IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 3
Senior Airman (E-4), **DALYN P. LOWE,** United States Air Force, *Appellant.*	)	No. ACM S32707
	)	29 October 2021

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **5 January 2022**. The record of trial was docketed with this Court on 7 September 2021. From the date of docketing to the present date, 52 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[redacted]

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

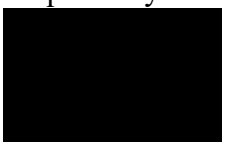
[redacted]

GRANTED
3 Nov 2021

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 29 October 2021.

Respectfully submitted,



SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

29 October 2021

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DALYN P. LOWE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32707 Panel No. 3

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 29 October 2021.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**MERITS BRIEF**
Appellee,	)	
	)	
v.	)	Before Panel No. 3
	)	
Senior Airman (E-4),	)	No. ACM S32707
DALYN P. LOWE,	)	
United States Air Force,	)	15 November 2021
Appellant.	)	

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

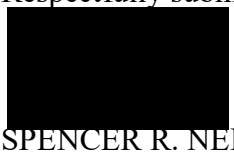
Submission of Case Without Specific Assignments of Error

The undersigned appellate defense counsel attests he has, on behalf of Appellant, carefully examined the record of trial in this case. Appellant does not admit the findings and sentence are correct in law and fact, but submits the case to this Honorable Court on its merits with no specific assignments of error.[1]

[1] Appellant has conformed this merits brief to the format in Appendix B of this Honorable Court's Rule of Practice and Procedure. Appellant understands this Court will exercise its independent "awesome, plenary, [and] *de novo* power" to review the entire record of this proceeding for factual and legal sufficiency, and for sentence propriety, and to "substitute its judgment" for that of the court below, as is provided for and required by Article 66(d), UCMJ, 10 U.S.C. §866(d) (2019). *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990); *United States v. Chin*, 75 M.J. 220 (C.A.A.F. 2016).

However, through undersigned counsel, SrA Lowe raises one issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982) which is discussed in the attached Appendix A.

Respectfully submitted,



SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 15 November 2021.

Respectfully submitted,

[redacted]

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

APPENDIX A

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

WHETHER SRA LOWE'S DEFENSE COUNSEL WAS INEFFECTIVE DURING THE SENTENCING CASE WHEN THEY FAILED TO ADMIT AND ARGUE EVIDENCE OF HIS POST TRAUMATIC STRESS DISORDER (PTSD) DIAGNOSIS?

SrA Lowe's first duty station was Incirlik, Turkey where he spent time outside of the base's perimeter. (Report of Investigation, Record of Trial (ROT) Vol. 2, Exhibit 9 at 2.) In 2019, he had a combat deployment to Syria. (*Id*.) On 28 July 2020, SrA Lowe was diagnosed with PTSD because of stressors from those assignments. (*Id.* at 4.) On 17 February 2021, charges were preferred against SrA Lowe for, *inter alia*, assaulting his wife on two occasions. (DD Form 458, Charge Sheet, ROT Vo1. 1.)

During sentencing, trial defense counsel failed to put on evidence of SrA Lowe's PTSD diagnosis, how it has affected his cognitive and emotional abilities, and how it could have mitigated the offenses for which he was convicted. (*See generally*, Defense Exhibits (DE) A-J; R at 78-93, 95-100.) PTSD claims during sentencing are "favored as a mitigating factor." (Betsy J. Grey, Article, Neuroscience, PTSD, and Sentencing Mitigation, 34 Cardozo L. Rev. 53, 67 (2012)("However, the American criminal justice system increasingly has recognized that, in certain settings, an offender's exposure to extreme trauma that results in PTSD is favored as a mitigating factor. Two stressor contexts that give rise to popularly viewed sympathetic defendants are discussed below: military service and BWS.")) But for his counsels' ineffective

assistance in failing to raise this matter, SrA Lowe could have—and should have—received a lighter sentence.[2]

WHEREFORE, SrA Lowe respectfully requests that this Honorable Court find that his counsel was ineffective and re-assess his sentence accordingly.

[2]SrA Lowe pled guilty to pursuant to a plea agreement in which two charges were dismissed. Although the withdrawn charges are reflected on the Entry of Judgment and Statement of Trial Results, the original charge sheet reflecting the withdrawn charges is missing from the ROT.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME**
v.	)	
	)	Panel No. 3
Senior Airman (E-4) **DALYN P. LOWE**, USAF, *Appellant.*	)	No. ACM S32707
	)	30 November 2021

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

Pursuant to Rule 23.3(m)(5) of this Honorable Court's Rules of Practice and Procedure, the United States respectfully requests that it be allotted an additional 14 days after the submission of trial defense counsel's statements to provide its answer to Appellant's brief, dated 15 November 2021.

Pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982), Appellant claimed ineffective assistance of counsel. On 30 November 2021, the United States filed a Motion to Compel Affidavits or Declarations, asking this Court to compel the trial defense counsel to submit statements to address Appellant's claim. The United States asked that this Court compel trial defense counsel's statements within 14 days of the Court's order.

The Government's answer to Appellant's brief is currently due to the Court on 15 December 2021. Thus, undersigned counsel requests an additional 14 days after the submission of trial defense counsel's affidavits to file the answer to Appellant's brief in order to properly address Appellant's ineffective assistance of counsel claim.

This case was docketed with the Court on 7 September 2021. Appellant filed his brief with this Honorable Court on 15 November 2021, 69 days after docketing. This is the United States' first request for an enlargement of time. As of the date of this request, 84 days have elapsed since docketing.

For these reasons, the United States seeks an enlargement to ensure a proper and responsive brief is filed with this Court and respectfully requests this Court grant this motion for an enlargement of time. In the event the United States' brief is completed before the new proposed due date, it will be promptly filed with this Court.

[redacted]

ABBIGAYLE C. HUNTER, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations
Military Justice and Discipline Directorate
United States Air Force
[redacted]

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 30 November 2021.

ABBIGAYLE C. HUNTER, Maj, USAF
Appellate Government Counsel,
Government Trial and Appellate Operations
Military Justice and Discipline Directorate
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION TO COMPEL AFFIDAVITS OR DECLARATIONS**
v.	)	
	)	Panel No. 3
Senior Airman (E-4) **DALYN P. LOWE**, USAF, *Appellant.*	)	No. ACM S32707
	)	30 November 2021

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

Pursuant to Rule 23.3(e) of this Honorable Court's Rules of Practice and Procedure, the United States asks this Court to order Appellant's trial defense counsel to provide an affidavit or declaration in response to Appellant's allegation of ineffective assistance of counsel (IAC).

Appellant claims, in his sole assignment of error[1], trial defense counsel were ineffective during sentencing for "fail[ing] to put on evidence of [Appellant's] PTSD diagnosis, how it has affected his cognitive and emotional abilities, and how it could have mitigated the offenses of which he was convicted." (App. Br. at Appendix A.) On 22 November 2021, undersigned counsel requested an affidavit or declaration from Capt Amy Mondragon and Capt Daniec Stefan, the counsel who represented Appellant at trial, to respond to the IAC claim. Both Capt Mondragon and Capt Stefan declined to respond absent a court order.

The United States requires evidence from trial defense counsel to adequately respond to this allegation. *See* United States v. Rose, 68 M.J. 236, 236 (C.A.A.F. 2009); United States v. Melson, 66 M.J. 346, 347 (C.A.A.F. 2008). Appellant's IAC claim is premised on two factual claims: (1) Appellant had been diagnosed with PTSD which impacted his cognitive and emotional abilities and is mitigation for the offenses of which he is convicted; and (2) the absence of a reasonable

[1] Appellant's sole Assignment of Error is raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

tactical or strategic decision for not presenting evidence of Appellant's PTSD diagnosis in sentencing. (App. Br. at Appendix A.) To answer this claim, the Government will need to show, *inter alia*, whether Appellant's "allegations are true" and, if so, whether there was "a reasonable explanation for counsel's actions." United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (citation omitted). Trial defense counsel are the only individuals who can provide the factual predicate to rebut this claim and shed light onto the strategic and tactical decisions that shaped Appellant's sentencing case.

Appellant already "waive[d] the attorney-client privilege as to matters reasonably related to" his IAC claim. Melson, 66 M.J. at 350. This Court cannot grant Appellant's IAC claim without first obtaining a statement from trial defense counsel. *See* Rose, 68 M.J. at 237; Melson, 66 M.J. at 347. Our superior Court encourages the Government to "continue to endeavor to complete the appellate record *promptly and avoid any undue delay*" by seeking affidavits or declarations to respond to IAC claims. Melson, 66 M.J. at 350 (emphasis added). To the extent this Court views Appellant's allegation as "a colorable claim warranting further inquiry," the United States seeks an affidavit or declaration from trial defense counsel now so as to avoid undue delay. Id.

