

III.

**WHETHER THE EVIDENCE SUPPORTING CHARGE II,
SPECIFICATION 1 IS FACTUALLY INSUFFICIENT TO
PROVE THE OFFENSES BEYOND A REASONABLE
DOUBT GIVEN THE ABSENCE OF ANY PHYSICAL
EVIDENCE CORROBORATING THE ALLEGATION;**

[APPELLANT]’S IMMEDIATE, ADAMANT DENIAL OF HAVING COMMITTED THE OFFENSE; AND HIS EXPLANATION THAT THE ALLEGED VICTIM ADVANCED THE ALLEGATION IN AN EFFORT TO “GASLIGHT” HIM?

IV.

WHETHER [APPELLANT]’S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN HE WAS CONVICTED OF OFFENSES WITH NO REQUIREMENT THAT THE COURT-MARTIAL PANEL (THE FUNCTIONAL EQUIVALENT OF THE JURY) VOTE UNANIMOUSLY THAT HE IS GUILTY?

STATEMENT OF THE CASE

The United States generally accepts Appellant’s statement of the case.

STATEMENT OF FACTS

The victim, HC, met Appellant in December 2017 and they married in July 2019. (R. at 655.) Together, they had two sons. (R. at 654.) At the time of the convicted offenses, HC, Appellant, and their two minor sons lived together on the island of Oahu, Hawaii. (Id.)

On 11 February 2023, Appellant and HC attended a neighborhood gathering at a friend’s firepit. (R. at 653-54, 669, 969.) At the firepit, Appellant became visibly intoxicated. (R. at 670.) When someone changed the music Appellant was listening to, he became “upset and angry.” (R. at 869.) Appellant began “cursing aggressively” at HC, yelling “fuck you,” making everyone around the firepit uncomfortable, and acting “aggressive.” (R. at 869-870, 917-918, 934-935, 1034-1035.) Appellant was “irate.” (R. at 739.) Appellant called HC a “cunt” and “got really mad” at her. (R. at 1034-1035.) The firepit attendees grew “uncomfortable” due to Appellant’s behavior and “one by one everyone just started to leave.” (R. at 871.)

HC left the gathering around midnight after Appellant directed offensive language at her and other neighbors. (R. at 671-72, 674.) Fearing his level of intoxication, HC returned to their

residence and locked the doors. (R. at 674-675.) She also sent a text message to Appellant, telling him, "Find somewhere else to sleep." (Pros. Ex. 2.) However, Appellant came home instead and broke a panel in the back door to gain entry. (R. at 675-676, 741; Pros. Ex. 4.) HC testified that upon gaining entry, Appellant came into the bedroom and began cursing at her. (R. at 676.) HC testified she got out of bed to ensure he did not disturb their son who was sleeping. (R. at 676.) While in the hallway, Appellant was "still screaming at" HC when he "spit on" and then "slapped" her. (R. at 677, 678, 679.) HC was seven months pregnant at the time. (R. at 677.)

At trial, the government introduced Prosecution Exhibit 3, which was baby monitor video footage of HC and Appellants' younger son who was asleep in his crib. (R. at 687.) The baby monitor footage captured the sound of Appellant kicking down the door to force his way into the home and then slamming the master bedroom door shut. (R. at 688.) The baby monitor also captured Appellant yelling and cursing at HC before and after he slapped her and spit on her:

You locked me out of the house, you fucking bitch. Fuck you. You fucking cunt. You fucking cunt. You fucking cunt. Why did you lock me out, you bitch. Why did you lock me out? [Inaudible.] Why did you lock me out? You locked me out. You fucking cunt. You fucking locked me out, you bitch. You locked me out, you bitch.

[HC is heard crying.]

You [inaudible] you fucking cunt. You're a fucking [inaudible]. Why did you lock me out of the house, you bitch?

...

[HC is heard crying and inaudible response.]

Why are you [inaudible].

[Inaudible response from HC.]

You locked me out of the house, you fucking cunt. [Inaudible] you fucking bitch.

HC: Let me go.

[Inaudible.]

HC: Let me go.

[Inaudible response from HC]

(R. at 687, 1309-1310.)

Soon after the slapping and spitting incident, HC texted a neighbor, KK, asking her to come over and de-escalate. (R. at 699, 931.) KK and her husband, JK, came over. (R. at 946, 976.) When KK came over, she found HC crying hysterically and holding her face. (R. at 946-947, 965.) HC told KK that Appellant had slapped her. (R. at 946.) JK observed the door Appellant broke entering the home earlier that evening. (R. at 977.) Appellant was “very upset,” using “lots of curse words” directed at his wife and using “slander words” against his wife. (R. at 977.) Specifically, KK overheard Appellant call HC a “cunt” and “bitch” and blamed HC for Appellant having to kick down the door because HC locked Appellant out of the house. (R. at 978.)

The next morning, HC told Appellant that he slapped her and that he needed to get help (R. at 702.) HC testified that the Appellant stated that it was her fault. (R. at 702-703.) In April or May 2023, Appellant told MSgt MY, and MSgt AD that he slapped HC. (R. at 1102-03.)

ARGUMENT

I.

TRIAL COUNSEL DID NOT COMMIT PROSECUTORIAL MISCONDUCT DURING THE FINDINGS ARGUMENT.

Additional Facts

During the defense's cross-examination of the named victim, trial defense counsel attacked HC's credibility, impeaching her on multiple occasions with prior perceived inconsistent statements. (R. at 720-21, 32-33, 742, 746, 760, 764-66.) Trial defense counsel also cross-examined HC on her motive to fabricate, including eligibility for victims transitional compensation if Appellant is convicted. (R. at 785-86.)

Trial counsel's findings argument spanned 19 pages of transcript. (R. at 1274-1297.) Trial defense counsel did not object once. (Id.) The members deliberated for two days, including an overnight recess, before ultimately convicting Appellant of some, but not all, charges. In pertinent part, the special trial counsel argued:

So members, let's start with the first. *HC is telling the truth here*, and there's a couple ways that you can be sure of that, beyond a reasonable doubt. And it has to do with one of your most important jobs this week. This is an instruction that you received from the military judge about determining the credibility of witnesses. Because members, that duty is important. It's something that each of you individually has to assess. You have to think back to the testimony of each person who came before you.

There's a lot of factors to consider in the instruction, but what you will find is that while it did take HC years to open up to the abuse that her and her son endured, when she did, those crimes we're corroborated by physical evidence, other testimony, and in one instance by [Appellant] himself.

(R. at 1277) (emphasis added.)

And think about it, members. If this was made up, if HC is just throwing things out there, if she had this goal to make up accusations against him, why didn't she do it back then? Why didn't she create

something to support it? If that's what she supposedly did? She was candid that there was nothing else to support it. She didn't tell people until later. There's no text messages, there's no nothing. Just her word on what she told her friends when she felt safe. If she was going to fabricate something, don't you think she would have done it better? ***The truth of the matter is that she isn't lying. She's telling the truth.*** This is the first thing that happened to her.

(R. at 1279) (emphasis added.)

Trial defense counsel did not object to any portion of the closing argument, including the PowerPoint slides. (R. at 1258, 1274-1293.)

Trial counsel also used 65 PowerPoint slides during closing argument. (App. Ex. XXIX.) One of the 65 slides read: "HC is telling the truth. But you don't have to believe only her word, there is corroborating evidence." (Id. at page 4.) The very next slide trial counsel used was the military judge's instruction on the credibility of witnesses. (Id. at page 5.)

The military judge asked if defense counsel had reviewed trial counsel's closing PowerPoint slides. (R. at 1258.) Trial defense counsel answered he had. (Id.) The military judge then asked if there was any objection to the slides. (Id.) Trial defense counsel responded, "No, Sir." (Id.)

After trial counsel's unobjected argument, the military judge convened an Article 39(a), UCMJ session to discuss the defense's request for a curative instruction regarding a *different* topic the special trial counsel addressed in closing relating to a different victim. (R. at 1295-1296.) The military judge asked defense counsel if they had anything else to take up before calling the members. (R. at 1295.) He did not. (Id.) When the members returned, the military judge provided the following curative instruction:

Members, before the defense counsel presents closing argument, during the trial counsel's closing argument there was a discussion about CJ hitting the back of his head and that his back of his head was soft and not fully formed. There was no evidence presented that that was the case. So I need everyone to disregard any discussion

regarding what the state of CJ's head may have been when he may or may not have hit the back of his head. Can every member follow that direction?

(R. at 1297.)

The members answered affirmatively that they could follow the military judge's instruction. (Id.)

Standard of Review

Prosecutorial misconduct and improper argument are reviewed de novo. United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019) (citing United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018)). However, where no objection is made, the claim is reviewed for plain error. Andrews, 77 M.J. at 398.

Under plain error review, the appellant has the burden of proving: “(1) there is error, (2) the error is clear or obvious, and (3) the error results in material prejudice to a substantial right of the accused.” Id. at 401 (citation omitted). For improper argument, a court must specifically determine: “(1) whether trial counsel's arguments amounted to clear, obvious error; and (2) if so, whether there was ‘a reasonable probability that, but for the error, the outcome of the proceeding would have been different.’” Voorhees, 79 M.J. at 9 (quoting United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017)).

