IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **JAMES P. BAUMGARTNER,** United States Air Force *Appellant*	)	No. ACM 40413 31 March 2023

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **8 June 2023**. The record of trial was docketed with this Court on 8 February 2023. From the date of docketing to the present date, 51 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]

KASEY W. HAWKINS, Maj, 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
Email: kasey.hawkins@us.af.mil

GRANTED
4 APR 2023

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 31 March 2023.

Respectfully submitted,

KASEY W. HAWKINS, Maj, 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
Email: kasey.hawkins@us.af.mil

4 April 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) JAMES P. BAUMGARTNER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40413 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]

OLIVIA B. HOFF, Capt, 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 4 April 2023.

OLIVIA B. HOFF, Capt, 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	)	**MOTION TO EXAMINE**
Appellee	)	**SEALED MATERIALS**
	)	
v.	)	Before Panel No. 1
	)	
Technical Sergeant (E-6)	)	No. ACM 40413
JAMES P. BAUMGARTNER,	)	
United States Air Force	)	28 April 2023
Appellant	)	

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 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves to examine the following sealed materials: Appellate Exhibits (App. Ex.) IX, X, XI, XII, XIII, XVI, and XVII. App. Ex. IX – XI are a Defense Motion to Admit evidence under Mil. R. Evid. 412, and the Government and victim's responses to that motion. App. Ex. XII and XIII are a Defense Motion to Compel a Forensic Psychologist and the Government response to that motion. App. Ex. XVI and XVII are a Defense Motion for a Bill of Particulars and the Government's response to that motion. These motions were reviewed by counsel for the government, defense, and victim and ordered sealed by the military judge. R. at 20-22, 24-25; App. Ex. XLI.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these materials is reasonably necessary to appellate counsel's responsibilities, undersigned counsel asserts that review of the referenced exhibits is necessary to conduct a complete review of the record of trial and be in a position to advocate competently on behalf of Appellant. Undersigned counsel acknowledges that trial defense counsel withdrew the requests for relief under App. Ex. IX and XII. R. at 22. However, review of these motions and the corresponding responses is necessary to ensure Appellant received effective representation. The

military judge denied the Defense Motion for a Bill of Particulars, thus review of that motion and the Government's response is necessary to ensure the military judge did not err. App. Ex. XLIII.

Moreover, a review of the entire record of trial is necessary because this Court is empowered by Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, to grant relief based on a review and analysis of "the entire record." To determine whether the record of trial yields grounds for this Court to grant relief under Article 66, UCMJ, 10 U.S.C. § 866, appellate defense counsel must, therefore, examine "the entire record."

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

United States v. May, 47 M.J. 478, 481, (C.A.A.F. 1998). The sealed materials referenced above must be reviewed to ensure undersigned counsel provides "competent appellate representation." *Id*. Accordingly, examination of these exhibits is reasonably necessary since undersigned counsel cannot fulfill her duty of representation under Article 70, UCMJ, 10 U.S.C. § 870, without first reviewing the complete record of trial.

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

Respectfully submitted,

KASEY W. HAWKINS, Maj, 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
Email: kasey.hawkins@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 28 April 2023.

KASEY W. HAWKINS, Maj, 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
Email: kasey.hawkins@us.af.mil

1 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) JAMES P. BAUMGARTNER, USAF *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIAL ACM 40413 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 responds to Appellant's Motion to Examine Sealed Material. The United States does not object to Appellant's counsel reviewing the materials listed in Appellant's motion –which appear to have been available to all parties at trial – so long as the United States can also review the sealed portions of the record as necessary to respond to any assignment of error that refers to the sealed materials. The United States respectfully requests that any order issued by this Court also allow counsel for the United States to view the sealed materials.

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

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
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 1 May 2023.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40413**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
James P. BAUMGARTNER	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 28 April 2023, Appellant's counsel submitted a Motion to Examine Sealed Materials, specifically, Appellate Exhibits IX–XIII, XVI, and XVII.

The motion states the materials were reviewed by counsel at trial and that examination of these sealed materials is reasonably necessary to fulfill appellate counsel's responsibilities. The Government does not oppose the motion, as long as the materials were viewed by both counsel at trial and Government counsel can also examine the sealed materials.

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities." Rule for Courts-Martial 1113(b)(3)(B)(i), *Manual for Courts-Martial*, *United States* (2019 ed.).

The court has considered Appellant's motion, the Government's response, case law, and this court's Rules of Practice and Procedure. The court has reviewed the requested material. The court also finds that appellate defense counsel has made a colorable showing that review of the material is reasonably necessary to a proper fulfillment of appellate defense counsel's responsibilities.

Accordingly, it is by the court on this 2d day of May, 2023,

ORDERED:

Appellant's Motion to Examine Sealed Materials is **GRANTED.** Appellate defense counsel and appellate government counsel are authorized to examine **Appellate Exhibits IX–XIII, XVI, and XVII**, subject to the following conditions:

To examine these materials, counsel will coordinate with the court.

No counsel will photocopy, photograph, or otherwise reproduce this material and will not disclose or make available its contents to any other individual without this court's prior written authorization.

FOR THE COURT

[redacted]

FLEMING E. KEEFE, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **JAMES P. BAUMGARTNER,** United States Air Force *Appellant*	)	No. ACM 40413 1 June 2023

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 Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **8 July 2023**. The record of trial was docketed with this Court on 8 February 2023. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

From 26-29 September 2022, Appellant was tried by a general court-martial at Schriever Space Force Base, Colorado. Contrary to his pleas, the panel of officer members found Appellant guilty of one charge with two specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b; and one charge with three specifications of assault consummated by a battery upon a child under sixteen years in violation of Article 128, UCMJ, § 928.[1] R. at 61, 691; Record of Trial (ROT) Vol. 1, Entry of Judgment

GRANTED
5 JUN 2023

[1] After the members' guilty finding, as relief for an unreasonable multiplication of charges, the military judge conditionally set aside and conditionally dismissed Specification 1 of Charge II (assault consummated by a battery upon a child under sixteen years). R. at 796, EOJ. The set aside and dismissal of Specification 1 of Charge II was conditioned upon the findings of guilty to Specification 1 of Charge I (sexual abuse of a child) surviving completion of appellate review. *Id.* Also as a relief for unreasonable multiplication of charges, the military judge consolidated

(EOJ), dated 4 Nov. 2022. The members sentenced Appellant to a reprimand, reduction in grade to E-1, confinement for three years, and a dishonorable discharge. R. at 792; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, Convening Authority Decision on Action – *United States v. TSgt James P. Baumgartner*, dated 12 Oct. 2022.

The record of trial is seven volumes consisting of six prosecution exhibits, one court exhibit, 17 defense exhibits, and 44 appellate exhibits; the transcript is 797 pages. Appellant is currently confined.

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

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

Respectfully submitted,

[redacted]

KASEY W. HAWKINS, Maj, 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
Email: kasey.hawkins@us.af.mil

Specification 2 and Specification 3 of Charge II (assault consummated by a battery upon a child under sixteen years) into a single specification. *Id.*

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 1 June 2023.

Respectfully submitted,

KASEY W. HAWKINS, Maj, 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
Email: kasey.hawkins@us.af.mil

2 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) JAMES P. BAUMGARTNER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40413 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 2 June 2023.

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 *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **JAMES P. BAUMGARTNER,** United States Air Force *Appellant*	)	No. ACM 40413 29 June 2023

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 Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignment of Error (AOE). Appellant withdraws his previous motion for enlargement of time, dated 29 June 2023, and replaces it with this motion to correct a scrivener's error in the date the enlargement of time will end. Appellant requests an enlargement for a period of 30 days, which will end on **7 August 2023**. The record of trial was docketed with this Court on 8 February 2023. From the date of docketing to the present date, 141 days have elapsed. On the date requested, 180 days will have elapsed.

