IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Technical Sergeant (E-6) **RYAN M. PALIK,** United States Air Force *Appellant*	))))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)** Before Panel No. 2 No. ACM 40225 2 February 2022

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 an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 60 days, which will end on **13 April 2022.** The record of trial was docketed with this Court on 14 December 2021. From the date of docketing to the present date, 50 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,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

GRANTED
4 FEBRUARY 2022

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 2 February 2022.

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

3 February 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) RYAN M. PALIK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40225 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 3 February 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Technical Sergeant (E-6) **RYAN M. PALIK,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)** Before Panel No. 2 No. ACM 40225 31 March 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **13 May 2022.** The record of trial was docketed with this Court on 14 December 2021. From the date of docketing to the present date, 107 days have elapsed. On the date requested, 150 days will have elapsed.

On 8 June 2021, and from 9-13 August 2021, at Royal Air Force (RAF) Mildenhall, United Kingdom, a panel of officer members tried Appellant, TSgt Ryan Palik. (Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 23 Sep. 2021; Record (R.) at 53.) Contrary to his pleas, the members convicted TSgt Palik of one specification of assault consummated by a battery and two specifications of domestic violence in violation of Article 128 and 128b, Uniform Code of Military Justice

GRANTED
7 APR 2022

(UCMJ), 10 U.S.C. § 928, 928b (2019).[1,2] (R. at 38, 997.) A military judge sentenced TSgt Palik to 10 months' confinement, reduction to the grade of E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. (R. at 1002.) The convening authority took no action on the findings or the sentence.

The record of trial consists of 5 prosecution exhibits, 15 defense exhibits, 50 appellate exhibits, and 1 court exhibit. The transcript is 1002 pages. TSgt Palik is in confinement.

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

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

---

[1] Unless otherwise noted, all references to the UCMJ, Rules for Courts-Martial (R.C.M.), and Mil. R. Evid. are to the *Manual for Courts-Martial, United States* (2019 ed.) [2019 *MCM*].

[2] The members acquitted TSgt Palik of 11 specifications of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. 928 (2016 and 2019).

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 31 March 2022.

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

4 April 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) RYAN M. PALIK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40225 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Technical Sergeant (E-6) **RYAN M. PALIK,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)** Before Panel No. 2 No. ACM 40225 3 May 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **12 June 2022.** The record of trial was docketed with this Court on 14 December 2021. From the date of docketing to the present date, 140 days have elapsed. On the date requested, 180 days will have elapsed.

On 8 June 2021, and from 9-13 August 2021, at Royal Air Force (RAF) Mildenhall, United Kingdom, a panel of officer members tried Appellant, TSgt Ryan Palik. (Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 23 Sep. 2021; Record (R.) at 53.) Contrary to his pleas, the members convicted TSgt Palik of one specification of assault consummated by a battery and two specifications of domestic violence in violation of Article 128 and 128b, Uniform Code of Military Justice

GRANTED
9 MAY 2022

(UCMJ), 10 U.S.C. § 928, 928b (2019).[1,2] (R. at 38, 997.) A military judge sentenced TSgt Palik to 10 months' confinement, reduction to the grade of E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. (R. at 1002.) The convening authority took no action on the findings or the sentence.

The record of trial consists of 5 prosecution exhibits, 15 defense exhibits, 50 appellate exhibits, and 1 court exhibit. The transcript is 1002 pages. TSgt Palik is in confinement.

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

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

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[1] Unless otherwise noted, all references to the UCMJ, Rules for Courts-Martial (R.C.M.), and Mil. R. Evid. are to the *Manual for Courts-Martial, United States* (2019 ed.) [2019 *MCM*].

[2] The members acquitted TSgt Palik of 11 specifications of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. 928 (2016 and 2019).

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 3 May 2022.

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

5 May 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) RYAN M. PALIK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40225 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 5 May 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Technical Sergeant (E-6) **RYAN M. PALIK,** United States Air Force *Appellant*	))))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)** Before Panel No. 2 No. ACM 40225 1 June 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **12 July 2022.** The record of trial was docketed with this Court on 14 December 2021. From the date of docketing to the present date, 169 days have elapsed. On the date requested, 210 days will have elapsed.

On 8 June 2021, and from 9-13 August 2021, at Royal Air Force (RAF) Mildenhall, United Kingdom, a panel of officer members tried Appellant, TSgt Ryan Palik. (Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 23 Sep. 2021; Record (R.) at 53.) Contrary to his pleas, the members convicted TSgt Palik of one specification of assault consummated by a battery and two specifications of domestic violence in violation of Article 128 and 128b, Uniform Code of Military Justice

GRANTED
3 JUN 2022

(UCMJ), 10 U.S.C. § 928, 928b (2019).[1,2] (R. at 38, 997.) A military judge sentenced TSgt Palik to 10 months' confinement, reduction to the grade of E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. (R. at 1002.) The convening authority took no action on the findings or the sentence.

The record of trial consists of 5 prosecution exhibits, 15 defense exhibits, 50 appellate exhibits, and 1 court exhibit. The transcript is 1002 pages. TSgt Palik is in confinement.

Counsel is currently assigned 24 cases, with 10 pending initial brief before this Court. Counsel has not yet begun review in this case. Five cases at the Air Force Court has priority over this case:

1. *United States v. Baker*, ACM 40091. The record of trial consists of 6 prosecution exhibits, 7 defense exhibits, and 19 appellate exhibits. The transcript is 247 pages. Counsel has begun review of this record and drafted the AOE.

2. *United States v. McCoy*, ACM 40119. The record of trial consists of 12 prosecution exhibits, 10 defense exhibits, and 40 appellate exhibits, and 1 court exhibit. The transcript is 537 pages. Counsel has completed review of this record an identified issues to raise.

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[1] Unless otherwise noted, all references to the UCMJ, Rules for Courts-Martial (R.C.M.), and Mil. R. Evid. are to the *Manual for Courts-Martial, United States* (2019 ed.) [2019 *MCM*].

[2] The members acquitted TSgt Palik of 11 specifications of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. 928 (2016 and 2019).

3. *United States v. Williamson*, ACM 40211. The record of trial consists of 18 prosecution exhibits, 28 defense exhibits, 42 appellate exhibits, and 2 court exhibits. The transcript is 653 pages. Counsel has not yet begun review of this record.

4. *United States v. King*, ACM 39927 (f rev). The record of trial consists of 4 prosecution exhibits, 7 defense exhibits, 14 appellate exhibits, and 1 court exhibit. The transcript is 104 pages. Counsel has reviewed the record in this case.

5. *United States v. Mobley*, ACM 40088 (f rev). The record of trial consists of 4 prosecution exhibits, 4 defense exhibits, and 9 appellate exhibits. The transcript is 110 pages. Counsel has reviewed the record in this case.

Additionally, counsel is working on a grant brief for *United States v. Day*, ACM 39962. The CAAF granted review on 23 May 2022, and the brief is due 22 June 2022.

Through no fault of TSgt Palik, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. TSgt Palik was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review TSgt Palik's case and advise him regarding potential errors.

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

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 1 June 2022.

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

2 June 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) RYAN M. PALIK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40225 Panel No. 2

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

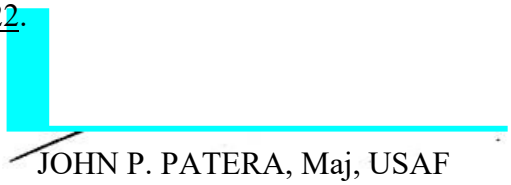
Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

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

JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 2 June 2022.



JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division
Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Technical Sergeant (E-6) **RYAN M. PALIK,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)** Before Panel No. 2 No. ACM 40225 30 June 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **11 August 2022.** The record of trial was docketed with this Court on 14 December 2021. From the date of docketing to the present date, 198 days have elapsed. On the date requested, 240 days will have elapsed.

On 8 June 2021, and from 9-13 August 2021, at Royal Air Force (RAF) Mildenhall, United Kingdom, a panel of officer members tried Appellant, TSgt Ryan Palik. (Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 23 Sep. 2021; Record (R.) at 53.) Contrary to his pleas, the members convicted TSgt Palik of one specification of assault consummated by a battery and two specifications of domestic violence in violation of Article 128 and 128b, Uniform Code of Military Justice

(UCMJ), 10 U.S.C. § 928, 928b (2019).[1,2] (R. at 38, 997.) A military judge sentenced TSgt Palik to 10 months' confinement, reduction to the grade of E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. (R. at 1002.) The convening authority took no action on the findings or the sentence.

The record of trial consists of 5 prosecution exhibits, 15 defense exhibits, 50 appellate exhibits, and 1 court exhibit. The transcript is 1002 pages. TSgt Palik is in confinement.

Counsel is currently assigned 22 cases, with 8 pending initial brief before this Court. Counsel has not yet begun review in this case. Four cases at the Air Force Court has priority over this case:

1. *United States v. McCoy*, ACM 40119. The record of trial consists of 12 prosecution exhibits, 10 defense exhibits, and 40 appellate exhibits, and 1 court exhibit. The transcript is 537 pages. Counsel has completed review of this record and drafted approximately 80% of the brief.

2. *United States v. King*, ACM 39927 (f rev). The record of trial consists of 4 prosecution exhibits, 7 defense exhibits, 14 appellate exhibits, and 1 court exhibit. The transcript is 104 pages. Counsel has reviewed the record in this case.

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[1] Unless otherwise noted, all references to the UCMJ, Rules for Courts-Martial (R.C.M.), and Mil. R. Evid. are to the *Manual for Courts-Martial, United States* (2019 ed.) [2019 *MCM*].

[2] The members acquitted TSgt Palik of 11 specifications of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. 928 (2016 and 2019).

3. *United States v. Mobley*, ACM 40088 (f rev). The record of trial consists of 4 prosecution exhibits, 4 defense exhibits, and 9 appellate exhibits. The transcript is 110 pages. Counsel has reviewed the record in this case.

4. *United States v. Williamson*, ACM 40211. The record of trial consists of 18 prosecution exhibits, 28 defense exhibits, 42 appellate exhibits, and 2 court exhibits. The transcript is 653 pages. Counsel has not yet begun review of this record.

Additionally, counsel will have to file a reply brief in the CAAF case *United States v. Day*, ACM 39962. The Government's Answer is expected in late July.

Through no fault of TSgt Palik, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. TSgt Palik was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review TSgt Palik's case and advise him regarding potential errors.

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

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 30 June 2022.

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

30 June 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) RYAN M. PALIK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40225 Panel No. 2

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

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

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

JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 30 June 2022.

JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40225**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Ryan M. PALIK	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 30 June 2022, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 5th day of July, 2022,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **11 August 2022**.

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

FOR THE COURT

FLEMING E. KEEFE, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Technical Sergeant (E-6) **RYAN M. PALIK,** United States Air Force *Appellant*	))))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)** Before Panel No. 2 No. ACM 40225 1 August 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **10 September 2022.** The record of trial was docketed with this Court on 14 December 2021. From the date of docketing to the present date, 230 days have elapsed. On the date requested, 270 days will have elapsed.

On 8 June 2021, and from 9-13 August 2021, at Royal Air Force (RAF) Mildenhall, United Kingdom, a panel of officer members tried Appellant, TSgt Ryan Palik. (Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 23 Sep. 2021; Record (R.) at 53.) Contrary to his pleas, the members convicted TSgt Palik of one specification of assault consummated by a battery and two specifications of domestic violence in violation of Article 128 and 128b, Uniform Code of Military Justice

GRANTED
2 AUG 2022

(UCMJ), 10 U.S.C. § 928, 928b (2019).[1,2] (R. at 38, 997.) A military judge sentenced TSgt Palik to 10 months' confinement, reduction to the grade of E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. (R. at 1002.) The convening authority took no action on the findings or the sentence.

The record of trial consists of 5 prosecution exhibits, 15 defense exhibits, 50 appellate exhibits, and 1 court exhibit. The transcript is 1002 pages. TSgt Palik is in confinement.

Counsel is currently assigned 21 cases, with 8 pending initial brief before this Court. Counsel has not yet begun review in this case. Three cases at the Air Force Court have priority over this case:

1. *United States v. Brassil-Kruger*, ACM 40223. The record of trial has 6 volumes and the trial transcript has 753 pages. There are 15 prosecution exhibits, 6 defense exhibits, 44 appellate exhibits, and 1 court exhibit. Counsel recently received this case from the previous appellate defense counsel, who is no longer with the division. A reply in this lengthy case is due shortly.

2. *United States v. Williamson*, ACM 40211. The record of trial consists of 18 prosecution exhibits, 28 defense exhibits, 42 appellate exhibits, and 2 court exhibits. The transcript is 653 pages. Counsel has reviewed the record and begun the AOE.

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[1] Unless otherwise noted, all references to the UCMJ, Rules for Courts-Martial (R.C.M.), and Mil. R. Evid. are to the *Manual for Courts-Martial, United States* (2019 ed.) [2019 *MCM*].

[2] The members acquitted TSgt Palik of 11 specifications of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. 928 (2016 and 2019).

3. *United States v. Paugh*, ACM 40231. The record of trial consists of 13 prosecution exhibits, 10 defense exhibits, 7 appellate exhibits, and 1 court exhibit. The transcript is 224 pages. Counsel has not yet begun review of this record.

Through no fault of TSgt Palik, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. TSgt Palik was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review TSgt Palik's case and advise him regarding potential errors.

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

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 1 August 2022.

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

2 August 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) RYAN M. PALIK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40225 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 2 August 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Technical Sergeant (E-6) **RYAN M. PALIK,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)** Before Panel No. 2 No. ACM 40225 30 August 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **10 October 2022.** The record of trial was docketed with this Court on 14 December 2021. From the date of docketing to the present date, 259 days have elapsed. On the date requested, 300 days will have elapsed.

On 8 June 2021, and from 9-13 August 2021, at Royal Air Force (RAF) Mildenhall, United Kingdom, a panel of officer members tried Appellant, TSgt Ryan Palik. (Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 23 Sep. 2021; Record (R.) at 53.) Contrary to his pleas, the members convicted TSgt Palik of one specification of assault consummated by a battery and two specifications of domestic violence in violation of Article 128 and 128b, Uniform Code of Military Justice

GRANTED
31 AUG 2022

(UCMJ), 10 U.S.C. § 928, 928b (2019).[1,2] (R. at 38, 997.) A military judge sentenced TSgt Palik to 10 months' confinement, reduction to the grade of E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. (R. at 1002.) The convening authority took no action on the findings or the sentence.

The record of trial consists of 5 prosecution exhibits, 15 defense exhibits, 50 appellate exhibits, and 1 court exhibit. The transcript is 1002 pages. TSgt Palik is no longer in confinement.

Counsel is currently assigned 21 cases, with 7 pending initial brief before this Court. Counsel has begun review of this case. One case at the Air Force Court has priority over this case:

United States v. Williamson, ACM 40211. The record of trial consists of 18 prosecution exhibits, 28 defense exhibits, 42 appellate exhibits, and 2 court exhibits. The transcript is 653 pages. Counsel has reviewed the record and begun the AOE.

Through no fault of TSgt Palik, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. TSgt Palik was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review TSgt Palik's case and advise him regarding potential errors.

---

[1] Unless otherwise noted, all references to the UCMJ, Rules for Courts-Martial (R.C.M.), and Mil. R. Evid. are to the *Manual for Courts-Martial, United States* (2019 ed.) [2019 *MCM*].

[2] The members acquitted TSgt Palik of 11 specifications of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. 928 (2016 and 2019).

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

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 30 August 2022.

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

30 August 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) RYAN M. PALIK, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40225 Panel No. 2

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 30 August 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**MOTION TO EXAMINE SEALED MATERIALS**
v.	)	Before Panel No. 2
Technical Sergeant (E-6) **RYAN M. PALIK,** United States Air Force *Appellant*	)	No. ACM 40225 30 August 2022

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and Rule 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves to examine the following:

- Appellate Exhibits IX, X, and XI in volume 2 of the Record of Trial (ROT). These exhibits are the motions related to Mil. R. Evid. 513.
- The related closed hearing. Undersigned counsel cannot identify the precise number of pages because the pagination in his ROT (and in the copy on webdocs) does not indicate the length of the closed session. It begins and ends on page 59 of counsel's record.

Both trial counsel and trial defense counsel had access to the exhibits for the court-martial. (R. at 55–57.) The military judge sealed the exhibits. (R. at 57; Appellate Exhibit (AE) XIX.)

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examining these materials is reasonably necessary to fulfill appellate counsel's

responsibilities, undersigned counsel asserts that viewing the referenced exhibits and transcript is reasonably necessary to assess whether the military judge abused his discretion in his ruling on producing records pursuant to Mil. R. Evid. 513. The military judge reviewed 33 pages of A1C SM's medical records in camera, eventually choosing to release 21 pages to the parties. (AE XIV; R. at 87–88.)

Without the benefit of the motions, counsel cannot ascertain what the Defense actually sought within these records. At this time, counsel is *not* seeking access to the materials reviewed in camera, but not released to the parties. If counsel can meet the good cause requirements in R.C.M. 1113(b)(3)(B)(ii), counsel will file a separate motion seeking access to the pages reviewed only in camera.

To determine whether the record of trial yields grounds for this Court to grant relief under Article 66(d), UCMJ, 10 U.S.C. § 866(d), appellate defense counsel must therefore examine "the entire record."

> Although Courts of Criminal Appeals have a broad mandate to review the record unconstrained by an appellant's assignments of error, that broad mandate does not reduce the importance of adequate representation. As we said in *United States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987), independent review is not the same as competent appellate representation.

United States v. May, 47 M.J. 478, 481 (C.A.A.F. 1998). Undersigned counsel must review the sealed materials to provide "competent appellate representation." *See id.* Accordingly, good cause exists in this case since undersigned counsel cannot fulfill his duty of representation under Article 70, UCMJ, 10 U.S.C. § 870, without first reviewing these exhibits and related transcript.

WHEREFORE, counsel requests that this Honorable Court grant this motion.

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 30 August 2022.

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

1 September 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) RYAN M. PALIK, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIALS No. ACM 40225 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States responds to Appellant's Motion to Examine Sealed Materials, dated 30 August 2022. The United States does not object to Appellant's counsel examining any transcript portions or exhibits that were released to the parties if the United States can also review the sealed portions of the record as necessary to respond to any assignment of error that references the sealed materials. The United States thus respectfully requests that any order issued by this Court also allows appellate counsel for the United States to view the sealed materials.

The United States would not consent to Appellant's counsel viewing any exhibits that were reviewed in camera but not released to the parties unless this Court has determined there is good cause for Appellant's counsel to do so under R.C.M. 1113.

WHEREFORE, the United States respectfully responds to Appellant's motion.

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel
Government Trial and
Appellate Counsel Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 1 September 2022.

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel
Government Trial and
Appellate Counsel Division
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40225**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Ryan M. PALIK	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 30 August 2022, Appellant's counsel submitted a Motion to Examine Sealed Materials, requesting to examine Appellate Exhibits IX, X, XI and the closed session beginning on page 59 of the record.[1]

Appellant's motion states the exhibits were reviewed by the parties at trial. Appellant's counsel avers "that viewing the referenced exhibits and transcript is reasonably necessary to assess whether the military judge abused his discretion in his ruling on producing records pursuant to Mil. R. Evid. 513."

The Government responded to the motion on 1 September 2022. It does not object to Appellant's counsel reviewing exhibits that were released to both parties at trial—as long as the Government "can also review the sealed portions of the record as necessary to respond to any assignment of error that references the sealed materials."

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities." Rule for Courts-Martial 1113(b)(3)(B)(i), *Manual for Courts-Martial*, *United States* (2019 ed.). The court finds Appellant's counsel has made a colorable showing that review of the appellate exhibits and transcript pages is necessary to fulfill counsel's duties of representation to Appellant.

The court notes that Appellant's motion indicates that the closed session "begins and ends on page 59 of counsel's record." The court further notes that a review of Webdocs indicates that the closed session also begins and ends on

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[1] Appellant's motion states: "[C]ounsel cannot identify the precise number of pages because the pagination in his ROT (and in the copy on [W]ebdocs) does not indicate the length of the closed session. It begins and ends on page 59 of counsel's record." As discussed in this order, the transcript filed in the record of trial with the court appears to be different from the version provided to counsel and uploaded to Webdocs.

page 59 of the version uploaded to Webdocs. In the version on Webdocs, the next transcript page is 60. However, these appear to be pagination errors in the copies of the transcript provided to counsel and uploaded to Webdocs.

In the record of trial filed with the court, transcript pages 59–72 contain proceedings of a closed session. In the court's record of trial, the open session of court resumes on transcript page 73, with the testimony of Special Investigator HO. However, transcript pages 59–72 in the court's record of trial are not properly sealed in an envelope with appropriate markings.

Accordingly, it is by the court on this 13th day of September, 2022,

ORDERED:

Appellant's Motion to Examine Sealed Materials, dated 30 August 2022, is **GRANTED**.

Appellate defense counsel and appellate government counsel may view **Appellate Exhibits IX, X, XI and transcript pages 59–72**, subject to the following conditions: To view the sealed materials, counsel will coordinate with the court.

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

It is further ordered:

The Government shall take all steps necessary to ensure that copies of transcript pages 59–72 of Appellant's court-martial in the possession of any Government office, Appellant, counsel for Appellant (trial and appellate), or any other known copy of transcript pages 59–72, be retrieved and destroyed.

However, if appellate defense counsel and appellate government counsel possess copies of transcript pages 59–72, counsel are authorized to retain copies of transcript pages 59–72 in their possession until completion of our Article 66, UCMJ, 10 U.S.C. § 866, review of Appellant's case, to include the period for reconsideration in accordance with JT. CT. CRIM. APP. R. 31. After this period, appellate defense and appellate government counsel shall destroy any retained copies of transcript pages 59–72 in their possession

The Clerk of the Court will ensure transcript pages 59–72 are properly sealed in the court's record.

It is further ordered:

Not later than **20 September 2022**, the Government shall provide all parties—in digital or printed form—correct copies of the verbatim transcript of

open sessions of Appellant's court-martial, with proper pagination.[2] The Government shall also ensure that this correct version of the verbatim transcript of open sessions of Appellant's court-martial, with proper pagination, is uploaded to Webdocs.

FOR THE COURT

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

[2] The pagination is correct in the certified record of trial filed with the court. Accordingly, insofar as the pagination is incorrect in the copies provided to various parties, the court finds that a correction of the certified record of trial is unnecessary. *See generally* Rule for Courts-Martial 1112.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Technical Sergeant (E-6) **RYAN M. PALIK,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)** Before Panel No. 2 No. ACM 40225 3 October 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **9 November 2022.** The record of trial was docketed with this Court on 14 December 2021. From the date of docketing to the present date, 293 days have elapsed. On the date requested, 330 days will have elapsed.

On 8 June 2021, and from 9-13 August 2021, at Royal Air Force (RAF) Mildenhall, United Kingdom, a panel of officer members tried Appellant, TSgt Ryan Palik. (Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 23 Sep. 2021; Record (R.) at 53.) Contrary to his pleas, the members convicted TSgt Palik of one specification of assault consummated by a battery and two specifications of domestic violence in violation of Article 128 and 128b, Uniform Code of Military Justice

(UCMJ), 10 U.S.C. § 928, 928b (2019).[1,2] (R. at 38, 997.) A military judge sentenced TSgt Palik to 10 months' confinement, reduction to the grade of E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. (R. at 1002.) The convening authority took no action on the findings or the sentence.

The record of trial consists of 5 prosecution exhibits, 15 defense exhibits, 50 appellate exhibits, and 1 court exhibit. The transcript is 1002 pages. TSgt Palik is no longer in confinement.

Counsel is currently assigned 22 cases, with 8 pending initial brief before this Court. Counsel has completed review of the record and begun drafting the AOE. One case at the Air Force Court has priority over this case:

United States v. Williamson, ACM 40211. The record of trial consists of 18 prosecution exhibits, 28 defense exhibits, 42 appellate exhibits, and 2 court exhibits. The transcript is 653 pages. Counsel has reviewed the record and completed significant work on the AOE.

In addition, counsel will argue two cases before the CAAF on consecutive days in late October: *United States v. Day*, ACM 39962, and *United States v. Harrington*, ACM 39825. This will inhibit progress on TSgt Palik's case during the month of October.

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[1] Unless otherwise noted, all references to the UCMJ, Rules for Courts-Martial (R.C.M.), and Mil. R. Evid. are to the *Manual for Courts-Martial, United States* (2019 ed.) [2019 *MCM*].

[2] The members acquitted TSgt Palik of 11 specifications of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. 928 (2016 and 2019).

Through no fault of TSgt Palik, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. TSgt Palik was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to complete briefing in TSgt Palik's case and advise him regarding potential errors.

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

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 3 October 2022.

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

4 October 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) RYAN M. PALIK, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40225 Panel No. 2

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40225**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Ryan M. PALIK	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 3 October 2022, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 5th day of October, 2022,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than **9 November 2022**.

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

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Technical Sergeant (E-6) **RYAN M. PALIK**, USAF, *Appellant.*	)))))))))	UNITED STATES' MOTION TO ATTACH DOCUMENT OUT OF TIME Before Panel No. 2 No. ACM 40225 26 September 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 document to this motion out of time:

- Palik - 40225 - Corrected Transcript (19 Sep 22) (SENSITIVE)

The attached corrected transcript is responsive to this Court's order directing the correction of pagination in the verbatim transcript of open sessions in Appellant's court-martial and uploading the corrected verbatim transcript to Webdocs. (Court Order, dated 5 August 2022.)

Our Superior Court has 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). Accordingly, the attached document is relevant and necessary to address this Court's order.