Law and Analysis

Appellant argues that the special trial counsel improperly vouched for the named victim in three portions of the unobjected-to findings argument: twice orally and once with PowerPoint Slide 4 that was used as a demonstrative aid during findings argument. (App. Br. at 10.) Appellant waived any objection to the PowerPoint slides. For the oral statements, Appellant has failed to demonstrate plain error and is not entitled to relief. First, he has failed to show error

because trial counsel did not engage in prosecutorial misconduct. Second, even if this Court finds trial counsel to have engaged in prosecutorial misconduct, Appellant is still entitled to no relief because it was harmless under the facts of his case.

A. Appellant waived any error with respect to the PowerPoint slides.

During an Article 39(a) session before findings argument, the military judge ensured trial defense counsel had reviewed trial counsel's closing argument PowerPoint slides. (R. at 1257-58.) Trial defense counsel responded: "Yes, Your Honor." Then the military judge queried: "Any objection to each other's slides?" (R. at 1258.) Trial defense counsel responded: "No, Sir." An affirmative statement than an accused at trial has "no objection" generally "constitutes an affirmative waiver of the right or admission at issue." United States v. Swift, 76 M.J. 210, 217 (C.A.A.F. 2017) (citation omitted). Since Appellant affirmatively waived his objection to the PowerPoint slides, there is nothing to correct on appeal for that aspect of the assignment of error.

B. Trial counsel did not improperly vouch for the victim.

Trial counsel never vouched for HC's credibility. Trial defense counsel made HC's credibility a central issue throughout its lengthy cross-examination. In sum, trial counsel was allowed to argue the evidence-based reasons why the members should find HC credible. "Prosecutors, as well as defense lawyers, may and must argue as to the credibility of witnesses, and in a case of this kind the issue of credibility is crucial. The very nature of closing argument requires a detailed analysis of the testimony of each witness and the inferences to be drawn from the evidence." United States v. Grey Bear, 883 F.2d 1382, 1392 (8th Cir. 2000). Arguing that a witness does not have a reason to lie is proper argument so long as such statement is grounded in evidence. United States v. Eley, 723 F.2d 1522, 1526 (11th Cir. 1984).

Improper vouching occurs when trial counsel “places the prestige of the government behind a witness through personal assurances of the witness’s veracity.” United States v. Fletcher, 62 M.J. 175, 780 (C.A.A.F. 2005) (quoting United States v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1993)). During findings argument, the government marshalled evidence in support of its claim that HC had told the truth—just as the Defense argued she was lying. This line of argument is “common to trial litigation,” and this Court has found it proper. United States v. Chisum, 75 M.J. 943, 953 (A.F. Ct. Crim. App. 2016); *see also* R.C.M. 919 (findings arguments “may properly include reasonable comment on the evidence in the case, including inferences to be drawn therefrom, in support of a party’s theory of the case.”)

Here, trial counsel did not express a personal belief as to HC’s credibility nor did she *improperly* vouch for HC’s credibility. First, trial counsel never used personal pronouns when making these statements. Fletcher, 62 M.J. at 180 (explaining that “use of personal pronouns in connection with assertions that a witness was correct or to be believed” is improper); *see also* Voorhees, 79 M.J. at 11 (trial counsel improperly expressed his personal opinion by using personal pronouns). In this regard, trial counsel here never invoked the prestige of her position as a special trial counsel to bolster her opinion as to the victim’s credibility. *See* United States v. Young, 470 U.S. 1, 18-19 (explaining the danger of a prosecutor vouching for the credibility of witnesses is the prosecutor’s opinion may carry with it “the imprimatur of the Government.”)

Trial counsel’s statements regarding HC were made with references to evidence that supported the inferences she wished the factfinder to draw. And as a zealous advocate, trial counsel may “forcefully assert reasonable inferences from the evidence.” United States v. Coble,

No. 201600130, 2017 CCA LEXIS 113, *10 (N-M. Ct. Crim. App. 23 February 2017) (unpub. op.) (quoting Cristini v. McKee, 526 F.3d 888, 901 (6th Cir. 2008)).

In United States v. Parks, the appellant raised a similar improper vouching argument for the first time on appeal. 2017 CCA LEXIS 106, *20-21 (15 February 2017) (unpub. op.) In rejecting the appellant's argument, this Court found no error, no less plain error, when trial counsel argued that the victim was "not lying" but "a young woman trying to make sense of what happened to her." Id. at *21. The Court found this was an appropriate argument in response to the attack of the witness' credibility on cross examination.

In United States v. Fuentes, the CMA found that trial counsel's assertion that a witness' testimony was "fabricated" was not error because it "did not purport to be based on any personal knowledge or belief of the trial counsel." 18 M.J. 41, 52 (C.M.A. 1984). The Court reasoned that trial counsel "was only contending that the factfinder should draw certain inferences as to accuracy and truthfulness of [the witness]'s testimony from the evidence that had been received. For a trial counsel to make such an argument is quite different from his having personal knowledge that a witness is lying." Id.

In Young, the Supreme Court stated that context of a prosecutor's arguments must be considered when being reviewed. There, the Court noted that the "prosecutor's statement of his belief that respondent intended to commit a fraud contained no suggestion that he was relying on information outside the evidence presented at trial," but rather was supported in closing argument by referencing evidence presented at trial. 740 U.S. at 18-19. As a result, the Court stated "when viewed in context, the prosecutor's remarks cannot be read as implying that the prosecutor had access to evidence outside the record." Id.

When trial counsel argued “HC is telling the truth here,” she immediately cited the “important” instruction from the military judge “about determining the credibility of witnesses.” (R. at 1277.) She emphasized that it was the members’ duty to determine witness credibility. (Id.) This was entirely proper. After harkening back to the proper instructions and emphasizing the burden of proof beyond a reasonable doubt, trial counsel then detailed the corroboration from physical evidence and the accused himself. (Id.) On balance, trial counsel’s comments were not calculated to inflame the members. Trial counsel did not invite the panel to satisfy its passions by looking beyond the evidence before it in rendering a verdict and trial counsel did not “place the prestige of the Government behind a witness through personal assurances of the witness’ veracity.” Fletcher, 62 M.J. at 180. On the contrary, trial counsel argued HC was credible because of ample “corroboration,” including eyewitnesses, physical evidence, video footage, photographic evidence, and Appellant’s own words. (R. at 1276, 1279-81, 1284-1285.) It was proper for trial counsel to argue that the members should find HC credible because the available evidence supported that she was telling the truth. Since trial counsel correctly tied her statements about HC’s credibility to the evidence and reminded the members that it was their own duty to determine credibility, there is no possibility that the members understood trial counsel to be saying that they should find HC credible merely because the prosecution said so.

As the Supreme Court has directed, “a Court should not lightly infer” that trial counsel’s statements were intended to carry their “most damaging meaning” or that the members would automatically draw the most damaging meaning from the statements. Donnelly v. DeChristoforo, 416 U.S. 637, 646-47 (1974). In context, trial counsel’s argument that “HC is telling the truth” was a proper inference from the evidence, given the amount of corroboration in

the case. Moreover, it was proper for trial counsel to rebut the defense's slashing cross examination implying that HC fabricated the assault charges.

Accordingly, this Court should find that trial counsel's statements regarding HC were not error, much less plain and obvious error.

C. Appellant cannot demonstrate that he suffered any prejudice.

Even if this Court finds trial counsel's statements regarding the credibility of HC to be plain and obvious error, Appellant has not shown how he has been prejudiced. CAAF explained that the test for prejudice where improper arguments were made requires a balancing of three factors: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." Fletcher, 62 M.J. at 184. "In other words, prosecutorial misconduct by a trial counsel will require reversal when the trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone." Id. Here, the three factors weigh in favor of finding no prejudice.

Under the first Fletcher factor, the severity of any misconduct was slight. The remarks only occurred during argument in a trial that spanned five days and did not extend to rebuttal, where trial counsel had the last word. (R. at 1339-1345.) The statements were not made repeatedly and spread throughout trial, but were limited to two occasions that occurred close in time during a relatively brief closing argument. The record does not support a finding that any misconduct was "pervasive and severe." Fletcher, 62 M.J. at 185.

In addition, trial defense counsel's lack of objection, despite ample opportunity, is "some measure of the minimal impact of [the] prosecutor's [alleged] improper argument." United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001). The lack of objection was a "tactical

decision.” See Darden v. Wainwright, 477 U.S. 168, 182 (1986) (finding no prejudice from prosecutorial misconduct where a defense counsel made “tactical decision[s]” in case strategy.) After allowing trial counsel’s arguments to proceed, without interruption, defense counsel re-framed the debate: “The greatest advantage to speaking the truth is that you don’t have to remember what you said. Members, if the defense had to describe this case to you in one sentence, that would be it.” (R. at 1297.) Defense counsel co-opted the victim’s credibility by arguing: “But as it relates to direct evidence, all you have are words from [HC]. That’s it. HC. And so HC is the only direct evidence that you members have before you. Her credibility becomes paramount becomes critical.” (R. at 1307.) The defense’s strategic response regarding HC’s credibility – rather than lodging an objection – shows that any improper argument was not severe. Therefore, the first factor weighs in favor of the Government.