From 26-29 September 2022, Appellant was tried by a general court-martial at Schriever Space Force Base, Colorado. Contrary to his pleas, the panel of officer members found Appellant guilty of one charge with two specifications of sexual abuse of a child in violation of Article 120b, Code of Military Justice (UCMJ), 10 U.S.C. § 920b; and one charge with three ations of assault consummated by a battery upon a child under sixteen years in violation f Article 128, UCMJ, § 928.[1] R. at 61, 691; Record of Trial (ROT) Vol. 1, Entry of Judgment

GRANTED
30 JUN 2023

[1] After the members' guilty finding, as relief for an unreasonable multiplication of charges, the military judge conditionally set aside and conditionally dismissed Specification 1 of Charge II

(EOJ), dated 4 Nov. 2022. The members sentenced Appellant to a reprimand, reduction in grade to E-1, confinement for three years, and a dishonorable discharge. R. at 792; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, Convening Authority Decision on Action – *United States v. TSgt James P. Baumgartner*, dated 12 Oct. 2022.

The record of trial is seven volumes consisting of six prosecution exhibits, one court exhibit, 17 defense exhibits, and 44 appellate exhibits; the transcript is 797 pages. Appellant is currently confined.

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

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

Respectfully submitted,

[redacted]
KASEY W. HAWKINS, Maj, 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
Email: kasey.hawkins@us.af.mil

(assault consummated by a battery upon a child under sixteen years). R. at 796, EOJ. The set aside and dismissal of Specification 1 of Charge II was conditioned upon the findings of guilty to Specification 1 of Charge I (sexual abuse of a child) surviving completion of appellate review. *Id.* Also as a relief for unreasonable multiplication of charges, the military judge consolidated Specification 2 and Specification 3 of Charge II (assault consummated by a battery upon a child under sixteen years) into a single specification. *Id.*

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 29 June 2023.

Respectfully submitted,

KASEY W. HAWKINS, Maj, 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
Email: kasey.hawkins@us.af.mil

29 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) JAMES P. BAUMGARTNER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40413 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]

OLIVIA B. HOFF, Capt, 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 29 June 2023.

OLIVIA B. HOFF, Capt, 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,* v. Technical Sergeant (E-6) **JAMES P. BAUMGARTNER** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)** Before Panel No. 1 No. ACM 40413 31 July 2023

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

Pursuant to Rule 23.3(m)(3) and 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **6 September 2023**. The record of trial was docketed with this Court on 8 February 2023. From the date of docketing to the present date, 173 days have elapsed. On the date requested, 210 days will have elapsed.

From 26-29 September 2022, Appellant was tried by a general court-martial at Schriever Space Force Base, Colorado. Contrary to his pleas, the panel of officer members found Appellant guilty of one charge with two specifications of sexual abuse of a child in violation of Article niform Code of Military Justice (UCMJ), 10 U.S.C. § 920b; and one charge with three ations of assault consummated by a battery upon a child under sixteen years in violation of Article 128, UCMJ, § 928.[1] R. at 61, 691; Record of Trial (ROT) Vol. 1, Entry of Judgment

GRANTED
2 AUG 2023

[1] After the members' guilty finding, as relief for an unreasonable multiplication of charges, the military judge conditionally set aside and conditionally dismissed Specification 1 of Charge II (assault consummated by a battery upon a child under sixteen years). R. at 796, EOJ. The set aside and dismissal of Specification 1 of Charge II was conditioned upon the findings of guilty to

(EOJ), dated Nov. 2022. The members sentenced Appellant to a reprimand, reduction in grade to E-1, confinement for three years, and a dishonorable discharge. R. at 792; EOJ. The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, Convening Authority Decision on Action – *United States v. TSgt James P. Baumgartner*, dated 12 Oct. 2022.

The record of trial is seven volumes consisting of six prosecution exhibits, one court exhibit, 17 defense exhibits, and 44 appellate exhibits; the transcript is 797 pages. Appellant is currently confined.

Since moving for a third enlargement of time, the previously assigned appellate defense counsel has transitioned out of the Appellate Defense Division and the undersigned counsel was assigned to this case on 17 July 2023. The undersigned counsel's first full day in the office was today, 31 July 2023. Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information.

Counsel is currently assigned twelve cases; eight cases are pending initial AOEs before this Court and one case is pending a grant brief before the United States Court of Appeals for the Armed Forces (CAAF). Three cases have priority over the present case:

1. *United States v. Leipart*, USCA Dkt. No. 23-0163/AF – The CAAF granted review on two issues on 20 July 2023. Appellant's brief and the joint appendix are due in accordance with the CAAF's order on 21 August 2023. Undersigned counsel did not represent this Appellant

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Specification 1 of Charge I (sexual abuse of a child) surviving completion of appellate review. *Id*. Also as a relief for unreasonable multiplication of charges, the military judge consolidated Specification 2 and Specification 3 of Charge II (assault consummated by a battery upon a child under sixteen years) into a single specification. *Id*.

before this Court or for his Petition to the CAAF and is familiarizing herself with the record and granted issues.

2. *United States v. Trueman*, ACM 40404 – The trial transcript is 134 pages long and the record of trial consists of two volumes containing three prosecution exhibits, zero defense exhibits, two appellate exhibits, and one court exhibit. Appellant is not currently in confinement. Counsel has not yet completed her review of the record of trial.

3. *United States v. Bak*, ACM 40405 – The trial transcript is 95 pages long and the record of trial is comprised of four volumes containing seven prosecution exhibits, two defense exhibits, nine appellate exhibits, and two court exhibits. Appellant is currently confined. Counsel has not yet completed her review of the record of trial.

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

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

Respectfully submitted,

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
Email: samantha.castanien.1@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 31 July 2023.

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
Email: samantha.castanien.1@us.af.mil

1 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) JAMES P. BAUMGARTNER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40413 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 1 August 2023.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40413**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
James P. BAUMGARTNER	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 8th day of August, 2023,

ORDERED:

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

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 3
Technical Sergeant (E-6), **JAMES P. BAUMGARTNER,** United States Air Force, *Appellant*.	)	No. ACM 40413 28 August 2023

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

Pursuant to Rule 23.3(m)(3) and 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **6 October 2023**. The record of trial was docketed with this Court on 8 February 2023. From the date of docketing to the present date, 201 days have elapsed. On the date requested, 240 days will have elapsed.

From 26-29 September 2022, Appellant was tried by a general court-martial at Schriever Space Force Base, Colorado. Contrary to his pleas, the panel of officer members found Appellant guilty of one charge and two specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b; and one charge and three specifications of assault consummated by a battery upon a child under sixteen years in violation of Article 128, UCMJ, § 928.[1] R. at 61, 92, 691. The members sentenced Appellant to a

[1] After the members' guilty finding, as relief for an unreasonable multiplication of charges, the military judge set aside and dismissed one of the assaults consummated by a battery, conditioned upon one of the sexual abuse charges surviving appellate review. R. at 796. The military judge also consolidated the remaining assaults consummated by a battery into a single specification. *Id.*

reprimand, reduction in grade to E-1, confinement for three years, and a dishonorable discharge. R. at 792. The convening authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action – United States v. TSgt James P. Baumgartner*, dated 12 October 2022.