There is good cause to grant this motion out of time. On 19 September 2022, in accordance with this Court's order, undersigned counsel transmitted, via DoD SAFE, the corrected transcript. However, undersigned counsel did not include a corresponding motion to attach the document. Accordingly, while the document was provided on time and in

GRANTED
5 Oct 2022

accordance with this Court's order, a motion to attach was not included. Such a motion is included now.

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

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

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

For:

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 26 September 2022.

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

11 November 2022

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee,

v.

RYAN M. PALIK,
Technical Sergeant (E-6), USAF
Appellant

Before Panel No. 2

No. ACM 40225

BRIEF ON BEHALF OF APPELLANT

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

Counsel for Appellant

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ASSIGNMENTS OF ERROR

I.

WHETHER TSGT PALIK'S DOMESTIC VIOLENCE AND ASSAULT CONSUMMATED BY A BATTERY CONVICTIONS ARE FACTUALLY SUFFICIENT.

II.

THE GOVERNMENT LOST THE ONLY TWO VIDEO-RECORDED STATEMENTS FROM SM, THE COMPLAINING WITNESS FOR EVERY CONVICTED OFFENSE. DID DEFENSE COUNSEL PROVIDE INEFFECTIVE ASSISTANCE BY FAILING TO FILE AN R.C.M. 914 MOTION BASED ON THE GOVERNMENT'S INABILITY TO PRODUCE HER STATEMENTS?

III.

WHETHER TSGT PALIK WAS ENTITLED TO A UNANIMOUS VERDICT UNDER THE FIFTH AND SIXTH AMENDMENT.

IV.[1]

WHETHER TSGT PALIK'S DOMESTIC VIOLENCE AND ASSAULT CONSUMMATED BY A BATTERY CONVICTIONS ARE LEGALLY SUFFICIENT.

V.

WHETHER TRIAL COUNSEL IMPROPERLY ARGUED THAT TSGT PALIK'S SENTENCE SHOULD EXCEED THE ONE YEAR THAT THE COMPLAINING WITNESS "HAD TO DEAL WITH THIS."

VI.

WHETHER THE RECORD OF TRIAL CONTAINS DUPLICATE APPELLATE EXHIBITS AND REQUIRES REMAND FOR CORRECTION.

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[1] Issues IV, V, and VI are raised in the appendix pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

STATEMENT OF THE CASE

On 8 June 2021, and from 9-13 August 2021, at Royal Air Force Mildenhall, United Kingdom, a panel of officer members tried Appellant, TSgt Ryan Palik. (Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 23 Sep. 2021; Record (R.) at 53.) Contrary to his pleas, the members convicted TSgt Palik of two specifications of assault consummated by a battery and one specification of domestic violence in violation of Articles 128 and 128b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 928, 928b (2019).[2,3,4] (R. at 38, 990.) A military judge sentenced TSgt Palik to 10 months' confinement, reduction to the grade of E-1, forfeiture of all pay and allowances,[5] and a bad-conduct discharge. (R. at 1015.) The convening authority took no action on the findings or the sentence.

---

[2] Unless otherwise noted, all references to the UCMJ, Rules for Courts-Martial (R.C.M.), and Mil. R. Evid. are to the *Manual for Courts-Martial, United States* (2019 ed.) [2019 *MCM*].

[3] The members acquitted TSgt Palik of 11 specifications of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2016 and 2019).

[4] It is unclear why the Government charged TSgt Palik with violating Article 128 and Article 128b on the same days against the same complaining witness, SM. (Charge Sheet, ROT Vol. 1.) TSgt Palik asserts no prejudice from this aspect of the charging.

[5] The EOJ incorrectly states that the military judge adjudged "Total Forfeitures." (EOJ, ROT Vol. 1, 23 Sep. 2021.) In fact, the military judge sentenced TSgt Palik "[t]o forfeit all pay and allowances." (R. at 1015.) TSgt Palik respectfully requests this Court remand for a corrected EOJ. *See, e.g.*, *United States v. Mihalec*, No. ACM 39771, 2021 CCA LEXIS 25, at *52 n.26 (A.F. Ct. Crim. App. 26 Jan. 2021) (unpub. op.) (ordering a new promulgating order when the members adjudged "forfeiture of all pay and allowances" but the promulgating order stated "total forfeitures").

STATEMENT OF FACTS

TSgt Palik joined the Air Force in 2009 and deployed four times during his career. (R. at 614–15.) He met Airman First Class SM (SM) in mid-2019 at the Dining Facility where they both worked. (R. at 312–13, 642.) They began a dating relationship and informed their leadership when then-SSgt Palik was selected to take a supervisory position over SM. (R. at 642.) Their relationship was "very passionate," "very emotional," and full of trust issues, including whether each was cheating on the other. (R. at 342, 345, 643.) The narrative that follows draws on their conflicting testimony at the court-martial. Record citations from pages 311 to 401 are from SM's testimony; citations from pages 614 to 743 are from TSgt Palik's testimony.

The Fourth of July Weekend, 2020

SM stayed at TSgt Palik's apartment over the long weekend of the Fourth of July, 2020. (R. at 346.) The couple went to a nearby bar for drinks around 2000 hours and returned to the apartment after SM broke a wine glass. (R. at 644.) They argued in the apartment, and SM stood in front of TSgt Palik's face, calling him names and poking him in the face. (R. at 645.) He told her to back off, but she said "[o]r what?" and pushed his face back. (*Id.*) He pushed her upper chest to create distance. (R. at 645–46.) At that point, SM began to destroy objects in TSgt Palik's apartment. (R. at 646.) She grabbed a bottle of whisky by the neck and smashed it on the table, then held the broken bottle by the neck. (R. at 646.) She threw the bottle down and proceeded to break his laptop, chair, going-away gifts, and PlayStation 4. (R. at 646–50.) She left a hole in the wall when she threw the PlayStation into it. (R. at 650.) Defense Exhibit B documents the extensive damage caused. (R. at 647–53; Defense

Exhibit (DE) B.) During this outburst, TSgt Palik stood in the same place telling her to leave. (R. at 653.)

SM, by contrast, claimed that when she got in TSgt Palik's face to yell at him, he responded by putting his hands around her neck and choking her for five seconds. (R. at 315–16.) According to her, this came "out of nowhere." (R. at 353.) She could not recall whether she told the trial counsel during pretrial interviews that TSgt Palik used one hand (rather than two) to choke her. (R. at 355.) She maintained that after TSgt Palik strangled her, she proceeded to break things in the apartment, argue with him, and eventually slept on the couch in the next room. (R. at 316.) At that point, she had not moved in with TSgt Palik yet and she still had a dorm room.[6] (R. at 314.)

She also claimed that TSgt Palik slapped her the next day during a barbecue, and that at least one witness, TSgt AB, definitely saw it. (R. at 316–17, 352.) TSgt AB testified he did not witness a physical altercation. (R. at 759.) The panel acquitted TSgt Palik of the slapping allegation. (R. at 990.) Although it did not convict TSgt Palik of the strangulation allegation, it did convict him of the lesser-included offense of assault consummated by a battery for touching her neck. (R. at 990.)

[6] At other points, SM provided alternate testimony on when she moved in with TSgt Palik and when (sometime later) she fully moved out of her dorm room. (R. at 318–19, 346, 395, 398.)

20 August 2020

SM testified that she continued living with TSgt Palik after the alleged strangulation because she "really didn't have any money and [] didn't know what to do." (R. at 319.) Approximately six weeks later, TSgt Palik and SM went out to the same bar for drinks. (R. at 656–57.) They left when SM threw up at the bar and TSgt Palik had to carry her up the stairs. (R. at 656.) While she was asleep, TSgt Palik went through her phone and found a text message between SM and her mother discussing another male. (R. at 659.)

TSgt Palik poured about an inch of water from a water bottle onto her to wake her up. (*Id*.) SM became upset and went to the bathroom within the master bedroom. (R. at 660.) When she refused to exit, TSgt Palik threatened to, and then did, throw her phone out the bedroom window. (R. at 661.) SM exited the bathroom and, when she could not unlock his phone, threw his phone out the bedroom window. (R. at 662.) TSgt Palik took her second cellphone and snapped it in half. (*Id.*) SM then struck TSgt Palik in the face with her closed fist. (*Id.*) TSgt Palik extended his arms to keep her away, making contact with her upper chest. (R. at 663.) At that point, SM began "swingingly wildly," hitting him three or four more times. (R. at 662–63.) He pushed her away, and she then ran into the living room and began destroying things, including a television. (R. at 663–64.)

Several minutes later SM left to get her cell phone. (R. at 670.) She returned to a locked door and began yelling (it was 0300 to 0400 hours), so TSgt Palik let her back in. (R. at 670–71.) They sat down on the couch to talk, where TSgt Palik asked

about the male that SM discussed with her mother. (R. at 672.) When SM ignored him, he began calling her names. (*Id.*) She then slapped him with the back of her hand. (*Id.*) She next got up and resumed destroying the apartment, which led TSgt Palik to grab her shirt and push her towards the door. (R. at 673.) When they reached the kitchen SM dropped to her knees, then began "flailing and swinging." (*Id.*) TSgt Palik admitted that, when he attempted to remove her, he pulled her hair for approximately two seconds, letting go as soon as he felt tension. (R. at 674.) During this process SM grabbed the wall to remain in the apartment. (*Id.*) For the next 15-20 minutes, TSgt Palik told SM she needed to leave. (R. at 675.) He poured the remains of a can of Monster energy drink on her, which led her to grab a full beer and pour it on him. (R. at 676–77.) When she crawled away from the door, TSgt Palik again tried to pull her out of the apartment, and again grabbed her hair in the process. (R. at 677.) SM acknowledged there were several times when she could have run out the door. (R. at 372.)

SM's testimony diverged at the point where she retrieved her phone from outside the apartment. She claimed that when she returned and threw TSgt Palik's phone out the window, he pinned her on the bed with his whole body and choked her with both hands for five to eight seconds. (R. at 322.) She did not explain how she went from the front door to the bedroom, or how it began. She could not recall whether she told either the Family Advocacy Program (FAP) or the Air Force Office of Special Investigations (OSI) that it happened near the bed (rather than on the bed), or whether her arms were pinned. (R. at 367–68.)

After this alleged strangulation and hair-pulling, SM sat down on the couch and threw a PlayStation controller at the TV. (R. at 323.) She claimed that TSgt Palik then pinned down her legs and choked her with both hands. (*Id.*) She stated that she punched him twice in the face with a closed fist, causing him to let go. (R. at 324.) She alleged that he dragged her by the hair to the hallway, and then by the hair again when he dragged her out the front door. (*Id.*) She additionally claimed that she retreated to the bedroom, where he hit her with the door 10 to 15 times. (R. at 325.) As a result of the incident, TSgt Palik suffered a bloody nose and black eye. (R. at 678.) OSI took photographs of SM the same day which showed markings on her neck, face, lower back, and legs. (R. at 330–36; Prosecution Exhibit (PE) 2.)

Based on the allegations from 20 August 2020, the members convicted TSgt Palik of strangling SM on divers occasions and pulling her by the hair on one occasion, but acquitted him of hitting her with the door. (R. at 990.)

ARGUMENT

I.

TSGT PALIK'S DOMESTIC VIOLENCE AND ASSAULT CONSUMMATED BY A BATTERY CONVICTIONS ARE FACTUALLY INSUFFICIENT.

Standard of Review

Factual sufficiency is reviewed *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted).

Law

Factual Sufficiency and Elements of the Offenses

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [this Court is] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). "In conducting this unique appellate role, [this Court takes] a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (internal punctuation omitted) (quoting *Washington*, 57 M.J. at 399). This Court exercises an "awesome, plenary, *de novo* power of review" under Article 66(d), UCMJ, 10 U.S.C. § 866(d). *See United States v. Parker*, 36 M.J. 269, 271 (C.M.A. 1993) (citation omitted).

The elements of assault consummated by a battery for Specification 12 of Charge I, based on the members' exceptions and substitutions, are as follows: (1) TSgt Palik did bodily harm to SM by pulling her hair with his hand "in the direction of or through the front door of the apartment"; (2) the bodily harm was done unlawfully; and, (3) the bodily harm was done with force or violence. *MCM*, pt. IV, ¶77.b.(2); R. at 885, 990.

For Charge II, Specification 1—the conviction of assault consummated by a battery as a lesser-included offense of Article 128b, UCMJ, domestic violence—the

elements include: (1) that TSgt Palik did bodily harm to SM by touching her neck; (2) that the bodily harm was done unlawfully; and (3) that the bodily harm was done with force or violence. *MCM*, pt. IV, ¶ 77.b.(2); R. at 886, 990.

The elements of domestic violence, as charged, are as follows: (1) that TSgt Palik assaulted SM by strangling her with his hands on diverse occasions on 20 August 2020; and (2) that, at the time, SM was his intimate partner. (R. at 886.)[7] Strangulation is "[i]ntentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim." Exec. Order 14,062, 81 Fed. Reg. 4763, 4772, 26 Jan. 2022 (now *MCM*, pt. IV, ¶78a.(c)(5).)

Relevant Defenses

Self-defense is a complete defense to each of the convicted specifications. *See Military Judge's Benchbook* [*Benchbook*], Dept. of the Army Pamphlet 27-9 at 1658 (29 Feb. 2020). The defense has two parts. First, the accused must "[a]pprehend[], upon reasonable grounds, that bodily harm was about to be inflicted wrongfully on [himself]." R.C.M. 916(e)(3). This is an objective test which asks whether the

[7] At the time of the court-martial, the President had not issued guidance on the elements of the new offense of Domestic Violence. The elements in the President's current guidance are as follows: "(a) That the accused assaulted a spouse, an intimate partner, or an immediate family member of the accused; (b) That the accused did so by strangulation or suffocation; and (c) That the strangulation or suffocation was done with unlawful force or violence." Exec. Order 14,062, 87 Fed. Reg. 4763, 4779, 26 Jan. 2022 (now *MCM*, pt. IV, ¶78a.b.(6)).

accused's apprehension is "one which a reasonable, prudent person would have held under the circumstances." R.C.M. 916(e)(1), Discussion. Intoxication is irrelevant. *Id.* The second part requires that the accused must "[b]elieve[] that the force that accused used was necessary for protection against bodily harm, provided that the force used by the accused was less than force reasonably likely to produce death or grievous bodily harm." R.C.M. 916(e)(3)(B). This test is entirely subjective. R.C.M. 916(e)(1), Discussion. An accused has provoked an attack, and thereby lost the right to self-defense, "if he willingly and knowingly does some act toward the other person reasonably calculated and intended to lead to a fight. Unless such act is clearly calculated and intended by the accused to lead to a fight, the right to self-defense is not lost." *Benchbook*, at 1669.

Where the accused's use of force causes serious injury, self-defense may operate in conjunction with the defense of accident. R.C.M. 916(e)(3), Discussion. The defense of accident has three elements:

> First, evidence must be introduced that the accused was engaged in an act not prohibited by law, regulation, or order. Second, this lawful act must be shown by some evidence to have been performed in a lawful manner, *i.e.*, with due care and without simple negligence. Third, there must be some evidence in the record of trial that this act was done without any unlawful intent.

United States v. Van Syoc, 36 M.J. 461, 464 (C.M.A. 1993) (quoting *United States v. Ferguson*, 15 M.J. 12, 17 (C.M.A. 1983)).

Defense of property operates in a similar fashion. The accused must have an objectively reasonable belief that his personal property "was in immediate danger of theft or destruction" and a subjective belief that "the force he used was necessary to

prevent the theft or destruction of his personal property." *Benchbook*, at 1688.

Analysis

TSgt Palik acted in justifiable self-defense for every convicted specification. This Court should set aside and dismiss each as factually insufficient.

1. Assault Consummated by a Battery on 3 July 2020 – Touching SM's Neck (Specification 1 of Charge II)

TSgt Palik responded within the limits of self-defense when SM repeatedly poked him in the face. (R. at 645.) To begin, SM's account is hardly credible. She admits that she was angry, yelling, and pointing in his face. (R. at 315–16, 353.) She nevertheless claimed that, "out of nowhere," he began to choke her for five seconds. (R. at 353.) She gave only limited details on how this happened, and described the strangulation differently during pretrial interviews. (R. at 315–16, 815.) And she claimed that after he cut off her air supply, she responded by rampaging through his apartment. (R. at 315–16.) Consider the likelihood that a victim responds to a life-threatening situation by remaining in the apartment and proceeding to destroy property right in front of the person who she alleged had just choked her, cutting off her air supply. The members understandably disbelieved her account but convicted TSgt Palik of assault consummated by a battery for touching her neck.

This gives insufficient credit to self-defense as a basis for touching her neck. She admitted to being in his face, yelling at him, and pointing at his face; TSgt Palik explained that she actually poked him and then pushed him in the face (rather than just pointed). (R. at 315–16, 353, 645.) He used two open hands to push her away. (R. at 645–46.) This push, which merely created space between them, meets the two

elements of self-defense. Given that SM had already poked him in the face multiple times, his apprehension of further bodily harm was objectively reasonable. Further, the second element is also met because TSgt Palik believed the force was necessary to protect against the bodily harm. He testified that the push to the neck or chest area was "really just to create distance." (R. at 646.) This limited response to her aggression should be a complete defense to the lesser-included offense of assault consummated by a battery.

2. Alleged Strangulation on 20 August 2020 (Specification 2 of Charge II)

The contradictions between TSgt Palik and SM's accounts make analysis somewhat jumbled, but this Court should analyze as follows. SM claimed he strangled her twice that night: first on the bed in the bedroom and second on the couch in the living room. For the first, this Court should discredit her improbable narrative and find that the Government failed to disprove that TSgt Palik acted in self-defense when he pushed SM away in response to repeated punching. For the second alleged strangling, this Court should also find TSgt Palik acted in justifiable self-defense by pushing SM when she slapped him in the face.

As to SM's allegation that TSgt Palik strangled SM on the bed, the evidence cannot support her claim beyond a reasonable doubt. In addition to her general credibility issues discussed below, this Court has ample reason to doubt her narrative here. Her original report to family advocacy claimed that it happened, at least in part, on the ground, and yet at trial she testified that it all occurred on the bed. (R. at 750.) She also told OSI it occurred next to the bed. (R. at 793.) She further claimed that TSgt Palik, while choking her, pinned both her arms and legs while also choking

her with both his hands. (R. at 322.) The mechanics of how TSgt Palik would do all these things at once defy visualization—how could he choke her with both of his hands while also simultaneously pinning her arms and legs so she could not move? SM did not even attempt to explain how this was possible. Of the many things SM could not remember at trial, she could not recall whether she told OSI anything about her arms being pinned. (R. at 367.) The agent taking notes during her interview recalled no mention of having her arms pinned during the alleged strangulation. (R. at 796.) Simply put, this allegation is not credible.

Against this questionable story stands TSgt Palik's credible account of reacting to SM repeatedly punching him in the face. In that circumstance, it was objectively reasonable that TSgt Palik would apprehend further bodily harm, and he believed the limited use of force—a push—was necessary to prevent further bodily harm. He explained that whatever pressure occurred was from her trying to fight her way back to him. (R. at 725.) Even if his use of force caused her serious injury—which it did not—the defense of accident applies. *See* R.C.M 916(e)(3), Discussion. TSgt Palik was lawfully acting in self-defense and did not act in a negligent fashion when he did so. Thus, even if there was any serious injury that resulted from his exercise of self-defense, it falls under the protection of the defense of accident.

SM claimed that TSgt Palik choked her a second time on the couch shortly thereafter. The implausibility of her actions undercuts her credibility. She testified that that during the first choking on 20 August she "thought [she] was going to die." (R. at 322.) To believe her story, one would have to also believe that she responded

to the first strangulation on 20 August by rampaging around the home destroying the property of the person who just allegedly cut off her air supply, rather than simply leaving the home. (R. at 359; 663–664.) This narrative is farfetched.

TSgt Palik described what happened on the couch: he was again concerned that SM was discussing other men, and he began to call her names. (R. at 672.) SM then slapped him with the back of her hand. (*Id.*) He then pushed her back, which set off another frenzy of destruction. (R. at 672–73.) He admitted to contacting her neck when pushing her away. (R. at 673.)

The self-defense analysis is similar for the second push. After SM slapped TSgt Palik while they sat on the couch, he extended his arms and pushed her away. For the same reasons as the first push, his actions meet the objective and subjective elements of self-defense, and if serious injury resulted to SM, the defense of accident applies. The members may have mistakenly used inadvertent interruption of her breathing as a basis for convict him, despite the defense of accident. One of the members asked whether SM's breathing was restricted while pushing her; TSgt Palik responded that it probably was on the couch when he pushed her with his hand. (R. at 740–41.) He believed the marks on her neck may have resulted from that push. (R. at 741.) Additionally, he explained that he held his hands to her neck and clavicle area for several seconds to hold her away when she was swinging wildly at him. (R. at 725.) The members may have made a mistake on the import of this testimony, but this Court should not. The push was self-defense and any serious injury resulting was accidental.

Nor did TSgt Palik lose the right to self-defense through provocation. Pouring water on her head, throwing her cell phone out the window, insulting her, or breaking her second cell phone were certainly steps that would provoke *argument*, but not provoke *a fight* such that TSgt Palik would have lost the right of self-defense. The right of self-defense is only lost if the act "is clearly calculated *and intended* to lead to a fight." *Benchbook*, at 1669 (emphasis added).

A likely basis for the members' verdict here was the pictures in Prosecution Exhibit 2: the images of SM that OSI took shortly after the incident. These images, including the use of alternate light source to illuminate the injuries and make them appear far worse, ostensibly provide confirmation of the convictions. But they do little more than verify what was already known: TSgt Palik pushed SM away two times, and they were struggling for extended periods when TSgt Palik was trying to get her to leave. Thus, it is little surprise that she would have some injury. TSgt Palik, too, came away with bruises to his face from the incident. (R. at 678.)

The Government also failed to connect the pictures with proof of the actual convicted offenses. Nobody with medical training testified that her injuries were consistent with strangulation. The Government presented the exhibit through a security forces investigator with no forensic training who admitted she had no ability to opine on whether the injuries were consistent with any allegations. (R. at 292, 301–302.) While the members may have put significant stock in these images, this Court should not.

In sum, TSgt Palik acted in justified self-defense when he pushed SM away to end her violent attacks.

3. Assault Consummated by a Battery on 20 August 2020 – Pulling SM's Hair (Specification 12 of Charge I)

Although SM alleged that TSgt Palik pulled her by the hair on divers occasions, the members only convicted him of pulling her "in the direction of, or through, the front door of the apartment." (R. at 990.) In that instance, TSgt Palik's effort to pull SM out of the apartment was a valid act of self-defense and defense of property, and any pulling of her hair was accidental.

SM claimed that the night's altercations ended when TSgt Palik grabbed her by her hair and back and threw her out. (R. at 327.) By that point, SM had already destroyed TSgt Palik's television and other belongings—in addition to having punched and slapped him in the face. Given those events, it was objectively reasonable for TSgt Palik to use force to remove her from the apartment. When he was trying to get her to leave, she dropped "dead weight" on the ground. (R. at 373.) In order to remove her when she was effectively dead weight, he would have had to lift her up. He explained that when she began crawling further into the house he ended up grabbing her hair when he tried to bring her back towards the door. (R. at 677.) He then grabbed her by her shirt and dragged her out. (*Id.*) His testimony establishes his subjective belief that the amount of force used was necessary to avoid further destruction of property or bodily harm to himself. Additionally, to the degree he grabbed her hair, it falls under the defense of accident. He was exercising lawful defense of property and self-defense, did so in a non-negligent way while trying to

eject a resistant SM, and in the process grabbed her hair. The defense of accident is met in these circumstances.

4. Credibility Issues

In addition to the mechanical and practical improbability of SM's testimony, there are several cross-cutting issues with her narrative. First, she had a substantial motive to fabricate. She was an active-duty Airman who destroyed a significant amount of the property of another Airman. Her allegation served to shift the spotlight from herself to TSgt Palik. She testified under a grant of immunity. (Grant of Immunity to SM, ROT Vol. 3, 2 Aug. 2021.) Second, she was highly intoxicated, especially on 20 August 2020. Her own testimony shows her poor recall—especially on cross where she could remember very little. Third, the specifics of TSgt Palik's acquittal for the alleged slap on the Fourth of July Weekend deeply undermines her credibility. SM claimed that he slapped her in full view of others; the Defense put forward witnesses from that evening—including the TSgt whom SM claimed had definitely seen the slap—none of whom could corroborate her story. (R. at 352, 758–59, 767.) For the one offense that was more than he-said, she-said, the objective truth shows she alleged something that did not happen.

5. Conclusion

For each of the three convicted offenses—touching SM's neck on 3 July, grabbing her hair on 20 August, and strangling her on 20 August—the evidence is factually insufficient. The Government failed to meet its burden to prove the allegations beyond a reasonable doubt, and also failed to disprove self-defense,

defense of property, and the defense of accident. Accordingly, this Honorable Court should find the evidence factually insufficient.

WHEREFORE, this Honorable Court should set aside the findings and sentence and dismiss all specifications.

II.

THE GOVERNMENT LOST THE ONLY TWO VIDEO-RECORDED STATEMENTS FROM SM, THE COMPLAINING WITNESS FOR EVERY CONVICTED OFFENSE. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO FILE AN R.C.M. 914 MOTION DUE TO THE GOVERNMENT'S INABILITY TO PRODUCE HER STATEMENTS.