The second Fletcher factor also weighs in favor of the Government. The standard instructions given by the military judge and defense counsel’s argument were sufficient to cure any allegedly improper insinuations by trial counsel. Appellant argues that “there was a total lack of curative measures” to address trial counsel’s misconduct. (App. Br. at 11-12.) In the absence of any objection from defense, the military judge did not give specific curative instructions. But he did give the standard instruction, “Argument by counsel is not evidence. Counsel are not witnesses. If the facts as you remember them differ from the way counsel state the facts, it is your memory of the facts that control.” (R. at 1347.) Appellant did not object to the instruction or request additional instructions. (Id.) The military judge’s instruction was sufficient to neutralize Appellant’s complaint that the members perceived an expectation to believe HC just because the trial counsel said she was telling the truth. See Fletcher, 62 M.J. at

194 (the military judge took appropriate steps to limit any potential harm resulting from trial counsel’s remarks by providing the same instruction that arguments of counsel are not evidence.)

After all, members are presumed to follow the judge’s instructions. United States v. Ricketts, 50 C.M.R. 567, 570 (C.M.A. 1975). And here, this Court need not rely on a presumption of compliance—the members verbalized their affirmative willingness and capability to understand and comply with the judge’s instructions when he provided a different curative instruction. (R. at 1297.) The military judge provided the members “complete and correct instructions” and informed them “that these instructions should control their deliberations.” United States v. Palacios Cueto, 82 M.J. 323, 335 (C.A.A.F. 2022). That is considered a curative measure. Id.

Before findings argument, the military judge instructed the members on the credibility of witnesses:

You have the duty to determine the believability of the witnesses. In performing this duty you must consider each witness’ intelligence, ability to observe and accurately remember, sincerity and conduct in court, and prejudices and character for truthfulness. Consider also the extent to which each witness is either supported or contradicted by other evidence; the relationship each witness may have with either side; and how each witness might be affected by the verdict.

(R. at 1267.)

Even if the special trial counsel improperly vouched for HC’s credibility, the military judge’s thorough instructions on witness credibility significantly mitigated any potential prejudice. Because members are presumed to follow the military judge’s instructions, the panel was bound to weigh HC’s testimony using the factors articulated by the judge – intelligence, demeanor, bias, corroboration, etc. – rather than relying solely on the special trial counsel’s non-binding assertions about HC’s truthfulness. And the judge reminded the panel that what the

counsel said was not evidence. Therefore, the military judge effectively neutralized any potential harm from the alleged vouching.

Under the third factor, as discussed under Issue III below, the evidence supporting Appellant's conviction "so clearly favor[s] the government that [A]ppellant cannot demonstrate prejudice." United States v. Sewell, 76 M.J. 14, 18 (C.A.A.F. 2017). Appellant has not demonstrated that any improper argument was instrumental to the finding of guilty. Thus, the third factor also weighs in favor of the Government.

On balance, the three factors demonstrate that Appellant suffered no prejudice. After reviewing the record, this Court should be "confident that the members convicted the appellant on the basis of the evidence alone." Fletcher, 62 M.J. at 184. Accordingly, even if trial counsel's argument amounted to plain error, Appellant suffered no prejudice and is entitled to no relief. This Court should deny this assignment of error.

II.

APPELLANT WAIVED ANY OBJECTION TO THE CONTENTS OF THE VICTIM'S UNSWORN STATEMENT, AND THE UNSWORN STATEMENT DID NOT CONSTITUTE PLAIN ERROR

Additional Facts

HC offered a one-page victim impact statement during pre-sentencing proceedings. (R. at 1395-96; Court Ex. A.) The military judge asked trial defense counsel if they had an opportunity to review the statement. (R. at 1396.) Trial defense counsel confirmed they had reviewed the statement. (Id.) The military judge then inquired if trial defense counsel had any objection to the victim impact statement. (R. at 1397.) They stated they did not. (Id.) HC then read the one-page written victim impact statement verbatim to the members. (Id.) Trial defense counsel likewise did not object during the reading of the victim impact statement. (Id.) After

HC delivered her oral unsworn statement, the military judge stated in front of the members, “Just so it is clear, I did admit Court Exhibit A into evidence as Court Exhibit A.” (R. at 1397.) The defense did not object to the military judge’s admission of the court exhibit or the content of the victim impact statement at any time.

Standard of Review

An affirmative statement than an accused at trial has “no objection” generally “constitutes an affirmative waiver of the right or admission at issue.” United States v. Swift, 76 M.J. 210, 217 (C.A.A.F. 2017) (citation omitted).

In the absence of an objection at trial, this Court reviews claims of erroneous admission of a victim’s unsworn statement for plain error, where 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) (citations omitted).

Law and Analysis

Appellant waived any objection to the victim’s unsworn statement when the military judge queried if he had any objection to the statement and trial defense counsel responded, “No, Your Honor.” (R. at 1397.) Since Appellant affirmatively waived his objection to the victim’s unsworn statement, there is nothing to correct on appeal. Even if this Court finds Appellant forfeited—and did not waive—his objection to the victim impact statement, no relief is warranted under a plain error standard.

Rule for Courts-Martial (RCM) 1001(c)(2)(B) permits victim impact statements to include “any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty.”

Executive Order 14103, dated 28 July 2023, amended R.C.M. 1001(c) to permit a crime victim to make a request for a specific sentence in non-capital cases in sentencing proceedings conducted by a military judge in accordance with Section 539E of FY2022 NDAA. Exec. Order No. 14103, 28 July 2023, Annex 3, ¶ (i), 88 Fed. Reg. 50535, 50706 (2 August 2023). The amendment to R.C.M. 1001(c) was contained in Annex 3. (Id.) The Executive Order provided that Annex 3 “shall take effect on December 27, 2023, and shall apply in accordance with section 539E(f) of the NDAA FY 2023 (10 U.S.C. 853 note).” (Id.) Therefore, according to section 539E(f), it appears the new R.C.M. 1001(c) did not apply to Appellant’s court-martial since his offenses did not occur post 27 December 2023. (App. Br. at 16; *See also* Drafter’s Analysis to Appendix 15, A15-24.)

Applying the old R.C.M. 1001(c), which did not allow for victims to make specific sentence recommendations, Appellant claims three statements by HC in her impact statement were error: (1) “[Appellant] should not be an airman,” (2) HC’s plea to impose “severe” consequences; and (3) uncharged misconduct. HC’s victim impact statement fell within the rules and to the extent any statement did not, the error was not plain or obvious and did not materially prejudice a substantial right of Appellant.

A. Appellant Should Not Be an Airman.

Appellant contends that HC’s single statement – “[Appellant] should not be an Airman” – was impermissible and constituted plain error. (App. Br. at 17.) Appellant argues that this statement functioned as an improper, thinly-veiled recommendation for a punitive dismissal since the only means by which the members could remove Appellant from the Air Force was through such a dismissal. (App. Br. at 17.) This argument lacks merit under plain error review.

First, HC's statement was not an explicit recommendation for a punitive discharge, or for any specific sentence. She did not use language such as "he should be dismissed," or "I want him out of the Air Force." She merely stated her belief that, based on his actions, Appellant did not embody the values she associates with service in the Air Force. (Court Ex A.)

Second, and more importantly, Appellant's argument ignores the context of HC's statement. HC explained that her parents both served in the Army, and that she "grew up thinking that a member of our United States Armed Forces meant that they were disciplined, honorable, and understood how to treat those they cared about." (Id.). She then concluded, "I still believe that. And that is why [Appellant] should not be an Airman." (Id.) This was not a calculated attempt to influence the sentencing decision, but rather an expression of HC's personal disappointment and the psychological impact Appellant's actions had on her views of military service and those who volunteer to serve. This statement falls squarely within the scope of permissible victim impact testimony under R.C.M. 1001(c)(2)(B).

Appellant's reliance on United States v. Ohrt, 28 M.J. 301 (C.M.A. 1989), is misplaced. Ohrt did not concern a victim impact statement. Instead, Ohrt addressed the propriety of a *witness* providing an opinion on whether the accused should be punitively discharged. Id. at 304-305. The Court reasoned that because the appropriateness of punishment is an issue for the court-martial to decide, "it cannot be usurped by a witness." Id. at 305. That is simply not applicable to this case. As a victim of Appellant's crimes, HC was exercising her right to allocution under R.C.M. 1001(c)(5). Moreover, the military judge properly instructed the members that:

The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that the statement is not under oath, its inherent probability or improbability, whether it is supported or contradicted by evidence

in the case, as well as any other matter that may have a bearing upon its credibility. In weighing an unsworn statement, you are expected to use your common sense and knowledge of human nature and the ways of the world.

(R. at 1424-1425.)

These instructions ensured that the members understood their duty to independently weigh the credibility and significance of HC's statement. This is more than sufficient to address any possible concern stemming from HC's allocution.

For these reasons, HC's statement that she believes Appellant "should not be an Airman" was permissible victim impact testimony and did not constitute plain error.

B. HC's Plea to Impose "Severe" Consequences.

In the penultimate paragraph of her victim impact statement, HC implored the members to "take into consideration the struggles and trauma I have endured as a result of his actions. Please give him a sentence that might actually get through to him and show that there are consequences—severe ones—for committing violence against his family." (Court Ex. A.) Appellant now argues that this statement constituted plain error. This argument also fails.