For these reasons, the United States asks this Court to grant this motion to compel trial defense counsel to provide a specific, factual response to Appellant's IAC claim within 14 days of this Court's order.

[redacted]

ABBIGAYLE C. HUNTER, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations
Military Justice and Discipline Directorate
United States Air Force
[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 30 November 2021.

ABBIGAYLE C. HUNTER, Maj, USAF
Appellate Government Counsel,
Government Trial and Appellate Operations
Military Justice and Discipline Directorate
United States Air Force
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32707**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Dalyn P. LOWE	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 30 November 2021, the Government filed a Motion to Compel Affidavits or Declarations from Appellant's trial defense counsel, namely, Captain (Capt) Amy Mondragon and Capt Dainec P. Stefan. The Government seeks to respond to the claim that trial defense counsel provided ineffective assistance of counsel when they failed to put on sentencing evidence of Appellant's post-traumatic stress disorder (PTSD). This issue was raised by Appellant personally pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and is the only raised issue on appeal. According to the Government, Appellant's claim is premised on two factual claims: (1) Appellant had been diagnosed with PTSD, which impacted his cognitive and emotional abilities and is mitigation for the offenses of which he is convicted; and (2) the absence of a reasonable tactical or strategic decision for not presenting evidence of Appellant's PTSD diagnosis in sentencing. The Government argues that trial defense counsel are the only individuals who can provide the factual predicate to rebut Appellant's claim of ineffective assistance of counsel and to shed light onto the strategic and tactical decisions that shaped Appellant's sentencing case. The Government avers that each attorney from Appellant's trial defense counsel has responded that they would only provide a declaration or affidavit pursuant to an order by this court.

Appellant opposes the Motion to Compel Declarations, noting that his ineffective assistance of counsel claim was raised pursuant to *Grostefon*, 12 M.J. 431. Appellant explains while the claim "certainly has the potential to be meritorious, the manner by which it was raised should factor into [our] consideration of whether affidavits are necessary prior to the Government's [answer] and [our] review of the record." Appellant also cites *United States v. Lewis*, 42 M.J. 1, 6 (C.A.A.F. 1995), to argue that "the Government must first review and respond to Appellant's assignment of errors, including his ineffective assistance of counsel allegation."

Additionally, on 30 November 2021, the Government filed a Motion for Enlargement of Time to submit its answer. The Government requests that its answer be due 14 days after receipt of trial defense counsels' affidavits or declarations. Appellant filed an out-of-time opposition to this request in the same filing as the opposition to the motion to compel. Specifically, Appellant notes that if we compel affidavits or declarations, he requests "an expedited timeframe by which the Government must comply" with our order. In support of this request, Appellant explains that his trial defense counsel "are employed by the Government" and "should be able to ensure they prioritize [our] order and provide timely responses." We considered Appellant's out-of-time opposition.

This court makes three observations from its review of the record of trial. First, the Air Force Office of Special Investigations' report of investigation includes references to Appellant's PTSD diagnosis and supporting documentation from Appellant's medical records. Second, trial defense counsel filed a pretrial motion to exclude evidence under Mil. R. Evid. 404(b), including statements Appellant purportedly made to a child protective services worker that Appellant "was going through PTSD" at the time of one of the offenses. Third, and finally, trial defense counsel filed a request with the convening authority for an expert consultant in the field of forensic psychology. Part of the justification for the expert consultant was that Appellant received "treatment" for PTSD and a forensic psychologist could "advise defense counsel" on the impacts of PTSD. Trial defense counsel described expert consultant assistance in this area as "indispensable for [Appellant]'s effective representation." The convening authority approved the requested expert consultant.

The Court of Appeals for the Armed Forces (CAAF) "has concluded based on experience that 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions' that arise during Article 66(c), UCMJ, reviews." *United States v. Jessie*, 79 M.J. 437, 442–43 (C.A.A.F. 2020) (quoting *United States v. Parker*, 36 M.J. 269, 272 (C.M.A. 1993)). When an appellant raises an ineffective assistance of counsel claim, the CAAF has noted "there are legitimate and salutary reasons for the now-Court of Criminal Appeals to have the discretion to obtain evidence by affidavit, testimony, stipulation, or a factfinding hearing, as it deems appropriate." *Id.* at 446 (quoting *United States v. Boone*, 49 M.J. 187, 193 (C.A.A.F. 1998)).