Additional Facts

The OSI interviewed SM on 20 August 2020 (the day she alleged that much of the misconduct occurred) and 21 August 2020. (R. at 294–95.) It recorded both interviews, but the detachment deleted both interviews for "an unknown reason" before they were transferred to a CD. (R. at 295–96, 430.) The lead investigator, Special Investigator (SI) HO, noticed the loss on 26 October 2020. (R. at 437.)

Special Agent (SA) RA took notes during the interviews. (R. at 434–35.) During the litigated portion of the court-martial, the Defense called SA RA to testify about SM's interview; by that date in the trial, 12 August 2021, almost a year had elapsed since the interview. (R. at 776.) When the Circuit Defense Counsel (CDC) asked a general question about SM's allegations, SA RA provided a brief explanation before having to resort to his notes. (R. at 792–93.) These notes were marked as Appellate Exhibit XXXV; they span two pages of content. (R. at 794.) Although SA

RA could answer some questions, when the CDC asked him specifics about what SM said in her interview, he replied that he could not *recall* her saying the statement in question, not that she *did not* say it. (R. at 796–97.) For instance, when asked SM mentioned having her arms pinned down during the first alleged strangulation on 20 August, he responded "I don't recall that." (R. at 796.) When the CDC asked whether something was not said, or simply not in the notes, SA RA responded, in part, that:

> it possibly could have been said and I just didn't write it down because I was still trying to figure out what, you know, what I need to say next or receive the information that she's relaying -- and this just goes for any interview but because I didn't write it down I don't -- it's possible that it wasn't said.

(R. at 797.) During cross-examination, the Government drew out that the primary interviewer, SI HO, was relatively inexperienced, and thus SA RA had to act as both the primary and secondary (note-taking) interviewer. (R. at 799–800.) The Government elicited testimony that normally the primary does the talking while the secondary focuses on note taking. (R. at 802.) The Government repeatedly asked SA RA to confirm that his notes were only bullet points. (R. at 800, 802.) The Trial Counsel (TC) had SA RA acknowledge that his lack of recall about SM's statements did not mean she did not say something. (R. at 801–02.)

Standard of Review

A claim of ineffective assistance involves a mixed question of law and fact. *United States v. Paxton*, 64 M.J. 484, 488 (C.A.A.F. 2007) (citation omitted). This

Court reviews whether appellant received ineffective assistance and was prejudiced thereby *de novo*. *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007).

Law

Rule for Courts-Martial 914

R.C.M. 914 "states an important rule that furthers the defense's ability to confront witnesses who testify for the government." *United States v. Sigrah*, 2022 CAAF LEXIS 627, at *17 (C.A.A.F. 30 Aug. 2022) (Maggs, J., concurring). The rule provides that:

> After a witness other than the accused has testified on direct examination, the military judge, on motion of a party who did not call the witness, shall order the party who called the witness to produce, for examination and use by the moving party, any statement of the witness that relates to the subject matter concerning which the witness has testified, and that is: (1) In the case of a witness called by the trial counsel, in the possession of the United States . . . .

R.C.M. 914(a). In *United States v. Muwwakkil*, the Court of Appeals for the Armed Forces (CAAF) rejected the argument that R.C.M. 914(a)(1) did not apply to lost statements. 74 M.J. 187, 192 (C.A.A.F. 2015). If the Government fails to provide a qualifying statement, the military judge has two options under R.C.M. 914(e): (1) "order that the testimony of the witness be disregarded by the trier of fact" or (2) "declare a mistrial if required in the interest of justice." The Rule "contains no express exceptions." *Sigrah*, 2022 CAAF LEXIS 627, at *21 (Maggs, J., concurring).

In *United States v. Sigrah*, the CAAF recently addressed lost video-recordings of victim interviews. 2022 CAAF LEXIS 627, at *2, 5–6. Similar to this case, the Army Criminal Investigative Division (CID) initially recorded the interviews with the

victim and key witnesses, but the interviews were never transferred to a CD and were eventually overwritten. *Id.* at *5–6. The granted issue in *Sigrah* involved whether the denial of an R.C.M. 914 motion prejudiced the appellant, but the CAAF accepted the Government's concessions that the military judge erred when she held the videos did not violate R.C.M. 914, and that the Government "showed sufficient culpability to preclude the good faith loss doctrine." *Id.* at *8 n.2. In setting aside the findings and sentence due to the R.C.M. 914 violation, the CAAF rejected the notion that a separate, harmless error type of test applies where the appellant possesses "substantially the same information." *Id.* at *12–14; *id.* at *22–23 (Maggs, J., concurring).

Ineffective Assistance

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

performance prejudiced the defense through errors was so serious as to deprive the defendant of a fair trial. *See* 466 U.S. at 687.

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

> 1. Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
>
> 2. If the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance . . . [ordinarily expected] of fallible lawyers"?
>
> 3. If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result?

United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (citations omitted).

Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. *Loving v. United States*, 64 M.J. 132, 141–42 (C.A.A.F. 2006). However, the Supreme Court has recognized "an attorney's ignorance of a point of law that is fundamental to the case combined with the failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014).

Analysis

TSgt Palik's defense counsel were fully aware that the Government lost SM's interviews.[8] They highlighted the loss with both agents on the case, SI HO and

[8] There were no written statements from SM in the case.

SA RA. (R. at 295–96, 430, 792.) The contents of SM's interviews were critical to the case, as they reflected several important contradictions between her trial testimony and her statements to OSI immediately after the alleged incident. What remained of the interview, in the form of agent notes, could not suffice to fill the void left by her lost statement. Indeed, because the notes were favorable to the Defense—because they contained inconsistencies—the Government was in the unusual position of trying to undermine the notes by highlighting that SA RA was doing more work than a normal notetaker, and that he only made bullet-point notes. (R. at 799–802.) Despite the importance of the lost interviews, the Defense never filed a motion under R.C.M. 914.

The language of R.C.M. 914 is unequivocal and unforgiving: if the Government fails to produce a qualifying statement, the military judge *shall* order a mistrial or strike the testimony of the witness who originally produced that statement. R.C.M. 914(e); *Muwakkil*, 74 M.J. at 192–93. In *Sigrah*, the CAAF addressed extremely similar situation where a victim interview that was recorded and then lost. 2022 CAAF LEXIS 627, at *5–6. The defense counsel in *Sigrah* appropriately moved to strike under R.C.M. 914 in response to the lost statement. *Id.* at *6–7. The CAAF unanimously agreed to set aside the findings and sentence because of the R.C.M. 914 violation. *Id.* at *1–2.

Although *Sigrah* is a recent case, its recency does not forgive the defense counsel's failure to file a motion to strike. R.C.M. 914 has remained essentially unchanged for more than a generation. *Compare* R.C.M. 914 *with* R.C.M. 914, 1984

MCM. It "states an important rule that furthers the defense's ability to confront witnesses who testify for the government." *Sigrah*, at *17 (Maggs, J., concurring). TSgt Palik lost the ability to wield this potent weapon through his defense counsel's failure.

The ineffective assistance analysis in *Gooch* asks first whether there is a reasonable explanation for counsel's actions; a reasonable explanation is absent here. This was a cost-free motion for the defense. At worst, they would have lost in an Article 39(a) session and the members would be none the wiser. At best, the military judge would have either struck SM's testimony, or declared a mistrial as to SM's specifications. Either of the latter outcomes would represent a large win for the Defense, especially when, as the court-martial results showed, SM yielded the only convictions. Instead, the Defense made small points about the loss of videos through SA RA and SI HO. The two courses of action are incomparable—R.C.M. 914 offers the unequivocally better path for TSgt Palik. What this shows is that the defense counsel were likely not aware that an R.C.M. 914 motion was the perfect solution to their problem. And "an attorney's ignorance of a point of law that is fundamental to the case combined with the failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton*, 571 U.S. at 274.

The second prong in the analysis asks whether the defense counsel's performance fell measurably below that ordinarily expected of fallible lawyers. On

this issue, it did. Failing to utilize a potentially case-dispositive tool (at least with regard to SM) represented deficient performance.

Finally, the third prong asks whether, absent the error, there was a reasonable probability of a different result. This is easily met here. As the CAAF explained in *Sigrah*, the military judge would have little option in the face of an R.C.M. 914 violation: strike SM's testimony or order a mistrial. This certainly equates to a different result. The Government simply could not meet its burden on SM's specifications without her testimony.

TSgt Palik's defense counsel mounted a robust defense that succeeded for the majority of the charges he faced. However, they failed to realize the necessity of filing an R.C.M. 914 motion in the face of SM's multiple lost statements. Their deficient performance prejudiced TSgt Palik, and this Court should set aside the findings and sentence.

WHEREFORE, TSgt Palik respectfully requests this Honorable Court set aside all charges and specifications.

III.

TSGT PALIK WAS ENTITLED TO A UNANIMOUS VERDICT UNDER THE FIFTH AND SIXTH AMENDMENT.

Additional Facts

TSgt Palik elected trial by members. (R. at 53.) The military judge instructed the members that only three-fourths needed to agree to reach a finding of guilty. (R. at 957.)

Standard of Review

"An appellant gets the benefit of changes to the law between the time of trial and the time of his appeal." *United States v. Tovarchavez*, 78 M.J. 458, 462 (CAAF 2019). "A new rule of criminal procedure applies to cases on *direct* review, even if the defendant's trial has already concluded." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021) (emphasis in original). Thus, as the CAAF has explained, when an appellant fails to object at trial to an error of constitutional dimension that was not yet resolved in his favor at the time of his trial, the "error in the case is forfeited rather than waived." *See Tovarchavez*, 78 M.J. at 462. In such circumstances, military appellate courts review for plain error, but "the prejudice analysis considers whether the error was harmless beyond a reasonable doubt." *Id*. (internal quotations omitted).

Law & Analysis

In *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), the Supreme Court "repudiated [its] 1972 decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), which had allowed non-unanimous juries in state criminal trials." *Edwards*, 141 S. Ct. at 1551. Instead, *Ramos* held that the Due Process Clause of the Fourteenth Amendment required applying the same jury-unanimity rule to state convictions for criminal offenses that already applied to federal convictions under the Jury Trial Clause of the Sixth Amendment. 140 S. Ct. at 1397. As the Supreme Court reiterated in 2021, in so holding, *Ramos* unequivocally broke "momentous and consequential" new ground. *See Edwards*, 141 S. Ct. at 1559; *see also id*. at 1555–56 (noting that "[t]he jury-unanimity requirement announced in *Ramos* was not dictated by precedent or

apparent to all reasonable jurists" beforehand). Indeed, the *Edwards* majority recognized that *Ramos* was on par with other "landmark" cases of criminal procedure "like *Mapp, Miranda, Duncan, Batson,* [and] *Crawford*." *Id.* at 1559.

For decades, the prevailing assumption has been that, as was true for state courts until last year, the Constitution does not require unanimous verdicts for non-capital courts-martial.[9] *See, e.g.*, *United States v. Lebron*, 46 C.M.R. 1062, 1068–69 (A.F.C.M.R. 1973). As this Court's predecessor explained in 1973, this purportedly followed from the Supreme Court's recognition in cases such as *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), and *Ex parte Quirin*, 317 U.S. 1 (1942), that the Sixth Amendment's jury-trial right does not extend to military tribunals. *See Lebron*, 46 C.M.R. at 1068–69.

Ramos turns that assumption on its head. It does this not by applying the Sixth Amendment Jury Trial Clause to courts-martial, but by emphasizing two features of the unanimity requirement that *do* apply to military trials, whether through the Sixth Amendment or the Fifth Amendment. First, *Ramos* makes clear that the right to a unanimous verdict is an essential aspect of the Sixth Amendment right to an *impartial* jury—a right that, as the CAAF has recognized, both the UCMJ and the Constitution provide to the accused in a court-martial. *See, e.g.*, *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005). Second, *Ramos* recognizes that

[9] The UCMJ and the Constitution both require unanimous verdicts as to the conviction and sentence in capital cases. *See* Article 52(b)(2), UCMJ, 10 U.S.C. § 852(b)(2); *United States v. Gray*, 51 M.J. 1, 61 (C.A.A.F. 1999).

unanimity is central to the fundamental *fairness* of a jury verdict—as opposed to a verdict rendered by a judge.

Under *Milligan* and *Quirin*, Congress may not have been under a constitutional obligation to provide TSgt Palik with the right to trial by members in the first place. But as the CAAF has long held, "[a]s a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001). Thus, whether under the Sixth Amendment or the Fifth, Congress's choice to provide a statutory right to trial by a panel necessarily triggered constitutional requirements of fairness and impartiality—requirements that, after *Ramos*, can no longer be satisfied by nonunanimous convictions for the offenses for which TSgt Palik was tried.

1.* Ramos *unequivocally holds that unanimous verdicts are central to a defendant's right not just to a trial by jury, but to a jury that is itself impartial.

The Supreme Court's landmark decision in *Ramos* was not just a technical interpretation of the Sixth Amendment's Jury Trial Clause. Rather, both the holding and the result in *Ramos* were based upon "a fundamental change in the rules thought necessary to ensure *fair criminal process*." *Edwards*, 141 S. Ct. at 1574 (Kagan, J., dissenting) (emphasis added). Indeed, *Ramos* opens with an explanation of how it was understood at the Founding that unanimity was central not just to the right to a petit jury in a criminal case, but to the right to an *impartial* jury—which, unlike unanimity, the text of the Sixth Amendment expressly requires. *See Ramos*, 140 S. Ct. at 1395–

97. As Justice Gorsuch explained, "[w]herever we might look to determine what the term 'trial by an *impartial* jury' meant at the time of the Sixth Amendment's adoption—whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict." *Id.* at 1395 (emphasis added).

Justice Gorsuch's opinion stressed that the Supreme Court has long held that the Sixth Amendment Jury Trial Clause requires unanimous verdicts in the federal system. The Court has also long made clear that constitutional provisions that have been incorporated against the states through the Fourteenth Amendment's Due Process Clause, including the Sixth Amendment Jury Trial Clause (which was incorporated in *Duncan v. Louisiana*, 391 U.S. 145 (1968)), necessarily have the same scope and meaning as applied to states as they do directly against the federal government. Neither of these principles was in dispute. *See Ramos*, 140 S. Ct. at 1397. Rather, the question was whether, taken together, they justified overruling *Apodaca*—in which Justice Powell's enigmatic solo concurring opinion attempted to split the difference. And the Court's central justification for relegating *Apodaca* "to the dustbin of history," *id.* at 1410 (Sotomayor, J., concurring in part), was the extent to which it was inconsistent with fundamental (and Founding-era) understandings of procedural fairness.

In her concurring opinion, Justice Sotomayor reinforced the connection between unanimity and fairness. As she wrote, nonunanimous verdicts can give rise to at least a "perception of unfairness," especially when there are racial disparities in

the pool of defendants or the composition of the jury. *See id*. at 1418 (Sotomayor, J., concurring in part).[10] In that respect, *Ramos* did more than just overrule *Apodaca* and incorporate the unanimous jury requirement against the states; it reinforced that unanimous juries are part-and-parcel of the Constitution's *separate* requirements to *impartial* juries and *fair* verdicts. *See, e.g.*, *Edwards*, 141 S. Ct. at 1575 (Kagan, J., dissenting) ("[T]he [*Ramos*] Court took the unusual step of overruling precedent for the most fundamental of reasons: the need to ensure, in keeping with the Nation's oldest traditions, fair and dependable adjudications of a defendant's guilt."). That distinction is critical here, for it underscores why, even if TSgt Palik had no constitutional right to a trial by petit jury in his court-martial, the Constitution nevertheless required that, once he was tried by a jury that Congress chose to provide, his convictions had to be unanimous. *Cf. Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (explaining why, even if a criminal defendant has only a statutory—rather than a constitutional—right to appeal a conviction, "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution").

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[10] The historical origins of nonunanimous verdicts in courts-martial do not share the troubled, racially motivated underpinnings behind the Louisiana and Oregon statutes that *Ramos* struck down. *See* Murl A. Larkin, *Should the Military Less-Than-Unanimous Verdict of Guilt Be Retained?*, 22 HASTINGS L.J. 237, 239 & n.13 (1971). That said, many of the concerns about racial disparities to which Justice Sotomayor adverted in her *Ramos* concurrence are undeniably present in contemporary courts-martial—including in the Air Force. *See* Air Force Inspector General, Report of Racial Inquiry, Independent Racial Disparity Review, December 2020. In any event, Justice Gorsuch's majority opinion in *Ramos* made explicit that "a jurisdiction adopting a nonunanimous jury rule, *even for benign reasons*, would still violate the Sixth Amendment." *Ramos*, 140 S. Ct. at 1440 n.44 (emphasis added).

2. As the CAAF has repeatedly recognized, the UCMJ and the R.C.M. create both statutory and constitutional rights for the accused vis-à-vis the panel.

In the abstract, the argument that the Constitution protects rights to an impartial panel and a fair verdict even in cases in which there is no constitutional right to a trial by petit jury in the first place may seem unorthodox. But the CAAF's jurisprudence unequivocally establishes that proposition—and has reflected it for decades. Thus, it is the combination of the Supreme Court's decision in *Ramos* and the line of CAAF decisions recognizing constitutional rights to both an impartial decision maker and a fair verdict that required unanimous convictions here.

As far back as 1964, the CAAF's predecessor explicitly recognized that, even if servicemembers do not have a constitutional right to trial by petit jury, "[c]onstitutional due process includes the right to be treated equally with all other accused in the selection of *impartial* triers of the facts." *United States v. Crawford*, 35 C.M.R. 3, 6 (C.M.A. 1964) (emphasis added). More recently, the CAAF has suggested that the right to an impartial court-martial panel comes not only from the Due Process Clause of the Fifth Amendment, as in *Crawford*, but from the Sixth Amendment *itself*. *See, e.g.*, *United States v. Lambert*, 55 M.J. 293, 295 (C.A.A.F. 2001) ("[T]he *Sixth Amendment* requirement that the jury be impartial applies to court-martial members and covers not only the selection of individual jurors, but also their conduct during the trial proceedings and the subsequent deliberations." (emphasis added)).

Lambert is hardly the only case in which the CAAF has extended Sixth Amendment protections to courts-martial. To the contrary, the CAAF has also held

that courts-martial accused are entitled under the Sixth Amendment—and not just the UCMJ—to: (1) a speedy trial, *see United States v. Danylo*, 73 M.J. 183, 186 (C.A.A.F. 2014); (2) a public trial, *see United States v. Hershey*, 20 M.J. 433, 435 (C.M.A. 1985); (3) the ability to confront witnesses, *see United States v. Blazier*, 69 M.J. 218 (C.A.A.F. 2010); (4) notice of the factual and legal bases for the charges, *see United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011); (5) the ability to compel testimony that is material and favorable to the defense, *see United States v. Bess*, 75 M.J. 70, 75 (C.A.A.F. 2016); (6) counsel, *see United States v. Wattenbarger*, 21 M.J. 41, 43 (C.M.A. 1985); and (7) the effective assistance thereof, *see United States v. Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011). *Lambert*'s reasoning—that the Sixth Amendment right to an *impartial* jury also applies to court-martial panels—is deeply consistent with this large body of case law.

Thus, once an accused elects to be tried by a panel, *Lambert* establishes that he has a *constitutional* right to impartiality under the Sixth Amendment with respect to both how the panel members are selected and how they deliberate their verdict. If, as *Ramos* suggested, unanimous convictions are necessary to impartiality, then it follows that an accused in a court-martial who elects to be tried by a panel has a Sixth Amendment right to a unanimous guilty verdict.

3. Even if the Sixth Amendment does not require unanimous verdicts for serious offenses tried by court-martial, the Due Process Clause of the Fifth Amendment does.

TSgt Palik also had a right to a unanimous guilty verdict as part of his right to due process under the Fifth Amendment because "[i]mpartial court-members are

a *sine qua non* for a fair court-martial." *United States v. Modesto*, 43 M.J. 315, 318 (C.A.A.F. 1995); *see also United States v. Witham*, 47 M.J. 297, 301 (C.A.A.F. 1997) ("[A] military accused has no right to a trial by jury under the Sixth Amendment. He does, however, have a right to due process of law under the Fifth Amendment, and Congress has provided for trial by members at a court-martial." (citations omitted)). This Court's superior has also recognized that when a right applies by virtue of due process "it applies to courts-martial, just as it does to civilian juries." *United States v. Santiago-Davilla*, 26 M.J. 380, 390 (C.M.A. 1988) (holding that the Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), applied to courts-martial).

As with any number of other due process contexts, Congress may not have been obliged to offer TSgt Palik the option of being tried by a panel, but once it chose to provide that option, it had to do so in a manner consistent with fundamental notions of procedural fairness—because criminal trials necessarily implicate the accused's liberty. *See, e.g.*, *Wilkinson v. Austin*, 545 U.S. 209, 221–24 (2005). Put another way, Congress could hardly rely upon an accused's lack of a constitutional right to a trial by jury to provide a panel that reaches its verdict by flipping a coin. *See Evitts*, 469 U.S. at 393; *see also United States v. Rodriguez-Amy*, 19 M.J. 177, 178 (C.M.A. 1985) ("a military criminal appeal is a creature . . . solely of statutory origin, conferred neither by the Constitution nor the common law. However, once granted, the right of appeal must be attended with safeguards of constitutional due process" (internal quotations and citations omitted)).

As the Supreme Court made clear in *Weiss v. United States*, 510 U.S. 163 (1994), when it comes to an accused's procedural rights in a court-martial, the relevant question under the Due Process Clause is "'whether the factors militating in favor of [the right] are so extraordinarily weighty as to overcome the balance struck by Congress.'" *Id.* at 177–78 (quoting *Middendorf v. Henry*, 425 U.S. 25, 44 (1976)). In *Weiss*, the petitioners challenged whether they had a right to have their courts-martial presided over by military judges with fixed terms in office. In holding that the Due Process Clause did not require fixed terms, the Court expressly tied its analysis to the *lack* of a connection between fixed terms and impartiality, rejecting petitioners' claim that "a military judge who does not have a fixed term of office lacks the independence necessary to ensure impartiality." *Id.* at 178.

Ramos, in contrast, establishes the precise connection that the *Weiss* petitioners could not. Indeed, it is impossible to read *Ramos*—or the Court's subsequent discussion of it in *Edwards*—and *not* come away with the conclusion that "the factors militating in favor of [unanimous verdicts] are . . . extraordinarily weighty." *Weiss*, 510 U.S. at 177. If unanimous verdicts are necessary in the civilian criminal justice system "to ensure impartiality," as *Ramos* held, it ought to follow that they are equally necessary in a court-martial.

Moreover, unanimity is also central to a distinct due process right possessed by courts-martial accused: the right to have the government prove its case beyond a reasonable doubt. *See United States v. Gay*, 16 M.J. 475, 477 (C.M.A. 1983) ("Due process requires proof beyond a reasonable doubt for conviction of a crime." (citing *In*

re Winship, 397 U.S. 358 (1970))). For decades, federal civilian courts have recognized a direct connection between this right and the requirement of jury unanimity as to guilt. As Judge Prettyman wrote in *Billeci v. United States*, 184 F.2d 394 (D.C. Cir. 1950):

> An accused is presumed to be innocent. Guilt must be established beyond a reasonable doubt. All twelve jurors must be convinced beyond that doubt; if only a verdict of guilty cannot be returned. These principles are not pious platitudes recited to placate the shares of venerated legal ancients. They are working rules of law binding upon the court. Startling though the concept is when fully appreciated, those rules mean that the prosecutor in a criminal case must actually overcome the presumption of innocence, all reasonable doubts as to guilt, and the unanimous verdict requirement.

Id. at 403.[11] More recently, the three dissenting justices in *Edwards* recognized the interplay between a unanimous guilty verdict and the right to have one's guilt proven beyond a reasonable doubt. Repeatedly citing to *Winship*, Justice Kagan observed that unanimity was "similarly integral" to the jury-trial right that requires proof beyond a reasonable doubt. *Edwards*, 141 S. Ct. at 1576–77 (Kagan, J., dissenting). As she elaborated:

> Allowing conviction by a non-unanimous jury "impair[s]" the "purpose and functioning of the jury," undermining the Sixth Amendment's very "essence." It "raises serious doubts about the fairness of [a] trial." And it fails to "assure the reliability of [a guilty] verdict." So when a jury has divided, as when it has failed to apply the reasonable-doubt standard,

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[11] *See also Hibdon v. United States*, 204 F.2d 834, 838 (6th Cir. 1953):

> The unanimity of a verdict in a criminal case is inextricably interwoven with the required measure of proof. To sustain the validity of a verdict by less than all of the jurors is to destroy this test of proof for there cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remain reasonably in doubt as to guilt. It would be a contradiction in terms.

> "there has been no jury verdict within the meaning of the Sixth Amendment."

Id. at 1577 (alterations in original; citations omitted).

So long as *Apodaca* was the law of the land, there was at least a plausible argument that this understanding applied only in federal civilian courts. This was because the gravamen of Justice Powell's solo opinion, filed in the companion case *Johnson v. Louisiana*, 406 U.S. 366 (1972), was that the unanimity right did *not* have the same valence in all courts—and that other tribunals retained "freedom to experiment with variations in jury trial procedure." *Id*. at 376 (Powell, J., concurring in the judgment). It is this exact functional approach that *Ramos* rejected. *See* 140 S. Ct. at 1398–1400. As Justice Gorsuch put it:

> The deeper problem is that [*Apodaca*] subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment in the first place. As judges, it is not our role to reassess whether the right to a unanimous jury is 'important enough' to retain. With humility, we must accept that this right may serve purposes evading our current notice.