Appellant incorrectly suggests that a victim cannot express the desire for the accused to face consequences for his actions. This is simply incorrect. R.C.M. 1001 specifically allows for victim impact statements to provide the *impact* of the crime – financial, emotional, medical, social, etc. It is impossible to express the full impact of a crime if the victim is unable to request that they face any consequences. The military judge correctly instructed the members that their sentence should reflect "the seriousness of the offenses" and to consider "all matters in aggravation and mitigation." (R. at 1440.) A "severe" sentence may reflect this analysis by the panel members. United States v. Mabe, 30 M.J. 1254, 1269 (N-M.C.M.R. 1990). It is neither

improper nor error, plain or otherwise, for a victim to request the sentencing body echo these factors in their analysis.

C. HC's Reference to Uncharged Misconduct.

Appellant argues that HC's statement regarding the "shame and abuse that I endured throughout the course of our marriage" and how Appellant's behavior when they "started dating...was the beginning of his abuse," was impermissible because it referred to events starting more than three-and-a-half years before any offense of which Appellant was convicted. (App. Br. at 18; Court Ex. A.)

Appellant claims, for the first time on appeal, this violates R.C.M. 1001(c)(2)(B) because it includes matters that did not "directly relate to or arise from the offense of which the accused has been found guilty." (App. Br. at 18.) Appellant is incorrect for three separate reasons. First, Appellant's reliance on United States v. Campos, 85 M.J. 310 (C.A.A.F. 2025) is misplaced. (App. Br. at 18.) CAAF decided Campos the month after the military judge admitted the victim unsworn statement. (App. Br. at 18.) In Campos, the victim accused the appellant of yelling at her, grabbing and pulling her arms, immobilizing her against a wall, taking her phone away, and cutting off her internet service. Id. at 315. The appellant, however, was not charged with any offense in connection with these alleged acts. Here, in contrast to Campos, HC did not list a litany of uncharged offenses. In fact, she did not list any uncharged offenses at all; rather, she generically referred to "shame and abuse that I endured throughout the course of our marriage." (Court Ex. A.) This did not obviously refer to any uncharged misconduct. Appellant argues the victim impact statement was improper because HC referred to Appellant's unspecified behavior when they "started dating" as "the beginning of the abuse." (App. Br. at 18.) But HC did not reference any physical act of abuse or domestic violence (such as grabbing and pulling her arms)

or controlling and depriving behavior (taking her phone away or cutting off her internet service), like was the case in Campos. On the contrary, HC merely stated: “When [Appellant] and I started dating he was outgoing, fun to be around, and made feel the center of his world. Looking back on it, I now see that this was the beginning of the abuse.” (Court Ex. A.) If anything, Appellant’s behavior HC referred to while dating, preceding the convicted conduct, was flattering, which is properly “matters in mitigation” under R.C.M. 1001(c)(3).

In her victim impact statement, HC specifically explained the devastating and ongoing psychological impact this abuse has had on her and on her perception of herself. As she explained, she was not speculating about future events or improperly attempting to portray the Appellant as irredeemable or unworthy of leniency. She was describing the present – and very real – emotional turmoil she has been experiencing for years as a *direct* result of his behavior. Any error here was not obvious. In sum, because there was no plain error in admitting the unsworn victim impact statement from HC, this Court should deny the relief sought by Appellant and affirm his findings and sentence.

Even assuming that the challenged statements in HC’s victim impact statement were somehow improper, they could not have *substantially* sway a panel already confronted with the stark reality of Appellant’s brutal actions. The government presented an exceedingly strong sentencing case: a pregnant woman terrorized in her own home, a defenseless toddler violently shoved, a drunken rampage shattering the peace of a military community. Appellant’s conviction alone, for these appalling acts of domestic violence and service-discrediting conduct, justified the sentence imposed (ROT Vol. 1, EOJ). In stark contrast, Appellant’s sentencing presentation was a hollow echo of generic praise and self-serving excuses. (Def. Exs. I-P; Def. Ex. Q.)

The character letters, while praising Appellant’s professional attributes, largely omit any acknowledgement of the seriousness of his offenses or his ability to reform following such behavior. (Def Ex. I-P.) Moreover, in his unsworn statement, while Appellant expressed remorse, he also appeared to minimize his misconduct by attributing his actions to the stress caused by his son’s illness, which may have been perceived as a deflection of responsibility (Def. Ex. Q.) Given this limited and somewhat self-serving sentencing case, it is unlikely that the members were unduly swayed by the victim impact statement. The alleged improper statements by HC were not particularly material as shown by the fact that none of the statements were even referenced by trial counsel in argument. (R. at 1441-1445.) Finally, trial counsel argued for 3 years of confinement, total forfeitures, and a dismissal, but the members sentenced Appellant to only 30 days confinement and a dismissal. (R. at 1445, 1468.) His relatively low sentence reflects that the panel was not substantially influenced by the statements. Therefore, there is no prejudice, and this Court should deny Appellant’s requested relief.

III.

APPELLANT’S CONVICTION FOR SLAPPING AND SPITTING ON HC IS FACTUALLY SUFFICIENT.

Standard of Review

A CCA “may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with [Article 66(d)(1)(B)].” 10 U.S.C. § 866(d)(1)(A). If all offenses occurred on or after 1 January 2021¹, factual sufficiency review is triggered only if an appellant (1) asserts it as an assignment of error, and (2) shows “a specific deficiency in proof.” 10 U.S.C. § 866(d)(1)(B)(i); United States v. Harvey, 85 M.J. 127, 130 (C.A.A.F. 2024).

¹ National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, Section 542(b), 134 Stat. 3611-12.

If both threshold elements are met, a CCA may “weigh the evidence and determine controverted questions of fact.” 10 U.S.C. § 866(d)(1)(B)(ii). The CCA must give “appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence.” Id. The CCA must also give “appropriate deference to findings of fact entered into the record by the military judge.” Id. “[T]he degree of deference will depend on the nature of the evidence at issue.” Harvey, 85 M.J. at 130. Then, the CCA must be “clearly convinced that the finding of guilty was against the weight of the evidence” before they may “dismiss, set aside, or modify the finding, or affirm a lesser finding.” 10 U.S.C. § 866(d)(1)(B)(iii).

Law

Factual Sufficiency

Deference for a witness who testified might be high because the CCA judges did not see the witness testify, and the deference for objective evidence, like documents, might be low because the CCA can assess the evidence. Harvey, 85 M.J. at 131. It is within this court’s discretion to determine what level of deference is appropriate. Id. “[T]he quantum of proof necessary to sustain a finding of guilty during a factual sufficiency review is proof beyond a reasonable doubt, the same as the quantum of proof necessary to find an accused guilty at trial.” Id. (internal quotation marks omitted).

For this Court “to be ‘clearly convinced that the finding of guilty was against the weight of the evidence,’ two requirements must be met.” United States v. Kelnhofer, 2024 CCA LEXIS 492 (A.F. Ct. Crim. App. 15 November 2024) (unpub. op.) (citing Harvey, 85 M.J. at 132.) First, this Court must find that the evidence, “does not prove that the appellant is guilty beyond a reasonable doubt.” Id. Second, this Court “must be clearly convinced of the correctness of this decision.” Id.

Article 128b, UCMJ

To prove Appellant guilty of domestic violence under Specification 1 of Charge II, the Government was required to prove:

- (1) That at or near the island of Oahu, Hawaii, on or about 11 February 2023, the accused committed a violent offense, to wit: unlawfully slapping HC's face with his hand and unlawfully spitting on her; and
- (2) That the violent offense was committed against HC, who was then the spouse of the accused.

(App. Ex. XXXI, pages 2-3; R. at 1262.)

The term “violent offense” includes a violation of Article 128, UCMJ, assault consummated by a battery. The elements of assault consummated by a battery are as follows:

- (1) That at or near the island of Oahu, Hawaii, on or about 11 February 2023, the accused did bodily harm to HC by unlawfully slapping HC's face with his hand and unlawfully spitting on her;
- (2) That the bodily harm was done unlawfully; and
- (3) That the bodily harm was 1 done with force or violence.

(Id.)

Analysis

Appellant challenges only the factual sufficiency as to Specification 1 of Charge II – the slapping and spitting incident on 11 February 2023. (App. Br. at 24.) He claims his “immediate denial” of the allegations over text message to HC is a “deficiency of proof.” (App. Br. at 25.) But Appellant’s argument amounts to merely a disagreement with the factfinder’s conclusion that HC was credible and that Appellant’s “denial” was not credible. Our sister services, in published cases, have found a mere disagreement with the conclusion of a factfinder, even where there is conflicting evidence, to be insufficient to establish a deficiency of proof. *See United States v.*

Valencia, 85 M.J. 529 (N-M Ct. Crim. App. 2024) (holding that a general disagreement with a verdict falls short of a specific showing of a deficiency in proof); United States v. Brassfield, 85 M.J.523 (A. Ct. Crim. App. 2024) (finding contrary testimony by the appellant and inconsistencies in the victim’s testimony to be insufficient to establish a specific showing of a deficiency in proof). This Court should follow our sister services and find that Appellant has failed to establish a specific showing of a deficiency in proof by merely disagreeing with the fact-finder’s conclusion on elements one and three.