"Counsel whose conduct of a criminal case is drawn into question is entitled to testify concerning the matters charged and is not precluded from disclosing the truth concerning the accusation to the extent defense counsel reasonably believes necessary, even though this involves revealing matters which were given in confidence." Air Force Instruction 51-110, *Professional*

Responsibility Program, Attachment 7, *Air Force Standards for Criminal Justice*, ¶ 4-8.6(d) (11 Dec. 2018).

We considered Appellant's argument that the Government must review and respond to Appellant's assignment of error prior to our ordering of declarations or affidavits. Implicit in Appellant's argument is that this "response" must be the Government's answer and that the Government's motion to compel is an insufficient "response." We are not persuaded that the only Government "response" that can be accepted by our court is an "answer." We find the motion to compel is a sufficient response in this case. We find the allegation of ineffective assistance of counsel and the record contain evidence that, if unrebutted, would overcome the presumption of competence. *See United States v. Melson*, 66 M.J. 346, 350–51 (C.A.A.F. 2008). As there is no affidavit or declaration from trial defense counsel in the record and the Government has not been successful in obtaining a declaration without an order from our court, we are "required to obtain a response from trial defense counsel in order to properly evaluate the allegations." *See id.* at 351.

After considering the Government's motions, Appellant's brief and response to the motion, case law, and the record of trial, it is by the court on this 8th day of December, 2021,

ORDERED:

The Government's Motion to Compel Declarations or Affidavits is **GRANTED**. Appellant's trial defense counsel, Capt Amy Mondragon and Capt Dainec P. Stefan, are each ordered to provide an affidavit or declaration responsive to Appellant's allegation of ineffective assistance of counsel.

The declarations or affidavits shall be provided to counsel for the Government not later than **22 December 2021**. The Government shall deliver a copy of responsive declarations or affidavits to Appellant's counsel upon receipt.

It is further ordered:

The Government's Motion for Enlargement of Time is **GRANTED**. The Government shall file its answer to Appellant's raised issue **not later than 14 days after receipt** of the affidavits or declarations.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' ANSWER TO ASSIGNMENT OF ERROR
v.	)	Before Panel No. 3
Senior Airman (E-4) **DALYN P. LOWE,** United States Air Force *Appellant.*	)	No. ACM S32707 4 January 2022

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

ISSUE PRESENTED

I.

WHETHER SRA LOWE'S DEFENSE COUNSEL WAS INEFFECTIVE DURING THE SENTENCING CASE WHEN THEY FAILED TO ADMIT AND ARGUE EVIDENCE OF HIS POST TRAUMATIC STRESS DISORDER (PTSD) DIAGNOSIS?

STATEMENT OF CASE

Appellant claims, in his sole assignment of error[1], trial defense counsel were ineffective during sentencing for "fail[ing] to put on evidence of [Appellant's] PTSD diagnosis, how it has affected his cognitive and emotional abilities, and how it could have mitigated the offenses of which he was convicted." (App. Br. at Appendix A.) After trial defense counsel refused to provide statements without a court order, the United States petitioned this Court to compel statements from trial defense counsel. (Gov. Motion to Compel, 30 November 2021.) This

[1] Appellant's sole Assignment of Error is raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

Court granted the request and, in light of the Court's order, both trial defense counsel provided declarations providing details regarding the decision to not present evidence of Appellant's PTSD diagnosis. (Order, No. ACM S32707, 8 December 2021; Gov. Motion to Attach, 4 January 2022.)

STATEMENT OF FACTS

Appellant, in line with his elections at trial, was represented at trial by Capt A.M. and Capt D.S. (R. at 7.) Pursuant to his pleas, Appellant was convicted of one charge and two specifications of assault consummated by battery, in violation of Article 128, Uniform Code of Military Justice. (*Entry of Judgment*, 8 June 2021, ROT, Vol 1.) Appellant was also facing one charge and one specification of spoiling non-military property, in violation of Article 109, Uniform Code of Military Justice, and one charge and one specification of adultery, in violation of Article 134, Uniform Code of Military Justice, however both these charges and their specifications were dismissed with prejudice pursuant to the plea agreement. (Id., App. Ex. V at 2.)

