IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	
	)	Before Panel No. 1
Senior Airman (E-4) **JONATHON V. TYSON,** United States Air Force, *Appellant.*	)	No. ACM 40617
	)	23 July 2024

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 60 days, which will end on **3 October 2024**. The record of trial was docketed with this Court on 5 June 2024. From the date of docketing to the present date, 48 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
[redacted]

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 Air Force Government Trial and Appellate Operations Division on 23 July 2024.

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
[redacted]

23 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JOHNATHON V. TYSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40617 Panel No. 1

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

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

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

[redacted]

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 23 July 2024.

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40617**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jonathon V. TYSON	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 23 July 2024, counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 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 24th day of July, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **3 October 2024**.

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

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40617**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Jonathon V. TYSON	)	**PANEL CHANGE**
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 25th day of September, 2024,

ORDERED:

The record of trial in the above styled matter is withdrawn from Panel 1 and referred to a Special Panel for appellate review.

The Special Panel in this matter shall be constituted as follows:

ANNEXSTAD, WILLIAM J., Colonel, Senior Appellate Military Judge
DOUGLAS, KRISTINE M., Colonel, Appellate Military Judge
WARREN, CHARLES G., Lieutenant Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (SECOND)**
v.	)	
	)	Before Panel No. 1
Senior Airman (E-4)	)	
JONATHON V. TYSON,	)	No. ACM 40617
United States Air Force,	)	
Appellant.	)	23 September 2024

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

Pursuant to Rule 23.3(m)(3) and (4) of this Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **2 November 2024**. The record of trial was docketed with this Court on 5 June 2024. From the date of docketing to the present date, 110 days have elapsed. On the date requested, 150 days will have elapsed.

On 15 December 2023, a general court-martial convened at Minot Air Force Base, North Dakota, consisting of officer and enlisted members found Appellant, contrary to his pleas, guilty of one charge and six specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice (UCMJ). R. at 1, 117, 120, 1157. Consistent with his pleas, Appellant was acquitted of three specifications of domestic violence, in violation of Article 128b, UCMJ. R. at 117, 120, 1157. On 16 December 2023, the panel of officer and enlisted members sentenced Appellant to be reduced to the grade of E-1, to be confined for one year, and to be discharged with a bad conduct discharge. R. at 1241-42. The convening authority took no action on the findings or sentence and denied Appellant's request for (1) suspension, commutation, or reduction of the adjudged reduction in pay grade and (2) waiver of automatic forfeitures.

Convening Authority Decision on Action – *United States v. Senior Airman Jonathon Tyson* (Jan. 19, 2024).

The trial transcript is 1244 pages long and the electronic record of trial is three volumes containing 25 Prosecution Exhibits, 14 Defense Exhibits, one Court Exhibit, and 71 Appellate Exhibits. Appellant is not currently confined.

Appellant was advised of his right to a timely appeal. Appellant was provided an update of the status of undersigned counsel's progress on his case. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

Through no fault of Appellant, undersigned counsel has been unable complete her review of Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise him regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Court grant the requested enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
[redacted]

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 Air Force Government Trial and Appellate Operations Division on 23 September 2024.

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
[redacted]

24 September 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JONATHON V. TYSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40617 Panel No. 1

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

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

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

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 24 September 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (THIRD)**
v.	)	
	)	Before Special Panel
Senior Airman (E-4)	)	
JONATHON V. TYSON,	)	No. ACM 40617
United States Air Force,	)	
Appellant.	)	21 October 2024

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

Pursuant to Rule 23.3(m)(3) and (4) of this Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **2 December 2024**. The record of trial was docketed with this Court on 5 June 2024. From the date of docketing to the present date, 138 days have elapsed. On the date requested, 180 days will have elapsed.

On 15 December 2023, a general court-martial convened at Minot Air Force Base, North Dakota, consisting of officer and enlisted members found Appellant, contrary to his pleas, guilty of one charge and six specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice (UCMJ). R. at 1, 117, 120, 1157. Consistent with his pleas, Appellant was acquitted of three specifications of domestic violence, in violation of Article 128b, UCMJ. R. at 117, 120, 1157. On 16 December 2023, the panel of officer and enlisted members sentenced Appellant to be reduced to the grade of E-1, to be confined for one year, and to be discharged with a bad conduct discharge. R. at 1241-42. The convening authority took no action on the findings or sentence and denied Appellant's requests for (1) suspension, commutation, or reduction of the adjudged reduction in pay grade and (2) waiver of automatic forfeitures.

Convening Authority Decision on Action – *United States v. Senior Airman Jonathon Tyson* (Jan. 19, 2024).

The trial transcript is 1244 pages long and the electronic record of trial is three volumes containing 25 Prosecution Exhibits, 14 Defense Exhibits, one Court Exhibit, and 71 Appellate Exhibits. Appellant is not currently confined.

Appellant was advised of his right to a timely appeal. Appellant was provided an update of the status of undersigned counsel's progress on his case. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

Through no fault of Appellant, undersigned counsel has been unable complete her review of Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise him regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Court grant the requested enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
[redacted]

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 Air Force Government Trial and Appellate Operations Division on 21 October 2024.

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
[redacted]

21 October 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JONATHON V. TYSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40617 Special Panel

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

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

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 21 October 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (FOURTH)**
v.	)	
	)	Before Special Panel
Senior Airman (E-4)	)	
JONATHON V. TYSON,	)	No. ACM 40617
United States Air Force,	)	
Appellant.	)	18 November 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **1 January 2025**. The record of trial was docketed with this Court on 5 June 2024. From the date of docketing to the present date, 166 days have elapsed.[1] On the date requested, 210 days will have elapsed.

On 15 December 2023, a general court-martial convened at Minot Air Force Base, North Dakota, consisting of officer and enlisted members, found Appellant, contrary to his pleas, guilty of one charge and six specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice (UCMJ). R. at 1, 117, 120, 1157. Consistent with his pleas, Appellant was acquitted of three specifications of domestic violence, in violation of Article 128b, UCMJ. R. at 117, 120, 1157. On 16 December 2023, the panel of officer and enlisted members sentenced Appellant to be reduced to the grade of E-1, to be confined for one year, and to be discharged with a bad conduct discharge. R. at 1241-42. The convening authority took no action on the findings or sentence and denied Appellant's requests for (1) suspension, commutation, or

[1] This request for an enlargement of time is being filed well in advance to avoid any issues while undersigned counsel is out of the office on leave from 22-29 November 2024.

reduction of the adjudged reduction in pay grade and (2) waiver of automatic forfeitures. Convening Authority Decision on Action – *United States v. Senior Airman Jonathon Tyson* (Jan. 19, 2024).

The trial transcript is 1,244 pages long and the electronic record of trial is three volumes containing 25 Prosecution Exhibits, 14 Defense Exhibits, one Court Exhibit, and 71 Appellate Exhibits. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel also provides the following information. Appellate defense counsel is currently assigned 37 cases; 20 cases are pending before this Court (15 cases are pending AOEs), 15 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF), and two cases are pending petitions to the United States Supreme Court. To date, thirteen cases have priority over the present case:

1. *United States v. Casillas*, No. 24-0089/AF – On 29 October 2024, the CAAF ordered additional briefing in this case. Briefs are currently due 9 December 2024.

2. *United States v. Leipart*, No. 24A288 – The CAAF issued a decision in this case on 1 August 2024. Undersigned counsel will file a petition of certiorari to the United States Supreme Court by 29 December 2024.

3. *United States v. Johnson*, No. 24-0004/SF – Undersigned counsel filed this two-issue Grant Brief on 4 November 2024. Any reply brief will be due after the Government files its answer in December.

4. *United States v. Wells*, No. 23-0219/AF – The CAAF issued a decision in this case on 24 September 2024. Undersigned counsel anticipates filing a petition of certiorari to the United States Supreme Court by 23 December 2024, barring any extensions.

5. *United States v. Folts*, No. ACM 40322 – On 26 August 2024, this Court issued an opinion in this appellant's case. As this Court denied the motion for reconsideration, undersigned counsel is now working with civilian appellate defense counsel on drafting the petition and supplement to the CAAF, due in early December.

6. *United States v. Singleton*, No. ACM 40535 – Undersigned counsel anticipates withdrawing from this case to allow a more available appellate defense counsel to take over. The new counsel has already made an appearance, and withdrawal is pending client consultation and turnover.

7. *United States v. Gray*, No. ACM 40648 – Undersigned counsel has filed her withdrawal in this case, which is pending this Court's action.

8. *United States v. Kim*, No. ACM 24007 – The record of trial for this direct appeal is five volumes consisting of five Prosecution Exhibits, three Defense Exhibits, 27 Appellate Exhibits, and one court exhibit. The transcript is 421 pages. This appellant is not currently confined. Counsel has not yet completed her review of this appellant's record.

9. *United States v. Thomas*, No. ACM 22083 – The record of trial is four volumes consisting of 14 Prosecution Exhibits, five Defense Exhibits, and 33 Appellate Exhibits. The verbatim transcript is 528 pages. This appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

10. *United States v. Marin Perez*, No. ACM S32771 – The trial transcript is 108 pages long and the record of trial is an electronic ROT, which is one volume of 381 pages. There are four Prosecution Exhibits, fourteen Defense Exhibits, four Appellate Exhibits, and one Court Exhibit. This appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

11. *United States v. Marschalek*, No. ACM S32776 – The trial transcript is 198 pages long and the record of trial is comprised of two volumes containing nine Prosecution Exhibits, twelve Defense Exhibits, one Court Exhibit, and three Appellate Exhibits. This appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

12. *United States v. Brown*, No. ACM S32777 – The trial transcript is 133 pages long and the record of trial is three volumes containing nine Prosecution Exhibits, one Defense Exhibit, four Appellate Exhibits, and one Court Exhibit. This appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

13. *United States v. Ziesche*, No. ACM 24022 – The trial transcript is 174 pages long and the record of trial is four volumes comprised of four Prosecution Exhibits, 13 Defense Exhibits, and 16 Appellate Exhibits. This appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

Appellant was advised of his right to a timely appeal. Appellant was provided an update of the status of undersigned counsel's progress on his case. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

Through no fault of Appellant, undersigned counsel has been unable complete her review of Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise him regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Court grant the requested enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
[redacted]

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 Air Force Government Trial and Appellate Operations Division on 18 November 2024.

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
[redacted]

20 November 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JONATHON V. TYSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40617 Special Panel

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

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

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

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 20 November 2024.

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (FIFTH)**
v.	)	
	)	Before Special Panel
Senior Airman (E-4)	)	
JONATHON V. TYSON,	)	No. ACM 40617
United States Air Force,	)	
Appellant.	)	11 December 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **31 January 2025**. The record of trial was docketed with this Court on 5 June 2024. From the date of docketing to the present date, 189 days have elapsed.[1] On the date requested, 240 days will have elapsed.

On 15 December 2023, a general court-martial convened at Minot Air Force Base, North Dakota, consisting of officer and enlisted members, found Appellant, contrary to his pleas, guilty of one charge and six specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice (UCMJ). R. at 1, 117, 120, 1157. Consistent with his pleas, Appellant was acquitted of three specifications of domestic violence, in violation of Article 128b, UCMJ. R. at 117, 120, 1157. On 16 December 2023, the panel of officer and enlisted members sentenced Appellant to be reduced to the grade of E-1, to be confined for one year, and to be discharged with a bad conduct discharge. R. at 1241-42. The convening authority took no action on the

[1] This request for an enlargement of time is being filed well in advance to avoid any issues while undersigned counsel is out of the office on leave from 13-21 December 2024. Early submission also mitigates any problems that could arise when this Court is closed on 25 and 26 December 2024 and 1 January 2025.

findings or sentence and denied Appellant's requests for (1) suspension, commutation, or reduction of the adjudged reduction in pay grade and (2) waiver of automatic forfeitures. Convening Authority Decision on Action – *United States v. Senior Airman Jonathon Tyson* (Jan. 19, 2024).

The trial transcript is 1,244 pages long and the electronic record of trial is three volumes containing 25 Prosecution Exhibits, 14 Defense Exhibits, one Court Exhibit, and 71 Appellate Exhibits. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel also provides the following information. Appellate defense counsel is currently assigned 38 cases; 21 cases are pending before this Court (16 cases are pending AOEs), 15 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF), and two cases are pending petitions to the United States Supreme Court. To date, ten cases have priority over the present case:

1. *United States v. Leipart*, No. 24A288 – The CAAF issued a decision in this case on 1 August 2024. Since Appellant's last enlargement of time, undersigned counsel drafted the petition of certiorari to the United States Supreme Court. The filing is undergoing final review and editing before being sent to the printer (authorization and printing take about two weeks). It will be filed by 29 December 2024.

2. *United States v. Folts*, No. ACM 40322 – On 26 August 2024, this Court issued an opinion in this appellant's case. Since Appellant's last enlargement of time, undersigned counsel drafted two issues for the supplement to the petition for grant of review and is working with civilian appellate defense counsel to finalize the filing, due to the CAAF on 26 December 2024.

3. *United States v. Johnson*, No. 24-0004/SF – Undersigned counsel filed this two-issue Grant Brief on 4 November 2024. Any reply brief will be due after the Government's Answer, which is due 20 December 2024.

4. *United States v. Casillas*, No. 24-0089/AF – On 29 October 2024, the CAAF ordered additional briefing in this case. Briefs were filed on 9 December 2024. Undersigned counsel is beginning to prepare for oral argument, scheduled for 14 January 2025.

5. *United States v. Kim*, No. ACM 24007 – The record of trial for this direct appeal is five volumes consisting of five Prosecution Exhibits, three Defense Exhibits, 27 Appellate Exhibits, and one Court Exhibit. The transcript is 421 pages. This appellant is not currently confined. Counsel has not yet completed her review of this appellant's record.

6. *United States v. Wells*, No. 24A520 – The CAAF issued a decision in this case on 24 September 2024. Undersigned counsel will file a petition of certiorari to the United States Supreme Court by 21 February 2025.

7. *United States v. Thomas*, No. ACM 22083 – The record of trial is four volumes consisting of 14 Prosecution Exhibits, five Defense Exhibits, and 33 Appellate Exhibits. The verbatim transcript is 528 pages. This appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

8. *United States v. Marin Perez*, No. ACM S32771 – The trial transcript is 108 pages long and the record of trial is an electronic ROT, which is one volume of 381 pages. There are four Prosecution Exhibits, fourteen Defense Exhibits, four Appellate Exhibits, and one Court Exhibit. This appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

9. *United States v. Brown*, No. ACM S32777 – The trial transcript is 133 pages long and the record of trial is three volumes containing nine Prosecution Exhibits, one Defense Exhibit, four Appellate Exhibits, and one Court Exhibit. This appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

10. *United States v. Ziesche*, No. ACM 24022 – The trial transcript is 174 pages long and the record of trial is four volumes comprised of four Prosecution Exhibits, 13 Defense Exhibits, and 16 Appellate Exhibits. This appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

Appellant was advised of his right to a timely appeal. Appellant was provided an update of the status of undersigned counsel's progress on his case. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

Through no fault of Appellant, undersigned counsel has been unable complete her review of Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise him regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Court grant the requested enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
[redacted]

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 Air Force Government Trial and Appellate Operations Division on 11 December 2024.

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
[redacted]

12 December 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JONATHON V. TYSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40617 Special Panel

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

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

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

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 12 December 2024.

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (SIXTH)**
v.	)	
	)	Before Special Panel
Senior Airman (E-4)	)	
JONATHON V. TYSON,	)	No. ACM 40617
United States Air Force,	)	
Appellant.	)	21 January 2025

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

Pursuant to Rule 23.3(m)(3) and (6) of this Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **2 March 2025**. The record of trial was docketed with this Court on 5 June 2024. From the date of docketing to the present date, 230 days have elapsed. On the date requested, 270 days will have elapsed.

On 15 December 2023, a general court-martial convened at Minot Air Force Base, North Dakota, consisting of officer and enlisted members, found Appellant, contrary to his pleas, guilty of one charge and six specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice (UCMJ). R. at 1, 117, 120, 1157. Consistent with his pleas, Appellant was acquitted of three specifications of domestic violence, in violation of Article 128b, UCMJ. R. at 117, 120, 1157. On 16 December 2023, the panel of officer and enlisted members sentenced Appellant to be reduced to the grade of E-1, to be confined for one year, and to be discharged with a bad conduct discharge. R. at 1241-42. The convening authority took no action on the findings or sentence and denied Appellant's requests for (1) suspension, commutation, or reduction of the adjudged reduction in pay grade and (2) waiver of automatic forfeitures.

Convening Authority Decision on Action – *United States v. Senior Airman Jonathon Tyson* (Jan. 19, 2024).

The trial transcript is 1,244 pages long and the electronic record of trial is three volumes containing 25 Prosecution Exhibits, 14 Defense Exhibits, one Court Exhibit, and 71 Appellate Exhibits. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel provides the following information. Appellate defense counsel is currently assigned 38 cases; 19 cases are pending before this Court (16 cases are pending AOEs), 17 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF), and two cases are pending before the United States Supreme Court (one is pending a petition).

Since Appellant's last request for an extension of time, undersigned counsel filed the petition for certiorari for *United States v. Leipart* with the United States Supreme Court, filed with the CAAF the three-issue supplement to the petition for grant of review in *United States v. Folts*, No. 25-0043/AF, along with a reply, filed two additional petitions and supplements to the CAAF (*United States v. Scott* and *United States v. Lawson*), and completed the reply brief, along with two motions and their associated replies, in *United States v. Johnson*, No. 24-0004/SF, also for the CAAF. Undersigned counsel also completed oral argument in *United States v. Casillas*, No. 24-0089/AF. To date, seven cases have priority over the present case:

1. *United States v. Johnson*, No. 24-0004/SF – Undersigned counsel is preparing for oral argument, scheduled for 29 January 2025.

2. *United States v. Wells*, No. 24A520 – The CAAF issued a decision in this case on 24 September 2024. From the date of decision, this appellant has 90 days to file a petition of certiorari to the United States Supreme Court. 28 U.S.C. § 1259(3); Supreme Court Rule 13(1). Due to undersigned counsel's schedule, undersigned counsel requested a 60-day extension to file the

petition for *Wells*. Supreme Court Rule 13(5). Thus, undersigned counsel will file a petition of certiorari to the United States Supreme Court by 21 February 2025. Undersigned counsel intends to work *Wells* simultaneously with *United States v. Kim*, No. ACM 24007. Undersigned counsel will begin briefing *Wells* following *Johnson*, and then turn to *Kim*.

3. *United States v. Kim*, No. ACM 24007 – The record of trial for this direct appeal is five volumes consisting of five Prosecution Exhibits, three Defense Exhibits, 27 Appellate Exhibits, and one Court Exhibit. The transcript is 421 pages. This appellant is not currently confined. Counsel has not yet completed her review of this appellant's record.

4. *United States v. Thomas*, No. ACM 22083 – The record of trial is four volumes consisting of 14 Prosecution Exhibits, five Defense Exhibits, and 33 Appellate Exhibits. The verbatim transcript is 528 pages. This appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

5. *United States v. Marin Perez*, No. ACM S32771 – The trial transcript is 108 pages long and the record of trial is an electronic ROT, which is one volume of 381 pages. There are four Prosecution Exhibits, fourteen Defense Exhibits, four Appellate Exhibits, and one Court Exhibit. This appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

6. *United States v. Brown*, No. ACM S32777 – The trial transcript is 133 pages long and the record of trial is three volumes containing nine Prosecution Exhibits, one Defense Exhibit, four Appellate Exhibits, and one Court Exhibit. This appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

7. *United States v. Ziesche*, No. ACM 24022 – The trial transcript is 174 pages long and the record of trial is four volumes comprised of four Prosecution Exhibits, 13 Defense Exhibits,

and 16 Appellate Exhibits. This appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

Appellant was advised of his right to a timely appeal. Appellant was provided an update of the status of undersigned counsel's progress on his case. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

Through no fault of Appellant, undersigned counsel has been unable complete her review of Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise him regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Court grant the requested enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
[redacted]

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 Air Force Government Trial and Appellate Operations Division on 21 January 2025.

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
[redacted]

21 January 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JONATHON V. TYSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40617 Special Panel

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.

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 21 January 2025.

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (SEVENTH)**
v.	)	
	)	Before Special Panel
Senior Airman (E-4)	)	
JONATHON V. TYSON,	)	No. ACM 40617
United States Air Force,	)	
Appellant.	)	18 February 2025

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

Pursuant to Rule 23.3(m)(3) and (6) of this Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **1 April 2025**. The record of trial was docketed with this Court on 5 June 2024. From the date of docketing to the present date, 258 days have elapsed. On the date requested, 300 days will have elapsed.

On 15 December 2023, a general court-martial convened at Minot Air Force Base, North Dakota, consisting of officer and enlisted members, found Appellant, contrary to his pleas, guilty of one charge and six specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice (UCMJ). R. at 1, 117, 120, 1157. Consistent with his pleas, Appellant was acquitted of three specifications of domestic violence, in violation of Article 128b, UCMJ. R. at 117, 120, 1157. On 16 December 2023, the panel of officer and enlisted members sentenced Appellant to be reduced to the grade of E-1, to be confined for one year, and to be discharged with a bad conduct discharge. R. at 1241-42. The convening authority took no action on the findings or sentence and denied Appellant's requests for (1) suspension, commutation, or reduction of the adjudged reduction in pay grade and (2) waiver of automatic forfeitures.

Convening Authority Decision on Action – *United States v. Senior Airman Jonathon Tyson* (Jan. 19, 2024).

The trial transcript is 1,244 pages long and the electronic record of trial is three volumes containing 25 Prosecution Exhibits, 14 Defense Exhibits, one Court Exhibit, and 71 Appellate Exhibits. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel provides the following information. Appellate defense counsel is currently assigned 39 cases; 19 cases are pending before this Court (16 cases are pending AOEs), 18 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF), and two cases are pending before the United States Supreme Court (one is pending a petition).

Since Appellant's last request for an extension of time, undersigned counsel completed oral argument in *United States v. Johnson*, No. 24-0004/SF (29 Jan. 2025) and wrote the petition of certiorari for *United States v. Wells*, No. 24A520, which is now pending filing (due 21 Feb. 2025). She also completed review of the record in *United States v. Kim*, No. ACM 24007, as detailed more below. To date, eight cases have priority over the present case:

1. *United States v. Kim*, No. ACM 24007 – Undersigned counsel completed review of this appellant's record and is researching and drafting the AOE. While working this appellant's case, undersigned counsel will also be participating in at least eight moots for the following cases: *United States v. Csiti*, No. 24-0175/AF; *United States v. Arroyo*, No. 24-0212; *United States v. Navarro Aguirre*, No. 24-0146/AF; *United States v. Roan*, No. 24-0104; and *United States v. Jenkins*, No. ACM S32765.

2. *United States v. Braum*, No. 25-0046/AF – Since Appellant's last request for an EOT, the CAAF granted review of one issue in this case. The Grant Brief is due on 25 February 2025,

and while undersigned counsel is not lead on this case, she will be assisting with the joint appendix and review of the brief. Undersigned counsel intends to work this case simultaneous with *Kim.*

3. *United States v. Giles*, No. ACM 40482 – The petition for grant of review was filed today, 18 February 2025, along with a request for a 21-day extension to file the supplement to the petition. C.A.A.F. R. 19(a)(5)(A). Undersigned counsel intends to work the supplement to the petition simultaneously with *United States v. Thomas*, No. ACM 22083.

4. *United States v. Thomas*, No. ACM 22083 - The record of trial is four volumes consisting of 14 Prosecution Exhibits, five Defense Exhibits, and 33 Appellate Exhibits. The verbatim transcript is 528 pages. This appellant is not currently confined. Undersigned counsel has not yet completed her review of this appellant's record.

5. *United States v. Marin Perez*, No. ACM S32771 - The trial transcript is 108 pages long and the record of trial is an electronic ROT, which is one volume of 381 pages. There are four Prosecution Exhibits, fourteen Defense Exhibits, four Appellate Exhibits, and one Court Exhibit. This appellant is not currently confined. Undersigned counsel has not yet completed her review of this appellant's record.

6. *United States v. Marschalek*, No. ACM S32776 - The trial transcript is 198 pages long and the record of trial is comprised of two volumes containing nine Prosecution Exhibits, twelve Defense Exhibits, one Court Exhibit, and three Appellate Exhibits. This appellant is not currently confined. While the first draft of the AOE was completed in this case, this work was done by a reservist, who is now effectively barred from working. 90 Fed. Reg. 8,251 (Jan. 28, 2025). Undersigned counsel may have to take lead on this case and is alerting the Court out of an abundance of caution that this case may have to take priority over Appellant's case.

7. *United States v. Brown*, No. ACM S32777 – The trial transcript is 133 pages long and the record of trial is three volumes containing nine Prosecution Exhibits, one Defense Exhibit, four

Appellate Exhibits, and one Court Exhibit. This appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

8. *United States v. Ziesche*, No. ACM 24022 – The trial transcript is 174 pages long and the record of trial is four volumes comprised of four Prosecution Exhibits, 13 Defense Exhibits, and 16 Appellate Exhibits. This appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

Appellant was advised of his right to a timely appeal. Appellant was provided an update of the status of undersigned counsel's progress on his case. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

Through no fault of Appellant, undersigned counsel has been unable complete her review of Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise him regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Court grant the requested enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
[redacted]

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

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770

20 February 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JONATHON V. TYSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40617 Special Panel

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 to file an Assignment of Error in this case.

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

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

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 20 February 2025.

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (EIGHTH)**
v.	)	
	)	Before Special Panel
Senior Airman (E-4)	)	
JONATHON V. TYSON,	)	No. ACM 40617
United States Air Force,	)	
Appellant.	)	17 March 2025

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

Pursuant to Rule 23.3(m)(3) and (6) of this Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **1 May 2025**. The record of trial was docketed with this Court on 5 June 2024. From the date of docketing to the present date, 285 days have elapsed. On the date requested, 330 days will have elapsed.

On 15 December 2023, a general court-martial convened at Minot Air Force Base, North Dakota, consisting of officer and enlisted members, found Appellant, contrary to his pleas, guilty of one charge and six specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice (UCMJ). R. at 1, 117, 120, 1157. Consistent with his pleas, Appellant was acquitted of three specifications of domestic violence, in violation of Article 128b, UCMJ. R. at 117, 120, 1157. On 16 December 2023, the panel of officer and enlisted members sentenced Appellant to be reduced to the grade of E-1, to be confined for one year, and to be discharged with a bad conduct discharge. R. at 1241-42. The convening authority took no action on the findings or sentence and denied Appellant's requests for (1) suspension, commutation, or reduction of the adjudged reduction in pay grade and (2) waiver of automatic forfeitures.

Convening Authority Decision on Action – *United States v. Senior Airman Jonathon Tyson* (Jan. 19, 2024).

The trial transcript is 1,244 pages long and the electronic record of trial is three volumes containing 25 Prosecution Exhibits, 14 Defense Exhibits, one Court Exhibit, and 71 Appellate Exhibits. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel provides the following information. Appellate defense counsel is currently assigned 38 cases; 19 cases are pending before this Court (18 cases are pending AOEs), 18 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF), and one case is pending before the United States Supreme Court.

Since Appellant's last request for an extension of time, undersigned counsel wrote the brief for *United States v. Kim*, No. ACM 24007, reviewed the record of trial for *United States v. Marin Perez*, No. ACM S32771, filed the supplement to the petition for the grant of review in *United States v. Giles*, No. 25-0100/AF, filed a petition for reconsideration for *United States v. Folts*, No. 25-0043/AF, and completed five peer reviews while participating in five moots. To date, six cases have priority over the present case:

1. *United States v. Kim*, No. ACM 24007 – The AOE is undergoing final review before filing on or before 23 March 2025.

2. *United States v. Marin Perez*, No. ACM S32771 – Undersigned counsel has completed her review of the record and is consulting with this appellant on identified issues.

3. *United States v. Braum*, No. 25-0046/AF – Since Appellant's last EOT request, undersigned counsel assisted with compiling the Joint Appendix and peer reviewed the Grant Brief, which was filed on 25 February 2025. Any reply brief will be due at the beginning of April, with which military appellate defense counsel will likely assist.

4. *United States v. Thomas*, No. ACM 22083 - The record of trial is four volumes consisting of 14 Prosecution Exhibits, five Defense Exhibits, and 33 Appellate Exhibits. The verbatim transcript is 528 pages. This appellant is not currently confined. Undersigned counsel has not yet completed her review of this appellant's record.

5. *United States v. Brown*, No. ACM S32777 – The trial transcript is 133 pages long and the record of trial is three volumes containing nine Prosecution Exhibits, one Defense Exhibit, four Appellate Exhibits, and one Court Exhibit. This appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

6. *United States v. Ziesche*, No. ACM 24022 – The trial transcript is 174 pages long and the record of trial is four volumes comprised of four Prosecution Exhibits, 13 Defense Exhibits, and 16 Appellate Exhibits. This appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

Appellant was advised of his right to a timely appeal. Appellant was provided an update of the status of undersigned counsel's progress on his case. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

Through no fault of Appellant, undersigned counsel has been unable complete her review of Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise him regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Court grant the requested enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
[redacted]

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 Air Force Government Trial and Appellate Operations Division on 17 March 2025.

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES'
	)	OPPOSITION TO
Appellee,	)	APPELLANT'S MOTION FOR
	)	ENLARGEMENT OF TIME
v.	)	
	)	Before Special Panel
Senior Airman (E-4)	)	
JONATHAN V. TYSON,	)	No. ACM 40617
United States Air Force.	)	
Appellant	)	18 March 2025

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 330 days in length. Appellant's nearly year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two thirds of the 18 month standard for this Court to issue a decision, which only leaves about 8 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

[redacted]

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 18 March 2025.

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40617**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jonathon V. TYSON	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

Appellant's case was docketed with the court on 5 June 2024. The three-volume electronic record of trial in Appellant's case consists of a 1,244-page verbatim transcript, 25 Prosecution Exhibits, 14 Defense Exhibits, 71 Appellate Exhibits, and one Court Exhibit. On 17 March 2025, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) requesting an additional 30 days to submit Appellant's assignments of error. In the motion, Appellant's counsel proffered that she "has been unable [to] complete her review of Appellant's case." Appellant's counsel further proffers that Appellant has been advised by his counsel of his case status, informed of this eighth enlargement of time request, and concurs with the request. 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 19th day of March, 2025,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than **1 May 2025.** Further requests by Appellant for enlargements of time may necessitate a status conference insofar as any future enlargements of time will involve Appellant filing his assignment of errors brief 360 days (or more) after docketing of this case.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	
	)	Before Special Panel
Senior Airman (E-4) **JONATHON V. TYSON,** United States Air Force, *Appellant.*	)	No. ACM 40617
	)	21 April 2025

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

Pursuant to Rule 23.3(m)(3) and (6) of this Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **31 May 2025**. The record of trial was docketed with this Court on 5 June 2024. From the date of docketing to the present date, 320 days have elapsed. On the date requested, 360 days will have elapsed. If this Court intends to deny this EOT, Appellant requests a status conference.

On 15 December 2023, a general court-martial convened at Minot Air Force Base, North Dakota, consisting of officer and enlisted members, found Appellant, contrary to his pleas, guilty of one charge and six specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice (UCMJ). R. at 1, 117, 120, 1157. Consistent with his pleas, Appellant was acquitted of three specifications of domestic violence, in violation of Article 128b, UCMJ. R. at 117, 120, 1157. On 16 December 2023, the panel of officer and enlisted members sentenced Appellant to be reduced to the grade of E-1, to be confined for one year, and to be discharged with a bad conduct discharge. R. at 1241-42. The convening authority took no action on the findings or sentence and denied Appellant's requests for (1) suspension, commutation, or reduction of the adjudged reduction in pay grade and (2) waiver of automatic forfeitures.

Convening Authority Decision on Action – *United States v. Senior Airman Jonathon Tyson* (Jan. 19, 2024).

The trial transcript is 1,244 pages long and the electronic record of trial is three volumes containing 25 Prosecution Exhibits, 14 Defense Exhibits, one Court Exhibit, and 71 Appellate Exhibits. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel provides the following information. Undersigned counsel is currently assigned 38 cases; 20 cases are pending before this Court (17 cases are pending AOEs), and 18 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). Since Appellant's last request for an extension of time, undersigned counsel filed a supplement to the petition for grant of review in two cases, *United States v. Giles*, No. 25-0100/AF, and *United States v. Hogans*, No. 25-0119/AF, filed AOEs in two cases, *United States v. Kim*, No. ACM 24007, and *United States v. Marin Perez*, No. ACM S32771, completed briefing in *United States v. Braum*, No. 25-0046/AF, and reviewed the record in *United States v. Brown*, No. ACM S32777. To date, four cases have priority over the present case:

1. *United States v. Kim*, No. ACM 24007 – Undersigned counsel is currently working the Reply brief in this case, which will be submitted to this Court by 25 April 2025.

2. *United States v. Brown*, No. ACM S32777 – This appellant moved to withdraw from appellate review after fully consulting with undersigned counsel after she was able to review the record. Unless and until this Court approves the withdrawal, this case remains prioritized above Appellant's.

3. *United States v. Ziesche*, No. ACM 24022 – The trial transcript is 174 pages long and the record of trial is four volumes comprised of four Prosecution Exhibits, 13 Defense Exhibits,

and 16 Appellate Exhibits. This appellant is not currently confined. Undersigned has not yet completed her review of the record of trial.

4. *United States v. Thomas*, No. ACM 22083 - The record of trial is four volumes consisting of 14 Prosecution Exhibits, five Defense Exhibits, and 33 Appellate Exhibits. The verbatim transcript is 528 pages. This appellant is not currently confined. Undersigned has not yet completed her review of the record of trial.

Undersigned counsel is also assisting civilian appellate defense counsel on two cases at the CAAF: *United States v. Folts*, No. 25-0043/AF, and *United States v. Baumgartner*, No. 25-0135/AF. Concurrent briefing for *Folts* is due 23 April 2025 and oral argument is on 20 May 2025, of which civilian counsel will be handling. The supplement to the petition for *Baumgartner* is due 5 May 2025.

Appellant was advised of his right to a timely appeal. Appellant was provided an update of the status of undersigned counsel's progress on his case. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

Through no fault of Appellant, undersigned counsel has been unable complete her review of Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise him regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Court grant the requested enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
[redacted]

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 Air Force Government Trial and Appellate Operations Division on 21 April 2025.

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
Senior Airman (E-4) **JONATHON V. TYSON**, United States Air Force. *Appellant*	)	Before Special Panel No. ACM 40617 23 April 2025

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 360 days in length. Appellant's nearly one year delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two thirds of the 18-month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process

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

KATE E. LEE, Maj, USAF
Appellate Government Counsel
Government Trial & Appellate Operations
1500 W. Perimeter Road, Suite 1190
Joint Base Andrews, MD
DSN: 612-4809

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 23 April 2025.

KATE E. LEE, Maj, USAF
Appellate Government Counsel
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1500 W. Perimeter Road, Suite 1190
Joint Base Andrews, MD
DSN: 612-4809

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40617**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jonathon V. TYSON	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 21 April 2025, counsel for Appellant submitted a Motion for Enlargement of Time (Ninth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

On 25 April 2025, the court held a status conference to discuss the progress of Appellant's case. Appellant was represented by Captain (Capt) Samantha Castanien and Lieutenant Colonel Allen Abrams. Major Kate Lee represented the Government. Capt Castanien provided an update on the status of her review of the case and additional details regarding how other obligations had impacted her ability to prepare Appellant's assignments of error. She summarized her current caseload and those cases prioritized over Appellant's case, and further informed the court of her upcoming approved personal leave. Capt Castanien estimated that she would be able to complete her review of the record of trial and submission of assignments of error by the end of July 2025.

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 25th day of April, 2025,

ORDERED:

Appellant's Motion for Enlargement of Time (Ninth) is **GRANTED**. Appellant shall file any assignments of error not later than **31 May 2025**.

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

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (TENTH)**
v.	)	
	)	Before Special Panel
Senior Airman (E-4)	)	
JONATHON V. TYSON,	)	No. ACM 40617
United States Air Force,	)	
Appellant.	)	19 May 2025

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

Pursuant to Rule 23.3(m)(3) and (6) of this Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **30 June 2025**. The record of trial was docketed with this Court on 5 June 2024. From the date of docketing to the present date, 348 days have elapsed. On the date requested, 390 days will have elapsed. Only if this Court intends to deny this EOT does Appellant request a status conference.

On 15 December 2023, a general court-martial convened at Minot Air Force Base, North Dakota, consisting of officer and enlisted members, found Appellant, contrary to his pleas, guilty of one charge and six specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice (UCMJ). R. at 1, 117, 120, 1157. Consistent with his pleas, Appellant was acquitted of three specifications of domestic violence, in violation of Article 128b, UCMJ. R. at 117, 120, 1157. On 16 December 2023, the panel of officer and enlisted members sentenced Appellant to be reduced to the grade of E-1, to be confined for one year, and to be discharged with a bad conduct discharge. R. at 1241-42. The convening authority took no action on the findings or sentence and denied Appellant's requests for (1) suspension, commutation, or reduction of the adjudged reduction in pay grade and (2) waiver of automatic forfeitures.

Convening Authority Decision on Action – *United States v. Senior Airman Jonathon Tyson* (Jan. 19, 2024).

The trial transcript is 1,244 pages long and the electronic record of trial is three volumes containing 25 Prosecution Exhibits, 14 Defense Exhibits, one Court Exhibit, and 71 Appellate Exhibits. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel provides the following information. Undersigned counsel is currently assigned 36 cases; 18 cases are pending before this Court (14 cases are pending AOEs), and 18 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). Since Appellant's last request for an extension of time, undersigned counsel filed reply briefs in two cases, *United States v. Kim*, No. ACM 24007, and *United States v. Marin Perez*, No. ACM S32771, reviewed the records in *United States v. Ziesche*, No. ACM S32777, and *United States v. Stone*, No. ACM S32797,[1] and drafted one of errors assigned for review (including the facts, reasons to grant, and analysis) for the supplement to the petition for grant of review in *United States v. Baumgartner*, No. 25-0135/AF. Undersigned counsel also participated in two moots to support civilian counsel in *United States v. Folts*, No. 25-0043/AF, and assisted civilian counsel with other oral argument preparations (argument at the CAAF is scheduled for 20 May 2025). Additionally, undersigned counsel participated in four other moots for *United States v. Cook*, No. 24-0221, scheduled on the same day as *Folts*. To date, two cases have priority over the present case:

1. *United States v. Ziesche*, No. ACM 24022 – The brief for this case is undergoing final review before filing this week.

[1] The appellant in *Stone* elected to withdraw from appellate review after fully consulting with undersigned counsel.

2. *United States v. Thomas*, No. ACM 22083 - The record of trial is four volumes consisting of 14 Prosecution Exhibits, five Defense Exhibits, and 33 Appellate Exhibits. The verbatim transcript is 528 pages. This appellant is not currently confined. Undersigned has not yet completed her review of the record of trial.

As explained in the status conference on 25 April 2025, undersigned counsel anticipates filing Appellant's AOE by the end of July. Order (Apr. 25, 2025). To date, nothing has changed that calculation. Undersigned counsel needs additional time to fully review Appellant's lengthy record and ensure he is provided effective assistance of counsel, same as undersigned counsel's other appellate clients.

Appellant was advised of his right to a timely appeal. Appellant was provided an update of the status of undersigned counsel's progress on his case. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

Through no fault of Appellant, undersigned counsel has been unable complete her review of Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise him regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Court grant the requested enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
[redacted]

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 Air Force Government Trial and Appellate Operations Division on 19 May 2025.

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Special Panel
Senior Airman (E-4) **JONATHON V. TYSON**, United States Air Force. *Appellant*	)	No. ACM 40617
	)	20 May 2025

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 390 days in length. Appellant's over 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 more than two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 5 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process

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

KATE E. LEE, Maj, USAF
Appellate Government Counsel
Government Trial & Appellate Operations
1500 W. Perimeter Road, Suite 1190
Joint Base Andrews, MD
DSN: 612-4809

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 20 May 2025.

KATE E. LEE, Maj, USAF
Appellate Government Counsel
Government Trial & Appellate Operations
1500 W. Perimeter Road, Suite 1190
Joint Base Andrews, MD
DSN: 612-4809

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (ELEVENTH)**
v.	)	
	)	Before Special Panel
Senior Airman (E-4)	)	
JONATHON V. TYSON,	)	No. ACM 40617
United States Air Force,	)	
Appellant.	)	16 June 2025

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

Pursuant to Rule 23.3(m)(3) and (6) of this Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **30 July 2025**. The record of trial was docketed with this Court on 5 June 2024. From the date of docketing to the present date, 376 days have elapsed. On the date requested, 420 days will have elapsed. Barring exceptional or unforeseen circumstances, **undersigned counsel anticipates this will be Appellant's last EOT request.**

On 15 December 2023, a general court-martial convened at Minot Air Force Base, North Dakota, consisting of officer and enlisted members, found Appellant, contrary to his pleas, guilty of one charge and six specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice (UCMJ). R. at 1, 117, 120, 1157. Consistent with his pleas, Appellant was acquitted of three specifications of domestic violence, in violation of Article 128b, UCMJ. R. at 117, 120, 1157. On 16 December 2023, the panel of officer and enlisted members sentenced Appellant to be reduced to the grade of E-1, to be confined for one year, and to be discharged with a bad conduct discharge. R. at 1241-42. The convening authority took no action on the findings or sentence and denied Appellant's requests for (1) suspension, commutation, or

reduction of the adjudged reduction in pay grade and (2) waiver of automatic forfeitures. Convening Authority Decision on Action – *United States v. Senior Airman Jonathon Tyson* (Jan. 19, 2024).

The trial transcript is 1,244 pages long and the electronic record of trial is three volumes containing 25 Prosecution Exhibits, 14 Defense Exhibits, one Court Exhibit, and 71 Appellate Exhibits. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel provides the following information. Undersigned counsel is currently assigned 40 cases; 20 cases are pending before this Court (15 cases are pending AOEs), and 20 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). Since Appellant's last request for an extension of time, undersigned counsel filed the brief in *United States v. Ziesche*, No. ACM 24022, and reviewed the records of trial for *United States v. Thomas*, No. ACM 22083, and *United States v. Watkins*, No. ACM 40639.[1] To date, only *Thomas* has priority over Appellant's case and that appellant's brief, if any, will be submitted on or before 24 June 2025. Additionally, to the extent a reply brief is warranted in *Ziesche*, that brief is expected to be filed by the end of June 2025.

As explained in the status conference on 25 April 2025, undersigned counsel anticipates filing Appellant's AOE by the end of July. Order (Apr. 25, 2025). To date, nothing has changed that calculation. Undersigned counsel needs additional time to fully review Appellant's lengthy record and ensure he is provided effective assistance of counsel, same as undersigned counsel's other appellate clients.

---

[1] This case was prioritized over Appellant's due to an order by the Court. Order, *United States v. Watkins*, slip op. at 2, No. ACM 40639 (May 22, 2025) ("Any future request for an enlargement of time may be looked upon unfavorably absent exceptional circumstances."); *see* Order, *United States v. Evangelista*, slip op. at 2 n.3, No. ACM 40531 (Dec. 6, 2024) (detailing that "routine workload" is insufficient justification for "exception circumstances"). The appellant in *Watkins* elected to withdraw from appellate review after fully consulting with undersigned counsel.

Appellant was advised of his right to a timely appeal. Appellant was provided an update of the status of undersigned counsel's progress on his case. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

Through no fault of Appellant, undersigned counsel has been unable complete her review of Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise him regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Court grant the requested enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
[redacted]

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 Air Force Government Trial and Appellate Operations Division on 16 June 2025.

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before a Special Panel
Senior Airman (E-4) **JONATHON V. TYSON,** United States Air Force, *Appellant.*	)	No. ACM 40617
	)	18 June 2025

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

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

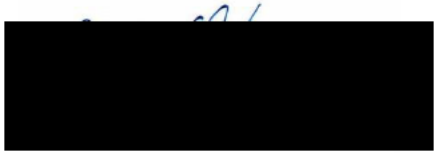
The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 420 days in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

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

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 18 June 2025.



JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**CONSENT MOTION TO EXAMINE SEALED MATERIALS**
v.	)	
	)	Before Special Panel
Senior Airman (E-4) **JONATHON V. TYSON,** United States Air Force, *Appellant.*	)	No. ACM 40617
	)	11 July 2025

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and Rules 3.1(c) and 23.3(f)(1) of this Court's Rules of Practice and Procedure, undersigned counsel hereby moves to examine the following materials sealed by the military judge: **Prosecution Exhibit 15, Defense Exhibit A,** and **Appellate Exhibit LXIV.** These exhibits apparently contain nudity (*see* R. at 584, 623, 658, 698, 702, 825), and the military judge decided to seal them. R. at 627, 1166. The Government consents to both parties viewing the sealed materials.

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 materials is reasonably necessary to assess whether the Government proved the charges, as both exhibits were admitted as relevant evidence for the members to consider and were relied upon in closing argument. All parties to the trial had access to the exhibits listed above.

While this Court has "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." *United States v. May*, 47 M.J. 478, 481 (C.A.A.F. 1998). "Independent review is

not the same as competent appellate representation." *Id*. The sealed materials here must be reviewed for counsel to provide "competent appellate representation." *Id*. Viewing these exhibits is reasonably necessary to determine whether Appellant is entitled to relief due to errors during any portion of the proceedings. Therefore, undersigned counsel's examination of the sealed materials is reasonably necessary to fulfill her responsibilities in this case as counsel cannot perform her duty of representation under Article 70, Uniform Code of Military Justice, 10 U.S.C. § 870, or fulfill her duty to provide effective assistance of counsel, without first reviewing the complete record of trial, to include all exhibits presented to the factfinder for consideration.

WHEREFORE, Appellant respectfully requests this Court grant this motion.

Respectfully submitted,

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 11 July 2025.

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40617**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Jonathon V. TYSON	)	**PANEL CHANGE**
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	

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

ORDERED:

The record of trial in the above styled matter is withdrawn from a Special Panel and referred to another Special Panel for appellate review.

The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
DOUGLAS, KRISTINE M., Colonel, Appellate Military Judge
MCCALL, KRISTIN K.B., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40617**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jonathon V. TYSON	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 11 July 2025, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials, requesting both parties be allowed to examine Prosecution Exhibit 15, Defense Exhibit A, and Appellate Exhibit LXIV, which were reviewed by trial and defense counsel at Appellant's court-martial.

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* (2024 ed.).

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

Accordingly, it is by the court on this 16th day of July 2025,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view **Prosecution Exhibit 15, Defense Exhibit A, and Appellate Exhibit LXIV**, subject to the following conditions:

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

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

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (TWELFTH)**
v.	)	
	)	Before Special Panel
Senior Airman (E-4)	)	
JONATHON V. TYSON,	)	No. ACM 40617
United States Air Force,	)	
Appellant.	)	18 July 2025

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

Pursuant to Rule 23.3(m)(3) and (6) of this Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **29 August 2025**. The record of trial was docketed with this Court on 5 June 2024. From the date of docketing to the present date, 408 days have elapsed. On the date requested, 450 days will have elapsed.

Undersigned counsel is requesting 30 days, but is hopeful that the AOE will be submitted before then. As further explained below, **undersigned counsel has had one exceptional circumstance and one unforeseen circumstance arise** that justify the need for additional time to complete Appellant's AOE. Additionally, based on undersigned counsel's progress on this case to date, **undersigned counsel anticipates this will be Appellant's last EOT request.**

On 15 December 2023, a general court-martial convened at Minot Air Force Base, North Dakota, consisting of officer and enlisted members, found Appellant, contrary to his pleas, guilty of one charge and six specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice (UCMJ). R. at 1, 117, 120, 1157. Consistent with his pleas, Appellant was acquitted of three specifications of domestic violence, in violation of Article 128b, UCMJ. R. at 117, 120, 1157. On 16 December 2023, the panel of officer and enlisted members sentenced

Appellant to be reduced to the grade of E-1, to be confined for one year, and to be discharged with a bad conduct discharge. R. at 1241-42. The convening authority took no action on the findings or sentence and denied Appellant's requests for (1) suspension, commutation, or reduction of the adjudged reduction in pay grade and (2) waiver of automatic forfeitures. Convening Authority Decision on Action – *United States v. Senior Airman Jonathon Tyson* (Jan. 19, 2024).

The trial transcript is 1,244 pages long and the electronic record of trial is three volumes containing 25 Prosecution Exhibits, 14 Defense Exhibits, one Court Exhibit, and 71 Appellate Exhibits. The electronic record of trial that undersigned counsel has—that combines everything—is 3,099 pages in length. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel provides the following information. Undersigned counsel is currently assigned 40 cases; 19 cases are pending before this Court (14 cases are pending AOEs), 20 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF) (including one supplement to a petition for grant of review), and one case is pending before the United States Supreme Court (for petition for writ of certiorari), although the number of cases before the CAAF and the Supreme Court is soon to shift (explained below). Since Appellant's last requested EOT, undersigned counsel completed briefing in *United States v. Ziesche*, No. ACM 24022, filed the AOE in *United States v. Thomas*, No. ACM 22083, and filed a petition for reconsideration—and a response to the Government's opposition—in *United States v. Johnson*, USCA Dkt. No. 24-0004/SF. Appellant's case is undersigned counsel's first priority.

As explained in the status conference on 25 April 2025, undersigned counsel anticipated filing Appellant's AOE by the end of July. Order (Apr. 25, 2025). However, over the past few

weeks, an exceptional circumstance and an unforeseen development outside of undersigned counsel's control have changed that calculation.

The CAAF's decision in *Johnson* is the exceptional circumstance that arose, pausing undersigned counsel's review of several cases, including Appellant's. Considering there are cases argued earlier than *Johnson* still pending a decision, *Johnson*'s recent publication was unexpected—and it came with a significant impact on undersigned counsel's docket. Undersigned counsel is carrying most of the division's firearm prohibition cases. Division leadership previously informed undersigned counsel that the impact of this increased workload is that undersigned counsel's number of clients requiring advice and advocacy was 41% larger than any other counsel's in the Division; she has acquired three more firearm cases since then due to counsel leaving the Division too. When *Johnson* was decided and reconsideration was denied, undersigned counsel needed to begin coordinating with clients who were waiting for resolution of this issue. Coordination was time-consuming, spanning over a week. But coordination needed to begin to ascertain interest in petitioning the Supreme Court. This is because petitions can be joined if on a similar issue, but the petition still has to be filed within 90 days of the earliest decision date in the group. There are also a number of other strategic considerations taking place that have to be factored in early, along with fiscal year limitations (the Supreme Court requires petitions for writs of certiorari to be bound in a booklet, which takes at least two weeks to print from an outside contractor). The timing of *Johnson* required undersigned counsel to prioritize these clients over Appellant so as to preserve their right to petition the Supeme Court and ensure they all received effective assistance of counsel.

On top of *Johnson,* undersigned counsel experienced an unforeseen personal tragedy within the past two weeks that has prevented her from working her caseload on weekends and evenings. Should the Court require more information on this issue in order to grant the requested

extension of time, undersigned counsel requests a status conference. Perhaps needless to say, the amount of work undersigned counsel needs to complete under the deadlines this Court has set coupled with her ethical obligations to each client at every court requires significant time, and often necessitates scheduling work on weekends or in the evening. When any time is unexpectedly lost due to personal unforeseen circumstances, undersigned counsel's schedule and priorities shift.

To date, undersigned counsel has almost finished reviewing the record for completeness; she needs to check the original record of trial for several items in her electronic record of trial that are nonfunctional or sealed. Undersigned counsel is reviewing the transcript currently, and is reviewing the Government's case in chief. R. at 281. So far, undersigned counsel has concerns on the following topics: possible record completeness, a possible error in the post-trial documents, unanimous verdict, referral, panel member challenges, evidence permitted under Military Rule of Evidence 404(b), exclusion of evidence, and legal and factual sufficiency. These topic areas are not yet fully researched, and undersigned counsel has not yet completed review of the transcript to know whether there is prejudice. Thus, undersigned counsel cannot anticipate a complete set of errors at this time, but does anticipate the AOE to be lengthy. There is also the possibility of a petition for a new trial, but additional time is needed to assess this likelihood as well. Undersigned counsel anticipates review, research, and coordination with Appellant will take the week of 20-26 July 2025. That would leave inadequate time to draft the AOE and route it through peer and leadership review by the current deadline, 30 July 2025 (typically a one-to-two-week process depending on AOE size). Thus, the additional time afforded by this EOT will allow undersigned counsel to complete her review, research the issues, coordinate with Appellant, discuss any issues that he would like to personally raise, and then draft the AOE with sufficient time for review.

Appellant was advised of his right to a timely appeal. Appellant was provided an update of the status of undersigned counsel's progress on his case. Appellant was advised of the request for

this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

Through no fault of Appellant, undersigned counsel has been unable complete her review of Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise him regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Court grant the requested enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

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

SAMANTHA M. CASTANIEN, Capt, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before a Special Panel
Senior Airman (E-4) **JONATHON V. TYSON,** United States Air Force, *Appellant.*	)	No. ACM 40617
	)	21 July 2025

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 450 days in length. Appellant's over 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 more than two thirds of the 18-month standard for this Court to issue a decision, which only leaves about 3 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

[redacted]

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(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 21 July 2025.

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Military Justice and Discipline Directorate
United States Air Force
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Filed August 29, 2025

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

Senior Airman (E-4)
JONATHON V. TYSON,
United States Air Force,
Appellant.

Before Special Panel

No. ACM 40617

BRIEF ON BEHALF OF APPELLANT

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Counsel for Appellant

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	
	)	Before Special Panel
Senior Airman (E-4) **JONATHON V. TYSON,** United States Air Force, *Appellant*.	)	No. ACM 40617
	)	August 29, 2025

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

ASSIGNMENTS OF ERROR

I.