Should this Court disagree, this Court should not be clearly convinced Appellant’s conviction was against the weight of the evidence. Appellant’s so-called “adamant denials” consist of text messages sent after the incident. (Def. Ex. A.) Such communications are inherently self-serving and offer no opportunity for real-time scrutiny or questioning. Importantly, Appellant did not testify at trial (R. at 1256); therefore, the members were limited to assessing his credibility solely through the self-serving text messages he sent to HC, which lack the weight and persuasiveness of sworn testimony subject to the scrutiny of cross-examination. Appellant now asks the Court to overturn his conviction based upon those same unverified, out-of-court statements. (Def. Ex. A.)

Here, HC testified under oath that Appellant slapped her face and spat on her on 11 February 2023 after breaking into their home. (R. at 676-79.) Because this Court was unable to view HC’s testimony in person, it should afford greater deference to the finding of the trial court. Harvey, 85 M.J. at 130. HC credibly described the spit as “pretty liquidly and pretty loud,” indicating it was more than just talking. (R. at 678). HC indicated that the slap hurt and that Appellant used force. (R. at 679). While she admitted on cross-examination that the slap was quick and caused “no apparent injuries” (R. at 745), she consistently maintained that Appellant

did slap her and spit on her. (R. at 676-79.) HC testified that after Appellant slapped and spit on her, she tried to get away to get her phone when he grabbed her. (R. at 679-680.) Additionally, HC testified that Appellant broke out a panel at the bottom of the back door to enter the house. (R. at 676, 741.) This shows Appellant's intent to confront HC despite being locked out.

"Bodily harm" includes "offensive touching, however slight" and does not require proof of physical injury. (R. at 1263.) While Appellant's actions may have "annoyed" HC more than physically harmed her (R. at 734), HC's testimony that "the slap hurt and that Appellant used force" (R. at 679) is enough.

The Government corroborated HC's testimony by introducing footage of a baby monitor that captured Appellant's angry yelling at HC leading up to slapping her and spitting on her. (R. at 1309-1310; Pros. Ex. 3.) During her testimony, HC watched the footage and testified that when she was heard crying in the baby monitor recording, that timestamp corresponded to being slapped by Appellant. (Id.)

Moreover, a neighbor, KK, testified that HC was "crying hysterically, holding her face" soon after the alleged incident. (R. at 946, 965.) HC appeared "very distraught" and "emotional" after the assault. (R. at 945-96.) Although KK did not see bruises, she saw redness from crying. (R. at 958). HC also told Ms. KK that Appellant had slapped her. (R. at 946.) The Government introduced this statement as a prior consistent statement under M.R.E. 801(d)(1)(B). (R. at 945.) Accordingly, the military judge properly instructed the members on prior consistent statements and that the panel may use those statements for the "truth of the matters expressed therein." (R. at 1268.) Finally, unprompted, Appellant admitted to slapping HC to both MSgt MY and MSgt AD. (R. at 1102-03.)

Appellant argues a “real possibility” that HC “concocted the slapping and spitting allegation” to “win her neighbors’ sympathy.” (App. Br. at 25-26.) It is unclear how. This narrative is also unsupported by the objective baby monitor footage that contemporaneously captured Appellant’s aggressive and agitated state, yelling and cursing at HC, as she cried and begged for him to let her go.

Next, Appellant contends that the members’ credibility assessment was “tainted by the special trial counsel’s improper vouching during closing argument,” thus negating the deference this Court would normally afford the factfinder. (App. Br. at 26.) Appellant cites no case law in support of this novel argument. Instead, Appellant cites a Major League Baseball scandal involving trash cans and the Houston Astros. (App. Br. at 14.) Even if this Court finds the military judge plainly erred by not interrupting trial counsel’s findings argument about the victim’s credibility, HC’s testimony was not solely reliant on her word. On the contrary, the Government introduced corroborating evidence, including video footage, Appellant’s admissions, and eyewitness testimony. Even if trial counsel’s argument was ultimately improper, it was unlikely to completely override the members’ proper consideration of other credibility assessment factors².

After reviewing HC’s testimony and taking into account Appellant’s own admissions and the eyewitnesses and corroborating video footage, this Court should not be clearly convinced that the conviction for domestic violence was against the weight of the evidence. Because

² The military judge provided detailed instructions on assessing witness credibility, explicitly instructing the members to consider factors, such as: intelligence, ability to observe and accurately remember, sincerity, conduct in court, prejudices, character for truthfulness, and consistency with the other evidence. (R. at 1267, 1347.)

Appellant's conviction for domestic violence is factually sufficient, this Court should deny Appellant's requested relief.

IV.

APPELLANT WAIVED ANY OBJECTION TO THE MILITARY JUDGE'S FAILURE TO INSTRUCT ON A UNANIMOUS VERDICT.

Additional Facts

Trial defense counsel did not file a motion for appropriate relief requesting a unanimous verdict at trial or otherwise object to the panel's composition. During an Article 39(a) session before findings argument, trial defense counsel specifically affirmed that the Court's instructions, which did not include an instruction on unanimity, were correct:

MJ: Okay. And Defense Counsel, you specifically affirm that the defense requested this court not instruct the members on any additional – anything additional than what is provided in the instructions as I've sent them to you currently? That's for defense counsel.

...

DC: I think I understand what you said, which is no, we're not asking for any additional instructions.

MJ: Okay. And what I'm asking is, do you affirm that the instructions as written are correct?

DC: Yes, Your Honor.

(R. at 1256.)

Without objection, the military judge instructed the members: "The concurrence of at least three-fourths of the members present when the vote is taken is required for any finding of guilty. Since we have eight members, that means six members must concur in any finding of guilty." (R. at 1347-48.)

Standard of Review

The constitutionality of a statute is a question of law that is reviewed de novo. United States v. Wright, 53 M.J. 476, 478 (C.A.A.F. 2000) (citing United States v. Brown, 25 F.3d 307, 308 (6th Cir. 1994)).

Law and Analysis

Appellant raises this assignment of error “for issue preservation purposes.” (App. Br. at 2, n1.) But trial defense counsel did not file a motion for appropriate relief for a unanimous verdict at trial or otherwise object to the panel’s composition. When asked if trial defense counsel had any objection to the Court’s instructions, which included non-unanimity, the defense affirmatively stated they had none. Therefore, this issue is waived. And there is nothing to preserve on appeal.

Should this Court disagree, at the time of Appellant’s court-martial, Article 52, UCMJ, required the concurrence of three-fourths of the panel members for a conviction. At trial, the military judge instructed the members in accordance with Article 52, UCMJ. (R. at 1347-48.) Appellant now argues for the first time on appeal that he was deprived of his constitutional right to a unanimous guilty verdict. (App. Br. at 27.)

In Ramos v. Louisiana, the Supreme Court held that the Sixth Amendment right to a jury includes the right to a unanimous jury. 590 U.S. 83 (2020). The Court further held that the Fourteenth Amendment incorporated this right to criminal proceedings at the state level. Id. at 90-91. The Supreme Court did not state that this interpretation extended to military courts-martial.

CAAF addressed the applicability of Ramos to courts-martial in United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 1003 (2024). Our Superior

Court reaffirmed that servicemembers do not have a Sixth Amendment right to a jury trial. Id. at 295. CAAF rejected the same claims Appellant raises now:

[W]e disagree that [Ramos] further held that [a unanimous verdict] is also an essential element of an impartial factfinder. In the absence of a Sixth Amendment right to a jury trial in the military justice system, Appellant had no Sixth Amendment right to a unanimous verdict in his court-martial.

Id. at 298. CAAF held that Fifth Amendment due process does not require unanimous verdicts in courts-martial. Id. at 300.

CONCLUSION

WHEREFORE, the United States respectfully requests this Court to deny Appellant's claims and affirm the findings and sentence.

[REDACTED]
MORGAN R. CHRISTIE, Maj, USAF
Appellate Government Counsel

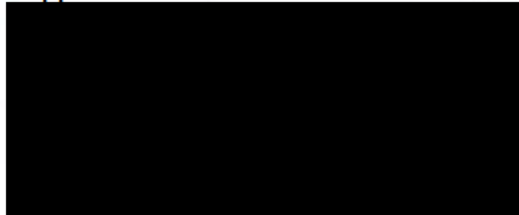
[REDACTED]
Associate Chief, Government Trial and
Appellate Counsel Division
[REDACTED]

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 November 2025.



MORGAN R. CHRISTIE, Maj, USAF
Appellate Government Counsel



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

UNITED STATES	)	No. ACM 40823
<i>Appellee</i>	)	
	)	
v.	)	
	)	NOTICE OF PANEL
Brandon S. JASTAL	)	CHANGE
Major (O-4)	)	
U.S. Air Force	)	
<i>Appellant</i>	)	

It is by the court on this 15th day of December, 2025,

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Panel 3 and referred to Panel 2 for appellate review.

This panel letter supersedes all previous panel assignments.