Prior to trial but after the date of the charged offenses of which he was convicted, a behavioral health provider found Appellant "me[t] criteria for posttraumatic stress disorder unspecified." (ROT, Vol 2.) Investigators reviewed Appellant's records and noted in the Report of Investigation that Appellant told providers he started experiencing PTSD symptoms in 2016. (Id.) Appellant told providers his PTSD symptoms were due to numerous experiences, including Appellant finding the dead body of a friend who had killed himself when Appellant was 11 or 12 years old, Appellant conducting outside the wire missions while stationed in Turkey, Appellant witnessing the bodies of dead babies in coolers while deployed, and Appellant's participation in convoys with an Improvised Explosive Device risk. (Id.) In interviews with Appellant's family,

co-workers, supervisors, and instructors, investigators found Appellant had never experienced any of the events he reported to mental health providers. (Id.) There was ample evidence however that Appellant's younger brother was tragically killed when Appellant's older brother accidentally discharged a firearm in their home. (R. at 79-85, Def. Ex. B at 2.) Moreover, there was evidence that Appellant's emotional and mental health were significantly negatively impacted by his brother's tragic death. (Id.)

During the sentencing phase of trial, the Defense did not present evidence that Appellant had been diagnosed with PTSD, but did supplement evidence presented by the Government of Appellant's combat service and presented multiple forms of evidence about the death of Appellant's brother and its impact on Appellant. In sentencing, the Government admitted Appellant's Personal Data Sheet and Enlisted Performance Reports, both of which documented his deployments and combat service. (Pros. Ex. 2 and 3.) In its case, the Defense supplemented this evidence by providing the citation for Appellant's Air Force Achievement Medal that he earned during his deployment to Syria from 2018-2019. Furthermore, the Defense called Appellant's mother, who testified about the close relationship between Appellant and his brothers, the tragic death of his brother, and the impact she witnessed on Appellant's emotional well-being following that tragedy. (R. at 79-85.) Appellant also submitted a written and oral unsworn statement, wherein he talked about his brother's death, the impact it had on his mental health, and the steps he had taken to seek counseling since the charged offenses. (Def. Ex. B, R. at 88-89.)

Under the plea agreement, Appellant had to be sentenced to a bad conduct discharge for the offenses of which he was convicted. (App. Ex. V at 2.) The plea agreement limited the term of possible confinement to 60 days minimum, 90 days maximum for each of the two

specifications he plead guilty to, and allowed the terms of confinement to run concurrently, consecutively, or a mixture of both, but capped total consecutive confinement at 90 days. (Id.) No other limitations on sentence were imposed by the plea agreement. (Id.)

On 18 May 2021, the military judge adjudged the sentence of reduction to E-1, 60 days total confinement, and a bad conduct discharge. (R. at 103.)

In response to Appellant's claims of ineffective assistance of counsel and this Court's order compelling statements, both trial defense counsel submitted declarations explaining their decision not to present evidence of Appellant's PTSD diagnosis at trial. (Gov. Motion to Attach, 4 January 2022.) Both trial defense counsel noted the decision not to present evidence of Appellant's PTSD diagnosis was a conscious, strategic decision because trial defense counsel and the Government were aware that Appellant had fabricated the traumatic experiences he reported to mental health providers. (Declaration of Capt A.M.; Declaration of Capt D.S.) Trial defense counsel knew the Government was aware of this discrepancy and planned to rebut any PTSD evidence put on by the Defense because of the information in the Report of Investigation and the persons on the Government's witness list. (Id.) Defense counsel feared that presenting evidence of Appellant's PTSD diagnosis would lead the Government to rebut that claim with evidence of Appellant's lies to providers that led to the diagnosis. (Id.) In the minds of his counsel, this rebuttal evidence would likely defeat any mitigating effect of the PTSD diagnosis, call into question the rehabilitative nature of Appellant's guilty plea, undermine the credibility of Appellant's promises to continue counseling and rehabilitation, and weaken Appellant's claims of remorse. (Id.)

ARGUMENT

I.

TRIAL DEFENSE COUNSEL'S PERFORMANCE WAS NOT DEFICIENT AND APPELLANT HAS FAILED TO SHOW ANY DEFICIENCY RESULTED IN PREJUDICE

Standard of Review

To show ineffective assistance of counsel, "an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). Both the questions of deficient performance and prejudice are reviewed de novo. United States v. Datavs, 71 M.J. 420, 424 (C.A.A.F. 2012).