WHETHER SRA TYSON WAS DENIED MEANINGFUL CROSS-EXAMINATION OF MR IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION WHEN THE MILITARY JUDGE EXCLUDED EVIDENCE OFFERED UNDER MIL. R. EVID. 608(C) THAT MR WAS ARRESTED FOR A DOMESTIC VIOLENCE ALLEGATION MADE BY HER THEN-HUSBAND WHOM SHE CLAIMED FAKED THE CORROBORATING INJURY.

II.

WHETHER SRA TYSON'S CONVICTION FOR STRANGLING MR IS FACTUALLY INSUFFICIENT.

III.

WHETHER SRA TYSON'S CONVICTION FOR KICKING MR IN THE LEGS ON DIVERS OCCASIONS IS LEGALLY AND FACTUALLY INSUFFICIENT.

IV.

WHETHER SRA TYSON'S CONVICTION FOR PUNCHING MR IN THE ARMS AND TORSO ON DIVERS OCCASIONS IS LEGALLY AND FACTUALLY INSUFFICIENT.

V.

WHETHER SRA TYSON'S CONVICTION FOR DESTROYING MR'S CELLPHONE IS LEGALLY AND FACTUALLY INSUFFICIENT.

VI.

WHETHER SRA TYSON'S CONVICTION FOR DESTROYING A VARIETY OF MR'S BELONGINGS IS LEGALLY AND FACTUALLY INSUFFICIENT.

VII.

WHETHER SRA TYSON'S CONVICTION FOR THREATENING MR ON DIVERS OCCASIONS IS LEGALLY AND FACTUALLY INSUFFICIENT.

VIII.

WHETHER THE TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT DURING HIS FINDINGS ARGUMENT RESULTING IN MATERIAL PREJUDICE TO SRA TYSON'S SUBSTANTIAL RIGHTS.

IX.

WHETHER OMISSION OF THE FOURTEEN FILES CONTAINED IN PRELIMINARY HEARING EXHIBIT 16 IS A SUBSTANTIAL OMISSION THAT REQUIRES REMAND TO CORRECT THE RECORD.

X.

WHETHER THE 172-DAY DELAY FROM SENTENCING TO DOCKETING OF THIS CASE WITH THIS COURT WAS UNREASONABLE, WARRANTING APPROPRIATE RELIEF.

XI.

WHETHER SRA TYSON'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN HE WAS CONVICTED OF OFFENSES WITH NO REQUIREMENT THAT THE COURT-MARTIAL PANEL (THE FUNCTIONAL EQUIVALENT OF THE JURY) VOTE UNANIMOUSLY THAT HE IS GUILTY.[1]

[1] This assignment of error is raised for issue preservation purposes.

XII.

DID THE OFFICE OF SPECIAL INVESTIGATIONS CONDUCT A BIASED INVESTIGATION, LEADING TO A DISCRIMINATORY OR VINDICTIVE PROSECUTION?

XIII.

WHETHER BARRING SRA TYSON FROM MULTIPLE AIR FORCE INSTALLATIONS WHILE ON APPELLATE LEAVE CONSTITUTES UNLAWFUL PUNISHMENT OR OTHERWISE VIOLATES THE LAW BY BEING ARBITRARY OR CAPRICIOUS.[2]

STATEMENT OF THE CASE

On December 15, 2023, a general court-martial consisting of officer and enlisted members convened at Minot Air Force Base (AFB), North Dakota, found Senior Airman (SrA) Jonathon Tyson, contrary to his pleas, guilty of one charge and six specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice (UCMJ). R. at 1, 117, 120, 1157-58. The panel acquitted SrA Tyson of three other specifications of domestic violence. R. at 117, 120, 1157. The following day, on December 16, 2023, the members sentenced[3] SrA Tyson to be reduced to the grade of E-1, to be confined for one year, and to be discharged with a bad-conduct discharge. R. at 1241-42. The military judge announced that SrA Tyson would be credited with 246 days of pre-trial confinement credit. R. at 1244.

The convening authority took no action on the findings or sentence and denied SrA Tyson's requests for clemency. Convening Authority Decision on Action – *United States v. Senior Airman Jonathon Tyson* (Jan. 19, 2024).

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[2] Issues XII and XIII are raised personally by SrA Tyson, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[3] The panel member president announced the sentence in an apparent violation of Rule for Courts-Martial (R.C.M) 1007(b)(1). R. at 1242. Assuming error, SrA Tyson does not assert any prejudice.

STATEMENT OF FACTS

MR, Her Former Husband, and Getting Together with SrA Tyson

In 2021, SrA Tyson met MR on Tinder, an online dating app. R. at 517. A month and a half later, in April, MR moved in with SrA Tyson on base at Minot AFB. R. at 631. At trial, she said she did so despite thinking he was "shady." R. at 631. At the time, MR was married to an active-duty member also stationed at Minot, SSgt AC. R. at 632.

SSgt AC married MR "roughly around" 2015. R. at 629. But she moved in with him when he was stationed at Holloman AFB, New Mexico. R. at 629. There, in 2014, MR and SSgt AC got into a physical altercation. R. at 736-37. MR told Security Forces that SSgt AC "took a key and scratched his face to make it look like she had dug her nail into his face worse than before." Post-Trial Submission of Matters—*United States v. SrA Johnathon [sic] V. Tyson*, Atch. 1 at 6 (Dec. 26, 2023); *see* R. at 741 (explaining MR stated SSgt AC "had taken the key to his own face"). She reported that he then ran into the bathroom where he "continued to scratch his face." Post-Trial Submission of Matters—*United States v. SrA Johnathon [sic] V. Tyson*, Atch. 1 at 6 (Dec. 26, 2023). When asked if SSgt AC ever hit, pushed, or restrained her before, she accused him of "always push[ing] me against walls, scream[ing] at my face, and throw[ing] things at me." *Id*. MR was detained and cited for "[b]attery on a household member." *Id*. There was no evidence anything came of this citation. R. at 744. MR stayed with SSgt AC until she met SrA Tyson and moved in with him in April 2021. R. at 630.

Except for a short break in the fall of 2021, MR lived at SrA Tyson's house until mid-2023. R. at 526-27, 765. She divorced SSgt AC in May 2022, after SrA Tyson came back from a temporary assignment overseas in late April. R. at 529, 632.

The Domestic Violence Allegations in 2022

From late April 2022 to April 2023, MR testified that the relationship with SrA Tyson turned physically abusive. R. at 535-50. She broadly asserted SrA Tyson would grab her, threaten her, point his gun at her, and destroy her things. *See, e.g.*, 536, 570, 600.[4] She said he would kick and punch her. R. at 536.[5] Every time they would argue, which she claimed was every day in this approximately 365-day period, he would punch her in the left arm. R. at 536, 570; *see* Charge Sheet at 1 (showing Specification 5 alleges "punching arms"). She provided photos of bruises from May 2022, July 2022, and February 2023 (Pros. Exs. 8-11, 19), stating the bruises were from SrA Tyson doing something to her. R. at 538-49, 814-15.

For the first set of photos taken in May 2022, MR stated she went to the hospital for "chest pains," asserting broadly "that day he had, kicked me, punched me — and it hurt really bad to breathe. So that's why I went to get it checked out." R. at 537-40, 799. Photos and videos she took that day show a large bruise on her leg was visible. R. at 798-99; Pros. Ex. 8 at 4; Pros. Ex. 10. That day, when MR went to the hospital, SrA Tyson learned MR had been lying about her age; he overheard MR telling the nurses the year she was born. R. at 636, 798-99. There is no evidence MR reported physical abuse at the hospital and there are no photos of injuries to her chest. MR also convinced SrA Tyson she had *not* lied about her age. R. at 642-43.

In July 2022, there was a disagreement about going to a local fair. R. at 549. MR claimed photos of bruises she took at the time were caused by SrA Tyson "grabbing [her] arm." *Id*.

[4] Some of this testimony is the basis for Specifications 8 and 9 of the Charge, alleging divers property destruction and divers communication of threats. Charge Sheet at 3. SrA Tyson was convicted of these specifications. R. at 1157.

[5] Some of this testimony is the basis for Specifications 4 and 5 of the Charge, alleging "kicking" and "punching" separately and on divers occasions. Charge Sheet at 1. SrA Tyson was convicted of these specifications. R. at 1157.

From Engagement to Break Up

On October 31, 2022, SrA Tyson and MR got engaged, but the engagement was short-lived for SrA Tyson. R. at 527; *see* Pros. Ex. 17 (calling her his "ex" by February 2023). At some point between summer 2022 and December 2022, SrA Tyson learned about MR's real age (again). R. at 648-50.[6] Some point after learning that MR had still been lying to him about her age, in late December 2022 or early January 2023, SrA Tyson told MR that she had four months to get out of his house. Pros. Ex. 16 at 7. He called her his "desperate ex" in late February. Pros. Ex. 17. But MR stayed in SrA Tyson's house with him until April 14, 2023. *See* Pros. Ex. 16; R. at 527.

During this timeframe, MR offered her own take on the engagement. At trial, she testified that she was under the impression she was married to SrA Tyson because he gave her a ring and had her sign some paperwork. R. at 553-55. But MR could not identify her wedding anniversary date. R. at 645. There was no wedding, no social media posts, no videos, no selfies, and no enrollment into DEERs or any other military system that would indicate she was his dependent or that a marriage occurred. R. at 643-45. Notably, MR had been enrolled before and understood the military dependent system by virtue of her marriage to SSgt AC. R. at 645-46. Despite all this, MR held herself out as married to SrA Tyson; the people she worked with at the medical group where she was an appointment line clerk thought she was married because she told them so. R. at 558, 660. At trial, MR claimed that she only found out she was *not* married in April 2023 because someone checked her status and told her. R. at 850. But in February 2023, in the midst of SrA Tyson telling MR to get out of his house, she had called SrA Tyson her fiancé in text messages. Pros. Ex. 17.

[6] The trial defense counsel attempted to show he discovered her age in December 2022 when MR got pulled over with SrA Tyson driving home from Christmas vacation, but MR stated he was aware of her real age "like, over the summer" of 2022. R. at 649-50.

Telling her co-workers that she was married was not the only false impression of the relationship MR gave her co-workers. They also thought she was enrolled in the Family Advocacy Program, but she was not; she had lied. R. at 577. She also told people at the medical group that SrA Tyson destroyed her stuff and they were having "marital issues." R. at 307, 321. But she never told her co-workers any physical violence was occurring, despite taking pictures of bruises since April 2022.

From late 2022 to April 2023, the discord between MR and SrA Tyson showed itself beyond SrA Tyson asking MR to leave his house. Pros. Ex. 16. He wanted the ring he gave her back. R. at 613; Pros. Ex. 16 at 34. He called her "the desperate ex." Pros. Ex. 17. And he expressed how much he disliked her. *Id.*; R. at 584-85 (describing in open court Pros. Ex. 15, which is sealed, but transcribed here); Pros Ex. 12. Furthermore, SrA Tyson was seeing other women. Pros. Ex. 16 at 3, 10, 12, 24-25; Pros. Ex. 17. MR stated the February 2023 bruise photos she took (Pros. Ex. 19) was around the time she followed SrA Tyson to another woman's house, but then he "escaped out of the window" from MR when she banged on the door. R. at 811-14. In videos MR took of SrA Tyson damaging property in the house, SrA Tyson demanded that MR leave his house and called her names or verbally berated her. Pros. Ex. 12; R. at 584-85 (describing in open court Pros. Ex. 15, which is sealed, but transcribed here). He "want[ed] [MR] out." Pros. Ex. 16 at 11.

But MR would not leave. She testified she could not stay with her ex-husband. R at 658. She was not from the local area, but Chicago, where her family still lived. R. at 517, 529. She was in Minot, North Dakota, with a man who wanted her out of his house. Pros. Ex. 16. But MR did not want the relationship to end and claimed she did not think the relationship was over. R. at 792-93. She asserted there were still "good times," like SrA Tyson taking her to Starbucks. R. at 520, 738, 792; *see* Pros. Ex. 16 at 31-32 (discussing Starbucks on April 12, 2023). When she caught

him with the other woman in late February 2023, she told SrA Tyson's paramour that she was SrA Tyson's fiancé, that they sleep together, and that they live together. Pros. Ex. 17; R. at 811. She told no one of the physical abuse. And she still did not leave the house. R. at 527.

The Domestic Violence Allegations in April 2023

In April 2023, everything came to a head. MR alleged that a wide variety of misconduct occurred in the days leading up to April 14, 2023, including her "stuff" and phone being destroyed (R. at 321, 585-86), and that the relationship exploded on that day. The order of events and what occurred was somewhat unclear.

That morning, SrA Tyson had just come off his duty-day shift (he was working mids/nights). R. at 371, 567. A neighbor heard two people arguing ("scream[ing]" words) and a thump. R. at 283, 289. MR called into work saying SrA Tyson was destroying her "stuff." R. at 296. She said she was safe (*id.*), and never asserted she was scared or hurt despite later testifying (1) that she had already been grabbed and "thrown around" that morning (R. at 595) and (2) that SrA Tyson had grabbed her by the neck about a day earlier (R. at 601). R. at 320-21. Concerned about MR, members of her work and members of SrA Tyson's unit showed up at SrA Tyson's house. R. at 300. When they rang the doorbell, MR effectively claimed she was saved by the bell, testifying that SrA Tyson stopped strangling her in that very moment. R. at 602.[7]

According to MR's account at trial, all the physical abuse on that day happened after SrA Tyson locked her out of the house, which happened after she called her supervisor about the harm to her property. R. at 594-601. The physical abuse, according to her, also all occurred upstairs. R. at 599-601; *see* R. at 603 (showing MR had to go upstairs to get to the computer room, where she

[7] This allegation of strangulation was the underlying basis of Specification 1 of the Charge, of which SrA Tyson was convicted. *Compare* Charge Sheet at 1, *with* R. at 1157.

alleged he "possibly" pointed a gun at her). She claimed SrA Tyson pointed a gun at her and threatened to kill her. R. at 599. But when asked to clarify at trial, she appeared confused as to whether the gun incident happened that day or where. R. at 599-600.[8] She also alleged SrA Tyson strangled her and threated to kill her that morning. R. at 601.

None of these claims were relayed to the members of the unit when they arrived, and MR took some time answering the door. R. at 302-03, 337-38. When she did, they could see she had bruises on her legs and she appeared upset and disheveled. R. at 302. They told her to go get SrA Tyson. R. at 303. She was gone for a few minutes. R. at 338. When she returned, she said he did not want to come and speak to them. R. at 385-86. They sent her back upstairs to him. R. at 338. She was gone for several minutes again. R. at 338. This time, when she came back, she had a fresh cut on her leg.[9] R. at 339. At some point, the members noticed the cut and pulled her out of the house. R. at 339, 387-88. At that point, MR was put in a car with her male supervisor. R. at 305. There, she said she did not want to get anyone in trouble and "just wanted him to stop destroying her stuff." R. at 305.

Law enforcement arrived and SrA Tyson was arrested and immediately put into pretrial confinement. R. at 401-03; Department of Defense Form 2707, *Confinement Order* (Apr. 14, 2023). DNA evidence was taken but it only showed what was expected: MR and SrA Tyson lived together and she had recently been around men (unidentifiable). R. at 864-65, 871-74.

[8] SrA Tyson was acquitted of the specification regarding MR's allegations regarding the firearm. *Compare* Charge Sheet at 1, *with* R. at 1157.

[9] MR claimed this cut came from SrA Tyson slicing her with scissors when she went to tell him to come downstairs. R. at 604, 711-19. SrA Tyson was acquitted of the "scissors allegation." *Compare* Charge Sheet at 1, *with* R. at 1157.

MR continued living in SrA Tyson's house on base (without him) until mid-2023. R. at 76-77, 765. She had been using a contractor identification card to access base, which, by the motions hearing in August, was turned in. R. at 73-77.

MR's Character for Truthfulness and Motive

No one testified that MR was a truthful person. Instead, an Air Force officer from the medical group testified MR did not have a character for truthfulness. R. at 968. This officer also strongly insinuated MR was involved in a health data incident, suggesting MR misused patient data. R. at 971-72. Furthermore, it was undisputed at trial that MR lied about her age repeatedly. *E.g.*, R. at 637-43, 798-800, 807-08, 845-47, 915, 918-20. She also lied about being enrolled in Family Advocacy. R. at 577.

There were also Facebook messages between MR and SrA Tyson in the days leading up to April 14, 2023, where she said he had been "silently" terrorizing her for three months. Pros. Ex. 16 at 6. MR accused SrA Tyson of infidelity and using her for sex. Pros. Ex. 16 at 3-8, 10. But then, she accused him of hitting her and doing something to her rib within the past day. Pros. Ex. 16 at 8. She invited him to "go round [two]." Pros. Ex. 16 at 26. A video of SrA Tyson and MR from April 13, 2023 (R. at 701), the same timeframe as these texts, was transcribed for the record and only included an accusation of him breaking her phone—no physical abuse. R. at 699; *see* R. at 823 (discussing the phone in the video); R. at 1134 (discussing in open court Def. Ex. A, which is sealed, but the content of which is described on the record). Based on her actions, MR did not appear in any pain nor did she allege any pain. R. at 699, 703. Rather, she was focused on her phone not working and got very upset SrA Tyson recorded her. R. at 699-701. She accused him of revenge pornography and demanded he delete the video. *Id*. This was the only evidence provided of SrA Tyson documenting what was happening in the relationship. *See* R. at 702 (discussing SrA

Tyson is the one recording MR's behavior). Everything else came from MR—including the Facebook messages. Pros. Exs. 7-14, 16, 18-20; *see* R. at 582-85 (discussing and transcribing in open court Pros. Ex. 15, a video MR took that the military judge sealed).

When she continued to bring up what he recently did to her over Facebook messages, SrA Tyson said "Take me to court." Pros. Ex. 16 at 17. She continued asserting he abused her, and his response was: "Take me to court bitch," followed by, "You're wasting your time." Pros. Ex. 16 at 25. Less than ten seconds later, MR wrote: "All of the pictures and video I have will never be dismissed," followed with, "You have no marks on you but everything is on me." *Id*.

SrA Tyson was convicted of six out of the nine domestic violence charges against him. R. at 1157.

Additional facts are included below that are relevant to the Assignments of Error.

ARGUMENT

I.

SrA Tyson was denied meaningful cross-examination of MR in violation of his Sixth Amendment right to confrontation when the military judge excluded evidence offered under Mil. R. Evid. 608(c) that MR was arrested for a domestic violence allegation made by her then-husband whom she claimed faked the corroborating injury.

Additional Facts

During MR's cross-examination, defense counsel attempted to impeach MR about what she thought was going to happen when members of the unit arrived. R. at 721. The defense wanted to get into the 2014 domestic violence incident that occurred between her and her ex-husband (SSgt AC) and how she was removed from base housing. Post-Trial Submission of Matters—*United States v. SrA Johnathon [sic] V. Tyson*, Atch. 1 at 6 (Dec. 26, 2023). This immediately set off an Article 39(a), UCMJ, hearing, where trial counsel asserted a mistrial might need to be

requested for "incredibly—its improper character evidence" and "extrinsic evidence of conduct . . . . not relevant to this case whatsoever." R. at 722-23.

The defense theory of relevance was multifaceted. First, the defense was trying to impeach MR about what she thought was going to happen when law enforcement showed up. R. at 721-22. Trial defense counsel argued that MR told the Office of Special Investigations that she was worried that *she* was going to be taken away following the incident on April 14th because of her experience with a prior domestic violence incident on base. R. at 724. This initial theory started after MR testified that she was worried whether *SrA Tyson* would be taken away. R. at 721. That triggered the defense line of questioning about MR being "removed from base housing." R. at 722.

The military judge let trial defense counsel explore their theory of relevance by questioning MR. R. at 726. MR had no memory of the previous situation except for Security Forces coming to the house. R. at 727-29. Then the military judge allowed the defense to call the patrolman who responded. R. at 732. Prior to doing so, the trial counsel asserted the Security Forces member "had no recollection of it, other than the fact that he remembers taking Staff Sergeant [AC] away, but not [MR]." R. at 725.

The patrolman explained that the situation MR was previously involved in was one of mutual aggression—both MR and SSgt AC expressed there had been pushing and shoving. R. at 738. After having his memory refreshed, the defense counsel asked questions about MR reporting that SSgt AC had scratched himself across the eye with a key. R. at 739-40.

> Q. Based on your review of the file, do you now recall if there were statements concerning self-harm?
>
> A. There was, according to [MR]. Like I said, that statement was done by my partner . . . and she had stated that he had taken the key to his own face.
>
> Q. So, just so I understand. When you say he, do you mean [SSgt AC]?
>
> A. Yes.

Q. And so [MR] had stated that [then-]Airman [AC] had taken a key and scratched his own face with it?

A. Yes.

R. at 740-41. The patrolman also explained MR was detained, transported in a police car, and cited for a violation of state law. R. at 737-38. He did not know what happened after she was arrested. R. at 744.

Combined, the evidence from the patrolman became the theory of relevance under Military Rule of Evidence (Mil. R. Evid.) 608(c) for motive to fabricate. R. at 746. The defense asserted that because MR was arrested after then-husband showed signs of injury, the "police did not believe her. And that is her previous experience with law enforcement. . . . And she is now in a similar situation . . . . And at some point she comes out with a cut, and she claims that Airman Tyson has made that cut. . . . [G]iven her experience — she has a motive to fabricate." R. at 746. The defense also asserted, "And it goes to her knowledge as well . . . about what happens when one of the parties in a domestic violence incident has a cut. . . . that the person with a cut is presumed to be the victim of the other person. Whether it be mutual, or exclusive." R. at 746. The theory of relevance focused on self-harm, that the person who has a cut would not be labeled as the abuser. *See* R. at 747 ("Essentially, this is her explaining away the cut on his face with self-harm — she's not responsible."). There was extensive back-and-forth with the military judge on this theory until defense counsel asserted, "[MR] may have knowledge, or this perception, that when there is an active bleeding cut – that impacts how law enforcement reacts to a situation." R. at 747-52.

To the defense, this was about role reversal. R. at 752. SSgt AC was bleeding then, and MR was taken away. *Id*. Now, the theory was she was bleeding due to self-harm, so the theory was SrA Tyson would be taken away. R. at 753. The defense asserted it was "highly probative and

highly relevant that [MR] has this knowledge and this experience, that an active bleeding cut may shift equities, and may shift decision-making for law enforcement who are responding on the scene." R. at 753. The defense argued that MR did not know how the situation would turn out with SrA Tyson's unit or law enforcement, but that "this encounter arguably solidified the minute she presented with a shallow cut. And it's again about those equities in the minds of first responders." R. at 753.

The military judge excluded the evidence, finding it both irrelevant under Mil. R. Evid. 401 and that it would not pass the Mil. R. Evid. 403 balancing test. R. at 756-57. The military judge found that the "[d]efense argues this evidence is relevant and admissible under [Mil. R. Evid.] 608(c) related to [MR's] mindset and motive to fabricate the charge and its specifications before the court . . . ." R. at 755. In her assessment of Mil. R. Evid. 401, the military judge found there was no real and direct nexus of fact: "As I discussed with counsel in argument, defense's proffer of relevance that an individual who presents with a fresh wound will shift the outcome of the investigation or responders, is not supported by the 2014 allegations they intend to — ask of the witness." R. at 756. The military judge found MR suffered no consequences from the 2014 incident to have a motive to fabricate a new incident: she remained married and "was never charged or convicted" of any offense. R. at 756. The military judge found MR also had no memory of the 2014 incident, so "it would not have been on her mind in 2023." R. at 756. Additionally, MR was not the one who called the police in 2014, but was the one who called the police in 2023. R. at 756. The military judge also found that MR was not SrA Tyson's spouse and would have no legal standing to stay in the house if either party was at fault in 2023. R. at 756. The military judge also found that MR "was already packing up her boxes to leave the house in the first place." R. at 757.

Even if the evidence was relevant, the military judge found the evidence failed the Mil. R. Evid. 403 balancing test. R. at 757. The evidence was from nearly ten years prior and the defense had already done "extensive cross-examination of [MR] and adduced other potential evidence and motive to fabricate, to include anger at breaking up, alleged infidelities, pending separation, and a variety of other issues." R. at 757. The military judge determined the evidence "is trying to paint [MR] as an aggressive and unsympathetic victim, and has a significant chance of confusing the members about the issue, creating a trial within the trial, causing undue delay, and is needless presentation of cumulative evidence." R. at 757. She concluded by saying, "There's also significant risk that the members will misuse this evidence beyond the limited purpose offered by the defense as a motive to fabricate, to draw impermissible conclusions." R. at 757. There was no other elaboration on these conclusions.

The defense clarified that the position taken was not about character evidence, but "the evidence is admissible, as it goes to [MR's] knowledge of the effect of presenting to law enforcement with an injury caused by one self [sic], and blaming someone else." R. at 758. The defense then asked for Mil. R. Evid. 404(b)(2) to be considered. R. at 758. The military judge denied admissibility under Rule 404 for the same reasons. R. at 759.

Standard of Review

When the military judge excludes evidence of bias, the exclusion raises issues regarding an accused's Sixth Amendment right to confrontation. *United States v. Bins*, 43 M.J. 79, 84 (C.A.A.F. 1995). When claiming a violation of the Confrontation Clause for not being able to conduct "an otherwise appropriate cross-examination designed to show a witness's bias, the appellant has the burden of showing that a reasonable jury might have reached a significantly different impression of the witness's credibility if the defense counsel had been able to pursue the

proposed line of cross-examination." *United States v. Moss*, 63 M.J. 233, 236 (C.A.A.F. 2006) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)).

"Where the Sixth Amendment's right to confrontation is allegedly violated by a military judge's evidentiary ruling, the ruling is reviewed for an abuse of discretion." *Moss*, 63 M.J. at 236 (citing *United States v. Israel*, 60 M.J. 485, 488 (C.A.A.F. 2005)). "Abuse of discretion occurs when the military judge: (1) bases a ruling on findings of fact that are not supported by the evidence; (2) uses incorrect legal principles; (3) applies correct legal principles in a clearly unreasonable way; or (4) does not consider important facts." *United States v. Shelby*, 85 M.J. 292, 294 (C.A.A.F. 2025) (citing *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017)). If an abuse of discretion is found, the case will be reversed unless the error is harmless beyond a reasonable doubt. *Id.*

Law and Analysis

1. **The military judge abused her discretion in excluding MR's past domestic violence claim because the evidence went directly to the defense theory: MR fabricated all the allegations by creating and manipulating evidence.**

The Confrontation Clause preserves the right of an accused "to be confronted with the witnesses against him." U.S. CONST. amend. VI. This right includes the right to cross-examine witnesses, including on issues of bias and credibility. The Court of Appeals for the Armed Forces (CAAF) "has held that rules of evidence should be read to allow liberal admission of bias-type evidence." *Moss*, 63 M.J. at 236. Mil. R. Evid. 608(c) allows for evidence to show bias, prejudice, or any motive to misrepresent through the examination of witnesses *or* extrinsic evidence.

"A defendant's right under the Sixth Amendment to cross-examine witnesses is violated if the military judge precludes a defendant from exploring an entire relevant area of cross-examination." *Israel*, 60 M.J. at 486 (citing *United States v. Gray*, 40 M.J. 77, 81 (C.M.A. 1994)).

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Mil. R. Evid. 401; *see United States v. Guihama*, 85 M.J. 48, 55 (C.A.A.F. 2024) ("The relevance standard is a low threshold." (quoting *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010)). "The partiality of a witness . . . is '*always relevant* as discrediting the witness and affecting the weight of his testimony.'" *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (quoting 3A John Henry Wigmore, *Evidence* § 940, at 755 (Chadbourn rev. 1970)) (emphasis added). "[T]he right to cross-examine is the right to question where the proffer establishes a real and direct nexus to a fact or issue at hand." *United States v. Sullivan*, 70 M.J. 110, 115 (C.A.A.F. 2011).

The 2014 domestic violence incident was relevant to the defense theory for two reasons. First, the defense was trying to impeach MR in order to argue that she was worried about *herself* being arrested, not that SrA Tyson would be.

But during that 2014 incident, MR had also asserted the scratch on her then-husband's face was self-inflicted. This was the second reason why the evidence was relevant. The defense theory of relevance under Mil. R. Evid. 608(c) was that "the evidence is admissible, as it goes to [MR's] knowledge of the effect of presenting to law enforcement with an injury caused by one self [sic], and blaming someone else." R. at 758. The previous incident tended to show that MR knew the impact of "an active bleeding cut," which would turn MR into the victim, rather than a mutual combatant or aggressor. The defense theory at trial was that MR fabricated her injuries (1) to manipulate the reaction of law enforcement in April and (2) to control SrA Tyson over a year. Essentially, MR was using outward signs of abuse—photos of bruises and cuts—to frame SrA Tyson as she asserted was done to her in 2014.

MR knew there would be "negative consequences to a domestic violence report for both parties." R. at 751. In line with the defense theory, MR had a lot to lose: the place she was living, base access, her job, and her status as a "military spouse." *See* R. at 648 (showing MR knew military spousal status came with employment preference). MR cloaked herself in the safety of being labeled the perceived victim and adjusted a scheme she had initiated during her relationship with SrA Tyson—manipulating him with allegations. When the military judge determined that MR was not SrA Tyson's spouse and thus would have no legal standing to stay in the house, she overlooked a significant motive to fabricate. Instead of facing consequences for the lies about her status—such as being removed from SrA Tyson's on base home or losing her job—MR would reap the benefits of them in alleging various offenses. In coming to her decision, the military judge dismissed the defense theory altogether, believing the Government's theory instead. This was an abuse of discretion because it was a failure to consider important facts that would contradict MR's testimony.

The defense theory was supported by the proffered evidence. The evidence of MR's knowledge about the scratch, her motive to fabricate her own injuries, her ability to flip a narrative, and her desire to avoid consequences is directly relevant to the determination of guilt. Even though SrA Tyson was acquitted of the scissors allegation related to the actively bleeding cut, every single bruise photo is called into question through the 2014 incident. The Government's entire case was based on MR's testimony. Even the photographs "corroborating" her narrative required her testimony to explain what they were and who caused them. Pros. Exs. 2-4, 8, 11, 18-19; *see, e.g.*, R. at 539, 550 (describing some of the photos and the source of the bruises). This makes the 2014 evidence more relevant, rather than less, by showing a motive—and means—to fabricate. Relevance is a low bar and there was a theory of relevance with a real and direct link to the current

case. The military judge did not consider important facts, which amounts to an abuse of discretion.

2. The military judge also abused her discretion in excluding this evidence under Mil. R. Evid. 403 because there was otherwise no evidence in the record that MR would self-harm and only one witness would be required to prove up the relevant points.

The military judge also abused her discretion during the Mil. R. Evid. 403 balancing test. There was nothing in the record that to indicate MR would consider self-harm as a means to manipulate the narrative. Thus, the evidence was not cumulative. The concept of self-harm or manipulating the narrative went beyond the scissors allegation, but the miliary judge improperly narrowed the theory of relevance to just the cut on April 14, 2023. The whole defense theory relied on MR faking all the injuries. This included the idea that MR would strangle herself or create fake strangulation marks through another means.

MR told the police SSgt AC scratched himself across his eye with a key. If *true*, MR learned how to manipulate the evidence and police through self-harm or creating a false narrative through a corroborating injury. This was the articulated defense theory. But if *not true*, the assertion that SSgt AC harmed himself is something MR came up with on her own, which suggests it is something she would think to do and possibly actually do herself. That conclusion is part and parcel to the defense theory and constitutes evidence of motive to fabricate under Mil. R. Evid. 608(c). Whether true or not, this was MR's story—SSgt AC did something extreme to himself and that shows (1) to what extent MR would lie and (2) her knowledge about how to manipulate a response from law enforcement. The members could have used MR's account for either purpose when offered as bias or a motive to fabricate.

That was the broader defense theory at trial: MR was a liar. MR documented bruises claiming they were injuries by SrA Tyson, faked strangulation marks, and cut herself open with scissors to frame SrA Tyson. Not, as the military judge opined, because the defense was painting

MR as an "aggressive and unsympathetic victim." She may be, but that was not the theory of relevance or the significance of the evidence. To think MR knew that cuts on herself would trigger favorable law enforcement action supports the idea she *would* create strangulation marks on herself or have someone else help her do so. On top of that, to think MR would come up with a story like her then-husband taking a key across his eye is enough to wonder what MR would do herself to maintain control and her image. The evidence had significant probative value if limited to those key points.

The military judge also determined that because the incident happened ten years ago, the probative value was degraded. Part of this assessment seems to be coupled with the fact MR had no memory of the event. R. at 756. But whether MR would admit to the incident or not is irrelevant for two reasons.

First, in this particular case, the fact MR did not remember the incident increases the weight of this evidence, rather than decreases it. MR said some version of "I don't remember" more than eight-seven times throughout the trial. R. at 1117. MR could not even remember her testimony from the day before. R. at 713 ("I'm not sure what I said yesterday."). This admission was before the military judge as well. *Compare* R. at 713 (showing her lack of memory), *with* R. at 722 (being confronted about the 2014 incident). The fact MR did not remember being escorted out of her home in a police car because, according to her at the time, her then-husband falsely accused her of harm is beyond belief, as were many of MR's other accounts under oath. MR's purported lack of memory goes to the weight of the evidence, but it was not so significant to eliminate the probative value. In finding otherwise, the military judge applied the law in a clearly unreasonable way to the facts of this case. Even if the value of the evidence was lowered because MR "failed to remember" an incriminating incident, the remaining probative value going to MR's credibility was not

substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the members, or wasting time.

Second, one witness, the patrolman, could have provided the evidence. Extrinsic evidence of bias is permitted. Mil. R. Evid. 608(c). The defense did not need more than two facts to make the relevant point: MR was previously arrested when her then-husband accused her of domestic violence and MR stated that the corroborating evidence was fabricated through self-harm. On the record, even including refreshing the witness's memory, the patrolman testified in less than twenty-five minutes. Open Proceedings, "A9126hmqk_16fa8v6_hi8.tmp" at 03:26:40-3:48:10.[10] Admitting MR's experience through extrinsic evidence after she "did not remember" would have taken less time and could have been narrowly tailored enough to permit the defense to argue the real and direct effects of the evidence in closing. A limiting instruction could have been given too. Thus, concerns about delay, confusing the issues, wasting time, and misleading the members were clearly unfounded. Combined, the military judge erred when she excluded relevant evidence that went to the crux of the defense theory of the case attacking MR' bias and establishing her motive to fabricate.

3. The exclusion of the evidence was not harmless beyond a reasonable doubt because no other evidence showed MR would be willing to lie or fabricate physical injuries.

Where the defense is prohibited from exploring an appropriate cross-examination designed to elicit bias-type evidence, "the appellant has the burden of showing that a reasonable jury might have reached a significantly different impression of the witness's credibility if the defense counsel

[10] The audio of the open proceedings in appellate defense counsel's copy of the record of trial is a two-page PDF with seven imbedded audio files. The patrolman's testimony is on the first page, in the file on the far right of the second row (reading from top to bottom and left to right, that would be the fourth file). If the file name in the copy of the record is the same for the Court, it is "A9126hmqk_16fa8v6_hi8.tmp."

had been able to pursue the proposed line of cross-examination." *Moss*, 63 M.J. at 236 (C.A.A.F. 2006) (citing *Van Arsdall*, 475 U.S. at 680).

By excluding the evidence, the defense was left with only a figment of a theory that MR could self-harm or manipulate the narrative. This is far less strong than having direct evidence that MR was exposed to this actual experience. The exclusion of this evidence meant there was no evidence MR would "turn and burn."[11] The Government capitalized on this in closing, accusing defense counsel of "gaslight[ing]" MR and by extension the members, with this theory. R. at 1128, 1131; *see, infra*, Issue VIII (asserting this was improper argument). But the excluded evidence would have supported what the Government virtually called a conspiracy theory.[12] *Id*. With the evidence, the panel would have been left with a different impression of MR's knowledge, experience, and penchant to lie.

The acquittal on the scissors allegation shows that even without this evidence, the members did not believe MR's narrative—but the impact of the evidence goes beyond that specification. Every bruise is a question: could MR have done that to herself or manipulated the narrative? The experts foreclosed a self-harm theory. R. at 995-96. But if MR had gotten hurt in another way or manipulated the narrative for her own purposes, that changes the evidence in this case. The petty lies about her age and the breakups, and that she followed SrA Tyson to his lover's house matter—but they do not provide an explanation for the bruises. Had the members received the evidence,

[11] The defense theory was MR had a "click and burn and go" plan to frame SrA Tyson. R. at 1107.
[12] The common use of the term "conspiracy theory" is to imply that the subject of it is false, and that people who believe it are irrational. David Coady, *Conspiracy theory as heresy*, 55 EDUCATIONAL PHILOSOPHY AND THEORY at 756 (2021), https://doi.org/10.1080/00131857.2021.1917364 (last accessed Aug. 28, 2025). This also aligns with the meaning of "gaslighting" given to the members in trial. *See* R. at 893 ("Gas lighting is actually invalidating somebody's reality, somebody's perception of an experience . . . .); R. at 907 (discussing how gaslighting "destroys someone's sense of reality" and is the "crumbling away of the truth").

there were two conclusions to draw from it. MR either (1) was exposed to how persuasive someone could be by faking an injury to law enforcement or (2) she concocted the story that her then-husband scratched himself across the eye. They operate together as a motive to fabricate and are two sides of the same coin. MR's 2014 key story is true or it is false. Either way, it casts doubt on MR's credibility for every allegation.

The defense theory that she had a motive to frame SrA Tyson in response to him breaking up with her, evicting her, and using her for sex becomes stronger when viewed through the lens that *she* was controlling *him* with photos and bruises. She was the one who threatened to take him to court and ruin his life. *See generally* Pros. Ex. 16. She was the one who invited him to "go round two." Pros. Ex. 16 at 26. She made a point that there are only marks on her, none on him. Pros. Ex. 16 at 25. She was missing the tell-tale signs of strangulation: redness on the throat (no witness testified seeing this), throat pain (R. at 942), difficulty swallowing (R. at 942), or trouble speaking (no witness testified she appeared physically impaired except when crying). R. at 942 ("[T]he neck examination — they didn't really notice much, except for, they called it a small bruise on the right lower neck."). But she had bruises that only she could claim were from being strangled.

MR had recorded snippets of SrA Tyson destroying her things, but never any recordings of him hurting her; not even audio recordings. Pros. Exs. 12-14; *see* R. at 582-85 (describing in open court Pros. Ex. 15, which is sealed, but transcribed here). Even in Defense Exhibit A,[13] where she confronted him about damaging her phone, she made no allegation about him beating her. R. at 699-701. Yet it was pointed out that there was a large visible bruise on her arm. R. at 1133 (discussing Def. Ex. A). On top of lacking any allegations of violence, the video revealed MR's

[13] The exhibit itself is sealed, but the contents and events are discussed openly on the record and that information is what is cited herein.

bias, motive, and modus operandi. After failing to get what she wanted and losing control of what was happening, MR removed her shirt and showed her breasts (R. at 699, 702, 825), telling SrA Tyson that the partial nudity she just initiated made the video "revenge pornography," requiring its wholesale deletion. R. at 699-700. This was a clear example of MR needing to control the narrative, constituting a motive to fabricate that extended to all the evidence. *Id*.; *see also* R. at 791 (showing when asked if she reset SrA Tyson's Facebook and searched on his laptop how to delete Snapchat, MR responded simply with: "I don't recall doing that"). But it still did not show that MR would be so calculated as to harm to herself or lie about injuries to frame SrA Tyson.

Without the evidence stemming from MR's 2014 domestic violence incident, the defense case was limited. The defense argued she made those marks herself or they were caused in some other way, but that theory was largely unsupported. There was evidence or theories that MR threw herself to the floor (R. at 698), that she threw herself against a door (R. at 705), and that she worked at UPS where she might handle packages (R. at 558-59). The experts could not rule out accidental injury for some of the bruises. *E.g.*, R. at 1000-02. But none of those theories explain how the limited strangulation marks occurred—unless she faked them. That theory is significantly bolstered by her past experience with domestic violence and law enforcement, and makes no sense without it. To think she would accuse her then-husband of dragging a key over his eye matches the level of manipulation required for MR to drag scissors over her leg, pinch herself on the neck to make a red mark, punch herself in the arm to create bruises, and orchestrate verbal fights to frame SrA Tyson as the abuser. Knowing that self-harm will result in at least one party being believed is significant. Knowing that MR would even say someone could scratch themselves across the eye is a reflection on her veracity. Had the members been able to hear about MR's past, they would have been left with a significantly different impression of her truthfulness.

Consequently, a reasonable jury might have reached a significantly different impression of MR's credibility if the defense had been able to pursue the proposed line of cross-examination about the prior domestic violence incident.

WHEREFORE, SrA Tyson requests this Court set aside the findings and the sentence.

II.

SrA Tyson's conviction for strangling MR is factually insufficient.

Standard of Review

Article 66(d)(1)(B), UCMJ, 10 U.S.C. § 866(d)(1)(B), allows this Court to review a conviction for factual sufficiency when an appellant (1) asserts an assignment of error and (2) shows a specific deficiency in proof. *United States v. Harvey*, 85 M.J. 127, 130 (C.A.A.F. 2024).

Law and Analysis

For factual sufficiency, Article 66(d)(1)(B)(ii), UCMJ, directs this Court to "weigh the evidence and determine controverted questions of fact." "This power is subject, in part, to Article 66(d)(1)(B)(ii)(I), UCMJ, which requires 'appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence.'" *Harvey*, 85 M.J. at 130. This Court does not have to give complete deference to the court-martial, and depending on the evidence, no deference may be appropriate. *See id.* at 130-31 ("The statute affords the [court of criminal appeals (CCA)] discretion to determine what level of deference is appropriate."). This Court can "weigh the evidence differently from how the court-martial weighed the evidence." *Id*. at 131. If after this weighing, the CCA is clearly convinced the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding. Article 66(d)(1)(B)(iii), UCMJ.

For this Court to be "clearly convinced that the finding of guilty was against the weight of the evidence," this Court must (1) decide that the evidence, as just weighed, does not prove guilt beyond a reasonable doubt, and (2) "be clearly convinced of the correctness of this decision." *Harvey*, 85 M.J. at 132.

To prove domestic violence by strangulation, the Government had to prove beyond a reasonable doubt that SrA Tyson strangled MR with his hand with unlawful force or violence. Charge Sheet at 1; R. at 1053; Exec. Order No. 14062, 87 C.F.R. 4763, 4779 (2022). "Strangulation" means "intentionally, knowingly, or recklessly impeding the normal breathing or circulation of blood of a person by applying pressure to the throat or neck . . . ." R. at 1055; Exec. Order No. 14062, 87 C.F.R. 4763, 4772 (2022). No specific intent is required for this offense.

Here, the Government did not prove SrA Tyson strangled MR, as the term is legally defined. MR never testified that her breathing or blood circulation was impaired. The only thing MR testified to was that SrA Tyson "grabbed" her by the neck and put "a lot of force into it." R. at 601. She confirmed he was "pressing" with both of his hands. R. at 601. But she does not say she could not breathe, that she thought she was going to pass out, that she was dizzy, or saw stars. *Compare* R. at 601, *with United States v. Webb*, No. ACM 39904, 2021 CCA LEXIS 607, at *23-24 (A.F. Ct. Crim. App. Nov. 18, 2021) (finding "strangulation" where the victim *at least* testified she got dizzy and saw stars). There is also no indication that she lost any of her acrylic nails in trying to remove hands from her neck. *Compare* Pros. Ex. 18 at 9 (showing her nails on her right hand), *with* R. at 952-53 (eliciting testimony that MR may have scratched herself on the right side of her face trying to get SrA Tyson's hands off her neck); *see* R. at 1087 (arguing she did not lose a nail).

MR did not testify to *any* impairment of her faculties or bodily functions as required for strangulation. R. at 602. Even when the trial counsel tried to get MR to explain how the strangulation felt, she used amorphous phrases without describing the impact to her breathing or other bodily functions. *See* R. at 601 ("I thought, okay, maybe this is where it ends for me."); R. at 610 ("It felt—felt like it—that could've been the last time I was alive."). There is also a point where she is confronted with a previous statement to law enforcement about possibly biting SrA Tyson during this encounter. R. at 843; *see* Pros. Ex. 6 (showing no bite marks, only healing scrapes and scratches). She starts crying when she cannot "recall what [she] watched . . . a couple hours earlier [in the day]." R. at 843. She asserted: "I know that it happened, I don't know in what order, I don't know how, I don't know how my hair was, I don't know if I was wearing a bra, I don't know specifics. I just know it did happen." R. at 844. MR could not remember what happened earlier in the day or what she testified to the day before, let alone what happened when she was allegedly strangled. R. at 710, 713. She said "it happened"—but MR's testimony and the bruises are the only evidence on this specification.

Medical evidence also supports that there was no strangulation. There were no red marks on MR's neck when members of the unit arrived or when MR reported to the hospital. R. at 942. She had no trouble talking or swallowing. *Id*. "The neck examination . . . didn't really notice much, except for . . . a small bruise on the right lower neck." R. at 942. MR complained of no medical injury from the strangulation *other than* the bruises on her neck.

The DNA evidence seemed to contradict MR's version of events as well. Forensic testing could not find MR's DNA on SrA Tyson's hands, which would be expected if he recently used both hands to wrap around her neck in a way to cut off her airway or blood circulation. R. at 876. MR's neck had male DNA on it, but as the expert noted, that could have been from any of the male

servicemembers who checked on her and whom she interacted with on the morning of April 14, 2023. R. at 873-75; *see* R. at 491 (showing law enforcement agents followed MR to the hospital after the incident on April 14, 2023); R. at 497 (showing law enforcement swabbed MR's neck for DNA at the hospital).

The minimal evidence provided by MR is not enough to prove strangulation, especially where medical and forensic evidence does not support her version of events. But, even if MR did provide enough information during her testimony to prove strangulation, her lack of credibility would still be problematic. MR's lack of credibility was apparent throughout trial. She habitually lied about her age. R. at 637-43, 798-800, 807-08, 845-47, 915, 918-20. A witness testified about MR's character for untruthfulness. R. at 968. She was involved in an allegation "that she utilized [a] health record inappropriately." R at 972. She lied about her marital status—or at least exhibited an incredible amount of ignorance about her marital status. R. at 643-47. She dodged every inconvenient fact by saying she could not remember, saying some version of "I don't know" or "I don't remember" over eighty-seven times; eighty-two of these times occurred during cross-examination. R. at 1117. Her lack of credibility is revealed by the mixed findings too. R. at 1157.

The Government asserted at trial that, under the defense theory, MR would have had to strangle herself. R. at 995, 1101-02. This is an overexaggeration of the defense's theory. Rather, the defense argued she merely manufactured the bruises, either herself (by pinching her neck or otherwise manipulating the skin) or with someone's help. *See* R. at 1106 ("SDC: Members, make no mistake. This case is about false allegations."). Either way, the defense theory was that SrA Tyson did not strangle MR or cause the bruises. *Id*. There was evidence in the record that MR said SrA Tyson pinched her on her neck and caused a mark. R. at 814-15; Pros. Ex. 19 at 1. Considering the unbelievable accounts or otherwise detail-lacking narratives MR told about her various injuries

(*see, infra*, Issues III-VII (challenging legal and factual sufficiency based on paucity of evidence), the existence of this mark on her neck caused by a "pinch" provides an explanation for the bruises on her neck. The expert even noted there were similarities between the pinch marks in February 2023 and the strangulation marks in April 2023. R. 1003-05. MR did not have to "strangle herself." She easily could have pinched herself.

This goes to the overall defense theory that MR was operating on a scorched earth policy. *See* R. at 1106 (calling it a "bug-out plan" or "click and burn and go"). She was upset SrA Tyson broke up with her and she was upset he was "cheating" on her after the breakup. R. at 661-64. She testified *she* "wasn't gonna [sic] allow" SrA Tyson to see other women. R. at 669. *She* was the one who followed him to another woman's house to confront him. R. at 667-70, 811-12. She was not scared of him, but jealous and scorned, and using false allegations to control SrA Tyson to keep using him to her benefit. *See* Pros. Ex. 16 (casting herself as the reason he's not facing charges). As a result of her untrue claim of being SrA Tyson's wife and thus a "military spouse," she received hiring preferences (R. at 648), on-base housing (R. at 630-31, 661), monetary benefits (Pros. Ex. 16 at 3 (showing SrA Tyson pays the bills)), and gifts—to include an engagement ring (R. at 648). *She* was the one documenting a narrative to manipulate SrA Tyson. Pros. Exs. 8-14, 16, 18-20; *see* R. at 582-85 (discussing and transcribing in open court Pros. Ex. 15, a video MR took that the military judge sealed). MR was going to destroy SrA Tyson for "using her," not for beating her, not for strangling her, but for being a bad boyfriend.

This entire case rose and fell with MR's credibility. This Court should give minimal weight to MR's testimony and should review the images of the bruises through the lens of MR's motive to fabricate and her ability to control the narrative. In doing so, this Court should be clearly convinced that after weighing the evidence, the finding of guilt is not supported.

WHEREFORE, SrA Tyson requests that this Court set aside the finding of guilty as to Specification 1 of the Charge, dismiss Specification 1 of the Charge with prejudice, and set aside the sentence.

III.

SrA Tyson's conviction for kicking MR in the legs on divers occasions is legally and factually insufficient.

Standard of Review

This Court reviews issues of legal sufficiency de novo. *United States v. Harrington*, 83 M.J. 408, 414 (C.A.A.F. 2023) (citing *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019)).

The factual sufficiency standard referenced in Issue II, *supra*, is also applicable for this issue and is incorporated herein.

Law and Analysis

"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) (citation omitted).

The factual sufficiency case law cited in Issue II, *supra*, is also applicable for this issue and is incorporated herein.

To find an accused guilty of an "on divers occasions" specification, there needs to be proof the accused "committed two acts" that meet the elements of the charged offense. *United States v. Rodriguez*, 66 M.J. 201, 203 (C.A.A.F. 2008). Here, the Government charged SrA Tyson with kicking MR's legs on divers occasions. Therefore, to prove this offense, the Government had to prove SrA Tyson committed "two acts of kicking" MR in the legs. MR only testified to one

instance with any detail to sustain a conviction on legal sufficiency. R. at 540; Pros. Ex. 8 at 4; Pros. Ex. 10. This is not enough for an "on divers occasions" charge.

This case is similar to *United States v. Rodriguez*, No. ACM 36455, 2007 CCA LEXIS 254, at *2 (A.F. Ct. Crim. App. June 26, 2007). In *Rodriguez*, the Government attempted to show three separate instances of marijuana use. *Rodriguez*, 66 M.J. at 203-04. One witness testified he used marijuana with the appellant, but the other witnesses only relayed admissions by the appellant that he had used previously. *Rodriguez*, No. ACM 36455, 2007 CCA LEXIS 254, at *2. Those admissions were vague as to time and place. *Id*. On appeal, "given the extremely vague admissions made by the appellant," this Court did not affirm on "divers occasions." *Id*. at *7. This holding was also similar to the Chief Judge's rationale in a recent case: "Given the paucity of evidence elicited by the Government, I am clearly convinced including these touches in the conviction would also be against the weight of the evidence." *United States v. Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *55-56 (A.F. Ct. Crim. App. Aug. 15, 2025) (Johnson, C.J., dissenting).

Here, the allegations by MR of being kicked were vague as to time and place. R. at 536. She suggested there was missing evidence (R. at 654, 657, 783, 819, 1021) and frequently failed to recall details of the various assaults (*see, e.g.*, R. at 600, 687, 717 (noting the times MR claimed it was all a "blur"). She could not articulate specifics (R. at 536-37) and only clearly had pictures of one time where she asserted SrA Tyson kicked her: on or around May 6, 2022. Pros. Ex. 8 at 4; Pros. Ex. 10. The members appeared not even to know when MR alleged kicking because they requested pieces of her testimony to show when she was allegedly kicked. R. at 1144. The parties picked three excerpts. Appellate Ex. LXVI. Those three excerpts only went to one instance of kicking: May 6, 2022. *Id*. The paucity of evidence indicates the Government did not prove this allegation on "divers occasions."

Moreover, even if one—or more—instance of kicking was legally sufficient, no alleged instance was factually sufficient due to MR's lack of credibility. The only evidence of kicking was on May 6, 2022. R. at 536-37; Pros. Exs. 8-10. MR said she was kicked and took photos of it. Pros. Ex. 8. But she also went to the hospital at this time and never alleged domestic violence to anyone despite having a very prominent bruise on her leg. R. at 537. MR simply documented bruises she had and saved them—for almost a year.

However, the timing of the photographs coincided with SrA Tyson finding out MR lied about her age for the first time. R. at 637-642, 799. SrA Tyson was twenty-two in early 2021 (when they met) and he thought MR was twenty-five. R. at 636; *compare* Pros. Ex. 24 (showing SrA Tyson's age), *with* R. at 517 (showing they met in 2021). She was actually over thirty, something SrA Tyson apparently did not like. R. at 807-08 (calling her an "old ass bitch"). He learned about her age when he went to the hospital with her and overheard her tell the nurses her birth year. R. at 799. To be clear, him finding out the truth about her age would have been *after* the alleged source of the bruises. *Compare* R. at 537 (testifying she went to the hospital for "chest pains), *with* R. 799 (testifying "that day he had, kicked me, punched me, and it hurt really bad to breathe. So what's why I went to get it checked out.").