Id. at 1401–02. Because *Ramos* thus makes clear that unanimity is central to the underlying *fairness* of a criminal proceeding in *any* forum, it likewise makes clear that military accused such as TSgt Palik have a due process right to a unanimous guilty verdict. If anything, the unanimity requirement is even *more* important in trial courts, such as courts-martial, that utilize panels with fewer than twelve members. *See Ballew v. Georgia,* 435 U.S. 223, 234 (1978) ("Statistical studies suggest that the risk of convicting an innocent person . . . rises as the size of the jury diminishes."). TSgt Palik's panel had eight members. Less than four years ago the Supreme Court claimed that "[t]he procedural protections afforded to a service

member are 'virtually the same' as those given in a civilian criminal proceeding, whether state or federal." *Ortiz v. United States*, 138 S. Ct. 2165, 2174 (2018). Until the right to a unanimous conviction is guaranteed at courts-martial, however, that pronouncement will ring hollow.

a. Unanimity vindicates due process by enhancing the reliability of convictions.

Reliability of the verdict is also a factor that weighs heavily in favor of unanimity in any "balance" struck by Congress. The Supreme Court has long made clear that requiring unanimous guilty verdicts increases efficiency by strengthening deliberations, reducing the frequency of factual errors, fostering greater consideration of minority viewpoints, and increasing confidence in verdicts and the criminal justice system. *Brown v. Louisiana*, 447 U.S. 323, 332 (1980).

The research basis for these conclusions is robust. One study set up juror deliberations in unanimous and nonunanimous conditions. *See* Reid Hastie et al., *Inside the Jury* 115, 145–47 (1983). Juries requiring unanimity deliberated longer and deeper that those not required to reach a unanimous verdict. *Id*. at 76–77, 97. They then rated their deliberations as more thorough than jurors operating under nonunanimous decision rules. *Id*. at 77. Unanimity also reduces the likelihood of error. In the same study, unanimous juries reached a legally inaccurate verdict less often than nonunanimous juries. *Id*. at 62, 81.

b. Unanimity helps to ameliorate the risk of discrimination.

Article 52(a)(3) does not carry with it the same explicitly racist history as the Louisiana and Oregon non-unanimity laws, but the possibility of a discriminatory

silencing of minority voices is still present. Nonunanimous convictions can give rise to at least a "perception of unfairness," especially when there are racial disparities in the pool of defendants or the composition of the jury. *Ramos*, 140 S. Ct. at 1418 (Sotomayor, J., concurring). Extant disparities in the military justice system compound this problem. In *Ramos,* the Court was clear that even if the laws of non-unanimity did not have a discriminatory intent, it has had a discriminatory effect. Nonunanimous juries can silence the voices and negate the votes of minority panel members, especially in cases with minority defendants or victims. Members "can simply ignore the views of their fellow panel members of a different race or class." *Ramos,* 140 S. Ct. at 1418. "That reality—and the resulting perception of unfairness and racial bias—can undermine confidence in and respect for the criminal justice system." *Id.*

4. The Government cannot establish that this constitutional violation was harmless beyond a reasonable doubt.

There is no way of knowing whether TSgt Palik's convictions were secured by a nonunanimous verdict. But that is a problem for the Government, not TSgt Palik. Where constitutional error is at hand, the Government bears the burden of proving harmlessness beyond a reasonable doubt. And, because there is no way of knowing the vote count (especially since the Rules for Courts-Martial explicitly preclude the members from being polled), the Government cannot meet this already onerous burden. *See* R.C.M. 922(e); *Lambert*, 55 M.J. at 295 ("It is long-settled that a panel member cannot be questioned about his or her verdict . . . ."). The

Government cannot show the failure to require a unanimous verdict was harmless beyond a reasonable doubt.

WHEREFORE, TSgt Palik respectfully requests that this Honorable Court set aside his convictions and the sentence.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 11 November 2022.

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APPENDIX

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

IV.

TSGT PALIK'S CONVICTIONS FOR DOMESTIC VIOLENCE AND ASSAULT ARE LEGALLY INSUFFICIENT.

Standard of Review

Legal sufficiency is reviewed *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted).

Law

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)).

Analysis

For the reasons discussed in the main brief in Assignment of Error I, TSgt Palik's convictions are legally insufficient. No reasonable factfinder could conclude that the Government met its burden to prove each offense or to disprove self-defense, defense of accident, or defense of property beyond a reasonable doubt.

WHEREFORE, TSgt Palik respectfully requests this Honorable Court set aside the findings and sentence.

V.

TRIAL COUNSEL IMPROPERLY ARGUED THAT TSGT PALIK'S SENTENCE SHOULD EXCEED THE ONE YEAR THAT THE COMPLAINING WITNESS "HAD TO DEAL WITH THIS."

Additional Facts

During sentencing argument, the trial counsel argued:

> And I want to talk about why less than 24 months, less than two years is not appropriate. Your Honor, [SM] has dealt with this for a whole year. She's dealt with this trauma for a whole year. The accused has not had to deal with this. And that is significant. And for every month that [SM] had to deal with looking at herself in the mirror, not eating, not having the same goals that she did. She said her place is a mess every day and when she tries to fix it, it just turns out the same way. These are issues that the accused has not had to deal with, and therefore, it's only appropriate that the accused gets 24 months.

(R. at 1010).

Standard of Review

Whether argument is improper is a question of law, reviewed *de novo*. *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018). If defense counsel does not object, this Court reviews for plain error. *Id.* "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *Id.* at 401 (quoting *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005)).

Law

Improper argument, a facet of prosecutorial misconduct, "occurs when trial counsel oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *United States*

v. Sewell, 76 M.J. 14, 18 (C.A.A.F. 2017) (internal quotation marks, citation, and alterations omitted). Improper argument will yield relief only if the misconduct "actually impacted on a substantial right of an accused (*i.e.*, resulted in prejudice)." *Fletcher,* 62 M.J. at 178 (quoting *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)).

The Court of Appeals for the Armed Forces (CAAF) outlined a balancing approach of three factors for assessing prosecutorial misconduct's prejudicial effect: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Id.* at 184. When applying *Fletcher* to improper sentencing argument, this Court considers whether "trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the appellant was sentenced on the basis of the evidence alone." *United States v. Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2013) (citations, alterations, and internal quotation marks omitted).

Analysis

The trial counsel explicitly asked the military judge to issue a sentence because of the complaining witness' experience over the previous year. While victim impact is a valid consideration for sentencing, it is invalid to create a mathematical relationship between the time SM had to "deal with this" and the recommendation of 24 months' confinement. This was plain and obvious error. Further, this misuse of victim impact may well have swayed the military judge to issue greater confinement than he otherwise would have. As such, the improper argument raises the question

of whether the military judge sentenced TSgt Palik on the basis of the evidence alone. The three prongs in *Fletcher* are met, and this Court should set aside the sentence.

WHEREFORE, TSgt Palik respectfully requests this Honorable Court set aside the sentence.

VI.

THE RECORD OF TRIAL CONTAINS DUPLICATE APPELLATE EXHIBITS AND REQUIRES REMAND FOR CORRECTION.

Standard of Review

Whether a record of trial is incomplete or not substantially verbatim is reviewed *de novo*. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000).

Additional Facts

In the ROT, Appellate Exhibit II is supposed to be the release for then-Capt AN, who was detailed to the case but released in anticipation of a guilty plea. (R. at 5–6.) Appellate Exhibit II is actually the release for Capt RH, who was released after the guilty plea failed. (R. at 44.) His release is also found at Appellate Exhibit V.

Law and Analysis

The record of trial is "the very heart of the criminal proceedings and the single essential element to meaningful appellate review." *United States v. Credit*, 4 M.J. 118, 119 (C.M.A. 1977). A complete record of proceedings is required for every court-martial in which the sentence adjudged includes "a sentence of death, dismissal, discharge, confinement for more than six months, or forfeiture of pay for more than

six months." Article 54(c)(2), 10 U.S.C. § 854(c)(2). A complete record shall include "any appellate exhibits." R.C.M. 1112(b)(6).

The record of trial is incomplete because Appellate Exhibits II and V are duplicates. This Honorable Court should remand and require the Government to complete the record of trial in accordance with R.C.M. 1112.

WHEREFORE, TSgt Palik respectfully requests this Honorable Court remand for completion of the Record of Trial.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**UNITED STATES' MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **RYAN M. PALIK**, United States Air Force *Appellant*	)	No. ACM 40225 22 November 2022

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

Pursuant to Rule 23.3(m)(5), the United States respectfully requests that it be given 14 days after this Court's receipt of a declaration or affidavit from both trial defense counsel to submit its answer so that it may incorporate statements provided by Appellant's trial defense counsel in response to the specified ineffective assistance of counsel issues.[1] Appellant filed his brief with this Court on 11 November 2022. This is the United States' first request for an enlargement of time. As of the date of this request, 342 days have elapsed since docketing.

There is good cause for the enlargement of time in this case. Appellant has raised, *inter alia*, one area in which he claims his trial defense counsel were ineffective. The United States cannot prepare its answer to the allegations of ineffective assistance of counsel without statements from trial defense counsel. An enlargement of time is necessary to ensure trial defense counsel have time to review the allegations before they draft and submit their statements to the Court, and to give the United States sufficient time to incorporate trial defense counsels' statements into its answer. Moreover, additional time is needed for drafting and supervisory

[1] The United States is filing a motion to compel a declaration or affidavit from Appellant's trial defense counsel contemporaneously with this motion.

review before the United States files it answer. Fourteen days is a reasonable request, given the nature of the allegation and the need to coordinate with two separate defense counsel to receive responsive declarations.

This is undersigned counsel's first priority case and the only case to which undersigned counsel is currently assigned. Undersigned counsel has begun to review the record of trial.

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

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United States Air Force

MARY ELLEN PAYNE
Associate 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 the Appellate Defense Division on 22 November 2022.

DEEPA M. PATEL, Maj, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
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United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**UNITED STATES' MOTION TO COMPEL**
Appellee	)	**DECLARATIONS OR AFFIDAVITS**
	)	
v.	)	Before Panel No. 2
	)	
Technical Sergeant (E-6)	)	No. ACM 40225
RYAN M. PALIK,	)	
United States Air Force	)	22 November 2022
Appellant	)	

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

Pursuant to Rule 23.3(e) of this Honorable Court's Rules of Practice and Procedure, the United States hereby requests this Court to compel Appellant's trial defense counsel, Maj A N , Capt O H , and Capt R H , to provide affidavits or declarations in response to Appellant's allegation of ineffective assistance (IAC) of counsel. In his assignments of error, Appellant claims he received ineffective assistance of counsel when his trial defense counsel failed to file an Rule for Court Martial (R.C.M.) 914 motion for the government to produce two video recorded statements by the named victim. (App. Br. at 18.) Maj N , Capt H , and Capt H responded to undersigned counsel stating that they would only provide an affidavit or declaration by order by this Court. The government is requesting this court compel declarations from all three trial defense counsel.

To prepare an answer under the test set out in United States v. Polk,[1] 32 M.J. 150, 153 (C.M.A. 1991), the United States requests that this Court compel trial defense counsel to provide

[1] 1) Are appellant's allegations true, and if so, "is there a reasonable explanation for counsel's actions"? 2) If the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance… [ordinarily expected] of fallible lawyers"? (3) If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result?

a declaration or affidavit. A statement from each attorney is necessary because the record is insufficient to answer Appellant's IAC allegations as the record provides no information about trial defense counsels' strategic decisions as they relate to the decision not to make a motion under R.C.M. 914. The record also contains no evidence as to what information was known to trial defense counsel that informed their decision not to file a motion. Thus, the United States requires statements from trial defense counsel to adequately respond to Appellant's brief. See United States v. Rose, 68 M.J. 236, 236 (C.A.A.F. 2009); United States v. Melson, 66 M.J. 346, 347 (C.A.A.F. 2008). In fact, this Court cannot grant Appellant's ineffective assistance of counsel claim without first obtaining statements from trial defense counsel. See Rose, 68 M.J. at 237; Melson, 66 M.J. at 347.

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

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 22 November 2022.

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40225**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Ryan M. PALIK	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 11 November 2022, Appellant, through counsel, submitted an assignments of error brief to the court. In the brief, Appellant alleges, *inter alia*, that trial defense counsel were ineffective. Specifically, Appellant claims trial defense counsel were deficient in that they failed to file a Rule for Courts-Martial (R.C.M.) 914 motion based on the Government's inability to produce two video-recorded statements of the complaining witness, which were lost by the Government.*

On 22 November 2022, the Government filed a Motion to Compel Declarations or Affidavits and contemporaneously filed a Motion for Enlargement of Time. The Government requests this court "compel Appellant's trial defense counsel, [Major (Maj)] A N , [Captain (Capt)] O H , and Capt R H , to provide affidavits or declarations in response to Appellant's allegation of ineffective assistance [ ] of counsel." According to the Government, Appellant's trial defense counsel indicated "they would only provide an affidavit or declaration by order by this [c]ourt." The Government requests trial defense counsel each "provide an affidavit or declaration, containing specific and factual responses to Appellant's allegations of ineffective assistance of counsel," within 30 days of an order to compel. In the motion for enlargement of time, the Government requests "14 days after this [c]ourt's receipt of a declaration or affidavit from [ ] trial defense counsel to submit its answer." Appellant did not file a response to the motions.

The court has examined the claimed deficiencies and finds good cause to compel a response. The court cannot fully resolve Appellant's claims without piercing the privileged communications between Appellant and his trial defense counsel. Considering that the Government has not had an opportunity to

* The court has reworded Appellant's assignment of error.

conduct discovery of the facts and circumstances underlying the claims—because trial defense counsel stated they would not provide information except by an order from this court—the court is not disposed to deny the requested enlargement of time.

Accordingly, after considering the Government's motions and the issues Appellant raises, it is by the court on this 6th day of December, 2022,

ORDERED:

The Government's Motion to Compel Declarations or Affidavits is **GRANTED**. Maj A N , Capt O H , and Capt R H are each ordered to provide an affidavit or declaration to the court that is a specific and factual response to Appellant's claims that they were ineffective in that they failed to file an R.C.M. 914 motion based on the Government's inability to produce two video-recorded statements of the complaining witness, which were lost by the Government.

A responsive affidavit or declaration will be provided to the court not later than **5 January 2023.** The Government shall deliver a copy of the responsive affidavits or declarations to Appellant's counsel.

It is further ordered:

The Government's Motion for Enlargement of Time is **GRANTED**. The Government's answer to Appellant's assignments of error brief will be filed not later than **19 January 2023**.

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**UNITED STATES' MOTION TO ATTACH DOCUMENTS**
v.	)	Before Panel No. 2
Technical Sergeant (E-6) **RYAN M. PALIK**, United States Air Force *Appellant*	)	No. ACM 40225 5 January 2023

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

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

- Appendix A – Declaration of Maj A N , dated 4 January 2023 (3 pages total)
- Appendix B – Declaration of Capt O H dated 5 January 2023 (3 pages total)
- Appendix C – Declaration of Capt R H , dated 5 January 2023 (2 pages total)

The attached declarations are responsive to this Court's order directing Maj A N , Capt O H , and Capt R H to provide declarations responsive to Appellant's Assignment of Error concerning whether he received ineffective assistance of counsel. (Court Order, dated 6 December 2022.)

Our Superior Court has 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 has also concluded that "based on experience . . . fact determinations' may be 'necessary predicates to resolving appellate [q]uestions.'" Id. at 442 (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)).

GRANTED
17 JAN 2023

Accordingly, the attached documents are relevant and necessary to address this Court's order and Appellant's Assignment of Error.

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

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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 5 January 2023.

DEEPA M. PATEL, Maj, USAF
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Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before Panel No. 2
Technical Sergeant (E-6) **RYAN M. PALIK** United States Air Force *Appellant.*	)	No. ACM 40225
	)	19 January 2023

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

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INDEX OF BRIEF

[1] Appellant has raised this issue under United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).
[2] Appellant has raised this issue under United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).
[3] Appellant has raised this issue under United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

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OTHER AUTHORITIES

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before Panel No. 2
Technical Sergeant (E-6) **RYAN M. PALIK** United States Air Force *Appellant.*	)	No. ACM 40225 19 January 2023

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

ISSUES PRESENTED

I.

WHETHER TSGT PALIK'S DOMESTIC VIOLENCE AND ASSAULT CONSUMMATED BY A BATTERY CONVICTIONS ARE FACTUALLY SUFFICIENT.

II.

THE GOVERNMENT LOST THE ONLY TWO VIDEO RECORDED STATEMENTS FROM SM, THE COMPLAINING WITNESS FOR EVERY CONVICTED OFFENSE. DID DEFENSE COUNSEL PROVIDE INEFFECTIVE ASSISTANCE BY FAILING TO FILE AN R.C.M. 914 MOTION BASED ON THE GOVERNMENT'S INABILITY TO PRODUCE HER STATEMENTS?

III.

WHETHER TSGT PALIK WAS ENTITLED TO A UNANIMOUS VERDICT UNDER THE FIFTH AND SIXTH AMENDMENT.

IV.

WHETHER TSGT PALIK'S DOMESTIC VIOLENCE AND ASSAULT CONSUMMATED BY A BATTERY CONVICTIONS ARE LEGALLY SUFFICIENT.[4]

V.

WHETHER TRIAL COUNSEL IMPROPERLY ARGUED THAT TSGT PALIK'S SENTENCE SHOULD EXCEED THE ONE YEAR THAT THE COMPLAINING WITNESS "HAD TO DEAL WITH THIS."[5]

VI.

WHETHER THE RECORD OF TRIAL CONTAINS DUPLICATE APPELLATE EXHIBITS AND REQUIRES REMAND FOR CORRECTION.[6]

STATEMENT OF CASE

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

STATEMENT OF FACTS

Appellant was initially charged with one charge and 13 specifications of a violation of Article 128, Uniform Code of Military Justice (UCMJ), and one charge and two specifications of a violation of Article 128b, UCMJ. (Charge Sheet, dated 15 March 2021.) Relevant to Appellant's assignments of error, Charge I, Specification 12 read

> In that Technical Sergeant Ryan M. Palik, United States Air Force, , Royal Air Force Mildenhall, United Kingdom, did, on divers occasions, at or near Bury St. Edmonds, United Kingdom, on or about 20 August 2020, unlawfully pull [SM], the intimate partner of the accused, by the hair with his hand.

(Charge Sheet, dated 15 March 2021.)

---

[4] Appellant has raised this issue under United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).
[5] Appellant has raised this issue under United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).
[6] Appellant has raised this issue under United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

At trial, the panel found him guilty of this charge and specification but "except the words on divers occasions. Substituting therefore, the words "in the direction of or through the front door of the apartment." (R. at 990.)

Further, Charge II, Specification 1 read

> In that Technical Sergeant Ryan M. Palik, United States Air Force, Squadron, Royal Air Force Mildenhall, United Kingdom, did, at or near Bury St. Edmonds, United Kingdom, on or about 3 July 2020 and 5 July 2020, commit an assault on [SM], the intimate partner of the accused, by strangling her with his hand

(Charge Sheet, dated 15 March 2021.)

For Charge II, Specification 1, the panel found Appellant not guilty of domestic violence under Article 128b, UCMJ, but guilty of the lesser included offense of assault consummated by battery for the following elements:

> One, that between on or about 3 July 2020 and on or about 5 July 2020, at or near Bury St. Edmunds, the accused did bodily harm to [SM] by touching her neck; two, that the bodily harm was done unlawfully; and three that the bodily harm was done with force or violence.

(R. at 886, 990.)

Additionally, Charge II, Specification 2 read

> In that Technical Sergeant Ryan M. Palik, United States Air Force, Squadron, Royal Air Force Mildenhall, United Kingdom, did, on divers occasions, at or near Bury St. Edmonds, United Kingdom, on or about 20 August 2020, commit an assault on [SM], the intimate partner of the accused, by unlawfully strangling her with his hands.

(Charge Sheet, dated 15 March 2021.)

For Charge II, Specification 2, the panel found Appellant guilty as charged. (R. at 990). The panel found Appellant not guilty on the remaining charges and specifications. (Id.)

Trial defense counsel requested the military judge give members the standard self-defense instruction for all the charged offenses, and the government did not object. (R. at 827-828.) Accordingly, the military judge gave members the instruction for self-defense in non-aggravated assault cases. (R. at 829.) He read the following, in relevant part:

> Self-defense is a complete defense to the charged offenses and must be considered by you in your evaluation of the evidence. For self-defense to exist, the accused must have had a reasonable belief that bodily harm was about to be inflicted upon himself and he must have actually believed that the force he used was necessary to prevent bodily harm. In other words, the defense of self-defense has two parts.
>
> First, the accused must have had a reasonable belief that physical harm was about to be inflicted on him. The test here is whether, under the same facts and circumstances in this case, any reasonably prudent person faced with the same situation, would have believed that he would immediately be physically harmed. Because this test is objective, such matters as intoxication or emotional instability of the accused are not relevant.
>
> Secondly, the accused must have actually believed that the amount of force he used was required to protect himself. To determine the accused's actual belief as to the amount of force which was necessary, you must look at the situation through the eyes of the accused. In addition to the circumstances known to the accused at the time, the accused's age, intelligence, and emotional control are all important factors in determining the accused's actual belief about the amount of force required to protect himself. In protecting himself, the accused is not required to use the same amount or kind of force as the attacker. However, the accused cannot use force which is likely to produce death or grievous bodily harm.
>
> (…)
>
> The prosecution's burden of proof to establish the guilt of the accused not only applies to the elements of the offenses, but also to the issue of self-defense. Therefore, in order to find the accused guilty of the charged offenses, you must be convinced beyond a reasonable doubt that the accused did not act in self-defense.
>
> A person may stand his ground when he is at a place at which he has a right to be. Evidence tending to show that the accused either had

or did not have an opportunity to withdraw safely is a factor which should be considered along with all the other circumstances in deciding the issue of self-defense.

The accused, under the pressure of a fast moving situation or immediate attack, is not required to pause at his peril to evaluate the degree of danger or the amount of force necessary to protect himself. In deciding the issue of self-defense, you must give careful consideration to the violence and rapidity, if any, involved in the incident.

On the issue of self-defense alone, the accused's voluntary intoxication should not be considered in deciding whether the accused was in reasonable apprehension of an attack upon himself. Voluntary intoxication does not permit the accused to use any greater force than he would believe necessary to use when sober.

A person who intentionally provoked an attack upon himself or voluntarily engaged in mutual fighting is not entitled to self-defense unless: one, he previously withdrew in good faith; two, it was physically impossible for him to withdraw in good faith; or three, the adversary escalated the level of conflict.

A person has provoked an attack and, therefore, given up the right to self-defense if he willingly and knowingly does some act toward the other person reasonably calculated and intended to lead to a fight. Unless such act is clearly calculated and intended by the accused to lead to a fight, the right to self-defense is not lost.

A person may seek an interview with another in a nonviolent way for the purpose of demanding an explanation of offensive words or conduct, or demanding redress of a grievance or settlement of a claim, without giving up the right to self-defense. One need not seek the interview in a friendly mood.

The burden of proof on this issue is on the prosecution. If you are convinced beyond a reasonable doubt that the accused intentionally provoked an attack upon himself so that he could respond by injuring an alleged victim, or if you are convinced beyond a reasonable doubt that the accused voluntarily engaged in mutual fighting, then you have found that the accused gave up the right to self-defense. However, if you have a reasonable doubt that the accused intentionally provoked an attack upon himself or that he voluntarily engaged in mutual combat then you must conclude that the accused retained the right to self-defense, and, then you must determine if the accused actually did act in self-defense.

(R. at 889-891.)

Trial defense counsel requested the military judge to give an instruction on accident for Charge II, Specification 2. "I believe he said that he pushed her to move away and it hit her neck and then I think a question from one of the members prompted whether or not that was what resulted in the injury to the victim." (R. at 830.) Trial counsel objected and the military judge overruled the objection, reading the following instruction to the members:

> Accident is a complete defense to the charged offenses and must be considered by you in your evaluation of the evidence. If the accused was doing a lawful act in a lawful manner free of any negligence on his part, and an unexpected bodily harm occurs, the accused is not criminally liable. The defense of accident has three parts. First, the accused's act resulting in the bodily harm must have been lawful. Second, the accused must not have been negligent. In other words, the accused must have been acting with the amount of care for the safety of others that a reasonably prudent person would have used under the same or similar circumstances. Third, the bodily harm must have been unforeseeable and unintentional. The burden is on the prosecution to establish the guilt of the accused. Consequently, unless you are convinced beyond a reasonable doubt that the bodily harm was not the result of an accident, the accused may not be convicted of the offense.
>
> If you find the accused was negligent and, thus, not protected from criminal liability by the defense of accident, you may not convict unless you find beyond a reasonable doubt that the negligence was a proximate cause of the bodily harm.
>
> Proximate cause" means that the bodily harm must have been the result of the accused's negligent act. A proximate cause does not have to be the only cause, but it must be a direct or contributing cause which plays a material role, meaning an important role, in bringing about the bodily harm. If some other unforeseeable, independent, intervening event, which did not involve the accused, was the only cause which played any important part in bringing about the bodily harm, then the accused may not be convicted of the offense.
>
> The burden is on the prosecution to establish the guilt of the accused. Before the accused can be convicted of an offense, you must be

> convinced beyond a reasonable doubt that the defense of accident either does not exist or has been disproved, and that the accused's negligent conduct was a proximate cause of the bodily harm.

(R. at 893-894.)

The charges and specifications for which Appellant was convicted involved two separate incidents – the first on 3 July 2020 and the second on 20 August 2020. Charge II, Specification 1 (domestic assault by unlawful strangulation) addressed the July incident, and Charge 1, Specification 12 (hair pulling) and Charge II, Specification 2 (domestic assault by unlawful strangulation) addressed the 20 August 2020 incident.