FOR THE COURT

[Redacted signature block]

JACOB B. HOEFERKAMP, Capt, USAF
Chief Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	APPELLANT’S REPLY BRIEF
<i>Appellee,</i>	)	
	)	
v.	)	
	)	Before Panel 3
Major (O-4)	)	
Brandon S. Jastal,	)	No. ACM 40823
United States Air Force,	)	
<i>Appellant.</i>	)	10 November 2025

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

Pursuant to Rule 18(d)(2) of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, Appellant replies to the United States’ Answer filed on 3 November 2025.

Assignment of Error I

The special trial counsel committed prosecutorial misconduct during closing argument by vouching for the credibility of the only named alleged victim to testify.

A. Where no objection is made at trial, a prosecutorial misconduct claim is subject to plain error review on appeal.

Controlling case law compels rejecting the Government’s argument that the trial defense counsel waived a prosecutorial misconduct challenge to the special trial counsel’s closing argument slide stating that “[HC] is telling the truth.” Gov’t Br. at 7, 8; App. Ex. XXIX at 4. As the Court of Appeals for the Armed Forces has stated, “The following is well established in our case law. We review prosecutorial misconduct and improper argument *de novo*. If proper objection is made, we review for prejudicial error. *If no objection is made, we hold the appellant has forfeited his right to appeal and review for plain error.*” *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018) (emphasis added). Thus, under “well established” controlling case law, Appellant’s prosecutorial misconduct challenge to the special trial counsel’s closing argument—

including slide 4 of the PowerPoint presentation—is not waived but is subject to plain error review.

B. The special trial counsel’s repeated assurances to the members that HC was “telling the truth” constituted impermissible vouching.

Controlling case law holds that it is impermissible for a prosecutor to “claim[]” during closing argument that a witness “was telling the truth.” *United States v. Norwood*, 81 M.J. 12, 18–19 (C.A.A.F. 2021). In *Norwood*, the court characterized that trial counsel’s statement that a witness was telling the truth as seeming to “personally vouch for [the witness’s] credibility.” *Id.* *Norwood* establishes that using a personal pronoun is not required for a prosecutorial assurance of truth-telling to constitute impermissible vouching. The trial counsel in that case did not use a personal pronoun in connection with statements that the witness was telling the truth. *See* Appellant’s Brief at 6, 23, *United States v. Norwood*, 81 M.J. 12 (C.A.A.F. 2021) (No. 20-0006/NA), *available at* <https://www.armfor.uscourts.gov/briefs/2020Term/Norwood200006AppellantBrief.pdf>. Rather, the trial counsel argued: “[E.N.] told you the truth”; “you got to see the truth”; “you know [E.N.] told you the truth”; and “It’s not a fabrication. It’s not a lie. It’s the truth. You know it’s the truth.” *Id.* at 23. Those assertions were remarkably similar to the special trial counsel’s arguments in this case that “[HC] is telling the truth”; “[HC] is telling the truth here”; and “The truth of the matter is that she isn’t lying. She’s telling the truth.” App. Ex. XXIX at 4; Trial Tr. at 1277, 1279. And those assertions are what the Court of Appeals for the Armed Forces characterized as “misconduct” in the form of “vouching for EN, a method of argument that we have explicitly prohibited.” *Norwood*, 81 M.J. at 20 (citing *United States v. Voorhees*, 79 M.J. 5, 11–12 (C.A.A.F. 2019); *United States v. Fletcher*, 62 M.J. 175, 180 (C.A.A.F. 2005)).

In reaching its conclusion that the *Norwood* prosecutors impermissibly vouched for a

witness's credibility, the Court of Appeals for the Armed Forces rejected an argument almost identical to that which the Government makes here. In *Norwood*, the Government argued that the "Trial Counsel reasonably commented on the inferences to be drawn from the evidence" rather than "improperly vouch[ing] for the Victim," adding that the trial counsel "did not offer personal assurances or unsupported bolstering." Answer on Behalf of Appellee at 27, 28, *United States v. Norwood*, 81 M.J. 12 (C.A.A.F. 2021) (No. 20-0006/NA), *available at* <https://www.armfor.uscourts.gov/briefs/2020Term/Norwood200006AppelleeBrief.pdf>.

Similarly, here, the Government argues that "the government marshalled evidence in support of its claim that HC had told the truth" and "never used personal pronouns when making these statements." Gov't Br. at 9. Just as the Court of Appeals for the Armed Forces rejected those arguments on behalf of the United States in *Norwood*, this Court should reject them here. Just as in *Norwood*, the special trial counsel's assurances in this case that a key prosecution witness told the truth constituted "a method of argument that [the Court of Appeals for the Armed Forces has] explicitly prohibited." *Norwood*, 81 M.J. at 20. The United States' continued attempt to justify such arguments using the same rationales *Norwood* rejected highlights the need for this Court to emphatically admonish the special trial counsel's impermissible arguments.

The Government attempts to defend the special trial counsel's arguments by reframing them as claims that "the members should find HC credible." Gov't Br. at 11; *see also id.* at 8 ("trial counsel was allowed to argue the evidence-based reasons why the members should find HC credible"); *id.* at 11 ("trial counsel argued HC was credible because of ample 'corroboration'"); *id.* ("there is no possibility that the members understood trial counsel to be saying that they should find HC credible merely because the prosecution said so"). But the special trial counsel did not seek to explain why HC was "credible." Rather, the special trial

counsel thrice assured the members that HC was “telling the truth.” App. Ex. XXIX at 4; Trial Tr. at 1277, 1279. In one of those instances, she coupled that assurance of HC’s truth-telling with the statement, “The truth of the matter is that she isn’t lying.” Trial Tr. at 1279. Thus, rather than marshaling evidence to build a case that HC was a credible witness, the special trial counsel suggested to the members that she was aware of the objective “truth” and assured the members that HC’s testimony was consistent with that objective truth. That is improper argument. Just as in *Norwood*, the special trial counsel’s repeated assurances to the members that a critical witness was “telling the truth” “constituted obvious error.” 81 M.J. at 20.

C. The special trial counsel’s improper vouching prejudiced Maj Jastal’s defense.

Where improper vouching occurs, an appellate court applies a three-part prejudice analysis, which considers: “(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction.” *Voorhees*, 79 M.J. at 12 (quoting *Andrews*, 77 M.J. at 402 (quoting *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017))). The Government errs in its analysis of each of these factors. Most significantly, in attempting to argue that the military judge took adequate corrective measures, the Government’s Answer mischaracterizes a dissenting opinion by one Court of Appeals for the Armed Forces judge as the opinion of the court. *See* Gov’t Br. at 13–14.¹

1. The prosecutorial misconduct was severe.

The Government fails to heed the Court of Appeals for the Armed Forces’ case law when it characterizes the “severity of any misconduct” during the prosecution’s closing argument as

¹ Although no doubt unintentional, the error still eviscerates the Government’s argument. *See In re Donnelly*, Bankruptcy No. 17-032130CL13, 2018 Bank. LEXIS 3103, at *10 n.6 (Bankr. S.D. Cal. May 18, 2018), *aff’d*, 2018 U.S. Dist. LEXIS 170414 (S.D. Cal. Oct. 2, 2018), *aff’d*, 773 Fed. App’x 963 (9th Cir. 2019).

“slight.” Gov’t Br. at 12. In *Norwood*, the court observed that “[t]rial counsel ‘are military officers and should conduct themselves accordingly,’ a standard that these trial counsel failed to meet under our precedent regarding improper argument.” *Norwood*, 81 M.J. at 20. Far from “slight,” the severity of the special trial counsel’s improper argument was significant.

In seeking to diminish the misconduct’s severity, the Government also characterizes the improper vouching as “limited to two occasions,” Gov’t Br. at 12, ignoring the visual vouching in the special trial counsel’s closing argument PowerPoint presentation. App. Ex. XXIX at 4.

2. The military judge took inadequate curative measures.

In *Fletcher*, the Court of Appeals for the Armed Forces held that improprieties in the trial counsel’s closing and rebuttal arguments constituted “plain and obvious” errors. 62 M.J. at 184. The court further held that the errors “were materially prejudicial to Fletcher’s substantial rights under both Article 59(a) and the plain error doctrine.” *Id.* at 185. “In light of” that prejudice, the court set aside the findings and sentence. *Id.* at 186. Thus, it is surprising to see the Government cite *Fletcher* for the proposition that “the military judge took appropriate steps to limit any potential harm resulting from trial counsel’s remarks by providing the same instruction [as in this case] that arguments of counsel are not evidence.” Gov’t Br. at 13–14. That conundrum is resolved by the fact that the Government’s Answer cited a portion of Judge Crawford’s dissent rather than the majority opinion of the court’s other four judges. *See Fletcher*, 62 M.J. at 192–94 (Crawford, J., dissenting). Yet the Government’s Answer presents that proposition as if it were the opinion of the court.

The *actual Fletcher* opinion of the court held that the military judge did not take adequate corrective measures. The Government itself argues that this case features “the same instruction” as that provided in *Fletcher*. Gov’t Br. at 14. There, the court held that “[t]he military judge’s

curative efforts were minimal and insufficient to overcome the severity of the trial counsel's misconduct." 62 M.J. at 185. That is also true here, where—according to the Government—the military judge gave “the same instruction.” Gov’t Br. at 14.