Having bruise photos would have been a way for MR to manipulate SrA Tyson to stay with her despite her age. But she did not need to do that (yet). *See* Pros. Ex. 16 at 25 (threatening him with "pictures" of "assault and domestic violence" in April 2023). MR was able to convince SrA Tyson she was not an "old ass bitch" by "gaslighting" him about her age, as the Government expert agreed (R. at 919-20), claiming she showed him her ID with her age—and then testifying to a more positive version of this event on the stand. R. at 637-42. She claimed she covered her ID or told him something different. *Id*. She also claimed she could not recall what happened because it was

so long ago. *See id.* (showing she said she could not remember on every page but specifically "so long ago" twice).

MR could not even identify one specific instance of kicking or how it happened. She just said SrA Tyson would kick her. R. at 536-37, 559. Even the experts could not age the bruises, explain where they came from, or what caused them. R. at 943, 997-1003, 1011. One expert said the bruises captured in photographs on April 14, 2023, *could* be from kicks, but MR did not testify to kicking around that time. *See* R. at 1011 (discussing Pros. Ex. 18 at 3-5). No evidence presented provides context or explanation for MR's apparent injuries. Instead, MR merely alleged that kicking occurred. There is simply not enough evidence in the record for a reasonable person to convict, especially considering MR's lack of credibility.

When looking at MR's credibility as a whole, this allegation is another example of her tactic of manipulation and lying. As with the strangulation bruises, the only evidence that SrA Tyson caused the apparent injuries was MR's testimony. But MR had a relationship, a job, a house, and an overall fraudulent life to salvage. She held herself out as a twenty-six-year-old and struggled to remember if she represented herself as a nurse when, at the time of trial, she was a thirty-three-year-old appointment line clerk. R. at 517, 558. She took pictures of bruises not because SrA Tyson kicked her in the legs, but so she could control him and prevent him from breaking up with her. Pros. Ex. 16 at 12 (showing MR saying "fucking respect me" because she is keeping him from domestic violence charges). And it worked—for a while. But then SrA Tyson broke up with MR (Pros. Ex. 16 at 7; Pros. Ex. 17), and she had zero intention of honoring that. *See* R. at 844-45 (showing some of her things were packed but she had no moving truck, no lease, no move-out date, nothing). And that is when everything escalated and MR documented the most "wrongs" by

SrA Tyson. Pros. Exs. 12-14, 16-20; *see* R. at 582-85 (discussing and transcribing in open court Pros. Ex. 15, a video MR took that the military judge sealed).

Where the only corroborating evidence are photos of bruises that no one can verify, MR's testimony broadly alleging SrA Tyson kicked her is not enough. Where she did not testify credibly, these bare bones assertions about kicking should result in setting aside the specification.

WHEREFORE, SrA Tyson requests that this Court set aside the finding of guilty as to Specification 4 of the Charge with prejudice for factual sufficiency, and set aside the sentence. Alternatively, even if factual sufficiency is found, this Court should not affirm the "on divers occasions" of the finding of guilty of Specification 4 of the Charge.

IV.

SrA Tyson's conviction for punching MR in the arms and torso on divers occasions is legally and factually insufficient.

Standard of Review

The standard of review for this assignment of error is the same as Issue III. *See, supra*, Issue III (covering legal and factual sufficiency).

Law and Analysis

1. The Government failed to prove that SrA Tyson committed the charged violent offense on divers occasions.

The legal and factual sufficiency case law cited in Issues II and III, *supra*, is also applicable for this issue and is incorporated herein.

"To prepare a defense, the accused must have notice of what the government is required to prove for a finding of guilty. The charge sheet provides the accused" such notice. *United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018) (citation omitted). Here, the Government charged

SrA Tyson with punching MR's "arms and torso with his fists" on divers occasions. Charge Sheet at 1.

Since "[t]here is no dispute that the government controls the charge sheet," SrA Tyson is entitled to rely on the specific body parts and method of harm listed within the specification: "punching" MR's "arms and torso." *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017). In fact, as the CAAF recently observed, the Government has "complete discretion" over how to charge an accused and the Government "accept[s] the risk" that an appellant may not be criminally liable based upon how the charging scheme connects with the evidence. *United States v. Mader*, 81 M.J. 105, 109 (C.A.A.F. 2021).

The charging language and instructions dictate that the panel had to find that SrA Tyson committed *a singular* "violent offense," which was "assault consummated by battery by punching [MR's] arms and torso with his fists" on more than one occasion. Charge Sheet at 1. The parties' understanding of what the Government had to prove based on the instructions seems to align. The panel had to find that SrA Tyson did "bodily harm" by punching her "arms *and* torso" with his fists. R. at 1060. As charged, this is a *set of conduct*, not individual acts. By the plain language of the specification, punching both the arms *and* the torso must occur *together* in the same incident to constitute the offense. This understanding of the specification is consistent with the instructions and indicates the parties' interpretation of the specification at trial. *United States v. George*, __ M.J. __, No. 24-0206, 2025 CAAF LEXIS 577, at *9 (C.A.A.F. July 21, 2025). Since it is a reasonable interpretation, this version controls. *Id*.

Furthermore, this interpretation is consistent with the unit of prosecution for assaults. "Congress intended assault, as prescribed in Article 128, UCMJ, 10 U.S.C. § 928, to be a continuous course-of-conduct-type offense and that each blow in a single altercation should not be

the basis of a separate finding of guilty." *United States v. Flynn*, 28 M.J. 218, 221 (C.M.A. 1989) (first citing *United States v. Morris*, 18 M.J. 450 (C.M.A. 1984); then citing *United States v. Rushing*, 11 M.J. 95 (C.M.A. 1981)). The unit of prosecution for "an uninterrupted attack comprising touchings 'united in time, circumstance, and impulse' charged as assault under Article 128, UCMJ . . . is the number of overall beatings the victim endured rather than the number of individual blows suffered." *United States v. Clarke*, 74 M.J. 627, 628 (A. Ct. Crim. App. 2015) (citing *Rushing*, 11 M.J. at 98). A domestic violence offense under Article 128b, UCMJ, directly incorporates assault and the elements under Article 128, UCMJ. Exec. Order No. 14062, 87 C.F.R. 4763, 4778-80 (2022). Therefore, as charged, the Government adopted this standard as the unit of prosecution; an "uninterrupted attack" must have included punches to both the "arms *and* torso."

MR never testified to punches to her torso and arms happening in the same assault. In fact, she never testified to the substance of any physical abuse with specificity. She only vaguely asserted SrA Tyson punched her *arm* (singular) or punched her torso. She never asserted these actions happened in the same instance.

MR also never testified in any detail about being "punched" in the torso. There are only two pieces of corroborating evidence to her otherwise sparse allegation: Prosecution Exhibits 16 and 19. In the Facebook messages, MR says SrA Tyson punched her in the chest. Pros. Ex. 16 at 28. These are dated April 12, 2023. *Id*. Then, when the trial counsel is showing MR the photos she took of herself in February 2023, MR says the bruises seen on page two (showing her chest) are "where he had punched me." Pros. Ex. 19 at 2 (referring back to testimony on R. 814). MR does not testify to any other "punches" to her torso. To be sure, MR alleges a number of other assaults and coupled them with photos, but none of them qualify as a "punch to the torso." *See, e.g.*, R. at

536-37, 539, 546, 549, 576, 595, 598, 611, 695, 829-30, 955 (discussing "grabbing"); R. at 814 (discussing "pinching); R. at 612, 678 (discussing how SrA Tyson put his weight on her).

As for the punches in the "arm*s*," MR broadly stated SrA Tyson would punch her in a specific place—the left *arm*—at a specific frequency—*every* time they argued. R. at 536, 611. The February 2023 incident that has a punch to the chest ("torso") has no corroborating photo of a punch to the arm, let alone *arms*. Pros. Ex. 19. MR also does not testify she was punched in the arm or arms at this time. She says the photos are a "fair and accurate representation[] of the injuries [she] sustained in February 2023." R. at 814. Nothing else was alleged. Therefore, without a punch to the arms, the punch to the torso in February is insufficient proof for the alleged assault. No reasonable factfinder could find that the assault in February has all the essential elements where there is no punch to either arm, let alone *both arms*.

The April 2023 incident appears to contain both a punch to the arm and a punch to the torso. Pros. Ex. 18 at 2, 9. While this may be enough for legal sufficiency of *one* instance for a singular arm, it is not enough for divers occasions. MR simply did not testify to another occasion where the assault as charged occurred. Should this Court ultimately find that the conviction is factually sufficient, this Court should only affirm so much of this specification to reflect a single assault consummated by battery for punching the torso and one arm.

2. This Court should find this specification factually insufficient.

Every specification that SrA Tyson was convicted of has the same defect: MR was not a credible witness and the "corroborating evidence" relied on MR's bare-bones description of it. The whole case rested on MR's credibility: her character for lack of truthfulness, her motive to fabricate, and her consistent and convenient memory lapses show the broad uncorroborated allegations are not enough to sustain this conviction.

The corroborating evidence, such as the photos of the bruises and the text messages, relied on MR's narrative. No one else ever saw or corroborated any form of physical or emotional abuse. No one testified to her character for truthfulness. No friends or family members of MR's testified, despite her ex-husband and best friend living and working on Minot AFB. *See* R. at 629-30 (showing SSgt AC lived down the street from SrA Tyson); R. at 322 (showing MR's friend (R. at 633) worked with MR at the medical group). MR's evidence was full of convenient snippets of SrA Tyson. *See generally* Pros. Exs. 8-14, 16-20 (showing MR as the "victim"); *see* R. at 582-85 (transcribing in open court Pros. Ex. 15, a video MR took showing SrA Tyson calling her names). But MR created all of this evidence and was the only one describing the context. *See generally* Pros. Ex. 1-20. The experts relied on that narrative too. *See, e.g.*, R. at 904-05 (discussing how concluding the existence of coercive control is based on the victim's report). But MR was not a credible witness.

MR's motive to control and frame SrA Tyson if he did not do what she wanted colors all of the evidence, particularly the text messages. Pros. Ex. 16. There is no evidence in the record that SrA Tyson ever *admitted* to hurting MR. He is blunt and mean to her in the Facebook messages, but he never says he physically assaulted her. Pros. Ex. 16. His responses make more sense in this context as well. He is not afraid of her "taking him to court" because he did not do anything. Pros. Ex. 16 at 17, 25. He tells her to go to the doctor, which would make little sense if MR's testimony to arguments and punches to the arm every day for a year were true. Pros. Ex. 16 at 20, 24. He tells her to go to the emergency room. Pros. Ex. 16 at 8. He is not concerned with her false allegations.

Furthermore, these messages are all when MR is trespassing in SrA Tyson's home. Pros. Ex. 16 at 6. After they broke up (Pros. Ex. 17), she refused to leave. Pros. Ex. 16 at 6. Then, on

April 11, 2023, the messages started turning to allegations of domestic violence. Pros. Ex. 16 at 8-39. The correlation makes sense: she was trying to manipulate SrA Tyson with the threat of criminal liability so he would not kick her out. Multiple times in the messages MR asserts she is the only thing standing between him and abuse charges. Pros. Ex. 16 at 17, 25, 30, 33. The last message from MR, from April 13, 2023, at 11:48 PM, is "I'll deal with you in the morning," which was less than eight hours before she called her supervisor (R. at 294) and SrA Tyson subsequently "leaves in cuffs." Pros. Ex. 16 at 27, 39.

MR had every reason to lie and manipulate the evidentiary landscape. *See, supra*, Issues II-III (covering previously her motives to fabricate). She had every reason to fabricate allegations and manipulate SrA Tyson. *Id*. *MR* was in charge and she controlled the narrative. Her vague testimony about the alleged abuse makes sense in this framework because it reinforces that the bruises were not from SrA Tyson. These motives and fabrication support that MR made the bruises to herself, got someone else to cause them, or accidentally bruised herself but framed them as evidence of abuse. SrA Tyson, who did not have MR's DNA on him after she alleged that he beat and strangled her on April 14, 2023, is not the source of the bruising or abuse. When reviewing the evidence in total, the specification is not factually sufficient.

WHEREFORE, SrA Tyson requests that this Court set aside the finding of guilty as to Specification 5 of the Charge with prejudice via factual sufficiency review, and set aside the sentence. Alternatively, this Court should not affirm the "on divers occasions" of the finding of guilty of Specification 5 of the Charge.

V.

SrA Tyson's conviction for destroying MR's cellphone is legally and factually insufficient.

Standard of Review

The standard of review for this assignment of error is the same as Issue III. *See, supra*, Issue III (covering legal and factual sufficiency).

Law and Analysis

The legal and factual sufficiency case law cited in Issues II-III, *supra*, is also applicable for this issue and is incorporated herein.

To prove this offense, the Government needed to prove "destruction" versus "damage" to property and specific intent. It failed to do either.

1. The Government did not prove MR's phone was destroyed, as charged.

SrA Tyson did not "destroy" MR's phone. "To be destroyed, the property need not be completely demolished or annihilated, but must be sufficiently injured to be useless for its intended purpose." *Manual for Courts-Martial*, *United States* (2019 ed.) [hereinafter *MCM*], pt. IV, para. 45.c.(2); R. at 1065. "Damage" to property requires much less: "any physical injury to the property." *MCM*, pt. IV, para. 45.c.(2); R. at 1065. While the panel was read both definitions, the members were not instructed that they could find "damage" to the property as a lesser included offense. R at 1065. The panel was, however, instructed they could substitute the value of the property. R at 1065-66.

The evidence did not show SrA Tyson "destroyed" MR's phone, but merely damaged it. First, the phone MR complained was "destroyed" still worked. An agent from the Office of Special Investigations testified and said, "The phone appeared damaged versus destroyed." R. at 512. Critically, though, the agent added, "And it was able to be powered on." *Id*.

MR's testimony—again reliant on her credibility—was much more categorical. She claimed the screen was so shattered that, if she used it, she would cut her hand. R. at 762. She also broadly claimed, "It stopped working." R. at 586. However, neither was true.

The photos of the phone revealed damage to the screen (Pros. Ex. 20), but no more than expected when an iPhone is dropped. *See* Christina Bonnington, *Why Are iPhones Still So Fragile?*, Slate (Nov. 7, 2017, 7:32 PM) https://slate.com/technology/2017/11/iphone-x-durability-broken-phones-raise-questions-of-why-iphones-are-still-so-fragile.html ("Drop tests . . . show that the phone . . . is ready to shatter if you drop it from as little as three feet."). Despite this damage, though, the phone and screen continued to work. This is shown through three pieces of evidence. First, MR held her phone in front of a camera (R. at 699 (describing Def. Ex. A played in open court)) and "the damage . . . [didn't] compare to . . . the actual picture of the phone" in Prosecution Exhibit 20—when MR reported the offense. R. at 1125 (describing Def. Ex. A during closing argument). Second, MR sent Facebook messages to SrA Tyson during this time, an application that would have worked on WiFi and was accessible via phone. Pros. Ex. 16. She was able to send detailed messages to SrA Tyson at various times during the day, suggesting she was doing so on her cellphone. *Id*. Third, and critically, MR testified that the phone still worked on WiFi and was "usable": "I could continue to use it on WiFi . . . ." R. at 762. She explained that she could not receive calls or text messages, but her Apple iPhone 13 did work when she connected to WiFi. *Id*. She admitted she used this phone to send videos and "screen grabs" to her Special Victims' Counsel for the Government's case. R. at 763-65.

What was wrong with MR's phone is comparable to having broken headlights on a car. If the headlights on her car were broken, she could not drive at night, but she could still drive her car. Similarly, MR's phone still powered on, still connected to WiFi, and could send videos and

messages via WiFi. Neither the phone nor the car may work in all circumstances, but they still work for their intended purposes.[14] Thus, because MR's phone worked for its intended purpose of communicating with others even if just via WiFi, it was not "destroyed."

The fact the phone was not sufficiently injured to be useless for its intended purpose explains the members' decision to only convict for "some value." R. at 1157. MR testified the damaged phone cost $700.00. R. at 586, 1021. That was the amount listed in the specification. Charge Sheet at 3. However, the members substituted "$700.00" for "some value," which, in light of the evidence, makes sense. Her phone still worked. Therefore, the whole cost of the phone was not lost. Rather, there was some damage done to the phone and the cost of the damage was unknown. Therefore, "some value" was substituted in for $700.00. The panel was given the evidence to convict on the specification without exceptions and substitutions, but the members' did not do so. This decision supports the conclusion the phone was *damaged* not *destroyed.*

However, the panel was not instructed on "damage" to the phone being a lesser included offense of "destruction" of the phone. Where there is no dispute the phone was damaged and "destruction" necessarily implies "damage," this Court can affirm a conviction for a lesser included offense. *See United States v. Upham*, 66 M.J. 83, 88 (C.A.A.F. 2008) (discussing the circumstances where this Court's statutory authority allows it approve a lesser included offense). At minimum, if this Court finds the intent element met despite MR's serious credibility problems, this Court should affirm a lesser included offense of "damaging" the phone rather than "destroying" it.

[14] For example, "composing" electronic messages and "initiating a command or request to access the Internet" is itemized as something barred by New Hampshire's law on cellphone *use* while driving. N.H. Rev. Stat. Ann. § 265:79-c.

2. MR's credibility problems cast doubt on whether the requisite intent was proven.

This domestic violence specification also required the Government to also prove that SrA Tyson injured MR's phone with an intent to "threaten and intimidate" her. Charge Sheet at 3; Exec. Order No. 14062, 87 C.F.R. 4763, 4779 (2022). The Government failed to prove SrA Tyson's intent.

MR described that SrA Tyson "broke" her phone: "He, um, would consistently bang it on the metal bed frame." R. at 586. She provides no other explanation. She did not allege he banged up her phone because she was calling 9-1-1 or someone for help. She did not allege he did it because she was recording him during an assault or while he was threatening her or causing property damage. She just says he "would consistently bang [her cellphone] on the metal bed frame." R. at 586. The record is devoid of any explanation for this instance of property damage. The Government was required to prove SrA Tyson had the specific intent to "threaten and intimidate" MR when he injured her phone—not that he was just mad at her (or the situation) and banged her phone on the bedframe. Because there are no details or context to this incident, it is impossible to say why SrA Tyson injured her phone. With all of MR's credibility concerns, *see, supra*, Issues II-IV, this Court cannot be clearly convinced the weight of the evidence supports the conviction.

Based on the defects in the evidence, this Court should aside this specification of domestic violence through its factual sufficiency review. Should this Court find SrA Tyson damaged MR's cellphone willingly and wrongfully despite MR's minimal testimony on how or why her property was damaged, this Court should find the lesser included offense of "damage" to non-military property under Article 109, UCMJ.

WHEREFORE, SrA Tyson requests that this Court set aside the finding of guilty as to Specification 7 of the Charge with prejudice via factual sufficiency review, and set aside the sentence. Alternatively, this Court should only affirm the lesser included offense of "damaging" non-military property under Article 109, UCMJ.

VI.

SrA Tyson's conviction for destroying a variety of MR's belongings is legally and factually insufficient.

Standard of Review

The standard of review for this assignment of error is the same as Issue III. *See, supra*, Issue III (covering legal and factual sufficiency).

Law and Analysis

The legal and factual sufficiency case law cited in Issue II-V, *supra*, is also applicable for this issue and is incorporated herein.

This specification was charged similarly to the punching allegation in that on more than one occasion, SrA Tyson had to "destroy" a specific list of items. *See* Charge Sheet at 3 (itemizing a number of MR's belongings). Except for maybe on or about April 14, 2023, SrA Tyson never damages this complete list of items. As for what happens on April 14, 2023, there is a three-fold problem with the evidence. First, there is no testimony SrA Tyson injured these items altogether on that day. Second, SrA Tyson does not "destroy" most of these items. Third, the Government did not prove the required intent. Therefore, this conviction should be set aside for legal and factual sufficiency.

The charge sheet provides notice for what the Government is required to prove. *Armstrong*, 77 M.J. at 469 (citation omitted). Since the Government controls the charge sheet, the Government accepts the risk that its charging scheme may not align with the evidence. *Mader*, 81 M.J. at 109;

Reese, 76 M.J. at 301. Here, the Government charged SrA Tyson with destroying a list of MR's property on divers occasions. Charge Sheet at 3. "Divers occasions" means an accused "committed an offense two or more times, not that a single offense was perpetrated over a period of time." *United States v. Ozbirn*, No. ACM 39556, 2020 CCA LEXIS 138, at *20 (A.F. Ct. Crim. App. May 1, 2020) (citing *United States v. Neblock*, 45 M.J. 191, 199 n.10 (C.A.A.F. 1996)).

The charging language and instructions dictate that the panel had to find that SrA Tyson committed *a singular act* in "violation of the UCMJ against . . . property." Charge Sheet at 3; R at 1064. This singular offense was specifically charged as "willfully and wrongfully destroying [a specific list of items] and other household items of a value of about $3,000.00, the property of [MR]" on more than one occasion. Charge Sheet at 3.

The parties' understanding of what the Government had to prove based on the instructions seems to align. The panel had to find that SrA Tyson "committed *an act* in violation of the Uniform Code of Military Justice, to wit: destroying non-military property in violation of Article 109, UCMJ." R at 1064 (emphasis added). The military judge then instructed on the violation of Article 109, UCMJ: "on divers occasions, the accused willfully and wrongfully destroyed certain personal property, that is clothing, shoes, hair appliances, toiletries, bags, a cooler, makeup items, eye-glasses and other household items" which was MR's property and worth about $3,000.00. *Id*. By the plain language of the specification, the Government had to prove SrA Tyson destroyed this complete list of items worth $3,000.00 in a single instance—and then did so again. This understanding of the specification is consistent with the instructions, of which reflect a reasonable interpretation of the specification by the parties at trial. *George*, 2025 CAAF LEXIS 577, at *9. Thus, this version controls. *Id*.

Furthermore, this is consistent with the unit of prosecution for property damage. By listing all the property together, the Government asserted "only a single incident or transaction." *United States v. Collins*, 36 C.M.R. 323, 325 (C.M.A. 1966). In *Collins*, the Court of Military Appeals (CMA) found "that when several articles of property are damaged, in violation of Article 109, under circumstances indicating only a single incident or transaction, *the damage must be alleged as part of one offense*." *Id*. at 325 (emphasis added). When the Government alleged multiple items were damaged (a safe, pinball machines, and a jukebox), the question became "whether the articles were all damaged *in a single incident, as alleged in the specification*, and as to which the Government has the burden of proof." *Id*. at 326 (emphasis added). The CMA ultimately determined that all the damage to the listed property was done in one instance, as charged. *Id*. at 325-26. Therefore, pursuant to *Collins*, adding "divers occasions" to a set of property listed in a specification means there must be two separate instances of damage to the property list, not that one unit of prosecution (the damage to a list of items) is *divided* over *multiple* instances of damage.

Here, SrA Tyson never destroyed the charged list of items on one occasion, as required by *Collins*—except maybe on April 14, 2023. MR broadly asserted SrA Tyson was "demolishing things" in February 2023. R. at 559. When further pressed, she said he was breaking "anything he could get his hands on. Shoes. Clothes. Toiletries. Purses." *Id*. This list did not include hair appliances, "a cooler, make-up items, eyeglasses, and other household items." Charge Sheet at 3. She also never asserted this damage happened in the same incident. Moreover, the video evidence where SrA Tyson appears to damage a candle or candle holder on February 11, 2023, breaks a cellphone charger in March 2023, and pushes toiletry items to the ground on April 11, 2023,[15] are

[15] This conduct is captured in Prosecution Exhibits 12, 14, and 15. Pros. Exs. 12, 14; *see* R. at 561 (dating Pros. Ex. 12); R. at 571 (dating Pros. Ex. 14); R. at 582-84 (dating and transcribing Pros. Ex. 15, a video MR took that the military judge sealed).

not part of the same incident by virtue of their dates. *United States v. Patterson*, __M.J.__, No. 25-0073, 2025 CAAF LEXIS 548, at *4 (C.A.A.F. July 14, 2025) (citing *United States v. Simmons*, 82 M.J. 134, 139 (C.A.A.F. 2022)). Even if they were, there is still no evidence SrA Tyson destroyed hair appliances, "a cooler, make-up items, eyeglasses, and other household items" any other time than on or about April 14, 2023. The evidence simply does not align with the Government's charging scheme. These items were all charged together, asserting a single incident of property damage—which had to occur more than once. There is no evidence that happened, though. Thus, at minimum, the injury to property did not happen on divers occasions, and this Court should not affirm that language.

As to a singular incident, there are at least photos indicating the list of property charged was in some state of injury on April 14, 2023. However, MR does not testify to the destruction of this evidence in one single incident, the items are not "destroyed," and the Government did not prove SrA Tyson's intent.

For whatever reason, the Government did not elicit testimony from MR that SrA Tyson injured those items during the same event. Instead, the Government only asked the following: "[MR] as you go through Prosecution Exhibit 5. And particularly towards the end as you get to, photographs of your belongings. Are those — is that damage done by you, or by someone else?" R. at 833. MR responded, "No, all of this is done by [SrA Tyson]." *Id*. But, she never explained when such damage was done.

By charging everything together, the Government asserted a singular event where all of this property damage occurred—on more than one occasion. *Collins*, 36 C.M.R. at 325. But there simply is no evidence supporting that. No one knows when MR's hair appliances, clothes, shoes, bags, cooler, eye-glasses or "other household items" were damaged. It is just as likely that the

property was damaged in a series of different acts spanning a period of time rather than one incident. This Court can only affirm as much property damage as occurred in a single instance, as charged. *Collins*, 36 C.M.R. at 325-26.

Even if all of the listed property was injured at the same time, it was not damaged. This is similar to the cellphone. *See, supra*, Issue V. Most of the listed property is damaged, but not "sufficiently injured to be useless for its intended purpose." *MCM*, pt. IV, para. 45.c.(2). The hair appliances look destroyed (Pros. Ex 5. at 22), but nothing else does—everything else is still useable. Shoelaces can be replaced; clothes can be sewn and repaired. Pros. Ex. 5 at 23, 24, 26-28. The glasses appear to have just fallen on the floor. Pros. Ex. 5 at 18. For all the items listed, there is not proof that each was destroyed. MR seems to assert there was proof via receipts, but none of that was presented at trial. *See* R. at 1021 (claiming she "submitted" pictures, prices, and receipts). Therefore, if this Court affirms any form of this specification, it should affirm the lesser included offense of "damage" to non-military property, rather than "destruction" as charged.

Finally, as with every specification on the charge sheet, MR's credibility impacts whether the Government proved the specific intent required to turn a property crime into a domestic violence crime. *See, supra*, Issues II-V. When looking at the record in total, this Court cannot be clearly convinced the weight of the evidence supports the conviction.

Based on the defects in the evidence, this Court should set aside this specification of domestic violence for factual sufficiency. Should this Court find SrA Tyson damaged any of MR's property willingly and wrongfully despite MR's minimal testimony on how or when her property was damaged, this Court should find the lesser included offense of *damage* to non-military property under Article 109, UCMJ, on a single occasion on April 14, 2023, and narrow the specification to only those items proven to be damaged in that single instance.

WHEREFORE, SrA Tyson requests that this Court set aside the finding of guilty as to Specification 8 of the Charge with prejudice via factual sufficiency review, and set aside the sentence. Alternatively, this Court should only affirm the lesser included offense of "damaging" non-military property under Article 109, UCMJ, and narrow the specification to only include items damaged altogether in one instance.

VII.

SrA Tyson's conviction for threatening MR on divers occasions is legally and factually insufficient.

Standard of Review

The standard of review for this assignment of error is the same as Issue III. *See, supra*, Issue III (covering legal and factual sufficiency).

Law and Analysis

The legal and factual sufficiency case law cited in Issues II-VI, *supra*, is also applicable for this issue and is incorporated herein.

"Divers occasions" means an accused "committed an offense two or more times, not that a single offense was perpetrated over a period of time." *Ozbirn*, No. ACM 39556, 2020 CCA LEXIS 138, at *20 (citing *Neblock*, 45 M.J. at 199 n.10). "When the Government elects to charge an offense alleging the use of specific words, it stands to reason that a charge of 'divers occasions' is legally insufficient unless Appellant repeats those particular words on two or more occasions." *Id.* For example, this Court in *Ozbirn* found the conviction for "divers occasions" legally insufficient where the appellant sent the charged language to two individuals over a period of days, but there was no evidence he sent those specific messages two or more times. *Id.* at *20-21.

The same problem exists here. The Government charged SrA Tyson with saying two phrases on divers occasions: "I'm going to have to kill you" and "I'm going to blow your brains

out."[16] R. at 1067; Appellate Exhibit LXIII at 12; Charge Sheet at 3. MR testified that SrA Tyson would say phrases like these multiple times during each argument, every day. R. at 570. But she did not testify that he would say *both* of these phrases each time, merely that he threatened her during every argument—though she seemed to fail to understand that "name calling" was not a threat. R. at 569-70 (responding to the question "[d]id he ever verbally threaten you" with "I'm sure there has been, I'm trying to think — it was such a broad time. Um, verbally threaten me, as in like — calling me name [sic], or?").

As with assaults and property damage, when the Government charges a string of conduct together, it is charging a singular violation of Article 115, UCMJ, committed on more than one occasion. *Cf. Clarke*, 74 M.J. at 628 (citing *Rushing*, 11 M.J. at 98); *Collins*, 36 C.M.R. at 325. In the way the language is charged and as seen through the instructions, SrA Tyson needed to say both statements during the same incident. MR never provided testimony to that effect. Even on April 14, 2023, the threats MR claimed SrA Tyson stated that day are broken apart into different instances, to include the acquitted offense of holding a gun to her head. *Compare* R. at 599, 831 (discussing the gun incident), *with* R. at 601-02 (discussing being grabbed by the neck). The threats did not happen during the same incident, even if they occurred on the same day. At minimum, this Court cannot affirm this specification for "divers occasions."

Even assuming MR described an instance where SrA Tyson threated her with both of these statements in the same act, her bare assertion he would threaten her during every argument is

[16] Review of the charge sheet reveals there is a scrivener's error in the quoted language. Charge Sheet at 3. The phrase "I'm going to blow your brains out" does not have an initial quotation mark. *Id*. The Entry of Judgment and Statement of Trial Results do. Regardless, the parties reviewed instructions showing these were two separate phrases. Appellate Exhibit LXIII at 12. Where there is no objection to the wording and no claim of a lack of notice, the parties' interpretation of the specification at trial controls if it is reasonable. *George*, 2025 CAAF LEXIS 577, at *9.

inconsistent with other evidence. The videos MR took of the verbal altercations do not include these two threats. Pros. Exs. 12-14; *see* R. at 582-85 (describing in open court Pros. Ex. 15, which is sealed, but transcribed here). MR seemed to think "name calling" was a threat (R. at 570), which does appear in every video and the Facebook messages, but that is insufficient to constitute a "threat." A "threat" is an "expressed present determination or intent to *kill or injure a person* presently or in the future." R. at 1067; *MCM*, pt. IV, para. 53.c.(1) (emphasis added). Name calling does not express an intent to kill or injure a person, nor would a reasonable person think that.

MR's deficient credibility fails to prop up the sketches set out in her allegation. When first asked, she could not even describe how SrA Tyson threatened her. R. at 569 ("Um, verbally threaten me, as in like — calling me name [sic], or?"). Then she swung the pendulum to compensate, claiming these threats happened every day (R. at 570), albeit with no corroborating evidence. This evinces an accuser tossing out an inkblot on the assumption that such broad strokes are enough to meet the Renaissance master-level detail required by the charged elements—and what it takes to find proof beyond a reasonable doubt. *See, supra*, Issues II-VI (explaining MR's motives to fabricate and the associated evidence). MR's testimony is not enough to affirm this specification where her credibility was so undermined and the evidence was so sparse.

WHEREFORE, SrA Tyson requests that this Court set aside the finding of guilty as to Specification 9 of the Charge with prejudice, and set aside the sentence.

VIII.

The trial counsel committed prosecutorial misconduct during the findings argument resulting in material prejudice to SrA Tyson's substantial rights.

Additional Facts

The "Chief, Special Trial Counsel" (as introduced to the members by the military judge (R. at 127))[17] gave the Government's closing argument. His argument spanned twenty-eight pages of trial transcript and was over an hour long. R. at 1077-1105; Open Proceedings, "A9107odbi_16fa8v8_hi8.tmp." at 1:17:54-2:35:53.[18]

The trial counsel began his argument recognizing that MR had serious credibility issues. R. at 1077. He asserted, "*We* have provided evidence — good, bad indifferent. In the search for *the truth*. In the search for *justice*." R. at 1078 (emphasis added).

When discussing the incident MR testified occurred in May 2022, he argued:

> Members, this is direct evidence of injury sustained by [MR] in 2022. And *we know* through testimony that there was argument, and the accused was already upset about finding out — or suspecting at this point that [MR] had lied about her age. So *we know* what he did later on when that happened.

R. at 1081 (emphasis added). Then he asserted, "So *we know* by now this relationship has certainly become physically abusive. So, the natural question that *we would ask of ourselves and our loved ones is, why the heck are you still there? Why did you stay? It's an absolutely normal response*." R. at 1082 (emphasis added).

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[17] During voir dire, the trial counsel introduced himself as the "District Chief, Special Trial Counsel for the Office of Special Counsel." R. at 149.

[18] The audio of the open proceedings in appellate defense counsel's copy of the record of trial is a two-page PDF with seven imbedded audio files. The closing arguments are on the first page, in the file on the far right of the third row (reading from top to bottom and left to right, that would be the last file on the page). If the file name in the copy of the record is the same for the Court, it is "A9107odbi_16fa8v8_hi8.tmp."

In further explaining MR's desire to stay in the relationship, to include thinking she was married to SrA Tyson, the trial counsel stated:

> She just takes it at his word because, why — she told us what would happen if you questioned it. What would happen if you started the argument? Well, *we know* from May of 2022 and the pictures, right? *We know* from July in 2022 and the pictures, and *we know* from all the other evidence of the days when there aren't pictures of. That when she challenged it — . . . . That's when she would get beaten.

R. at 1083-84 (emphasis added).

Shortly after, the trial counsel turned to the December 2022 timeframe:

> Because now as we get to December of 2022, *I think we can all agree* that the accused has finally found out that [MR] was lying about her age. *Members, and let me be clear right now — she was. It's why I had no cross-examination for [the supervising HIPAA officer] when she got up and opined upon her character for truthfulness. [MR] was not truthful to Airman Tyson about her age. She lied about her age.*

R. at 1084 (emphasis added).

When discussing Facebook messages, the trial counsel asserted that "[MR] is absolutely right," when she commented that there was so much the members did not see in those messages. R. at 1085. In discussing the video where SrA Tyson stabs an ice maker (Pros. Ex. 13), the trial counsel provided, "There's no evidence of her physically harming him here. There's no evidence of her slapping him. There's no evidence of her being physically aggressive." R. at 1086. He argued, "*We're not just taking her word for it* — we have photographs. When we talk about the evidence being presented, this isn't something where you rely on [MR] to tell you about all these things . . . ." R. at 1086.

Turning to April 2023, the trial counsel repeated "there is no evidence" MR is physically aggressive in Pros. Ex. 15, but SrA Tyson "[c]alls her every name in the book. Disgusting names." R. at 1087.

The trial counsel began reciting the events of April 14, 2023. R. at 1087-88. The first mention of the defense theory is quickly dismissed by the trial counsel, saying "some plot to get him in trouble" "doesn't hold any water." R. at 1088-89. He argued the theory that she cut herself was "silly":

> I mean, if that's where we are — then that's where we are, but that's — that's certainly kind of *silly*. I mean — that's not reasonable. That's not a reasonable doubt to have. That's not reasonable to think that that is what happened on the 14th of April.
>
> *What happened on the 14th of April was what [MR] testified to. That there was an argument, that it got physically violent, and that the accused strangled her*.

R. at 1090.

Discussing MR's testimony about being strangled, the trial counsel turned his argument towards the defense expert: "Now, strangulation is legally defined and this is why *I had to have a very frank conversation* with [the defense's expert] about medical definitions and legal definitions. *I couldn't spell asphyxia for you right now, off the top of my head, but I'm sure as heck sure it ain't in there*." R. at 1091.

The trial counsel moved through the now-acquitted offenses, noting, "Members, we've talked about this already, but — the testimony in court, the evidence that we have — there's no indication of self-harm. Let me be clear on that. Despite defense's promises in opening statement that you would hear much evidence of self-harm — there was none. None." R. at 1092.

He moved on to discussing the expert evidence presented. He discussed the DNA evidence, asserting "All in all, it — *to me*, DNA cannot answer the questions in this one because they lived together, right?" R. at 1101. He commented that the Government's expert's testimony about how there is no literature about "mechanical self-strangulation with your own hands" is "pretty powerful." R. at 1102. And then he discussed coercive control:

> [A]s a lay person you hear about domestic violence, you hear about intimate partner violence, and you want your sister, or your mother, or your friend, or your brother, or your cousin — to get the heck out of there. Why would you stay in there? Why would you stay in there? Talked about coercive control, right?

R. at 1102.

After the defense counsel gave his closing argument, the special trial counsel stood back up for rebuttal argument. R. at 1127. His rebuttal argument spanned seven pages of trial transcript. R. at 1128-35.

He began by stating, "We have put on good, bad, indifferent evidence in an effort to find the truth and to find justice in this case." R. at 1128. He continued, telling the members that despite having "immense respect for the senior defense counsel in this case," that defense was "gaslight[ing] [MR]" and by virtue the members. R. at 1128. The defense's argument was nothing more than a "spin." R. at 1128.

Switching to the Government theory, he said, "And as much as she tried to protect the man that she still loved, as hard as that is to believe — *as hard as it is to believe, and as much as we don't want to believe that, maybe — maybe, what really happened is exactly what was testified to, and is exactly what makes sense*." R. at 1129 (emphasis added). Trial counsel claimed that the Government's theory "makes a heck of lot more sense and is a lot more reasonable" than the defense's "concocted" theory. R. at 1129.

Correctly noting that the defense theory was focused on MR, the trial counsel then said:

> *Do not let them continue to do what he has done to her for 2 years. This woman had no history of self-harm. There is none. There's no evidence, no history that she bruises easily.* Think of that — defense counsel goes, the government could've given you medical records. Medical records, what — that say she doesn't bruise easily? That say she doesn't have one of those diseases? Would she have to be tested for that? Is that normal? *I'm not a medical person — but for goodness sakes, my medical records don't say he doesn't have cancer. What medical records could we have provided that would have proven she doesn't bruise easily? When we know what the*

> *cause of her bruising is — he's sitting right there. It's his hands and his feet. And it's as clear as day.*

R. at 1131 (emphasis added).

The trial counsel went on:

> Defense counsel somehow wants to give their client credit for not grievously, seriously injuring her. I mean, that's the argument, right? Is he's so big, it would've been a lot worse. *I don't know how much worse it could get; thank goodness it didn't.* But you don't get credit for only beating somebody pretty badly. That's not a defense. "I didn't whoop you — I didn't whoop you as much as I could have." *Thanks for the restraint, Airman Tyson.*

R. at 1133 (emphasis added). He repeated, "There's no evidence that she self-harmed. There's no evidence that anybody else caused the bruises. Caused the injuries. Caused the damage." R. at 1135. He closed with a charge: "Apply the facts to the case through the legal instructions. The government is confident that you'll return a verdict of guilty to this charge and all specifications." R. at 1135.

Right after the trial counsel finished, the military judge provided an instruction sua sponte:

> If you believe that you heard either counsel express their personal opinion about a witness's character or the strength of the evidence, you may not consider it for that purpose. Counsel are not permitted to offer personal opinions; that was merely argument. Neither counsel's personal opinions, personal qualifications, or personal conduct in court are matters relevant for your consideration in resolving the matters before you. You, and you alone, determine the credibility of the witnesses and whether the government has proven the elements of an offense beyond a reasonable doubt.

R. at 1135. There were no objections to any of the Government's arguments and the military judge did not interrupt the trial counsel or provide any other instructions during his argument.

Standard of Review

This Court reviews prosecutorial misconduct and improper argument de novo. *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019). Where no objection is made, the Court conducts plain error review. *Id*. (citing *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018)).

Under plain error review, the appellant bears the burden to demonstrate error that is clear or obvious and results in material prejudice to his substantial rights. *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014). When the error is of constitutional dimensions, "the burden shifts to the Government to convince [the Court] that this constitutional error was harmless beyond a reasonable doubt." *United States v. Carter*, 61 M.J. 30, 33-35 (C.A.A.F. 2005) (citing *United States v. Carpenter*, 51 M.J. 393, 396 (C.A.A.F. 1999)); *see also United States v. Flores*, 69 M.J. 366, 369 (C.A.A.F. 2011) ("Regardless of whether there was an objection or not, in the context of a constitutional error, the burden is on the Government to establish that the comments were harmless beyond a reasonable doubt.") (cleaned up)).

This Court reviews the issue of whether a constitutional error was harmless beyond a reasonable doubt de novo. *United States v. Kreutzer*, 61 M.J. 293, 299 (C.A.A.F. 2005).

Law and Analysis

The prosecution's closing argument was "riddled with egregious misconduct," including obvious errors of multiple types. *Voorhees*, 79 M.J. at 10. He (1) injected his unsolicited personal beliefs and opinions by vouching for MR and commenting on the truth or falsity of the evidence, (2) disparaged opposing counsel, and (3) indirectly commented on SrA Tyson's constitutional right not to testify in his own defense. These arguments constitute serious misconduct—some of which impinged on SrA Tyson's constitutional right to remain silent—and warrant relief.

1. The trial counsel interjected unsolicited personal beliefs and opinions, to include vouching for MR and commenting on the truth or falsity of the evidence.

As the CAAF has noted, "There are many ways a trial counsel might violate the rule against expressing a personal belief or opinion." *United States v. Fletcher*, 62 M.J. 175, 180 (C.A.A.F. 2005). Giving personal assurances that the Government's witnesses are telling the truth is one. *United States v. Young*, 470 U.S. 1, 18-19 (1985). This is vouching. As seen in *Fletcher*,

vouching for the credibility of the Government's witnesses occurred when the trial counsel concluded "*we know* [something to be true]." *Fletcher*, 62 M.J. at 180. The use of personal pronouns in connection with assertions that a witness is correct or to be believed is the problem. *Fletcher*, 62 M.J. at 180 (citing *United States v. Washington*, 263 F. Supp. 2d 413, 431 (D. Conn. 2003)).

Here, the trial counsel used "we know" over and over to conclude MR's testimony was true:

- "*We know* through testimony that there was argument, and the accused was already upset about finding out — or suspecting at this point that [MR] had lied about her age. *So we know* what he did later on when that happened." R. at 1081 (emphasis added).

- "So *we know* by now this relationship has certainly become physically abusive. So, the natural question that *we would ask of ourselves and our loved ones is*, why the heck are you still there? Why did you stay? *It's an absolutely normal response*." R. at 1082 (emphasis added).

- "Well, *we know* from May of 2022 and the pictures, right? *We know* from July in 2022 and the pictures, and *we know* from all the other evidence of the days when there aren't pictures of. . . . That's when it would become physical — when she challenged him." R. at 1084 (emphasis added).

- "But what *we do know* is when the accused finally found out — and he was certain that she had lied to him, he lost it." R. at 1084 (emphasis added).

- "So *we know* that there is this pattern, this consistency of physical violence, right? *We're* not just taking her word for it — *we have photographs*." R. at 1086 (emphasis added).

- "[A]s much as she tried to protect the man that she still loved . . . *as hard as it is to believe, and as much as we don't want to believe that*, maybe . . . what really happened is exactly what was testified to, and is exactly what makes sense." R. at 1129 (emphasis added).

He also made a comment about how the Government's expert's testimony was "pretty powerful." *Compare* R. at 1102, *with Fletcher*, 62 M.J. at 180 ("She referred to another exhibit, the drug test results, personally characterizing the exhibit as '*a perfect litigation package*.'" (emphasis added)).

Every such comment by the trial counsel "places the prestige of the government behind [MR] through personal assurances of [MR's] veracity." *Fletcher*, 62 M.J. at 180 (quoting *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993)). In reviewing these comments, what cannot be forgotten is that while there are photographs of bruises, MR was the only one who testified to the source of those bruises. She was also, in most instances, the source of the photos. Thus, the comments about the "we know . . . from the pictures" is still vouching for MR's truthfulness.

"[S]ubstantive commentary on the truth or falsity of the testimony and evidence" is another form of trial counsel expressing a personal opinion or belief. *Id.* at 180 (citing *Young*, 470 at 8). As the Supreme Court has recognized, "Prosecutors sometimes breach their duty to refrain from overzealous conduct by commenting on the defendant's guilt and offering unsolicited personal views on the evidence." *Young*, 470 U.S. at 7.

The last comment from the bulleted list above, "what really happened is exactly what was testified to, and is exactly what makes sense," falls into this category as substantive commentary on MR's testimony. R. at 1129. There are more comments to that effect, along with unsolicited personal commentary about the evidence itself:

- "Because now as we get to December of 2022, *I think we can all agree* that the accused has finally found out that [MR] was lying about her age. *Members, and let me be clear right now — she was. It's why I had no cross-examination for [the supervising HIPAA officer] when she got up and opined upon [MR's] character for truthfulness.*" R. at 1084 (emphasis added).

- In describing a video, the trial counsel commented that SrA Tyson "[c]alls [MR] every name in the book. *Disgusting names*." R. at 1087 (emphasis added).

- "*What happened on the 14th of April was what [MR] testified to*. That there was an argument, that it got physically violent, and that the accused strangled her." R. at 1090 (emphasis added).

- In discussing how MR made a comment that there was so much the members did not see in the Facebook messages: "*[MR] is absolutely right*." R. at 1085 (emphasis added).

- When describing SrA Tyson's theory of defense he *initially* used words like "silly." R. at 1090. "I mean, if that's where we are — then that's where we are, but that's — that's certainly *kind of silly*. I mean — that's not reasonable. That's not a reasonable doubt to have." *Id*. (emphasis added).

- "Now, strangulation is legally defined and this is why *I had to have a very frank* conversation with [the defense expert] about medical definitions and legal definitions. *I couldn't spell asphyxia for you right now, off the top of my head, but I'm sure as heck sure it ain't in there*." R. at 1091 (emphasis added).

- "All in all, it — *to me,* DNA cannot answer the questions in this one because they lived together, right?" R. at 1101 (emphasis added).

- "And there's no evidence; the reason that is our position is because there's no evidence of [MR being the aggressor]. *To think that she just sat there and took it for 2 years — I don't think she'd be here, members*." R. at 1103 (emphasis added).

- "*I'm not a medical person—but for goodness sakes, my medical records don't say he doesn't have cancer.* What medical records could we have provided that would have proven she doesn't bruise easily?" R. at 1131 (emphasis added). This was immediately followed with: "*When we know what the cause of her bruising is — he's sitting right there. It's his hands and his feet. And it's as clear as day.*" *Id*. (emphasis added).

All of these comments interjected the trials counsel's personal opinion about the case or the evidence. Most relevant are those that bolster MR: MR is telling the truth; she is right; MR is lying about her age (insinuating she was not lying about anything else). *See Voorhees*, 79 M.J. at 12 ("[Senior Airman HB's] not lying. It's the truth. It's what happened."). Other comments simply operate to lead the members to "believe that the issue is whether or not the prosecutor is truthful,"

rather than focusing on the evidence itself. *Fletcher*, 62 M.J. at 181 (citing *United States v. Modica*, 663 F.2d 1173, 1181 (2d Cir. 1981)).

Saying the defense theory is "silly" or asserting MR is telling the truth "could be perceived as putting the weight of the Government behind the evidence," making it appear "stronger than it really is." *Id*. at 180 (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)). "This is a dangerous practice because 'when the prosecutor conveys to the jurors his personal view that a witness spoke the truth, it may be difficult for them to ignore his views, however biased and baseless they may in fact be.'" *Id.* at 180-81 (quoting *Modica*, 663 F.2d at 1178-79). When the only source of evidence is MR, and every other witness is working from her account, bolstering her with the weight of the federal government is even more dangerous.

In addition to all of the above, "it is error for trial counsel to make arguments that 'unduly . . . inflame the passions or prejudices of the court members.'" *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007) (quoting *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983)). Trial counsel cannot ask court members to place themselves in the shoes of the victim or a near relative. *United States v. Baer*, 53 M.J. 235, 237-38 (C.A.A.F. 2000). These types of "Golden Rule" arguments "are improper and impermissible in the military justice system." *Id.* at 238.

In addressing a weakness in the Government's case about why MR would stay with SrA Tyson when she claimed she was in such an abusive relationship, the trial counsel turned toward the Government's expert's testimony about coercive control. However, in doing so, he equated the alleged abuse MR was going through with the panel's family members: "You hear about domestic violence, you hear about intimate partner violence, and *you want your sister, or your mother, or your friend, or your brother, or your cousin — to get the heck out of there. Why would you stay in*

there? Why would you stay in there?" R. at 1102. This kind of commentary is "improper and impermissible in the military justice system." *Baer*, 53 M.J. at 238.

2. The most senior counsel in the courtroom disparaged opposing counsel, comparing their actions to that of the accused.

It is improper for trial counsel to attempt to win favor with the members by maligning defense counsel. *See Fletcher*, 62 M.J. at 181. At risk is that members could have been convinced to decide the case based on which lawyer they liked better. *Id.* (citing *Young*, 470 U.S. at 18). In *Fletcher*, trial counsel "made disparaging comments about defense counsel's style and also made comments suggesting that Fletcher's defense was invented by his counsel." *Id.* at 181. In *Voorhees*, it was clear, obvious error to accuse defense counsel of misplaced lying and making the defense theory of the case seem fantastical. 79 M.J. at 5.

The defense theory being "silly" is one thing, i.e., personal commentary about the case. It is a whole other thing to accuse the defense counsel of personally "gaslight[ing]" a named victim:

> I have immense respect for the senior defense counsel in this case, *but to stand up here and argue to you that these are false allegations — to continue to gaslight [MR], to accuse that woman of being a criminal mastermind capable of "click, burn, go" bug-out plan, is not a reasonable doubt.* It's not a reasonable argument. And *it ignores almost all of the evidence in this case. Almost all of it. It's a spin, sure.*

R. at 1128 (emphasis added); *see* R. at 893 (defining gaslighting as "invalidating somebody's reality" to "question their memory, their perception, their intelligence").

That opening comment set up the trial counsel for a myriad of personal commentary on the defense theory:

- "*I don't know* how you get from that to being surprised when people showed up. It's not common sense. And then — she initiates this bug out plan with — *I guess, prefabricated evidence*." R. at 1128 (emphasis added).

- "If this is now her plan, it's a bug-out plan, and *she has to "frame him" — I'm putting air quotes up —in order to, I don't know — avoid something, they weren't*

clear on that." R. at 1129 (emphasis added).

- "That makes a heck of lot more sense and is a lot more reasonable than some *concocted* bug-out plan by a criminal mastermind who happens to work the night shift as a supervisor at UPS." R. at 1129 (emphasis added). Followed immediately by: "Because that's what defense would have to have you believe . . . . That she peppered her videos with little terms like domestic violence; or — *I don't know, maybe she watched TV. Or read the news. Or, I don't know — heard of something called Domestic Violence Awareness Month.*" R. at 1129 (emphasis added).

While these statements do not directly malign defense counsel, they are improper (*Young*, 470 U.S. at 7) and they are sandwiched between the more important concerns: accusations that defense counsel were gaslighting MR.

Halfway through his rebuttal argument, the "Special Trial Counsel," a Lieutenant Colonel, accused both defense counsel of "gaslight[ing]" MR by directly comparing them to the accused: "*They* don't want you to think about him. *They* want this to be *U.S. v. [MR]*, and *they* want to be all about [MR]. She's not on trial here, members. She is not on trial here. *Do not let them continue to do what he has done to her for 2 years.*" R. at 1131 (emphasis added). Under the kindest interpretation, the highest-ranking individual in the room[19] is accusing the defense of "gaslight]ing]" MR, and that if the lower ranking panel members believe that theory, then *they are complicit in SrA Tyson's abuse.*

This is a call to arms to "do the right thing" and convict through maligning the defense counsel. *See United States v. Cruz*, 592 Fed.Appx. 623, 624 (9th Cir. 2015) ("Without reference to the evidence or the burden of proof, the 'do the right thing' statement improperly urged the jury to convict on the basis of the prosecutor's subjective belief of what was 'right,' as opposed to the persuasive force of the evidence."); *see also United States v. Mandelbaum*, 803 F.2d 42, 43 (1st

[19] The military judge was also a Lieutenant Colonel (R. at 114), but it can be fairly assumed she had a judge's robe on that would cover her rank.

Cir. 1986) (finding prosecutor's concluding remark—"And I would ask you, therefore, to do your duty and return a verdict of guilty"—was improper.). This is improper argument and goes to the heart of why maligning counsel is inappropriate: the members could have decided the case based on which lawyer they liked better. *Fletcher*, 62 M.J. at 181 (citing *Young*, 470 U.S. at 18). Did they like the "gaslight[ing]," abusive defense attorneys or the senior ranking prosecutor whose goal is "to find truth and . . . justice in this case"? R. at 1128.

In another part of the rebuttal argument, the trial counsel went after SrA Tyson. "Disparaging comments are also improper when they are directed to the defendant himself." *Fletcher*, 62 M.J. at 182. Here, trial defense counsel suggested that if a muscular airman like SrA Tyson actually beat MR to the degree she testified to, then he would have done much more damage to her. R. at 1120-21. Trial counsel's response was not to point to the evidence but to ridicule the defense, proffer his opinion on the evidence, and made a sarcastic remark to SrA Tyson:

> Defense counsel *somehow* wants to give their client credit for not grievously, seriously injuring her. I mean, that's the argument, right? Is he's so big, it would've been a lot worse. *I don't know how much worse it could get; thank goodness it didn't. But you don't get credit for only beating somebody pretty badly*. That's not a defense. "I didn't whoop you — I didn't whoop you as much as I could have." *Thanks for the restraint, Airman Tyson.*

R. at 1133 (emphasis added). This flippant comment directed at SrA Tyson qualifies as a disparaging remark and only magnifies the trial counsel's continued attack on defense counsel's "silly" theory of the case. Consistent with *Voorhees*, this amounted to plain error.