Law

"An appellant 'must surmount a very high hurdle' to successfully assert ineffective assistance of counsel." United States v. Kane, No. ACM 39590, 2020 CCA LEXIS 275, at *26 (A.F. Ct. Crim. App. 20 Aug. 2020) (unpub. op.) (citing Perez, 64 M.J. at 243.) To prevail on a claim of ineffective assistance of counsel, an appellant must show two things: (1) that trial defense counsel's performance was deficient, and (2) that the deficiency resulted in prejudice. Green, 68 M.J. at 361. Trial defense counsel is presumed to be competent, and the burden rests with the appellant to demonstrate a constitutional violation. United States v. Cronic, 466 U.S. 648, 658 (1984). Our superior Court observed:

> To overcome the presumption of competence, an appellant must demonstrate: (1) a deficiency in counsel's performance that is so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment; and (2) that the deficient performance prejudiced the defense through errors 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

United States v. Moulton, 47 M.J. 227, 229 (C.A.A.F. 1997) (quoting Strickland v. Washington,

466 U.S. 688, 687 (1984)) (internal quotations omitted.)

With respect to the first prong, the deficiency of counsel, courts give deference to counsel and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. To establish deficient performance, an appellant must establish his counsel's representation "amounted to incompetence under 'prevailing professional norms.'" Harrington v. Richter, 131 S. Ct. 770, 788 (2011) (quoting Strickland, 466 U.S. at 690).

In reviewing the decisions and actions of trial defense counsel, a reviewing court does not second-guess strategic or tactical decisions. *See* United States v. Morgan, 37 M.J. 407, 410 (C.M.A. 1993). It is only in those limited circumstances where a purported "strategic" or "deliberate" decision is unreasonable or based on inadequate investigation that it can provide the foundation for a finding of ineffective assistance. *See* United States v. Davis, 60 M.J. 469, 474 (C.A.A.F. 2005). When defense counsel make an objectively reasonable strategic decision to accept a risk or forego a potential benefit, their performance is not deficient. United States v. Gooch, 69 M.J. 353, 362-363 (C.A.A.F. 2011). "Disagreements as to the strategic or tactical decisions made at the trial level by defense counsel will not support a claim of ineffective assistance of counsel so long as the challenged conduct has some reasoned basis." United States v. Mansfield, 24 M.J. 611, 617 (A.F.C.M.R. 1987). *See also* United States v. McIntosh, 74 M.J. 294, 296 (C.A.A.F. 2015). Further, in assessing claims of ineffective assistance of counsel, appellate courts do not look at the success of a defense attorney's strategy "but rather whether counsel made an objectively reasonable choice in strategy from the alternatives available at the time." United States v. Dewrell, 55 M.J. 131, 136 (C.A.A.F. 2001) (*citing* United States v. Hughes, 48 M.J. 700, 718 (A.F. Ct. Crim. App. 1998)).

When addressing the second prong, prejudice to appellant due to error, an appellant must demonstrate a "reasonable probability that, but for counsel's [deficient performance] the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A showing that an error had some conceivable effect on the outcome is not sufficient to meet this burden. Harrington, 131 S. Ct. at 787.

Military courts have taken the standards for ineffective assistance of counsel claims articulated by the Supreme Court and built a three-part test to assess whether the presumption of competence has been overcome. Kane, 2020 CCA LEXIS at *26-27 (citing United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011)). The three-part test examines: (1) if there is a reasonable explanation for counsel's actions; (2) whether defense counsel's level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers; and (3) if defense counsel was ineffective, whether there is a reasonable probability that, absent the errors, there would have been a different result. Gooch, 69 M.J. at 362. (internal citations and quotations omitted.)

Analysis

Trial defense counsel were not ineffective. Their decision to not present evidence of Appellant's PTSD diagnosis in sentencing was an objectively reasonable, strategic decision, as presenting such evidence would have led the Government to rebut the diagnosis with damaging evidence that Appellant had fabricated experiences he claimed caused his PTSD. Far from deficient, trial defense counsel instead skillfully avoided the trap door of Appellant's PTSD diagnosis while still putting on evidence about emotional issues Appellant suffered due to traumatic experiences trial defense counsel proved did occur. This approach both leveraged the potential mitigation of Appellant's provable traumatic experiences and resulting mental health

battles, while eliminating the potential for the Government to put on evidence that would have severely undermined Appellant's credibility, claims of PTSD, and remorse.

Even if trial defense counsel were ineffective, Appellant has not shown a reasonable probability that but for the deficiency the outcome would have been different. Appellant received the lowest mandatory sentence possible under his plea agreement with respect to both confinement and discharge. Appellant's reduction in rank is the only part of the adjudged sentence that was not otherwise mandatory, and Appellant has failed to prove his reduction in rank resulted from the lack of evidence about his PTSD diagnosis presented at trial. Therefore, Appellant has failed to overcome the presumption of competence, and no relief is warranted.