3 July 2020 Incident

The evidence for the 3 July 2020 incident came primarily from the testimony of SM and Appellant at trial. During direct examination, SM testified that the July incident was the first time Appellant choked and slapped her. (R. at 313.) She stated:

> Q. Can you kind of explain to me how the argument escalated? What happened? Just walk us through the argument.
>
> A. I got pretty close to his face and that when he choked me against the wall. I don't remember what the argument was about.
>
> Q. When you say you got pretty close to his face, what do you mean?
>
> A. What do you…I'm sorry.
>
> Q. I'll rephrase it. I'm sorry if I'm confusing you. When you say that you -- you said that you got pretty close to his face, did you lean into him?
>
> A. Yes, ma'am. I got closer to his face to yell.
>
> Q. And why did you do that?
>
> A. I was angry.
>
> Q. Do you recall what you said?

A. I do not. No, ma'am.

Q. What was your point in doing that?

A. I was just trying to get him to hear me.

Q. Were you concerned that he wasn't hearing you?

A. He just wasn't listening.

Q. And so you said that you kind of got in his face and leaned into him. What -- how did he respond?

A. By choking me, ma'am.

Q. How was -- can you walk us through like what did he do? What did he do with his hands?

A. He put both hands around my neck and pushed me up against the wall and choked me.

Q. And he had -- you said he had both hands around her neck, how did you feel?

A. Scared. I couldn't breathe. That's about it. Yeah.

Q. Were you able to say anything?

A. No, ma'am.

Q. About how long would you say it lasted if you had to estimate?

A. Like five seconds.

Q. And what happened after that?

A. He let go of me and we argued some more. I broke some things. We went into the bedroom and we sat down and had a talk and like argued more and that's when he told me he's never choked anybody before. He doesn't know why he's doing this, so forth.

(R. at 313-316.)

During his direct examination with his trial defense counsel, Appellant testified that he and SM got into an argument during the weekend of 4 July 2020. He stated he and SM had gone to a bar near his apartment and had drinks. (R. at 644-645.) At some point they left because SM broke a wine glass on the table. (R. at 645.) After they got back to Appellant's apartment, they argued:

> Q. What happened that night?
>
> A. Well, we continued arguing while we went up and I don't remember what we were arguing about but I know she was upset and just yelling at me, standing in front of my face. At first she was just pointing at my face, you know, calling me names, telling me I'm stupid, I'm an idiot, you're immature and all this stuff and I just kept telling her, "Just back off, like, back the F off." And she kept saying, or what, or what and then she starts poking me in the face.
>
> Q. Let the record reflect that he used his index finger to point at his nose and touch his nose.
>
> A. And then once she starts poking me in the face, I said, like, "Back off, like, fucking stop." And she said, "Or what?", and then she just pushes my face back.
>
> Q. Let the record reflect that the witness used his right hand to open palm towards his face and pushed his face up towards with his chin. What happens at that point?
>
> A. At that point I didn't know what she was going to do and I just pushed her to create some distance and told her to back the fuck off.
>
> Q. Let the record reflect that the witness used his hands -- both hands with his palms open facing away from him and pushing forward away from his body. Did you make contact with her?
>
> A. Yes, ma'am.
>
> Q. Where?
>
> A. Probably around her upper chest area. I just pushed straight forward but she's about 5'3"- 5'4", so it's like right here.

> Q. Let the record reflect that the witness is pointing to the area just beneath his tie between his clavicle and collarbone area below. How long did you make contact with her in that area?
>
> A. It was quick. It was really just to create distance.
>
> Q. And what happened then?
>
> A. We kind of look at each other and couldn't really believe -- because that's the first time our relationship -- in our relationship that we had gone to that point and it was something we always talked about that wouldn't happen, like, we joke about it and stuff but it was never something that, like, we actually did.
>
> Q. And then what happened?
>
> A. Then she freaks out and starts destroying everything in the apartment, putting holes in the walls and she reaches over and grabs the big bottle of Jack Daniels by the neck and just smashes it on the table. At that point, I back up, I'm standing near the kitchen, and she's holding the neck, holding the broken bottle by the neck and we kind of just look at each other and I think she realized what it looked like so she threw it into the living room and continued to destroy the living room.

(R. at 645-646.)

20 August 2020, Incident

Regarding the incident on August 20, 2020, SM testified on direct examination that she and Appellant had been drinking at a pub earlier in the night. (R. at 319-320.) When she came home, she fell asleep and woke up with Appellant screaming and throwing water on her face. (Id.) They began arguing about text messages SM received on her phone. (R. at 320-321.) SM asked for her phone and Appellant threw it outside of the window. (Id.) SM tried to get another phone, and Appellant took the second phone and snapped it in half. (Id.) SM left the apartment to retrieve the phone that Appellant threw outside the window and eventually came back. After that, the situation escalated.

A (By SM). I went back in and he took the other phone from me. I took his phone and I threw it out the window, and that's ----

Q (By TC). The same window?

A. Yes, ma'am. That's when he pinned me down on the bed and he choked me again.

Q. When you say he pinned you down on the bed, what parts of his body were ----

A. His whole body was covering mine. I couldn't move my arms or legs.

Q. And did he put his hands on your neck?

A. Yes, ma'am.

Q. Was it one hand were both hands?

A. It was both hands around my neck and he choked me for approximately five to eight seconds.

Q. How did you feel?

A. I felt very scared. I was shocked. I couldn't breathe, my ears were ringing, my vision was like going black. I thought I was going to die.

Q. And what happened next?

A. Eventually he let go and I like hunched over to catch my breath and he dragged me by my hair into the hallway towards the living room.

Q. How far was the living room from his bedroom?

A. I want to say like 15 feet.

Q. And you said he dragged you by your hair?

A. Yes, ma'am.

Q. You now have your hair tied back today. How long is your hair?

A. Like bottom of my back.

Q. Did you have it loose? Was it in a ponytail? How was it that night?

A. It was loose, ma'am.

Q. And where, like on your head, did he grab you?

A. He grabbed the top of my head.

Q. So what happened when you were in the living room?

A. I went to the couch. I sat there. I was frustrated so I took the PS4 controller and I threw it at the TV. That's when he walked over and he put his hands around my neck again and choked me for a second time.

Q. I want to talk a little bit about that second time. Where -- you said you were on the couch?

A. Yes, ma'am.

Q. How did he pin you down?

A. Just my legs. My right arm was free.

Q. Was this on the couch at this time?

A. Yes, ma'am.

Q. And he used one hand? Two hands?

A. He used two hands, ma'am.

Q. How did you feel the second time?

A. My arm was free so I felt a little bit better about that that I could do something about this time.

Q. When he had his hands around your neck, could you breathe?

A. No, ma'am.

Q. Were you able to say anything?

A. No, ma'am.

> Q. And what happened?
>
> A. I punched him with a closed fist as hard as I could in his face two times.
>
> Q. What happened after that?
>
> A. He let go of me.
>
> Q. And then what did you do?
>
> A. I try to catch my breath again and he dragged me about my hair to the hallway again.

(R. at 322-324.)

Additionally, SM walked trial counsel through photographs of the injuries caused by Appellant's strangulation and pulling of her hair. (R. at 330-332.) Those photographs were taken on the same day as the incident. (R. at 330.) SM had injuries on the front of her neck and side of her face that she said were caused by Appellant strangling her. (R. at 330-332.)

During his testimony, Appellant confirmed that SM was asleep after an evening of drinking, he found text messages that he "didn't like" on her phone, got upset, and woke her up by pouring water on her. (R. at 657-659.) He also confirmed that he threw SM's phone out of the window and that SM retrieved a second phone, which he snapped in half. (R. at 661-662.) After that, Appellant testified that SM struck him in the face four or five times with a closed fist, and he pushed her on her chest. (R. at 662-663.) He said SM began destroying things in their house, and he "just wanted her out" so he "grabbed her shirt and pushed her towards the door." (R. at 673.) He further stated,

> Once we get close to the doorway for the kitchen, she drops to her knees, just dead weight, just drops down and at that point I'm trying to grab -- grab her to try to get her out and she's just swailing [phonetic] -- she's flailing and swinging and I eventually ended up

> grabbing her hair and I tried to pull her towards the door but she grabbed the wall and I didn't -- I was just trying to do it to kind 11 of get her to move that way but once she grabbed the wall I didn't want to actually hurt her so I let her know.

(R. at 674.)

Appellant admitted to pulling SM's hair for about 2 seconds before letting go. (R. at 674.) He said he "just wanted her out of the apartment," and at some point, SM dropped down on her knees to the floor, where she stayed for "14 or for 15-20 minutes." (R. at 675.)

Sentencing

Appellant elected to be sentenced by military judge alone. (R. at 995.) During sentencing argument, trial counsel stated,

> And I want to talk about why less than 24 months, less than two years is not appropriate. Your Honor, [SM] has dealt with this for a whole year. She's dealt with this trauma for a whole year. The accused has not had to deal with this. And that is significant. And for every month that [SM] had to deal with looking at herself in the mirror, not eating, not having the same goals that she did. She said her place is a mess every day and when she tries to fix it, it just turns out the same way. These are issues that the accused has not had to deal with, and therefore, it's only appropriate that the accused gets 24 months.

(R. at 1010.)

The military judge sentenced Appellant to four months for Charge I, Specification 12; two months for Charge II, Specification 1; and eight months for Charge II, Specification 2. Charge I, Specification 12 and Charge II, Specification 2 ran concurrently, and Charge II, Specification 1 ran consecutively for a total of 10 months confinement. Additionally, the military judge sentenced Appellant to reduction to the grade of E-1, total forfeiture of all pay and allowances and a bad conduct discharge. (R. at 1015.)

ARGUMENT

I.

TSGT PALIK'S DOMESTIC VIOLENCE AND ASSAULT CONSUMMATED BY A BATTERY CONVICTIONS ARE FACTUALLY SUFFICIENT.

Standard of Review

A Court of Criminal Appeals may affirm only such findings of guilty "as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1), UCMJ. "Article 66[(d)] requires the Courts of Criminal Appeals to conduct a *de novo* review of legal and factual sufficiency of the case." United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted).

Law

The test for factual sufficiency is whether, after weighing the evidence of trial and making allowances for not having personally observed the witnesses, the court is convinced of Appellant's guilt beyond a reasonable doubt. United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987). "In conducting this unique appellate role, [the court] take[s] 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" United States v. Chisum, 75 M.J. 943, 952 (A.F. Ct. Crim. App. 2016) (quoting Washington, 57 M.J. at 399). This Court's "assessment of appellant's guilt or innocence for legal and factual sufficiency is limited to the evidence presented at trial." United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993).

The testimony of a single witness may be sufficient to establish guilt beyond a reasonable doubt so long as the trier of fact finds the witness's testimony sufficiently credible. *See* United States v. Rodriguez-Rivera, 63 M.J. 372, 383 (C.A.A.F. 2006) (citations omitted).

Self-defense is a defense to assault consummated by a battery and requires that Appellant "(A) [a]pprehended, upon reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused; and (B) [b]elieved that the force that accused used was necessary for protection against bodily harm, provided that the force used by the accused was less than force reasonably likely to produce death or grievous bodily harm." Rule for Courts-Martial (R.C.M.) 916(e)(3). Additionally, "[t]he right to self-defense is lost…if the accused was an aggressor, engaged in mutual combat, or provoked the attack which gave rise to the apprehension, unless the accused had withdrawn in good faith after the aggression, combat, or provocation and before the offense alleged occurred. R.C.M. 916(e)(4). Failure to retreat, when retreat is possible, does not deprive a person of the right to self-defense. R.C.M. 916(e)(4), Discussion. Once raised, the Government has the burden of proving beyond a reasonable doubt that the defense of self-defense did not exist. R.C.M. 916(b)(1).

The affirmative defense of accident is defined as a "death, injury, or other event which occurs as the unintentional and unexpected result of doing a lawful act in a lawful manner is an accident and excusable." R.C.M. 916(f). The defense of accident three elements of proof: 1) "evidence must be introduced that the accused was engaged in an act not prohibited by law, regulation, or order," 2) the "lawful act must be shown by some evidence to have been performed in a lawful manner, *i.e.,* with due care and without simple negligence, and 3) "there must be some evidence in the record of trial that this act was done without any unlawful intent. United States v. Ferguson, 15 M.J. 12, 17 (C.M.A. 1983).

Analysis

Appellant argues that his conviction for assault consummated by battery is factually insufficient because he acted in self-defense during both incidents for which he was convicted. The evidence doesn't support this argument.

Assault Consummated by Battery on 3 July 2020 – Touching SM's Neck (Charge II, Specification 1)

For the July 2020 incident, Appellant argues that he acted in self defense because 1) "SM's account is hardly credible," 2) SM "admitted to being in his face, yelling at him, and pointing at his face," and 3) "Given that SM had already poked him in the face multiple times, his apprehension of further bodily harm was objectively reasonable." (App. Br. at 11-12.) However, these arguments do not hold muster.

First, the panel found SM's testimony to be credible and did not find that Appellant acted in self defense. The panel members were in the room and able to view testimony from both witnesses. They were charged with making a credibility determination, and in this situation, they found SM to be credible. Appellant tries to undermine SM's credibility by asking this court to "[c]onsider the likelihood that a victim responds to a life-threatening situation by remaining in the apartment and proceeding to destroy property right in front of the person who she alleged had just choked her, cutting off her air supply." (App. Br. at 11.) However, SM testified that at the time of the incident, she had moved in with Appellant and didn't have any money. (R. at 319.) She had also been drinking and nothing in the evidence showed that she was able to drive or leave at that time of night. Additionally, common sense and knowledge of the ways of the world have shown that victims may not leave an abusive situation. Regardless of her reasons, the fact that SM did not leave does not make it less likely that this assault occurred or more likely that Appellant was acting in self defense.

Appellant argues that the "members understandably disbelieved her account but convicted TSgt Palik of assault consummated by battery for touching her neck." (App. Br. at 11.) In fact, the record shows that opposite. The members demonstrated that they believed SM not just by finding Appellant guilty of that charge and specification, but by also including exceptions and substitutions. Further, by finding Appellant guilty of the lesser included offense of assault consummated by battery for touching SM's neck, the members showed that they may have taken into account Appellant's admission that he pushed her in her upper chest area, "pointing to the area just beneath his tie between his clavicle and collarbone area below," and found at the very least that Appellant had touched SM's neck. (R. at 646.)

This panel showed that they understood the evidence well and took extra measures to ensure they found Appellant guilty of the evidence before them. They also showed that they considered witness credibility by finding Appellant not guilty of other specifications. All these arguments indicate that that SM's credibility was, in fact, a strong consideration for the members during the court-martial.

Further, the government successfully met its burden of proving beyond a reasonable doubt that self defense did not exist in this case for the July incident under R.C.M. 916(e)(3). First, Appellant must have been reasonable in his apprehension of bodily harm. SM was angry, yelling and, according to Appellant's account, poking at his face. Admittedly, poking Appellant in the face (if Appellant's count is to be believed) *could* reasonably meet the definition of bodily harm and *could* meet the first prong. However, Appellant's argument fails on the second element that the force was necessary to protect against bodily harm, provided that the force used by the accused was less than force reasonably likely to produce death or grievous bodily harm." R.C.M. 916(e)(3). The force that Appellant used against SM was not necessary for protection

against bodily harm. SM was yelling at Appellant, pointing at his face. Even if she poked Appellant in the face, in response, Appellant pushed her neck area. He didn't block his face or swipe her hand away, which might be a proportionate response to being poked in the face. There was no evidence Appellant believed touching SM's neck specifically was necessary to protect himself from her poking him in the face. Appellant's argument fails on this standard, and thus, the government met its burden of proving that self defense did not exist in the July incident.

Strangulation on 20 August 2020 (Charge II, Specification 2)

Regarding the August incident, SM testified that Appellant strangled her twice -- first in response to SM throwing Appellant's phone out of the window and second in response to SM throwing the PS4 remote at the television. During his testimony, Appellant confirmed that SM was asleep after an evening of drinking, he found text messages that he "didn't like" on her phone, got upset, and woke her up by pouring water on her. (R. at 657-659.) He also confirmed that he threw SM's phone out of the window and that SM retrieved a second phone, which he snapped in half. (R. at 661-662.)

Additionally, SM walked trial counsel through photographs of the injuries caused by Appellant's strangulation and pulling of her hair. (R. at 330-332). Those photographs were taken on the same day as the incident. (R. at 330.) SM had injuries on the front of her neck and side of her face that she said were caused by Appellant strangling her. (R. at 330-332.)

Considering the panel's guilty verdict, they found SM's testimony to be credible regarding both incidents of strangling. Her testimony was further corroborated by the photographs that were taken on the same day as the incident, which showed bruising and injury around SM's neck.

Further, SM's actions of throwing Appellant's phone and a remote did not help Appellant meet either element of self defense. First, the SM's actions were not enough to give Appellant a *reasonable* apprehension of harm. The first instance of strangulation occurred after SM threw Appellant's phone out of the window. Appellant testified that SM had woken up to him pouring water on her and had gone into the bathroom. "At that point, she got up and didn't want to hear it and she went into the bathroom in the -- in the master bedroom." (R. at 659.) After SM went into the bathroom and shut the door, Appellant stated, "I follow her and she closes it and I bang on the door and tell her to come out and that if she didn't come out that I would throw her phone out the window." (R. at 661.) He then threw SM's phone out of the window, after which, SM tried to retrieve another phone, which Appellant also grabbed and snapped in half. (R. at 321.) SM testified that she disengaged entirely and left the apartment to retrieve the phone from the parking lot three floors below. (R. at 321.) She remained outside for approximately 10 minutes because Appellant had locked her out. (Id.) When Appellant let SM back into the apartment, she threw his phone out of the window, and it was at this point that Appellant strangled SM the first time that evening. (R. at 322.) He pinned her down on the bed using his whole body, placed both hands around her neck, and strangled her for about five to eight seconds. (Id.)

After the first instance of strangulation, Appellant dragged SM by the hair, which is discussed under Charge I, Specification 12 below. Once Appellant had dragged SM by her hair into the living room, SM testified that, "I went to the couch. I sat there. I was frustrated so I took the PS4 controller and I threw it at the TV. That's when he walked over and he put his hands around my neck again and choked me for a second time." (R. at 323.) This time, he pinned down SM's legs on the couch and used two hands to strangle her again. In response, SM punched Appellant in the face with a closed fist two times. (R. at 324.)

Neither instance meets the elements of self defense. The fact that SM disengaged and left the apartment entirely was a clear indication that Appellant did not have a reasonable apprehension of harm. Even after SM came back into the apartment, Appellant was the one who grabbed her, pinned her down, and strangled her. The second time, he was the one who dragged her by her hair to the couch and then strangled her again. He was the aggressor, and her behavior did not rise to the level that Appellant's actions would meet the first objective element of self defense.

Under the second element of self defense, nothing in the evidence showed that Appellant thought strangulation was necessary for Appellant to protect himself against bodily harm either once SM left the apartment to retrieve her phone or when she was sitting on the couch catching her breath. At this point during both instances, the situation had been calmed down a bit. Even if they continued arguing, SM leaving the apartment made any physical action by Appellant not just unnecessary, but combative. The same is true of the strangling on the couch, where SM testified that she was just trying to catch her breath when he reengaged and held her down again.

Additionally, Appellant loses his right to claim self defense if he "engaged in mutual combat, or provoked the attack which gave rise to the apprehension, unless the accused had withdrawn in good faith after the aggression, combat, or provocation and before the offense alleged occurred." R.C.M. 916(e)(4). Appellant engaged in each of these components. He provoked the fight when he poured water on SM while she was sleeping, then threw on cell phone out of the window and snapped another on in half. Second, unlike SM, he never withdrew from the argument even after she left the apartment and came back. He continued to his own attack by strangling her.

Appellant also argues that the strangulation was accidental, that he "push[ed] her off" by extending his hands. (App. Br. at 13; R. at 663.) The military judge gave the accident instruction to the members, however, their verdict indicated that they did not believe Appellant accidentally strangled SM. Appellant testified to the following:

> A. After she hits me four or five times in the face, I push her off and tell her like "Back the fuck off," and she grabs the bed, she doesn't fall on it, but she loses her balance I'm guessing and she grabs the bed and she runs into the living room and starts destroying everything again.
>
> Q. Okay. So after the first strike is when you extend your hands?
>
> A. Yes.
>
> Q. And where -- where is your hand making -- where are your hands making contact with her body?
>
> A. It was on her upper chest, clavicle area.
>
> Q. Okay. And you hold it there?
>
> A. Yes. I'm just holding her back while she's -- once she starts swinging I just -- I'm trying to push her back.
>
> Q. Okay. How long do you think you were holding her hands up for?
>
> A. I mean she hit me five -- four or five times, so in the duration that she hit me, that's when my hands were up.
>
> Q. Okay. And your contact from your hands to her clavicle ceased when?
>
> A. Once I pushed her off.

(R. at 663.)

However, the photographs that were taken of SM's neck on the same day as the incident show severe bruising. Common sense indicates that the severity of the bruising would not have been caused by an accidental push or touch to the neck. The photographs that were entered into

evidence show bruising around SM's upper neck, and not in the clavicle area as Appellant described. Appellant did not act accidentally when he strangled SM.

It is also worth noting that Appellant's testimony was widely different from SM's testimony. But Appellant was the only one of them that had a reason to lie on the stand. He was the one facing a conviction and sentence and as a result, his credibility was certainly in question. At best, his statement was self-serving and the members took that factor into consideration when rendering their verdict.

In light of these facts and circumstances, the government proved beyond a reasonable doubt that neither self defense nor accident existed during the August strangling incident and that every element of the crime was met.

Assault Consummated by Battery on 20 August 2020 – Pulling SM's Hair (Charge I, Specification 12)

Appellant's charge of assault consummated by battery for pulling SM's hair also involved the 20 August 2020 incident. After Appellant let SM back into the apartment and strangled her, he pulled her by her "hair into the hallway towards the living room. (R. at 322.) At the time he grabbed her, SM said that she was "hunched over to catch [her] breath." (Id.)

Appellant admitted to pulling SM by the hair, stating:

> Once we get close to the doorway for the kitchen, she drops to her knees, just dead weight, just drops down and at that point I'm trying to grab -- grab her to try to get her out and she's just swailing [phonetic] -- she's flailing and swinging and I eventually ended up grabbing her hair and I tried to pull her towards the door but she grabbed the wall and I didn't -- I was just trying to do it to kind of get her to move that way but once she grabbed the wall I didn't want to actually hurt her so I let her know.

(R. at 674.)

Appellant stated he "just wanted her out of the apartment," and at some point, SM dropped down on her knees to the floor, where she stayed for "14 or for 15-20 minutes." (R. at 675.)

This offense also fails on Appellant's claim of self defense for the same reasons as the strangulation above. Appellant argues that SM was punching him in the face. SM testified that she punched Appellant because he was strangling her. Under the first element of self defense, it was actually SM who reasonably apprehended that bodily harm was about to be inflicted on her, not Appellant. He had her pinned down with his hands around her neck, and she punched him to get him off of her. A key component of this element is that bodily harm must have been wrongfully inflicted on Appellant for him to be acting in self defense. Here, SM's punches were not wrongful; rather, they were made in an effort for SM to protect herself from Appellant's strangling her neck. Additionally, the second element is also not met because nothing in the evidence showed that Appellant believed the force he used in pulling SM's hair was necessary to protect himself against bodily harm. In fact, he testified that his goal in pulling SM's hair that night was to get her to leave the apartment, which is decidedly different from him claiming that he was protecting himself. (R. at 675.) If Appellant thought that SM's punches were going to harm him, pulling her hair as a means of protection does not make sense. He could have actually gotten off of her and stopped strangling her. Also, the timing does not align. SM said that he grabbed her by the hair when she was trying to catch her breath and had stopped punching him. At this point, she had again disengaged, and he again engaged unprovoked.

Appellant was the aggressor in every way when he dragged SM by the hair across the apartment. She was trying to catch her breath and was hunched over. She was not doing anything that could be perceived as threatening to him. He had started the altercation by pouring water on the sleeping SM because he was mad that she was talking to another man. As a result, Appellant

lost the right to claim self defense under R.C.M. 916(e)(4) because he was the initial aggressor and by strangling her, he provoked her to punch him to get him off of her. And he never withdrew even though she did on multiple instances.

Therefore, the government proved every element of Charge I, Specification 12 and proved that self defense did not exist beyond a reasonable doubt. Taking into account that the members were able to observe the demeanor of both SM and Appellant, among other factors, to determine their credibility, their verdict of guilty one some specifications and not guilty on others, and their evaluating all of the evidence, this Court should be convinced that Appellant was guilty beyond a reasonable doubt.

II.

APPELLANT CANNOT ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL.

Additional Facts

OSI interviewed one of the named victims, SM, on both 20 and 21 August 2020 (R. at 294-95; 430.) Although OSI believed the interviews were recorded, the video recordings were ultimately "lost." (R. at 296.) Special Investigator (SI) HO testified at trial: "those interviews were deleted off the system. There's an unknown reason. However, they were deleted before we were able to put them on a CD." (R. at 430.) SI HO realized that the videos were missing on 26 October 2020. (R. at 437; App. Ex. XX at 8.)

On 19 November 2022, OSI notified the base legal office about the missing videos. (App. Ex. XX at 5.) On 23 July 2021, assistant trial counsel on the case informed the defense that "any OSI recorded interview of [SM] was lost and that no member of the legal office has previously reviewed any OSI recorded interview of [SM]." (Declaration of Maj AN, dated 4 January 2022 at 2.)