Given the nature of the violations, the number of violations, and their obvious impermissibility, just as in *Fletcher*, the prosecution's clearly improper arguments "rose to the level of prosecutorial misconduct" and constituted "'plain and obvious' errors." 62 M.J. at 178, 184.

3. The trial counsel indirectly, or by innuendo, commented on SrA Tyson's constitutional right not to testify in his own defense.

The Government has the burden of proof to produce evidence on every element and to persuade the members of guilt beyond a reasonable doubt. *United States v. Czekala*, 42 M.J. 168, 170 (C.A.A.F. 1995) (citing U.S. CONST. amend. V). The burden of proof never shifts to the defense. *United States v. Berri*, 33 M.J. 337, 342-43 (C.M.A. 1991) (citations omitted).

"For trial counsel to suggest the accused has any burden to produce evidence demonstrating his innocence is 'an error of constitutional dimension.'" *United States v. Matti*, No. ACM 22072, 2025 CCA LEXIS 72, at *16 (A.F. Ct. Crim. App. Feb. 28, 2025) (citing *United States v. Mason*, 59 M.J. 416, 424 (C.A.A.F. 2004)). Additionally, as the CAAF observed, "it is black letter law that a trial counsel may not comment directly, *indirectly, or by innuendo*, on the fact that an accused did not testify in his defense." *Carter*, 61 M.J. at 33 (emphasis added) (quoting *United States v. Mobley*, 31 M.J. 273, 279 (C.M.A. 1990)).

While it is well established the Government can comment "on the failure of a defendant to refute government evidence or to support his own claims," a constitutional violation occurs if "the defendant alone has the information to contradict the government evidence referred to." *Carter*, 61 M.J. at 33 (quoting *United States v. Coven*, 662 F.2d 162, 171 (2d Cir. 1981)). The comments in the context of the facts of the case are critical. *See United States v. Robinson*, 485 U.S. 25, 32 (1988) ("[W]here as in this case the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel, we think there is no violation of the privilege."); *United States v. Hasting*, 461 U.S. 499, 515 (1983) (Stevens, J., concurring in the judgment) ("I do not believe the protective shield of the Fifth Amendment should be converted into a sword that cuts back on the area of legitimate comment by the prosecutor on the weaknesses in the defense case.").

Riddled amongst some of the non-constitutional improper arguments noted above was an attempt to attack the defense theory about "self-harm." The trial counsel's comments focused on how there was "no evidence" of self-harm or of MR being the aggressor. *See, e.g.*, R. at 1086 (discussing Pros. Ex. 13: "There's no evidence of her physically harming him here. There's no evidence of her slapping him. There's no evidence of her being physically aggressive."); R. at 1092 ("[T]he testimony in court, the evidence that we have — there's no indication of self-harm. Let me be clear on that. Despite defense's promises in opening statement that you would hear much evidence of self-harm — there was none. None."); R. at 1103 ("And there's no evidence; the reason that is our position is because there's no evidence of [her being the aggressor]."); R. at 1134 ("There's no evidence that she self-harmed. There's no evidence that anybody else caused the bruises . . . . injuries. . . . damage.").

Perhaps in any other case this kind of identification of a weakness in the defense theory would be acceptable: the defense promised evidence of self-harm and there was none. But in the context of this entire court-martial, the *only* person who could have rebutted the "no evidence" comment was SrA Tyson. It is purely the nature of the allegations and how *everything* was based on MR's narrative. Here, "no evidence" of self-harm is an indirect, or by innuendo, comment on the fact that SrA Tyson did not testify in his defense to rebut MR's account. In this case, it is similar to arguing the evidence is "uncontroverted," like what occurred in *Carter.*

As in *Carter*, the physical assaults that were charged here took place in a private residence with no other witnesses. *Carter*, 61 M.J. at 33-34. MR was not heard screaming or yelling from being abused, similar to the victim in *Carter*. *Id*. The DNA evidence was inconclusive. R. at 864-65, 871-74. There was testimony that MR did not show signs of strangulation other than the bruises. R. at 942. And the Government did not present medical records (although commenting

that doing so would have shown nothing). R. at 1131. Much like with the DNA evidence, trial counsel's suggestion was that *if* there had been evidence, the Government would have presented it because "[w]e have put on good, bad, indifferent evidence in an effort to find the truth and to find justice in this case." R. at 1128. But the problem was all the evidence stemmed from MR pointing to a bruise and saying, "He did it." No matter how many witnesses testified, it all came down to MR's credibility. Only SrA Tyson could contradict what was, in reality, the Government's only witness. And even if this Court finds these arguments did not impermissibly comment on SrA Tyson's right to remain silent, they magnified the already improper arguments in existence by bolstering or vouching for MR.

As a final matter, there *was* evidence of self-harm or that MR could concoct a plan about self-harm: the 2014 domestic violence incident. *Supra*, Issue I. But this evidence was excluded. *Id*. Trial counsel capitalized on *excluded evidence* to combat the very reason defense thought the incident was relevant in the first place.

The trial counsel's argument was plain error. In *Carter*, the CAAF concluded that "[i]n light of the well-established prohibition against such comments, as reflected in *Mobley*, 31 M.J. at 279, and in the Discussion accompanying R.C.M. 919(b), the error was plain under the second prong of the plain error test." *Carter*, 61 M.J. at 34. The error was clear and obvious here because *Carter* itself prohibited the trial counsel's arguments.

4. The special trial counsel's improper arguments prejudiced SrA Tyson.

The burden is on an appellant to show that the improper argument materially prejudiced a substantial right of the accused. *Voorhees*, 79 M.J. at 9. When assessing prejudice, an appellate court considers "the cumulative impact of any prosecutorial misconduct on the accused's

substantial rights and the fairness and integrity of his trial." *Fletcher*, 62 M.J. at 184. Thus, all of the improper arguments are assessed together, not in isolation.

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

Once an appellant has established plain error in the prosecution's improper commentary "directly, indirectly, or by innuendo" on his failure to testify, "the burden shifts to the Government to convince [the appellate court] that this constitutional error was harmless beyond a reasonable doubt." *Carter*, 61 M.J. at 34. "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the [accused's] conviction or sentence." *United States v. Prasad*, 80 M.J. 23, 29 (C.A.A.F. 2020) (alteration in original) (quoting *United States v. Hills*, 75 M.J. 350, 357 (C.A.A.F. 2016)). The Government cannot carry that burden here. Even if the "no evidence" arguments are not of a constitutional dimension, SrA Tyson has carried his burden to show the improper argument materially prejudiced his substantial rights. *Voorhees*, 79 M.J. at 9.

i. The trial counsel's improper expressions of personal opinion about guilt, use of personal pronouns, vouching for and bolstering prosecution witnesses, and maligning defense counsel prejudiced SrA Tyson.

(1) The trial counsel's misconduct was severe.

Indicators of severity include (1) the instances of misconduct as compared to the overall length of the argument, (2) whether the misconduct was spread throughout the findings argument,

(3) the length of the trial, (4) the length of deliberations, and (5) whether the trial counsel followed by any rulings from the military judge. *Fletcher*, 62 M.J. at 184 (citing *Modica*, 663 F.2d at 1181).

The Government's finding argument was over an hour long and spanned twenty-eight pages of transcript. It is littered with improper argument; almost every page of the transcript contains an error. The raw numbers in this case are critical when looking at why and when trial counsel was invoking improper argument: to make MR's testimony more believable. When talking about the "plain" evidence, he relied less on inflaming the passions of the members, but when the topic turned to why the panel should believe MR, the argument strayed. These were not isolated incidents of poor judgment, but calculated efforts to make MR a more credible witness.

The rebuttal, where a lot of the improper argument occurred, was the last word on the evidence before deliberations. *See Domingo-Gomez v. People*, 125 P.3d 1043, 1052 (Colo. 2005) ("Rebuttal closing is the last thing a juror hears from counsel before deliberating, and it is therefore foremost in their thoughts."). The panel deliberated for about four and half hours[20] after listening to four full days of testimony and evidence. The trial was a weeklong and the entire focus was on corroborating MR and improving her credibility. And that's where the trial counsel exploited his argument—on her credibility.

Trial counsel also ignored a ruling by the military judge. Trial counsel had previously objected to defense counsel's "facial expressions" that occurred during MR's testimony. R. at 848. The military judge sustained the objection. *Id*. However, in closing, the trial counsel brought up defense counsel's "bewildering eyes," and coupled it with the argument about defense counsel "gaslight[ing]" MR. R. at 1128. The panel was already told to ignore that facial expression, but

[20] The panel deliberated for about three and half hours before they asked a question about the evidence. R. at 1142-44. Deliberations were paused for an hour, and then the panel deliberated for another hour. R. at 1148-49, 1153-54.

trial counsel brought it up to argue that defense counsel were engaged in "gaslight[ing]" and putting a "spin" on the evidence. R. at 1128. But two wrongs do not make a right. Combined, the trial counsel's misconduct was both pervasive and severe.

(2) The curative instruction following rebuttal argument was not sufficient.

In this case, just as in *Fletcher*, "[t]he military judge's curative efforts were minimal and insufficient to overcome the severity of the trial counsel's misconduct." 62 M.J. at 185. The military judge provided a partial curative instruction focused on disregarding counsel's "personal opinions." R. at 1135.

This instruction broadly covered some of the trial counsel's misconduct, but as in *Fletcher*, it was not targeted and did not occur before counsel used most of his rebuttal argument to disparage the defense and bolster MR's credibility (while also commenting on SrA Tyson's rights). The military judge did not make any effort to remedy the misconduct as it occurred, some of which was extreme: "Do not let them continue to do what he has done to her for 2 years." R. at 1131.

The military judge had an obligation to correct trial counsel as he crossed the threshold from "hard blows" to "foul ones." *Berger*, 295 U.S. at 88. "Military judges are neither mere figureheads nor are they umpires in a contest between the Government and accused; they too have a sua sponte duty to ensure that an accused receives a fair trial." *Voorhees*, 79 M.J. at 14-15 (cleaned up). While letting trial counsel personally opine on the case and attack the defense may have been a strategic choice by defense counsel, the military judge should not have let trial counsel "ramble on with his improper argument." *Id*. As this Court's superior court has recognized, "[T]he judge should have interrupted trial counsel before he ran the full course of his impermissible argument. Corrective instructions at an early point might have dispelled the taint of the initial remarks." *United States v. Knickerbocker*, 2 M.J. 128, 129 (C.M.A. 1977). The curative instruction

after all arguments were presented was not sufficient to dispel the taint of such a wide variety of improper remarks designed to make MR appear more credible.

(3) Where there were mixed findings and the entire case rested on MR's credibility, the weight of evidence supporting the conviction was low.

The entire trial rested on MR's credibility. There was no independent corroborating evidence. The DNA analysis was unhelpful. The neighbor's testimony could not reveal what happened on the morning of April 14th or that anything appeared wrong in the relationship. The servicemembers who arrived at the house could not tell how or when MR was hurt. The photos of bruises relied on MR saying what they showed and from when. The specific intent behind the property damage relied on MR's explanation of the relationship.

But MR was not a credible witness and it showed. The fact trial counsel went out of his way to bolster her, disparage the defense theory, and comment on how the Government did everything it could to prove its case shows how weak the evidence was. Otherwise, trial counsel would not have needed to stoop so low.

The mixed verdict also reveals the weaknesses in the Government's case. MR testified in the most detail to the offense of which the panel acquitted SrA Tyson. *See, e.g.*, R at 711-19 (describing the scissors allegation). The other specifications were bare assertions with little explanation. MR testified to "I don't know" or "I don't remember" or "it was such a blur" over eighty-seven times. R. at 1117. Her lack of credibility is reflected in the verdict. R. at 1157.

MR was neither the first nor last witness who testified. The well-documented concepts of primary and recency suggest the seasoned prosecutor leading the Government's presentation understood MR was its weakest link: MR. *People v. Robinson*, 2017 COA 128M, ¶ 36 (Oct. 19, 2017) ("[W]e . . . recognize, as have numerous scientists and academics, that principles of primacy may cause statements and arguments made early in a trial to have a disproportionately influential

weight." (first citing L. Timothy Perrin, *From O.J. to McVeigh: The Use of Argument in the Opening Statement*, 48 EMORY L.J. 107, 124 (1999); then citing John B. Mitchell, *Why Should the Prosecutor Get the Last Word?*, 27 AM. J. CRIM. L. 139, 157-58 (2000))), *rev'd*, 454 P.3d 229 (Dec. 9, 2019); *Dudley v. State*, 951 P.2d 1176, 1180 (Wyo. 1998) ("[W]e recognize[] the accepted psychological impact of the testimony of witnesses presented first or last under the theory of 'primacy and recency.'" (quoting *Whiteplume v. State*, 841 P.2d 1332, 1340 (Wyo. 1992))).

No witness corroborated SrA Tyson had been beating her for a year. No one testified they had seen bruises on her. She went to the hospital on one occasion, whereafter she took the video of her leg with a large bruise. Yet no medical documents or professionals testified on this concerning injury quite obviously displayed on her leg. MR's friends and colleagues were mentioned at trial, but none testified to her credibility. Instead, a supervisor at the medical group said MR was untruthful and strongly insinuated MR misused patient data.

The defense theory that MR crafted the whole case against SrA Tyson was equally supported by the evidence. She took the videos when she wanted. But they all focused on him damaging her property. She took various photos of bruises when she wanted, but she was the only one who could testify to what the bruises were from and who caused them. She made a point several times during her testimony that *she* was the one providing the evidence and suggested there was evidence that was not presented that would corroborate her. *E.g.*, R. at 635. But MR had a myriad of credibility problems. *See, supra*, Issues II-VII (discussing MR's credibility concerns for factual sufficiency review). So this was a case that relied on one witness with serious trustworthiness issues.

When the three factors are weighed against one another, the balance is firmly in SrA Tyson's favor. The trial counsel made multiple improper arguments. He violated the rules against

vouching for witnesses, offered his personal views, attacked opposing counsel, and unduly inflamed the passions and prejudices of the members. The argument was designed to discredit the defense theory, not through the evidence, but through personal attacks on a "silly," "concocted" theory. The trial counsel's "excess zeal [was] so egregious that it taint[ed] the conviction." *United States v. White*, 486 F.2d 204 (2d Cir. 1973)). His misconduct was not "slight or confined to a single instance, but . . . pronounced and persistent, with a probably cumulative effect upon the jury which cannot be regarded as inconsequential." *Berger*, 295 U.S. at 89. This Court cannot be confident that the members convicted SrA Tyson on the basis of the evidence alone. The errors here were materially prejudicial to SrA Tyson's substantial rights under the plain error standard. In light of this prejudice, the findings and sentence must be reversed.

ii. The Government cannot carry its burden to prove beyond a reasonable doubt that the trial counsel's improper indirect references to SrA Tyson's failure to testify were harmless.

Taking all the non-constitutional improper arguments together and coupling them with the trial counsel's insinuations about SrA Tyson's failure to testify, the Government cannot show the latter comments were harmless beyond a reasonable doubt. The harmless beyond a reasonable doubt standard "is met where a court is confident that there was no reasonable possibility that the error might have contributed to the conviction." *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

The *Fletcher* factors are helpful for this analysis. The trial counsel had many improper arguments through his closing and rebuttal arguments. The case relied solely on MR, but all of the evidence relied on MR's narrative. She was not a credible witness and the evidence in this case was not overwhelming. MR had bruises and they were caused by someone, but only MR—or SrA Tyson (at least as MR described the facts)—could say who. The curative instruction vaguely

mentioned the Government had the burden of proof, but did not address the commentary on SrA Tyson's right not to testify. In looking at this argument in total, this Court cannot be convinced that these arguments did not taint or otherwise contribute to SrA Tyson's conviction.

WHEREFORE, this Court should set aside the findings of guilty and the sentence, and remand the case for a new hearing.

IX.

Omission of the fourteen files contained in Preliminary Hearing Exhibit 16 is a substantial omission that requires remand to correct the record.

Additional Facts

During the preliminary hearing, Preliminary Hearing Officer (PHO) Exhibit 16 was provided to and reviewed by the PHO. Department of Defense Form 457, *Preliminary Hearing Officer's Report* [hereinafter PHO Report], Continuation of Item 13a (May 14, 2023). The PHO described the exhibit as "Audio/Video files of SUB's home, dated 14 April 2023, 14 audio/video files." *Id*. There is no description anywhere else in the PHO Report of what PHO Exhibit 16 contained. The audio associated with the preliminary hearing captured the PHO summarizing the evidence provided. PHO Exhibit 16 was described as audio and video files from SrA Tyson's "home." Recording of Preliminary Hearing at 26:26. The PHO later repeated that PHO Exhibit 16 "[was] the fourteen audio and video files." *Id*. at 32:17.

Upon review of the original record or trial filed with the Court, PHO Exhibit 16 is not fourteen audio or video files of or from SrA Tyson's home. PHO Ex. 16. Instead, there are fifteen one-to-three second audio clips of what sounds like pieces of an interview. *Id*. MR's voice appears in one of the files on page two of the PDF (the far-left file in the middle row). PHO Ex. 16 at 2. She can be heard discussing a metal bed frame. *Id*. It is possible these snippets may have been inadvertently cropped or cut from her interview with the Office of Special Investigations. Either

way, these files do not appear to be the intended content of PHO Exhibit 16. *Compare* PHO Ex. 16, *with* PHO Report, Continuation of Item 13a.

Standard of Review

"Whether an omission from a record of trial is 'substantial' is a question of law which [appellate courts] review de novo." *United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000). Each case is analyzed individually to decide whether an omission is substantial. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999).

Law and Analysis

Unless used as an exhibit, the PHO Report prepared pursuant to Article 32, UCMJ, 10 U.S.C. § 832, shall be attached to the record for appellate review. R.C.M. 1112(f)(1)(A). "In assessing [] whether a record is complete . . . the threshold question is 'whether the omitted material was "substantial," either qualitatively or quantitatively.'" *United States v. Davenport*, 73 M.J. 373, 377 (C.A.A.F. 2014) (quoting *United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982)). "Omissions are quantitatively substantial unless 'the totality of omissions . . . becomes so unimportant and so uninfluential when viewed in the light of the whole record, that it approaches nothingness.'" *Id.* (omission in original) (quoting *United States v. Nelson*, 13 C.M.R. 38, 43 (C.M.A. 1953)). "[A] substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the [G]overnment must rebut." *United States v. Harrow*, 62 M.J. 649, 654 (A.F. Ct. Crim. App. 2006) (citation omitted), *aff'd*, 65 M.J. 190 (C.A.A.F. 2007).

"A record of trial found to be incomplete or defective before or after certification may be corrected to make it accurate. A superior competent authority may return a record of trial to the military judge for correction under this rule." R.C.M. 1112(d).

PHO Exhibit 16, and by extension the preliminary hearing report as a whole, has not been properly attached to the record. *See* R.C.M. 1112(f)(1)(A); *United States v. Ort*, No. ACM 40261, 2022 CCA LEXIS 521, at *2 (A.F. Ct. Crim. App. Aug. 31, 2022) (order) (remanding for correction under similar circumstances); *United States v. Simmons*, No. ACM 40462, 2023 CCA LEXIS 236, at *1-2 (A.F. Ct. Crim. App. June 5, 2023) (remanding where the Government conceded "the PHO report is among those items the United States is required to attach to the record of trial"). The wrong audio files appear to be incorporated into the document that was intended to be PHO Exhibit 16. Rather than containing any audio or video files of or from SrA Tyson's home, as described, the document contains fifteen very short audio files with little to no content. *Compare* PHO Report, Continuation of Item 13a, *with* PHO Ex. 16. Because the description is so vague, it is unknown whether these fourteen files were reproduced in other parts of the record.

This is a substantial omission from the record because it appears these files were supposed to be additional evidence of activities between MR and SrA Tyson. PHO Report, Continuation of Item 13a. Where this entire case rested on MR's credibility and her description of the relationship, this evidence could have an impact on the appeal. If any of this evidence would have countered MR's account or narrative, there could be an issue of ineffective assistance of counsel for failing to present or impeach based on these files. This evidence, depending on what it is, could have also supported admissibility of the 2014 domestic violence incident if there were other similarities between the 2014 incident and what occurred between SrA Tyson and MR. But without knowing what these files are, it is impossible to say whether there is any impact on the trial.

Furthermore, this Court has the authority to grant relief for "error or excessive delay" following the entry of judgment. Article 66(d)(2), UCMJ. There was already a record completeness issue in this case, which delayed docketing SrA Tyson's record of trial with this Court. *See* U.S.

v. Senior Airman Jonathon V. Tyson, Suspense: 23 May 2024 (Apr. 25, 2024) (accompanying the record of trial when docketed); *infra*., Issue X (discussing post-trial delay). This error caused the record to be returned, rather than docketed. U.S. v. Senior Airman Jonathon V. Tyson, Suspense: 23 May 2024 (Apr. 25, 2024). Apparently, though, the error involving PHO Exhibit 16 was overlooked. *See id*. (identifying only an issue with an appellate exhibit). An issue of record completeness remains and will trigger more delay in this case because the omission is not "so unimportant and so uninfluential when viewed in the light of the whole record, that it approaches nothingness." *Davenport*, 73 M.J. at 377. Since a post-trial delay issue is already being raised, this omission with its subsequent delay provides additional reason for this Court to grant appropriate relief under Article 66(d)(2), UCMJ. *See, infra*, Issue X. Combined, the omission of this PHO Exhibit of fourteen files is, on its face, qualitatively and quantitatively substantial.

WHEREFORE, SrA Tyson requests that this Court remand his record of trial for correction under R.C.M. 1112(d).

X.

The 172-day delay from sentencing to docketing of this case with this Court was unreasonable, warranting appropriate relief.

Additional Facts

SrA Tyson was sentenced on December 16, 2023. R. at 1242-43. A memorandum on the front of the record of trial indicates that on April 25, 2024, the Military Justice Law and Policy Division returned the record of trial for correction. U.S. v. Senior Airman Jonathon V. Tyson, Suspense: 23 May 2024 (Apr. 25, 2024). SrA Tyson's case was docketed with this Court on June 5, 2024. United States Air Force Court of Criminal Appeals, *Court Docket*, https://afcca.law.af.mil/docket.html (last visited Aug. 21, 2025).

Standard of Review

A Court of Criminal Appeals necessarily considers de novo whether excessive post-trial delay warrants relief under Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2).

Law and Analysis

The Government unreasonably delayed the post-trial processing of SrA Tyson's record. It took the Government 172 days to get from sentencing to docketing with this Court. This delay is facially unreasonable because it exceeds the 150 days from sentencing to docketing that this Court has previously held constitutes a facially unreasonable delay. *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020). Furthermore, the delay is apparently based on a record completeness issue. *See* U.S. v. Senior Airman Jonathon V. Tyson, Suspense: 23 May 2024 (Apr. 25, 2024) (accompanying the record of trial when docketed). The memorandum on top of the record of trial indicates that Appellate Exhibit XXXI was possibly incorrect. *Id*. So while the Government attempted to docket the record on time, it failed because it did not compile the record of trial correctly in the first place. The additional time it took to correct the error caused the facially unreasonable post-trial delay. *See id.* (suggesting had the record been complete, it would have been docketed by the end of April, not June).

This Court has previously chastised the Government for rampant record of trial errors. Record completeness is "a systemic problem indicating institutional neglect." *United States v. Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *17 (A.F. Ct. Crim. App. Jun. 7, 2024), *aff'd* 83 M.J. 361 (C.A.A.F. 2025).[21] When this Court determined there was a

[21] *See also United States v. Burkhardt-Bauder*, No. ACM 24011, 2025 CCA LEXIS 81 (A.F. Ct. Crim. App. Jan. 24, 2025) (remand order); *United States v. Casillas*, No. ACM 40499, 2024 CCA LEXIS 394 (A.F. Ct. Crim. App. Sep. 24, 2024) (remand order); *United States v. Kershaw*, No. ACM 40455, 2024 CCA LEXIS 354 (A.F. Ct. Crim. App. Aug. 26, 2024); *United States v. Boren*, No. ACM 40296, 2024 CCA LEXIS 246 (A.F. Ct. Crim. App. Jun. 24, 2024) (remand order);

systemic problem, that was the time same time SrA Tyson's record was delivered to the Court. *Compare* U.S. v. Senior Airman Jonathon V. Tyson, Suspense: 23 May 2024 (accompanying the record of trial in June 2024, the month of docketing), *with Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223 (finding institutional neglect in June 2024). Even still, the initial review did not catch that PHO Exhibit 16 is ostensibly missing fourteen audio and video files of SrA Tyson's home. *See, supra*, Issue IX. Thus, the issue of record completeness persists to date. At a certain point, which has now been surpassed, an appellant should get relief—in part—to motivate the Government to do its job correctly in preparing and docketing a correct record of trial. The delay, caused by another completeness issue, continues to demonstrate a gross indifference towards timely, and accurate, post-trial processing. *See Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *17 (holding that the Government's actions "demonstrate[] gross indifference to post-trial processing in this case which impacted timely processing").

United States v. Howard, No. ACM 40478, 2024 CCA LEXIS 137 (A.F. Ct. Crim. App. Apr. 9, 2024) (remand order); *United States v. Moore*, No. ACM 40442, 2024 CCA LEXIS 118 (A.F. Ct. Crim. App. Mar. 21, 2024) (remand order); *United States v. Donley*, No. ACM 40350, 2024 CCA LEXIS 115 (A.F. Ct. Crim. App. Mar. 19, 2024); *United States v. Smith*, No. ACM 40437, 2024 CCA LEXIS 109 (A.F Ct. Crim. App. Mar. 11, 2024) (remand order); *United States v. Harnar*, No. ACM 40559, 2024 CCA LEXIS 39 (A.F. Ct. Crim. App. Jan. 31, 2024) (remand order); *United States v. Wells*, No. ACM S32762, 2024 CCA LEXIS 15 (A.F. Ct. Crim. App. Jan. 18, 2024) (remand order); *United States v. Conway*, No. ACM 40372, 2023 CCA LEXIS 501 (A.F. Ct. Crim. App. Dec. 5, 2023); *United States v. Blackburn*, No. ACM 40303, 2023 CCA LEXIS 386 (A.F. Ct. Crim. App. Sep. 11, 2023) (remand order); *United States v. Portillos*, No. ACM 40305, 2023 CCA LEXIS 321 (A.F. Ct. Crim. App. Aug. 1, 2023) (remand order); *United States v. Manzano Tarin*, No. ACM S32734, 2023 CCA LEXIS 291 (A.F. Ct. Crim. App. Jun. 27, 2023) (remand order); *United States v. Hubbard*, No. ACM 40339, 2023 CCA LEXIS 263 (A.F. Ct. Crim. App. Jun. 15, 2023) (remand order); *Simmons*, No. ACM 40462, 2023 CCA LEXIS 236 (remand order); *United States v. Gammage*, No. ACM S32731, 2023 CCA LEXIS 240 (A.F. Ct. Crim. App. Jun. 5, 2023) (remand order); *United States v. Goodwater*, No. ACM 40304, 2023 CCA LEXIS 231 (A.F. Ct. Crim. App. May 31, 2023) (remand order); *United States v. Irvin*, No. ACM 40311, 2023 CCA LEXIS 201 (A.F. Ct. Crim. App. May 12, 2023) (remand order).

This Court is statutorily empowered to "provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record." Article 66(d)(2), UCMJ. Article 66(d)(2), UCMJ, now constitutes the only authority for this Court to grant relief for post-trial processing issues because it superseded previous cases that addressed post-trial error under the old statute. *Valentin-Andino*, 83 M.J. at 366 n.4. Because the post-trial processing resulted in an unreasonable delay that evinces gross indifference, this Court should grant appropriate relief under Article 66(d)(2), UCMJ. Appropriate relief is that which is "suitable considering the facts and circumstances surrounding that case." *Id.* at 367.

Here, SrA Tyson requests the bad-conduct discharge be set aside in light of the systemic record of trial issues and how, as presented in his declaration, SrA Tyson experienced harm caused by the delay. Decl. at 4-6. Had SrA Tyson's case been docketed sooner, his case would have been prioritized higher. *See, e.g.*, Appellant's Motion for Enlargement of Time (Tenth) (May 19, 2025) (showing two cases prioritized over SrA Tyson's that would have been prioritized later had SrA Tyson's case been docketed earlier). SrA Tyson is seeking review of issues that could cause a rehearing or setting aside his convictions, both of which would remove or affect the barment decision currently negatively impacting him. Decl. at 4-6. Even if this Court cannot directly act on such collateral consequences, this Court can consider the harm the delay has caused through evidence of such collateral matters. If this Court does not disaffirm the bad-conduct discharge, SrA Tyson requests this Court approve only so much of the sentence that includes confinement and a bad-conduct discharge.

WHEREFORE, SrA Tyson respectfully requests that this Court disaffirm the bad-conduct discharge, or, in the alternative, the reduction to the grade of E-1.

XI.

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

Additional Facts

The defense filed a motion for a unanimous verdict. Appellate Ex. IV. The motion was denied. Appellate Ex. VI at 5.

The military judge expressly instructed the members:

> The concurrence of at least three-fourths of the members present when the vote is taken is required for any finding of guilty. Since we have eight members, that means six members must concur in any finding of guilty. If you have at least six votes of guilty of any offense, then that will result in a finding of guilty for that offense.

R. at 1137.

The members found SrA Tyson guilty of six specifications. R. at 1157. It is unknown and unknowable whether his conviction for each offense was based on a vote of 6-2, 7-1, or 8-0.

Standard of Review

The standard of review for questions of constitutional law is de novo. *United States v. Busch*, 75 M.J. 87, 91 (C.A.A.F. 2016).

Law and Analysis

In *United States v. Anderson*, the CAAF held that non-unanimous findings of guilty do not violate a court-martial accused's constitutional rights. *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 1003 (2024). SrA Tyson acknowledges that, absent intervening CAAF or Supreme Court case law, this Court is bound by the *Anderson* opinion. Nevertheless, SrA Tyson maintains that *Anderson* was wrongly decided and expressly preserves this issue for further appellate review.

WHEREFORE, SrA Tyson requests this Court set aside the findings and the sentence, while authorizing a rehearing at which SrA Tyson may be found guilty only upon a unanimous vote of the members.

Respectfully submitted,

[redacted]

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Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 29 August 2025.

Respectfully submitted,

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APPENDIX

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

XII.

The Office of Special Investigations conducted a biased investigation, leading to a discriminatory or vindictive prosecution.

ARGUMENT

"A court of law, in reviewing the prosecutor's charging decision, can review that decision, for vindictive prosecution, impermissible discrimination against the class of defendants, or to determine if there has been malicious and discriminatory prosecution in multiplying the number of charges brought." *United States v. Quiroz*, 55 M.J. 334, 340 (C.A.A.F. 2001) (Crawford, C.J., dissenting) (citing *United States v. Batchelder*, 442 U.S. 114, 123-24 (1979)).

> A charge of selective prosecution in the federal courts arises implicitly under the Due Process Clause of the Fifth Amendment. And although the Executive exercises broad discretion in deciding whether or not to prosecute, the decision is subject to review under the equal protection component of the Due Process Clause.

United States v. McKinley, 48 M.J. 280, 282 (C.A.A.F. 1998) (first citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996); and then citing *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)). Discriminatory prosecution claims require showing (1) that other violators similarly situated are generally not prosecuted; (2) that the selection of the claimant was "intentional or purposeful"; and (3) that the selection was pursuant to an "arbitrary classification." *Id*. (citing 2 W. LaFave and J. Israel, *Criminal Procedure*, § 13.4 at 186-88 (1984)).

Here, SrA Tyson was selectively and vindictively prosecuted because the Office of Special Investigations (OSI) did not conduct an impartial investigation. Instead, the Government and its

agents believed MR, adopted her version of events without question, and refused to investigate her many motives to fabricate. Had OSI conducted an investigation into her, then the Government would not have prosecuted SrA Tyson. Instead, though, the Government's failure to investigate MR cast ripple effects through the trial that made the process unfair.

The first piece of evidence that OSI did not investigate dealt with MR's ex-husband, SSgt AC. MR claimed during trial that they had minimal contact, only with regard to her dogs. R. at 633. However, SrA Tyson's phone—seized by OSI—contained a video of what appeared to be SSgt AC's vehicle driving by a house that SrA Tyson was at to meet another woman. Decl. at 2. MR testified that *she* was there, but claimed that SSgt AC was not involved. R. at 668. Instead, she testified she drove her and her friend there. R. at 668. But a witness who saw the vehicle leave could confirm that it was a male driver—not a female—and MR was the passenger. Decl. at 4. MR testified to being afraid to confront SrA Tyson (R. at 678), but she was running around putting trackers on his car and following him to different locations to catch him with other women from January to March 2023, right before she made all her allegations to law enforcement. Furthermore, OSI could have identified the types of cars her friend and SSgt AC drove and tracked down both of them to find the truth. That would have revealed that MR was not afraid of SrA Tyson—she was jealous, tracking him down, and lying about her ex-husband's involvement. Rather than investigate MR's motive to track SrA Tyson down to a location after the two had already broken up, the Government ignored the credibility issues caused by this evidence.

Had this video been investigated at the outset, the Government would have learned that MR was tracking SrA Tyson with GPS trackers. Decl. at 1, 3, 4. MR claimed she "followed" SrA Tyson, but that explanation falls apart when viewed next to evidence of a GPS tracker that was found on SrA Tyson's phone. R. at 667-70. SrA Tyson told OSI about the tracker during his

interview, but they ignored that detail entirely—both in their questioning and in their final report. Decl. at 1. The existence of that GPS tracker contradicts MR's claim that she was afraid of SrA Tyson and instead supports a narrative that she was tracking and targeting SrA Tyson.

OSI also failed to question a screenshot of MR's Tinder profile wherein she lied about her age and claimed to be a registered nurse. Decl. at 2. This evidence was also on SrA Tyson's phone, which OSI extracted. Decl. at 1, 2. A constant theme at the trial was MR's age, which she clearly lied about. *See, e.g.*, R. at 1084 (trial counsel conceding MR lied about her age). Her Tinder profile solidified that lie; she was not just lying to SrA Tyson (R. at 636) and SSgt AC (R. at 847 (revealing the birthday on her divorce decree from him was wrong)), but to everyone. She was also lying about her profession. *Compare* Decl. at 2 (claiming to be a registered nurse on Tinder), *and* R. at 631 (failing to recall she held herself out as a nurse on Tinder), *with* R. at 558 (admitting she worked the appointment line), *and* R. at 968 (confirming MR was an "appointment line clerk"). These are not harmless white lies; they speak directly to MR's credibility, her relationship with truth, and the false image presented to the court.

Further, there was evidence—again ignored by OSI—showing MR's ongoing interactions with multiple male service members. Decl. at 1, 3. One of these men sent her money, and their text messages reveal flirtatious exchanges. *Id*. In one message, the man asks her, "Do you just want my money, babe?" *Id*. In a separate Snapchat message, MR comments that she just met a pilot who gave her $120 for "letting him lmfao." *Id*. This clearly contradicts the image of a fearful, isolated victim and points instead to someone engaging in manipulative relationships with multiple men simultaneously. Furthermore, when coupling her Tinder profile with the texts she sent to other men, this evidence suggests she was using men to finance her life. This also ties into her lies about being married to SrA Tyson. She asserted she was married to him at the time he was arrested. *See*

R. at 321 (showing medical staff attempting to find her in databases based on this assertion). OSI could have also easily investigated this fact through checking the Department of Defense's system for logging dependents, known as DEERS, and proved she was lying on this point. R. at 557 (showing MR knew what DEERs was and had been enrolled before through SSgt AC). Faking a marriage, or lying about one, would also show a motive to use men, specifically SrA Tyson now, to finance her life. This would have been a motive to fabricate her allegations, but which was left uninvestigated.

Her engagement with other men also ties back to SSgt AC. Had OSI investigated the video of the jeep, that would have opened the door to SSgt AC's involvement. He would have been placed around MR, been involved doing things for MR, and been an important enough witness behind the scenes to cast doubt on MR's version of events. He could have been the source of the bruising, either because MR was around him or because she asked him to bruise her or help fabricate evidence. The 2014 domestic violence incident also becomes more relevant because whether MR was telling the truth or not about that situation, SSgt AC's continued presence in MR's life raises questions. If he *did* self-harm, as she reported to law enforcement, then he could have helped MR do something to herself to frame SrA Tyson. If SSgt AC *did not* self-harm but MR fabricated that he did, then that shows she is the type to make up stories to manipulate law enforcement. *Cf.* Mil. R. Evid. 608(b); Mil. R. Evid. 613. To ensure a fair investigation into the allegations, OSI should have investigated MR's relationship with SSgt AC further, to include investigating the 2014 domestic violence incident and asking *him* to explain whether her allegations against him were true.

All of this is highly relevant. It shows that MR was not just in contact with her ex-husband and other men, but that she misrepresented the nature of those relationships and her actions during

the investigation and later under oath. That directly undercuts her credibility and shows a consistent pattern of deceptive behavior.

This pattern of behavior is critical where the defense theory was MR fabricated all of the allegations against SrA Tyson. She did not have to "self-harm," but she could have asked any one of these men to bruise her or caused the bruises herself, accidentally or intentionally. The excluded 2014 domestic violence incident would suggest that she may have done either. There, MR reportedly told law enforcement that SSgt AC had scratched himself in the bathroom to make it look like she had injured him. Post-Trial Submission of Matters—*United States v. SrA Johnathon [sic] V. Tyson*, Atch. 1 at 6 (Dec. 26, 2023); *see* R. at 741 (explaining MR stated SSgt AC "had taken the key to his own face"). This is significant because it reflects a past pattern of manipulative behavior—lying about her behavior or exaggerating the truth to shift blame and influence perception. What is troubling even with this incident is that the special trial counsel claimed the responding officer did not recall the event. R. at 725. However, the responding officer did; he testified to the entire event after his memory was refreshed by the report. R. at 733-45. It is clear the Government, even at the trial level, failed to investigate this case, closing its eyes to the credibility problems MR had and her manipulative nature.

Failing to investigate this evidence excluded a web of behaviors, contradictions, and credibility issues that would have fundamentally altered whether MR's credibility was enough to continue this case to trial. She, after all, was the source of all the evidence because she was the only person claiming SrA Tyson caused those bruises on her and how. Rather than being the victim, the uncovered evidence would have shown MR as the one in control of the relationship, to the point where she was using SrA Tyson for his on-base house, his stable income, and his access

to base resources. This evidence would have cast doubt on whether this case should have gone to trial at all.

The intentional ignorance to evidence casting doubt on MR's narrative made this a targeted prosecution against SrA Tyson. He was arbitrarily cast as an abuser as soon as MR said anything because no one looked into her credibility. Had they, this case would not have continued because the Government's burden to prove guilt beyond a reasonable doubt could not have been met where MR was an unbelievable witness.

WHEREFORE, SrA Tyson personally and respectfully requests that this Court set aside and dismiss the findings and set aside the sentence.

XIII.

Barring SrA Tyson from multiple Air Force installations while on appellate leave constitutes unlawful punishment or otherwise violates the law by being arbitrary or capricious.

ARGUMENT

In his declaration, SrA Tyson asserted that he was barred from Minot AFB and Seymour Johnson AFB. Decl. at 4-6. The barments prevented him from accessing the entitlements he has while on appellate leave. *Id*.

The barments operated as punishment by denying SrA Tyson access to resources he was entitled to while on appellate leave. Decl. at 4-6. Having corrected the appellate leave concerns, the barment still operates as punishment to brand SrA Tyson as someone who is dangerous to the base based on a conviction from another state involving an individual with no connection to Seymour Johnson AFB. SrA Tyson has not acted in any way that poses a danger to the good order and discipline of the base. Instead, the barment decision occurred because SrA Tyson was convicted of domestic violence. Decl. at 5. The barment, therefore, operates as a punishment for

this offense. The barment also only matters because SrA Tyson is appealing his conviction. In that regard, Air Force officials are punishing SrA Tyson for appealing and doing so for this length of time. Had SrA Tyson been able to secure relief through his appeal sooner, the barment would not have occurred. By harming SrA Tyson for challenging his convictions and for failing to recognize that his convictions have no relationship to the safely, morale, welfare, or good order and discipline of Seymour Johnson AFB, the barment constitutes unlawful punishment.

Additionally, according to the amended barment letter, SrA Tyson is being barred from Seymour Johnson AFB based *solely* on his conviction. Decl. at 5. But this violates 32 C.F.R. § 809a.2(b), which dictates that "the installation commander must not act in an arbitrary or capricious manner" when denying access to the installation. Furthermore, 32 C.F.R. § 809a.2(b) states that a commander's "action must be reasonable in relation to [the] responsibility to protect and to preserve order on the installation and to safeguard persons and property thereon." The decision to bar SrA Tyson is arbitrary and capricious because other servicemembers who are convicted of offenses who are not discharged remain in the Air Force with full access to installations. Even servicemembers who receive non-judicial punishment offenses for similar crimes of domestic violence retain complete access to installations. Denying SrA Tyson access to the base is therefore arbitrary and capricious if solely based on his conviction or the underlying charged conduct that is the subject of this appeal.

There is no evidence SrA Tyson otherwise violated any rules or regulations while on appellate leave. He also does not pose a risk to Seymour Johnson AFB. His offenses are limited to one person who he is no longer in any proximity to. Charge Sheet. He was on Honor Guard and had a good career aside from the conduct that is now being appealed. Pros. Exs. 24-25; Def. Exs.

E-N. There has been no determination on why *this base* needs to be protected from him or how he is impacting good order and discipline or the safety of those on *this* base.

Conversely, the Minot AFB barment *could have* been based on valid considerations because MR lived in the area and she had base access at some point. A limited barment in such a situation *may* be appropriate. But those concerns do not apply to Seymour Johnson AFB. SrA Tyson is an active-duty airman undergoing appeal. His conviction status is not finalized. Article 76, UCMJ. His convictions could be set aside, or a rehearing could be ordered. For SrA Tyson, even the limited barment at Seymour Johnson AFB is arbitrary under the circumstances. SrA Tyson has not disrupted the base. He has been accessing the base for some time without issue. This barment was sudden and only triggered by a decision to "honor" Minot AFB's barment decision. Decl. at 4.

The barments are errors in post-trial processing for which this Court can order appropriate relief under Article 66(d)(2), UCMJ. The barment at Seymour Johnson occurred after the military judge signed the entry of judgment and the barment directly connected to his conviction. This Court can award appropriate relief by acting upon the sentence and disaffirming the bad-conduct discharge. Not only would that obviate the entire problem, it is appropriate in light of the Government's arbitrary and capricious actions in this case. No member on appellate leave should be forced to carry paperwork to access rights they are already entitled to—especially not while other individuals with convictions or who have committed similar conduct move about freely. The Minot-originated barment that triggered all of this and the amended barment offered by Seymour Johnson AFB leadership all point to an ongoing pattern of mistreatment and punishment.

WHEREFORE, SrA Tyson personally and respectfully requests that this Court provide appropriate relief under Article 66(d)(2), UCMJ, by setting aside the punitive discharge.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**APPELLANT'S MOTION TO EXCEED PAGE LIMIT AND WORD COUNT**
v.	)	
	)	Before Special Panel
Senior Airman (E-4) **JONATHON V. TYSON**, United States Air Force, *Appellant*.	)	No. ACM 40617
	)	August 29, 2025

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

Pursuant to Rules 17.3 and 23.3(q) of this Court's Rules of Practice and Procedure, Appellant moves to file his Assignment of Error brief in excess of this Court's 50-page or 20,000-word count limit. Appellant respectfully requests 82 pages for his opening brief and a final word count of 27,437 words. Pursuant to Rule 17.3, the requested word count and page total does not include indices, tables, attachments, and appendices, including the eight pages in the Appendix capturing Appellant's personally raised issues.

Good cause exists to grant this motion due to the length and complexity of the case. Undersigned counsel's copy of the record is electronic, and it is 3,099 pages containing twenty-five Prosecution Exhibits, fourteen Defense Exhibits, one Court Exhibit, and seventy-one Appellate Exhibits. The trial transcript alone is 1,244 pages long. Appellate defense counsel identified, and is submitting, eleven assignments of error, to include specific deficiencies in the evidence for legal or factual sufficiency review regarding all six domestic violence convictions. Additional length is required to thoroughly brief these issues and ensure Appellant meets his burden. *See United States v. Harvey*, 85 M.J. 127, 130 (C.A.A.F. 2024) (finding Article 66(d)(1)(B)(i), Uniform Code of Military Justice, requires Appellant to assert an error and show a specific deficiency in proof to trigger factual sufficiency review).

WHEREFORE, Appellant respectfully requests this Court grant this motion.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on August 29, 2025.

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40617**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jonathon V. TYSON	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 29 August 2025, Appellant submitted a motion to attach a declaration by Appellant, dated 27 August 2025. Appellant moves to attach this declaration because it is relevant and necessary to resolve three of Appellant's assignments of error alleging a biased investigation, discriminatory or vindictive prosecution, unlawful punishment while on appellate leave, and post-trial delay. Appellant submits that attaching this declaration will assist the court in resolving issues "reasonably raised by materials in the record but not fully resolved by those materials," quoting *United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020).

The Government opposes the motion as this document is not necessary to resolve an issue raised by materials in the record, citing *Jessie*, 79 M.J. at 437.

Having considered Appellant's motion, the Government's opposition, this court's Rules of Practice and Procedure, and the applicable law, we grant the motion to attach. We defer consideration of the applicability of *Jessie*, 79 M.J. at 444, and related case law to these attachments until we complete our Article 66, UCMJ, 10 U.S.C. § 866, review of Appellant's case.

Accordingly, it is by the court on this 8th day of September, 2025,

ORDERED:

Appellant's 29 August 2025 Motion to Attach a Document is **GRANTED.**

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**APPELLANT'S MOTION TO ATTACH A DOCUMENT**
v.	)	
	)	Before Special Panel
Senior Airman (E-4) **JONATHON V. TYSON,** United States Air Force, *Appellant*.	)	No. ACM 40617
	)	August 29, 2025

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

Pursuant to Rule 23.3(b) of this Honorable Court's Rules of Practice and Procedure, Senior Airman (SrA) Jonathon Tyson (Appellant) moves to attach the following document to the Record of Trial: Declaration, dated 27 August 2025 [hereinafter Decl.].

The declaration is relevant and necessary to this Court's evaluation of the errors personally raised by SrA Tyson regarding the biased investigation by the Office of Special Investigations and unlawful punishment. Br. on Behalf of Appellant, Appendix (Aug. 29, 2025). SrA Tyson's declaration provides and explains the various pieces of evidence that were not investigated, while also detailing the harms he has suffered since being released from confinement. Decl. It explains that the Office of Special Investigations did not follow up on leads and information provided by SrA Tyson (information which does not appear in the record but stems from information therein) that shows MR's bias. Decl. at 1-4. Furthermore, it explains how two base barments have affected his physical and mental stability while on appellate leave. Decl. at 4-6.

In *United States v. Jessie*, 79 M.J. 437, 445 (C.A.A.F. 2020), the Court of Appeals for the Armed Forces continued the practice of allowing consideration of matters outside the record to resolve issues reasonably raised by materials in the record but not fully resolved by those materials. The declaration expands upon issues in the record, like MR's credibility and post-trial

delay to address the specific concerns SrA Tyson personally raised. Br. on Behalf of Appellant, Appendix; *see* Br. on Behalf of Appellant at Issues II-VII (citing MR's credibility issues raised by the record), Issue X (asserting relief should be granted for post-trial delay).

To resolve SrA Tyson's claim of vindictive or discriminatory prosecution, this Court will need to be aware of why SrA Tyson was selected for prosecution and how that selection was arbitrary. *United States v. McKinley*, 48 M.J. 280, 282 (C.A.A.F. 1998) (citing 2 W. LaFave and J. Israel, *Criminal Procedure*, § 13.4 at 186-88 (1984)). The Court can only do this by knowing what was omitted from the investigation leading to his prosecution, which SrA Tyson's declaration provides. In his declaration, SrA Tyson asserts the Office of Special Investigations was biased because the agents failed to look into MR's credibility, the only source of the allegations against him. Decl. 1-4. SrA Tyson's phone (seized by law enforcement) and his interview with law enforcement provided various pieces of information that would have showed MR was lying about various things. Decl. 1-4. However, these pieces of evidence were ignored by the Office of Special Investigations. *Id*. He asserts that, had this evidence not been ignored, he would not have been prosecuted.

As for the second issue, SrA Tyson asserts he has been unlawfully punished due to two base barments. Br. on Behalf of Appellant, Appendix at Issue XIII. His declaration provides the factual predicate for the harm he has suffered, which this Court is allowed to consider under Article 66(d)(2), Uniform Code of Military Justice, for determining whether to grant appropriate relief for post-trial errors. This part of the declaration also goes to Issue X, discussing whether post-trial delay warrants appropriate relief. *See* Br. on Behalf of Appellant at Issue X (arguing whether to grant appropriate relief considers the facts and circumstances surrounding the case, to include any harm to SrA Tyson).

Without the information in the declaration, this Court cannot resolve the issues SrA Tyson raised or assess whether appropriate relief is warranted for post-trial delay.

WHEREFORE, SrA Tyson requests this Court grant this motion to attach.

Respectfully submitted,

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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Office: (240) 612-4770
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 29 August 2025.

Respectfully submitted,

[redacted]

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO MOTION TO ATTACH
v.	)	Before Special Panel
Senior Airman (E-4) **JONATHAN V. TYSON,** United States Air Force *Appellant.*	)	No. ACM 40617 5 September 2025

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

Pursuant to Rules 23(c) and 23.3(b) of this Court's Rules of Practice and Procedure, the United States respectfully requests this Honorable Court deny Appellant's Motion to Attach, dated 29 August 2025. The United States generally opposes the attachment of Appellant's declaration because they raise matters outside the record and are not "necessary to resolve an issue raised by the record" pursuant to United States v. Jessie, 79 M.J. 437 (C.A.A.F. 2020). The United States will address in further detail why the matters in the declaration cannot be considered in its answer brief.

WHEREFORE, the United States respectfully requests that this Honorable Court deny Appellant's motion to attach his declaration.

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Associate Chief
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 5 September 2025.

KATE E. LEE, Maj, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) **JONATHON V. TYSON,** United States Air Force, *Appellant.*	)))))))))	UNITED STATES' MOTION FOR AN ENLARGEMENT OF TIME (FIRST) Before Special Panel No. ACM 40617 24 September 2025

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 a 20-day enlargement of time to respond in the above-mentioned case. This is the United States' first request for an enlargement of time. The record of trial was docketed with this Court on 5 June 2024. As of the date of this request, 476 days have elapsed since docketing. The United States' brief is currently due 8 October 2025.[1] If the enlargement of time is granted the United States' response will be due 28 October 2025, and 510 days will have elapsed since docketing.

There is good cause for the enlargement of time in this case. Since Appellant filed his brief on 29 August 2025, undersigned counsel filed a 55-page answer brief for United States v. Matti, USCA Dkt. No. 25-0148/AF, at the United States Court of Appeals for the Armed Forces (CAAF) on 8 September 2025. Also on this date, undersigned counsel filed a motion for reconsideration for United States v. Sanger, No. ACM S32773. Undersigned counsel is currently working on a brief due to this Court in United States v. Saul, No. ACM 40341 (rem) due 15 October 2025. Undersigned counsel has two days of use or lose pre-approved leave on 22

[1] This Court granted Appellant's motion to exceed the page limit tolling the United States' answer filing deadline to 8 October 2025.

September 2025 and 29 September 2025. She will also be out of the office for the mandatory annual Joint Appellate Advocacy Training on 25-26 September 2025. Further, JAJG will be closed on Friday 10 October 2025 and 13 October 2025 for the Columbus Day holiday. JAJG has four oral arguments scheduled at the United States Court of Appeals for the Armed Forces on 21-22 October 2025, limiting JAJG's leadership's ability to conduct supervisory review prior to 22 October 2025. Due to her workload and schedule, undersigned counsel has not begun working on the above-mentioned case. This case is undersigned counsel's second priority after United States v. Saul, No. ACM 40341. In Saul, this Court notified the parties that it would not grant subsequent motions for an enlargement of time absent exceptional circumstances.

The Air Force Appellate Operations Division (JAJG), as a whole, currently has 14 briefs with due dates pending at this Court and 3 briefs with pending due dates before CAAF. JAJG currently only has 6 active duty appellate attorneys, 1 active duty division chief, and one civilian associate chief. JAJG's director of operations, Lt Col Liabenow, was reassigned out of the office in August 2025 without a replacement, which means that JAJG has one less supervisory attorney to conduct supervisory review of briefs. Finally, two government appellate attorneys have been at temporary duty locations for the majority of the month of September.

A 20-day enlargement of time is warranted. Appellant filed an extensive 99-page brief with 13 assignments of error. The electronic record of trial contains over 3,000 pages. The enlargement of time to 28 October 2025 is necessary to provide ample time for counsel to effectively represent the United States before this Court. Due to office workload and although JAJG is marshalling reserve support, there is no other appellate government counsel who can work on the brief sooner. The enlargement of time also allows sufficient time for supervisory review and will ensure that the division can file the most thorough, helpful brief possible.

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

[redacted]

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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 24 September 2025.

VANESSA BAIROS, Maj, USAF
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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	
	)	Before Special Panel
Senior Airman (E-4) **JONATHAN V. TYSON,** United States Air Force, *Appellant*.	)	No. ACM 40617
	)	28 October 2025

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

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TABLE OF AUTHORITIES

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before Panel Special Panel
Senior Airman (E-4) **JONATHAN V. TYSON,** United States Air Force, *Appellant.*	)	No. ACM 40617 28 October 2025

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

ISSUES PRESENTED

I.