3. The prosecution’s case supporting Charge II, Specification 1 was weakened by challenges to HC’s credibility.

There were no eyewitnesses to the domestic violence offense alleged by Charge II, Specification 1 other than HC and Maj Jastal. Thus, HC’s credibility was a key factor in whether the prosecution would be able to prove that offense beyond a reasonable doubt. The Government’s Answer acknowledges that “[d]uring the defense’s cross-examination” of HC, the trial defense counsel “impeach[ed] her on multiple occasions with prior perceived inconsistent statements” as well as implicating a motive to fabricate. Gov’t Br. at 5 (citing Trial Tr. at 720–21, 732–33, 742, 746, 760, 764–66, 785–86). The defense’s demonstration that the members should be skeptical of HC’s reliability, along with Maj Jastal’s immediate, emphatic denials of the allegations, *see* Def. Ex. A, rendered the prosecution’s case sufficiently weak that the special trial counsel’s improper vouching for “the truth” of HC’s testimony may have been outcome determinative. That improper vouching was prejudicial.

For the foregoing reasons as well as those set out in Maj Jastal’s opening brief, this Court should set aside the finding of guilty to Charge II, Specification 1, set aside the sentence, and remand the case to the convening authority with authorization to conduct a rehearing on that specification and the sentence.

Assignment of Error II.

The military judge committed plain error in this members sentencing case by admitting into evidence an unsworn victim impact statement opining that the accused “should not be an Airman,” asking for a sentence that shows “that there are consequences—severe ones—for committing violence against his family,” and alleging abuse over a three-and-a-half year period preceding any offense resulting in a conviction.

A. This Court’s well-established case law provides that where no objection is made at trial, this Court reviews whether a victim impact statement included impermissible content under a plain error standard.

As this Court has held numerous times, “In the absence of an objection at trial, [this Court] review[s] claims of erroneous admission of an unsworn victim impact statement for plain error” *United States v. Arroyo*, No. ACM 40321 (f rev), 2024 CCA LEXIS 242, at *12 (A.F. Ct. Crim. App. June 18, 2024); *accord, e.g., United States v. Halter*, No. ACM S32666 (f rev), 2022 CCA LEXIS 254, at *10 (A.F. Ct. Crim. App. May 4, 2022); *United States v. Tellor*, No. ACM 39770 (f rev), 2021 CCA LEXIS 444, at *19 (A.F. Ct. Crim. App. Sep. 1, 2021), *petition denied*, 82 M.J. 258 (C.A.A.F. 2022); *United States v. Da Silva*, No. ACM 39599, 2020 CCA LEXIS 213, at *55 (A.F. Ct. Crim. App. June 25, 2020). That approach reflects the fact that “the military judge has an obligation to ensure the content of a victim’s unsworn statement comports with the parameters of victim impact or mitigation as defined by” the applicable Rule for Courts-Martial. *United States v. Tyler*, 81 M.J. 108, 112 (C.A.A.F. 2021); *Halter*, 2022 CCA LEXIS 254, at *10–11. This Court should decline the Government’s invitation to repudiate this well-established approach. *See* Gov’t Br. at 15, 16.

B. HC’s statement that Maj Jastal “should not be an Airman” was impermissible under Rule for Courts-Martial 1001(c)(3).

The version of Rule for Courts-Martial 1001(c) that both the Government and the defense agree applies to Maj Jastal’s trial, *see* Gov’t Br. at 17, provided that victim impact statements

“may only include victim impact and matters in mitigation. The statement may not include a recommendation of a specific sentence.” R.C.M. 1001(c)(3), *Manual for Courts-Martial, United States* (2019 ed.). That rule also included a definition of “victim impact”: “For purposes of this subsection, victim impact includes any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty.” R.C.M. 1001(c)(2)(B).

HC’s statement that Maj Jastal “should not be an Airman,” Ct. Ex. A; Trial Tr. 1397, is plainly and obviously impermissible under that standard. HC’s opinion that Maj Jastal “should not be an Airman” is not “financial, social, psychological, or medical impact” on her nor is it a matter in mitigation. Thus, it does not fall within either of the “only” two categories of information that may be included in a victim impact statement. R.C.M. 1001(c)(3). The statement was impermissible on that basis alone. The Government attempts to defend HC’s statement as merely “stat[ing] her believe that, based on his actions, Appellant did not embody the values she associates with service in the Air Force.” Gov’t Br. at 18. While, as explained below, HC’s statement was actually an impermissible recommendation that the members sentence Maj Jastal to a dismissal, even if the Government’s interpretation were correct, the statement would still be impermissible. Under the law that governed Maj Jastal’s trial, a victim impact statement could “only include victim impact and matters in mitigation.” R.C.M. 1001(c)(3). HC’s belief that “Appellant did not embody the values she associates with service in the Air Force” is neither. It was, therefore, plainly and obviously impermissible.

The statement was independently impermissible because it violated R.C.M. 1001(c)(3)’s prohibition against recommending a specific sentence. The only manner in which the members could prevent Maj Jastal from continuing to be an Airman would be by sentencing him to a

dismissal. Military law has long recognized that using a euphemism for an impermissible call for a punitive discharge is equally objectionable as a more direct entreaty. *United States v. Ohrt*, 28 M.J. 301, 305 (C.M.A. 1989). The Government argues that “*Ohrt* did not concern a victim impact statement.” Gov’t Br. at 18. Citing *Ohrt*, the Navy-Marine Corps Court of Criminal Appeals has appropriately recognized that a victim impact statement’s use of language that is “tantamount” to calling for a particular form of sentence is impermissible. *United States v. Mellette*, No. 201900305 (f rev), 2025 CCA LEXIS 469, at *55 (N-M. Ct. Crim. App. July 8, 2025). This Court should reach the same conclusion.

The military judge plainly and obviously erred if *either* HC’s statement that Maj Jastal “should not be an Airman” did not fall within R.C.M. 1001(c)(2)(B)’s definition of victim impact *or* it constituted an impermissible recommendation for a specific sentence. This Court should hold that it was plain and obvious error for the military judge to allow HC to make that statement to the members on both bases.

The military judge erred yet again when he allowed HC to ask the members to show Maj Jastal “that there are consequences—severe ones—for committing violence against his family.” Ct. Ex. A; Trial Tr. 1397. That request for sentence severity plainly and obviously does not fall within either of the only two categories of information that a victim impact statement may include. *See* R.C.M. 1001(c)(3). The Government argues to the contrary by offering the erroneous claim that “[i]t is impossible to express the full impact of a crime if the victim is unable to request that they face any consequences.” Gov’t Br. at 19. As a general matter, it is possible for a crime victim to fully discuss the impact of a crime without coupling that discussion with a call for consequences—let alone “severe” consequences. Indeed, that routinely occurs in courts-martial. In this case, it was just as possible for HC to describe for the members the full

impact of the crime without using the words, “show that there are consequences—severe ones—for committing violence against his family.” The severity of the sentence the members would impose on Maj Jastal was not a “financial, social, psychological, or medical impact on the crime victim.” R.C.M. 1001(c)(2)(B). Nor was HC’s call for a severe sentence a “matter[] in mitigation.” R.C.M. 1001(c)(3). It was, therefore, plainly and obviously impermissible. *Id.*

In addition to HC’s statements that Maj Jastal “should not be an Airman” and that he should suffer severe consequences for his actions, the military judge allowed her to make still more impermissible assertions to the members. Only one of the specifications of which Maj Jastal was convicted named HC as the victim. Charge Sheet, Charge II, Specification 1; Trial Tr. 1363. That specification alleged an offense on or about 11 February 2023. Charge Sheet, Charge II, Specification 1. Yet in her victim impact statement, HC referred to enduring “abuse” throughout the course of her marriage, which began in July 2019. Ct. Ex. A; Trial Tr. 1397; *see* Trial Tr. 654 (establishing July 2019 marriage date). She also told the members that Maj Jastal’s “abuse” of her began even earlier. Ct. Ex. A; Trial Tr. 1397. Those references plainly and obviously exceeded the bounds of permissible victim impact, which includes only “financial, social, psychological, or medical impact on the crime victim *directly relating* to or arising from the offense of which the accused has been found guilty.” R.C.M. 1001(c)(2)(B) (emphasis added); *United States v. Campos*, 85 M.J. 310, 315 (C.A.A.F. 2025) (“accusations of uncharged conduct were not ‘victim impact’ within the meaning of R.C.M. 1001(c)(2)(B) and . . . including these accusations in the unsworn statement violated R.C.M. 1001(c)(3)”).

The Government’s observation that “CAAF decided *Campos* the month after the military judge admitted the victim unsworn statement,” Gov’t Br. at 20, is of no consequence. An

appellate court conducts a plain error analysis under the law as it exists at the time of appeal, not at the time of trial. *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008).

Next, the Government contends that HC did not allege uncharged misconduct because, despite accusing Maj Jastal of long-term “abuse,” she “did not obviously refer to any uncharged misconduct.” Gov’t Br. at 20. Yet HC’s victim impact statement included the following:

- “I am going to try to describe for you how Brandon’s abuse has impacted me.”
- “Yes, Brandon’s abuse was physical. But I have learned in the course of all of this that while the physical injuries heal over time, the unseen trauma and hurt he has caused has taken a greater toll on me.”
- “Before being abused by Brandon, I never doubted my abilities and believed I was capable of accomplishing my goals like most well-adjusted people.”
- “His abuse has made me second-guess my ability to parent as a single mother. I constantly feel like what I think is best for my sons may not be so. I’ve learned that that is the result of trauma inflicted by my marriage.”