Turning to the first question of the Gooch framework, whether there is a reasonable explanation for trial defense counsel's actions, the declarations of both Capt D.S. and Capt A.M. show that counsel made a conscious and reasoned decision to avoid evidence of PTSD diagnosis because of the damaging rebuttal evidence that awaited. Counsel's concerns were well founded because Appellant's fabrications were noted in the Report of Investigation, thus were known to the Government. The Government's witness list further alerted trial defense counsel that the Government was prepared to rebut PTSD evidence. Defense counsel's explanation for not presenting this evidence shows an informed, conscious, reasonable decision. Appellant has not overcome the presumption of competence, thus no relief should be given by this Court.

The second Gooch question, whether defense counsel's level of advocacy fell measurably below the performance ordinarily expected of fallible lawyers, is likewise answered in the negative. First, appellant's counsel made their own independent efforts to substantiate Appellant's claimed traumatic events. (Declaration of Capt A.M.; Declaration of Capt D.S.) Capt D.S. noted, "Capt [A.M.] and I interviewed potential witnesses regarding claimed traumatic

events. . . . We were unable to identify any substantiation for this claim." (Declaration of Capt D.S. at paragraph 3d.) Further, public records trial defense counsel examined contradicted claims of insurgent attacks and combat deaths Appellant claimed to have experienced. (Id.) While only a portion of Appellant's mental health records were contained in the Report of Investigation, counsel obtained the rest of Appellant's mental health records, reviewed them, and "the records were not helpful in addressing [their] concerns." (Id. at paragraph 3e.) Counsel used multiple avenues to substantiate Appellant's reported traumatic experiences to no avail. Their pursuit of these avenues shows their performance was not deficient.

Trial defense counsel's advocacy was also not deficient because they found a way to present evidence of a traumatic event in Appellant's life and the emotional impact of that trauma. This strategy effectively presented mitigation that would have been similar to evidence of Appellant's PTSD diagnosis without the risk of damaging rebuttal evidence. The Defense's sentencing case at trial, through Appellant's unsworn statements and his mother's live testimony, centered on the tragic death of Appellant's brother, the traumatic nature of that experience for Appellant, and the immense mental fallout Appellant suffered as a result. This skillful approach, wherein trial defense counsel threaded the evidentiary needle to present mitigating evidence without opening the door to damaging rebuttal evidence, clearly does not fall measurably below that expected of fallible attorneys. Counsel's performance was not deficient, Appellant has failed to meet his burden, and relief is not warranted.

Finally, with respect to the third Gooch question, whether any deficiency resulted in prejudice so great that there is a reasonable probability a different outcome would have been reached but for the errors, Appellant failed to meet the burden. To start, Appellant has failed to show there was any deficiency, much less one that led to a different outcome than otherwise

would have resulted. Assuming there was any deficiency though, a superficial examination of the mandatory minimum punishment agreed upon in the plea agreement as compared to the adjudged sentence defeats Appellant's position. The plea agreement called for a mandatory minimum of 60 days in confinement and a bad conduct discharge. (App. Ex. V at 2.) The adjudged sentence was, in total, reduction to E-1, 60 days confinement, and a bad conduct discharge. (R. at 103.) In effect, the military judge, based on all of the evidence presented at trial, only sentenced Appellant to reduction to E-1 because the other portions of the sentence were the mandatory minimums dictated by the plea agreement. Appellant has failed to show that the reduction to E-1 would have been avoided had the judge been provided evidence of his PTSD diagnosis. There was a litany of evidence the military judge could have relied upon in deciding to adjudge reduction to E-1, including that Appellant was convicted of multiple specifications of domestic violence, that Appellant's crimes resulted in injury to the victim, or that the victim articulated in her victim impact statement experiencing intense fear as a result of Appellant's abuse. (*Entry of Judgment*, 8 June 2021, ROT, Vol 1; Pros. Ex. 1 at 2; Court Exhibit A.) Assuming counsel's performance was deficient, Appellant has failed to show any prejudice as a result, let alone a reasonable probability that the outcome of the trial would have been different absent any error. Therefore, no relief can be given, and this Court should deny Appellant's request.

Applying the three question framework employed by military courts to address claims of ineffective assistance of counsel shows Appellant's trial defense counsel were not ineffective by not presenting evidence of his PTSD diagnosis. Counsel had a reasonable explanation for that decision, diligently advocated for Appellant given the alternatives available at the time, and

Appellant did not suffer sufficient prejudice from any deficiency as he received little more than the mandatory minimum sentence.