APPELLANT WAS DENIED MEANINGFUL CROSS-EXAMINATION OF MR IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION WHEN THE MILITARY JUDGE EXCLUDED EVIDENCE OFFERED UNDER MIL. R. EVID. 608(C) THAT MR WAS ARRESTED FOR A DOMESTIC VIOLENCE ALLEGATION MADE BY HER THEN-HUSBAND WHOM SHE CLAIMED FAKED THE CORROBORATING INJURY.

II.

APPELLANT'S CONVICTION FOR STRANGLING MR IS FACTUALLY INSUFFICIENT.

III.

APPELLANT'S CONVICTION FOR KICKING MR IN THE LEGS ON DIVERS OCCASIONS IS LEGALLY AND FACTUALLY INSUFFICIENT.

IV.

APPELLANT'S CONVICTION FOR PUNCHING MR IN THE ARMS AND TORSE ON DIVERS OCCASIONS IS LEGALLY AND FACTUALLY INSUFFICIENT.

V.

APPELLANT'S CONVICTION FOR DESTROYING MR'S CELLPHONE IS LEGALLY AND FACTUALLY INSUFFICIENT.

VI.

APPELLANT'S CONVICTION FOR DESTROYING A VARIETY OF MR'S BELONGINGS IS LEGALLY AND FACTUALLY SUFFICIENT.

VII.

APPELLANT'S CONVICTION FOR THREATENING MR ON DIVERS OCCASIONS IS LEGALLY AND FACTUALLY INSUFFICIENT.

VIII.

THE TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT DURING THE FINDINGS ARGUMENT RESULTING IN MATERIAL PREJUDICE TO APPELLANT'S SUBSTANTIAL RIGHTS.

IX.

OMISSION OF THE FOURTEEN FILES CONTAINED IN PRELIMINARY HEARING EXHIBIT 16 IS A SUBSTANTIAL OMISSION THAT REQUIRES REMAND TO CORRECT THE RECORD.

X.

THE 172-DAY DELAY FROM SENTENCING TO DOCKETING OF THIS CASE WITH THIS COURT WAS UNREASONABLE, WARRANTING APPROPRIATE RELIEF.

XI.

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

XII. [1]

THE OFFICE OF SPECIAL INVESTIGATIONS CONDUCTED A BIASED INVESTIGATION, LEADING TO A DISCRIMINATIVE OR VINDICTIVE PROSECUTION.

XIII.

BARRING APPELLANT FROM MULTIPLE AIR FORCE INSTALLATIONS WHILE ON APPELLATE LEAVE CONSTITUTES UNLAWFUL PUNISHMENT OR OTHERWISE VIOLATES THE LAW BY BEING ARBITRARY OR CAPRICIOUS.

STATEMENT OF CASE

The government charged Appellant with one charge and nine specifications of domestic violence in violation of Article 128b, UMCJ. (*Entry of Judgment*, 2 February 2024, eROT, Vol. 1.) A panel, consisting of officer and enlisted members, found Appellant guilty, contrary to his pleas, of six specifications of domestic violence. (Id.) The panel acquitted Appellant of three specifications of domestic violence. (Id.) The members sentenced Appellant to reduction in grade to E-1, one year of confinement, and a bad-conduct discharge. (Id.) The military judge credited Appellant with 246 days of pre-trial confinement credit. (Id.) The convening authority took no action of the findings or sentence. (*Convening Authority Decision on Action*, 19 January 2024, eROT Vol. 1.)

[1] Issues XII and XIII were raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

STATEMENT OF FACTS

MR met Appellant on the Tinder dating application in March 2021. (R. at 517.) Although MR described Appellant as shady, she continued to talk to him for flirtation and to keep each other company. (Id. at 517-18.) When MR initially told Appellant that he was abusive, Appellant told her that she was overreacting. (R. at 518.) MR testified that she and Appellant did not go on dates or talk on the phone. (Id.) Initially, MR and Appellant primarily communicated through Snapchat. (Id.)

In April 2021, MR moved in with Appellant at his residence at Minot Air Force Base. (R. at 519.) While there were good times in their relationship, MR and Appellant argued "about little things." (R. at 519.) MR and Appellant would go to Starbucks, the mall, and movies. (R. at 520.) But they did not have friends at Minot Air Force Base. (Id.)

MR testified that there was a break in the relationship in September 2021 because Appellant was upset that he could not find a calculator, and there was a dispute over that. (R. at 526.) MR left for about a month or two. (Id.) They reconnected in fall 2021 when Appellant reached out to MR. (Id.) MR moved back into Appellant's residence on base. (R. at 527.) They were engaged on 31 October 2022. (Id.) MR continued to live with Appellant until April 2023. (Id.)

Appellant went on temporary duty (TDY), and when he returned, MR said things went "further down to like the bad side, I would say." (R. at 530.) Around April and May 2022, MR noticed a change in Appellant's demeanor in that Appellant would get very angry. (R. at 535.) Verbal arguments turned physical. (Id.)

Appellant punched MR's arms and torso (Specification 5) and kicked her legs (Specification 4)

The physical abuse started in May 2022. (R. at 536.) Appellant would punch MR's left arm, which would happen every time Appellant and MR argued. (R. at 536.) MR further explained that Appellant would also kick and punch her. (Id.) Appellant would kick her on her legs. (Id.) Regarding the punches, MR said that Appellant would "always start with, I believe it's [sic] left arm." (Id.) Around 6 or 7 May 2022, MR went to the hospital with chest pains. (R. at 537.) MR took photographs of her injuries. (Pros. Ex. 8.) The injuries showed that MR had bruises on her arms, wrists, and legs. (Id.) MR even took a video of the injury to her leg. (Pros. Ex. 10.) The photographs and video of the injuries were taken on 6 May 2022. (R. at 541-42.) MR took the photographs of the injuries because Appellant would tell MR that he did not hit MR hard, or Appellant would deny the assaults. (R. 546.) MR stayed in a relationship with Appellant because she thought things would get better and that Appellant would change because there were still good times. (R. at 546.)

On 6 July 2022, Appellant and MR were supposed to go to a Military Day fair. (R. at 548-49.) They were going to be late to the fair, and MR told Appellant that they needed to go or else they would miss part of the fair. (R. at 549.) MR asked, "can we go." (Id.) And Appellant started yelling at her, and eventually grabbed MR's arm to get out of that room. (Id.) MR took photographs of her injuries. (Pros. Ex. 11.) They ended up going to the fair, and MR continued to stay in the relationship with Appellant because they had a great time at the fair. (R. at 551.) MR explained that the physical altercations and tension would eventually deescalate, and things would go back to normal, and Appellant would then talk about what they were going to eat for dinner. (Id.)

On 31 October 2022, Appellant proposed to MR and bought her a ring. (R. at 552; Pros. Ex 7.) MR had mixed feelings about the engagement. (R. at 554.) MR testified that there was a time she thought she and Appellant were married, even though there was no ceremony, oaths, or justice of the peace involved. (R. at 555.) Appellant gave her a sheet to sign and told her that states such as Colorado only required a signed sheet which Appellant would file. (Id.) MR trusted that Appellant filed the paperwork. (R. at 556.) Anytime MR would challenge Appellant or did not trust him, that would lead to a fight, and Appellant would say, "Men lead, women follow. That's not your place. You do as I say." (Id.) MR inquired whether she was enrolled in the Defense Enrollment Eligibility Reporting System (DEERS), and asked about obtaining a military ID, but Appellant told her that she did not need it because she already had a job on base. (R. at 558.) MR worked at the medical group appointment line center and UPS. (R. at 558-59.) MR had a stable employment while living with Appellant on base. (R. at 559.) But regarding her relationship with Appellant, MR testified that from "a physical standpoint," Appellant kicked her more frequently resulting in more frequent bruises. . (R. at 559.)

Appellant destroyed MR's personal property (Specification 8)

In addition to physical abuse, around February 2023, Appellant while angry at MR broke her personal belongings, such as shoes, clothes, toiletries, purses. (R. at 559.) On 11 February 2023, Appellant and MR had an argument as depicted in the video that was Prosecution Exhibit 12. (R. at 561.) This video showed Appellant picking up a glass candle jar off the kitchen counter while MR screamed, "Leave my candle alone! Leave it! I bought that! Just leave it alone! Leave it alone!" (R. at 562.) Appellant responded, "I don't care, I don't care. Squeal again you stupid fucking bitch. I'll break the goddamn neck off. Squeal a f-fucking-gain, you

stupid whore. Do it. Yea, you fucking dumb bitch." (R. a 562.) MR's testimony further explained that Appellant was breaking her candle holder. (R. at 562.)

MR testified that she and Appellant argued often in the house, as portrayed in Prosecution Exhibit 12. (R. at 563.) MR purchased an ice maker for Appellant, and Prosecution Exhibit 13 portrayed Appellant stabbing the icemaker with a knife. The video showed MR screaming, "Stop! I just bought that for you!" (Pros. Ex. 13; R. at 565-66.) Appellant responded, "You better clean my goddamn room." (Id.) MR confirmed again that arguments with Appellant would escalate to either violence against MR or violence against property. (R. at 566.) Prosecution Exhibit 14, another video, demonstrated Appellant destroying with MR's cell phone charger with a pair of pliers. In this video MR screamed, "Do It! You wanna do that again? You want to damage my fucking property again?" Appellant responded, "Yep." (R. at 574.) Also in this video, Appellant was seen grabbing things off the kitchen counter and making twisting and cutting motions with the tools in his hands while arguing with MR. (R. at 575.) After the video cut off, Appellant grabbed MR and tried to take MR's phone away. (R. at 576.) MR acknowledged that she argued with Appellant and screamed at him. (R. at 879-80.) MR reached this level of anger because Appellant was always breaking her things, trying to go after her dogs, and calling her "name after name after name." (R. at 580.)

Prosecution Exhibit 15, a video taken on 11 April 2023, showed Appellant threatening MR while destroying her personal property, such as toiletries. Appellant said, "Get your goddamn purse or I'm gonna fuck that shit up," and "Get the fuck outta here, bitch. Or I'm gonna pour every goddamn thing out. I don't have time for it. Now get the fuck out of this goddamn bathroom. I ain't got time for you, fucking fat ass goddamn hog. (R. at 583-84.) Appellant threatened to go on a rampage to break MR's personal belongings. (R. at 585.) When

asked by trial counsel what Appellant did to her personal property the week of 11 April 2023, MR said that he "dumped it. Cut it. Hit it. Shredded it." (Id.) This was the week that Appellant did the most damage to her property. (Id.) MR also said that Appellant would carry scissors and cut her property. (R. at 587.)

Appellant threatened MR (Specification 9)

There were times in which Appellant threatened MR. MR testified that Appellant made the following threats: "he's going to kill me;" "I'm gonna blow your brains out;" and "I'm gonna kill you, stupid bitch." (R. at 570.) Appellant made threat multiple times during each argument. (Id.) Arguments occurred every day or every other day. (Id.) During their relationship, Appellant continued to make threats and harm property. (Id.) MR explained that she continued to stay with Appellant because they " had good times." (R. at 578.) And she was hoping Appellant would get help. (Id.)

Appellant destroyed MR's cell phone (Specification 7)

MR recalled a time when Appellant broke her cellphone. (R. at 586.) Appellant banged the phone on the metal bed frame. (Id.) The cellphone was completely shattered and stopped working. (Id.) The destruction of the cellphone happened on or about 13 April 2023, and by 14 April the cellphone was not working. MR had to get a new phone on 13 April 2023. (Id.) Prosecution Exhibit 20 showed MR's shattered phone.

Appellant strangled MR (Specification 1)

In April 2023, MR missed a few days of work because Appellant hit her rib resulting in pain. (R. at 594.) MR and Appellant had an argument, and Appellant had his whole body weight and pressed onto MR's rib. (R. at 588.) From this point on, MR was in too much pain to go to work. (R. at 594.) On 14 April 2023, MR called her supervisor, Capt AR, to call in sick

because she was still in pain. (R. at 596.) MR had to hide from Appellant to make the call because she was using her new phone, and she did not want Appellant to take the new phone from her. (R. at 595.) Appellant found MR in the laundry room, and he grabbed MR's phone and went into the garage. (R. at 595.) Appellant locked MR in the garage. (R. at 595.) MR left the garage, but she was not able to fully enter the house because she was stuck between two doors. (R. at 596.) MR yelled at Appellant to let her in the house because it was cold outside. (R. at 596.) MR eventually entered the house through the garage door. (R. at 598.) But Appellant grabbed her arms trying to throw MR back into the garage. (R. at 598.) Appellant then ran upstairs, and MR ran behind him to save whatever Appellant was about to damage. (R. at 598.) Appellant threw MR to the floor and continued to try to find her phone. (R. at 599.) Appellant grabbed his unloaded gun and pointed at MR, and said that he was going to blow MR's brains out. (R. at 599.)

Next, Appellant grabbed MR by the neck. (R. at 601.) MR described the following: "He puts a lot of force into it. He puts – he just grabs me by the neck, and tells me, I have to kill you, [MR]. It's the only way." MR explained that Appellant grabbed her by the neck while they were standing up. (R. at 601.) In describing the event during her testimony, MR had both her "right and left hand kind of circling around her neck with the thumbs," indicating that Appellant pressed both of his hands upon her neck. (R. at 601.) MR testified, "It was a lot of pressure. Enough to where I thought, okay, maybe this is where it ends for me." (R. at 601.) Appellant put his hands on MR's neck the day before this incident, applying "medium to hard" amount of force. (R. at 601.) But on 14 April 2023, Appellant applied a "hard" amount of force. (R. at 601.) When Appellant had his hands over her throat, MR just saw Appellant's face turning red – saying over and over again, "I have to kill you, [MR}. It's the only way." (R. at 601-02.) The

door bell rang, and Appellant let go. MR answered the door, and it was her supervisor Capt AR along with two other men. (R. at 603.) Capt AR, a health service administrator and MR's supervisor, testified that on 14 April MR called him. (R. at 294.) Capt AR explained that he was aware of MR's and Appellant's relationship. (R. at 307.) Capt AR testified that MR sounded like she was in distress. (R. at 295.) MR said that Appellant was destroying her stuff. (Id.) Capt AR could hear someone else in the background. (Id.) The call eventually ended from MR's end, and Capt AR attempted to call her back, but there was no answer. (Id.) Capt AR along with his First Sergeant and members from Appellant's unit conducted a wellness check at MR's and Appellant's residence. (R. at 299.) Capt AR testified that the Appellant's First Sergeant rang the doorbell. (R. at 302.)

MR, in her testimony, explained that leadership wanted to see Appellant, but he refused to come downstairs. (R. at 603.) Capt AR and the other First Sergeants said they were not leaving until Appellant showed himself. (Id.) Appellant continued to refuse to come down, and Appellant cut MR's leg with scissors. (Id.) Capt AR and the other men noticed that MR had a cut on her leg, and at that point, they called Security Forces who responded to the incident. (R. at 604.) Also, in his testimony, Capt AR explained that he saw a big bruise on MR's right thigh. (R. at 302.)

Afterwards, MR sought medical treatment at a local hospital. (R. at 606.) Air Force Office of Special Investigations (OSI) Agent KB went to see MR at the hospital and took pictures. (R. at 607; Pros. Exs. 2-4.) MR also took photographs that night at her residence. (R. at 607; Prosecution Exhibit 18.) Photographs taken at the hospital and by OSI revealed extensive bruising throughout her body, including MR's neck. (Pros. Ex. 2, 3, 4.) Page 6 of Prosecution Exhibit 18 also showed bruising around her neck from when Appellant's put his hands around

her neck earlier that day. (R. at 609-10.) MR confirmed that on two occasions that week Appellant, put his hands around her neck – strong enough to leave bruises. (R. at 611.) Page 9 of Prosecution Exhibit 18 also showed a bruise on MR's arm– MR explained that Appellant usually began punching her left arm. (R. at 611.) The pictures also showed bruises to the right arm. (Pros Ex. 18 page 8; R. at 611.)

ARGUMENT

I.

THE MILITARY JUDGE DID NOT ABUSE HER DISCRETION IN EXCLUDING EVIDENCE, AND APPELLANT WAS AFFORDED MEANINGFUL CROSS EXAMINATION OF MR

Additional Facts

On 14 April 2023, MR called her leadership, Captain AR to call out from work for the third day in a row. (R. at 56, 594-595.) MR did not ask her leadership to come to the house and was surprised when Capt AR and the first sergeant showed up. (R. at 595, 721.) MR was worried when they arrived because she thought they might take Appellant away. (R. at 721.) MR initially denied being worried that she herself would be taken away, but when confronted with a statement she had made to OSI, MR clarified that she was afraid of being taken to the hospital or otherwise split apart from Appellant. (Id.) Trial defense counsel then attempted to enter a line of questioning regarding a domestic violence incident between MR and her former spouse in 2014 [2014 incident]. (R. at 722.) This triggered a hearing outside the presence of the members under Article 39(a), UCMJ. (Id.)

Trial defense counsel explained a theory of a motive under Mil. R. Evid. 608(c) to fabricate due to MR's previous experience of being removed from base housing following a domestic violence incident wherein her former spouse had a cut, and MR told law enforcement

the cut was a result of self-injury. (R. at 724-25.) The military judge asked for additional facts and evidence in order to determine the admissibility of the evidence, allowing trial defense counsel to ask MR proposed questions. (R. at 725-26). MR had no recollection of the 2014 incident other than security forces arriving at her house. (R. at 727-28.) MR did not recall a physical altercation, did not recall denying causing her ex-husband any injury, did not recall telling security forces that her ex-husband had injured himself, did not recall being detained, and did not recall being cited for battery. (Id.) Upon redirect examination, MR clarified that she had never been removed or barred from the on-base house following the 2014 incident, and she continued to live with her ex-husband for approximately another 8 years. (R. at 728-29.)

Additionally, the military judge permitted trial defense counsel to call Mr. AC as a witness during the 39(a) hearing to provide testimony as one of the security forces patrolman who responded to the 2014 incident. (R. at 732-33.) Mr. AC had a vague recollection of the incident, initially believing that MR had the cut rather than her ex-husband. (R. at 735-36.) However, after his recollection was refreshed with the incident report, Mr. AC clarified that his partner had taken MR's statement. (R. at 740-41.) On direct examination, Mr. AC testified that: 1) MR made a statement that her ex-husband had scratched himself with a key; 2) both MR and her ex-husband were agitated; 3) both MR and her ex-husband admitted to pushing or shoving one another, and 4) they were both transported in separate patrol cars and detained by security forces. (R. at 734-743.) Mr. AC clarified that he did not know the outcome of MR's case, did not recall ever warning MR about potential barment from base, and had determined both MR and her ex-husband were mutual aggressors in the situation. (R. at 744-745.)

Trial defense counsel argued that the 2014 incident mirrored the April 2023 incident because MR presented with a cut on her leg after her leadership had arrived. (R. at 747.)

Further, the 2014 incident was needed to impeach MR as to what she thought was going to happen once law enforcement arrived and to establish motive to fabricate by self-injury. (Id.) However, as the military judge pointed out, trial defense counsel had already significantly cross-examined MR on the timing of the cut to her leg and had already raised a motive to fabricate through that line of questioning. (Id.) Trial defense counsel attempted to clarify that, assuming MR's statements regarding the 2014 incident were entirely truthful[2] (that her ex-husband went into the bathroom, called the police, and cut himself with a key), the cut on her ex-husband was directly tied to MR herself ending up in the back of a patrol car. (R. at 748-749.)

> MJ: But that's not all she told the police officers. Based on the testimony of your own witness, she told the police officers, both of them admitted to putting hands on each other. So it's not entirely true. Your conclusion that because he was cut, she's in the back of a car, isn't at all what your witness testified to, just now.
>
> DC: It is part that, Your Honor. And that is the part where, there is some relationship to this current case. In this case, there is a cut on her thigh as the police arrives.
>
> MJ: So you're asking me to take a portion of her statement from a 1 – year old incident, out of context, in order to establish further evidence of a motive to fabricate you've already established?

(R. at 749.)

The military judge requested further clarification and heard additional argument from counsel, focusing on specific questions related to the balancing test under Mil. R. Evid. 403. (R. at 749-53.) Trial defense counsel continually insisted that the roles were reversed between the 2014 incident and the charged offenses, arguing that MR had a prior experience with law enforcement, had a previous experience with claiming an injury was the result of self-harm, and

[2] Trial defense counsel also stated, "we don't know the facts, we're not here to litigate" regarding the 2014 incident. (R. at 748.)

had knowledge that a bleeding cut may shift equities in law enforcement's perception and reaction to the situation at hand. (R. at 751-53.) Trial counsel rested on the argument that the 2014 incident was not relevant and failed the balancing test under Mil. R. Evid. 403 because of unfair prejudice, delay, and trial within a trial. (R. at 750.)

In her ruling, the military judge found that trial defense counsel had failed to establish a real and direct nexus of fact for the 2014 incident to the charged offenses – specifically that there was no evidence before the court that MR suffered any real consequence as a result of the 2014 incident so much that she would have a motive to fabricate an additional incident 10 years later. (R. at 756.) Further, the military judge found that as MR did not recall the incident, it would not have been on her mind when her leadership showed up to her house. (Id.) This, coupled with the factual differences between the 2014 incident and the charged offenses, no logical nexus had been established. (R. at 756-57.)

The military judge also conducted a balancing test under Mil. R. Evid. 403, finding the probative value was substantially outweighed by the danger of confusing the issues, creating a trial within a trial, causing undue delay, needless presentation of cumulative evidence, and a high risk that the members would misuse the evidence beyond its limited purpose. (R. at 757.) The military judge reminded counsel that the ruling was subject to reconsideration if supported by new evidence or law, at which point trial defense counsel immediately asked for reconsideration, arguing admission under Mil. R. Evid. 404(b)(2) for character evidence. The military judge conducted an additional balancing test under Mil. R. Evid. 403 and came to the same conclusion, denying the request for reconsideration. (R. at 757-59.)

Cross examination of MR continued. Trial defense counsel established a motive to fabricate through anger at breaking up, pending separation, and alleged infidelity. (R. at 757.)

MR's credibility was further attacked regarding her memory (R. at 844), past lies about her age (R. at 636), her mistaken belief she and Appellant were married (R. at 555), her accessing Appellant's laptop and potentially deleting messages after Appellant was arrested (R. at 790-791), her slapping Appellant on a previous occasion (R. at 682), and her character trait for untruthfulness (R. at 968). Further, trial defense counsel put on a case-in-chief which included calling an expert, who testified that it was possible MR's injuries were self-inflicted or caused by other means such as moving heavy boxes. (R. at 943-46.) Ultimately, Appellant was acquitted of Specifications 2-3 and 6 of the Charge and convicted of Specifications 1, 4-5, and 7-9. (Entry of Judgment, ROT, Vol. 1.)

Standard of Review

This Court reviews a military judge's decision to exclude evidence for an abuse of discretion. United States v. St. Jean, 83 M.J. 109, 112 (C.A.A.F. 2023). The abuse of discretion standard is "a strict one, calling for more than a mere difference of opinion—[t]he challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." Id. (citing United States v. Hendrix, 76 M.J. 283, 288 (C.A.A.F. 2017) (alteration in original) (internal quotation marks omitted)). "A military judge abuses [her] discretion when [her] findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." United States v. Miller, 66 M.J. 306, 307 (C.A.A.F. 2008).

Law and Analysis

An accused enjoys the right of confrontation, as memorialized in the Sixth Amendment. U.S. Const. Amend. VI. This right includes the right to cross-examine witnesses, including on issues of bias and credibility. Relevant here, "Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Mil. R. Evid. 608(c).

While Confrontation Clause is essential to a fair trial, trial defense counsel is not allowed unfettered freedom to cross-examine a witness any way they please:

> On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. And as we observed earlier this Term, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.

Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam) (emphasis in original).

While "rules of evidence should be read to allow liberal admission of bias-type evidence," (United States v. Moss, 63 M.J. 233, 236 (C.A.A.F. 2006)) a military judge maintains "wide latitude" to impose "reasonable limits" on cross-examination. Delaware v. VanArsdall, 475, U.S. 673, 679 (1986). Moreover, evidence of bias is not excepted from all other rules of evidence. The right to confrontation, and cross-examination, does not extend so far as to any subject "solely because [an accused] describes it as one of credibility, truthfulness, or bias. There must be a direct nexus to the case that is rooted in the record." United States v. Sullivan, 70 M.J. 110, 115 (C.A.A.F. 2011).

Appellant contends that a logical nexus was drawn at trial because the information was directly tied to trial defense's theory of motive to fabricate and theory that MR's injuries were self-inflicted. (App. Br. at 12). Appellant argues that he was only able to argue a "figment of a theory" rather than direct evidence in support of the theory. (App. Br. at 22). However, the record makes clear: 1) the trial defense failed to establish a logical nexus as to admissibility under Mil. R. Evid. 608(c) and 401; 2) even if the evidence was relevant, its probative value did not pass a balancing test under Mil. R. Evid. 403; and 3) even assuming abuse of discretion, any error was harmless because trial defense counsel was able to conduct meaningful cross examination and was fully able to explore the theory of motive to fabricate, self-harm, and impeachment of MR's credibility.

Appellant's assertions that there was any abuse of discretion amounts to a difference of opinion as to the military judge's ruling. The military judge's exclusion of evidence and her reasonable limitation of cross examination were not arbitrary or clearly unreasonable or erroneous. Appellant's right to confrontation was not violated, and the military judge did not apply an erroneous view of the law. Thus, no relief should be granted.

A. The military judge imposed reasonable limits on cross-examination that did not amount to an abuse of discretion.

The military judge provided wide latitude for the trial defense counsel to establish a logical nexus and theory of admissibility at trial, including hearing testimony of both MR and Mr. AC, the patrolman who responded to the 2014 incident. (R. at 725-45.) Despite this, trial defense failed to establish the logical nexus required for admissibility under Mil. R. Evid. 608(c), and 401, and failed to overcome the balancing test under Mil. R. Evid. 403. Thus, the military judge properly used her discretion to reasonably limit cross examination.

Appellant failed to establish a direct nexus to support admissibility

Appellant relies on United States v. Moss, 63 M.J. 233 (C.A.A.F. 2006). (App. Br. at 15-16). However, this case is distinguishable. In Moss, a direct nexus between past bad acts of the victim and a motive to fabricate sexual assault allegations was established because the victim had been repeatedly beaten and institutionalized as a result of behavior problems contemporaneous with the events in question, leading to a viable theory that the victim would lie in order to change her own present circumstances. 63 M.J. at 235-37. Here, the evidence sought by Appellant had to do with a single instance, nearly ten years in the past, which was not repetitive, pervasive, ongoing, or contemporaneous. Indeed, this incident was so removed in time and impact, MR testified that she did not specifically recall the incident, did not recall being arrested, and did not recall being cited for battery. (R. at 724-29.) In order for evidence to support a motive to fabricate, the victim would have had to have been aware of it in the first place. United States v. Brunetta, 2019 CCA LEXIS 63, *9-10 (A. Ct. Crim. App. 2019). At trial, defense counsel argued that the motive to fabricate was specifically tied to the statement MR made about her former spouse using car keys to cut himself, leading to her arrest—attempting to establish a nexus between a prior experience where the other party had an active, bleeding cut through self-harm, leading to shifted equities and triggering MR's arrest. (R. at 752-53.) Trial defense further argued that, despite MR's lack of memory, it was highly probative for the members to know that MR was exposed to an incident of prior domestic violence for which she had been arrested as a mutual aggressor and claimed her former spouse had a self-inflicted injury. (Id.)

However, the military judge did not find such a nexus, given the facts as presented by the witnesses. The military judge found significant differences between the 2014 incident and the facts and circumstances surrounding the April 2023 incident. Specifically, in 2014: 1) MR's

former spouse called law enforcement to respond to the house during a physical dispute; 2) MR and her former spouse were *both* arrested; 3) both MR and her former spouse had admitted to putting hands on each other and were classified as mutual combatants; and 4) no evidence was presented as to what, if anything, ever came about from the arrest. (R. at 753-55.) As to the charged offense in April 2023: 1) MR called her supervisor to call out of work, not law enforcement and she did not call to report a crime; 2) only Appellant was arrested; 3) MR did not make statements indicating mutual combat; and 4) the incident directly led to the case at bar. (Id.) Additionally, the inference that MR was somehow afraid of being removed from the house or barred from base did not have a logical nexus to the charged incident, since MR had never previously been barred from base or base housing following the 2014 incident. (Id.) Further, MR had already packed several boxes and was in the process of separating from Appellant. (Id.)

The military judge cited United States v. Sullivan, and indeed the facts here align. 70 M.J. 110 (C.A.A.F. 2011). In Sullivan, the trial defense counsel failed to establish a sufficient nexus between a victim's previous mental health issues and counseling under a theory of motive to fabricate. Id. at 116. CAAF distinguished Sullivan from Moss because of available corroboration, lack of evidence that the fear giving rise to the motive to fabricate existed in the victim's mind, and substantial factual differences. Id. at 115-16. Here, as in Sullivan, this case is not simply a credibility contest between MR and Appellant because of ample corroboration evidence. Further, MR did not have a clear memory of the 2014 incident to inform a motive to fabricate, and there were substantial factual differences between the 2014 incident and the charged offenses.

Thus, there being no direct logical nexus between the 2014 incident and the charged offenses, the evidence regarding the 2014 incident was not admissible under Mil. R. Evid.

608(c), was not relevant under Mil. R. Evid. 401, and was properly excluded. The military judge did not abuse her discretion, and relief should not be granted.

The military judge properly applied the Mil. R. Evid. 403 balancing test

The military judge did not simply decide the evidence was irrelevant and stop there. In her ruling, she also evaluated the proffered evidence under the Mil. R. Evid. 403 balancing test and found any probative value was substantially outweighed by the needless presentation of cumulative evidence, confusing the issues, creating a trial within a trial, undue delay, and a high risk the members would misuse the evidence beyond the limited purpose presented. (R. at 753-57.)

First as to needlessly presenting cumulative evidence, trial defense had already substantially cross-examined MR on motive to fabricate or self-harm for a myriad of reasons, including anger at the breakup, alleged infidelity, and pending separation, to name a few. (Id.) Information regarding the 2014 incident, particularly where MR had no clear recollection of it, was cumulative to the impeachment already conducted by trial defense counsel. (Id.)

Second, as to confusing the issues, this information would only serve to create a trial within a trial and was an attempt to paint MR as an aggressive or unsympathetic victim. Trial defense counsel voluntarily conceded that, "we don't know the facts, we're not here to litigate [the 2014 incident]." (R. at 748.) This position further confused the military judge, who responded, "you're asking me to take a portion of a 10 year old incident out of context to establish further evidence of a motive to fabricate you've already established?" (Id.) Not knowing the outcome, impact, or truly the full breadth of the facts of the 2014 incident would only serve to confuse the issues, leading to a trial-within-a-trial. Members would be left confused as to whether they were resolving the truth of the 2014 incident or the charged

offenses. This distraction would not serve to make any fact more or less likely under Mil. R. Evid. 401, much less have the probative value to overcome the confusion and trial-within-a-trial under Mil. R. Evid. 403.

Appellant asserts that admission would not cause delay, since only one witness' testimony, Mr. AC, was required to 'prove up' their theory. (App. Br. at 19). However, the special trial counsel clarified for the military judge, "there's probably five or six other witnesses we're gonna call now, if we go down this road about a 2014 domestic violence" incident. (R. at 726.) This is an inherent hazard of a trial-within-a-trial. In addition to confusing the issues for panel members, generating a trial-within-a-trial causes needless delay in calling multiple other witnesses all in the name of proving up, clarifying, or explaining an incident that was tangential at best and irrelevant at worst to the charged offenses.

Finally, the military judge found there was a high risk that the members would improperly use the evidence beyond its limited purpose: specifically, to conclude that MR was an aggressive or unsympathetic victim. (R. at 753.) (Id.) Trial defense counsel at first averred that evidence about the 2014 incident was not character evidence and put forth their theory of admissibility fully under Mil. R. Evid. 608(c). (R. at 724.) However, upon the military judge issuing her ruling, trial defense counsel immediately moved for reconsideration, offering the evidence under Mil. R. Evid. 404(b)(2) as character evidence of crimes or other acts. (R. at 758.) Nonetheless, evidence offered under Mil. R. Evid. 404(b)(2) is also subject to the test for relevance under Mil. R. Evid. 401 and the balancing test of Mil. R. Evid. 403. The military judge conducted another balancing test and found the same outcome—the evidence still failed under Mil. R. Evid. 403. (R. at 759.)

Here as in Sullivan, "the military judge treated the relevance and balancing determinations with the care necessary to uphold the accused's constitutional rights while also protecting the privacy of the victim and did not abuse [her] discretion in doing so." 70 M.J. at 116. The probative value of a dissimilar incident that MR did not remember was of very limited probative value regarding MR's motive to fabricate, and any miniscule probative value was heavily outweighed by the dangers articulated by the military judge. Therefore, the military judge did not abuse her discretion, and relief should not be granted.

B. Any error was harmless beyond a reasonable doubt because Appellant was afforded substantial and meaningful cross examination of MR's credibility.

Even if this Court concludes that the military judge abused her discretion and should have admitted the proffered evidence, Appellant's claim yet fails because a "finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Article 59(a), UCMJ. If this Court finds the exclusion of evidence as an infringement of Appellant's constitutional right to confront witnesses, the Government has the burden of showing that the error was harmless beyond a reasonable doubt. United States v. Tovarchavez, 78 M.J. 458, 460 (C.A.A.F. 2019); *but see* Greer v. United States, 141 S. Ct. 2090, 2097 (2021) (Even for constitutional errors "[t]he defendant has the burden of establishing entitlement to relief.").

In determining whether the erroneous exclusion of confrontation evidence is harmless, courts consider: "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course, the overall strength of the prosecution's case." Moss, 63 M.J. at 238 (quoting Delaware v. Van Arsdall, 475 U.S. at 684).

Even if the military judge's exclusion of the proffered evidence constituted constitutional error, Appellant is not entitled to relief. Consideration of the Van Arsdall factors in this case demonstrates that there is "no reasonable possibility" that the judge's exclusion of evidence "might have contributed to the conviction," United States v. Upshaw, 81 M.J. 71, 74 (C.A.A.F. 2021), and that the ruling was therefore harmless beyond a reasonable doubt. First, and most powerfully, the proffered evidence was specifically brought up and argued regarding impeachment and self-harm as to the cut on MR's leg captured in Charge I, Specification 3, *for which Appellant was acquitted*. Entry of Judgement, ROT, Vol. 1. The proffered evidence regarding the 2014 incident would have done nothing to reduce Appellant's criminality as to an offense for which he is not guilty. Even if somehow it could, the probative value was extraordinarily low due to the remoteness of time, factual differences, MR's lack of memory, the incident's lack of impact on MR's relationship with her ex husband, and the lack of consequences or punishment following the 2014 incident.

Second, Appellant was successful in attacking, impeaching, and diminishing the credibility of MR to the point that he was acquitted not just of Specification 3 of the Charge, but also Specifications 2 and 6. (Id.) Appellant vigorously cross-examined MR at trial, the examination lasting from before 0900 until after 1615 (R. at 618-790). During cross-examination, trial defense counsel impeached MR's credibility on the basis of lying about her age, accessing Appellant's social media and email accounts after his arrest, mistakenly believing she and Appellant were married, inconsistencies in her testimony and statements she made to investigators or prior testimony, and improbabilities of her recitation of the charged offenses. (Id.) Further, trial defense counsel was able to fully explore motive to fabricate for anger at breaking up, alleged infidelities, embarrassment, revenge, and MR previously slapping Appellant

or 'snapping' emotionally during arguments. (Id.) Trial defense counsel furthered this theory by calling Captain CL, MR's previous government supervisor, who testified as to MR's character for untruthfulness. (R. at 968.)

What is more, trial defense counsel was able to fully explore a theory in which all of MR's injuries were self-inflicted through expert testimony of a forensic pathologist. (R. at 935.) This expert testified that it was entirely possible that the bruises and injuries referenced in Specifications 1 and 3-5 could have been inflicted by one's self or by activities such as moving boxes. (R. at 962.) However, the pathologist also testified to her limitations on review of the evidence, that the wide spread patterns and sizes of bruises were "horrible," some of MR's injuries were indicative of defensive wounds, and that she had never seen a case where so much bruising was the result of self-inflicted harm. (R. at 949-64.) While trial defense counsel was able to sufficiently raise a theory of self-injury, the panel members were able to give the evidence presented by the forensic pathologist the appropriate weight and come to their own conclusion. Appellant's extremely tenuous theory that the 2014 incident gave MR a reason to fabricate her injuries would not have given any more credence to the defense's self-injury theory.

The strength of Appellant's theory of self-injury is separate and distinct from his ability to raise it at trial in the first place. Appellant complains now that he was only able to argue a "figment" of the defense theory. (App. Br. at 22.) However, Appellant presented a robust case, with substantial evidence and argument which attacked the government's theory of the case, diminished MR's credibility to the best of his ability, and resulted in his acquittal for three of the nine offenses alleged. Trial defense counsel argued much more than a 'figment' of a theory of fabrication during closing arguments, contending that the entirety of the case is a false allegation brought about by lies, inconsistencies, and MR's own abuse of Appellant. (R. at 1106-1127.)

This was zealous, unabridged advocacy; not the limiting or weak representations at an unfair trial. Ultimately, the panel members appropriately weighed the evidence and reached their own conclusions regarding both the facts and MR's credibility. While the Appellant succeeded in casting doubt on certain specifications, his challenge to the evidence proved inconsequential with respect to those for which he was convicted.

Based on the facts of this case and the state of the law, if error occurred, it was harmless beyond a reasonable doubt. Tovarchavez, 78 M.J. at 460. Accordingly, relief is not warranted because Appellant has not suffered a material prejudice to a substantial right. United States v. King, 83 M.J. 115, 121 (C.A.A.F. 2023); *see also* United States v. Rodriguez, 60 M.J. 87, 89-90 (C.A.A.F. 2004) ("[W]here, in fact, there is no prejudice to an accused, we should not forsake society's other interests in the timely and efficient administration of justice."). For all of the above reasons, no relief should be granted under this assignment of error.

II.

APPELLANT'S CONVICTION FOR STRANGLING MR WAS FACTUALLY SUFFICIENT (SPECIFICATION 2).

Additional Facts

Appellant was found guilty of the following specification of strangulation in violation of Article 128b: "on or about 14 April 2023, [Appellant did] commit an assault upon [MR] the intimate partner of the accused, by unlawfully strangling her with his hands." (*Entry of Judgment*, 2 February 2024, eROT, Vol. 1.)

In addition to MR's testimony the following witnesses testified regarding the strangulation. The government called OSI Special Agent KB to testify to the scene of the crime and MR's physical state at the hospital. (R. at 460.) Agent KB testified to MR visibly shaking with a flushed red face, and multiple bruises across her body, including her neck and jaw. (Id.)

The government later called Dr. NS as an expert witness in the field of forensic psychology and intimate partner violence. (R. at 884.) Dr. NS testified to the patterns of behavior exhibited in this case and provided her opinion on the nature of the relationship between MR and Appellant. (R. at 898.) Dr. NS testified about the patterns of coercive control within intimate partners, and identified Appellant as engaging in such patterns frequently and intensely against MR. (R. at 902.) Coercive control is a pattern of strategic infliction of a variety of tactics and strategies used to control, dominate, subjugate a partner in an intimate relationship. (R. at 982.) Appellant destroying MR's property was a form of this type of control, as was economic abuse. Further, Appellants verbal threats were all examples of intimidation and coercion. (R. at 902.)

The defense called Dr. EL to testify as a forensic pathologist. (R. at 935.) Dr. EL's testimony encompassed the mechanics of strangulation, as well as providing an opinion on MR's experience and medical records. (R. at 939.) Dr. EL was not the medical professional who treated the victim but reviewed medical records and photographs of the sustained injuries. Upon review, Dr. EL confirmed that the photographs taken at the hospital showed bruising and abrasions on MR's neck. Medical records from that visit noted the victim experienced "choking." (R. at 942.)

Standard of Review

Factual sufficiency is reviewed using the following standard for every finding of guilty for an offense occurring on or after 1 January 2021[3]:

> (i) In an appeal of a finding of guilty under subsection (b), the Court may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.

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

> (ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—
>
> > (I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
> > (II) appropriate deference to findings of fact entered into the record by the military judge.
>
> (iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

Article 66 (d)(1)(B), UMCJ.

Law and Analysis

Appellant's conviction for strangulation was factually sufficient. Courts of Criminal Appeals (CCAs) "may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with [Article 66(d)(1)(B)]." Article 66(d)(1)(A), UCMJ (2024 ed.); United States v. Harvey, 85 M.J. 127, 130 (C.A.A.F. 2024). Factual sufficiency review is triggered only if an appellant (1) asserts it as an assignment of error, and (2) shows "a specific deficiency in proof." Article 66(d)(1)(B)(i), UCMJ; Harvey, 85 M.J. at 130. If both threshold elements are met, a CCA may "weigh the evidence and determine controverted questions of fact." Article 66(d)(1)(B)(ii). The CCA must give "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence." Id. "[T]he degree of deference will depend on the nature of the evidence at issue." Harvey, 85 M.J. at 130-131. Then, the CCA must be "clearly convinced that the finding of guilty was against the weight of the evidence" before they may "dismiss, set aside, or modify the finding, or affirm a lesser finding." Article 66(d)(1)(B)(iii), UCMJ.

A domestic violence specification charging strangulation required the government to prove the following elements under Article 128b, UCMJ:

(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. No. 14062, 87 C.F.R. 4763, 4779 (2022). Strangulation is "intentionally, 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." Id. at 4772.

A. The Government provided evidence for each element of the offense, demonstrating that Appellant committed domestic violence upon MR through strangulation.

Appellant contends that the government did not prove that Appellant strangled MR as the term, strangulation, is legally defined. (App. Br. at 26). But, Appellant fails to trigger factual sufficiency review by not articulating a specific deficiency of proof, and fails to demonstrate how Appellant's conviction was against the weight of the evidence. Even assuming Appellant made a showing of a specific deficiency of proof, this Court should not be clearly convinced that the finding of guilty was against the weight of the evidence, especially after giving appropriate deference that the panel saw and heard the witnesses testify. Harvey, 85 M.J. at 130-131.

The evidence admitted at trial should leave this Court convinced that the government proved Appellant's guilt beyond a reasonable doubt. To prove strangulation beyond a reasonable doubt, the panel must have found that Appellant committed an assault on his intimate partner, MR, that he did so by strangulation, and that the strangulation was done with unlawful force or violence. The government met this burden, and there was no question that the weight of the evidence clearly aligned with the finding of guilty.

The following evidence supported Appellant's conviction of strangulation. Here, MR stated that Appellant grabbed her by the neck, and that he "pressed" using "a lot of force." (R. at

601.) MR remembered Appellant repeatedly saying, "I have to kill you, [MR], it's the only way." (Id.) When asked to describe the event, MR recalled that there was a lot of pressure to where she thought, "maybe this is where it ends for me." (Id.) She felt that the moment of strangulation could have been "[T]he last time I was alive." (R. at 610.) While MR did not lose consciousness or develop petechiae (visible blood vessels), her testimony about the possibility of death while Appellant's hands "pressed" into her neck with "a lot of force" suggested the presence of a substantial risk of death or grievous bodily harm – although not necessary to sustain a conviction.

To prove strangulation, Appellant must have "intentionally, 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 No. 14062, 4772. There was no requirement that the strangulation resulted in injury. But as a result of the strangulation, MR suffered injuries to her neck, such as bruising. (Pros. Ex. 18, 19.) Further, MR testified that Appellant applied a lot of force on her neck. (R. at 601.) A panel could reasonably conclude that Appellant restricted MR's breathing because MR testified the strangulation as, "It was a lot of pressure. Enough to where I thought, okay, maybe this is where it ends for me." (Id.) She explained that at that moment the of strangulation could have been "[T]he last time [she] was alive." (R. at 610.) MR described that the pressure was so intense to the point where she felt that this could be the end was no doubt that Appellant's conduct satisfied the President's definition. MR did not consent to the abuse because she tried to fight back as evidence by the scratches on Appellant's arm. (Pros. Ex. 6, depicting scratches on Appellant's arm on 14 April 2023.) The military judge properly instructed the panel that the government had to prove that

Appellant strangled MR, an intimate partner, with unlawful force or without legal justification. (R. at 1055.) And the military judge explained to the panel that the force required was as minimal as an offensive touching and unlawful meant without legal justification. (Id.) For reasons described, the government proved beyond a reasonable doubt that Appellant strangled his intimidate partner with unlawful force or violence.

Contrary to Appellant's assertions, there was no requirement that MR had to demonstrate impairment or bodily functions as a result of the strangulation. (*See* App. Br. at 27); Exec. Order No. 14062, 4763, 4779. In United States v. Webb, the appellant made a similar in argument in that the force alleged was "such a minimal degree that the named victim said she could still 'talk' and 'breathe' when Appellant had his hands around TA's neck and thus was not clearly strangulation." 2021 CCA LEXIS 607, at *9 (AF. Ct. Crim. App. 18 November 2021) (unpub. op.) This Court found that no relief was warranted. Id. The opinion analyzed the same definition of strangulation applied in Appellant's case, and concluded that that the government is "alleviated from having to prove an appellant inflicted substantial or grievous bodily harm." Id. at *13-14. With this said, the government here did not have to prove that MR had any "impairment of her faculties or bodily functions." MR's testimony was sufficient in that Appellant pressed his hands with "a lot of force" on her neck, as corroborated by the photographic evidence showing marks around her neck. Appellant makes the point that there were no "red marks" (App. Br. at 27) but he disregards the evidence depicting bruises on MR's neck. In all, the government proved strangulation by satisfying all the statutory elements – that Appellant strangled his intimate partner with unlawful force.

Further evidence demonstrated that Appellant's conviction was not against the weight of the evidence. At trial, even the defense witness, Dr. EL, testified that strangulation is not one-

size-fits-all. (R. at 954.) She confirmed that a victim can be strangled and exhibit physical signs, clinical signs, both, or none. (Id.) A victim could be strangled and not have a voice change, not have difficulty swallowing, or not exhibit petechiae in the face. (Id.) Dr. EL expressed that while ruling out self-harm or accidental injury is difficult, she had never seen a case of self-harm where the amount of bruising was as significant as the level displayed by the photographs of MR's injuries. (R. at 956-57.) Agent KB testified that he recalled seeing MR's neck covered in bruises at the hospital and was present for photographing the evidence. (R. at 460-461.) Agent KB testified that it was "hard for [MR] to talk. She was very quiet." (R. at 461.) Further, Agent KB did not find any inconsistencies in MR's allegations during initial or follow-up questioning regarding the attacks. (R. at 508.) The government proved that Appellant strangled MR, and the corroborating evidence supported MR's testimony. (Pros. Exs. 2-4, 18.)

At trial and on appeal, Appellant suggested that MR self-inflicted the injuries at issue. But in its rebuttal case, the government called Dr. TH, an expert witness on pathology, who explained that Appellant applied pressure on both sides of MR's neck. (R. at 989.) Dr. TH opined that the injuries to MR's neck was not accidental. Further, Dr. TH opined that MR did not inflict the injuries to her neck upon herself. (R. at 994.) Dr. TH stated that there was no support in literature that described self-strangulation. (R. at 995.) This directly contradicted Appellant's theory that MR injured herself. (R. at 1106.) In sum, Appellant's conviction was not against the weight of the evidence, and therefore this Court should find Appellant's conviction factually sufficient.

B. Appellant's arguments regarding MR's credibility does not meet the standard of a specific deficiency in proof nor should it clearly convince this Court that Appellant's conviction was against the weight of the evidence.

Appellant goes to incredible lengths to allege that MR's inconsistent testimony creates a question of credibility and therefore undermines the conviction for strangulation. (App. Br. at 27). A mere question of credibility does not establish a specific deficiency in proof. United States v. Brassfield, __ M.J. __, 2024 CCA LEXIS 497, *12-13 (A. Ct. Crim. App. 20 November 2024). Even if Appellant's attack on MR's credibility met the threshold for showing a specific deficiency in proof, Appellant's conviction was not against the weight of the evidence. Courts have held that when describing acts of domestic violence, victims in traumatized states may have difficulty explaining their understanding of the sequence of events. United States v. Lopez recognized the importance of expert testimony in explaining the behavior of domestic violence victims. 913 F.3d. 807, 824 (9th Cir. 2019). The admission of expert testimony on the mental effects on victims of domestic violence could be significantly probative in rehabilitating a victim's credibility. Id. Expert testimony is a helpful tool in rehabilitating a victim whose credibility has been questioned:

> [A] jury naturally would be puzzled at the complete about-face [the victim] made, and would have great difficulty in determining which version of [the victim's] testimony it should believe. If there were some explanation for [the victim's] changed statements, such explanation would aid the jury in deciding which statements were credible.

United States v. Young, 316 F.3d 649, 657 (7th Cir. 2002) (quoting Arcoren v. United States, 929 F.2d 1235, 1241 (8th Cir. 1991)). Dr. NS rehabilitated MR's credibility when she described that when victims of abuse endure "so many instances of conflict, it's difficult to separate exact details of what happened. . . .[they] lose track of the source of memory, because it all starts to blend together." (R. at 896-97.) Appellant argues that MR's testimony was vague in that MR

stated, "I don't know" or "I don't remember" about eighty-seven times. (App. Br. at 28.) But Dr. NS's testimony described why MR would have lack of memory of all the assaults: because they all blended together between May 2022 and April 2023. Thus, the record had an explanation about MR's lack of memory and detail about every single assault – because MR described that Appellant frequently abused her. (R. at 559.) Nevertheless, MR still provided sufficient details regarding about the specifications charged.

The strength of the evidence included expert testimony, as discussed, and corroborating evidence. The photographic evidence depicted the many injuries Appellant inflicted upon MR. Witness testimony not only corroborated MR's testimony, but also showed that Appellant injured MR's neck by strangulation. Lastly, video evidence depicted Appellant being hostile to MR, which overall corroborated the hostile relationship between Appellant and MR. For these reasons, the evidence was strong in this case that it overcame MR's credibility issues. Trial defense counsel challenged MR, and the panel observed MR throughout her testimony. Thus, this Court should give appropriate deference to the panel who heard and saw MR testify. Harvey, 85 M.J. at 130-131. MR's credibility issues in light of the strong corroborating evidence did not render Appellant's conviction against the weight of the evidence.

Appellant also contends that MR lied on the stand regarding her marital status and her age. (App. Br. at 28). When assessing factual sufficiency, this Court must give appropriate deference to the trial court, since it heard the evidence and witness presentations. Article 66 (d)(1)(B), UMCJ. When evidence is contradictory at trial, the panel of members decides how to assign weight. (R. at 1068.)

MR's inconsequential inconsistent testimony should not be a reason to overturn Appellant's conviction. Not only did MR's testimony regarding the strangulation remain firm,

the issues of her marriage and age were not relevant to the strangulation charge– thus the factfinder could have given this evidence less weight. MR's age and marital status did not relate to an element of the offense. Still, the record provided an explanation for why a victim may lie about her age to her intimate partner. Dr. NS's expert opinion explained that a victim may lie about her age to a romantic partner in an attempt to attract or retain a partner. (R. at 915.) MR's statements about her age and marital status did not make a fact – whether Appellant strangled MR – more or less probable. Even if the factfinder considered MR's issues of age, it would still not cast doubt over MR's credibility as a whole. If anything, MR lying about her age would only have angered Appellant giving him a motive for committing assault. Further, Appellant sought control over MR and had her believe that they were married when she signed the marriage papers that Appellant never officially filed.

Appellant's fails to prove that his conviction was against the weight of the evidence. In all, the evidence is factually sufficient to support the finding of guilty of strangulation. At trial, the panel was free to evaluate the evidence and disregard conflicting evidence or inferences. In a factual sufficiency review, the Court should apply a high degree of deference to the credibility determinations of the trial court, since it heard the evidence and witness presentations. Given the strength of the government's case, this Court should not be clearly convinced that the finding of guilty was against the weight of the evidence. Article 66(d)(1)(B)(iii), UCMJ. The weight of the evidence clearly supported a finding of guilty. For these reasons, this Court should deny this assignment of error.

III.

APPELLANT'S CONVICTION FOR KICKING MR ON THE LEGS ON DIVERS OCCASIONS WAS FACTUALLY AND LEGALLY SUFFICIENT (SPECIFICATION 4).

Additional Facts

The panel convicted Appellant of kicking MR on divers occasions between on or about 1 May 2022 and 14 April 2023 in violation of Article 128b, UCMJ. (*Entry of Judgment*, 2 February 2024, eROT, Vol. 1.)

Standard of Review

The United States incorporates the applicable standard of review for factual sufficiency outlined in Issue II. This Court reviews issues of legal sufficiency de novo. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law and Analysis

The United States also incorporates the factual sufficiency case law referenced in Issue II. A conviction is legally sufficient when "considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." United States v. Young, 64 M.J. 404, 407 (C.A.A.F. 2007) (quotation and citations omitted). Under this standard, this Court must draw every reasonable inference from the evidence in favor of the prosecution. United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). The standard for legal sufficiency is "a very low threshold to sustain a conviction." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019).

A. The government proved that Appellant kicked MR "on diverse occasions."

To prove diverse occasions the United States had to prove that Appellant committed at least two acts. "When members find an accused guilty of an 'on divers occasions' specification, they need only determine that the accused committed two acts that satisfied the elements of the crime as charged – without specifying the acts, or how many acts upon which the conviction was based." United States v. Rodriguez, 66 M.J. 201, 203 (C.A.A.F. 2008). Appellant avers that MR only testified to one incident of kicking with any detail to sustain a conviction on legal sufficiency grounds. (App. Br. 30-31.)