The record of trial is seven volumes consisting of six Prosecution Exhibits, 17 Defense Exhibits, 44 Appellate Exhibits, and one court exhibit. The transcript is 797 pages. Appellant is currently confined.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information. Counsel is currently assigned fifteen cases; nine cases are pending initial AOEs before this Court. Two cases have priority over the present case:

1. *United States v. Trueman*, ACM 40404 – The trial transcript is 134 pages long and the record of trial consists of two volumes containing three Prosecution Exhibits, zero Defense Exhibits, two Appellate Exhibits, and one Court Exhibit. Appellant is not currently in confinement. Counsel has not yet completed her review of the record of trial.

2. *United States v. Bak*, ACM 40405 – The trial transcript is 95 pages long and the record of trial is comprised of four volumes containing seven Prosecution Exhibits, two Defense Exhibits, nine Appellate Exhibits, and two Court Exhibits. Appellant is currently confined. Counsel has not yet completed her review of the record of trial.

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

Appellant was advised of his right to a timely appeal. 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.

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

Respectfully submitted,

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
Email: samantha.castanien.1@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 28 August 2023.

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
Email: samantha.castanien.1@us.af.mil

30 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) JAMES P. BAUMGARTNER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40413 Panel No. 3

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

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

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(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 30 August 2023.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40413**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
James P. BAUMGARTNER	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 28 August 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 31st day of August, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **6 October 2023**.

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

FOR THE COURT

[redacted]

FLEMING E. KEEFE, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR WITHDRAWAL OF APPELLATE DEFENSE COUNSEL**
v.	)	Before Panel No. 3
Technical Sergeant (E-6), **JAMES P. BAUMGARTNER,** United States Air Force, *Appellant.*	)	No. ACM 40413
	)	28 August 2023

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

Pursuant to Rules 12(b), 12.4, and 23.3(h) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel respectfully requests to withdraw as counsel in the above-captioned case. The Judge Advocate General has reassigned undersigned counsel from the Air Force Appellate Defense Division to the Air Force Military Justice Law and Policy Division. Accordingly, undersigned counsel is no longer detailed under Article 70, Uniform Code of Military Justice (UCMJ) to represent Appellant.

Captain Samantha Castanien has been detailed substitute counsel in undersigned counsel's stead and made her notice of appearance on 31 July 2023. Counsel have completed a thorough turnover of the record.

Appellant has been advised of this motion to withdraw as counsel and consents to undersigned counsel's withdrawal. A copy of this motion will be delivered to Appellant following its filing.

GRANTED
8 SEP 2023

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

Respectfully submitted,

[redacted]

KASEY W. HAWKINS, Maj, USAF
Chief, Military Justice Policy
Military Justice Law & Policy Division (JAJM)
1500 West Perimeter Road, Suite 1130
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4828
Email: kasey.hawkins@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 28 August 2023.

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604
(240) 612-4770
samantha.castanien.1@us.af.mil

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 3
Technical Sergeant (E-6), **JAMES P. BAUMGARTNER,** United States Air Force, *Appellant.*	)	No. ACM 40413 27 September 2023

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

Pursuant to Rule 23.3(m)(3) and 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **5 November 2023**. The record of trial was docketed with this Court on 8 February 2023. From the date of docketing to the present date, 231 days have elapsed. On the date requested, 270 days will have elapsed.

From 26-29 September 2022, Appellant was tried by a general court-martial at Schriever Space Force Base, Colorado. Contrary to his pleas, the panel of officer members found Appellant guilty of one charge and two specifications of sexual abuse of a child in violation of Article [illegible]orm Code of Military Justice (UCMJ), 10 U.S.C. § 920b; and one charge and three [illegible]ons of assault consummated by a battery upon a child under sixteen years in violation of Article 128, UCMJ, 10 U.SC. § 928.[1] R. at 61, 92, 691. The members sentenced Appellant to

GRANTED
5 Oct 2023

[1] After the members' guilty finding, as relief for an unreasonable multiplication of charges, the military judge set aside and dismissed one of the assaults consummated by a battery, conditioned upon one of the sexual abuse charges surviving appellate review. R. at 796. The military judge also consolidated the remaining assaults consummated by a battery into a single specification. *Id.*

a reprimand, reduction in grade to E-1, confinement for three years, and a dishonorable discharge. R. at 792. The convening authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action – United States v. TSgt James P. Baumgartner*, dated 12 October 2022.

The record of trial is seven volumes consisting of six Prosecution Exhibits, 17 Defense Exhibits, 44 Appellate Exhibits, and one Court Exhibit. The transcript is 797 pages. Appellant is 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 fourteen cases; eight cases are pending initial AOEs before this Court and two cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). On 25 September 2023, counsel filed the Real Party in Interest's brief for *In re HVZ*, USCA Dkt. No. 23-0250/AF, at the CAAF. To date, two cases have priority over the present case:

1. *United States v. Leipart*, USCA Dkt. No. 23-0163/AF – The Government filed its Answer Brief on 20 September 2023. On 21 September 2023, the CAAF granted Appellant's motion to extend time to file the Reply Brief, which is now due on 13 October 2023. Oral argument is anticipated to occur by the end of the year.

2. *United States v. Bak*, ACM 40405 – The trial transcript is 95 pages long and the record of trial is comprised of four volumes containing seven Prosecution Exhibits, two Defense Exhibits, nine Appellate Exhibits, and two Court Exhibits. Appellant is currently confined. Counsel has completed her review of the sealed materials and is working to complete her review of the rest of the record.

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

Appellant was advised of his right to a timely appeal. 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.

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

Respectfully submitted,

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
Email: samantha.castanien.1@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 27 September 2023.

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
Email: samantha.castanien.1@us.af.mil

28 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) JAMES P. BAUMGARTNER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40413 Panel No. 3

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

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

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(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 28 September 2023.

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, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	
	)	Before Panel No. 3
Technical Sergeant (E-6), **JAMES P. BAUMGARTNER,** United States Air Force, *Appellant.*	)	No. ACM 40413
	)	23 October 2023

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 Honorable 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 **5 December 2023**. The record of trial was docketed with this Court on 8 February 2023. From the date of docketing to the present date, 257 days have elapsed. On the date requested, 300 days will have elapsed.

From 26-29 September 2022, Appellant was tried by a general court-martial at Schriever Space Force Base, Colorado. Contrary to his pleas, the panel of officer members found Appellant guilty of one charge and two specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b; and one charge and two specifications of assault consummated by a battery upon a child under sixteen years in violation of Article 128, UCMJ, 10 U.SC. § 928.[1] R. at 61, 92, 691. The members sentenced

GRANTED
25 Oct 2023

[1] After the members' guilty finding, as relief for an unreasonable multiplication of charges, the military judge set aside and dismissed one of the assaults consummated by a battery, conditioned upon one of the sexual abuse charges surviving appellate review. R. at 796. The military judge also consolidated the remaining assaults consummated by a battery into a single specification. *Id.*

Appellant to a reprimand, reduction in grade to E-1, confinement for three years, and a dishonorable discharge. R. at 792. The convening authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action – United States v. TSgt James P. Baumgartner*, dated 12 October 2022.

The record of trial is seven volumes consisting of six Prosecution Exhibits, 17 Defense Exhibits, 44 Appellate Exhibits, and one Court Exhibit. The transcript is 797 pages. Appellant is currently confined. Counsel has completed her review of the transcript, but has not yet completed her review of the remaining parts of Appellant's record.

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 thirteen cases; nine cases are pending initial AOEs before this Court and three cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). To date, three cases have priority over the present case:

1. *United States v. Wells*, USCA Dkt. No. 23-0219/AF – On 20 October 2023, the CAAF ordered briefing on one granted issue. Appellant's brief is currently due 20 November 2023, but on 23 October 2023, undersigned counsel requested an extension of time until 15 December 2023 due to trainings and pre-scheduled leave. Specifically, appellate defense counsel has two upcoming appellate advocacy trainings: (1) *Appellate Advocacy Training*, scheduled from 25-27 October 2023 at University of North Carolina, Chapel Hill; and (2) *Appellate Judges Education Institute Summit*, scheduled from 2-5 November 2023 in Washington D.C. She also has leave scheduled on the upcoming federal holidays: 10-13 November and 23-26 November.