CONCLUSION

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

[redacted]
ABBIGAYLE C. HUNTER, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
United States Air Force
[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 4 January 2022.

[redacted]
ABBIGAYLE C. HUNTER, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' MOTION TO ATTACH
v.	)	Before Panel No. 3
	)	No. ACM S32707
Senior Airman (E-4) **DALYN P. LOWE**, United States Air Force *Appellant.*	)	Filed on: 7 January 2022

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

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

- Declaration of Capt D.S., dated 21 December 2021 (3 pages total)
- Declaration of Capt A.M., dated 21 December 2021, with 2 attachments (28 pages total)

On 8 December 2021, this Court issued an interlocutory order directing trial defense counsel to provide declarations addressing Appellant's claim of ineffective assistance of counsel. (Order, No. ACM S32707, dated 8 December 2021.) These declarations are responsive to that order. Capt D.S. and Capt A.M.'s declarations were provided to the Air Force Appellate Defense Division on 23 December 2021. The attachments to Capt A.M.'s declaration contain redactions, and reflect the form in which the documents were received by appellate counsel. Appellate counsel did not redacted any material from any of the declarations or their attachments. On 4 January 2022, the United States filed a Motion to Attach seeking attachment of Capt A.M. and Capt D.S.'s declarations, which the United States hereby withdraws.

GRANTED
27 JAN 2022

Appellant claims, in his sole assignment of error[1], trial defense counsel were ineffective during sentencing for "fail[ing] to put on evidence of [Appellant's] PTSD diagnosis, how it has affected his cognitive and emotional abilities, and how it could have mitigated the offenses of which he was convicted." (App. Br. at Appendix A.) Our Superior Court held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court concluded that "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442. (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)). Specifically, with respect to claims of ineffective assistance of counsel, such as Appellant's, the Government needs to show whether there was "a reasonable explanation for counsel's actions." United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (citation omitted).

Capt D.S. and Capt A.M.'s declarations contain information needed to resolve the claim of ineffective assistance of counsel. Both declarations and the accompanying attachments provide trial defense counsel's explanation for their decision not to present evidence of Appellant's PTSD diagnosis at trial. Both declarations are directly responsive to this Court's order and are necessary to resolve Appellant's claim of error.

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

[redacted]
ABBIGAYLE C. HUNTER, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
United States Air Force
[redacted]

[1] Appellant's sole Assignment of Error is raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 7 January 2022 via electronic filing.

ABBIGAYLE C. HUNTER, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
United States Air Force
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

)
)
) **NOTICE OF PANEL**
) **CHANGE**
)

It is by the court on this 20th day of January, 2022,

ORDERED:

The following records of trial are withdrawn from Panel 3 and referred to Panel 1 for appellate review.

1. United States v. Ashmore, Donovan	No. ACM 40036
2. United States v. Dixon, JaKorbie R.	No. ACM 39878 (f rev)
3. United States v. Beehler, Erik M.	No. ACM 39964
4. United States v. Lopez, Luis J.	No. ACM S32681
5. United States v. Lowe, Dalyn P.	No. ACM S32707
6. United States v. Emas, Nicholas F.	No. ACM 40020
7. United States v. Kim, Won-Jun	No. ACM 40057
8. United States v. Mock, Joshua P.	No. ACM 40072
9. United States v. Taylor II, Terry J.	No. ACM 40086
10. United States v. Cooper, Calvin M.	No. ACM 40092
11. United States v. Ross, Jaden C.	No. ACM 40107
12. United States v. Todd, Jeremy T.	No. ACM S32701
13. United States v. Scott, Daionte K.	No. ACM 40130
14. United States v. Lampkins, Bradley D.	No. ACM 40135
15. United States v. Goldsmith, Devonte R.C.	No. ACM 40148
16. United States v. Davis, Ryan J.	No. ACM S32709
17. United States v. Rivera-Moyet, Jorgediego	No. ACM 40178
18. United States v. Sanders III, Lonnie E.	No. ACM S32714
19. United States v. Covitz, Colin R.	No. ACM 40193
20. United States v. Schauer, Matthew D.	No. ACM 40203
21. United States v. Dagan, Donivan B.	No. ACM S32717

This panel letter supersedes all previous assignments.

FOR THE COURT

[redacted]

ANTHONY F. ROCK, Capt, USAF
Deputy Clerk of the Court