Appellant does not dispute that the evidence is legally sufficient to show Appellant kicked MR in May 2022; he only disputes factual sufficiency based on MR's credibility. (App. Br. at 30-31; R. at 540, Pros. Ex. 8 at 4.) Appellant also disputes whether Appellant kicked MR on more than one occasion. The evidence at trial supported a conviction that Appellant kicked MR on divers occasions for the following reasons.

MR's testimony revealed that eventually Appellant turned physical during their verbal arguments. (R. at 539.) When testifying about the status of her relationship with Appellant in February 2023, MR explained that "the bruises were more frequent. Larger – um, *kicking was more frequent*." (R. at 559) (emphasis added). Thus, MR's testimony supported the charge in that Appellant kicked her on divers occasions. There was other evidence that proved that Appellant continued to kick MR, such as the April 2023 photographs of injuries that depicted multiple bruising on MR's legs. (Pros. Exs. 2, 18.)

Moreover, expert testimony supported the notion that MR suffered from repetitive blunt force trauma – supporting the allegations that Appellant kicked MR on multiple occasions. Dr. TH, a forensic pathologist, testified in the government's rebuttal case. Dr. TH testified that the

bruises from April 2023, as depicted in Prosecution Exhibit 2 and 18, were consistent with repetitive blunt force trauma over a period of time. (R. at 994.) Dr. TH said that the photographs showed indications of both recent injuries and healing injuries. (Id.) Finally, Dr. TH opined that MR's injuries were not consistent with self-inflicted injuries, which usually occur in the form of sharp-force injuries using a knife. (R. at 995-96.) Thus, expert testimony disproved Appellant's theory at trial and on appeal that MR injured herself.

The law did not require the panel members to state with specificity which acts supported divers occasions. Rodriguez, 66 M.J. at 203. The standard for legal sufficiency is whether any rational factfinder could find that Appellant kicked MR on more than one occasion and the answer here was yes. *See* Young, 64 M.J. at 407. Between May 2022 and April 2023 Appellant kicked MR frequently – all within the charged time frame. (R. at 559.) Still Appellant claims that MR's allegations of being kicked were vague as to time and place. (Id.) But this argument is not persuasive. Appellant was on notice that between on or about 1 May 2022 and on or about 14 April 2023, on diverse occasions, he committed a violent offense against MR by kicking her legs with his feet. MR's description of the assaults occurred within the charged time frame and corroborating by pictographic evidence. Thus, MR's accounts of the abuse were not vague nor lacked detail to render the specification either factually or legally insufficient.

To support his argument about vagueness, Appellant relies on United States v. Rodriguez, 2007 CCA LEXIS 254 (AF. Ct. Crim. App. 26 June 2007) (unpub. op.). (App. Br. at 31.) In Rodriguez the government charged drug use on divers occasions. Id. at *1. One witness testified that he used marijuana with the appellant. Id. at *3. The three witnesses only relayed admissions by the appellant that he had previously used drugs and the accounts lacked detail of time and place, but also included pre-service use. Id. at 203. But Appellant's case is

distinguishable from Rodriguez because there is no doubt that Appellant committed the abuse while in service. Further, the witnesses who did not see the appellant use drugs did not have a firsthand account of the appellant's drug use, versus MR who was in fact the victim and the recipient of the abuse. The factfinder knew that Appellant abused MR in her home. MR said that Appellant kicked her frequently, and the corroborating evidence depicting injuries to MR's legs, demonstrated that on at least two separate occasions: May 2022 and April 2023. (Pros. Ex. 8, 18.) Nevertheless, MR testified that in February 2023, Appellant kicked her more frequently-during arguments that occurred at home. (R. at 559.) Thus, the evidence established a time frame and place where the abuse occurred.

This case is similar to United States v. Westcott, 2022 CCA LEXIS 156, at *17-18 (AF. Ct. Crim. App 17 March 2022) (unpub. op) where the defense argued that the victim lacked credibility. This Court noted that the victim's testimony lacked details about the various assaults she alleged that she suffered over the course of her relationship with the appellant. Id. at *18. But throughout her relationship with the appellant, the victim was able to provide specific details regarding certain events and therefore the Court did not find the appellant's claims attacking the victim's credibility persuasive. Id. at *18-19. The same can be said here. MR was not specific with every assault endured, but there was still evidence in the record to prove beyond a reasonable doubt that Appellant kicked her on more than one occasion. MR specifically stated that around February 2023, the kicking and bruising became more frequent, which was evident from the photographs corroborating this specific testimony. Photographs dated April 2023 showed bruising on MR's legs, which is consistent with MR's testimony that in 2023 the abuse became more frequent. (R. at 559; Pros. Ex. 18 at 3-5.) In sum, a rational factfinder could find

that Appellant kicked MR on more than one occasion. Young, 64 M.J. at 407. Thus, this Court should find this conviction legally sufficient.

B. Regardless of MR's minor testimonial inconsistencies, the corroborating evidence supported MR's claims of domestic violence. Thus, the conviction was factually sufficient.

Again Appellant goes to great lengths to attack MR's credibility, and argues that even if the conviction was legally sufficient, the conviction was factually insufficient. (App. Br. at 32-34.) And although MR lied about her age and never alleged domestic violence during her hospital visits, Appellant's convictions were still not against the weight of the evidence – as highlighted in Issue II. When looking at MR's credibility in its entirety, her claims were corroborated by photographic evidence of injuries and other witness testimony, such as Agent KB who saw MR's injuries after the April 2023 assaults. Further, expert testimony discussed the dynamic between an abuser and victim and Appellant's control over MR that rehabilitated MR's credibility. (R. at 896-98.) Specifically, Dr NS discussed that one version of male dominant control was Appellant's comment that "men lead, women follow." (R. at 901.) There was no doubt that Appellant exerted mental and physical control over MR as evidenced by the kicking that MR explained happened frequently. Part of this control was systematic physical assaults, along with other forms of intimidation, such as destroying property and communicating threats.

Appellant's brief lacks citations to this overarching evidence lending credence to MR's allegations. Instead, his brief targets inconsequential inconsistencies, such as MR lying about her age and that MR had "an overall fraudulent life she had to salvage." (App. Br. at 33.) Of note, Appellant in his brief never acknowledged the video evidence that showed Appellant screaming at MR, calling MR disparaging names, and destroying her personal belongings. (Pros. Ex. 12, 13, 14, 15.) MR was not a perfect victim, and trial counsel acknowledged this in closing

argument and did not refute that fact that MR lied about her age. But trial counsel correctly noted in argument that MR's inconsequential inconsistencies did not excuse Appellant's physical violence. (R. at 1084.) MR confirmed that Appellant found out about her real age in May 2022, which was when the physical assaults commenced. (*See* Pros. Ex. 8 depicting photographs of MR's arm and leg injuries taken in May 2022.)

When assessing credibility, this Court should give substantial deference to the factfinder who heard and saw MR testify, along with viewing all the other evidence corroborating her claims. Harvey, 85 M.J. at 13. Appellant's conviction for kicking MR on divers occasions was not against the weight of the evidence. This Court should find Appellant's conviction factually sufficient.

Moreover, when drawing every reasonable inference from the evidence in favor of the prosecution, this Court should find that a reasonable factfinder could find Appellant guilty of all the essential elements beyond a reasonable doubt. Young, 64 M.J. at 407. Given that legal sufficiency is a lower threshold than factual sufficiency, this Court should find Appellant's conviction legally sufficient. King, 78 M.J. at 221. This Court should affirm Appellant's conviction for kicking MR on divers occasions, and deny this assignment of error.

IV.

APPELLANT'S CONVICTION FOR PUNCHING MR ON THE ARMS AND TORSO ON DIVERS OCCASIONS WAS FACTUALLY AND LEGALLY SUFFICIENT (SPECIFICATION 5).

Additional Facts

The panel convicted Appellant of "punching her arms and torso with his fists" on divers occasions between on or about 1 May 2022 and on or about 14 April 2023 in violation of Article 128b, UCMJ. (*Entry of Judgment*, 2 February 2024, eROT, Vol. 1.)

Standard of Review

The United States incorporates the standards of review in Issue II and III.

Law and Analysis

The United States also incorporates the factual and legal sufficiency case law cited in Issues II and III.

In this assignment of error, Appellant claims that the government charged "arms and torso" as the unit of prosecution, and therefore the government needed to prove that Appellant punched MR in the arms and torso as part of a singular offense. (App. Br. at 35.) According to Appellant, the punching of "both the arms and torso must occur together in the same incident to constitute the offense." (Id.) Appellant's claim lacks merit. First, Appellant did not cite a case in which diverse occasions was charged and fails to grasp what the unit of prosecution is in assault cases. (*See* App. Br. at 35-36, citing United States v. Flynn, 28 M.J. 218 (C.M.A. 1989); United States v. Rushing, 11 M.J. 95 (C.M.A. 1981); United States v. Clarke, 74 M.J. 617 (A. Ct. Crim. App. 2015).)

Appellant attempts to advance his claim by arguing that "arms and torso" was the single unit of prosecution for this specification. (App. Br. at 16.) Next, Appellant cites Clarke which explained, "an uninterrupted attack comprising touchings, 'united in time, circumstance, and impulse' charged as assault under Article 128, UCMJ. . . is the number of overall beatings the victim endured rather than the number of individual blows suffered." (App. Br. at 36 citing Clarke, 74 M.J. at 628.) The United States does not disagree with this proposition outlined in Clarke. But Clarke did not define unit of prosecution as a body part, but rather an overall beating the victim endured. Thus, Appellant's reliance on Clarke is unpersuasive.

The cases Appellant cites stands for the proposition that assaults as proscribed in Article 128, UCMJ is "a continuous course-of-conduct-type offense and that each blow in a single altercation should not be the basis of a separate finding of guilty." Clarke, 74 M.J. at 628 (citing Morris, 18 M.J. 450; Rushing, 11 M.J. 95). But this proposition – that a single fight should be charged as a single offense instead of charging each individual blow exchanged during that fight – still does not support Appellant's assertion that the unit of prosecution here included both "arms and torso" as part of an uninterrupted act.

In fact, the unit of prosecution employed by the Government in this case is the physical altercation itself, not a specific body part. Here, the United States charged each "fight" separately in line with Clarke, Morris, and Rushing. In line with the cases Appellant's relies on, the United States charged each altercation separately using the term "divers occasions" language in the charged specification. Thus, the United States did not have to prove that that Appellant punched MR on her torso and arms as an uninterrupted act because it charged that Appellant hit MR's torso and arms disjunctively on divers occasions.

Appellant does not dispute that the April 2023 incident contained a punch to MR's arm and a punch to the torso. (App. Br. at 37 citing Pros. Ex. 18 at 2, 9.) But Appellant asserts that Specification 5 was only legally sufficient for one occurrence and not legally sufficient for divers occasions. (App. Br. at 27.) Appellant is mistaken because the government proved that Appellant punched MR's torso and arms on more than one occasion.

In addition to the April 2023 incident, MR testified to other instances where Appellant punched her arms. MR testified that Appellant would start off punching her left arm every time they argued. (R. at 536.) In May 2022, MR testified that she went to the hospital with chest pains. (R. at 537.) Further, she took photographs of her injuries, which depicted bruising on her

arms, wrists, and legs, corroborating her account that Appellant punched her arms. (Pros. Ex. 8.) It was around this time that MR explained that verbal arguments turned physical. (R. at 535.) MR also testified about another incident where she received injuries to her arms in July 2022, which was corroborated by more photographs of bruising. (Pros. Ex. 11.) MR's testimony and the documentary evidence, along with the April 2023 incident, which Appellant does not dispute, proved that on more than one occasion Appellant punched MR's arms. The overwhelming evidence undermines Appellant's assertion that he did not punch MR's arms on diverse occasions. (*See* App. Br. at 37.)

Even assuming that Appellant's contention is correct – that the government needed to prove torso and arm together on two separate occasions – there was still evidence of this because MR testified that Appellant would start the physical abuse by punching her left arm every time they argued. (R. at 536.) So even if the government was required to prove torso and arm in the same occurrence, the government still meets its burden because, as explained below, Appellant on more than one occasion also punched MR on the torso; and according to MR, Appellant started each assault with a punch to an arm. Still, it was not necessary for the government to prove that the assault to the arm and torso occurred during the same transaction.

Turning to the punch to the torso, Prosecution Exhibit 19 showed bruising and injuries to MR's chest, or, in other words, torso. MR testified that she took those photographs around February 2023. (R. at 814.) She said, "[Appellant] pinched me by my neck, um – punched around my breast area." (Id.) This was another incident proving that Appellant punched MR on the torso on more than one occasion. Although Appellant recognizes this punch to the torso, he claims that there was still insufficient proof for the alleged assault as charged because there was no punch to the arms accompanying the punch to the torse. (App. Br. at 37.) But as stated

above, proving an assault to both arms and torso within the same transaction was not required to prove the charge. Thus, Appellant's conviction was legally sufficient because all essential elements were met, and a rational factfinder could find that Appellant on divers occasions punched MR on the torso and arms. *See* Young, 64 M.J. at 407

Appellant states that every conviction he "was convicted of has the same defect: MR was not a credible witness and the 'corroborating evidence' relied on MR's bare-bones description of it." (App. Br. at 37.) Appellant does not spell out the basis for why this conviction was factually insufficient, such as a "specific deficiency in proof" as required by Article 66(d)(1)(B)(i), UCMJ. Nonetheless, Appellant argues that MR's credibility renders this conviction factually insufficient.

Even assuming MR had a bare bones description of the corroborating evidence, the photos of the injuries speak for themselves. Prosecution Exhibits 18 and 19 depict multiple injuries associated with the February 2023 and April 2023 assault. MR's testimony – regardless of her inconsistencies and the defense's theory of MR's character for lack of truthfulness, her motive to fabricate, and her consistent and convenient memory lapses (App. BR. at 37) – was corroborated by an abundance of demonstrative evidence.

Appellant alleges that MR was the "one in charge and she controlled the narrative" and therefore had every reason to fabricate the assaults. (App. Br. at 39). Appellant further points out that MR's testimony was vague because it "reinforces that the bruises were not from [Appellant]." (Id.) This argument is not persuasive in light of the evidence. Not only did the videos demonstrate that Appellant exerted control over MR, but also that he intimidated her by ruining her personal property, calling MR "you stupid whore," and telling her that " I'll break the goddamn neck off. Squeal a f-fucking-gain, you stupid whore. Do it. Yea, you fucking dumb bitch." (Pros. Ex. 12; R. a 562.) While Appellant was breaking MR's candle, he said, "You

better clean my goddamn room." (Pros. Ex 13; R. at 565-66.) These incidences provided context to the dynamic of MR's and Appellant's relationship. Dr. NS discussed Appellant's control over MR, and Appellant's comment that "men lead, women follow" was an example of male privilege and a form of control. (R. at 901.) Dr. NS also discussed that destroying property was a form of intimidation and therefore control. (R. at 902.) For these reasons, Appellant's claims that MR was the one who was in control is not persuasive.

Simply put, MR's credibility concerns were not against the weight of the corroborating evidence, such as photograph evidence of injuries and videos of Appellant yelling at MR in complete dominance. Appellant throughout his brief fails to recognize the strength of the corroborating evidence. The panel members entered mixed findings and found Appellant guilty of specifications that had strong corroborating evidence. This Court should not be clearly convinced that the finding of guilty was against the weight of the evidence. *See* Article 66(d)(1)(B)(iii), UCMJ. Appellant's conviction for punching MR's arms and torso on divers occasions was factually sufficient. Given that the standard for legal sufficiency is lower than factual sufficiency, this Court should also find Appellant's conviction of punching MR's torso and arms legally sufficient. King, 78 M.J. at 221. This Court should deny this assignment of error.

V.

APPELLANT'S CONVICTION FOR DESTROYING MR'S CELLPHONE WAS FACTUALLY AND LEGALLY SUFFICIENT (SPECIFICATION 7).

Additional Facts

Appellant smashed MR's cellphone on the metal bedframe. (R. at 586.) Agent KB testified that MR's phone "appeared damaged versus destroyed. And it was able to be powered

on." (R. at 512.) MR testified that her phone still worked on Wi-Fi, but she could not receive or make calls or text messages. (R. at 762.) If MR continued to use the shattered touch screen, her "hand would get cut up." (Id.) MR also explained that she attempted to get her phone repaired, but T-Mobile said it could not be because the "phone was so damaged on the inside." (Id.) Instead, MR purchased a new phone. (Id.) After having her memory refreshed by trial defense counsel, MR did state that she was able to send videos and screen grabs from her broken iPhone 12. (R. at 764.) MR testified that the destroyed phone cost about $700.00. (R. at 586.)

The panel found Appellant guilty of destroying MR's cellular device, of some value, with intent to threaten and intimidate NR in violation of Article 128b. (*Entry of Judgment*, 2 February 2024, eROT, Vol. 1.)

Standard of Review

The United States incorporates the standards of review in Issue II-IV.

Law and Analysis

The United States also incorporates the factual and legal sufficiency case law cited in Issues II-IV.

A. Appellant destroyed MR's cellphone.

Appellant alleges that the evidence did not show that Appellant "destroyed" MR's phone, but damaged it instead. The Manual defines destruction of property as follows: "To be destroyed, the property need not be completely demolished, or annihilated, but must be sufficiently injured to be useless for its intended purpose." Manual for Courts-Martial, United States part IV, para. 45.c.(2) (2019 ed.) (MCM). On the other hand, damage to property is "any physical injury to property." Id.

Appellant avers that although MR said the phone was destroyed, she still used the phone when connected to WiFi. (App. Br. at 41 citing R. at 762.) Appellant argues that he, at most, damaged MR's cellphone. (App. Br. at 40.) But what he fails to grasp is that he sufficiently injured the phone rendering the phone useless for its intended purpose – MR could not make or receive phone calls. (R. at 762.) Using common sense and knowledge of human nature and the ways of the world, on which the military judge instructed the members (R. at 1075), the intended purpose of a cellphone is to make phone calls. MR's testimony describing the fate of her phone tracks the MCM explanation of destruction of property. While MR's testimony revealed that her phone was not "completely demolished," the evidence before the members shows her phone was nonetheless "sufficiently injured" and rendered useless for its intended purpose of making and receiving phone calls.

Appellant proposes a hypothetical that MR's phone was comparable to having broken headlights on a car because broken headlights do not impair a driver from driving during the day. (App. Br. at 41-42.) This hypothetical is not analogous to MR's destroyed phone. A car with broken headlights can still be used for its intended purpose at least part of the day, since the car is still equipped to drive during the daytime. But no matter the circumstances, MR could not use her destroyed cellphone to make or receive phone calls. For example, if MR had had gotten a new phone in April 2023, she could not have used her destroyed phone to call in sick when she was in too much pain to work because of the physical assaults. (R. at 595.)

Further, Appellant argues that the members substituted "700" for "some value," which showed that the phone was damaged rather than destroyed. (App. Br. at 42.) Just because MR could still use her phone for limited purposes, such as messaging on WiFi, and the members found that the phone was of some value, did not support the conclusion that the phone was

damaged and not destroyed. They could have simply found that that the phone was not "completely demolished or annihilated," and thus found that it still had some value even though it was "sufficiently injured to be useless for its intended purpose." Another reasonable explanation is that the record did not prove beyond a reasonable doubt with certainty an exact value of the phone. The members found the phone was of "some value" and this Court should not speculate what occurred during deliberations that led to this substituted finding. In all, even with this substitution, Appellant's conviction remains legally sufficient. Although not clear throughout this assignment of error, it appears that the basis for Appellant's legal sufficiency claim was that he did not destroy MR's phone, but rather damaged the phone. (App. Br. at 42.) Drawing every reasonable inference from the evidence in favor of the prosecution, this Court should find that a rationale factfinder could have found that Appellant destroyed MR's cellphone in violation of Article 109, UCMJ. *See* King, 78 M.J. at 221; Barner, 56 M.J. at 134. For these same reasons, after giving the appropriate deference to the trial court hearing the witnesses at trial, the Court should be clearly convinced that the finding of guilty was not against the weight of the evidence. Thus, Appellant's conviction was factually sufficient with respects to the destruction of the cellphone.

B. The government proved that Appellant destroyed MR's phone with the intent to threaten and intimidate.

As to factual sufficiency, Appellant again attacks MR's credibility, arguing that MR's credibility cast doubts on whether the government proved the requisite intent. (App. Br. at 43.) The United States agrees that Appellant had to intend to "threaten and intimidate" MR by destroying her phone. However, contrary to Appellant's claim, the government provided Appellant destroyed MR's phone with the requisite intent to threaten and intimidate her.

Under the new factual sufficiency standard, Appellant has failed to make a specific showing of a deficiency of proof. Yet even if he had, after making the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the finding of guilty was against the weight of the evidence.

Dr. NS, a forensic psychologist, explained that part of coercive control an abuser displays to his intimate partner, the victim, is a pattern of strategic infliction of a variety of tactics and strategies, used to control, dominate, subjugate a partner in an intimate relationship. (R. at 892.) Humiliation, intimidation, and threats are all examples of coercive control. (Id.) Dr. NS opined that coercive control applied in this case. (R. at 898.) Appellant here intimidated MR by destroying her property. (R. at 901.) Destroying property was also economic abuse as explained by Dr. NS – because the phone was property that MR bought with her own money. (R. at 902.) Finally, Dr. NS opined that Appellant destroying property and communicating verbal threats were all examples of intimidation, coercion, and threats. (Id.)

Here, the evidence showed that Appellant broke MR's cellphone with the intent to intimidate and threaten MR. The overarching theme throughout the government's case was that Appellant sought and exerted control over MR, which was exemplified by the videos of Appellant destroying her property while making disparaging and threatening remarks. Although the destruction of MR's cellphone was not captured on video, the facts and circumstances of this case proved that when MR and Appellant argued, he would frequently destroy her property. (R. at 566.) A reasonable inference was that Appellant was mad at MR, which resulted in him banging her phone against the metal bed frame. MR's testimony, along with Dr. NS's explanation of coercive control, demonstrated that Appellant destroyed her phone with the intent to intimidate and threaten MR.

Here, Appellant has failed to make a specific showing of a deficiency of proof as to his destruction of MR's cellphone conviction – either related to whether the phone was "destroyed" or to Appellant's intent to threaten or intimidate. Yet even if he had, Appellant's purported allegations regarding MR's credibility were all raised by trial defense counsel before the panel at trial. Despite these arguments, the panel – who had the distinct opportunity to witness first-hand the testimony of MR and all other witnesses – still found Appellant guilty of destructing her cellphone, among all the other guilty verdicts. After giving the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the finding of guilty was against the weight of the evidence. Accordingly, Appellant's factual sufficiency claim must fail. This Court should deny this assignment of error.

VI.

APPELLANT'S CONVICTION FOR DESTROYING MR'S PROPERTY WAS FACTUALLY AND LEGALLY SUFFICIENT (SPECIFICATION 8.)

Additional Facts

The panel convicted Appellant of the following offense in violation of Article 128b, UCMJ:

> [Appellant] [d]id, at or near Minot Air Force Base, North Dakota, between on or about 1 December 2022 and on or about 14 April 2023, on divers occasions, with the intent to threaten and intimidate the intimate partner of the accused, commit an offense in violation of the UCMJ against any property, to wit: destroying non-military property by willfully and wrongfully destroying clothing, shoes, hair appliances, toiletries, bags, a cooler, makeup items, eye-glasses, and other household items of [some value], the property of Maribel Ruiz.

(*Entry of Judgment*, eROT, Vol. 1, 2 February 2023.)

Standard of Review

The United States incorporates the standards of review in Issue II-V.

Law and Analysis

The United States also incorporates the factual and legal sufficiency case law cited in Issues II-V.

Appellant claims the government had to prove that Appellant destroyed the charged list of items in a single incident – similar to his argument in Issue III that the government had to prove that Appellant punched MR's arms and torso in the same uninterrupted act. (App. Br. at 46.) This time Appellant relies on United States v. Collins, 36 C.M.A. 323 (C.M.A. 1966). Appellant notes that "when several articles of property are damaged, in violation of Article 109, under circumstances indicating only a single incident or transaction, the damage must be alleged as part of one offense." (App. Br. at 46 citing Collins, 35 C.M.R. at 323.) Collins, is distinguishable from this case because that charge only dealt with "a single incident of transaction, " and did not contain the language "divers occasions." Here, Appellant is not charged with damaging all of the property on a single transaction, but instead charged with damaging all of the property on various occasions throughout the charged timeframe. While Collins stated that Article 109 "can be reasonably construed to express a purpose to permit all damage inflicted in a single transaction to be combined into a single offense, instead of constituting a separate offense for each article damaged," that holding is not at issue in this case as the government did not charge a single incident of property damage. *See* 24 C.M.R. at 325. Instead, the government charged Appellant for destroying the listed property on "divers occasions," which Collins did not discuss. Unlike the appellant in Collins who destroyed

property in a single transaction, Appellant on more than one occasion destroyed MR's property. Thus, Collins is unpersuasive.

Appellant's argument hinges on the unit of prosecution, as it did in Issue III. It is worth noting that units of prosecution are relevant in determining whether a charge and specification is multiplicious – an issue not raised by Appellant. *See* United States v. Forrester, 76 M.J. 479 (C.A.A.F. 2017) (analyzing units of prosecution in holding that possession of the same child pornography images in multiple devices was not multiplicious). The units of prosecution as charged were the enumerated items, but the government did not have to prove that Appellant destroyed items during in a single transaction. In any event, the government could have here charged each separate destruction of property as a single specification, but it did not – which was to the benefit of Appellant because it limited his punitive exposure.

Appellant has not provided this Court with any explanation of why the government's charging scheme was error. There was no requirement that Appellant had to destroy all listed items during a single incident – for the same reasons discussed in Issue III. Instead, the government had to prove that between on or about 1 December 2023 and on or about 14 April 2023, Appellant destroyed MR's property on multiple occasions (divers occasions), which included the following property: clothing, shoes, hair, appliances, toiletries, bags, a cooler (ice maker), makeup items, eye-glasses, and other household items. Further, like United States v. George, 2025 CAAF LEXIS 577, at *9-11 (21 July 2025), "the parties at trial reasonably understood" that the specification provided proper notice – notice that Appellant destroyed MR's property on more than one occasion and provided a list of personal property destroyed.

Next, Appellant argues that Appellant did not destroy MR's property. (App. Br. 48.) Appellant avers that most of the property was damaged, but not sufficiently injured to be useless

of its intended purpose. (Id.) For example, Appellant argues that shoelaces can be replaced and therefore was not destroyed. (Id.) Just as in Issue V above, Appellant's attempt to downplay his destructive tendencies is unpersuasive. The fact that Appellant openly admits that property had to be *replaced* effectively concedes that property was destroyed and therefore sufficiently injured to be useless for its intended purpose. Appellant's confusion over the difference between destroyed and damaged goods is further highlighted when he states that even if the property was "injured," it still was "not damaged." (*See* App. Br. at 48.) Despite Appellant's claims, injured property is indeed damaged, and property sufficiently injured to the point of uselessness for its intended purpose is destroyed.

The video evidence to prove that the property listed was, in fact, destroyed was abundant. Prosecution Exhibit 12 showed that Appellant broke her candle holder. Prosecution Exhibit 13 displayed Appellant stabbing the icemaker (cooler) with a knife. Prosecution Exhibit 14 revealed Appellant destroying MR's cellphone charger with pliers. When the abuse escalated in April 2023, Appellant destroyed MR's property in the bathroom with scissors. MR described the event as follows: Appellant "Dumped it. Cut it. Hit it. Shredded it." (R. at 585-87; Pros. Ex. 15.) Photographs of the crime scene, taken in April 2023, also showed the level of destruction to MR's property – especially in the bathroom. (Pros. Ex. 2.) There was no denying that Appellant destroyed MR's property by cutting it with scissors. (*See* Pros. Ex. 2 pictures of cut up bags, clothes, shoes, pillow, hair straightener, and other household items.) Despite Appellant's claims that he merely damaged MR's property, this Court should be convinced that Appellant destroyed her property.

Finally, Appellant argues that MR's credibility impacted whether the government proved the specific intent requirement that Appellant destroyed MR's property with the intent to

intimidate or threaten. This argument again misses the mark. The multiple video evidence showed Appellant yelling and screaming at MR while destroying her property. While in the bathroom on April 2023, Appellant stated, "Get your goddamn purse or I'm gonna fuck that shit up" and "Get the fuck outta here, bitch. Or I'm gonna pour every goddamn thing out. I don't have time for it. Now get the fuck out of this goddamn bathroom. I ain't got time for you, fucking fat ass goddamn hog." (Pros. Ex. 15; R. at 583-84.) Further, in February 2023, Appellant ruined MR's candle while yelling, "I don't care, I don't care. Squeal again you stupid fucking bitch. I'll break the goddamn neck off. Squeal a f-fucking-gain, you stupid whore. Do it. Yea, you fucking dumb bitch." (Pros. Ex. 12; R. a 562.) This, along with Dr. NS's testimony, as outlined in Issue V, about coercive control and destroying property as a means of intimidation, showed that the government met its burden here on the specific intent requirement. The videos spoke for themselves and showed that Appellant destroyed MR's property with the intent to intimidate and threaten MR – which he ultimately did by physically assaulting her.

Considering all of these facts and circumstances, the government provided the panel ample evidence of Appellant's guilt beyond a reasonable doubt in that he destroyed MR's property with intent to intimidate and threaten. Here, Appellant has failed to make a specific showing of a deficiency of proof as to his destruction of property charge. Yet even if he had, Appellant's purported assertions undermining MR's credibility were all raised by Appellant before the panel at trial. Despite these arguments, the panel – who had the distinct opportunity to witness first-hand MR's testimony and all other witnesses – still found Appellant guilty of destroying MR's property on divers occasions. After giving the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the finding of

guilty was against the weight of the evidence. Accordingly, Appellant's factual sufficiency claim must fail. *See* Harvey, 85 M.J. at 130. This Court should deny this assignment of error.

VII.

APPELLANT'S CONVICTION FOR THREATENING MR WAS FACTUALLY AND LEGALLY SUFFICIENT (SPECIFICATION 9.).

Additional Facts

The panel convicted Appellant of the following offense in violation of Article 128b, UCMJ:

> [Appellant] [d]id, at or near Minot Air Force Base, North Dakota, between on or about 1 December 2022 and on or about 14 April 2023, on divers occasions, with the intent to threaten and intimidate the intimate partner of the accused, commit and offense in violation of the UCMJ against Maribel Ruiz, to wit: communicating a threat by telling [MR] "I'm going to have to kill you" and I'm going to blow your brains out" or words to that effect, to convey his intent to injure her.

(*Entry of Judgment*, eROT, Vol. 1, 2 February 2023.)

Standard of Review

The United States incorporates the standards of review in Issue II-VI.

Law and Analysis

The United States also incorporates the factual and legal sufficiency case law cited in Issues II-VI.

For the third time in his brief, Appellant takes issue with the way the government charged on "divers occasions." (App. Br. at 49.) This time Appellant relies on United States v. Ozbirn, 2020 CCA LEXIS 138 (AF. Ct. Crim. App. 1 May 2020) (unpub. op.) Appellant highlights the following language from Ozbirn: "When the Government elects to charge an offense alleging the use of specific words, it stands to reason that a charge of 'divers occasions' is legally insufficient

unless Appellant repeats those particular words on two or more occasions." (App. Br. at 49 citing Ozbirn, unpub. op at 20.) In Ozbirn, the appellant was charged with attempting to commit a lewd act by communicating indecent language to a child under the age of 16 on divers occasions. Unpub. op. at 6. But the evidence there showed that the appellant only sent specific messages to the respective decoy once. Id. at *20. The Court noted that "the [a]ppellant did send his messages at different times over a period of about two days, but there is no evidence he sent any of the messages two or more times." As a result, this Court found that his conviction on divers occasions was legally insufficient. Id. at *21. Further, this case is distinguishable from Ozbirn, because in Ozbirn, the offense was sending specific lewd messages to a child, which the appellant did. But to satisfy "divers occasions," Appellant had to send *specific charged* messages, words, to the respective decoy more than once, but there was no evidence of that, just that the appellant sent messages at different times of the day. Here, Appellant communicated two different threats – each of which was its own *offense* that the government charged on "divers occasions." Unlike in Ozbirn, the specification did not exaggerate Appellant's criminality, because it rightly described that he "communicated a threat" on two separate occasions, by communicating two different threats.

What Appellant really takes issue with is that MR did not testify that Appellant said, "I'm going to have to kill you" and I'm going to blow your brains out" at the same time. (App. Br. at 50.) As similarly argued in Issues IV and VI, the government did not have to prove that Appellant said the threats as charged during the same instance to satisfy the charged language. Here the government did not charge a string of conduct together – but separate offenses on divers occasions. The specification stated an offense in that Appellant communicating specific threats and that he did so on divers occasions.

While Appellant strangled MR in April 2023, he said, "I have to kill you, [MR]. It's the only way." (R. at 601-02.) This was clearly a threat and one with the intent to threaten, intimidate, and injure MR. And as early as December 2022, Appellant made repeated threats, such as "I'm going to blow your brains out" or words to that effect. (R. at 570.) MR described that this occurred multiple times during each argument. (Id.) Circumstantial evidence throughout Appellant's trial proved that MR and Appellant argued a lot. While the videos did not show the verbal threats as charged, they did however depict other disgraceful comments Appellant made to MR, such as "I don't care, I don't care. Squeal again you stupid fucking bitch. I'll break the goddamn neck off." (Pros. Ex. 12; R. at 562.) Thus, the videos were still relevant to Appellant's state of mind of his intent to intimidate, threaten, and injure MR. Appellant's behavior as described by Dr. NS was associated with the intimidation and threatening factor many abusers exert over their victims. (R. at 901-92.)

Turning to credibility, Appellant claims that this evidence was not enough to affirm this specification where MR's "credibility was so undermined and the evidence was sparse." (R. at 51.) As stated in Issues II-VI, MR's overall credibility – while she was inconsistent at times about her age for example – was still corroborated by other independent evidence. In any event, the government was able to rehabilitate her credibility by presenting prior consistent statements made during MR's OSI interview. (Pros. Ex. 21; R. at 826.) Prosecution Exhibit 21 showed MR discussing the strangulation incident. This demonstrated that MR's story, her account of all the assaults, were consistent. Her age for example, as discussed in Issue II, was not relevant to the charged specifications of domestic violence. If anything, her lying about her age showed context in that once Appellant found out about MR's true age, the mental and physical abuse escalated.

Appellant's discussions about MR's credibility should not persuade this Court to find that Appellant's convictions were against the weight of the evidence.

Here, Appellant has failed to make a specific showing of a deficiency of proof as to his communicating a threat charge. Strong corroborating evidence bolstered MR's credibility. Nonetheless, trial defense counsel raised MR's credibility concerns before the panel at trial. Despite these arguments, the panel – who had the distinct opportunity to witness first-hand MR's testimony and all other witnesses – still found Appellant guilty of communicating threats. After giving the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the finding of guilty was against the weight of the evidence. Accordingly, Appellant's factual sufficiency claim must fail. *See* Harvey, 85 M.J. at 130. Given that legal sufficiency is a lower threshold than factual sufficiency, this Court should find Appellant's conviction legally sufficient. King, 78 M.J. at 221. Thus, this Court should deny this assignment of error.

VIII.

SPECIAL TRIAL COUNSEL DID NOT COMMIT PROSECUTORIAL MISCONDUCT BECAUSE HIS STATEMENTS IN CLOSING ARGUMENT WERE FAIR COMMENTS ON THE EVIDENCE PRESENTED AT TRIAL OR ON THE DEFENSE'S THEORY OF THE CASE. THEY DID NOT AMOUNT TO PLAIN AND OBVIOUS ERROR.

Additional Facts

Trial Defense Counsel's Opening Statement

Trial defense counsel began parts of her opening statements attacking MR's credibility. (R. at 277.) Trial defense counsel argued MR did not want her relationship with Appellant to end and "towards the end of [their] relationship, [MR] would use all means possible to keep the two of them together." (R. at 277.) Trial defense counsel stated, "[MR] would use pity. [MR]

would use threats. And [MR] would use sex to continue to remain within [the] relationship." (R. at 277.) Trial defense counsel stated after missing work for three days, MR's supervisors came to her home, and the police eventually showed up as well. (R. at 277-278.) According to trial defense counsel, "[A]t that point, [MR] had about 3 minutes. To come up with a story, and a plan." (R. at 278.) The opening statement emphasized that MR possessed a motive to fabricate—implying that she would do anything to continue her failed relationship with Appellant. (R. at 277.) At the end of her opening statement, trial defense counsel stated, "And if you find inconsistencies, if you find gaping holes . . . all we ask is that you go back and consider that [MR] had 3 minutes to come up with a plausible explanation for what was going on in that household." (R. at 278.)

Closing Arguments

Special Trial Counsel's Closing Argument

As relevant to Appellant's appeal, special trial counsel began his closing argument by reminding the members to focus on the evidence, stating, "Members, for the past week, we have heard testimony and received evidence — hundreds of pages of evidence, videos, reports, expert testimony, witness testimony, first responders, First Sergeants, medical records. *I ask you, and I know that you will — but I ask you to focus on the evidence*." (R. at 1077.) (emphasis added). Before proceeding with his analysis of the evidence, special trial counsel emphasized, "I want to foot stomp the judge's earlier instructions that this argument from me and argument from [senior defense counsel] are not evidence." (R. at 1078.)

Additional context surrounding the specific statements is detailed within the corresponding analysis below.

Senior Defense Counsel's Closing Argument

During closing arguments, senior defense counsel repeatedly attacked MR's credibility. Senior defense counsel, similar to special trial counsel, repeatedly used "we" or "we know." Senior defense counsel began closing arguments by immediately setting the stage attacking MR's credibility:

> Members, make no mistake. *This case is about false allegations*. [MR] had a plan. A bug out plan that she had crafted for well over a year, of what she would do if her relationship with Airman Tyson ever ended. *How to frame herself and how to frame him as a victim and as an aggressor*. Now, the morning of 14 April, she wasn't ready to put that plan in effect. It was a surprise when her leadership arrived to her house. That was a surprise. She wasn't ready. But she had a motive —she didn't want to be taken away. She didn't know who they were taking away; Airman Tyson, her, or both of them. And so she made three extreme allegations.
>
> Three extreme allegations that are unsupported by the evidence. *In fact, that we think you will see are false*.

(R. at 1106.) (emphasis added). When referring to the allegation of Appellant cutting MR's leg with scissors,[4] senior defense counsel argued, "That's a false story. It's somebody who's mixed up with the details, and I always like to apply the old adage, if you're telling the truth, you don't have to remember. Just tell [it] like it happened." (R. at 1111.) Senior defense counsel continued to attack MR's credibility throughout, arguing, "[t]he final obvious falsehood is the allegation of strangulation on 14 April." (Id.) Concerning MR's testimony, senior defense counsel emphasized, "There was 82 times when [trial defense counsel] asked [MR] a question that [MR] didn't remember. That is selective memory. And that is a witness whose credibility is low." (R. at 1116.) Senior defense counsel concluded his closing argument stating, ". . . this is a case of false allegations. This is a case where [MR] created a bug-out plan to damage

[4] Specification 3 of Charge I, in violation of Article 128b, UCMJ

[Appellant's] reputation if and ever he did decide to leave. And she put that plan in effect in a hurry — when she wasn't ready." (R. at 1127.) "Her word is not enough." (Id.)

Additional context surrounding the specific statements is detailed within the corresponding analysis below.

Special Trial Counsel's Rebuttal Argument

On rebuttal, special trial counsel began, "We have put on good, bad, indifferent evidence in an effort to find the truth and to find justice in this case." (R. at 1128.) Concerning the defense theory that MR had a bug-out plan, special trial counsel argued, "If [MR] was surprised . . . if this was a surprise — she had to do a bug-out plan because she didn't know people were gonna come. Members . . . again the evidence in front of us — she called Captain [AR] at 0738 crying, telling him that the accused was breaking her stuff." (Id.) It's not common sense . . . she initiates this bug out plan with – I guess, prefabricated evidence." (Id.) Special trial counsel argued the members have "Prosecution Exhibits 12, 13, 14, and 15," for consideration. (Id.) Special trial counsel then argued that it was more likely that MR was trying to protect Appellant, and that was "a lot more reasonable than some concocted bug-out plan by a criminal mastermind . . ." (R. at 1129.) Special trial counsel focused on MR's bruising after the strangulation and the defensive scratch marks on her face. (R. at 1132.) Special trial counsel focused on the testimony of Dr. TH and Dr. EL detailing that MR's body displays "repetitive blunt force trauma over time." (R. at 1132.) Special trial counsel reiterates, "They cannot run from that, members. They cannot run from what their own witness — expert witness, and our expert witness agreed to. (Id.). Special trial counsel ended his rebuttal by stating, "Members, I know you won't — that common sense, don't check it at the door. *Apply the facts to the case through the legal*

instructions. The government is confident that you'll return a verdict of guilty to this charge and all specifications." (R. at 1134-1135.)

Findings

The members returned a mixed verdict, finding Appellant guilty of six of the nine specifications. (*Entry of Judgment*, 2 February 2024, (ROT) Vol. 1). Appellant was found guilty of: (1) "unlawfully strangling [MR] with his hands" (Specification 1); (2) "kicking [MR's] legs with his feet" (Specification 4); (3) "punching [MR's] arms and torso with his fists" (Specification 5); (4) "destroying non-military property . . . a cellular device, of [some value], the property of [MR]." (Specification 7); (5) "destroying non-military property . . . and other household items of [some value], the property of [MR]." (Specification 8); and (6) "communicating a threat by telling [MR] 'I'm going to have to kill you' and 'I'm going to blow your brains out' or words to that effect, to convey his intent to injure her." (Specification 9). (Id.)

Standard of Review

This Court reviews "prosecutorial misconduct and improper argument de novo and where, as here, no objection is made, [] review[s] for plain error." Voorhees, 79 M.J. at 9 (citing United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018). To establish plain error, Appellant bears the burden of demonstrating: (1) there was error; (2) such error was clear or obvious; and (3) the error resulted in material prejudice to a substantial right. Id.

Law and Analysis

Special trial counsel's arguments were proper because his statements presented fair commentary on the state of the evidence or were in response to issues raised by the defense. And in any event, trial counsel's argument did not tip the scale in favor of a guilty verdict. Further, consistent with mixed findings, the members convicted Appellant on the basis of the evidence alone and not special trial counsel's closing argument. United States v. Schroder, 65 M.J. 49, 58 (C.A.A.F. 2007).

A. Trial counsel did not improperly bolster the government's case.

Appellant argues that special trial counsel's closing argument was "riddled with egregious misconduct," and his arguments constitute serious misconduct. Specifically, Appellant asserts that special trial counsel, "(1) injected his unsolicited personal beliefs and opinions by vouching for MR and commenting on the truth or falsity of the evidence, (2) disparaged opposing counsel, and (3) indirectly commented on [Appellant's] constitutional right not to testify in his own defense." (App. Br. at 57.) Appellant's arguments are unpersuasive.

i. Trial counsel did not vouch for MR's credibility.

First, Appellant argues that special trial counsel's frequent use of "we" and "we know" was used to vouch for MR's credibility by presenting statements elicited from her testimony as true. (App. Br. at 58.) "It is improper for a trial counsel to make "personal assurances" about witnesses or evidence." United States v. Fletcher, 62 M.J. 175, 180 (C.A.A.F. 2005). "An attorney's statements that indicate his opinion or knowledge of the case are permissible if the attorney makes it clear that the conclusions he is urging are conclusions to be drawn from the evidence." United States v. Causey, 82 M.J. 574, 582 (N.M. Ct. Crim. App. 2022) (quoting United States v. Scilluffo, No. ACM 39539, 2020 CCA LEXIS 62, *62-63 (A.F. Ct. Crim. App.

4 Mar. 2020)) (unpub. op.) "[A] prosecutor commits error when using "we know" or "we have heard" to mean the prosecution or the Government knows something outside the body of evidence." *See* Fletcher, 62 M.J. at 180. However, "[s]uch is not necessarily the case when the prosecutor uses "we" collectively, as in "all of us in this room." United States v. Smith, No. ACM 40202, 2023 CCA LEXIS 196, at *30-32 (A.F. Ct. Crim. App. May 5, 2023) (unpub. op.). Here, while special trial counsel used "we" or "we know" multiple times, the record indicates he was referring collectively to the individuals within the court-martial, including the defense team and Appellant. Nothing in the record indicates that special trial counsel, when using "we" or "we know" was referring to matters outside of the evidence properly before the court. The record also demonstrates that "senior defense counsel" frequently used "we" or "we know" while also delivering his closing arguments. Vouching for a witness's credibility occurs when a trial counsel "places the prestige of the government behind a witness through personal assurances of the witness's veracity." Fletcher, 62 M.J. at 182 (quoting United States v. Neceochea, 968 F.2d 1273, 1276 (9th Cir. 1994)). Vouching did not occur here. Considering both special trial counsel and senior defense counsel frequently used "we" and "we know" during their presentations, no member would consider the special trial counsel's specific use of the words "we" or "we know" as having the force and prestige of the government behind his usage. It is more likely than not that the members considered the usage to be common amongst attorneys. Additionally, special trial counsel, throughout his presentation, beginning with voir dire and ending with rebuttal repeatedly reminded the members that the burden remains with the government alone and never shifts to Appellant. (R. at 144; R. at 152; R. at 1078; R. at 1103.). Special trial counsel emphasized that "the government has never shied from its burden," and told the members to "apply the facts to the case through the legal instructions." (R. at 1078; R. at

1135.) When viewed properly in context, it is highly unlikely the members decided this case based upon special trial counsel's arguments and not solely based upon the evidence, as repeatedly instructed. Accordingly special trial counsel's arguments do not establish plain error, let alone clear or obvious error.

Here, Appellant provided six examples of statements he believes demonstrate improper argument. (App. Br. at 58.) Appellant's parsing of specific statements purposefully ignores surrounding context and is unpersuasive. Special trial counsel's arguments were grounded in the evidence admitted at trial and the alleged offending statements provided by Appellant fail to fully provide context for the court. Specifically, Appellant failed to include the statements immediately preceding or after the alleged offending statements, which should provide clarity to this Court. For example, Appellant considered the below argument improper:

> So we know by now this relationship has certainly become physically abusive. So, the natural question that we would ask of ourselves and our loved ones is, why the heck are you still there? Why did you stay? It's an absolutely normal response.

(R. at 1082; App. Br. at 58). However, upon adding the sentences immediately preceding the above statement, greater clarity was provided to the Court:

> *Members, recall Dr. [NS] testimony about 14 intermittent reinforcement[s]. About why someone would stay in a physically abusive relationship*. So we know by now this relationship has certainly become physically abusive. So, the natural question that we would ask of ourselves and our loved ones is, why the heck are you still there? Why did you stay? It's an absolutely normal response. *And we provided forensic psychologist, Dr. [NS], to testify that it is part of coercive control, this intermittent reinforcements. Good times and bad times.*

(emphasis added). In this passage, special trial counsel was referring to the evidence and testimony elicited at trial. The same process—reviewing the sentences immediately preceding and after—yields context, and this Court must examine the true context of special trial counsel's

arguments to determine whether they were proper. (App. Br. at 58.) "[A]rgument by [] trial counsel must be viewed within the context of the entire court-martial. The focus of [the] inquiry should not be on words in isolation, but on the argument as "viewed in context." United States v. Young, 470 U.S. 1, 16 (1985) "An attorney's statements that indicate his opinion or knowledge of the case are permissible if the attorney makes it clear that the conclusions he is urging are conclusions to be drawn from the evidence." Causey, 82 M.J. at 582 (quoting Scilluffo, 2020 CCA LEXIS 62, at *62-63. In each of the statements advanced by Appellant as vouching for MR, special trial counsel was discussing *the evidence* properly before the court, and this court should decline Appellant's attempts to focus the court's attention purely on the words "we" and "we know," and to parse out specific language, absent full context.

Next, Appellant argues that special trial counsel vouched for MR with respect to the photographs admitted into evidence detailing MR's injuries. (App. Br. at 59.) Appellant asserts, "the comments about [] 'we know . . . from the pictures' is still vouching for MR's truthfulness." (Id.) In doing so, Appellant acknowledges there was additional evidence beyond MR's testimony—photographs. Such evidence is traditionally characterized as corroborating evidence, and Appellant cites no case which holds that corroborating evidence, emphasized appropriately during closing arguments, should also be considered within an analysis on whether the government is vouching for a witness. The corroborating photographs of MR's physical injuries informed and heightened MR's credibility, and this Court should preclude Appellant from now characterizing fair commentary on corroborating evidence as vouching. "Prosecutors, as well as defense lawyers, may and must argue as to the credibility of witnesses, and in a case of this kind the issue of credibility is critical. The very nature of closing argument requires a detailed analysis of the testimony of each witness and the inferences to be drawn from the evidence."

United States v. Grey Bear, 883 F.2d 1382, 1392 (8th Cir. 2000). Arguing that a witness does not have a reason to lie is proper argument so long as such statement is grounded in evidence. United States v. Eley, 723 F.2d 1522, 1526 (11th Cir. 1984). Additionally, victims are often the only source of corroborating evidence. This evidence was admitted at trial and was the subject of proper comment during closing and the source of the photographs documenting MR's injuries. Special trial counsel's arguments cannot reasonably be interpreted as requesting the members to trust trial counsel's judgment on credibility rather than making their own independent determination based on the evidence. Thus, trial counsel's arguments about credibility did not amount to plain and obvious error. Additionally, fair commentary on corroborating evidence is not vouching, and this Court should decline to treat it as such, especially under plain error review.

ii. Trial counsel did not provide unsolicited personal commentary on the truth or falsity of the evidence.

Appellant asserts this comment by special trial counsel, "what really happened is exactly what was testified to, and is exactly what makes sense," falls into [the] category as substantive commentary on MR's testimony. (App. Br. at 59.) However, as with many of the examples provided by Appellant, further analysis within the argument gives the court clarity and context, particularly here, where the very next sentence, offered in rebuttal, stated—"that she tried to protect him." (R. at 1129.)

In his brief Appellant than provides a list of nine additional statements advanced as "unsolicited personal commentary about the evidence itself." (App. Br. at 59.) Appellant's examples and arguments are unpersuasive. In the examples provided, either (1) special trial counsel fairly commented on the evidence, (2) special trial counsel repeated the testimony or evidence elicited from trial; or (3) Appellant is now taking trial counsel's words out of context.

In one of the examples by Appellant, special trial counsel corrected himself immediately after uttering what could potentially be considered offending commentary. Specifically, Appellant cites this portion of special trial counsel's closing as unsolicited personal commentary because special trial counsel used the word "silly" when describing the potential inference from the evidence Appellant sought to advance:

> Do we think that she — I mean, unless you think that in that 3 to 5 minutes she covered herself in bruises, and cut herself, and then blamed it on falling down the stairs. That's — that's kind of silly. I mean, if that's where we are — then that's where we are, but that's — that's certainly kind of silly. I mean — that's not reasonable. *That's not a reasonable doubt to have*. That's not reasonable to think that that is what happened on the 14th of April.

(R. at 1090; App. Br. at 60.) (emphasis added). Here, this statement, at best, referred to reasonable doubt, and at worst, an unintentional statement immediately corrected to emphasize trial counsel's intent to assert that the defense's theory did not create a reasonable doubt. *See* Dunlop v. United States, 165 U.S. 486, 498 (1897) ("If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation."). Here, Appellant invites this court to "surgically carve" out portions of special trial counsel's argument, absent additional context. *See* United States v. Baer, 53 M.J. 235, 238 (C.A.A.F. 2000) (quoting Johnson v. United States, 318 U.S. 189, 202, 87 L. Ed. 704, 63 S. Ct. 549 (1943) (Frankfurter, J., concurring) (finding "[t]o turn a criminal appeal into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution.") This court should decline Appellant's invitation.

B. Special trial counsel did not violate the golden rule.

Appellant asserts that special trial counsel also violated the "Golden Rule" by asking panel members to place themselves in the in the shoes of the victim or a near relative" when detailing the evidence describing counterintuitive behavior. While perhaps inartful, when examined in the context of the entire argument, special trial counsel was referencing the evidence elicited from the forensic pathologist: Special trial counsel argues:

> In forensic psychology, Dr. [SN] took the stand. We talked about coercive control — and why Dr. [SN's] testimony is important as an expert witness is to inform your decisions, right? *To inform your deliberations and a little bit of education for everyone on — as a lay person you hear about domestic violence*, you hear about intimate partner violence, and you want your sister, or your mother, or your friend, or your brother, or your cousin — to get the heck out of there. Why would you stay in there? Why would you stay in there? Talked about coercive control, right? An act or pattern of acts of assault, threats, humiliation, and intimidation that is used to harm, punish or frighten. Members, that is rampant throughout this and it's —you don't just have to take [MR's] word for it. That's the thing, right? That's the thing in this case. *Those videos — those prosecution exhibits? Direct evidence of coercive control, of intimate terrorism, which is violence in a general pattern of coercive control*.

(R. at 1102.) The comment about the members' relatives was meant to highlight the purpose of expert testimony: to educate lay persons like the members about why domestic violence victims stay in abusive relationship, even if the average person would want their relatives to act differently. Special trial counsel's statements directed the members' attention to the prosecution exhibits, videos, and evidence, which highlighted and informed the forensic psychologist's testimony and its application to MR's counterintuitive behavior. Special trial counsel's arguments were not intended to inflame the members passions to bolster MR's credibility, and this factor was highlighted by special trial counsel's directive above to "don't just take [MR's] word for it," but instead focus on "[t]hose videos – those prosecution exhibits" – the evidence.