2. *United States v. Bak*, ACM 40405 – The trial transcript is 95 pages long and the record of trial is comprised of four volumes containing seven Prosecution Exhibits, two Defense

Exhibits, nine Appellate Exhibits, and two Court Exhibits. Appellant is currently confined. Counsel completed her review of the record, but, on 5 October 2023, filed a motion for leave to file motion for remand due to several errors and omitted attachments in the record of trial. The Government responded on 16 October 2023. This motion is pending resolution.

3. *United States v. Leipart*, USCA Dkt. No. 23-0163/AF – Undersigned counsel, while working on the cases listed above and Appellant's case, is preparing for oral argument in this case, which is anticipated to occur by the end of the year. Once a date for argument is set, this case will take priority over Appellant's.

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

Appellant was advised of his right to a timely appeal. 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.

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

Respectfully submitted,

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
Email: samantha.castanien.1@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 23 October 2023.

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
Email: samantha.castanien.1@us.af.mil

24 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) JAMES P. BAUMGARTNER, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40413 Panel No. 3

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly 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.

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 October 2023.

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, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	
	)	Before Panel No. 3
Technical Sergeant (E-6), **JAMES P. BAUMGARTNER,** United States Air Force, *Appellant*.	)	No. ACM 40413
	)	27 November 2023

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 Honorable 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 **4 January 2024**. The record of trial was docketed with this Court on 8 February 2023. From the date of docketing to the present date, 292 days have elapsed. On the date requested, 330 days will have elapsed.

From 26-29 September 2022, Appellant was tried by a general court-martial at Schriever Space Force Base, Colorado. Contrary to his pleas, the panel of officer members found Appellant guilty of one charge and two specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b; and one charge and three specifications of assault consummated by a battery upon a child under sixteen years in violation of Article 128, UCMJ, 10 U.SC. § 928.[1] R. at 61, 92, 691. The members sentenced

[1] After the members' guilty finding, as relief for an unreasonable multiplication of charges, the military judge set aside and dismissed one of the assaults consummated by a battery, conditioned upon one of the sexual abuse charges surviving appellate review. R. at 796. The military judge also consolidated the remaining assaults consummated by a battery into a single specification. *Id.*

Appellant to a reprimand, reduction in grade to E-1, confinement for three years, and a dishonorable discharge. R. at 792. The convening authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action – United States v. TSgt James P. Baumgartner*, dated 12 October 2022.

The record of trial is seven volumes consisting of six Prosecution Exhibits, 17 Defense Exhibits, 44 Appellate Exhibits, and one Court Exhibit. The transcript is 797 pages. Appellant is 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 fifteen cases; twelve cases are pending AOEs before this Court and three cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). Three cases before the CAAF and one AOE before this Court have priority over the present case:

1. *United States v. Wells*, USCA Dkt. No. 23-0219/AF – On 20 October 2023, the CAAF granted review of one issue. Counsel is currently writing the Grant Brief and compiling the Joint Appendix, due 15 December 2023.

2. *In re HVZ*, USCA Dkt. No 23-0250/AF – Oral argument is scheduled for 5 December 2023. While working on *United States v. Wells*, counsel will be preparing to argue on behalf of the real party in interest.

3. *United States v. Leipart*, USCA Dkt. No. 23-0163/AF – Oral argument is scheduled for 16 January 2023. While working on the case listed below, counsel will be preparing for oral argument in this case.

4. *United States v. Bak*, ACM 40405 – The trial transcript is 95 pages long and the record of trial is comprised of four volumes containing seven Prosecution Exhibits, two Defense

Exhibits, nine Appellate Exhibits, and two Court Exhibits. Appellant is currently confined. Counsel is preparing to write the AOE, which she intends to do while preparing for *United States v. Leipart.*

Since Appellant's last request for an enlargement of time, undersigned counsel began outlining an issue for the AOE, as she brought Appellant's case to the University of North Carolina (UNC) Appellate Advocacy Training in Chapel Hill, NC, from 25-27 October 2023. Counsel is still working through the remaining portions of the record and other possible issues.

Upon returning from UNC training, counsel immediately began working on *United States v. Wells*, which she took over from a previous appellate defense counsel. She reviewed the 1093-page transcript, researched the granted issue, and began drafting the Grant Brief. Due to her unfamiliarity with the record and need to review it before writing the brief, counsel was unable to attend the Appellate Judges Education Institute 2023 Summit from 2-5 November 2023; she worked on *United States v. Wells* instead. Over the last month, counsel has also assisted with five different moot court arguments for five different cases. She assisted by reading the briefs, doing legal research to ask questions, and participating in a mock oral argument for each case. To forewarn the Court, counsel will be preparing to assist with two more moots over the next month, in addition to her own, and she also has leave scheduled from 18-22 December 2023.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete the AOE. Accordingly, an enlargement of time is necessary to fully review Appellant's case and advise Appellant regarding potential issues.

Appellant was advised of his right to a timely appeal. 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.

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

Respectfully submitted,

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
Email: samantha.castanien.1@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 27 November 2023.

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
Email: samantha.castanien.1@us.af.mil

28 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) JAMES P. BAUMGARTNER, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40413 Panel No. 3

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly 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 7 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(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 28 November 2023.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40413**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
James P. BAUMGARTNER	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 27 November 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 29th day of November, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than **4 January 2024**.

Appellant's counsel is advised that given the number of enlargements granted thus far, the court will continue to closely examine any further requests for an enlargement of time.

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 Panel No. 3
Technical Sergeant (E-6), **JAMES P. BAUMGARTNER,** United States Air Force, *Appellant.*	)	No. ACM 40413
	)	27 December 2023

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 Honorable 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 **3 February 2024**. The record of trial was docketed with this Court on 8 February 2023. From the date of docketing to the present date, 322 days have elapsed. On the date requested, 360 days will have elapsed.

From 26-29 September 2022, Appellant was tried by a general court-martial at Schriever Space Force Base, Colorado. Contrary to his pleas, the panel of officer members found Appellant guilty of one charge and two specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b; and one charge and two specifications of assault consummated by a battery upon a child under sixteen years in violation of Article 128, UCMJ, 10 U.SC. § 928.[1] R. at 61, 92, 691. The members sentenced

GRANTED
28 DEC 2023

[1] After the members' guilty finding, as relief for an unreasonable multiplication of charges, the military judge set aside and dismissed one of the assaults consummated by a battery, conditioned upon one of the sexual abuse charges surviving appellate review. R. at 796. The military judge also consolidated the remaining assaults consummated by a battery into a single specification. *Id.*

Appellant to a reprimand, reduction in grade to E-1, confinement for three years, and a dishonorable discharge. R. at 792. The convening authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action – United States v. TSgt James P. Baumgartner*, dated 12 October 2022.

The record of trial is seven volumes consisting of six Prosecution Exhibits, 17 Defense Exhibits, 44 Appellate Exhibits, and one Court Exhibit. The transcript is 797 pages. Appellant is 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 fifteen cases; twelve cases are pending AOEs before this Court and three cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). Two cases before the CAAF and, depending on timing, one AOE to be filed with this Court by civilian appellate defense counsel have priority over the present case:

1. *United States v. Leipart*, USCA Dkt. No. 23-0163/AF – Oral argument is scheduled for 16 January 2024. Counsel is currently preparing for oral argument while working on the cases listed below, including Appellant's case.