After SM testified at Appellant's court-martial on behalf of the government, trial defense counsel did not make a motion under R.C.M. 914 asking for production of the prior video-recorded statements SM made to OSI. Nor did trial counsel request any remedy based on the government's inability to produce the recorded statements of SM.

In a declaration ordered by this Court, Appellant's circuit trial defense counsel, Maj AN stated:

> In this case, the Defense has no knowledge as to whether OSI's recording device was fully functional or definitely captured the two interviews OSI conducted of [SM] on 20 August and 21 August 2021 [sic]. To the defense's knowledge, no member of the legal office has viewed any recording of the two OSI interviews at issue, nor have they confirmed their existence at any point.

(Dec. of Maj AN at 2-3.)

In her court-ordered declaration, Capt OH, Appellant's other trial defense counsel, explained that a government attorney told her SM's interview was "'lost,' but could not confirm whether the interview had ever been recorded or was lost after being recorded, only that neither she nor the OSI agents had ever reviewed a recording of the interview." (Dec. of Capt OH, dated 5 January 2023 at 1.) Capt OH believed, based on her prior experiences with OSI:

> that it was possible the interviews (1) were recorded and not removed from the system, so automatically overwritten after a certain period of time; (2) were never recorded in the first place due to user error with the software system; (3) were never recorded because an agent did not know the best practice was normally to record victim interviews; or (4) were never recorded because the recording system malfunctioned.[7]

(Dec. of Capt OH at 2-3).

[7] Capt OH also described a prior case in which a video of an OSI interview had no sound due to the malfunctioning of the recording software. (Dec. of Capt OH at 3.) Capt OH made a motion under R.C.M 703(e)(2) for relief based on lost or destroyed evidence, but the military judge in that case denied the motion. (Id.)

Based on SM's almost immediate report of the assault, photographs of her injuries, and their client's statements to them, trial defense counsel had reason to believe that SM's allegations against Appellant were truthful. (Dec. of Maj AN at 1-2.) They therefore had concerns that if they pressed the issue in discovery, and OSI found the lost videos, the evidence could be used by the government at trial as a prior consistent statement to the detriment of their client. (Dec. of Maj AN at 3.) Trial defense counsel feared that the videos would show SM looking distraught or injured, given her immediate report of Appellant's assault, which would engender sympathy with the members. (Id.)

Both of Appellant's trial defense counsel said that if United States v. Sigrah, 82 M.J. 463 (C.A.A.F. 2022), had been decided at the time of Appellant's August 2021 court-martial, they might have taken a different approach. (Dec. of AN at 3; Dec. of OH at 3.) But Sigrah was not decided until August 2022. 82 M.J. at 463.

Maj AN and Capt OH's overall trial strategy led to Appellant's acquittal on 12 of 15 specifications, including one of the specifications involving SM. (Entry of Judgment, ROT, Vol. 1.) For Specification 12 of Charge I, Appellant was found not guilty of pulling SM's hair on divers occasions and was convicted only of doing so on one occasion. (Id.) For Specification 1 of Charge II, Appellant was only convicted of the lesser included offense of assault consummated by a battery upon SM, rather than the charged domestic violence. (Id.)

Standard of Review

Claims of ineffective assistance of counsel are reviewed *de novo*. United States v. Scott, No. 81 M.J. 79, 84 (C.A.A.F. 2021).

Law

Ineffective Assistance of Counsel

"In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing Strickland v. Washington, 466 U.S. 668, 698 (1984)). An ineffective assistance claim can be decided on either of these two elements without consideration of the other. Id. at 697.

There is a presumption of competent representation, and military courts apply the following three part test in assessing whether the presumption has been overcome: (1) "Are appellant's allegations true; if so, 'is there a reasonable explanation for counsel's actions'?"; (2) "did defense counsel's level of advocacy 'fall measurably below the performance…[ordinarily expected] of fallible lawyers'?"; and (3) "[i]f defense counsel was ineffective, is there 'a reasonable probability that, absent the errors,' there would have been a different result?" United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (quoting United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)).

"To establish the element of deficiency, the appellant must first overcome 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" Scott, 81 M.J. at 84 (quoting Strickland, 466 U.S. at 689). An appellant also "must show specific defects in counsel's performance that were 'unreasonable under prevailing professional norms.'" Id. (quoting United States v. Mazza, 67 M.J. 470, 475 (C.A.A.F. 2009)). "When a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion . . . , an appellant must show that there is a reasonable probability that such a motion would have been meritorious." United States v. Harpole, 77 M.J. 231, 236 (C.A.A.F. 2018)

(citation omitted) (internal quotation marks omitted). A "reasonable probability" is one "sufficient to undermine confidence in the outcome." United States v. Spurling, 74 M.J. 261, 261 (C.A.A.F. 2015) (citation omitted) (internal quotation marks omitted).

R.C.M. 914

The relevant portions of R.C.M. 914 state:

> (a) Motion for production. After a witness other than the accused has testified on direct examination, the military judge, on motion of a party who did not call the witness, shall order the party who called the witness to produce, for examination and use by the moving party, any statement of the witness that relates to the subject matter concerning which the witness has testified, and that is:
>
> > (1) In the case of a witness called by the trial counsel, in the possession of the United States . . . .
>
> (e) Remedy for failure to produce statement. If the other party elects not to comply with an order to deliver a statement to the moving party, the military judge shall order that the testimony of the witness be disregarded by the trier of fact and that the trial proceed, or, if it is the trial counsel who elects not to comply, shall declare a mistrial if required in the interest of justice.

In United States v. Muwwakkil, 74 M.J. 187, 193 (2015), our superior Court recognized the existence of a "good faith loss doctrine" in the military's R.C.M. 914 and Jencks Act jurisprudence, which "excuses the Government's failure to produce 'statements' if the loss or destruction of the evidence was in good faith." For example, in another case, our superior Court denied relief under the Jencks Act where the government lost Article 32 recordings of witness testimony. United States v. Marsh, 21 M.J. 445, 452 (C.M.A. 1986). The Court reasoned that although "some negligence may have occurred . . . there was no gross negligence amounting to an election by the prosecution to suppress these materials." Id.

In United States v. Sigrah, CAAF addressed a fact pattern in which law enforcement agents failed to preserve the video recording of the victim's interview. 82 M.J. at 465-66. After

the victim in the case testified at trial, the defense moved to strike her testimony under R.C.M. 914 because the government failed to preserve and produce the recorded interview. Id. at 466. The military judge denied the motion because there was "no evidence presented that law enforcement acted in bad faith or in a negligent manner." On appeal, the government conceded that there was an R.C.M. 914 violation and "that the Government showed sufficient culpability to preclude the good faith loss doctrine." Id. at 466, n.2. Based on the government's concession of a R.C.M. 914 violation, CAAF determined that the military judge should have employed one of the only two possible remedies under R.C.M. 914(e): striking the witness's testimony or declaring a mistrial. Id. at 467.

Analysis

Appellant claims that his trial defense counsel were ineffective for failing to make a motion under R.C.M. 914 for production of SM's recorded interview with OSI. But Appellant cannot establish any, let alone all, of the three factors in Polk that would be necessary for relief.

a. Although it is true that trial defense counsel did not make a motion under R.C.M. 914, there were reasonable explanations for their failure to do so.

Trial defense counsel did not file a motion under R.C.M. 914 for production of SM's recorded statements to OSI. But they had a reasonable explanation for not doing so – they did not believe the motion would prove successful. The defense could not confirm that the videos in question ever existed, because the videos had never been viewed by OSI or the prosecution. The defense had experience with OSI video equipment malfunctioning in other cases, so it was reasonable for them to believe the same could have happened in Appellant's case. R.C.M. 914(a)(1) only requires the production of statements "in the possession of the United States." Since the defense could not show that the missing videos had ever existed in a functioning format, and thus had been in the possession of the government, the defense could have

reasonably believed that a motion under R.C.M. 914 would fail. The existing R.C.M. 914 precedent at the time did not undermine this notion. In Muwwakkil, the missing audio recording at issue did exist at one time, because a paralegal used it to make written summaries of the witness's Article 32 testimony. 74 M.J. at 189. Likewise, Marsh involved physical tape recordings of Article 32 testimony that had existed, but then disappeared from a desk in a legal office. 21 M.J. at 447. So those cases do not suggest the defense can prevail on an R.C.M. 914 motion where no one knows if the missing recordings ever existed or ever worked properly. Even the more recent Sigrah decision does not establish that an R.C.M. 914 motion in Appellant's case would have succeeded. Since the government conceded an R.C.M. 914 error in Sigrah, our superior Court had no occasion to consider whether the defense can prove an R.C.M. 914 violation occurred if it cannot show that the statements at issue existed or were in the possession of the government in the first place. 82 M.J. at 466, n.2. Since trial defense counsel reasonably believed an R.C.M. 914 motion would fail, they had a reasonable explanation for not making one at Appellant's trial.

In addition to believing their R.C.M. 914 motion would fail, trial defense counsel also hesitated to press the government to produce the videos for another reason. They believed SM's account of events was mostly truthful and feared that if the government later found the videos,[8] they could be admitted at trial as damaging prior consistent statements. (Dec. of Maj AN at 3.) Trial defense counsel have "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. Appellant's trial defense counsel fulfilled that duty by making a reasonable, strategic decision

[8] OSI finding the videos later was not a farfetched possibility since Maj AN had experienced receiving belated discovery from OSI in the past. (Dec. of Maj AN at 3.)

that further investigating the whereabouts of the videos risked hurting, rather than helping their client. And appellate courts do not second guess the strategic and tactical decisions of counsel. *See* United States v. Anderson, 55 M.J. 198, 202 (C.A.A.F. 2001). Under these circumstances, trial defense counsel had a reasonable explanation for not making a motion under R.C.M. 914 or otherwise demanding the videos in pretrial discovery.

b. Trial defense counsel's level of advocacy did not fall measurably below the performance ordinarily expected of fallible lawyers.

Appellant's trial defense counsel performed reasonably given the state of the law at the time of Appellant's trial. As the Supreme Court warned, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from *counsel's perspective at the time.*" Strickland, 446 U.S. at 668 (emphasis added). As discussed above, at the time of Appellant's court-martial, the case law did not establish that the defense could gain relief under R.C.M. 914 where there was no concrete evidence that the statements at issue ever existed or had ever been in the possession of the government. And under Muwwakkil and Marsh, an R.C.M. 914 motion might not succeed if the military judge found no bad faith or gross negligence on the part of the government. Even if the 2022 Sigrah decision seems to make the prospect of prevailing on an R.C.M. 914 motion more likely, "[t]oday's case demands we consider the case law confronting counsel" in 2021. Lilly v. Gilmore, 988 F.2d 783, 786 (7th Cir. 1993). *See also* Bullock v. Carver, 297 F.3d 1036, 1052 (10th Cir. 2002) (counsel are not ineffective for failing to predict future law since "clairvoyance is not a required attribute of effective representation") (internal citations omitted).

Appellant argues that an R.C.M. 914 motion would have been a "cost-free motion for the defense" and that the viability of the motion should have been apparent since "R.C.M. 914 has

remained essentially uncharged for more than a generation." (App. Br. at 23-24.) But "effective assistance does not demand that every possible motion be filed, but only those having a solid foundation." United States v. Crouthers, 669 F.2d 635, 643 (10th Cir. 1982) (citation and quotation omitted). And "even if many reasonable lawyers at the pertinent time" would have read R.C.M. 914 to provide a likely avenue for relief at Appellant's trial, "no relief can be granted unless it is shown that *no* reasonable lawyer, in the same circumstances" would have thought an R.C.M 914 motion would be futile. Smith v. Singletary, 170 F.3d 1051, 1055 (11th Cir. 1999). Here, a reasonable lawyer could have believed that an R.C.M. 914 motion would fail since there was no concrete evidence that video recordings had existed in the first place. Further, a reasonable lawyer could have believed that there was little evidence that the government acted with gross negligence or in bad faith, and that the motion would also fail on that account.

In sum, trial defense counsel's failure to raise what appeared, in 2021, to be a losing issue did not fall "outside the wide range of professional assistance that constitutes effective assistance of counsel." Lilly, 988 F.2d at 787.

Appellant asserts that, despite the recency of the Sigrah opinion, R.C.M. 914 has not changed for a generation. (App. Br. at 23) Appellant then speculates that trial defense counsel's failure to recognize the viability of an R.C.M. 914 motion demonstrated their ignorance of the law. (App. Br. at 24.) But even if this Court determines that under the well-accepted interpretation of R.C.M. 914 at the time of trial, trial defense counsel should have known to file a motion for production of SM's statements, that does not end the inquiry. "An attorney's unawareness of relevant law at the time he made the challenged decision does not, in and of itself, render the attorney's performance constitutionally deficient." Bullock, 297 F.3d at 1048. Indeed, "the Sixth Amendment does not guarantee an errorless trial, and prevailing professional

norms do not require perfection at trial." United States v. Haddock, 12 F.3d 950, 955 (10th Cir. 1993). As the Sixth Circuit has recognized, the Constitution does not require trial defense counsel to "recognized and raise every conceivable" claim – even if the failure to raise the claim "is based upon ignorance of the law or a mistake in judgment." Long v. McKeen, 722 F.2d 286, 289 (6th Cir. 1983). Instead, appellate courts "assess counsel's *overall performance* throughout the case" to determine whether a particular error "overcome[s] the presumption that counsel rendered reasonable professional assistance." Kimmelman v. Morrison, 477 U.S. 365, 386 (1986) (emphasis added).

Here, trial defense counsel's overall performance was laudable. They earned acquittals for Appellant on 12 of 15 specifications. For one of the three remaining specifications, the members only convicted Appellant of a lesser included offense. And for another specification, the members only convicted him of one instance of assault consummated by a battery, rather than divers instances. Even Appellant concedes his trial defense counsel "mounted a robust defense." (App. Br. 25.) The favorable results of Appellant's trial prove that his trial defense counsel's level of advocacy did not fall measurably below the performance ordinarily expected of fallible lawyers. Thus, Appellant cannot prevail on his ineffective assistance of counsel claim.

c. There is not a reasonable probability that if trial defense counsel had filed an R.C.M. 914 motion, there would have been a different result.

Even if trial defense counsel were ineffective in failing to file an R.C.M. 914 motion, Appellant cannot show a reasonable probability that such a motion would have been meritorious. *See* Harpole, 77 M.J. at 236. Appellant presumes that Sigrah unquestionably establishes that if the defense made a motion under R.C.M. 914 at Appellant's trial, the military judge would have stricken SM's testimony or declared a mistrial. But Appellant glosses over some notable aspects of the Sigrah opinion that show otherwise. First, the government in Sigrah conceded an R.C.M.

914 violation on appeal. Id. at 466, n.2. In contrast, there is no indication that the government in Appellant's case would have conceded an R.C.M. 914 violation, especially since no one knew for sure whether the videos of SM's interviews had properly recorded and had, at one time, been "in the possession of the United States." And Sigrah does not establish that the defense can gain a remedy under R.C.M. 914 if it is unknown whether the missing statements existed in the first place, because that issue was not litigated on appeal.

Second, the Sigrah opinion does not disturb the judicially created good faith loss doctrine recognized in Muwwakkil and Marsh. *See* Sigrah, 82 M.J. at 472 (Maggs, J., concurring) (overturning the Court's R.C.M. 914 precedent "is not the issue here because neither party has asked us to overrule any precedent.") Since the government in Sigrah conceded that the good faith loss doctrine did not apply, our superior Court did not address whether the particular facts of that case supported that conclusion. In contrast, there is no indication that in Appellant's case, the government would concede that the good faith loss doctrine does not apply.

Appellant cannot show a reasonable probability that he would have prevailed on an R.C.M. 914 motion because he cannot establish that OSI did not act in good faith with respect to the videos. There is no evidence that OSI intentionally or recklessly deleted the videos of SM's interviews– if functional copies existed in the first place. Internal data pages from the investigation suggest that the lead investigator, SI HO, "was unaware of the timeframe OSI requires videos to be copied to a disk." (App. Ex. XX at 8). If SI HO incorrectly believed she would have longer access to the videos before they were deleted from OSI's recording system, that belief does not necessarily rise to the level of negligence, and certainly does not constitute gross negligence. A person using reasonable care might have encountered the same problem. But, in any event, SI HO testified that the reason the videos were deleted was "unknown." Thus,

the videos could have been deleted because of a system malfunction and not user error. Since the record does not confirm how or why the videos were deleted, Appellant faces a steep hurdle of showing bad faith, negligence, or gross negligence on the part of the government. Without a demonstration of bad faith, negligence, or gross negligence, under Muwwakkil and Marsh (which are still good law), Appellant cannot establish a reasonable probability that his R.C.M. 914 motion would have prevailed.[9] Thus, he cannot show that absent his counsel's alleged errors, the results of his trial would have been different.

In the end, Appellant cannot show either that his counsel performed deficiency or that the alleged deficiency prejudiced him. Since Appellant cannot overcome the presumption of competent representation, this Court should deny Appellant's requested relief.

III.

TSGT PALIK WAS NOT ENTITLED TO A UNANIMOUS VERDICT UNDER THE FIFTH AND SIXTH AMENDMENT.

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

At the time of Appellant's court-martial, Article 52, UCMJ, required the concurrence of three-fourths of the panel members for a conviction. Appellant did not raise this issue at trial.

[9] Although CAAF stated in Muwwakkil that "a finding of negligence *may* serve as the basis for a military judge to conclude that the good faith loss doctrine does not apply in a specific case," 74 M.J. at 193 (emphasis added), the Court did not undermine Marsh by saying mere negligence will *always* preclude application of the good faith loss doctrine. A military judge might also decide, as in Marsh, to apply the doctrine so long as there was no gross negligence. 21 M.J. at 452.

He now argues, in light of the Supreme Court's decision in Ramos v. Louisiana, 140 S. Ct. 1390 (2020), the Sixth Amendment and the Fifth Amendment rights to due process and equal protection required a unanimous verdict by the court-martial panel. (App. Br. at 32.)

In Ramos, the Supreme Court held that the Sixth Amendment right to a jury includes the right to a unanimous jury. Ramos, 140 S. Ct. at 1396-97. The Court further held that the Fourteenth Amendment incorporated this right to criminal proceedings at the state level. Id. at 1396-97. The Supreme Court did not state that this interpretation extended to military courts-martial.

This Court recently addressed the applicability of Ramos to courts-martial in United States v. Anderson, No. ACM 39969, 2022 CCA LEXIS 181, at *55-56 (A.F. Ct. Crim. App. Mar. 25, 2022), *review granted* 2022 CAAF LEXIS 529 (C.A.A.F. 25 Jul 2022). It rejected the same claims Appellant raises now:

> Ramos does not purport, explicitly or implicitly, to extend the *scope* of the Sixth Amendment right to a jury trial to courts-martial; nor does the majority opinion in Ramos refer to courts-martial at all. Accordingly, after Ramos, this court remains bound by the plain and longstanding precedent from our superior courts that the Sixth Amendment right to a jury trial does not apply to trial by courts-martial—and, by extension, neither does the unanimity requirement announced in Ramos.
>
> (…)
>
> This court has repeatedly held that Fifth Amendment due process does not require unanimous verdicts in courts-martial.

Further, in Anderson this Court found that non-unanimous verdicts did not constitute an equal protection violation under the Fifth Amendment. Id. at *56. *See also*, United States v. Monge, No. ACM 39781, 2022 CCA LEXIS 396, at *30-31 (A.F. Ct. Crim. App. July 5, 2022)

(holding that Appellant's unanimous verdict claim did not warrant discussion or relief). This Court should adopt its reasoning from Anderson and deny Appellant's requested relief.

IV.

TSGT PALIK'S DOMESTIC VIOLENCE AND ASSAULT CONSUMMATED BY A BATTERY CONVICTIONS ARE LEGALLY SUFFICIENT.[10]

Standard of Review

A Court of Criminal Appeals may affirm only such findings of guilty "as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1), UCMJ. "Article 66[(d)] requires the Courts of Criminal Appeals to conduct a *de novo* review of legal and factual sufficiency of the case." Washington, 57 M.J. at 399.

Law

The test for legal sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal citations omitted). This test does not require a court to ask whether it believes the evidence established guilt beyond a reasonable doubt, but whether *any* rational factfinder could have found the essential elements beyond a reasonable doubt. *See* United States v. Acevedo, 77 M.J. 185, 187 (C.A.A.F. 2018). In applying this test, this Court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." United States v. Pritchett, 31 M.J. 213, 216 (C.M.A. 1990). Accordingly, the threshold for legal sufficiency is very low. King, 78 M.J. at 221 (internal citations and quotations omitted).

"In determining whether any rational trier of fact could have determined that the evidence

[10] Appellant has raised this issue under United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

at trial established guilt beyond a reasonable doubt, [this Court is] mindful that the term 'reasonable doubt' does not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable inferences from the evidence presented." Id. The standard for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011). Our superior Court has long recognized that the Government can meet its burden of proof with circumstantial evidence. King, 78 M.J. at 221.

When assessing legal sufficiency, "[t]he evidence necessary to support a verdict 'need not conclusively exclude every other reasonable hypothesis and need not negate all possibilities except guilt.'" United States v. Wilson, 182 F.3d 737, 742 (10th Cir. 1999) (quoting United States v. Parrish, 925 F.2d 1293, 1297 (10th Cir. 1991)). A legally sufficient verdict may be based on circumstantial as well as direct evidence, and even "[i]f the evidence rationally supports two conflicting hypotheses, the reviewing court will not disturb the conviction." United States v. McArthur, 573 F.3d 608, 614 (8th Cir. 2009) (citations omitted).

Legal sufficiency does not demand proof that excludes "every hypothesis or possibility of innocence, but every fair and rational hypothesis except for guilt." United States v. Loving, 41 M.J. 213, 281 (C.A.A.F. 1994).

Analysis

The crux of Appellant's argument for legal sufficiency is the same as that addressed in Issue I above – but now he argues that "no reasonable factfinder could conclude that the Government met its burden to prove each offense or to disprove self-defense, defense of accident, or defense of property beyond a reasonable doubt." (App. Br. at 41.)

However, viewed in a light most favorable to the government a rational trier of fact could have, and did, find that the government met its burden of 1) proving every element of the charges and specifications for which Appellant was convicted, and 2) disproving the affirmative defenses beyond a reasonable doubt.

While there were certainly differences between the testimonies of SM and Appellant, the legal sufficiency standard does not require that the evidence be free from "any conflict" under King. Rather, the standard defers to the trier of fact to weigh those conflicts fairly. That is precisely what the panel members did in this case. They heard all the evidence, reviewed the instructions for the elements of the offense and any affirmative defenses that the military judge read, and reached a verdict of guilty for the three specifications addressed above.

Additionally, Appellant's argument that there may have been other explanations for the incidents for which he was convicted is not enough for this court to overturn the findings under McArthur, which holds that even if " the evidence rationally supports two conflicting hypotheses, the reviewing court will not disturb the conviction." McArthur, 573 F.3d at 614.

Since a rational trier of fact could have found the elements of the crime beyond a reasonable doubt, this Court should reject Appellant's claim and uphold the conviction as legally sufficient.

V.

TRIAL COUNSEL'S ARGUMENT THAT APPELLANT'S SENTENCE SHOULD REFLECT THE TIME THAT S.M. "HAD TO DEAL WITH THIS" WAS NOT PLAIN ERROR. [11]

[11] Appellant has raised this issue under United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

Standard of Review

Allegations of improper argument and prosecutorial misconduct are reviewed *de novo*. United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019). When no objection is made, this Court reviews for plain error. United States v. Andrews, 77 M.J. at 393, 398 (C.A.A.F. 2018). "The burden of proof under plain error is on the appellant." Voorhees, 79 M.J. at 9. "Plain error occurs when (1) there is error, (2) the error is clear and obvious, and (3) the error results in material prejudice to a substantial right of the accused." Id. For that reason, this Court "Must 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." Id.

When improper argument occurs during sentencing, this Court determines whether it can be "confident that the appellant as sentenced on the basis of the evidence alone." United States v. Frey, 73 M.J. 245, 248 (C.A.A.F. 2014) (citing United States v. Halpin, 71 M.J. 477, 480 (C.A.A.F. 2013)); *see* United States v. Marsh, 70 M.J. 101, 106 (C.A.A.F. 2011); United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000); *see also* United States v. Hornback, 73 M.J. 155 (C.A.A.F. 2014).

Law and Analysis

Under Voorhees, trial counsel's argument was not plain error because 1) there was no error, 2) any error was not clear and obvious, and 3) there was no material prejudice to a substantial right of the accused. Trial counsel argued for the military judge to consider the impact that Appellant's actions had on SM when determining a proper sentence. Trial counsel based her argument directly on SM's impact statement and argued for an "appropriate" sentence in this case. Victim impact is a proper basis for argument during sentencing. Baer, 53 M.J. at

238, see United States v. Tyler, 2020 CCA LEXIS 106, at *20-21 (A.F. Ct. Crim. App. Mar. 30, 2020). Trial counsel's argument in this case does not compare to the egregious statements made by the trial counsel during his closing argument in Voorhees. Therefore, there is no error here.