C. Special trial counsel did not disparage opposing counsel.

Appellant insinuates that special trial counsel improperly maligned the defense by offering personal commentary on the defense theory of the case. (App. Br. at 62-63.) Appellant's argument is misplaced and parses a few sentences from rebuttal, absent context. Referring to the evidence from trial that Appellant refused to come downstairs of his own volition, special trial counsel argued:

> They glossed over the fact that their client never went downstairs on his own volition. Never went downstairs. And so if [MR] is a guilty party here, why is she the one going down? It's because that's what she'd — been beaten into her. To do what he tells her to do. Not to do what he could have done, if he hadn't done any of this, if he was the one being gaslit, if he was the one being abused, then when the leadership comes, then don't you run downstairs, [Appellant], and say, "Thank goodness you're here. She's crazy. Look at what she's done. She's upstairs cutting herself for goodness sakes." How about that? They don't want you to think about him. They want this to be U.S. v. [MR], and they want to be all about [MR]. She's not on trial here, members. She is not on trial here. Do not let them continue to do what he has done to her for 2 years. This woman had no history of self-harm. There is none. There's no evidence, no history that she bruises easily.

(R. at 1130-1131.) In making this argument, special trial counsel was referring to the evidence elicited during testimony and Appellant's attempts to repeatedly damage MR's credibility. This is evinced by special trial counsel reiterating that the focus should not be on MR, but on Appellant and the evidence—an argument he made earlier in his closing, prior to the comments Appellant deems objectionable above, and emphasized again later in his closing. In describing the government's burden, special trial counsel argued:

> If this were a civil case, then we could have a long discussion about that. But it's not. It's not [MR] v. Tyson. It's not Tyson v. [MR]. This is United States of America v. Airman Tyson. For his crimes. Not hers. For his. And it's our burden to prove beyond a reasonable doubt that Airman Tyson committed each one of these

> specifications, each one of these crimes — beyond a reasonable doubt.

(R. at 1103.) Later in his closing, special trial counsel returned to his argument that Appellant was on trial, not MR:

> They want to make it about [the] credibility of [MR]. They want to make it — don't believe [MR]. [Appellant] has been trying to do that — [Appellant] has been trying to do that for 2 years, right? Because if he really wanted her out of his house — like, let's put this back on the focus on [Appellant] instead of [MR].

(R. at 1130-1133.) It was not improper for special trial counsel to characterize the defense's argument as an attack on MR's credibility and to attempt to refocus the members on whether the totality of the evidence showed that Appellant committed the charged offenses. Special trial counsel argued fair inferences from the evidence produced at trial and his argument, rebutting Appellant's assertions, were not plain error.

Appellant claims that special trial counsel accused trial defense counsel of gaslighting MR with the following statement:

> I have immense respect for the senior defense counsel in this case, but to stand up here and argue to you that these are false allegations — to continue to gaslight [MR], to accuse that woman of being a criminal mastermind capable of "click, burn, go" bug-out plan, is not a reasonable doubt. It's not a reasonable argument. And it ignores almost all of the evidence in this case. Almost all of it. It's a spin, sure.

(App. Br. at 62 citing R. at 1128.)

Appellant also complains that special trial counsel referred to the defense argument as "spin." (App. Br. at 62.) These comments were not plain and obvious error. First, testimony was elicited during trial concerning gaslighting and its application to this case. (R. at 893; R. at 900-01.) Specifically, special trial counsel asked Dr. SN to define "gaslighting" and in response, Dr.SN explained, "gaslighting is actually invalidating somebody's reality, *somebody's*

perception of an experience, right?" (R. 893.) (emphasis added.) "And it's super confusing, and so it starts to make somebody question their memory, their perception, their intelligence, their ability to effectively manage themselves in the world." (Id.) At different points, both sides tried to invoke evidence that MR and Appellant were "gaslighting" each other. (R. at 921-22.)

Second, senior defense counsel accused MR of gaslighting Appellant during his closing argument, due to MR lying about her age during the relationship:

> A 32-year old entering into a relationship with 24-year old — nothing wrong with that, but if you're claiming you're 6 years under and then maintaining that lie for months and months and then when he finds out and overhears that she's really born 6 years after she claims, *gaslighting* him and saying no, no, no, you didn't hear that right, no. Or explaining away that he must have seen my ID, but it wasn't false because 1 I had my thumb over the year of my birth. That's *gaslighting*, and that's a form of abuse. She *gaslit* him — that's a whopper.

(R. at 1118.) Special trial counsel did not mention gaslighting in his argument until rebuttal in response to senior defense counsel questioning MR's credibility. (R. at 1128.) While potentially inartful, the statement clearly did not malign senior defense counsel but was fair commentary on the defense's theory after trial defense counsel attacked MR's credibility. Special trial counsel's rebuttal argument about "gaslighting" was just a continuation of a theme that the defense had established themselves in closing. But here, special trial counsel argued that the defense's characterization of MR as a criminal mastermind who made false allegations was merely a continuation of Appellant's "gaslighting" attempts to convince MR that Appellant had done nothing wrong.

To offer context and clarity, when concluding his argument on this specific point, special trial counsel reiterated, ". . . counsel arguments are not evidence. The evidence, members, are those 23 Prosecution Exhibits, and those three Defense Exhibits, and the witness testimony [].

Please, please, please remember that when you're back there in deliberations." (R. at 1128). Special trial counsel's statements were a signal to the members that the government did not want the members to convict based on what trial counsel said in the argument but based on the evidence alone. This was not plain error.

With regard to special trial counsel's comment on "spin," "[i]t is well established that the government may comment on the failure of a defendant to refute government evidence or to support his *own* claims." United States v. Webb, 38 M.J. 62, 66 (C.M.A. 1993) (quoting United States v. Coven, 662 F.2d 162, 171 (1981) (emphasis added). Characterizing trial defense counsel's theory as a spin was one of the least disparaging ways to challenge the defense's theory. Special trial counsel highlighted to the members that his intent was not to disparage defense counsel as a person. In other words special trial counsel could properly argue that the defense's theory of the case lacked merit.

D. Special trial counsel did not disparage Appellant.

Appellant also argues that a flippant comment was directed towards him – "Thanks for the restraint, Airman Tyson" – and this lone comment qualified as a disparaging remark and was further evidence of special trial counsel's attack on senior defense counsel's theory of the case. (App. Br. at 64.) Appellant asserts that special trial counsel's comment, consistent with United States v. Voorhees, 79 M.J. 5 (C.A.A.F. 2019), is plain error. (Id.) However, Voorhees is factually distinct from this case. In Voorhees, trial counsel called Appellant "narcissistic, chauvinistic, joke of an officer, [n]ot an officer, not a gentleman, [] a pig." Voorhees, 79 M.J. 5, 11. Trial counsel continued this theme throughout the trial by stating, "Disgusting. Disgusting. Deplorable. Degrading. That's the nature of the conduct that the accused committed. That's the nature of this man." Id. The court found trial counsel's attacks were clear error. Id. First,

special trial counsel's arguments were directed towards Appellant's conduct, not his character. Second, the record does not indicate evidence of similar, *continuous*, negative descriptions of Appellant. Here, Appellant equates one lone remark, during rebuttal, where special trial counsel ended a specific argument directly commenting on the evidence and Appellant's conduct, with "Thanks for the restraint, [Appellant]," as conduct similar to the conduct in Voorhees. Appellant is incorrect, and it was fair comment for special trial counsel to assert that Appellant deserves no reward for failing to cause additional harm to MR. This argument by special trial counsel was not plain error.

E. Trial counsel did not indirectly comment on Appellant's constitutional right to testify.

Appellant argues that special trial counsel's comment that there is "'no evidence' of self-harm is an indirect, or by innuendo, comment on the fact that [Appellant] did not testify in his defense to rebut MR's account" [and in] this case, it is similar to arguing the evidence is 'uncontroverted,' like what occurred in Carter." (App. Br. at 66.) Further, Appellant argues the only person who could rebut special trial counsel's 'no evidence' comment was Appellant. (Id.) But, the facts in Carter are dissimilar, and Appellant's reliance on Carter is misplaced.

In Carter, "the charged act involved two adults alone in a private room in the morning." United States v. Carter, 61 M.J. 30, 34 (C.A.A.F. 2005). "There were no injuries, no physical evidence of a struggle, and no other witnesses." Id. To establish its case, the Government relied on the testimony of *one* witness and did not put forth any other evidence. Id. Only Appellee possessed the information to contradict the Government's *only* witness. Id. Appellee did not testify, submit any evidence, call any witnesses, and trial defense counsel did not object during trial counsel's closing argument. Carter, 61 M.J. 30, at 32.

In finding error, our superior court held, "Under these circumstances, prosecutorial comment on the failure to present contradicting evidence constitutes an impermissible reference to Appellee's exercise of the privilege against self-incrimination *unless the comment constituted a fair response to a claim made by the defense*." Carter, 61 M.J. at 34 (emphasis added). Here, unlike Carter, the government presented *multiple* witnesses, including a forensic psychologist and forensic pathologist, along with photographs depicting the injuries to [MR]. Also, unlike in Carter, trial defense counsel put forth a limited defense, calling two witnesses, including a forensic pathologist. Contrary to Appellant's assertions here, Appellant was not the only individual that could rebut the Government's case or special trial counsel argument.

Moreover, a closer inspection of special trial counsel's arguments indicates his arguments were a fair response to claims asserted by Defense.

Appellant identifies several statements as evidence of plain error, arguing special trial counsel infringed on Appellant's constitutional right not to testify. Appellant ignores the evidentiary context surrounding each statement. In the first statement where Appellant alleges plain error, special trial counsel, referring to the evidence, argued against an attack on MR's credibility:

> . . . there's no indication of self-harm. Let me be clear on that. Despite defense's promises in opening statement that you would hear much evidence of self-harm – there was none. . . .Both of them—[Dr. TH and Dr. EL]—agree that they had never seen this amount of bruising inflicted by self-harm. To believe that anybody but [Appellant] inflicted that cut on [MR], you would have to believe either (a) there was somebody else there. Right? The "*some other dude did it*" defense. There's no evidence of that. Or, (b) that [MR] did it to herself. Okay, we know she was at the house. We know she had access to the scissors — to sharp objects that could have cut her, yeah.

(R. at 1092.) In describing MR's counterintuitive behavior, special trial counsel argued:

> And the Duluth power and control wheel was provided as demonstrative as we went down — and yeah — yeah, members, in a 2 year relationship there's gonna[be spokes missing, and it is fair to say that there are times when [MR] was probably engaged in a little bit of it towards him, herself. Absolutely. Look, the government's position is not that [MR] is this lily-white, you know — you know, just — didn't argue, didn't fight back, didn't push, didn't pull, didn't yell, didn't scream. That's not our position. But our position is at no point in time was she the physical aggressor. And there's no evidence; the reason that is our position is because there's no evidence of it. To think that she just sat there and took it for 2 years — I don't think she'd be here, members. But the Duluth power and control wheel talks about all of those spokes, right? All of those internal spokes. And that's just explanation for why they would stay.

(R. at 1103.) On rebuttal, special trial counsel, addressing the evidence, concluded his argument, stating:

> There's no evidence that she self-harmed. There's no evidence that anybody else caused the bruises. Caused the injuries. Caused the damage. And no matter defense's arguments about possibilities, they have to be reasonable. There is no requirement that we prove beyond — to a mathematic certainty, beyond all possibilities. Members, I know you won't — that common sense, don't check it at the door. Apply the facts to the case through the legal instructions. The government is confident that you'll return a verdict of guilty to this charge and all specifications.

(R. at 1134.) Each of the arguments set forth by special trial counsel, when placed in proper context, represents fair commentary grounded in the evidence produced at trial or were in direct response to senior defense counsel's opening statement or closing argument. "Our superior Court has recognized "the Supreme Court's holding that the Government is permitted to make 'a fair response' to claims made by the defense, even when a Fifth Amendment right is at stake." United States v. Gilley, 56 M.J. 113, 120 (C.A.A.F. 2001) (quoting United States v. Robinson, 485 U.S. 25, 32, 99 L. Ed. 2d 23, 108 S. Ct. 864 (1988)). Furthermore, it was not error for special trial counsel to highlight that the defense had promised evidence of MR engaging in self-

harm in opening statement, but then failed to deliver. United States v. Zanabria, 74 F.3d 590, 592-93 (5th Cir. 1996) (highlighting that a prosecutor may comment on the failure of the defense to follow through on opening statement promises). *See also* United States v. Hoyle, 1995 CCA LEXIS 309, * 4 (A.F. Ct. Crim. App. 6 November 1995).

Here, special trial counsel appropriately commented on the state of the evidence that was presented at trial. Special trial counsel made no insinuations about whether Appellant could or should testify to strengthen his defense. No reasonable member would have interpreted special trial counsel's statements as a comment on Appellant's failure to testify. Accordingly, Appellant failed to meet his burden, and special trial counsel's arguments are not plain error.

i. Trial counsel did not capitalize on facts excluded from evidence.

Appellant takes issue with special trial counsel's argument about there being no evidence of self-harm by MR. (App. Br at 66.) Appellant asserts that "there was evidence of self-harm or that MR could concoct a plan about self-harm: the 2014 domestic violence incident." (App. Br. at 67.) Appellant further argues that this evidence was excluded, and "trial counsel capitalized on excluded evidence to combat the very reason defense thought the incident was relevant in the first place." (Id.) Appellant argues that, consistent with Carter, special trial counsel committed clear and obvious error. (Id.) However, Appellant's claims about the 2014 incident lack merit. The 2014 incident did not establish that MR herself engaged in self-harm, and the idea that she had learned about the ability to engage in self-harm from her ex-husband was farfetched, especially since MR did not remember the incident. Special trial counsel's argument was fair, especially since expert testimony supported that MR likely did not inflict the bruising on herself. Appellant has failed to meet his burden to establish plain error, let alone clear or obvious error.

F. Assuming error, Appellant suffered no prejudice because there were mixed findings and members convicted Appellant on the basis of the evidence alone.

In determining whether prejudice exists, military courts balance three factors: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." Fletcher, 62 M.J. at 184. To find plain error, trial counsel's arguments must be so damaging that this Court "cannot be confident that the members convicted the appellant on the basis of the evidence alone." Id. "Under this test, Appellant has the burden to prove that there is a reasonable probability that, but for the error, the outcome of the proceeding would have been different." United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017).

Appellant failed to demonstrate that special trial counsel's arguments were prejudicial and that Appellant was not convicted on the basis of the evidence alone. Accordingly, Appellant has failed to meet their burden, as established below, the Fletcher factors weigh in favor of the government.

i. The severity of the misconduct was low.

Appellant asserts that special trial counsel's argument "spanned twenty-eight pages of transcript," "is littered with improper argument," and "almost every page of the transcript contains an error." (App. Br. at 69.) Appellant's argument misstates special trial counsel's presentation. First, special trial counsel repeatedly emphasized that the burden remained with the government alone and never shifted to Appellant. (R. at 144; R. at 152; R. at 1078; R. at 1103: R. at 1135.) Special trial counsel also consistently told the members to apply the evidence to the law as instructed by the judge and that arguments are not evidence. (R. at 1077-1078; R. at 1104; R. at 1128.) Additionally, here, senior defense counsel failed to object during closing and rebuttal and a "lack of a defense objection is some measure of the minimal impact of a

prosecutor's improper comment." *See* Gilley, 56 M.J. at 123. Second, Appellant was acquitted of three of the nine specifications, and his acquittal is evidence that the members did not convict Appellant solely based on trial counsel's argument. *See* United States v. Sewell, 76 M.J. 14, 19 (C.A.A.F. 2017) (finding "the panel's mixed findings further reassure us that the members weighed the evidence at trial and independently assessed Appellant's guilt without regard to trial counsel's arguments."). Further, our superior court presumes, "absent contrary indications, that the panel followed the military judge's instructions that trial counsel's arguments were not evidence and that it must not engage in spillover when determining Appellant's guilt." Id. Those principles apply here and absent evidence to the contrary, this factor weighs in the Government's favor.

ii. The military judge's curative instruction and standard instructions were sufficient curative measures.

While senior defense counsel did not object during special trial counsel's closing argument, the military judge gave the following curative instruction:

> Members, counsel have referred to instructions that I gave you. If there's any inconsistency between what counsel have said and the instructions that I gave you, you must accept my statements as being correct. If you believe that you heard either counsel express their personal opinion about a witness's character or the strength of the evidence, you may not consider it for that purpose. Counsel are not permitted to offer personal opinions; that was merely argument. Neither counsel's personal opinions, personal qualifications, or personal conduct in court are matters relevant for your consideration in resolving the matters before you. You, and you alone, determine the credibility of the witnesses and whether the government has proven the elements of an offense beyond a reasonable doubt.

(R. at 1135.) The military judge's curative instruction came after both parties concluded their closing arguments, not immediately after special trial counsel's closing argument. Military members are presumed to follow the military judge's instructions. *See* United States v. Taylor,

53 M.J. 195, 198 (C.A.A.F. 2000) ("Absent evidence to the contrary, this Court may presume that members follow a military judge's instructions."). Based on this presumption and absent evidence to the contrary, coupled with the military judge's standard instruction as well the curative instruction, this Court should be convinced that the members convicted Appellant based solely on the evidence, and not arguments by trial counsel. Accordingly, this factor should be decided in favor of the Government.

iii. Weight of the evidence supported the convictions given the corroborating evidence.

When analyzing the third prong of the Fletcher factors, "[D]efense counsel's failure to object to any of the prosecutorial misconduct is 'some measure of the minimal impact of [the] prosecutor's improper argument.'" Voorhees, 79 M.J. at 13 (quoting Gilley, 56 M.J. at 123). Here, Defense failed to object during the Government's closing, to object to the military judge's *sua sponte* curative instruction, the general instructions, or request additional curative measures. Most importantly, contrary to Appellant's assertions in its brief, when weighing the third prong, courts have held that mixed findings provide some evidence that the members did not decide the issues merely in line with a "popularity contest" between counsel, as Appellant asserts, but based on the evidence. *See* Smith, 2023 CCA LEXIS 196, at *38-39.

Here, the panel weighed the evidence at trial, came to an independent determination based on the evidence presented, and the findings indicate they were firmly convinced of Appellant's guilt.

For Specification 1 (strangulation), MR's testimony, along with corroborating photographs support Appellant's conviction. MR testified that the strangulation occurred in the bathroom and "[Appellant] put his hands around [MR's] neck, and Appellant screamed [], "[I'm] going to kill you [MR] — I have to kill you [MR], it's the only way." (R. at 830-31; Pros. Exs.

2, 3, 4.) Additionally, testimony from Dr. TH, detailed potential injuries expected from an individual previously strangled, particularly non-fatal strangulation without evidence of petechiae. (R. at 984-86.) This combination of this evidence established Appellant's conviction for unlawful strangulation beyond a reasonable doubt.

Concerning Specifications 4 (kicking MR's legs) and 5 (punching MR's arms and torso), MR's testimony and corroborating photographs support Appellant's guilty finding. (R. at 516-851.) Additionally, the OSI agent testified that when he responded to the hospital, he observed multiple bruises across MR's body. (R. at 460-461.) Specifically, MR "had bruising on her neck, her right arm, her left arm, her stomach, her — both of her legs, on the thighs, the knees, as well as her foot, too." (R. at 461.) The pictures depicting MR's injuries were admitted into evidence. (Pros. Exs. 2,3, 4.) The evidence introduced by the government established Appellant's convictions for assault consummated by a battery beyond a reasonable doubt.

For Specification 7 (destroying a cellular device) and Specification 8 (destroying household items) , MR testified concerning the destruction of her cell phone and its purported value, coupled with other items destroyed by Appellant within their home. (R. at 585-586.) MR testified that she was not responsible for any of the damage. (R. at 586.) The members heard MR's testimony, observed her demeanor, and credited her testimony. The government introduced sufficient evidence to establish, beyond a reasonable doubt that "non-military property," to include a cellular phone and other household items, having some value, belonging to MR, were destroyed by Appellant.

For Specification 9 (threatening to kill to MR), MR's testimony supports Appellant's conviction. MR testified that Appellant threatened "to blow [her] brains out on multiple occasions. (R. at 570; R. at 599-600; R. at 602; R. at 831; R. at 843.) The members heard MR's

testimony, observed her demeanor, and credited her testimony. The government introduced sufficient evidence to establish, beyond a reasonable doubt, based upon MR's testimony that Appellant threatened to kill her, blow her brains out, or words to that effect on divers occasions

While the defense repeatedly attacked MR's credibility due to her honestly lying about her age while alleging she possessed a motive to fabricate because she wanted to remain in the relationship while Appellant did not, the evidence of MR's bruising, both recent and long term, mitigated concerns about her credibility concerns. The panel members heard and weighed the evidence and returned mixed findings. The mixed findings undercut Appellant's assertions that special trial counsel's argument was the deciding factor for his conviction. If special trial counsel's arguments were the deciding factor, one would expect the members to have returned a guilty finding on all specifications. That did not occur here. The government presented a strong case which was credited by the members. This factor must be weighed in the government's favor and under the plain error standard, Appellant fails.

iv. Any constitutional error was harmless beyond a reasonable doubt.

"[W]here a forfeited constitutional error was clear or obvious, 'material prejudice' is assessed using the 'harmless beyond a reasonable doubt' standard set out in Chapman v. California, 386 U.S. 18 (1967)." United States v. Tovarchavez, 78 M.J. 458, 460 (C.A.A.F. 2019) (citing United States v. Jones, 78 M.J. 37, 45 (C.A.A.F. 2018)). "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." United States v. Wolford, 62 M.J. 418, 420 (C.A.A.F. 2006) (internal quotations omitted).

A prosecutor's misconduct in attempting to shift the burden of proof must be "so pronounced and persistent that it permeates the entire atmosphere of the trial" to mandate reversal. United States v. Simon, 964 F.2d 1082, 1086 (11th Cir. 1992). In closing arguments, "prosecutors must refrain from making burden-shifting arguments which suggest that the defendant has an obligation to produce any evidence or to prove innocence." Id. Notably, "prejudice from the comments of a prosecutor which may result in a shifting of the burden of proof can be cured by a court's instruction regarding the burden of proof." Id. at 1087.

Special trial counsel made no burden shifting arguments, so there was no constitutional error. Even if there was a constitutional error, the error was harmless beyond a reasonable doubt. Here, the military judge provided a curative instruction immediately after the conclusion of all arguments. The members knew that the burden remained on the government based on the military judge's. (R. at 1052-1076.) *See* Mason, 59 M.J. at 425 (burden shifting was harmless beyond a reasonable doubt because the evidence was overwhelming, and the military judge gave the standard instruction that the burden of proof to establish guilt was with the government and the burden never shifts to the accused to establish innocence). Here, the members here were presumed to have followed these instructions. *See* Taylor, 53 M.J. at 198. Thus, any error was cured by the curative instruction.

The members came to a mixed verdict, demonstrating that they independently looked at the evidence admitted at trial and concluded that Appellant was not guilty beyond a reasonable doubt for six out of the nine specifications. The specifications for which Appellant was found guilty were supported by corroborating evidence. The government's case was strong. Assuming constitutional error, any error was harmless beyond a reasonable doubt because the errors did not contribute to Appellant's convictions. Wolford, 62 M.J. at 420.

In summation, Appellant has failed to establish that special trial counsel's arguments were plain and obvious error, and given that he suffered no prejudice, he is not entitled to any relief.

IX.

THE RECORD OF TRIAL'S OMISSIONS DO NOT REQUIRE RELIEF OR REMAND FOR CORRECTION

Additional Facts

United States has submitted, along with this Answer, a Motion to Attach the declaration provided by Technical Sergeant VP, Noncommissioned Officer in Charge (NCOIC), Military Justice, 5th Bomber Wing Legal Office (5 BW/JA), Minot Air Force Base, North Dakota ("Declaration of TSgt VP"), and the four files contained in PHO Ex. 16 which are not otherwise present in the record. The information provided in the Declaration of TSgt VP documents and explains the inadvertent corruption of the audio/video files contained in PHO Exhibit 16, explains what each file is, and if it can be found elsewhere in the electronic Record of Trial (eROT).

A preliminary hearing officer (PHO) was appointed on 5 May 2023 to conduct the preliminary hearing that preceded referral and trial on the merits. (Article 32 Preliminary Hearing, *U.S. v. SrA Jonathon V. Tyson*, 5th Maintenance Group, dated 5 May 2023, eROT, Vol. 1.) The preliminary hearing took place on 8 May 2023. (Id.) The PHO completed the report on 14 May 2023, which included a 22-page continuation document detailing all recommendations, analysis, and considerations by the PHO. (DD Form 457, ROT, Vol 1; Quick Summary of Findings/Recommendations, ROT, Vol. 1) ("PHO Report"). The PHO Report recounted exhibits offered on the record for consideration, a case synopsis, and analysis and findings for each

offense listed on the charge sheet. (Id.) PHO Exhibit 16 was identified as, "Audio/Video files of SUB's home, dated 14 April 2023, 14 audio/video files." (Id.)

The 14 audio/video files were largely videos which accompanied photos taken by MR or law enforcement. (Declaration of TSgt VP.) These short audio/video files are a function of certain cameras, where a short video is taken in conjunction with a photograph for a moment before and after the shutter registers the photograph. (Id.) The audio/video files largely accompany several photographs in the record, including in Prosecution. Exhibits 5, 13, 14, and 18, PHO Exhibit 14, and attachments to the pretrial confinement memoranda. (Id.) A few of the audio/video files were not introduced at trial, but were the short videos accompanying photographs taken by the Office of Special Investigations (OSI) of Appellant's home during the course of their investigation. (Id.) When the eROT was being prepared, the files were inadvertently corrupted when attempting to imbed them into a PDF. (Id.) Though the PHO received the audio/video files at the preliminary hearing, he did not specifically reference them or rely on them for his analysis and recommendation in the PHO Report.

Standard of Review

Whether an omission from a record of trial is "substantial" is a question of law reviewed de novo. United States v. Stoffer, 53 M.J. 26, 27 (C.A.A.F. 2000).

Law and Analysis

Appellate courts understand that inevitably records will be imperfect, and therefore review for substantial omissions. 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. United States v. Henry, 53 M.J. 108, 1111 (C.A.A.F. 2000) (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 can conduct an informed review. *See* United States v. Simmons, 54 M.J. 883, 887 (N-M. Ct. Crim. App. 2001); *see also* United States v. Morrill, 2016 CCA LEXIS 644, at *4-5 (A. Ct. Crim. App. 31 October 2016) (unpub. op.) (finding that despite the omission from the record of an Article 39(a) session containing the military judge's findings and conclusions related to an R.C.M. 917 motion, the record, as it was, was "adequate to permit informed review by this court and any other reviewing authorities"). For the reasons stated below, the omission of PHO Exhibit 16 is insubstantial, caused no prejudice, and no relief should be granted under this assignment of error.

A. Omission of PHO Exhibit 16 is not substantial, and Appellant suffered no prejudice.

Appellant argues that PHO Exhibit 16 and its contents are a substantial omission because the entirety of the case rested on MR's credibility and her description of the relationship. (App. Br. at 76). This is inaccurate. The record reflects substantial corroboration including other audio and video files depicting Appellant destroying property and threatening MR, and photographic and medical documentation of MR's injuries. (Pros. Ex. 1-5, 8-15, 18-20.) This singular exhibit when put in the context of the entirety of the record, especially considering it is largely duplicative of evidence otherwise available in the record, does not impact the case outcome and

does not prevent this Court from completing an informed review. *See* Simmons, 54 M.J. at 887. Comparison of the audio/video files, their contents, and location in the eROT are described in the table below:

Filename from PHO Exhibit 16.	Contents of File	Location in the eROT
EATT2373.mov	MR self-recorded video of bruises	Pros. Ex. 18
IMG_0049.mov	Video capturing before/after of OSI's photo of Appellant's garage	Pros. Ex. 5
IMG_0059	Video capturing before/after of OSI's photo of Appellant's dining room.	Pros. Ex. 5
IMG_0077	Video capturing before/after of OSI's photo of Appellant's dining room.	Not located in the eROT, but located in the ROI
IMG_0089	Video capturing before/after of OSI's photo of a closet in Appellant's home.	Not located in the eROT, but located in the ROI
IMG_0105	Video capturing before/after of OSI's photo of a closet in Appellant's home.	Not located in the eROT, but located in the ROI
IMG_0127	Video capturing before/after of OSI's photo of separated scissors with securing zip-ties and measurement.	Pros. Ex. 5
IMG_0128	Video capturing before/after of OSI's photo of floor vent and a broken object in Appellant's home.	Not located in the eROT, but located in the ROI
IMG_0142	Video capturing before/after of OSI's photo of torn red sweatshirt	Pros. Ex. 5
IMG_00502	Video provided by MR depicting argument the bedroom between herself and Appellant	PHO Ex. 14
IMG_1580	Video provided by MR depicting argument in the bathroom between herself and Appellant	Pros. Ex. 15, ordered sealed by the military judge.
IMG_5287	Video provided by MR depicting Appellant closing	Pretrial confinement hearing, eROT Vol. 1., 05.c.08

	gas access with sugar in his hand.	
IMG_9909	Video provided by MR depicting Appellant stabbing an appliance with a multitool.	Pros. Ex. 13
WWQS0139	MR self-recorded video of bruises.	Pros. Ex. 18 and PHO Ex. 14

Four of the audio/video files—IMG_0077, IMG_0089, IMG_0105, and IMG_0128—contain brief video clips capturing the moments immediately before and after OSI took photographs. These clips were not presented at trial and were not relied upon by the panel members at findings. (Declaration of TSgt VP.) These were videos accompanying photos of a hallway, a closet, a knife block, and a floor vent. (Id.) These files contained no additional relevant evidence, context, or information that was relied upon at trial. Additionally, these files were not mentioned and ostensibly not relied upon by the PHO in making his recommendation following the preliminary hearing. These four files are the only files not otherwise available in the eROT and are not substantial. Even if these files had not been provided, their omission would not have prevented this Court from completing an informed review. *See* Simmons, 54 M.J. at 887.

Four different audio/video files—IMG_0049, IMG_0059, IMG_0127,[5] and IMG_0142—are short videos which accompanied photographs captured by OSI contemporaneous with photographs in Pros. Ex. 5. (Declaration of TSgt VP.) Two of the audio/video files—EATT2373 and WWQS0139—are short videos which accompany MR taking photos of her

[5] While IMG_0127 depicts the separated scissors, this short video depicts the separated scissors after each portion was secured with zip-ties and measured by OSI. The photo contained in Pros. Ex. 5 does not show the zip-ties or the measuring tape. However, the video and photo were taken close in time, with the separated scissors in the same box. (Declaration of TSgt VP.)

bruises and reflect the injuries depicted in Pros. Ex. 18 and PHO Exhibit 14. (Id.) One audio/video file—IMG_0502—was a duplicate of PHO Ex. 14. (Id.) One audio/video file—IMG_1580—was entered at trial as Prosecution Exhibit 15 and was ordered sealed by the military judge. (Id.) One audio/video file—IMG_9909—was introduced at trial as Prosecution Exhibit. 13. (Id.) Finally, one audio/video file—IMG_5287—is contained in the eROT as an attachment to the pretrial confinement hearing. (Id.)

The superior Court has found several different types of omissions as substantial, such as evidence used to show the *mens rea* of an offense (United States v. McCullah, 11 M.J. 234 (C.M.A. 1981)), video of combat flying during a sentencing hearing (United States v. Seal, 38 M.J. 659 (ACMR 1993)), and absence of defense exhibits in findings (United States v. Stoffer, 53 M.J. 26 (C.A.A.F. 2000). Henry, 53 M.J. at 111. None of the four files contained in PHO Exhibit 16 that were not otherwise available in the record or properly admitted at trial went directly to any element of any offense for which Appellant was charged. Similarly, none of these same files went directly to any consideration for sentencing. That being the case, they are not substantial.

Other military courts have also enumerated examples of insubstantial omissions. Insubstantial records include photographic exhibits of stolen property (United States v. Carmans, 9 M.J. 606 (ACMR 1980)), a court member's written question (United States v. Baker, 21 M.J. 618 (ACMR 1985)), and a slide presentation used by trial counsel (United States v. Hickman, 2021 CCA LEXIS 16 (A.F. Ct. Crim. App. Jan. 22, 2021). Here, the record is complete as to "all matters affecting the merits of the findings and the sentence." McCullah, 11 M.J. at 238. From both a qualitative and quantitative perspective, the omission approaches nothingness. United States v. Davenport, 73 M.J. 373, 377 (C.A.A.F. 2014); Lashley, 14 M.J. at 9 (C.M.A. 1982).

The evidence from the missing PHO exhibit does nothing to counter MR's credibility or description of the relationship, does not give rise to potential ineffective assistance of counsel for failing to present it, and does not support the admissibility of the 2014 incident discussed above in Issue I. (*See* App. Br. at 76.)

Insubstantial omissions do not raise a presumption of prejudice or affect the record's characterization as a complete one. Henry, 53 M.J. at 111. Appellant has suffered no prejudice because he would have neither gained a benefit nor suffered disadvantage if these files had been properly incorporated in the eROT. Accordingly, the omission of PHO Exhibit 16 was insubstantial, Appellant suffered no prejudice, and remand for correction of the ROT is not warranted.

B. Remand is not warranted and would only cause unnecessary delay.

Appellant asserts that a remand is required to fix PHO Exhibit 16 and implies that the delay for remand compounded with the post-trial delay discussed below in Issue X warrants relief. (App. Br. at 76-77.) As discussed below, the post-trial delay to fix Appellate Exhibit XXXI was not excessive, unreasonable, or prejudicial. Appellant should not reap a benefit from demanding an unnecessary remand and also benefit from the proposed unnecessary remand. Also discussed below in Issue X, Appellant has requested twelve enlargements of time, delaying appellate review by 450 days. Further delay is unwarranted – especially a delay caused by an unnecessary remand. Therefore, no relief should be granted under this assignment of error.

X.

THE POST-TRIAL DELAY WAS NOT PREJUDICIAL AND DOES NOT WARRANT RELIEF.

Additional Facts

Appellant was sentenced on 16 December 2023. (Entry of Judgement, ROT, Vol. 1.) His case was docketed with this court on 5 June 2024. A total of 172 days elapsed between the conclusion of Appellant's court-martial and his case being docketed with this Court. The government attempted to forward the ROT in April 2024, however, an error was discovered in Appellate Exhibit XXXI which warranted correction. *See* U.S. v. Senior Airman Jonathon V. Tyson, Suspense: 23 May 2024 (Apr. 25, 2024) (accompanying the record of trial when docketed) ("JAJM Memorandum"). Appellate Exhibit XXXI was admitted by trial defense counsel and erroneously contained an extra file which was not offered or admitted at trial. (Certificate of Correction, ROT, Vol. 1; R. at 685.) The suspense date for the correction was 23 May 2024. (Id.) The correction was completed and certified before the deadline on 10 May 2024 and signed by the detailed military judge on 16 May 2024. (Certificate of Correction, ROT, Vol. 1.)

Since this case was initially docketed with this Court, Appellant has requested 12 enlargements of time to file his assignments of error. All were opposed by the Government but granted by this court. These enlargements of time have resulted in 450 days elapsing before Appellant filed his initial Assignments of Error with this Court. The Government sought one enlargement of time for an additional 20-days to file this answer brief.

Standard of Review

This Court reviews *de novo* an appellant's entitlement to relief for post-trial delay. United States v. Livak, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020) (citing United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)).

Law

In Moreno, the CAAF established thresholds for facially unreasonable delay, including docketing with the Court of Criminal Appeals more than 30 days after the convening authority's action or when a Court of Criminal Appeals completes appellate review and renders its decision over 18 months after the case is docketed with the court. 63 M.J. at 142-143. Post-trial processing of courts-martial has changed significantly since Moreno, including the requirement to issue an Entry of Judgment before appellate proceedings begin. *See* Livak, 80 M.J. at 633. Now, this Court applies an aggregate standard threshold: 150 days from the day the appellant was sentenced to docketing with this Court. Id.

When a case does not meet one of the above standards, the delay is presumptively unreasonable and a test to review claims of unreasonable post-trial delay evaluates (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right of timely review and appeal; and (4) prejudice. Moreno, 63 M.J. 135 (citing Barker v. Wingo, 407 U.S. 514, 530) (1972)). All four factors are considered together and "[n]o single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." Id. at 136.

In Moreno, the CAAF identified three types of cognizable prejudice for purposes of an appellant's due process right to timely post-trial review: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of the appellant's ability to present a defense at a rehearing. 63

M.J. at 138–39 (citations omitted). As to the first type of prejudice, where Appellant does not prevail on the substantive grounds of his appeal, there is no oppressive incarceration. 63 M.J. at 139. Similarly, looking at the third type of prejudice, where Appellant's substantive appeal fails, his ability to present a defense at a rehearing is not impaired. Id. at 140. Finally, with regard to the second type of prejudice, anxiety and concern, "the appropriate test for the military justice system is to require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." Id.

Where an appellant has not shown prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006). As the CAAF recently clarified in United States v. Valentin-Andino, Article 66(d)(2) now solely governs relief for excessive post-trial delay. 85 M.J. at 367 (C.A.A.F. 2025). The standard is whether "appropriate relief" is warranted, which means relief that is "suitable under the facts and circumstances of the case." Id. In deciding whether to invoke Article 66, UCMJ, to grant relief as a "last recourse," prior to Valentin-Andino, this Court laid out a non-exhaustive list of factors to be considered, including:

> (1) How long the delay exceeded the standards set forth in Moreno;
>
> (2) What reasons, if any, the Government set forth for the delay, and whether there is any evidence of bad faith or gross indifference to the overall post-trial processing of this case;
>
> (3) Whether there is some evidence of harm (either to the appellant or institutionally) caused by the delay;
>
> (4) Whether the delay has lessened the disciplinary effect of any particular aspect of the sentence, and is relief consistent with the dual goals of justice and good order and discipline;

> (5) Whether there is any evidence of institutional neglect concerning timely post-trial processing; and
>
> (6) Given the passage of time, whether the court can provide meaningful relief.

United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015) *aff'd*, 75 M.J. 264 (C.A.A.F. 2016).

CAAF recently explained that, while cases of institutional neglect may warrant relief, such relief need only be "appropriate, meaning it must be suitable considering the facts and circumstances surrounding that case." Valentin-Andino, 85 M.J. at 367. No "meaningful" relief is required. Id.

Analysis

Appellant claims that relief is warranted because the government's failure to get from sentencing to docketing with this Court demonstrated a facially unreasonable delay, institutional neglect, and gross indifference toward post-trial processing. (App. Br. at 78-80). This analysis fails because any post-trial delay in this case was not unreasonable under the totality of the circumstances and does not rise to gross indifference or institutional neglect. Though Appellant did not discuss the Barker factors in his assignment of error, they are discussed below and weigh in favor of the government. Thus, relief is not warranted.

A. Appellant's due process rights were not violated.

Most of the Barker factors weigh in favor of the government. Specifically, the information provided in the court reporter chronology and the attached declaration demonstrate government responsiveness and diligence in remedying errors once discovered, and the lack of prejudice to Appellant. Further as to prejudice, Appellant has not been subjected to oppressive incarceration, his participation in his own defense has not been impaired, and he has failed to

demonstrate particularized anxiety. As a result, Appellant's due process rights were not violated, and relief is not warranted.

Barker Factors –Length of Delay and Assertion of Speedy Post-Trial Processing

The first and third Barker factors—length of delay and assertion of speedy post-trial processing—weigh in favor of Appellant. First, the 172-day period from sentencing to docketing exceeds the 150-day benchmark in Livak, creating a presumption of unreasonableness and properly triggers the four-factor Barker analysis. However, the length of the delay is merely the starting point of the inquiry, not its conclusion. To its credit, the government acted with due diligence in attempting to docket this case within the 150-day window. However, there was an error, and it took additional time for the error to be corrected. (Certificate of Correction, ROT, Vol. 1.) Following the correction, it took additional time for the ROT to be mailed, received, and docketed at this Court. (Declaration of TSgt VP.) ("Declaration of TSgt VP").

The third Barker factor "calls upon [this Court] to examine an aspect of [Appellant's] role in this delay." Moreno, 63 M.J. at 138. Specifically, whether Appellant "object[ed] to any delay or assert[ed] his right to timely review and appeal prior to his arrival at this court." Id. In this case, Appellant did assert his right to speedy post-trial processing to the convening authority. (Post-Trial Submission of Matters – *United States v. SrA. Jonathon V. Tyson* (Dec. 26, 2024), ROT, Vol. 1.) Therefore, this factor weighs in the Appellant's favor.

While the two factors above favor Appellant, all other Barker factors heavily favor the government.

Barker Factors –Reason for Delay

The second Barker factor – the reason for delay – weighs in the government's favor. Appellant simply relies on the delay being facially unreasonable, therefore warranting relief. (App. Br. at 78-80). This position fails when looking at the information provided in both the Declaration of TSgt VP as well as reasonable inferences drawn from the memorandum for record which accompanied the record of trial when it was docketed and the certificate of correction contained in the ROT.

The base legal office diligently compiled the ROT and routed it for review well within the anticipated 150-day period, transmitting the ROT to the Military Justice Law and Policy Division (JAJM) prior to 25 April 2024. (Declaration of TSgt VP.) When the error to Appellate Exhibit XXXI was discovered, JAJM sent the ROT back for correction in accordance with R.C.M. 1112(d) and set a suspense date of 30 days to accomplish the correction. (JAJM Memorandum.) The base legal office immediately went to work to fix the correction, coordinating with the court reporter and the detailed military judge to execute the certificate of correction, update and review the ROT again, and prepare the ROT to be mailed in less than three weeks. (Declaration of TSgt VP; Certificate of Correction, ROT, Vol. 1.) Specifically, the additional file was removed from Appellate Exhibit XXXI and a certificate of correction as prepared and signed by the court reporter on 10 May 2024 in accordance with Department of the Air Force Instruction 51-201 *Administration of Military Justice*, Section 21E, paragraph 21.15. (Certificate of Correction, ROT, Vol. 1.) The certificate was signed by the detailed military judge on 16 May 2024. (Id.) Immediately following the military judge's signature, the ROT was prepared and sent via United States Postal Service (USPS) certified mail on 17 May 2024. (Id.) The ROT was delivered on 21 May 2024 and was picked up on 24 May 2024. (Id.) 27

May 2024 was Memorial Day, and processing picked up following the holiday. Finally, the ROT was processed and docketed on 5 June 2024.

The record and Declaration of TSgt VP reflect government actors who diligently worked to push forward the post-trial process, timely responded to resolve persistent issues, and immediately worked to correct errors once detected. While there is an argument that the government should have caught the issue with Appellate Exhibit XXXI before the ROT was routed initially, in context, it was a disk prepared, offered, and admitted by the trial defense counsel and was presumed to be correct. The actions reflected by the government here were the actions of responsible parties committed to procedural integrity and proper administration of justice in a fluid environment. Therefore, this factor weighs in favor of the government.

Barker Factors –Appellant suffered no prejudice

Appellant asserts that the government's delay impacted Appellant's ability to participate fully in his appeal – citing the degradation of memory alone. However, this does not take into account the 450 days of enlargements of time requested by Appellate Defense Counsel, opposed by Government Appellate Counsel, and granted by this Court. During the entirety of those 450 days, Appellant was not confined, and there has been no assertion that Appellate Defense Counsel had trouble contacting or conferring with Appellant directly. Appellant asserts that had his case been docketed sooner, it would have been given higher priority, citing the tenth request for enlargement of time showing two other cases prioritized over Appellant's. (App. Br. at 80.) However, no information has been provided as to how the 22-day delay past the anticipated 150-day clock would have somehow prioritized Appellant's case over the thirteen cases of higher priority as described in Appellant's fourth motion for enlargement of time. The only other

prejudice Appellant puts forth is from a collateral consequence, namely a barment decision. (App. Br. at 80). Appellant has failed to demonstrate any actual prejudice from this delay.

Where an appellant has not shown prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." Toohey, 63 M.J. at 362. However, as discussed above, this case is not one of neglect or indifference, and certainly does not demonstrate a lack of urgency. *Cf* United States v. Atencio, No. ACM S32783, 2024 CCA LEXIS 543, at *9-10 (A.F. Ct. Crim. App. Dec. 20, 2024). Here, delays were the result of reasonable efforts to resolve errors and securely transmit the ROT for docketing. Solutions were sought immediately and persistently as soon as issues were discovered, including prioritizing forwarding the ROT for this case as swiftly as possible. Should a reasonable member of the public be made aware of the reasons for the delay, their perception of the fairness and integrity of the military justice system would not be adversely affected.

Thus, there being no due process violation and no prejudice, no relief is warranted.

B. Appellant is not entitled to relief under Article 66(d).

The CAAF decision in Valentin-Andino established that in cases of post-trial processing delays, only appropriate relief is required. 85 M.J.at 367. The CAAF further emphasized that "appropriate relief" is not synonymous with "meaningful relief." Id. Therefore, "if a Court of Criminal Appeals decides relief is warranted for excessive post-trial delay under Article 66(d)(2) that relief must be 'appropriate,' meaning it must be suitable considering the facts and circumstances surrounding that case." Id. Appellant is requesting this Court to set aside the bad-conduct discharge or, in the alternative, to set aside all aspects of the sentence other than confinement and the bad-conduct discharge. (App. Br. at 80.) Considering the facts and

circumstances of this case, this Court should not grant Appellant relief for post-trial delays that were non-prejudicial and not unreasonable, especially considering his conviction for violent offenses against MR.

Article 66(d) grants the Courts of Criminal Appeals the discretion to grant relief for post-trial delays. In Valentin-Andino, this Court found gross indifference and institutional neglect, yet only modified the sentence by altering the reduction in grade to E-2 rather than E-1. Id. The extent of relief Appellant seeks – setting aside a BCD – would be is well beyond the relief granted in Valentin-Andino, especially where there is no institutional neglect or gross indifference. Indeed, Appellant has not shown institutional neglect or gross indifference. The record shows that the government took continual steps in the post-trial processing of the case. Exceeding the standard by less than a month does not rise to the level of indifference, much less gross indifference. Moreover, in this case, JAJM identified an error and ordered correction before docketing. This is evidence that the government is taking step to remedy the problem of ROT errors. If JAJM had not conducted this review and caught the error, much more time likely would have elapsed before the error was discovered and the case remanded, delaying appellate review even more. Institutional procedures calculated to prevent ROT errors before docketing are the opposite of institutional neglect.

In sum, Appellant is not entitled to relief for post-trial delay. The delay was not a result of institutional neglect or gross indifference to post-trial processing. The delay was reasonable considering all circumstances and did not result in any harm or prejudice. The sentence was appropriate, and no portion should be set aside. This Court should deny this assignment of error and should not grant relief.

XI.

APPELLANT WAS NOT DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS GUILTY VERDICT.

Additional Facts

Trial defense counsel filed a motion for appropriate relief for a unanimous verdict. (App. Ex. IV.) The military judge denied the motion. (App. Ex. VI.)

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. At trial, the military judge instructed the members in accordance with Article 52, UCMJ. (R. at 1137-38.) Appellant now argues, for preservation purposes, that he was deprived of his constitutional right to a unanimous guilty verdict. (App. Br. at 81.)

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

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

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

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

Id. at 298. CAAF held that Fifth Amendment due process does not require unanimous verdicts in courts-martial. Id. at 300. Further, our Superior Court found that non-unanimous verdicts did not constitute an equal protection violation under the Fifth Amendment. Id. at 302. This Court should follow CAAF's binding precedent and deny Appellant's assignment of error.

XII.[6]

APPELLANT WAIVED ANY CLAIMS OF VINDICTIVE OR SELECTIVE PROSECUTION OR FAILED TO SATISFY THE HEAVY BURDEN NECESSARY TO DEMONSTRATE VINDICTIVE OR SELECTIVE PROSECUTION.

Standard of Review

Allegations of selective prosecution are reviewed de novo. United States v. Argo, 46 M.J. 454, 463, (C.A.A.F. 1997). "Whether an appellant has waived an issue is a legal question the Court reviews de novo." United States v. Schmidt, 82 M.J. 68, 70 (C.A.A.F. 2022)

Law and Analysis

The burden of persuasion on a claim of selective prosecution is on the moving party. *See* RCM 905(c)(2)(A). "By advancing a selective prosecution argument, [A]ppellant asserts a defect in the preferral and referral of the charges." United States v. El-Amin, 38 M.J. 563, 564 (A.F.C.M.R. 1993) quoting United States v. Bradley, 30 M.J. 308, 310 (C.M.A. 1990)).

[6] Appellant raises Issues XII pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

"Motions or objections based on [a] defective investigation must be made before pleas." *See* RCM 905(b)(1); Argo, 46 M.J. at 459.

"Absent compelling circumstances, appellate courts are not the proper forum in which to litigate vindictive or selective prosecution motions for the first time." El-Amin, 38 M.J. at 564. At the very least, this Court should review Appellant's claim under a plain error standard.

Appellant failed to satisfy his burden to remove the presumption that "prosecuting authorities and convening authorities are presumed to act without bias." Argo, 46 M.J. at 463. To demonstrate a claim of selective or vindictive prosecution, Appellant "bears a "heavy burden" of showing that: (1) "others similarly situated" have not been charged; (2) "he has been singled out for prosecution;" and (3) "his 'selection . . . for prosecution' was 'invidious or in bad faith, i.e., based upon [] impermissible considerations [such] as race, religion, or the desire to prevent his exercise of constitutional rights.'" Argo, 46 M.J. at 463 (quoting United States v. Garwood, 20 M.J. 148, 154 (C.M.A. 1985), quoted in United States v. Hagen, 25 M.J. 78, 83 (C.M.A. 1987)). Not only has Appellant failed to satisfy any prong necessary to assert a claim of selective or vindictive prosecution, he made no attempt to. The allegations and statements asserted within Appellant's declaration, even if considered under United States v. Jessie, 79 M.J. 437 (C.A.A.F. 2020), are of questionable relevancy and provide no information sufficient to aid the court in determining whether "others similarly situated" have not been charged, whether he was singled out for prosecution, and whether his case was infected with "impermissible considerations [of] race, religion, or the desire to prevent his exercise of constitutional rights." *See* Argo, 46 M.J. at 463. MR's credibility was heavily litigated at trial, subject to proper evidentiary rules, and her credibility may not serve as the foundation for Appellant's claim. Appellant has failed to meet his burden, and his claims are without merit and must be denied.

XIII.[7]

APPELLANT'S BARMENT IS NOT A FINDING OR SENTENCE ENTERED INTO THE RECORD AND HIS BARMENT CANNOT BE REVIEWED BY THIS COURT UNDER ARTICLE 66(d).

Standard of Review

"Jurisdictional questions are reviewed de novo. United States v. Davis, 63 M.J. 171, 176 (C.A.A.F. 2006) (*citing* United States v. Melanson, 53 M.J. 1, 2 (C.A.A.F. 2000)).

Law and Analysis

This court "assess[es] sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." United States v. Bare, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), aff'd, 65 M.J. 35 (C.A.A.F. 2007). Previously, this court established that it may exercise its Article 66powers to "grant sentence relief for conditions of post-trial confinement and excessive post-trial delay, even in the absence of a due process violation or specific prejudice to the appellant." *See* United States v. Bodkins, 60 M.J. 322, 324 (C.A.A.F. 2004). Although this Court can modify the entry of judgment per Article 66(d)(2), UMCJ, this Court cannot provide relief to Appellant in this instance because barment was not a finding or sentence as notated in the entry of judgment.

This court previously addressed a similar issue in the context of Article 66(c) in two unpublished opinions in United States v. Flackus, No. ACM 38847, 2016 CCA LEXIS 735 (A.F. Ct. Crim. App. Nov. 15, 2016) (unpub. op.). and United States v. Roe, No. ACM S32322, 2016 CCA LEXIS 753, at *6-7 (A.F. Ct. Crim. App. Dec. 19, 2016) (unpub. op.).

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[7] Appellant raises Issues XIII pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

In Flackus, while pending appeal, the appellant challenged his barment from base, among other issues, after being convicted for multiple drug offenses. Flackus, 2016 CCA LEXIS 735, at *1. As a part of his sentence, the appellant received a bad conduct discharge. Id. On appeal, the appellant argued that "Air Force authorities unlawfully increased his punishment after his release from confinement, and he [requested] to have his bad-conduct discharge set aside." Flackus, 2016 CCA LEXIS 735, at *1-2. In declining to grant relief, this Court concluded, "although our Article 66(c) authority to determine sentence appropriateness is broad, this court is not a forum for Appellant to seek redress for every injustice, perceived or otherwise, he has suffered at Government hands." Id. at *9.

Similarly, in Roe, the appellant was barred from entering Minot Air Force Base after it was discovered that he was employed on base as a bartender after being convicted for cocaine use and distribution. Roe, 2016 CCA LEXIS 753, at *3-4. At the time of barment, his appeal was pending. As part of his sentence, appellant received a bad conduct discharge. The appellant challenged his initial barment which was then amended to provide appellant access to the base for the sole purpose of obtaining "dental, medical, legal, or Inspector General services." Id. at *4-5. Similar to Flackus, the appellant, while challenging other issues, appealed his barment and requested relief from this Court. Id. at *7.

In Roe, this Court, firmly reiterated, "we again *emphasize* that this court is not a forum for Appellant to seek redress for every injustice, perceived or otherwise, he has suffered at Government hands." Roe, 2016 CCA LEXIS 753, at *8 (emphasis added). "Unlike conditions of confinement or post-trial processing delay, the barment order is not part of a sentence adjudged by a court-martial, or integral to the court-martial and appellate review process." Id.