2. *United States v. Wells*, USCA Dkt. No. 23-0219/AF – On 20 October 2023, the CAAF granted review of one issue. Counsel filed the Grant Brief on 15 December 2023. The Government's Answer is expected no later than 15 January 2024, upon which military appellate defense counsel will begin working on the Reply Brief.

3. *United States v. Braum*, No. ACM 40434 – This appellant has provided limited consent to disclose a confidential communication with counsel wherein he has conditionally waived military appellate counsel's review of the record so as to exercise his right to speedy appellate

review. Based on this appellant's request, this appellant's civilian appellate defense counsel intends to file an AOE without undersigned counsel's review of the record. However, undersigned counsel remains detailed Article 70, UCMJ, counsel and will review the AOE, currently containing eight issues, prior to filing. Depending on when civilian appellate defense counsel completes the AOE, undersigned counsel's review of the brief may be prioritized over Appellant's case.

Since Appellant's last request for an enlargement of time, undersigned counsel participated in oral argument for *In re HVZ,* USCA Dkt. No 23-0250/AF, which took place on 5 December 2023 and covered four certified issues. She also filed a 13,139-word Grant Brief in *United States v. Wells*, USCA Dkt. No. 23-0219/AF, a case she took over from a previous military appellate defense counsel. Counsel has begun drafting an issue for Appellant's AOE, as she brought Appellant's case to the University of North Carolina (UNC) Appellate Advocacy Training in Chapel Hill, NC, from 25-27 October 2023. Counsel is still working through the remaining portions of the record and other possible issues. To forewarn the Court, undersigned counsel has leave scheduled from 17-20 January 2024.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete the AOE. Accordingly, an enlargement of time is necessary to fully review Appellant's case and advise Appellant regarding potential issues.

Appellant was advised of his right to a timely appeal. 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.

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

Respectfully submitted,

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
Email: samantha.castanien.1@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 27 December 2023.

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
Email: samantha.castanien.1@us.af.mil

27 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) JAMES P. BAUMGARTNER, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40413 Panel No. 3

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly 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 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 6 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

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 27 December 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TENTH)**
v.	)	
	)	Before Panel No. 3
Technical Sergeant (E-6), **JAMES P. BAUMGARTNER,** United States Air Force, *Appellant*.	)	No. ACM 40413
	)	22 January 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 Honorable 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 **4 March 2024**. The record of trial was docketed with this Court on 8 February 2023. From the date of docketing to the present date, 348 days have elapsed. On the date requested, 390 days will have elapsed.

From 26-29 September 2022, Appellant was tried by a general court-martial at Schriever Space Force Base, Colorado. Contrary to his pleas, the panel of officer members found Appellant guilty of one charge and two specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b; and one charge and three specifications of assault consummated by a battery upon a child under sixteen years in violation of Article 128, UCMJ, 10 U.SC. § 928.[1] R. at 61, 92, 691. The members sentenced

[1] After the members' guilty finding, as relief for an unreasonable multiplication of charges, the military judge set aside and dismissed one of the assaults consummated by a battery, conditioned upon one of the sexual abuse charges surviving appellate review. R. at 796. The military judge also consolidated the remaining assaults consummated by a battery into a single specification. *Id.*

Appellant to a reprimand, reduction in grade to E-1, confinement for three years, and a dishonorable discharge. R. at 792. The convening authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action – United States v. TSgt James P. Baumgartner*, dated 12 October 2022.

The record of trial is seven volumes consisting of six Prosecution Exhibits, 17 Defense Exhibits, 44 Appellate Exhibits, and one Court Exhibit. The transcript is 797 pages. Appellant is 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 fifteen cases; twelve cases are pending AOEs before this Court and three cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). Two cases before the CAAF and review of an AOE to be filed with this Court by civilian appellate defense counsel have priority over the present case:

1. *United States v. Leipart*, USCA Dkt. No. 23-0163/AF – Due to inclement weather, oral argument was rescheduled to 24 January 2024. Counsel is currently preparing for oral argument while working on the cases listed below.

2. *United States v. Wells*, USCA Dkt. No. 23-0219/AF – On 20 October 2023, the CAAF granted review of one issue. Counsel filed the Grant Brief on 15 December 2023. The Government received additional time to file the Answer Brief, which is expected no later than 23 January 2024, upon which counsel will begin working on the Reply Brief.

3. *United States v. Braum*, No. ACM 40434 – This appellant has provided limited consent to disclose a confidential communication with counsel wherein he has conditionally waived military appellate counsel's review of the record so as to exercise his right to speedy appellate

review. Based on this appellant's request, this appellant's civilian appellate defense counsel intends to file an AOE without undersigned counsel's review of the record. However, undersigned counsel remains detailed Article 70, UCMJ, counsel and will review the AOE, currently containing eight issues, prior to filing. Counsel is in receipt of the draft brief and has started her review.

Since Appellant's last request for an enlargement of time, undersigned counsel has participated in six oral argument moots, three of which were for her upcoming argument in *United States v. Leipart*, USCA Dkt. No. 23-0163/AF. While counsel has begun outlining one issue for Appellant's AOE, she is still working through the remaining portions of the record and other possible issues. She has also started review of the draft AOE in *United States v. Braum*, No. ACM 40434, so that as her priorities at the CAAF finish, she can move directly into Appellant's AOE.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete the AOE. Accordingly, an enlargement of time is necessary to fully review Appellant's case and advise Appellant regarding potential issues.

Appellant was advised of his right to a timely appeal. 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.

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

Respectfully submitted,

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
Email: samantha.castanien.1@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 22 January 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
Email: samantha.castanien.1@us.af.mil

24 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) JAMES P. BAUMGARTNER, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40413 Panel No. 3

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant 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 a 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 5 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

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 24 January 2024.

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 40413**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
James P. BAUMGARTNER	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 22 January 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Tenth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 25th day of January, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Tenth) is **GRANTED**. Appellant shall file any assignments of error not later than **4 March 2024**.

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

FOR THE COURT

[redacted]

FLEMING E. KEEFE, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (ELEVENTH)**
v.	)	
	)	Before Panel No. 3
Technical Sergeant (E-6), **JAMES P. BAUMGARTNER,** United States Air Force, *Appellant.*	)	No. ACM 40413
	)	22 February 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 Honorable 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 **3 April 2024**. The record of trial was docketed with this Court on 8 February 2023. From the date of docketing to the present date, 379 days have elapsed. On the date requested, 420 days will have elapsed.

From 26-29 September 2022, Appellant was tried by a general court-martial at Schriever Space Force Base, Colorado. Contrary to his pleas, the panel of officer members found Appellant guilty of one charge and two specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b; and one charge and three specifications of assault consummated by a battery upon a child under sixteen years in violation of Article 128, UCMJ, 10 U.SC. § 928.[1] R. at 61, 92, 691. The members sentenced

GRANTED
23 FEB 2024

[1] After the members' guilty finding, as relief for an unreasonable multiplication of charges, the military judge set aside and dismissed one of the assaults consummated by a battery, conditioned upon one of the sexual abuse charges surviving appellate review. R. at 796. The military judge also consolidated the remaining assaults consummated by a battery into a single specification. *Id.*

Appellant to a reprimand, reduction in grade to E-1, confinement for three years, and a dishonorable discharge. R. at 792. The convening authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action – United States v. TSgt James P. Baumgartner*, dated 12 October 2022.

The record of trial is seven volumes consisting of six Prosecution Exhibits, 17 Defense Exhibits, 44 Appellate Exhibits, and one Court Exhibit. The transcript is 797 pages. Appellant is 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 eighteen cases; fifteen cases are pending AOEs before this Court and three cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). One case before the CAAF has priority over the present case: *United States v. Wells*, USCA Dkt. No. 23-0219/AF. Oral argument is scheduled for 6 March 2024, and undersigned counsel is currently preparing for argument while completing her review of Appellant's record of trial.