But even if the court were to find error, it would not rise to the level of causing material prejudice to a substantial right of the Accused. Appellant was sentenced by the military judge and not a panel of members. As part of the presumption that military judges know and follow the law absent clear evidence to the contrary, this Court must "presume that the military judge is able to distinguish between proper and improper sentencing arguments." United States v. Hill, No. ACM 38979, 2017 CCA LEXIS 477, at *19-20 (A.F. Ct. Crim. App. July 12, 2017) (unpub. op.) (quoting United States v. Erickson, 65 M.J. 221, 225 (C.A.A.F. 2007)). This is true regardless of whether the military judge states on the record what portion of the argument is improper and will not be considered. Erickson, 65 M.J. at 225. The military judge in Appellant's case was more than capable of determining which arguments could appropriately form the basis for his sentence determination. The risk of prejudice with the military just was significantly lower than had this argument been made in front of members. Additionally, trial defense counsel did not object to the government's argument at the time, which shows that even they did not perceive the argument to be improper.

Further, this court must determine if there was a reasonable probability that, but for the error, the outcome of the proceeding would have been different. Appellant cannot meet his burden with speculation that the result of the proceeding would have been different had trial counsel not argued that SM "had to deal with this." The military judge weighed the evidence that was presented and sentenced Appellant appropriately. Nothing in the record indicates that one small portion of trial counsel's sentencing argument impacted the outcome in this case or

that the military judge sentenced Appellant on anything except the evidence alone. After all, "argument by counsel is not evidence." United States v. Bodoh, 78 M.J. 231, 236 (C.A.A.F. 2019). Appellant has not shown that he the outcome would have been different but for trial counsel's statement, and therefore, there is no plain error. This Court should deny this assignment of error.

VI.

THE RECORD OF TRIAL CONTAINS DUPLICATE APPELLATE EXHIBITS BUT DOES NOT REQUIRE REMAND FOR CORRECTION.[12]

Standard of Review

Whether the record of trial (ROT) is incomplete is a question of law that the Court reviews de novo. United States v. Henry, 53 M.J. 108, 110 (C.A.A.F. 2000).

Law

A complete record of proceedings, including all exhibits and a verbatim transcript, must be prepared for any general court-martial that results in a punitive discharge or more than six months of confinement. Article 54(c)(2), UCMJ. Appellate courts understand that inevitably records will be imperfect, and therefore review for substantial omissions. *See* United States v. Lashley, 14 M.J. 7, 8 (C.M.A. 1982). A substantial omission renders a record incomplete and raises a presumption of prejudice that the Government must rebut. Henry, 53 M.J. at 111 (citing United States v. McCullah, 11 M.J. 234, 237 (C.M.A. 1981)). Insubstantial omissions do not raise a presumption of prejudice or affect the record's characterization as complete. Id. A substantial omission may not be prejudicial if the appellate courts are able to conduct an informed review. United States v. Simmons, 54 M.J. 883, 887 (N-M. Ct. Crim. App. 2001); *see*

[1212] Appellant has raised this issue under United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

also United States v. Morrill, ARMY 20140197, 2016 CCA LEXIS 644, at *4-5 (A. Ct. Crim. App. 31 October 2016) (unpub. op.) (finding the record "adequate to permit informed review by this court and any other reviewing authorities") (citation omitted).

Analysis

Appellant argues that "[i]n the ROT, Appellate Exhibit II is supposed to be the release for then-Capt AN (now Maj AN), who was detailed to the case but released in anticipation of a guilty plea," however, "Appellate Exhibit II is actually the release for Capt RH, who was released after the guilty plea failed. His release is also found at Appellate Exhibit V." (App. Br. at 4). This argument on this issue hinges on three issues 1) whether the omission of then-Capt AN's release is substantial or unsubstantial, 2) whether duplicative copies are of Capt RH's release are substantial or insubstantial, and 3) whether a duplication violates the notion of completeness under Article 54(c)(2). First, the omission of then-Capt AN's release is insubstantial because after Appellant's guilty plea fell through, Maj AN represented him at trial. Second, the inclusion of duplicate copies of Capt RH's release is insubstantial because it does not prejudice Appellant in any way. And third, the case law on the matter of duplicative copies within a record of trial is sparse. However, the government's position is that an additional copy of a document does not detract from the completeness of the record. Unlike omitted documents, a duplicative document does not carry a significant risk of violating an Appellant's rights. A duplicative copy does not raise a presumption of prejudice in the same way that an omitted document does, and therefore, its inclusion in the record is insubstantial. For these reasons, the record of trial is not required to be remanded for correction, and Appellant is not entitled to any other relief.

CONCLUSION

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

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 19 January 2023.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S REPLY BRIEF**
	)	Before Panel No. 2
v.	)	
	)	No. ACM 40225
Technical Sergeant (E-6) **RYAN M. PALIK,** United States Air Force *Appellant*	)	26 January 2023

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

Appellant, Technical Sergeant (TSgt) Ryan M. Palik, pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this Reply to the Appellee's Answer, dated 19 January 2023 (Ans.). In addition to the arguments in his opening brief, filed on 11 November 2022 (App. Br.), TSgt Palik submits the following arguments for the issues listed below.

I.

TSGT PALIK'S DOMESTIC VIOLENCE AND ASSAULT CONSUMMATED BY A BATTERY CONVICTIONS ARE FACTUALLY INSUFFICIENT.

While TSgt Palik largely stands on the factual sufficiency analysis in his opening brief, several of the Government's arguments require a response. The Government repeatedly emphasizes the members' credibility determinations and ultimate findings in its argument. (Ans. at 17, 18, 22, 23, 25.) But the point of this assignment of error is that TSgt Palik urges this Court, pursuant to its duties under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, to take a "a fresh, impartial look at the evidence" and make its "own independent determination

as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (citation omitted).

1. Touching SM's Neck (Specification 1 of Charge II).

The Government asserts that "[t]here was no evidence Appellant believed touching SM's neck specifically was necessary to protect himself from her poking him in the face." (Ans. at 19.) This ignores TSgt Palik's testimony, where he explained that he pushed her "just to create distance" in response to her pushing his face backwards with her hand. (R. at 645–46.) A push in reaction to a push is not a disproportionate response.

2. Strangulation (Specification 2 of Charge II)

The briefs largely speak past each other, with the Government focusing on SM's account and the opening brief focused on TSgt Palik's. But the Government largely misinterprets a significant aspect of Appellant's arguments on appeal. TSgt Palik does not, as the Government suggests, believe strangulation qualified as self-defense. (Ans. at 21.) Instead, TSgt Palik emphasizes that the contact never occurred as SM claimed, and that any injury was accidental. (App. Br. at 12–15.)

Regarding the importance of the photographs of SM in Prosecution Exhibit 2, the Government on appeal repeats the Government's error at trial: relying on "common sense" instead of expert opinion to connect the photographs to SM's story. (Ans. at 22.) "Common sense" alone cannot interpret what these photographs mean and whether they are consistent with SM's testimony, especially given the use of alternative light source in a manner that makes the photographs appear much worse.

(Prosecution Exhibit (PE) 2.) The Government bears the burden of proving the offenses beyond a reasonable doubt. At trial, it relied on a law enforcement agent with no specialized training to introduce the photographs. (R. at 288, 293, 301, 307.) It declined to call an expert to connect the injuries to the narrative. Its failure to do so may not have resonated with the members, but it should with this Court.

The Government next claims that TSgt Palik lost the right to self-defense by provoking the initial attack with the following actions: pouring water on SM to wake her up when she was passed out, throwing her phone out the window, and snapping another phone. (Ans. at 21; R. at 658–62.) The Government cites no case supporting its view of provocation. However, the *Military Judges' Benchbook* suggests that such an act would have to be "clearly calculated *and intended* to lead to a fight." Dept. of the Army Pamphlet 27-9 at 1669 (29 Feb. 2020) (emphasis added). This standard is not met here.

Furthermore, the Government's argument on this point stands in tension with its argument on the first specification, where it asserted that TSgt Palik exceeded necessity by pushing SM away when she was poking and pushing his face. (Ans. at 18–19.) Here, SM responded to TSgt Palik throwing her phone out the window by punching him in the face. (R. at 662.) This takes a very narrow view of self-defense when applied to TSgt Palik, but a broad view of "provocation" excusing SM's disproportionate reaction to TSgt Palik's actions.

3. Pulling SM's Hair (Specification 12 of Charge I)

For this Specification, the Government devotes all its effort towards an allegation of which the members acquitted TSgt Palik. Specification 12 of Charge I

originally alleged hair pulling on divers occasions, and SM testified to hair pulling on two occasions—pulling *into* the living room and, much later, pulling through the front door. (Charge Sheet, Record of Trial, Vol. 1; R. at 322–327.) The Government's entire analysis is on the first occasion: pulling "into the hallway towards the living room." (Ans. at 23 (citing R. at 322).) SM described the first alleged hair pulling—into the living room—on page 322 and 323 of the transcript. Her testimony claimed further misconduct, including two other charged offenses, before she alleged that he pulled her hair a second time to take her out of the apartment. (R. at 323–27.) Yet the members, by exceptions and substitutions, convicted TSgt Palik only of hair pulling "in the direction of, or through, the front door of the apartment." (R. at 990.) The Government is analyzing the wrong conduct. This Court may safely ignore all the Government's analysis, as it relates only to the first allegation of hair pulling, which yielded an acquittal.

TSgt Palik stands on his arguments on defense of property for removing SM, which included an accidental pulling of her hair as she fought to avoid leaving the apartment. (App. Br. at 16.) The Government does not address defense of property at all. Indeed, it glosses over SM's misconduct in destroying significant amounts of TSgt Palik's property on 20 August. For instance, the Government claims that SM had no reason to lie. (Ans. at 23.) But she, too, was subject to the UCMJ. She caused serious property damage and struck TSgt Palik repeatedly. The Government too readily ignores this motivation. (*See also* App. Br. at 17 (providing other credibility arguments that the Government does not address).)

WHEREFORE, this Honorable Court should set aside the findings and sentence and dismiss all specifications.

II.

THE GOVERNMENT LOST THE ONLY TWO VIDEO-RECORDED STATEMENTS FROM SM, THE COMPLAINING WITNESS FOR EVERY CONVICTED OFFENSE. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO FILE AN R.C.M. 914 MOTION DUE TO THE GOVERNMENT'S INABILITY TO PRODUCE HER STATEMENTS.

As the Government notes, both trial defense counsel averred that "if *United States v. Sigrah*, 82 M.J. 463 (C.A.A.F. 2022), had been decided at the time of Appellant's August 2021 court-martial, they might have taken a different approach." (Ans. at 27 (citing Declaration of Maj AN at 3, Declaration of Capt OH at 3).) But this admission only helps TSgt Palik's claim of ineffective assistance of counsel. The new law in *Sigrah*, if any, related to the test for *prejudice*. 82 M.J. at 468 (clarifying that *Kohlbek* provides the appropriate framework for prejudice analysis from a preserved nonconstitutional R.C.M. 914 error). It neither created, nor recognized, any new standard for an R.C.M. 914 error itself. Trial defense counsel had everything they needed in the rule and the case law at the time of Appellant's trial to take advantage of the lost interview, and they did not.

1. Trial defense counsel's affidavits do not provide a reasonable explanation for failing to raise a motion under R.C.M. 914.

The Government claims that "[s]ince trial defense counsel reasonably believed an R.C.M. 914 motion would fail, they had a reasonable explanation for not making one at Appellant's trial." (Ans. at 31.) But a close review of the affidavits shows that

trial defense counsel *never* said they believed the motion would fail. (Declaration of Maj AN; Declaration of Capt OH.) Their affidavits are entirely consistent with TSgt Palik's statement in the opening brief that it appears they were not aware of the Rule. (App. Br. at 24.) Indeed, both claimed that the *Sigrah* case might have changed their approach, but *Sigrah* added nothing to the decision to file the motion—it only clarified the standard for assessing prejudice upon the erroneous denial of an R.C.M. 914 motion. The Government reads strategy into the affidavits that is plainly not there.

The Government also claims that because trial defense counsel did not know for certain the interviews were recorded in a functioning format, this would undermine any R.C.M. 914 motion. First, this information did not inform the decision not to raise an R.C.M. 914 motion because trial defense counsel never contemplated raising such a motion.

Second, the Government's additional requirement of a recording "existing in a functional format" is untethered from case law and incorrectly limits the scope of the Government's "possession" for the purposes of R.C.M. 914. The Government cites *United States v. Muwwakkil* as support, but misses the case's import. (Ans. at 31 (citing 74 M.J. 187, 192 (C.A.A.F. 2015).) In rejecting the notion that lost statements fell within the Government's possession for R.C.M. 914, the Court of Appeals for the Armed Forces (CAAF) wrote that "this reading of R.C.M. 914 would effectively render the rule meaningless. The Government would be able to avoid the consequences of R.C.M. 914's clear language and intent simply by failing to take adequate steps to preserve statements." *Muwwakkil*, 74 M.J. at 192. *Muwwakkil* noted that its

conclusion mirrored that of courts interpreting the Jencks Act. *Id.* at 192–93. One example was *United States v. Augenblick*, 393 U.S. 348, 355–56 (1969), where the Supreme Court noted that extensive testimony about key tapes of a co-actor's interrogation could not solve the "mystery" of what happened to them; despite the uncertainty, the Government still bore the burden of producing them. The Government conspicuously fails to cite *Sigrah* in this part of its argument even though *Sigrah* contains strikingly similar facts to this case—recorded but never viewed statements at a military criminal investigative organization. Uncertainty about *how* the Government lost the evidence does not undermine the basis for a motion.

The Government raises a final argument that trial defense counsel were concerned about OSI potentially discovering the video, with adverse consequences for the case. (Ans. at 31–32.) But several points demonstrate this was not a reasonable calculation regarding *an R.C.M. 914 motion*. First, trial defense counsel *did* attack OSI for deleting the video. (R. at 294–96, 437, 792.) If there was a concern about pressing the Government or OSI to discover the video, this line of attack would serve the same purpose as the R.C.M. 914 motion. Second, and relatedly, the R.C.M. 914 motion would only arise after SM's testimony. It would not provide a significant opportunity for OSI to find a "deleted" video it could not find for the previous *year*. Third, trial defense counsel's concern that the video would be damaging to the case for prior consistent statements is overblown—prior consistent statements are admissible only in response to specific attacks. *See United States v. Finch*, 79 M.J.

389, 397–98 (C.A.A.F. 2020) (finding fault in the military judge's admission of an entire video as a prior consistent statement, and stating that a "party moving to introduce a prior statement has a duty to identify those portions of the statement that are consistent with the witness's testimony, and then to demonstrate the relevancy link between the prior consistent statement and how it will rehabilitate the witness's credibility").

While the affidavits discuss case strategy in general, they do not illuminate trial defense counsel's failure to raise an R.C.M. 914 motion.

2. On this issue, trial defense counsel's performance fell measurably below the standard for fallible lawyers.

The Government takes several approaches to defend trial defense counsel's steps. First, it repeats the mistake that *Sigrah* changed the law on what constitutes an R.C.M. 914 violation. (Ans. at 32.) If decided before trial, *Sigrah* would have aided trial defense counsel not because it was new law, but because the facts are almost identical to this case.

Next, the Government suggests that defense counsel are not required to file every possible motion. (Ans. at 33.) TSgt Palik agrees with this principle, but a cost-free, essentially case-dispositive motion is always worth filing.

Third, the Government claims that a reasonable attorney might think an R.C.M. 914 motion would fail either because there was no evidence the videos existed in the first place, or because the Government did not act "with gross negligence or bad faith." (Ans. at 33.) On the first point, the evidence in Appellate Exhibit XX was that the videos were deleted from the system. (App. Ex. XX at 8 ("On 26 Oct 20, it

was discovered the SUBJECT, VICTIM [SM], and VICTIM [SM] follow-up interview recordings were deleted from the Getac system without copying the videos to a disk.") On the second point, OSI's negligence was clear. (*See id.* ("[SI HO] was unaware of the timeframe OSI requires videos to be copied to a disk.").) OSI recorded statements that were subject to R.C.M. 914, and its agent was "unaware" of the timeframe for copying videos to a disk to preserve them. (*Id.*) Given that OSI recorded and then lost the videos, combined with its negligent failure to preserve them, the motion had a high likelihood of success.

Finally, the Government makes the concerning argument that trial defense counsel's overall performance can erase this specific error. (Ans. at 34 (citing *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986)). But *Kimmelman* only stated the general principle that reviewing courts can look at trial defense counsel's overall performance in assessing the impact of "identified acts or omissions." 477 U.S. at 386. *Kimmelman* does not disturb the principle that a single issue can give rise to ineffective assistance of counsel. *See United States v. Cronic*, 466 U.S. 648, 657 n.20 (1984) ("Of course, the type of breakdown in the adversarial process that implicates the Sixth Amendment is not limited to counsel's performance as a whole -- specific errors and omissions may be the focus of a claim of ineffective assistance as well.") This is such a case. Though trial defense counsel, overall, performed well, that does not eliminate an ineffective assistance claim on a case-dispositive motion that would have undermined the only remaining convicted specifications.

In sum, trial defense counsel's performance fell measurably below that of fallible attorneys.

3. There is a reasonable probability that filing an R.C.M. 914 motion would have led to a different result.

The Government strains to characterize *Sigrah* as unhelpful to TSgt Palik; so unhelpful that—despite extraordinarily close facts to the current case—raising an R.C.M. 914 motion would not even have had a *reasonable probability* of a altering the result. (Ans. at 34–35.) The Government highlights that in *Sigrah*, the government conceded an R.C.M. 914 violation on appeal. (*Id.*) Thus, unlike the Army, the Air Force Appellate Government Division believes that these facts do not constitute an R.C.M. 914 violation. Of note, the lower court in *Sigrah* reached this issue and held that the military judge erroneously found no R.C.M. 914 violation, a point the Government does not mention. *See United States v. Sigrah*, No. ARMY 20190556, 2021 CCA LEXIS 279, at *13–14 (A. Ct. Crim. App. 9 June 2021) (unpub. op.), *reversed on other grounds by Sigrah*, 82 M.J. at 468.

The Government also claims that the good faith loss doctrine would have prevented TSgt Palik from prevailing. (Ans. at 35.) But it has the challenging task of distinguishing *Sigrah*. In *Sigrah*, the Government attorneys on appeal, believed the similar facts precluded application of the good faith loss doctrine. 82 M.J. at 466 n.2. And, once again, the lower court in *Sigrah* actually found that the good faith loss doctrine did not apply. 2021 CCA LEXIS 279, at *15–16. For this analysis of this prong of ineffectiveness of counsel, it is not the concession in *Sigrah* that is dispositive. It is the facts themselves.

4. Conclusion

Trial defense counsel mounted a generally effective defense of TSgt Palik. But, as their affidavits make clear, they did not understand the power of R.C.M. 914 as an "important rule that furthers the defense's ability to confront witnesses who testify for the government." *Sigrah*, 82 M.J. at 469 (Maggs, J., concurring). Their failure to understand and use this rule was not strategy, it was ineffective assistance. TSgt Palik has met all three prongs of the analysis under *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011), and this Court should set aside the convictions.

WHEREFORE, TSgt Palik respectfully requests this Honorable Court set aside all charges and specifications.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 26 January 2023.

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31 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) RYAN M. PALIK, USAF, *Appellant.*	)))))))))	MOTION TO SUBMIT SUPPLEMENTAL CITATION OF AUTHORITIES ACM 40225 Panel No. 2

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

Pursuant to Rule 23.3(d) of this Honorable Court's Rules of Practice and Procedure, the United States respectfully moves to submit a supplemental citation of authorities because additional relevant law has come to the government's attention.

United States v. Thompson, 81 M.J. 391 (C.A.A.F. 2021) is relevant for this Court to consider when deciding Issue II: whether Appellant received effective assistance of counsel. Thompson provides additional context to our superior Court's earlier decision in United States v. Muwwakkil, 74 M.J. 187 (C.A.A.F. 2015).

In his reply brief, Appellant seemingly argues that it does not matter whether SM's video statements ever existed in a functional format. (App. Rep. Br. at 6.) He claims that considering whether the recordings existed in a functional format as part of an R.C.M. 914 analysis "is untethered from case law." (Id.) Appellant implies that Muwwakkil, 74 M.J. at 192, requires the government to ensure witness interviews are captured and preserved in a functional format. (Id.) But Muwwakkil involved functional recordings that were known to exist and were in the possession of the government at one time and were later lost. *See* id. at 189 (explaining that a party played a functional recording to summarize witness testimony, but the recording itself was lost). The government in Muwwakkil had argued that R.C.M. 914 did not apply

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because the lost statements were no longer "in the possession of the United States." Id. at 192. CAAF rejected that particular argument because – as Appellant notes – "[t]he Government would be able to avoid the consequences of R.C.M.'s clear language and intent simply by failing to take adequate steps to preserve statements." Id. Still, Muwwakkil did not address cases like Appellant's where no one could confirm whether functional recordings of SM's interviews had ever been in the government's possession.

Thompson refutes Appellant's contention that Muwwakkil extends to cases where no one knows whether a recording existed in a functional format. In Thompson, CAAF clarified that law enforcement agents have no obligation to *create* R.C.M. 914 qualifying statements during witness interviews. 81 M.J. at 395. CAAF then cited United States v. Bernard, 625 F.2d 854, 859-60 (9th Cir. 1980) for the proposition that the government is not "required to create Jencks Act material by recording everything a potential witness says." Thompson, 81 M.J. at 395. If the government had no obligation to record SM's interview, then whether a working recording ever existed is relevant to whether the government "possessed" the recording under R.C.M. 914. Contrary to Appellant's insinuations, Muwwakkil and R.C.M. 914 do not require the government to preserve statements that were never in the possession of the government to begin with. Because Appellant's trial defense counsel could not prove that the recordings of SM's interviews ever existed, they could not show that the recordings were ever in the "possession of the United States" for purposes of R.C.M. 914. Since they could not meet their burden as the moving party at trial, trial defense counsel were not ineffective for not filing a motion for relief under R.C.M. 914.

For these reasons, the United States respectfully requests that this Court grant its motion to submit supplemental citation of authority.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, civilian defense counsel, and to the Air Force Appellate Defense Division on 31 January 2023.

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APPENDIX

United States v. Thompson

United States Court of Appeals for the Armed Forces

May 25, 2021, Argued; August 9, 2021, Decided

No. 21-0111

Reporter

81 M.J. 391 *; 2021 CAAF LEXIS 747 **; 2021 WL 3520515

UNITED STATES, Appellee v. Jesse M. THOMPSON, Sergeant First Class, United States Army, Appellant

Prior History: [1]** Crim. App. No. 20180519. Military Judges: Fansu Ku (arraignment) and Christopher E. Martin (trial).

United States v. Thompson, 2020 CCA LEXIS 420, 2020 WL 6899432 (A.C.C.A., Nov. 23, 2020)

Counsel: For Appellant: Captain Thomas J. Travers (argued); Colonel Michael C. Friess, Lieutenant Colonel Angela D. Swilley, Major Kyle C. Sprague, and Captain Lauren M. Teel (on brief).

For Appellee: Major Anthony A. Contrada (argued); Colonel Steven P. Haight, Lieutenant Colonel Wayne H. Williams, and Major Brett A. Cramer (on brief).

Judges: Judge SPARKS delivered the opinion of the Court, in which Judge MAGGS and Judge HARDY, and Senior Judge STUCKY, joined. Chief Judge OHLSON filed a separate opinion concurring in the result.

Opinion by: SPARKS

Opinion

[*393] Judge SPARKS delivered the opinion of the Court.

A general court-martial composed of a military judge sitting alone convicted Appellant, pursuant to his plea, of adultery, in violation of Article 134, UCMJ, *10 U.S.C. § 934 (2012)*. Contrary to his plea, Appellant was convicted of solicitation of production of child pornography, in violation of Article 134, UCMJ, *10 U.S.C. § 934 (2012)*. The military judge sentenced Appellant to a bad-conduct discharge and confinement for twenty-four months. The United States Army Court of Criminal Appeals affirmed the findings and sentence as approved by the convening authority. *United States v. Thompson, No. ARMY 20180519, 2020 CCA LEXIS 420, at *9, 2020 WL 6899432, at *4 (A. Ct. Crim. App. Nov. 23, 2020)* (unpublished).

We granted **[**2]** review to determine whether the military judge abused his discretion in failing to strike the victim's testimony under Rule for Courts-Martial (R.C.M.) 914. R.C.M. 914 requires the government to make available to the defense, after a witness has testified, any statement possessed by the United States that the witness has made. We conclude that the military judge did not abuse his discretion when he denied Appellant's R.C.M. 914 motion because the United States was not in possession of the alleged statement.

Background

In 2009, DS was approximately thirteen or fourteen years old when she first met Appellant, who was her uncle by marriage. In 2012, Appellant began sending DS Facebook messages complementing her looks. Their messaging progressed into daily Skype chats which were sexual in nature.

In 2015, the Federal Bureau of Investigation (FBI) began investigating Appellant after DS's mother,

MC, reported that she had discovered nude photographs of DS and Appellant on DS's iPad. After the FBI's investigation had progressed for more than a year, Appellant's case was transferred to the Army Criminal Investigation Command (CID).

During the investigation, DS had difficulty remembering the dates of her in-person interactions with Appellant due to the **[**3]** passage of time. In order to help DS remember, she and her mother created a written time line, using Facebook and MC's calendar, identifying the dates of DS's in-person interactions with Appellant. MC testified to the creation of the time line as follows:

> We talked about the relationship and things that had happened. [DS] could not remember the timeline very well. We looked through Facebook and said, "Oh, there was the visit"—we didn't remember what year family Christmas of 2012 was, so we did go back and look at, this was 2012 when this happened. "Oh yeah, the wedding was 2011. Oh, yeah, the first time we met was 2010." We did not remember those dates, so we did have to go back and find them out.