Here, Appellant has been barred from Minot Air Force Base and Seymour Johnson Air Force Base. (App. Br., Appendix at 6.) According to Appellant, his barment interferes with his entitlement to access benefits and services located on Seymour Johnson pending his discharge. (App. Br., Appendix at 6-7.) Similar to appellants in Flackus and Roe, Appellant alleges that his barment is based solely on his conviction. (App. Br. Appendix at 7.) Appellant contends the decision to bar him is "arbitrary and capricious because other servicemembers who are convicted of offenses who are not discharged remain in the Air Force with full access to service installations." (Id.) Appellant further argues that "servicemembers who receive nonjudicial punishment [for] offenses for similar crimes of domestic violence retain complete access to installations." (Id.) Finally, Appellant contends that he has not "otherwise violated any rules or regulations while on appellate leave and he does not pose a risk to Seymour Johnson because "[h]is offenses are limited to one person who he is no longer in proximity to." (Id.) Appellant requests this court set aside his bad-conduct discharge. (App. Br., Appendix at 8.) Appellant's arguments are unpersuasive.

Similar to the appellants in Flackus and Roe, Appellant argues that his barment serves as an additional punishment prior to execution of his punitive discharge. As a result, he requests this court set aside his bad-conduct discharge. Appellant is incorrect. As this court clearly articulated in Flackus and Roe, when faced with addressing similar facts, the "contention that [a] commander's barment order amounts to a *de facto* premature execution of his punitive discharge exaggerates its impact and does not transform it into an element of [the] sentence. Since a barment is not part of the sentenced entered into judgment, this Court has no authority to act on it. *See* Flackus, 2016 CCA LEXIS 735 at *9; *see also* Roe, 2016 CCA LEXIS 753, at *8. Accordingly, Appellant is not entitled to 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 28 October 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' MOTION TO EXCEED PAGE LIMIT**
v.	)	
	)	Before Special Panel
Senior Airman (E-4) **JONATHAN V. TYSON,** United States Air Force, *Appellant.*	)	No. ACM 40617
	)	28 October 2025

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

Pursuant to Rule 17.3 and 23.3(q) of this Honorable Court's Rules of Practice and Procedure, the United States moves to exceed this Court's 50-page limit on filings.

Rule 17.3 provides that "filings shall not exceed either 50 pages or 20,000 words, excluding indices, tables, attachments, and appendices." There is good cause for exceeding the page limit. The United States' answer to Appellant's assignments of error—which raised 13 substantive issues, including two claims of error pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982) – is 107 pages, totaling 32,273 words. Since Appellant raised several allegations of factual sufficiency a detailed exposition of the facts was necessary. Exceeding the page limit was necessary to sufficiently address each issue.

WHEREFORE, the United States respectfully requests that this Honorable Court grant this motion to exceed the 50-page limit.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' MOTION TO ATTACH DOCUMENTS**
v.	)	Before Special Panel
Senior Airman (E-4) **JONATHON V. TYSON,** United States Air Force *Appellant.*	)	No. ACM 40617
	)	28 October 2025

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 this Court to attach the following documents to this motion:

- Appendix– *TSgt VP declaration and attachments*, dated 28 October 2025 (4 pages, 4 disks)

Appellant's ninth assignment of error asserts that a remand is necessary to remedy omission of PHO Exhibit 16, and Appellants tenth assignment of error asserts that he is entitled to relief due to post-trial processing delays. PHO Exhibit 16 was fourteen video/audio files which were corrupted when compiled into the Record of Trial. This case was docketed 22 days after the 150 day benchmark outlined in United States v. Livak, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020).

In evaluating whether an omission renders a record incomplete, this Court reviews whether the omission is substantial or insubstantial. *See* United States v. Lashley, 14 M.J. 7, 8 (C.M.A. 1982); United States v. Henry, 53 M.J. 108, 111 (C.A.A.F. 2000); United States v. Stoffer, 53 M.J. 26, 27 (C.A.A.F. 2000). The declaration provides context to explain the reason for the omission, the content of the omission, and attaches portions of the PHO Exhibit which are

not otherwise found in the record.

In evaluating the reasonableness of a post-trial delay this Court reviews (1) the length of the delay; (2) the reasons for the delay, among other factors. *See* United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006). The declaration provides context to explain the reasons for delay, which is necessary for this Court to conclude whether the delay was reasonable and whether Appellant is entitled to any relief for post-trial processing.

Our Superior Court held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court concluded that "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442. (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)). The issue of post-trial delay was directly raised by materials in the record because they show, but do not fully explain, the delays in the post-trial processing of Appellant's case.

WHEREFORE, the United States respectfully requests this Court grant this Motion to Attach the declaration and its attachments.

[redacted]

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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 28 October 2025. [redacted]

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	)	
	)	Before Special Panel
Senior Airman (E-4) **JONATHON V. TYSON,** United States Air Force, *Appellant.*	)	No. ACM 40617
	)	9 November 2025

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

Senior Airman (SrA) Jonathon V. Tyson, Appellant, pursuant to Rule 18(d) of this Court's Rules of Practice and Procedure, files this Reply to the United States' Answer to Assignments of Error, Oct. 28, 2025 [Ans.].[1] In addition to the arguments in his opening brief, Br. on Behalf of Appellant, Aug. 29, 2025, SrA Tyson submits the following additional arguments. The original assignments of error are addressed in order, but have been renumbered to first address an initial discussion spanning nearly all issues.[2]

1. MR was not a credible witness, which impacts the analysis for Assignments of Error I-VIII.

The Government seems to recognize that MR's credibility concerns spanned more than just the lies about her age and marital status, but it fails to consider how these combined credibility issues impact the allegations. *See* Ans. at 23-24 (discussing MR's impeachment and her various motives to fabricate). If MR is not a credible witness, the Government failed to prove the various

[1] The Government filed a motion to exceed page limit for its answer brief. U.S. Motion to Exceed Page Limit, Oct. 28, 2025. "A Motion to Exceed Page Limit will toll the due date for any responsive filing for opposing counsel until the Court has ruled on such motion." A.F. Ct. Crim. App. R. 17.3. This Court ruled on the Government's motion on November 5, 2025. This reply brief is filed within seven days of that ruling. As such, it is timely filed. A.F. Ct. Crim. App. R. 18(d).
[2] SrA Tyson rests on his original filing for the two issues raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

offenses (Issues II-VII)[3] or overcome prejudice (Issues I and VIII) since the entire case rested on MR's testimony. Moreover, the lies about her age and her marital status are not "minor testimonial inconsistencies." *Contra* Ans. at 39; *see contra id.* at 33 (calling lies about her age "inconsequential"). She did more than just mislead SrA Tyson; she could not remember what birthday she put on her employment paperwork. R. at 848. She admitted she knew that military spouses received preferential employment and benefits. R. at 648. MR used SrA Tyson to maintain a certain lifestyle, and when he ended their relationship, she was looking at the prospect of being homeless and jobless. *See* R. at 517, 529, 658 (detailing how she was not from the area and could not stay with her ex-husband). But then these credibility concerns transformed into actual fabrication, as MR began claiming she was a victim of domestic violence. *See* Pros. Ex. 16 at 5-8, 10, 12, 25 (showing MR claiming domestic violence). The last text message she sent to SrA Tyson before he was arrested was "I'll deal with you in the morning." Pros. Ex. 16 at 39. And she did "deal with" him, by ruining his life with false allegations, just as he ruined hers—not through domestic violence, but by breaking up with her. *See* Pros. Ex. 17 (calling her the "desperate ex" in February 2023).

For factual sufficiency, MR's credibility underlies the "specific showing of a deficiency in proof" for every offense because MR's testimony is required to prove every allegation beyond a reasonable doubt. Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866. Because MR is not credible, this Court cannot be convinced that the Government proved its case beyond a reasonable doubt—on nearly every element for every specification charged. This is because whether the misconduct MR testified to happened *at all* is at issue due to her credibility. *See* Br.

[3] SrA Tyson was found guilty of six out of nine specifications of domestic violence, all alleged by MR.

on Behalf of Appellant at 25-51 (arguing that MR fabricated the domestic violence allegations, manipulated evidence, and repeatedly lied on the stand).

The Government recognizes MR's credibility issues, motives to fabricate, and truthfulness concerns, but minimizes them throughout its response to hide how pervasive these concerns were. First, as the Government acknowledges, the defense impeached MR on numerous topics: "lying about her age, accessing Appellant's social media and email accounts after his arrest, mistakenly believing she and Appellant were married, inconsistencies in her testimony and statements she made to investigators or prior testimony, and improbabilities of her recitation of the charged offenses." Ans. at 23. The Government also acknowledges MR's many motives to fabricate: "anger at breaking up, alleged infidelities, embarrassment, revenge, and MR previously slapping [SrA Tyson] or 'snapping' emotionally during arguments." Ans. at 23-24. The Government even notes that MR's supervisor testified as to MR's character for untruthfulness. *Id*. But in responding to the factual sufficiency arguments, the Government narrowly focuses only on two "inconsequential" lies: her age and her marital status. *See, e.g.*, Ans. at 33-34, 39, 57 (repeatedly narrowing MR's credibility issues to just her lies about her age). This is misleading for two reasons. First, MR's lies about her age and marital status are much more significant than the Government portrays, as noted *supra*. Second, MR's credibility issues span more than just issues with her age and marital status. Despite acknowledging this fact, the Government minimizes it. Ans. at 23-24.

MR's credibility issues and motives to fabricate infect every allegation because she was the sole source of evidence. The relationship between MR being the sole source of evidence and her credibility cannot be understated—as the Government attempts to do by minimizing her motives to fabricate. The weight of the evidence in this case is reliant on MR's ability to testify credibly, which includes without being skewed by improper motives, because MR was the only

one who could testify that SrA Tyson did anything to her. *See generally* Pros. Exs. 8-14, 16-20 (showing MR as the "victim"); *see* R. at 582-85 (transcribing in open court Pros. Ex. 15, a video MR took showing SrA Tyson calling her names). The evidence that *she* provided revealed her attempt to capture a narrative that was consistent with her version of events. MR's modus operandi of manipulating "corroborating evidence" to fit her narrative or get what she wanted was even evident when MR confronted SrA Tyson for seeing another woman and he denied her being his fiancée. Pros. Ex. 17. Her response to his denial was "No dumbass you are," and "*Got the pics and everything*." *Id.* (emphasis added).

MR was motivated to "deal with" SrA Tyson because he did her "fucking dirty," i.e., he was a bad boyfriend. Pros. Ex. 16 at 39. But only MR could testify that the "bad boyfriend" behavior escalated into crimes. She was the only one who could describe the context of all this evidence, *see generally* Pros. Ex. 1-20, because there were no other witnesses to the alleged misconduct. The photos had to be explained by MR, regardless of who took them. Same with the videos.

This flawed foundation also undermines the expert's testimony that was intended to support MR's narrative because the expert relied on MR's truthfulness. *See, e.g.*, R. at 904-05 (discussing how concluding the existence of coercive control is based on the complainant's report). The Government frequently resorts to relying on the forensic psychologist's testimony, but fails to acknowledge that the expert's opinion relies on MR's explanation of the relationship. *See, e.g.*, Ans. at 34, 39, 45, 49, 54. Even more telling, the Government often speaks out of both sides of its mouth, asserting that MR is credible but then acknowledging that she was impeached on over five different topics and admitting that the defense showed at least five different motives to fabricate. *Compare* Ans. at 32-33, 39, 45, 54, 57-58, 66, 69, 82 (arguing MR was credible due to what the

Government considered corroborating evidence), *with* Ans. at 14-15, 17, 23-24, 102 (noting the many different ways MR's credibility was attacked or contested). The Government does not address the fact the "corroboration" it relies on comes from MR or required her testimony. Such a glaring omission is telling: when all of the evidence for the convictions relied on MR's narrative, her testimony must be credible to sustain a conviction beyond a reasonable doubt. Her testimony was not.

Credibility can be, and is here, the factual basis for the specific showings of deficiency in proof. *See United States v. Csiti,* 85 M.J. 414, 420 (C.A.A.F. 2025) (approving of this Court's recognition that "the significance of the credibility of particular witnesses or testimony will vary depending on the circumstances of the case"). The Government cites a nonbinding Army Court of Criminal Appeals case to argue the contrary: "[a] mere question of credibility does not establish a specific deficiency in proof." Ans. at 32 (citing *United States v. Brassfield*, 85 M.J. 523, 528 (A. Ct. Crim. App. 2024)). This was not the holding in *Brassfield*. Rather, based on the specific facts of the case, the Army Court of Criminal Appeals determined, "[A]ppellant's testimony and any minor inconsistencies in the victims' testimony does not establish a specific deficiency of proof." *Brassfield*, 85 M.J. at 528. The Government overstates *Brassfield* to attempt to paper over MR's credibility problems.

Furthermore, *Brassfield* is distinguishable on the facts. The appellant was charged with domestic violence for whipping his sons. *Brassfield*, 85 M.J. at 524-25. The appellant admitted he whipped them but could not state where on their bodies he hit them or how long. *Id*. at 528. The boys testified he whipped them for a certain time and in certain places after telling them to remove their clothing. *Id*. at 524, 527. These differences were minor in context—especially where the appellant admitted to the conduct. *See id.* at 528 (comparing the testimony between the sons and

the appellant).

Here, SrA Tyson admitted nothing and, notably, was acquitted of three serious domestic violence allegations that had similar "corroboration" to what the Government relies on now. R. at 1157. For what SrA Tyson was convicted of, each element relied on MR: an unbelievable, highly motivated witness. SrA Tyson specifically noted the deficiencies in proof for all legal and factual insufficiency claims. Br. on Behalf of Appellant at 25-51. But, to be clear, every element of every offense relied on MR's version of events being true. There was no meaningful corroborating evidence because everything was based off MR's description. MR's testimony about the allegations themselves was bare bones. *E.g.*, R. at 536-37. There were no eyewitnesses. There were no outcries about physical harm. No one testified to MR's truthfulness. MR said some version of "I don't recall," even regarding her own testimony, over eighty-seven times. R. at 710, 713, 1117. There were mixed findings. R. at 1157. "[B]ased on the type of evidence presented at trial—a service court might owe little to no deference to the trial court in performing its factual sufficiency review." *United States v. Downum*, No. 24-0156/AR, 2025 CAAF LEXIS 828, at *13 n.4 (C.A.A.F. Sep. 30, 2025). This is such a case in light of MR's significant and pervasive credibility problems and motives to fabricate.

2. SrA Tyson was denied meaningful cross-examination of MR in violation of his Sixth Amendment right to confrontation when the military judge excluded evidence offered under Mil. R. Evid. 608(c) that MR was arrested for a domestic violence allegation made by her then-husband whom she claimed faked the corroborating injury.

SrA Tyson relies predominantly on his initial brief for this issue, but offers the following clarifying points.

First, MR was not a credible witness, which goes to the issue of relevancy. The excluded evidence was relevant because it impeached MR, which inherently included confronting her on her unbelievable lack of memory about the 2014 incident with her then-husband, Staff Sergeant

AC. Nevertheless, both the military judge and the Government on appeal outright believed MR, specifically the contention that she had no memory of the incident at all. R. at 756; Ans. at 18, 23. This apparently included no memory of being arrested and no memory of accusing her then-husband of self-harm. *Compare* Post-Trial Submission of Matters—*United States v. SrA Johnathon [sic] V. Tyson*, Atch. 1 at 6 (Dec. 26, 2023) (detailing her allegations), *with* R. at 727-29 (claiming to have no memory of these events). Blindly believing MR's testimony was an abuse of discretion by the military judge when MR's very testimony about failing to remember the event made the evidence more relevant to MR's credibility. This is because the memory lapses are yet another example of MR manipulating the narrative. Her testimony that she did not recall this incident—and others at trial—is incredible when looking at the evidence in front of the military judge at the time. Br. on Behalf of Appellant at 20. Prior to the Article 39(a), UCMJ, hearing on the 2014 incident with her ex-husband, MR said she couldn't remember what she had just testified about. *Compare* R. at 713 ("I'm not sure what I said yesterday."), *with* R. at 722 (being confronted about the 2014 incident); *see also* R. at 1117 (noting MR said a version of "I don't remember" more than eighty-seven times throughout trial). The purported lack of memory only heightened the existing basis for admissibility because it opened up another basis for impeachment on the same topic: her purported memory loss, about both the 2014 incident and her allegations against SrA Tyson.

As discussed, there was no independent or "ample" corroboration in this case, contrary to the Government's assertion. Ans. at 19. All the expert testimony, the photos, the damaged property, etc., *all* relied on MR explaining what happened. This is why *United States v. Sullivan*, 70 M.J. 110 (C.A.A.F. 2011), remains distinguishable. *See* Ans. at 19 (relying on *Sullivan* and "corroboration"). Since the entire case rested on MR explaining the who, what, where, when, and

how of her various allegations, the 2014 incident evidence established "a real and direct nexus to a fact or issue at hand" where the defense was asserting that MR would go so far as to hurt herself or lie about an injury to frame SrA Tyson. *Sullivan*, 70 M.J. at 115. Without the evidence showing MR could, or would, self-harm, the defense was deprived an avenue of cross-examination that went to the heart of the defense theory and was only left with a "figment of a theory" that MR would self-harm or be the type of person who could fabricate these allegations. Br. on Behalf of Appellant at 22.

The Government removes from context the "figment" argument made on appeal. Ans. at 24 (citing Br. on Behalf of Appellant at 22). As the Government acknowledges, the defense heavily impeached MR, to include on "the improbabilities of her recitation of the charged offenses." Ans. at 23-24. But none of the motives and impeachment topics went directly to the heart of the defense theory: MR got the bruises in some other way, possibly through self-harm. The 2014 incident evidence was not cumulative simply because MR had been impeached in other ways, contrary to the Government's assertion. Ans. at 20. The defense was left with a "figment of a theory" that MR would either self-harm or manipulate a narrative around injuries because the defense did not have any evidence that MR was exposed to self-harm previously or would devise a lie about self-harm. The prejudicial impact of excluding the 2014 incident evidence is heightened where the expert opined that the type and amount of injuries were likely not from self-harm. R. at 995-96. The distinct lack of evidence that MR was ever exposed to self-harm or could concoct a story about self-harm, coupled with the expert testimony, debilitated the defense theory.

Finally, contrary to the Government's assertion that this evidence only went to the acquitted allegation involving scissors, Ans. at 23, the excluded evidence would have affected every charged offense. Had the panel known MR either (1) came up with a story like that because

she is the type of person who would drag a key across her eye to show abuse, or (2) she learned that self-harm can manipulate law enforcement into believing the other person is the abuser, then the defense theory about MR framing SrA Tyson is reasonable doubt for every allegation. MR was the only person who could provide context for all the Government's evidence in this case.

WHEREFORE, SrA Tyson requests this Court set aside the findings and the sentence.

3. SrA Tyson's conviction for strangling MR is factually insufficient.

The Government had to prove "impairment of [MR's] faculties or bodily functions," contrary to its unsubstantiated assertion it did not. Ans. at 30. Specifically, the Government had to prove SrA Tyson "imped[ed] the normal breathing or circulation of blood" of MR, a literal impairment of breathing or blood flow. R. at 1055; Exec. Order No. 14062, 87 C.F.R. 4763, 4772 (2022). Due to MR's vague description of the effects on her body, the Government did not prove this element. Br. on Behalf of Appellant at 26-28.

The Government cited its forensic psychologist's testimony to explain why MR was such a vague witness: "victims of abuse endure so many instances of conflict, it's difficult to separate exact details of what happened. . . . [they] lose track of the source of memory, because it all starts to blend together." Ans. at 32 (quoting R. at 896-97). In this case, this explanation belies credulity because MR had the source for the memories: the photos—that she took. Pros. Exs. 8-11, 19. She had the source for the memories, and yet, she could not explain how anything happened other than generally asserting SrA Tyson would "kick" or "punch" her. R. at 536. Combined, these discrepancies support MR fabricating the allegations, manipulating evidence, and, in the case of strangulation, using other means to inflict bruises to control SrA Tyson. *See* R. 1003-05 (discussing similarities between the pinch marks in February 2023 and the strangulation marks in April 2023).

The Government's argument that SrA Tyson was "hostile" to MR, therefore he acted "hostile" overall in the relationship, is as unpersuasive as it is impermissible character argument. Ans. at 33. SrA Tyson being a "bad boyfriend" does not mean he beat her, as she alleged and as the Government argues. SrA Tyson stabbing his own property (Pros. Ex. 13) while MR overstays her welcome in his on-base house (Pros. Ex. 16 at 7) is a reflection on both of them. MR had no intention of leaving that property: no moving truck, no moving date, no place to go. R. at 844-45. As the Government acknowledged by citing the expert's testimony, MR lied about her age to retain SrA Tyson, who apparently did not like that MR was older. Ans. at 34 (citing R. at 915); R. at 807-08. He wanted his "desperate ex" out of his house. Pros. Ex. 17. When MR cannot remember any specific examples of physical abuse, when she never reported harm to herself until April 14, 2023, and when she only ever recorded him injuring her property, her memory issues about the specific instances of abuse are less indicative of things "blend[ing] together" and more evidence of fabricating physical abuse and the nature of the relationship. The lack of testimony to prove strangulation (*see* Br. on Behalf of Appellant at 26-28) coupled with MR's credibility problems demonstrate this specification should be set aside.

WHEREFORE, SrA Tyson requests that this Court set aside the finding of guilty as to Specification 1 of the Charge, dismiss Specification 1 of the Charge with prejudice, and set aside the sentence.

4. SrA Tyson's conviction for kicking MR in the legs on divers occasions is legally and factually insufficient.

As with every allegation, the Government asserts MR is credible based on "corroborating" evidence. Ans. at 39-40. All "corroboration" relies on MR's narrative and her assertions that SrA Tyson caused the bruises in the photos she took. Simply because a law enforcement agent saw a bruise, Ans. at 39, means nothing; the witness saw no physical altercation. The Government even

misstates evidence in trying to support corroboration. Ans. at 40 (linking SrA Tyson's discovery of MR's age with "when the physical assaults commenced"). SrA Tyson found out MR's age *at* the hospital in May (R. at 799), after the alleged beating already occurred. *Compare* R. at 537 (testifying she went to the hospital for "chest pains"), *with* R. 799 (testifying "that day he had, kicked me, punched me, and it hurt really bad to breathe. So that's why I went to get it checked out"). Therefore, any correlation or causation the Government asserts between SrA Tyson finding out MR's age and physically hurting MR is nonexistent. That was not the testimony or chronology of events.

Furthermore, the Government's reliance on the forensic psychologist's testimony is once again misplaced. The Government asserts that "there was no doubt that Appellant exerted mental and physical control over MR as evidenced by the kicking . . . ." Ans. at 39. For this argument to have any persuasive value, MR must be credible. But both the expert's testimony about "coercive control" and the Government's argument rely on MR's credibility, i.e., that the physical abuse is true and so is the context of the relationship in early 2023. The expert's testimony has little probative value when it is all predicated on MR's narrative. Because MR is not credible about the allegations, the expert's "corroborating" testimony also cannot be given much weight. This is why, as the Government puts it, "Appellant's brief lacks citations to this overarching evidence lending credence to MR's allegations." Ans. at 39. Even the expert upon whom the Government must rely upon at this point to "corroborate" MR eventually recognized that a false report would eliminate the theory of coercive control. R. at 905.

In contesting these vague allegations, the Government compares this case to *United States v. Westcott*. Ans. at 38 (citing *United States v. Westcott*, No. ACM 39936, 2022 CCA LEXIS 156, at *17-18 (A.F. Ct. Crim. App. Mar. 17, 2022). But apparently the Government missed the part

where that appellant was acquitted of all the vague allegations. *Compare Westcott*, No. ACM 39936, 2022 CCA LEXIS 156, at *4 ("The members convicted Appellant of two offenses arising out of his conduct during that last evening, but acquitted him of two specifications alleging prior assaults."), *and id.* at *7-8 (testifying "from September 2017 to May 2018, Appellant 'would force [her] clothes off of [her] and force [her] into having sex with him against [her] will even though [she] had repeatedly told him no,'" conduct of which he was acquitted), *with id.* at *8 ("Appellant's convictions for committing aggravated sexual contact and abusive sexual contact arose from events occurring in the evening of 23 May 2018 . . . ."). The "paucity of evidence," therefore, still demonstrates the vague allegations of kicking should be set aside. *United States v. Kim*, No. ACM 24007, 2025 CCA LEXIS 386, at *55-56 (A.F. Ct. Crim. App. Aug. 15, 2025) (Johnson, C.J., dissenting).

The Government then attempts to save the "divers" element by asserting other photos outside of the May 2022 allegation showed bruises on MR's legs and that MR testified "kicking became more frequent" in February 2023. Ans. at 36. To the photos, MR never testified the bruises captured in Prosecution Exhibits 2 and 18 were from kicks. That is the problem with the April 2023 evidence the Government cites for a second occasion of "kicking." Ans. at 36. As to the broad allegation of kicking becoming more "frequent," this is not a notice problem, as the Government seems to argue. Ans. at 37. Rather, the Government failed to prove "divers" beyond a reasonable doubt. The absence of evidence is the problem. This is no different than *Kim* or *United States v. Rodriguez*, No. ACM 36455, 2007 CCA LEXIS 254, at *2 (A.F. Ct. Crim. App. June 26, 2007). Alleging SrA Tyson would just kick her without additional facts parallels the same paucity of evidence. *Kim*, 2025 CCA LEXIS 386, at *55-56 (Johnson, C.J., dissenting); *Rodriguez*, 2007 CCA LEXIS 254, at *7.

"Nothing in the newly amended Article 66(d)(1)(B), UCMJ, requires a service court to give deference to the trial court about the *absence* of evidence that the service court believes is critical for a conviction to be factually sufficient." *United States v. Downum*, No. 24-0156, 2025 CAAF LEXIS 828, at *16 (C.A.A.F. Sep. 30, 2025). Furthermore, for legal sufficiency, the Government does not get the benefit of "*every potential* inference but rather, only those inferences reasonably and logically flowing from the other evidence adduced at trial." *United States v. Goldesberry*, 128 F.4th 1183, 1192 (10th Cir. 2025) (quoting *United States v. Santistevan*, 39 F.3d 250, 258 (10th Cir. 1994)). An inference is unreasonable if it requires a degree of speculation and conjecture that renders the finding a "guess or mere possibility." *Id*. (quoting *United States v. Jones*, 44 F.3d 860, 865 (10th Cir. 1995)). The Government asks this Court to guess whether MR was kicked based on these bruises that she does not even testify about. Ans. 36-37. That would be improper for both legal and factual sufficiency as it renders the finding a "mere possibility" under all the circumstances rather than beyond a reasonable doubt. Here, under either standard for sufficiency, there is not enough evidence for proof beyond a reasonable doubt for the offense as charged.

WHEREFORE, SrA Tyson requests that this Court set aside the finding of guilty as to Specification 4 of the Charge with prejudice for factual sufficiency, and set aside the sentence. Alternatively, even if factual sufficiency is found, this Court should not affirm the "on divers occasions" of the finding of guilty of Specification 4 of the Charge.

5. SrA Tyson's conviction for punching MR in the arms and torso on divers occasions is legally and factually insufficient.

The Government admits the unit of prosecution for assault is the "overall beating" endured and the "physical altercation itself." Ans. at 41-42. Nevertheless, the Government still splits apart the charging scheme to allege different blows are different "beatings" or "physical altercations." Ans. at 41-44. But the law, as the Government concurs, means the unit of prosecution shown in

the specification is a single fight made up of specific actions by SrA Tyson—punches to the torso, punches to the left arm, and punches to the right arm. *United States v. Clarke*, 74 M.J. 627, 628 (A. Ct. Crim. App. 2015) (citing *United States v. Rushing*, 11 M.J. 95, 98 (C.M.A. 1981)); *see United States v. English*, 79 M.J. 116, 120 (C.A.A.F. 2019) ("[W]hen it narrowed the scope of the charged offense by alleging the particular type of force, it was required to prove the facts as alleged."). As charged, the Government had to prove the "beating" listed in the specification included those specific contacts. Br. on Behalf of Appellant at 34-36.

The Government's own charging scheme belies its unsupported conclusion to the contrary. The Government charged kicks and strangulation separately. Charge Sheet at 1. According to MR's testimony, those were different physical altercations. *Compare* R. at 536-37 (discussing May 2022 kicking), *with* R. at 601-02 (discussing April 2023 strangulation). The way the Government charged the punches to the torso and arms shows what the Government refuses to admit on appeal: the specification is a fight that consisted of specific types of force. Notably, the Government does not grapple with the fact the instructions focused on a "single" instance of violence. R. at 1060. Arguing otherwise, as it does on appeal, contradicts the Court of Appeals for the Armed Forces' (CAAF's) holding in *United States v. George*, where an appellate court will not disturb the parties' understanding of the specification at trial if it is reasonable. __ M.J. __, No. 24-0206/AF, 2025 CAAF LEXIS 577, at *9 (C.A.A.F. July 21, 2025); *see United States v. Gonzalez*, __ M.J. __, No. 25-0032/AR, 2025 CAAF LEXIS 761, at *8 (C.A.A.F. Sep. 15, 2025) (applying *George* to eliminate a new interpretation of a specification on appeal). This Court is bound by what the Government charged, the parties' reasonable interpretation of the charge at trial, and the instructions that the Government did not object to. *See United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (holding agreeing to instructions constitutes waiver). In effect, the Government

waived any argument it charged "hitting MR's torso and arms disjunctively." Ans. at 42.

Turning to factual sufficiency, the Government claims SrA Tyson "does not spell out the basis for why this conviction was factually insufficient." Ans. at 44. To be sure, the "specific deficiency in proof" on this allegation is that the Government failed to prove any element beyond a reasonable doubt due to MR's credibility. *See* Br. on Behalf of Appellant at 36-39 (building off the legal sufficiency argument and the other factual sufficiency arguments to continuously assert for every offense that MR was not credible). MR was so unbelievable that the Government did not prove SrA Tyson punched MR in the "torso and arms" as alleged. *Id*. SrA Tyson cited to the other portions of his brief to incorporate why all of MR's credibility concerns affect every element of every specification. Br. on Behalf of Appellant at 39.

Furthermore, to ensure clarity, SrA Tyson contends that the evidence is not factually sufficient for any instance of physical violence, to include in April 2023. This is because the Government did not prove SrA Tyson punched MR in the (1) torso, (2) the left arm, and (3) the right arm during a single fight that day. The Government's own defense of this specification does not even muster the supporting evidence for both arms—just one. Ans. at 43. The Government asserts "the photos of the injuries" speak for themselves. Ans. at 44. As with the kicks, this wishful thinking approach by the Government is asking this Court to guess, which would be improper even under the less heightened standard for legal sufficiency. *Goldesberry*, 128 F.4th at 1192. The photos require MR to "speak" for them, to explain who caused the injuries and how because of the specificity in the charging scheme. Without her testimony, these photos could mean anything. *E.g.*, R. at 1000-02 (showing the experts could not rule out accidental injury for some of the bruises). Because MR was an unbelievable witness who did not testify with the specificity required for proof beyond a reasonable doubt, her testimony and the photos have little value.

Finally, MR's conduct tells a different story that conflicts with the Government's assertion that SrA Tyson was in control of the relationship, rather than MR. *See* Ans. at 44-45 (citing the videos where he called her names and told her to clean his room). MR followed SrA Tyson, her ex at that point, to his new girlfriend's house to confront him. R. at 811-14; Pros. Ex. 17 (telling him that she has proof of her version of events while he calls her the "desperate ex"). She banged on the front door while he fled out the back window, according to her own testimony. R. at 811-14; Pros. Ex. 17 (calling SrA Tyson scared). She sent him threatening messages about reporting him for domestic violence, which she ultimately followed through on. *See, e.g.*, Pros. Ex. 16 at 12 (showing MR saying "fucking respect me" because she is keeping him from domestic violence charges). She ripped open her shirt on camera to stop SrA Tyson from recording her behavior, accusing him of creating revenge porn to ensure destruction of evidence harmful to her narrative. R. at 699-700. Throughout the months of "silent[] terrorizing," she never reported him hurting her, only property destruction. R. at 307-08, 321; Pros. Ex. 16 at 6. The "threats" MR immediately could think of was SrA Tyson calling her names. R. at 569. MR was far from "controlled," as the Government contends. Ans. at 44-45. The Government failed to prove this specification for many reasons, including because MR's credibility casts doubt on every element of this offense.

WHEREFORE, SrA Tyson requests that this Court set aside the finding of guilty as to Specification 5 of the Charge with prejudice via factual sufficiency review, and set aside the sentence. Alternatively, this Court should not affirm the "on divers occasions" of the finding of guilty of Specification 5 of the Charge.

6. SrA Tyson's conviction for destroying MR's cellphone is legally and factually insufficient.

For this legal and factual sufficiency challenge, SrA Tyson primarily rests on his original brief. There are only two things to add.

First, as all the allegations rely on MR's credibility, SrA Tyson incorporates his arguments from the other issues herein. *Supra* sections 1-5. For all the reasons MR was not a believable witness for those assignments of error, the same holds true here.

Second, the Government relies on MR's testimony that she could not make phone calls to argue that her phone was rendered "useless for its intended purpose." Ans. at 47; *see Manual for Courts-Martial*, *United States* (2019 ed.), pt. IV, para. 45.c.(2) (defining "destruction" of property as property "sufficiently injured to be useless for its intended purpose"). It is common sense that an iPhone is not just used for calls, particularly when WiFi is available. Prosecution Exhibit 16 is some evidence of that alone, considering MR was messaging SrA Tyson on the 12th and 13th of April, after the phone was damaged. R. at 586; Pros. Ex. 16 at 33-37. Moreover, MR's testimony was contradictory on the phone's functioning. MR asserted she could not use cellular data or make calls using cellular data. R. at 824. But she fully admits that her phone worked on WiFi, *id*., and she was able to send messages—both to her Special Victims' Counsel for the Government's case and ostensibly to SrA Tyson via Facebook. R. at 762-65; Pros. Ex. 16. If her phone worked on WiFi, it is also common knowledge that WiFi calling exists. *Make a call with Wi-Fi Calling*, APPLE (April 29, 2025) https://support.apple.com/en-us/108066 (discussing no cellphone service needed for WiFi calling); *see VoIP-Pal.com, Inc. v. Apple Inc.*, 411 F. Supp. 3d 926, 931 (N.D. Cal. 2019) (discussing Apple systems and WiFi calling). Therefore, the Government's contention that the phone was "rendered useless for its intended purpose" because she could not make calls is incorrect and not a logical inference from the testimony. MR just could not use cellular data. Her iPhone still worked for many of its intended purposes and she did use it even after it was damaged.

WHEREFORE, SrA Tyson requests that this Court set aside the finding of guilty as to Specification 7 of the Charge with prejudice via factual sufficiency review, and set aside the

sentence. Alternatively, this Court should only affirm the lesser included offense of "damaging" non-military property under Article 109, UCMJ.

7. SrA Tyson's conviction for destroying a variety of MR's belongings is legally and factually insufficient.

As with Issue IV, *see supra* section 5, the Government attempts to minimize binding case law about the unit of prosecution. Ans. at 51. The Government asserts *United States v. Collins* is distinguishable because the Government did not charge "divers" property damage in that case. *Id*.; *United States v. Collins*, 36 C.M.R. 323, 325 (C.M.A. 1966). But *Collins* defines the unit of prosecution, so slapping "divers" in front of a unit of prosecution only means the conduct in the unit of prosecution had to happen on more than one occasion, not that the conduct became piecemeal. *See United States v. Ozbirn*, No. ACM 39556, 2020 CCA LEXIS 138, at *20 (A.F. Ct. Crim. App. May 1, 2020) (holding "divers" means committing an offense two or more times, "not that a single offense was perpetrated over a period of time"). The unit of prosecution matters and the Government provides no case law to the contrary to argue the specification should be interpreted in any other way.

In citing *George* for notice, the Government fails to understand the ramifications of *George* on its own charging scheme. An appellate court "will adopt the reading of the charge and specification that it appears the parties at trial adopted if that interpretation is reasonable." *George*, 2025 CAAF LEXIS 577, at *9. That holding equally applies to the Government as to the defense. Here, the charging scheme, the evidence of property destruction on April 14, 2023, and the instructions all support that the Government charged SrA Tyson with "an act . . . to wit: destroying non-military property" on more than one occasion, where that "non-military property" was a list of specific items. R. at 1064. The Government waived any argument that it charged "damaging all of the property on various occasions throughout the charged timeframe," Ans. at 51, as opposed

to one specifically defined instance of property damage that had to be repeated, when it did not object to the instructions that explained a charging scheme consistent with *Collins* and *Ozbirn*. *Davis*, 79 M.J. at 331. The Government cannot save this specification on appeal when it failed to elicit evidence from MR to prove that the specific property damage occurred altogether on more than one occasion.

Seeking to fix its unit of prosecution problem through resort to a different legal construct, the Government argues combining all the property damage into one specification was a benefit to SrA Tyson because it "limited his punitive exposure." Ans. at 52. Yet the unit of prosecution argument asserted is not a multiplicity or unreasonable multiplication of charges concern where the Government's point might matter. Rather, the focus is on how the Government charged the property damage. The Government controls the charge sheet. *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017). It decided to charge the way it did when controlling case law dictates what the unit of prosecution is for property damage. *Collins*, 36 C.M.R. at 325. If these were distinct instances of property damage, the Government would have charged them that way, as with the phone and the car. Charge Sheet.

Specifically, the Government charged SrA Tyson with three different specifications alleging property damage that MR testified all occurred in the same week. MR asserted the damage to the phone, the car, and the list of personal property all occurred during the week of April 11, 2023. R. at 585; Charge Sheet. This reveals that the Government considered these three instances of property damage distinct. Notably, the Government did *not* split apart the list of personal property that law enforcement took pictures of on April 14, 2023. Pros. Ex. 5. The list of property in the specification matches the photos the Office of Special Investigations (OSI) agent took that day, indicating the Government charged the property damage the way it did because it saw the unit

of prosecution correctly for all those items MR said SrA Tyson injured. *Compare* Pros. Ex. 5 at 17-28 (showing some property damage), and R. at 477-83 (walking the OSI agent through the photos so as to explain them),[4] *with* Charge Sheet at 3 (alleging injury to those same items). When compared to the other property damage specifications and the Government's purported reasoning behind the charging scheme on appeal, the Government's argument about "damaging all of the property on various occasions throughout the charged timeframe" fails.

The issue now is the Government was overly specific in its charging scheme, as with some of the other specifications. When the Government narrows the charging scheme, it still must prove what it charges. *English*, 79 M.J. at 120. Here, it had to prove the destruction of at least ten different specifically listed items occurred in one instance—and then in another instance. The Government failed to prove the "destruction" of many of those specific items, *see, e.g.*, *supra* at footnote 4, and failed to prove such destruction occurred on more than one occasion.

Finally, for factual sufficiency, SrA Tyson incorporates his argument from the other assignment of errors about MR's credibility herein. *See supra* sections 1-5. For all the same reasons already stated, MR was not a credible witness.

WHEREFORE, SrA Tyson requests that this Court set aside the finding of guilty as to Specification 8 of the Charge with prejudice via factual sufficiency review, and set aside the sentence. Alternatively, this Court should only affirm the lesser included offense of "damaging"

[4] Notably, the "icemaker" the Government calls a "cooler" in its brief could not be one of the charged items for two reasons. Ans. at 53. First, it was SrA Tyson's property, not MR's. Pros. Ex. 13. Second, the charged "cooler" was apparently the "hot pink" cooler shown in Prosecution Exhibit 5 on page 11. The Government asked the OSI agent about it, but the agent was unable to explain whether it was in any state of damage. R. at 477. No other testimony about damage to a cooler was provided.

non-military property under Article 109, UCMJ, and narrow the specification to only include items damaged altogether in one instance.

8. SrA Tyson's conviction for threatening MR on divers occasions is legally and factually insufficient.

"When the Government elects to charge an offense alleging the use of specific words, it stands to reason that a charge of 'divers occasions' is legally insufficient unless Appellant repeats those words on two or more occasions." *Ozbirn*, 2020 CCA LEXIS 138, at *20. This is not a complicated concept, though the Government attempts to obscure this clean construction. The Government argues it had to prove SrA Tyson said each phrase separately more than once. Ans. at 56. This is inaccurate. Rather than divers extending to each phrase, divers extends to the conjoined phrases that the Government elected to charge. This makes sense where "'[a]nd,' in grammatical terms, is of course a conjunction—a word whose function is to connect specified items. . . . 'And' . . . means 'along with or together with.'" *Pulsifer v. United States*, 601 U.S. 124, 133 (2024) (internal citations omitted). The Government had to prove SrA Tyson threatened MR on more than one occasion by using *both* phrases in a single instance.

The Government's attempt to distinguish this reasoning from *Ozbirn* is strained. The Government seems to agree with this Court's holding that "divers," when used with a specification's charging language, requires the specific language to be repeated more than once. Ans. at 56. But the Government does not apply that holding to this case. *See* Ans. at 56 (jumping to "further" without any application). The Government then argues that Specification 9 covers two different offenses, i.e., two distinct threats, but ignores its own conclusion about *Ozbirn* that would require the Government to prove that SrA Tyson had to say "specific charged messages, words, to [MR] more than once." Ans. at 56. As with lewd language to a child, threats are "specific words." *Ozbirn*, No. ACM 39556, 2020 CCA LEXIS 138, at *20. The "specific words" charged here are

two phrases connected by "and." Charge Sheet at 3. "Divers" applies to the conjoined phrase, meaning in one instance, SrA Tyson had to threaten MR with both phrases. This is supported by the instructions, to which the Government did not object. *See* R. at 1066-67 (discussing "an act" and "certain language, to wit: 'I'm going to have to kill you' and 'I'm going to blow your brains out'").

The Government cannot point to any evidence to show it proved that SrA Tyson said, on more than one occasion, both phrases to MR in one instance. Ans. at 56-57. But it had to prove just that. It controlled the charge sheet and elected to put two phrases, connected by "and," in this specification. It did not have to make this decision, but because it did, it took the risk that the evidence may not prove the charging scheme. *United States v. Mader*, 81 M.J. 105, 109 (C.A.A.F. 2021). The evidence here did not because no evidence showed the two phrases occurred in the same instance. Br. on Behalf of Appellant at 50.

The Government further contends once SrA Tyson found out about MR's age, the mental and physical abuse escalated. Ans. at 57. But the Government provides no citation for this because it cannot. *Id*. There was no correlation between the discovery about her age and "mental and physical abuse." *Supra* section 4. Furthermore, MR convinced SrA Tyson she did not lie about her age for several months. R. at 642-43. Then, they broke up—though MR disavowed any breakup. Pros. Ex. 16 at 7; Pros. Ex. 17; R. at 792-93. It is the breakup and MR refusing to leave SrA Tyson's home or accept the end of the relationship that correlates to the videos MR captured of SrA Tyson video breaking her things and calling her names. Pros. Exs. 12-14, 16-17, 20; see R. at 582-85 (discussing and transcribing in open court Pros. Ex. 15, a video MR took that the military judge sealed). This clarification reveals and reinforces MR's motive to fabricate the allegations and manipulate the evidence to control SrA Tyson—or exact revenge.

Finally, SrA Tyson incorporates his argument from the other assignment of errors about MR's credibility herein. *See supra* sections 1-5. For all the same reasons already stated, MR was not a credible witness.

WHEREFORE, SrA Tyson requests that this Court set aside the finding of guilty as to Specification 9 of the Charge with prejudice, and set aside the sentence.

9. The trial counsel committed prosecutorial misconduct during the findings argument resulting in material prejudice to SrA Tyson's substantial rights.

SrA Tyson predominately rests on his initial filing for this assignment of error. Only two additional points need to be made.

First, the Government deflects the prosecutorial misconduct by the trial counsel by emphasizing that the defense made similar statements, either in opening or after the trial counsel made his initial argument. *E.g.*, Ans. at 60, 64. Two wrongs do not make a right. The arguments by the trial counsel remain improper regardless of any defense "impropriety." *United States v. Braum*, No. ACM 40434, 2024 CCA LEXIS 419, at *31 (A.F. Ct. Crim. App. Oct. 10, 2024) ("[S]uch assertions by trial counsel were improper, but are not viewed in a vacuum ignoring trial defense counsel's simultaneous impropriety."). Context matters for the closing arguments and the context here was MR was an unbelievable witness who needed to be credited and bolstered at every chance possible for the prosecution to secure a conviction.

One means of crediting MR was to accuse the defense counsel of doing to the members what the Government believed SrA Tyson had been doing to MR: gaslighting. R. at 1131 ("Do not let them continue to do what he has done to her for 2 years.") Here, trial counsel "improperly maligned the defense," and this particular argument by the trial counsel is the epitome of the prosecutorial misconduct alleged. Br. on Behalf of Appellant at 63 ("Under the kindest interpretation, the highest-ranking individual in the room is accusing the defense of 'gaslight]ing]'

MR, and that if the lower ranking panel members believe that theory, then *they are complicit in SrA Tyson's abuse*."). The Government minimizes this particular comment by calling the assertion that the defense counsel were gaslighting the members "potentially inartful." Ans. at 72. It's much more than "potentially inartful" to equate the trial defense team with their client's alleged criminal conduct or to accuse them of "invalidating [the panel members'] reality" and "question their memory, their perception, their intelligence." *See* R. at 893 (defining gaslighting). This Court should not excuse, as the Government does on appeal, the trial counsel's comments toward the defense team. No context can justify this argument.

Second, SrA Tyson requests this Court consider SrA Tyson's arguments in his opening brief and herein on legal and factual sufficiency for why the weight of the evidence supporting the convictions was weak. MR was the only source of evidence and thus any "corroborating" evidence that the Government relies on, Ans. at 80-82, is of little value. *Supra* sections 1-8; *see generally* Br. on Behalf of Appellant (explaining in each assignment of error various reasons why MR is not credible). All the "corroborating" evidence the Government musters requires MR to be credible. Ans. at 80-82. As explained in at least eight of the eleven assignments of error and herein, MR was not a credible witness and the Government's evidence in this case was overall weak.

WHEREFORE, this Court should set aside the findings of guilty and the sentence, and remand the case for a new hearing.

10. Omission of the fourteen files contained in Preliminary Hearing Exhibit 16 is a substantial omission that requires remand to correct the record.

As this Court has repeatedly held, attachments to the appellate record do not complete the record. *See, e.g.*, *United States v. Welsh*, No. ACM S32719, 2022 CCA LEXIS 631, at *2 (A.F. Ct. Crim. App. Oct. 26, 2022) ("We acknowledge the motion to attach was granted, but we do not agree that this cures the defect without the exhibit actually being incorporated into the [record of

trial]."); *United States v. Garcia-Arcos*, No. ACM 40009, 2022 CCA LEXIS 339, at *6 (A.F. Ct. Crim. App. Jun. 9, 2022) ("[W]e do not consider the attachments to the appellate record as a means to complete the record; we assume our granting both motions does not change the fact that the record, as certified and submitted to the court, is incomplete."); *United States v. Mardis*, No. ACM 39980, 2022 CCA LEXIS 10, at *7 (A.F. Ct. Crim. App. Jan. 6, 2022) ("[W]e considered the attachments to trial counsel's declaration to determine whether the omission of the exhibits from the record of trial was substantial . . . we did not consider the exhibits as a means to complete the record."). Indeed, in both *Welsh* and *Mardis*, this Court remanded the record for correction after the Government attached missing materials to the appellate records because those attachments did not cure the defects and incorporate the materials into the records. 2022 CCA LEXIS 631, at *2-3; 2022 CCA LEXIS 10, at *4, 8-9.

Nevertheless, the Government here attempts to cure what is ultimately a record of trial omission by attaching missing materials to the appellate record—from a person with no personal knowledge of the case. U.S. Motion to Attach Documents, Oct. 28, 2025. By moving to attach four video files, the Government reveals two things. First, Preliminary Hearing Exhibit (PHO) Exhibit 16 is missing. Thus, the record is incomplete. R.C.M. 1112(f)(1)(A). Second, the Government was unable, or unwilling, to locate anyone with personal knowledge of this case to attest what was in PHO Exhibit 16. Decl. of VP at para. 4.c, 5.a-d. Instead, there remains a substantial omission in the record because, despite the Government's attempt to explain what PHO Exhibit 16 was and attach four video files to the record, Technical Sergeant VP has no personal knowledge about what was admitted. *Id*. She explains she "matched" the files by looking at the OSI digital case file, the Report of Investigation, the Office of Special Trial Counsel case file, and the office's case

management system. *Id*. Notably, a copy of PHO Exhibit 16 is not listed as something she looked at, nor does it seem she had any personal knowledge of the exhibit herself.

The Government's attempted solution highlights the very reason remand is necessary. Remand to the military judge gives the parties with personal knowledge an opportunity to check the purported exhibit. R.C.M. 1112(d)(2) ("The military judge shall give notice of the proposed correction to all parties and *permit them to examine and respond to the proposed correction*." (emphasis added)). If there was more on the record indicating what these fourteen video and audio files were, the Government's solution of comparing what else is in the record may have been more appropriate. But the fact remains that no one described this exhibit with any specificity. The Government's attestation through an individual with no personal knowledge of the case is insufficient to correct the record here.

Finally, the Government asserts that SrA Tyson "should not reap a benefit from demanding an unnecessary remand and also benefit from the proposed unnecessary remand." Ans. at 90. First, to be sure, because the record is incomplete SrA Tyson has only "demanded" what the law requires. R.C.M. 1112. Second, the required remand is the Government's fault, not SrA Tyson's. The Government ostensibly checked the record and failed to identify the corrupted files before forwarding the record to this Court. U.S. v. Senior Airman Jonathon V. Tyson, Suspense: 23 May 2024 (Apr. 25, 2024). Third, this Court is authorized to provide relief, not just for post-trial delay, which the Government narrows this issue to, but also for errors occurring after entry of judgment. Br. on Behalf of Appellant at Issues IX and X. The post-trial delay and record of trial error issues inform each other, but each could be an independent basis for relief under Article 66(d)(2), UCMJ. *See* 10 U.S.C. § 866(d)(2) (indicating an error in the processing of the court-martial that occurs after entry of judgment can qualify for relief); *United States v. Valentin-Andino*, No. ACM 40185

(f rev), 2024 CCA LEXIS 223, at *17 (A.F. Ct. Crim. App. Jun. 7, 2024), *aff'd* 83 M.J. 361 (C.A.A.F. 2025) (providing relief for systemic and institutional record of trial errors). This Court is permitted to provide relief for the missing exhibit, whether it remands or not. If the omission is substantial, remand is required. If the omission is not substantial and no remand occurs, this error can and should still result in relief under Article 66(d)(2), UCMJ, because the omission is an error that occurred after the entry of judgment and warrants relief due to systemic record completeness errors. *See* Br. on Behalf of Appellant at 78-79 (listing some of the recent cases with record of trial errors).

WHEREFORE, SrA Tyson requests that this Court remand his record of trial for correction under R.C.M. 1112(d) or, in the alternative, provide appropriate relief under Article 66(d)(2), UCMJ, for another example of systemic record completeness.

11. The 172-day delay from sentencing to docketing of this case with this Court was unreasonable, warranting appropriate relief.

The Government argues the *Moreno*[5] factors for several pages, Ans. at 94-98, addressing an argument SrA Tyson never raised or asserted. Ans. at 94 (noting the assignments of error brief does not discuss the *Barker*[6] factors). Rather, SrA Tyson's argument relies only on Article 66(d)(2), UCMJ, which does not require a prejudice analysis. Prejudice could affect what relief would be "appropriate," but prejudice is not required for this Court to provide any relief under Article 66(d)(2), UCMJ. Notably, this Court did not find prejudice in *Valentin-Andino* when it granted relief. No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *15-16. The CAAF affirmed this Court's decision and did not question this Court's award of appropriate relief under such circumstances. *Valentin-Andino*, 85 M.J. at 367.

[5] *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006).
[6] *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

The plain text of Article 66(d)(2), UCMJ, demonstrates that a prejudice analysis is not required in assessing whether appropriate relief should be awarded. Reading in a requirement for prejudice would contravene Congress's express language and requirements. Article 66(d)(2), UCMJ; *Valentin-Andino*, No. 24-0208, 2025 CAAF LEXIS 248, at *9, *11. Congress is presumed to know what the law is when it enacts legislation. *Miles v. Apex Marine Corp*., 498 U.S. 19, 32 (1990) (citing *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-97 (1979)). Had it required prejudice as a predicate to awarding appropriate relief in Article 66(d)(2), UCMJ, it would have said so. Furthermore, "Article 66(d)(2) is a specific provision incorporated to govern errors of excessive delay in post-trial processing," and it should not be undermined "by grafting onto it" other requirements not specifically required by the text. *Valentin-Andino*, No. 24-0208, 2025 CAAF LEXIS 248, at *10 n.4. An appellant is only required to demonstrate error after the entry of judgment. Article 66(d)(2), UCMJ. Thereafter, this Court may provide appropriate relief. *Id*.

SrA Tyson's case is another example of institutional neglect on record completeness. The two bases for relief under Article 66(d)(2), UCMJ, "excessive delay" and post-entry-of-judgment "error," appear here together because excessive delay was caused by a record of trial error. Furthermore, while prejudice is not required, some of the harm SrA Tyson has experienced while pending appeal can be considered for what kind of relief is appropriate. *See* Br. on Behalf of Appellant at 80 (referencing the harm the barment has caused SrA Tyson). This Court should grant relief because of the excessive delay, the record of trial error causing delay, the missing PHO Exhibit 16, or a combination of the above. *See supra* section 10.

WHEREFORE, SrA Tyson respectfully requests that this Court disaffirm the bad-conduct discharge, or, in the alternative, the reduction to the grade of E-1.

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

SrA Tyson rests on his initial filing for this assignment of error.

WHEREFORE, SrA Tyson requests this Court set aside the findings and the sentence, while authorizing a rehearing at which SrA Tyson may be found guilty only upon a unanimous vote of the members.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 9 November 2025.

Respectfully submitted,

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