Since Appellant's last request for an enlargement of time, filed 22 January 2024, undersigned counsel argued *United States v. Leipart*, USCA Dkt. No. 23-0163/AF, on 24 January 2024 at the CAAF. Shortly after argument, undersigned counsel had to request an extension of time for a reply brief in *United States v. Wells*, USCA Dkt. No. 23-0219/AF, due to catching the flu. Upon being able to return to work, undersigned counsel drafted the 28-page reply brief, which was submitted on 9 February 2024. Undersigned counsel also reviewed a 78-page draft AOE for *United States v. Braum*, No. ACM 40434, which civilian counsel ultimately submitted on 10 February 2024 in accordance with that appellant's request for speedy appellate review. Undersigned counsel also reviewed the minimal rehearing documents in *United States v.*

Dominguez-Garcia, No. ACM S32694 (f rev), a case she inherited from previous appellate defense counsel, to assess the nature of any new AOE. Review has triggered the need to read the transcript (362 pages) for a possible AOE, which has moved the case up undersigned counsel's priority list, but still below Appellant's case.

As it relates to Appellant's case, since the last enlargement of time, undersigned counsel has reviewed all the sealed materials in the case, the prosecution and defense exhibits, and the pre-trial and post-trial processing. She previously reviewed the transcript for an appellate advocacy training in October 2023. She has identified several assignments of error, to include legal and factual sufficiency for both charges, and has started outlining them as she continues her review. Undersigned counsel is balancing her review of Appellant's record with her preparation for oral argument in *United States v. Wells*, USCA Dkt. No. 23-0219/AF. As soon as oral argument is complete, Appellant's case is undersigned counsel's first priority.

To alert the Court, undersigned counsel has leave 20-25 March 2024 for her wedding. She anticipates this will be the last enlargement of time request for Appellant, but due the impending oral argument, the intricacies of Appellant's case, and the nature of undersigned counsel's upcoming leave, one final, but shorter, enlargement may be requested.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete the AOE. Accordingly, an enlargement of time is necessary to fully review Appellant's case, advise Appellant regarding potential issues, and complete the AOE.

Appellant was advised of his right to a timely appeal. 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.

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

Respectfully submitted,

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
Email: samantha.castanien.1@us.af.mil

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 22 February 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
Email: samantha.castanien.1@us.af.mil

23 February 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) JAMES P. BAUMGARTNER, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40413 Panel No. 3

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant 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-plus 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 two-thirds of the 18-month standard for this Court to issue a decision, which leaves approximately 4 months for the United States and this Court to perform their separate statutory responsibilities.

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

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate

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 February 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Technical Sergeant (E-6) **JAMES P. BAUMGARTNER** United States Air Force, *Appellant.*	**NOTICE OF APPEARANCE** Before Panel No. 3 Case No. ACM 40413 Filed on: 15 March 2024

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

COMES NOW, Frank J. Spinner, pursuant to Rule 12 of this Court's Rules of Practice and Procedure, and hereby files this written notice of appearance. In addition, counsel hereby informs this Court of the following:

(1) Business mailing address is: 1420 Golden Hills Road, Colorado Springs, CO 80919;

(2) Phone number is: 719-233-7192

(3) Business email is: lawspin@aol.com; and

(5) I am member of this Court's bar.

Respectfully submitted,

[redacted]: _____

[redacted]e Counsel
1420 Golden Hills Road
Colorado Springs, CO 80919
(719) 233-7192
E-Mail: lawspin@aol.com

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 15 March 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
Email: samantha.castanien.1@us.af.mil

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TWELFTH)**
v.	)	
	)	Before Panel No. 3
Technical Sergeant (E-6) **JAMES P. BAUMGARTNER,** United States Air Force, *Appellant*.	)	No. ACM 40413
	)	15 March 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 Honorable 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 **3 May 2024**. The record of trial was docketed with this Court on 8 February 2023. From the date of docketing to the present date, 401 days have elapsed.[1] On the date requested, 450 days will have elapsed.

From 26 to 29 September 2022, Appellant was tried by a general court-martial at Schriever Space Force Base, Colorado. Contrary to his pleas, the panel of officer members found Appellant guilty of one charge and two specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b; and one charge and three specifications of assault consummated by a battery upon a child under sixteen years in violation of Article 128, UCMJ, 10 U.SC. § 928.[2] R. at 61, 92, 691. The members sentenced

[1] This request for an enlargement of time is being filed well in advance to avoid and alleviate any issues since undersigned military appellate defense counsel is on leave 20-25 March 2024; she will not be able to work on Appellant's AOE during this time as she is getting married.

[2] After the members' guilty finding, as relief for an unreasonable multiplication of charges, the military judge set aside and dismissed one of the assaults consummated by a battery, conditioned

Appellant to a reprimand, reduction in grade to E-1, confinement for three years, and a dishonorable discharge. R. at 792. The convening authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action – United States v. TSgt James P. Baumgartner*, dated 12 October 2022.

The record of trial is seven volumes consisting of six Prosecution Exhibits, 17 Defense Exhibits, 44 Appellate Exhibits, and one Court Exhibit. The transcript is 797 pages. Appellant is currently confined.

Mr. Frank Spinner has been retained by Appellant to take lead on investigation and research into a possible assignment of error concerning ineffective assistance of counsel. In evaluating this issue for Appellant, Mr. Spinner reviewed the record, and he is currently conducting final research so as to advise Appellant on the scope of the issue. Military appellate defense counsel is taking lead on all other assignments of error. Appellant has been advised of this workload division. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consents to this division of labor. Mr. Spinner's addition to Appellant's case will not delay the filing of Appellant's AOE; both appellate defense counsel anticipate being able to file Appellant's AOE by the above requested date of 3 May 2024.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), counsel of record also provide the following information. Mr. Spinner represents multiple clients, both at the trial and appellate levels. He has several cases set for trial and several appeals pending at the various service courts of appeal. One case before this Court has priority over Appellant's, *United States v. Serjak*, No. ACM 40392. Civilian appellate defense counsel is currently drafting the AOE for that case.

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upon one of the sexual abuse charges surviving appellate review. R. at 796. The military judge also consolidated the remaining assaults consummated by a battery into a single specification. *Id.*

Military appellate defense counsel is currently assigned seventeen cases; fourteen cases are pending AOEs before this Court and three cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). Appellant's case is military appellate defense counsel's first priority.

Since Appellant's last request for an enlargement of time, military appellate defense counsel has completed her review of the record, advised Appellant on various issues, outlined two stand-alone legal issues along with legal and factual sufficiency for four specifications, and has begun drafting one of the factual sufficiency assignments of error. Additionally, she argued *United States v. Wells*, USCA Dkt. No. 23-0219/AF, at the CAAF on 6 March 2024 after participating in three moot arguments. [redacted] Upon return, writing Appellant's AOE is military appellate defense counsel's first priority.

Through no fault of Appellant, appellate defense counsel have been working on other assigned matters and have yet to complete the AOE. Accordingly, an additional enlargement of time is necessary to advise Appellant and complete the AOE.

Appellant was advised of his right to a timely appeal. 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.

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
Email: samantha.castanien.1@us.af.mil

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 15 March 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
Email: samantha.castanien.1@us.af.mil

19 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) JAMES P. BAUMGARTNER, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40413 Panel No. 3

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant 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 year-plus 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 two-thirds of the 18-month standard for this Court to issue a decision, which leaves approximately 3 months for the United States and this Court to perform their separate statutory responsibilities.