Ct. Ex. A.

Even without those statements, it would be apparent that HC’s references to the “shame and abuse that I endured throughout the course of our marriage” and “the beginning of his abuse” alleged uncharged misconduct. With those additional statements, that conclusion is even more obvious.

The Government also seeks to contrast the victim impact statement in this case with that in *Campos* by arguing that “HC did not reference any physical act of abuse or domestic violence (such as grabbing and pulling her arms) or controlling and depriving behavior (taking her phone away or cutting off her internet service) like was the case in *Campos*.” Gov’t Br. at 20–21. The Government neglects to mention that one of the allegations of uncharged misconduct that the Court of Appeals for the Armed Forces concluded was impermissible in *Campos* was the victim’s statement that the accused yelled at her. 81 M.J. at 313, 315, 317. Thus, to be

impermissible, uncharged misconduct referenced by a victim impact statement need not rise to the level of physical violence or deprivation of means of communication. In any event, a general reference to uncharged “abuse” no more falls within R.C.M. 1001(c)(2)(B)’s definition of victim impact than does a more detailed reference.

The Government goes so far as to contend that the following statement “is properly ‘matters in mitigation’ under R.C.M. 1001(c)(3)”: “When Brandon and I started dating he was outgoing, fun to be around, and made me feel the center of his world. Looking back on it, I now see that this was the beginning of his abuse.” Gov’t Br. at 21 (citing Ct. Ex. A). That claim refutes itself.

Maj Jastal was prejudiced by the military judge’s erroneous decision to allow HC to present impermissible portions of her victim impact statement to the members. The key issue at the sentencing hearing was whether to impose a dismissal. The defense demonstrated how committed Maj Jastal was to avoiding such a sentence by inviting the members to adjudge more confinement in lieu of a dismissal. Trial Tr. 1446–47, 1451. Yet after HC appeared before them and alleged years of abuse at Maj Jastal’s hands as a prelude to her euphemistic plea for a dismissal, the members imposed a sentence that included a dismissal. *Id.* at 1468. The Government now claims that Maj Jastal received a “relatively low sentence.” Gov’t Br. at 22. On the contrary, as this Court has repeatedly recognized, “dismissal is a severe punishment.” *E.g.*, *United States v. Barnes*, No. ACM 39834, 2021 CCA LEXIS 177, at *22 (A.F. Ct. Crim. App. Apr. 16, 2021); *United States v. Turpiano*, No. ACM 38873, 2018 CCA LEXIS 276, at *48 (A.F. Ct. Crim. App. May 24, 2018). It was particularly so in this case, where Maj Jastal’s attorney asked for enhanced confinement time as an alternative to a dismissal. Trial Tr. 1446–47, 1451.

Finally, the Government's Answer does not discuss the military judge's erroneous act of admitting HC's victim impact statement into evidence and the resulting additional prejudice.

Compare Gov't Br., *with* Appellant's Br. at 19–20.

For the foregoing reasons as well as those set out in Maj Jastal's opening brief, this Court should either affirm a sentence that does not include a dismissal or set aside the sentence and remand the case for a new sentencing hearing at which any victim impact statement will be limited to its proper scope.

Assignment of Error III.

The evidence supporting Charge II, Specification 1 is factually insufficient to prove the offense beyond a reasonable doubt given the absence of any physical evidence corroborating the allegation; Major Jastal's immediate, adamant denial of having committed the offense; and his explanation that the alleged victim advanced the allegation in an effort to "gaslight" him.

Citing cases by the Navy-Marine Corps and Army Courts of Criminal Appeals, the Government argues that Appellant's opening brief made an insufficient showing of a deficiency of proof to warrant a factual sufficiency review. Gov't Br. at 24–25 (citing *United States v. Valencia*, 85 M.J. 529 (N-M. Ct. Crim. App. 2024); *United States v. Brassfield*, 85 M.J. 523 (A. Ct. Crim. App. 2024)). The Government's Answer violates this Court's rules by failing to note that the Court of Appeals for the Armed Forces has granted review of the Navy-Marine Corps Court's *Valencia* decision.² A.F. Ct. Crim. App. R. 17.1 ("Citations in filings shall conform to the current version of the U. S. Air Force Court of Criminal Appeals Citation Guide and the most recent edition of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION

² The Government's Answer also violates A.F. Ct. Crim. App. R. 17.1 by failing to note the Court of Appeals for the Armed Forces' denial of review in *Brassfield*. *United States v. Brassfield*, __ M.J. __, No. 25-0082/AR, 2025 CAAF LEXIS 271 (C.A.A.F. Apr. 11, 2025) (mem.).

(Columbia Law Review Ass’n et al.).”); THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 114 (R. 10.7) (22d ed. 2025) (“Whenever a decision is cited in full, give the entire *subsequent* history of the case, but omit denials of certiorari or denials of similar discretionary appeals, unless the decision is less than two years old or the denial is particularly relevant.”); *see also id.* at 117 (R. 10.7.1(a)) (“Append the prior or subsequent history of a case to the primary citation.”); *United States v. Valencia*, 85 M.J. 400 (C.A.A.F. 2025) (mem.) (granting review of “WHETHER THE LOWER COURT ERRED WHEN IT CONCLUDED APPELLANT’S CLAIM OF FACTUAL INSUFFICIENCY DID NOT TRIGGER A FACTUAL SUFFICIENCY REVIEW UNDER ARTICLE 66, UCMJ.”).

The Court of Appeals for the Armed Forces will hear oral argument in *Valencia* on 19 November 2025. Scheduled Hearings, United States Court of Appeals for the Armed Forces, *available at* <https://www.armfor.uscourts.gov/calendar/202511.htm>. *Valencia*’s pendency before the Court of Appeals for the Armed Forces on the very issue for which the Government cited the case is obviously relevant. Yet, in violation of this Court’s rules, the Government did not indicate that pendency in its brief.

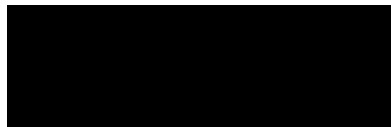
This Court should conclude that the combination of HC’s unreliability as a witness and Maj Jastal’s immediate, adamant denials of HC’s texted allegations not only constitutes a showing of a deficiency of proof for purposes of Article 66(d)(1)(B), UCMJ, but also precludes finding that the Government proved Charge II, Specification 1 beyond a reasonable doubt.

The Government’s attempt to rely on the baby monitor recording (Pros. Ex. 3) in support of the evidence’s sufficiency, Gov’t Br. at 26, is undercut by HC’s cross-examination, during which she acknowledged that none of “the slamming or loud noises we hear at various points in this video” was Maj Jastal hitting her. Trial Tr. 748.

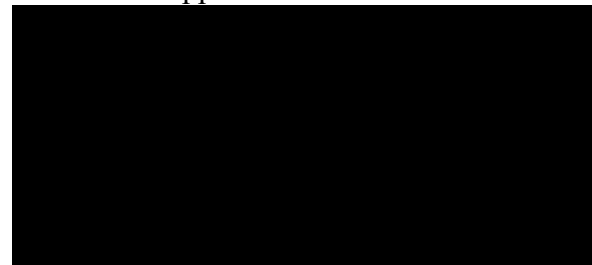
Additionally, the Government's Answer relies on one witness's contested assertion without acknowledging the evidence to the contrary. The Government's Answer states that, "unprompted, Appellant admitted to slapping HC to both MSgt MY and MSgt AD." Gov't Br. at 26 (citing Trial Tr. 1102–03). While Master Sergeant (MSgt) MAY testified that Maj Jastal made such a statement, Trial Tr. 1103, MSgt ARD testified that Maj Jastal actually "said he snapped once" and that she, rather than MSgt MAY, was in a better position to hear what Maj Jastal said. *Id.* at 1226, 1234, 1246–47. MSgt MAY's testimony is questionable for another reason as well. MSgt MAY initially testified that Maj Jastal made the disputed statement "[i]n speaking to Master Sergeant [ARD] and myself." *Id.* at 1103. During cross-examination, MSgt MAY said that when Maj Jastal made the statement, "[h]e was speaking to Master Sergeant [ARD]." *Id.* at 1105. But MSgt ARD testified that Maj Jastal made the disputed statement not to her, but rather to his attorney. *Id.* at 1246. That account is more plausible than MSgt MAY's. This Court should give no weight to MSgt MAY's disputed, implausible account of Maj Jastal's statement.

For the foregoing reasons as well as those set out in Maj Jastal's opening brief, this Court should set aside the finding of guilty to Charge II, Specification 1 and either affirm a sentence that does not include a dismissal or remand the case for a new sentencing hearing.

Respectfully submitted,



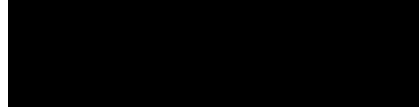
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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 10 November 2025.

Respectfully submitted,

A solid black rectangular box used to redact the signature of Dwight H. Sullivan.

Dwight H. Sullivan
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