DS had the time line in her pocket when she was interviewed by CID. The following colloquy during the interview took place:

> [CID Investigator]: Now you said you brought some—or you had some notes or **[*394]** something written down or something like that, dates and all that kind of stuff.
> [DS]: Yeah. I have it.
> [CID Investigator]: Have we pretty well covered most of that already?
> (pause)
>
> [DS]: Um, yeah. We covered when I first - when I first met him. But, I mean, I have specific dates if you want those. I **[**4]** couldn't remember them off the top of my head, but if you want them.
> [CID Investigator]: It's okay.
> [DS]: But we covered pretty much the—
> [CID Investigator]: And it—the specific dates, um, the only one that you're really confident of is the—
> [DS: March 8th.
> [CID Investigator]: —is the March 8th. Okay. All right. And the other ones, you're not a hundred percent on, but you kind of have an idea of the timeframe. Is that right?
> [DS]: Yeah. I wouldn't be able to remember them off the top of my head, but, um, whenever I—how I got those dates were just from pictures that we had taken on those different times.
> [CID Investigator]: Okay. Okay. And you—where are those pictures now?
> [DS]: They're probably on Facebook.
> [CID Investigator]: Okay. All right. Um, okay. So that's something I can probably get from you at a later time?
> [DS]: Yeah
> [CID Investigator]: Okay.
> [DS]: Yeah.

The CID Investigator did not collect the time line from DS during or after the interview. DS subsequently lost the time line.

After DS testified on direct at Appellant's court-martial, trial defense counsel moved to strike DS's trial testimony under R.C.M. 914 because the Government could not produce the lost time line. The military judge denied **[**5]** the R.C.M. 914 motion finding: (1) the time line was not a statement as it was not signed, adopted, or otherwise approved, nor intended to transmit information; (2) the time line was not in the possession of the United States; (3) the Government had not acted in bad faith or was not grossly negligent in losing the time line; and (4) it was unclear if the time line related to the subject matter of DS's testimony.

On appeal, Appellant argued the military judge erred in denying his R.C.M. 914 motion. *Thompson, 2020 CCA LEXIS 420, at *4-5, 2020 WL 6899432, at *3*. The lower court concluded that the military judge had not abused his discretion

because the time line did not qualify as an R.C.M. 914 statement and it was not in the possession of the United States. *Id. at *6-9, 2020 WL 6899432, at *3-4*. On the latter point, Appellant argued that while the time line was never in the Government's actual possession, it was in the Government's constructive possession because DS had offered the time line to CID. *Id. at *8, 2020 WL 6899432, at *4*. The lower court disagreed finding there had to be a joint law enforcement investigation between federal and state authorities for constructive possession to apply under R.C.M. 914. *Id. at *8-9, 2020 WL 6899432, at *4*.

Discussion

Appellant argues that the military judge abused his discretion in denying his R.C.M. 914 motion because the time line: (1) was a statement; (2) **[**6]** was in the constructive possession of the United States; (3) related to DS's testimony; and (4) was not lost in good faith.

We review a military judge's ruling on a R.C.M. 914 motion for an abuse of discretion. *United States v. Clark, 79 M.J. 449, 453 (C.A.A.F. 2020)*. "An abuse of discretion occurs when a military judge's findings of facts are clearly erroneous or his conclusions of law are incorrect." *Id.*

R.C.M. 914(a) states:

> After a witness other than the accused has testified on direct examination, the military judge, on motion of a party who did not call the witness, shall order the party who called the witness to produce, for examination and use by the moving party, any statement of the witness that relates to the subject matter concerning which the witness has testified, and that is:
>
> **[*395]** (1) In the case of a witness called by the trial counsel, in the possession of the United States; or
>
> (2) In the case of a witness called by the defense, in the possession of the accused or defense counsel.

The Jencks Act requires the trial judge, upon motion by the accused, to order the government to disclose prior "statement[s]" of its witnesses that are "relate[d] to the subject matter" of their testimony after each witness testifies on direct examination. *18 U.S.C. § 3500(b)*. "In 1984, the President **[**7]** promulgated R.C.M. 914, and this rule 'tracks the language of the Jencks Act, but it also includes disclosure of prior statements by defense witnesses other than the accused.'" *United States v. Muwwakkil, 74 M.J. 187, 190-91 (C.A.A.F. 2015)* (citation omitted). "Given the similarities in language and purpose between R.C.M. 914 and the Jencks Act, we have conclude[ed] that our Jencks Act case law and that of the Supreme Court informs our analysis of R.C.M. 914 issues." *Id. at 191*.

If the government, as the opposing party, fails to produce a qualifying statement, R.C.M. 914(e) provides the military judge with two remedies for the government's failure to deliver the qualifying statement: (1) "order that the testimony of the witness be disregarded by the trier of fact" or (2) "declare a mistrial if required in the interest of justice." When the military judge errs in denying a R.C.M. 914 motion, we determine whether this error prejudiced Appellant based on the nature of the right violated. *Clark, 79 M.J. at 454*.

Not every failure to produce a qualifying statement invokes a R.C.M. 914 remedy. Both the Supreme Court and this Court "have indicated that good faith loss or destruction of Jencks Act material and R.C.M. 914 material may excuse the government's failure to produce 'statements.'" *Id.* (citing *Muwwakkil, 74 M.J. at 193*; *United States v. Augenblick, 393 U.S. 348, 355-56, 89 S. Ct. 528, 21 L. Ed. 2d 537 (1969)*). "A finding of sufficient negligence may serve as **[**8]** the basis for a military judge's conclusion that the good faith loss doctrine does not apply." *Id.* (citing *Muwwakkil, 74 M.J. at 193*).

The relevant language of R.C.M. 914 requires the government to produce any pertinent statement of a

prosecution witness "in the possession of the United States." R.C.M. 914 (a)(1). R.C.M. 914 does not apply if the statement is not in the possession of the United States. R.C.M. 914 concerns preservation and disclosure of statements in the government's possession, not the collection or creation of evidence. Here, law enforcement chose not to take possession of DS's time line. This decision did not violate R.C.M. 914 because there was no obligation for CID to create an R.C.M. 914 qualifying statement during its interview of DS. *See United States v. Bernard, 625 F.2d 854, 859-60 (9th Cir. 1980)* (rejecting a claim that the government is required to create Jencks Act material by recording everything a potential witness says); *United States. v. Martinez-Mercado, 888 F.2d 1484, 1490 (5th Cir. 1989)* (the government is not required to develop potential Jencks Act statements by demanding that its witnesses reduce to writing every matter about which they intend to testify at trial; rather, the government is obligated to reveal to the defendant no more than what is embodied in reports and within statements); *United States v. Brennerman, 818 F. App'x 25, 30 (2d Cir. 2020)* (holding that the government was not "under any obligation under the Jencks **[**9]** Act to collect" personal notes prepared by a witness that "were not in the government's possession" at any time).

While the time line was not in the actual possession of the United States, Appellant contends that the time line was in its constructive possession because the CID Investigator, while acting on behalf of the Army, had access to the time line and consciously avoided collecting it. We have not previously addressed whether constructive possession applies to R.C.M. 914.

Federal circuit courts have generally concluded that the Jencks Act applies only to statements possessed by the prosecutorial arm of the federal government. *See, e.g., United States v. Naranjo, 634 F.3d 1198, 1211-12 (11th Cir. 2011)* (holding that a statement is in the possession of the United **[*396]** States for Jencks Act purposes "if it is in the possession of a federal prosecutorial agency" (internal quotation marks omitted) (quoting *United States v. Cagnina, 697 F.2d 915, 922 (11th Cir. 1983)*)). The prosecutorial arm of the federal government may, in certain cases, include nonfederal entities when the nonfederal entity is acting in concert or at the behest of the federal government as its agent. *See United States v. Moeckly, 769 F.2d 453, 463 (8th Cir. 1985)* ("The Jencks Act does not apply to statements made to state officials when there is no joint investigation or cooperation with federal authorities." **[**10]** (citations omitted)). Where the statements are physically held by someone other than a federal prosecutorial agency, such statements are generally not considered in the possession of the United States unless the holder serves as "an arm of the United States government." *United States v. Reyeros, 537 F.3d 270, 285 (3rd Cir. 2008)* (holding that Columbian courts holding extradition documents did not serve as an arm of the United States government and therefore the Jencks Act did not apply to such documents).

Consistent with the federal circuit courts, we conclude that R.C.M. 914 applies only to statements possessed by the prosecutorial arm of the federal government or when a nonfederal entity has a joint investigation with the United States. Ultimately, the party in control of the time line was DS—a third-party private citizen—not the United States, and therefore the time line was not subject to R.C.M. 914 production.[1]

Appellant argues that if we do not extend the doctrine of constructive possession to the instant case we allow the Government to avoid the consequences of R.C.M. 914 by failing to take adequate measures to preserve R.C.M. 914 statements. However, in the case Appellant cites for this proposition, *Muwwakkil, 74 M.J. at 192-93*, it was undisputed that the lost Article 32, UCMJ, *10 U.S.C. § 832 (2012)*, recorded victim testimony

[1] Having held that the time line was never in the actual or constructive possession of the United States, we need not and do not address whether the time line was a R.C.M. 914 statement or if the good faith loss doctrine applies to these facts.

had **[**11]** been in the actual possession of the United States before being lost. Thus, we held that the government could not be rewarded for its own negligence in failing to preserve the recording. *Id. at 193*. Here, the Government, unlike in *Muwwakkil*, had no obligation pursuant to R.C.M. 914 to preserve the time line which it never possessed.

Under the circumstances of this case, Appellant's reliance on the doctrine of constructive possession is misplaced. Accordingly, the military judge did not abuse his discretion in ruling that DS's time line was not in the possession of the United States pursuant to R.C.M. 914.

Decision

The judgment of the United States Army Court of Criminal Appeals is affirmed.

Concur by: OHLSON

Concur

Chief Judge OHLSON, concurring in the result.

Although I concur with the majority's holding that Appellant is not entitled to relief under Rule for Courts-Martial (R.C.M.) 914, I do not agree with their line of reasoning in reaching that result. Specifically, I would hold that DS's time line was a statement and that it was in the possession of the Government under R.C.M. 914, but that Appellant is not entitled to relief because of the good faith loss doctrine. Therefore, I write separately.

I. Applicable Law

R.C.M. 914(a)(1) requires the government, pursuant to a motion, to produce for **[**12]** the defense any relevant statement of a prosecution witness that is in the possession of the United States. A statement under R.C.M. 914 is defined as follows:

> (1) A written statement made by the witness that is signed *or otherwise adopted or approved by the witness*; [or]
> (2) A substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and contained in stenographic, mechanical, electrical, or other recording or a transcription thereof.

[*397] R.C.M. 914(f)(1)-(2) (2016) (emphasis added). Thus, under the provisions of R.C.M. 914 and our case law, in order for a statement to qualify under the rule, (1) the witness must have "made" the statement, (2) the witness must have signed, adopted, or approved the statement, and (3) the statement must relate to the subject matter to which the witness testified. *See United States v. Gonzalez-Melendez, 594 F.3d 28, 36 (1st Cir. 2010)* (defendant not entitled to discover FBI's recording of witness' out-of-court statements because there was no evidence that witness adopted it); *United States v. Oruche, 484 F.3d 590, 599, 376 U.S. App. D.C. 92 (D.C. Cir. 2007)* (government was not required to provide irrelevant grand jury testimony of a testifying witness).

In addition to these requirements, the statement also must be within the government's possession. In that regard, **[**13]** this Court has determined that R.C.M. 914 applies "to destroyed or lost statements" previously in the government's control, and that such lost statements are deemed to be in the government's continuing "possession" for purposes of R.C.M. 914. *United States v. Muwwakkil, 74 M.J. 187, 192-93 (C.A.A.F. 2015)* (describing how the government is implicitly required to take adequate steps to preserve statements). If these requirements are met, then the writing in question is a qualifying statement under R.C.M. 914.

If the government "elects" not to produce a qualifying statement, the military judge "shall order that the testimony of the witness be disregarded by the trier of fact [or] shall declare a mistrial *if*

required in the interest of justice." R.C.M. 914(e) (emphasis added). However, as the majority observes, there is a limited "judicially created good faith loss doctrine" that may apply to such situations. *Muwwakkil, 74 M.J. at 193*. Specifically, a military judge may decline to impose sanctions if there is a good faith loss by the government, that is, if the government neither acted in bad faith nor was sufficiently negligent in maintaining possession of the statement. *United States v. Moore, 452 F.3d 382, 389 (5th Cir. 2006)*; *see also United States v. Marsh, 21 M.J. 445, 451-52 (C.M.A. 1986)* (stating that "the drastic remedy of striking the testimony" for a violation of the Jencks Act, *18 U.S.C. § 3500(b)*, may be "required for deliberate suppression **[**14]** or for bad-faith destruction" of statements or for "gross negligence amounting to an election by the prosecution to suppress these materials").

II. Analysis

A. The Government Possessed the Time Line

The majority holds that the military judge did not abuse his discretion in concluding that the time line was not in the possession of the Government. In particular, the majority concludes that (1) the CID agent had "no obligation . . . to create an R.C.M. 914 qualifying statement during its interview of DS" and (2) the government cannot constructively possess the statements of a non-informant witness under R.C.M. 914. Although I generally agree with the proposition that the government does not have an affirmative burden to *create* R.C.M. 914 statements, this principle does not apply in the instant case because the Government was offered a statement that already had been created by the witness.[1] More critically, I firmly disagree with the majority's view that the government cannot constructively possess a statement made by a witness who is not part of the prosecutorial arm of the United States. Instead, I conclude that consistent with the provisions of applicable rules and case law, when a prosecution witness (a) unconditionally **[**15]** offers to a government agent (b) a previously prepared statement (c) that is immediately and easily accessible by the government agent and (d) that is **[*398]** the subject matter of the witness's testimony, then (e) that government agent constructively possesses that statement for the purposes of R.C.M. 914. *See generally United States v. Stellato, 74 M.J. 473 (C.A.A.F. 2015)*; *United States v. Muwwakkil, 74 M.J. 187 (C.A.A.F. 2015)*.

The majority is correct that the doctrine of constructive possession is usually applied in cases where there is a joint law enforcement investigation between federal and state authorities. *See, e.g., United States v. Naranjo, 634 F.3d 1198, 1211-13 (11th Cir. 2011)*; *United States v. Brooks, 79 M.J. 501, 508-09 (Army Ct. Crim. App. 2019)*. Further, because a non-informant witness is not a government agent, courts should indeed be circumspect about ruling that the government constructively possessed such a witness's notes because, unlike government agents and informants, cooperating witnesses are not categorically under the control of the government. *See United States v. Reyeros, 537 F.3d 270, 281-85 (3d Cir. 2008)*. However, this Court's decision in *Stellato* (albeit in the R.C.M. 701 context) demonstrates that the constructive possession doctrine can certainly extend to those situations where the government has the ability to control the handling and

[1] The majority cites *United States v. Brennerman* for the proposition that the government is not "under any obligation under the Jencks Act to collect" personal notes prepared by a witness that "were not in the government's possession" at any time. *818 F. App'x 25, 30 (2d Cir. 2020)*. Putting aside that this is an unpublished case, the Second Circuit's analysis of whether the government violated its disclosure obligations hinged on an observation that the government "[was] not aware of the personal notes" and a single citation to another Second Circuit case that determined federal authorities did not possess a local police file because there was no joint federal-state investigation. *Id. at 30* (citing *United States v. Bermudez, 526 F.2d 89, 100 n.9 (2d Cir. 1975)*). Neither Brennerman nor Bermudez respond to the facts of this case in a manner that fully supports the majority's view.

disposition of evidence in the custody of a cooperating witness. *74 M.J. at 483* (citing *United States v. Muwwakkil, 74 M.J. 187*). As this Court observed in *Stellato* ***[**16]*** , "the Government need not physically possess an object for it to be within the possession, custody, or control of military authorities." *74 M.J. at 485*.

Indeed, my grave concern is that to hold otherwise will incentivize government agents "to avoid the consequences of R.C.M. 914's clear language and intent simply by [purposely] failing to take adequate steps to preserve statements." *Muwwakkil, 74 MJ at 192*. As stated in Appellant's brief, a holding such as the majority's will "encourage law enforcement personnel to intentionally avoid collecting relevant evidence for fear it might not fit the government's theory of the case and [then] they [will] have to disclose [any exculpatory] evidence to the defense." Brief for Appellant at 11, *United States v. Thompson*, No. 21-0111 (C.A.A.F. Mar. 24, 2021)

The majority asserts that the legal issue before us turns on whether the government once actually physically possessed the statement. I am unconvinced. Consider the following scenario: a cooperating government witness repeatedly and unconditionally tries to hand to an investigating agent a written statement that already was prepared by the witness and that is directly relevant to the witness's testimony. However, the agent consistently rebuffs **[**17]** the witness's efforts because the agent is concerned that the statement contains evidence favorable to the defense. The majority would hold that the provisions of R.C.M. 914 would not apply. I wholeheartedly disagree.

Similarly, in the instant case the prosecution witness unconditionally offered the CID agent a previously prepared time line that was directly relevant to her testimony and that was in her pocket. Under these facts, I conclude that the Government constructively possessed DS's statement. As a result, I would hold that the military judge clearly erred in finding that the Government did not possess the time line.

B. The Time Line Was a Statement

Because I would find that the time line was in the possession of the Government, I next consider whether the time line was a statement under R.C.M. 914. I would hold that it is. In *United States v. Clark*, we held that this Court adopts an "expansive interpretation of the definition of 'statement.'" *79 M.J. 449, 454 (C.A.A.F. 2020)*. As the military judge noted, statements under R.C.M. 914 are generally intended to transmit information. *See United States v. Carrasco, 537 F.2d 372, 375 (9th Cir. 1976)*. Here, the time line purported to do exactly that: it outlined the history of DS's interactions with Appellant over a six-year period, including incidents that **[**18]** constituted the charged misconduct. These facts are substantively different from those found in *United States v. Ramirez* where the Fifth Circuit concluded that "scattered notes" taken by an informant-witness over the course of the investigation that included "odd pieces of paper on which [the witness] jotted down names, addresses, and license plate numbers" and that were destroyed before the witness testified "do not **[*399]** fit within the [Jencks] Act's purview." *954 F.2d 1035, 1038 (5th Cir. 1992)*. Therefore, the military judge's finding that the time line was more like notes for recollection rather than a statement under R.C.M. 914 demonstrated an improper understanding of the law and an incorrect application of the facts to the law.[2]

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[2] As examples, this Court and the CCAs have determined that the following constitute "statements" under the Jencks Act or R.C.M. 914: (1) a law enforcement officer's written notes of his interview with an informant or another witness if the officer is called to testify, *United States v. Jarrie, 5 M.J. 193, 194 (C.M.A. 1978)*; *see also Clancy v. United States, 365 U.S. 312, 315, 81 S. Ct. 645, 5 L. Ed. 2d 574 (1961)*; *United States v. Jordan, 316 F.3d 1215, 1253 (11th Cir. 2003)*; (2) a witness's Article 32, UCMJ, testimony, *Muwwakkil, 74 M.J. at 192*; (3) an audio recording of a witness interview, *Brooks, 79 M.J. at 506* (citing R.C.M. 914(f)(2)); (4) a tape recording of an officer's interview with a witness after the officer testifies, *United States v. Walbert, 14 C.M.A. 34, 37, 33 C.M.R. 246, 249 (1963)*; and (5) agents' statements while interviewing the accused. *Clark, 79 M.J.*

The military judge also clearly erred in finding that DS did not adopt or approve the statement. DS created the time line with her mother by selecting the pieces of information from Facebook and the calendar that they presumably believed were accurate and relevant. Further, DS carried the time line with her and offered to hand it over to an investigative agent of the United States government, again evincing her belief that the time line was accurate, relevant, and helpful. *See Carrasco, 537 F.2d at 375* ("By giving **[**19]** her diary to [the law enforcement agent, the paid government informant] transformed what had been a diary not covered by the Jencks Act into a statement which was.").[3] For these reasons, I conclude that the time line was a statement and the military judge clearly erred in finding otherwise.

C. Good Faith

Even though I conclude that the military judge erred in finding that the time line was not a statement in the possession of the Government, I would find that the military judge did not abuse his discretion when he concluded that there was "no bad faith or gross negligence" on the part of the Government. *Muwwakkil, 74 M.J. at 193*. Setting aside the issue of what degree of negligence is necessary to conclude that an R.C.M. 914 remedy is appropriate, there is no basis to conclude that the military judge did not properly comprehend the legal question of what constitutes good faith. Further, there is no basis to conclude that the military judge's factual finding was clearly erroneous when he concluded that the CID agent did not engage in bad faith by failing to obtain the time line from DS. At the CID interview when DS offered the time line to the agent, he responded that "he didn't need [it]." *United States v. Thompson, No. ARMY 20180519, 2020 CCA LEXIS 420 at *4, 2020 WL 6899432 at *2 (Army Ct. Crim. App. Nov. 23, 2020)*. The agent's decision not to **[**20]** collect the time line is neither inexplicable nor necessarily predicated on bad faith. Because DS and her mother coauthored the time line, the CID agent may have simply been seeking to obtain DS's recollection of events based solely on DS's own memory. The agent also may have determined that the time line's value was negligible: the Government already had access to the calendar and Facebook photographs with time stamps, all of which created their own irrefutable time line.[4] The record, therefore, supports the military judge's determination **[*400]** that there was no bad faith or gross negligence on the part of the Government. Accordingly, the military judge acted in a manner consistent with the good faith loss doctrine when he declined to impose any sanctions on the Government. *Muwwakkil, 74 M.J. at 193*.

III. Conclusion

Although I conclude that for R.C.M. 914 purposes DS's time line constituted a statement and was in the constructive possession of the Government, I also conclude that the good faith loss doctrine applies in this case such that Appellant is not entitled to relief. Therefore, I vote to affirm the judgment of the Army Court of Criminal Appeals.

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at 454. *See also Carrasco, 537 F.2d at 375-76* (finding a diary of a government informant to be a statement because it consisted of daily entries documenting the events leading up to a narcotics transaction that was signed or initialed on each page by the author as accurate).

[3] R.C.M. 914 requirements for determining whether something is a "statement" that was "adopted or approved" by the witness do not revolve around the issue of whether any witness relied on the statement at trial or whether investigators incorporated the statement into their report.

[4] Defense counsel also had access to the calendar, cross-examining DS on it, and could have gained access to the Facebook photographs but never requested them. Given that the defense made a request only for the time line and did not seek the Facebook photographs, it could be argued "that the purpose of the production request in this case was [not] to use the [time line] for impeachment purposes, but [rather] to prevent [DS] . . . from being able to testify . . . . [If so, t]he Jencks Act is not an appropriate tool for achieving that end." *United States v. Bobadilla-Lopez, 954 F.2d 519, 523 (9th Cir. 1992)*.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Technical Sergeant (E-6) **RYAN M. PALIK,** United States Air Force *Appellant*	)))))))))	**RESPONSE TO MOTION TO SUBMIT SUPPLEMENTAL CITATION TO AUTHORITIES** Before Panel No. 2 No. ACM 40225 2 February 2023

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

Pursuant to Rule 23.2 and 23(c) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby responds to the Government's Motion to Submit Supplemental Citation to Authorities, filed on 31 January 2023 (Gov. Mot.).

Appellant does not oppose the Government's Motion. However, the supplemental authority, *United States v. Thompson*, 81 M.J. 391 (C.A.A.F. 2021), offers this Court little assistance in resolving the assignment of error. Appellant agrees that the Government is not "required to create Jencks Act material by recording everything a potential witness says." (Gov. Mot. at 2 (citing *id.* at 395).) *Thompson* involved the Army Criminal Investigative Division's (CID's) failure to obtain a written timeline that the complaining witness possessed during her interview. 81 M.J. at 393–94. In that situation, CID had no obligation to take possession of the timeline. Here, the Government argues that because there is no obligation to create Jencks Act or R.C.M. 914 material, the defense counsel's inability

to prove that video recordings existed means they were not ineffective in failing to raise an R.C.M. 914 motion.

Understandably, the Government cannot point to a case that supports its point directly, as defense counsel need not prove precisely *how* the Government lost or deleted the recording. In *United States v. Sigrah*, there was similarly no indication that the lost videos were ever viewed or viewable. 82 M.J. 463, 465–66 (C.A.A.F. 2022). In support of the motion in *Sigrah*, defense counsel called an investigator who testified that it was always his practice to turn the audio on, thus starting the recording. *Id.* This was sufficient for the court of criminal appeals, *United States v. Sigrah*, 2021 CCA LEXIS 279, at *13 (A. Ct. Crim. App. 9 Jun. 2021) (mem. op.) (unpub. op.), and though the Court of Appeals for the Armed Forces (CAAF) resolved the case on different grounds, it noted that it still had the power to review this finding if it so chose. 82 M.J. at 466 n.2.

Turning to this case, defense counsel—as in *Sigrah*—could have used an Article 39(a), UCMJ, session to establish a comparable factual predicate *if* they filed an R.C.M. 914 motion. And that predicate is limited: the Government has a standardized recording practice and there is no reason to believe it failed to function in this case. Even without trying, defense counsel here still established a similar predicate. During the interview with Special Investigator HO, she acknowledged that it is generally their practice to record complaining witness interviews, and that the interviews were recorded. (R. at 295–96.) At no point did any agent say the recording failed; every bit of evidence presented was that it was deleted or lost.

In conclusion, Appellant does not oppose the Government's motion to cite additional authority, but, as noted above, Appellant believes that *Thompson* has far less value in resolving this case than *Sigrah*.

WHEREFORE, counsel respectfully responds to the Government's motion.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 2 February 2023.

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