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

[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 19 March 2024.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40413**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
James P. BAUMGARTNER	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 15 March 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Twelfth) requesting an additional 30 days to submit Appellant's assignments of error. Appellant's counsel anticipates this to be the last request for an enlargement of time before filing 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 20th day of March 2024,

ORDERED:

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

Appellant's counsel is advised that given the number of enlargements granted thus far, any further requests for an enlargement of time will not be granted absent extraordinary circumstances.

FOR THE COURT

[redacted]

FLEMING E. KEEFE, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) **JAMES P. BAUMGARTNER,** United States Air Force, *Appellant.*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRTEENTH)** Before Panel No. 3 No. ACM 40413 23 April 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 Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE) based on extraordinary circumstances that have arisen and are detailed herein. Appellant requests an enlargement for a period of 30 days, which will end on **2 June 2024**. The record of trial was docketed with this Court on 8 February 2023. From the date of docketing to the present date, 440 days have elapsed. On the date requested, 480 days will have elapsed.

From 26 to 29 September 2022, Appellant was tried by a general court-martial at Schriever Space Force Base, Colorado. Contrary to his pleas, the panel of officer members found Appellant guilty of one charge and two specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b; and one charge and three specifications of assault consummated by a battery upon a child under sixteen years in violation of Article 128, UCMJ, 10 U.SC. § 928.[1] R. at 61, 92, 691. The members sentenced

GRANTED
26 APR 2024

[1] After the members' guilty finding, as relief for an unreasonable multiplication of charges, the military judge set aside and dismissed one of the assaults consummated by a battery, conditioned upon one of the sexual abuse charges surviving appellate review. R. at 796. The military judge also consolidated the remaining assaults consummated by a battery into a single specification. *Id.*

Appellant to a reprimand, reduction in grade to E-1, confinement for three years, and a dishonorable discharge. R. at 792. The convening authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action – United States v. TSgt James P. Baumgartner*, dated 12 October 2022.

The record of trial is seven volumes consisting of six Prosecution Exhibits, 17 Defense Exhibits, 44 Appellate Exhibits, and one Court Exhibit. The transcript is 797 pages. Appellant is currently confined.

Mr. Frank Spinner was retained by Appellant to take lead on investigation and research into a possible assignment of error concerning ineffective assistance of counsel. In evaluating this issue for Appellant, Mr. Spinner reviewed the record, and he is currently conducting final research so as to advise Appellant on the scope of the issue. Military appellate defense counsel took lead on all other assignments of error. Appellant has been advised of this workload division. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consents to this division of labor.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), counsel of record also provide the following information. Mr. Spinner represents multiple clients, both at the trial and appellate levels. He has several appeals pending at the Court of Appeal for the Armed Forces (CAAF) and various service courts of appeal. One case before this Court has priority over Appellant's, *United States v. Serjak*, No. ACM 40392. Civilian appellate defense counsel is currently drafting the AOE for that case.

Unforeseen and extraordinary circumstances have arisen which led to this motion for an enlargement of time. On 4 April 2024, civilian appellate defense counsel experienced a desktop computer malfunction that limited access to his hard drive. This meant that Mr. Spinner lost

access to Appellant's case file and the relevant electronic media exhibits therein, along with his notes and work product related to the potential ineffective assistance of counsel issue—the primary issue he was investigating. Mr. Spinner did not regain access to his files until 22 April 2024. The following chronology describes the sequence of events that occurred in an attempt to repair the hard drive and regain access to Appellant's case files:

4 April – Malfunction occurs

5 April – Computer dropped off at Geek Squad, Best Buy (new hard drive ordered)

7 April – New hard drive received at Counsel's residence (on a Sunday)

8 April – New hard drive delivered to Geek Squad

10 April – Computer picked up

11 April – New issues identified as computer continues to malfunction

12 April – Computer dropped off at Geek Squad second time

13 April – Computer picked up again (on a Saturday)

15 April – Computer malfunctions as counsel is attempting to prepare tax returns

16 April – Computer dropped off at Geek Squad a third time

19 April – Geek Squad reports that "mother board corrupted;" new computer required

19 April – Counsel purchases new computer and requests transfer of files to it

21 April – New computer picked up but after arriving home, counsel cannot locate files

22 April – New computer returned to Geek Squad and files are uncovered after some effort

Civilian appellate defense counsel possesses documentation that substantiates this history and will provide it to the Court if directed.

Civilian appellate defense counsel's first duty is to complete work on *United States v. Serjak*, an Air Force appellate case that was docketed with this Court in December 2022,

approximately two months before Appellant's case. His second duty is to complete Appellant's case. The remainder of this week will be spent on *Serjak*. Then, on 28 April 2024, civilian counsel departs on a trip to Hilton Head, SC, that has been scheduled for one year to celebrate his wife's 72d birthday (4 May). He returns to Colorado on 7 May 2024. This will be followed by a trip departing on 9 May 2024 to San Diego, CA, to meet with Airman Serjak at the Miramar Brig to go over his appellate brief, set to be filed on 13 May. Civilian counsel also intends to meet with Appellant (also imprisoned at Miramar) that same day to go over the ineffective assistance of counsel issue.

Appellant has been fully briefed on the above challenges civilian counsel has faced in completing his work and concurs in the need to seek one last enlargement of time. There is one last witness to be interviewed on the ineffective assistance of counsel issue, along with preparing declarations to be signed by Appellant and his spouse. All other issues have been briefed by undersigned military appellate defense counsel and are in final review in her office.

Military appellate defense counsel is currently assigned 21 cases; 17 cases are pending AOEs before this Court and three cases are pending before the CAAF. Appellant's case is military appellate defense counsel's first priority.

Since Appellant's last request for an enlargement of time, military appellate defense counsel advised Appellant on any outstanding issues and then wrote five assignments of error for Appellant's case. As stated above, the draft brief is undergoing internal review and awaiting the potential ineffective assistance of counsel assignment of error before being finalized.

Also, since Appellant's last extension of time, military appellate defense counsel wrote the AOE brief for *United States v. Dominguez-Garcia*, No. ACM S32694 (f rev), based on this Court's order to submit any assignments of error by 24 April 2024, absent extraordinary

circumstances. She has also begun to review the record for *United States v. Folts*, No. ACM 40322, advised several new direct appeal clients, and participated in moots for *United States v. Daughma*, No. ACM 40385. To alert the Court ahead of time, undersigned military appellate counsel has authorized overseas leave from 11 to 24 May 2024. She will be out of the office from 10 to 28 May 2024. While out of the country, she will be unable to work on Appellant's case, or any other case, during this time.

Through no fault of Appellant, appellate defense counsel have had extraordinary circumstances arise that necessitate additional time to fully advise Appellant and complete his AOE. Accordingly, an additional enlargement of time is necessary.

Appellant was advised of his right to a timely appeal. Appellant was provided an update on the status of counsel's progress on his case, to include the status of the drafted AOE and civilian appellate defense counsel's substantial computer problem. 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.

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

Respectfully submitted,

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
Email: samantha.castanien.1@us.af.mil

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 23 April 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
Email: samantha.castanien.1@us.af.mil

24 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) JAMES P. BAUMGARTNER, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40413 Panel No. 3

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant 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 480 days in length. Appellant's year-plus 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 leaves approximately 2 months for the United States and this Court to perform their separate statutory responsibilities.

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

[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, as well as Frank J. Spinner Esq. on 24 April 2024.

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

Filed 3 June 2024

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

Technical Sergeant (E-6)
JAMES P. BAUMGARTNER,
United States Air Force,
Appellant.

Before Panel No. 3

No. ACM 40413

BRIEF ON BEHALF OF APPELLANT

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
E-mail: samantha.castanien.1@us.af.mil
Phone: (240) 612-4770

FRANK J. SPINNER
Attorney at Law
1420 Golden Hills Road
Colorado Springs, Colorado
E-mail: lawspin@aol.com
Phone: (719) 233-7192

Counsel for Appellant

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VI.

WHETHER TSGT BAUMGARTNER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL DEFENSE COUNSEL INEXPLICABLY FAILED TO PRESENT FAVORABLE EVIDENCE AT TRIAL.

STATEMENT OF THE CASE

From 26 to 29 September 2022, Technical Sergeant (TSgt) James P. Baumgartner was tried by a general court-martial at Schriever Space Force Base (SFB), Colorado. R. at 40, 50, 797. Contrary to his pleas, the panel of officer members found him guilty of one charge and two specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b;[1] and one charge and three specifications of assault consummated by a battery upon a child under sixteen years in violation of Article 128, UCMJ, 10 U.SC. § 928 (2016). R. at 61, 92, 691. After the members' guilty finding, as relief for an unreasonable multiplication of charges, the military judge set aside and dismissed one of the specifications of assault consummated by a battery (Charge II, Specification 1), conditioned upon one of the sexual abuse specifications (Charge I, Specification 1) surviving appellate review. R. at 796. The military judge also consolidated the remaining specifications for assault consummated by a battery into a single specification. *Id*. The same panel of members then sentenced TSgt Baumgartner to a reprimand, reduction in grade to E-1, confinement for three years, and a dishonorable discharge. R. at 792. The convening authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action – United States v. TSgt James P. Baumgartner*, dated 12 October 2022.[2]

[1] This charge spans a period of years, from 2014 to 2018. The elements are consistent throughout. *Manual for Courts-Martial, United States (2019 ed.)* (*MCM*), App. 22, paras. 45b.a.(h), b.(4)(a) (2019 ed.).

[2] The post-trial processing documents do not appear to properly apply the Article 60, UCMJ, 10 U.S.C. § 860 (2012), which was applicable due to the time of the earliest charged offense (1 January 2014). Exec. Order 13825, 83 F.R. 9889, Sec. 6(b) (2018). Trial defense counsel argued that the Convening Authority could not change the findings or the sentence adjudged. ROT, Vol. 3, *Clemency Request – United States v. TSgt James P. Baumgartner*, dated 5 Oct. 2022. This is incorrect; all the findings could have been set aside. 10 U.S.C. § 860 (2012). While the

STATEMENT OF FACTS

1. AB grew up in a fractured family, with an absent mother and a father who always sided with his new wife, AB's stepmother.

TSgt Baumgartner grew up in a home with eight siblings—all home schooled. R. at 732. To his older brother, TSgt Baumgartner "was a rambunctious, spunky young man, but always very kind, very loyal." R. at 716. He came from a military family—his father, uncles, grandfathers, and five of his siblings served. R. at 717. He married his first wife, Michaeleen, before the age of 21. *Compare* R. at 284 *with* Pros. Ex. 5 (showing ages of TSgt Baumgartner's and AB for comparison). And at 21, he became a father to a baby girl, AB, who was born in 2003. *Id.* But AB did not grow up in the same kind of home as her father.

When AB was 2 or 3 years old, just several months after her baby brother, EB, was born, her parents divorced. R. at 285-86. AB went to live with her grandparents. R. at 286. She did not see her mother or her father at all. *Id.* When she was four, she went back to live with TSgt Baumgartner, who had a new woman in his life. R. at 287. This woman would become his second wife, until they too divorced. *Id.* When she started school, AB was living with TSgt Baumgartner. R. at 288. Over the summers, she recalled going to her grandparents—even though the divorce decree dictated that was when her mother was supposed to take her. R. at 288, 485.

TSgt Baumgartner remarried for a third time when AB was in fourth or fifth grade. R. at 288. He married JG, a reservist TSgt in the Air Force. R. at 288, 513. TSgt JG testified at trial

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Convening Authority Decision on Action Memorandum is silent as to whether the Convening Authority was properly advised on his ability to set aside any findings, the fact that the trial defense counsel memorandum contains an improper advisement implicates precedent where the Staff Judge Advocate was required to affirmatively correct such misstatements of law. *E.g., United States v. Addison*, 75 M.J. 405 (C.A.A.F. 2016) (mem.). There is nothing in the record demonstrating the Convening Authority was properly advised after this error or whether he knowingly applied the correct Article 60, UCMJ, 10 U.S.C. § 860 (2012). **To the extent this is error is prejudicial to TSgt Baumgartner, TSgt Baumgartner affirmatively *waives* this issue.**

that the first time she met AB one-on-one, AB told her, "[My] dad [is] a very bad man, and that he raped and beat [my] mother." R. at 484. Under oath, AB told the court-martial panel that her mother never bad-mouthed her father. R. at 289. Her mother never said he had raped her—just insinuated a rape occurred; AB had put it together "over time." R. at 306-07. AB was eight years old when she told TSgt JG that TSgt Baumgartner raped her mother. R. at 350-51.

Over the years, AB lived mostly with TSgt Baumgartner and did not see her mother for long periods of time. R. at 287, 352, 485. After AB turned 12, she lived with her mother for about six months, and then lived with TSgt Baumgartner until the family moved to California in 2017. R. at 485. Before the move, when her parents both lived in Colorado, her mom would sometimes take her for weekends, but her relationship with her mom was "on and off." R. at 373, 486. Some evidence suggests that her mom could not afford AB or EB. R. at 373. Yet, AB loved her mom. *Id*. "Everyone always used to say that I was her mini her. I hung on to that because I didn't get to see my mom all the time. And when I did it was hard because it wasn't for a long time. She was nice to us." R. at 373. AB wanted to live with her mother, but she could not as her mother was living with a sex offender. R. at 357, 362.

AB's feelings about her mother did not extend to the new mother-figure in her life, TSgt JG. AB would fight with TSgt JG, and TSgt Baumgartner would always take TSgt JG's side. R. at 354-55; *see also* Pros. Ex. 1 at 5 (showing how AB felt like she always had to compete with her parents' spouses). AB fought with TSgt JG all the time about AB lying and disrespecting TSgt JG, running away, fighting with people, and AB's friend group. R. at 354-55. EB testified that AB told him she wanted out of TSgt Baumgartner's house because she did not like TSgt JG. R. at 407.

In 2017, at the age of 13 or 14, AB had fallen in with a bad crowd; she was around people who were smoking, using drugs, and drinking alcohol. R. at 486. She had a boyfriend, Myron, who she communicated with on a second phone. R. at 311, 314. She had a secret Facebook account showing her around Myron doing "illegal things." R. at 487-88. She was also being "inappropriate" with Myron on her cell phones. R. at 498. TSgt Baumgartner and TSgt JG were being pulled into numerous parent-teacher conferences. R. at 343. They tried to get her into counseling, church, and sports. R. at 486. AB would scream at them. R. at 487, 489. She was caught shoplifting. R. at 486. When she was caught, she lied to the police. R. at 339-431, 376. She was disrespectful. R. at 347, 355, 490. She would run away, threaten to call the police, and allege her parents were "beating" her, which, when confronted on the stand about a specific occasion, she admitted was untrue. R. at 341, 388, 494, 513. Years later, she would make it clear how she felt about TSgt Baumgartner: "I'm fucking tired of you always trying to tell me that I'm doing something wrong and I'm not." R. at 462; Pros. Ex. 3.

In AB's freshman year, "everything was becoming a little more extreme." R. at 486. Eventually, TSgt Baumgartner applied for a job at Vandenberg SFB, in July 2017. R. at 488. In August 2017, TSgt Baumgartner moved his family—TSgt JG, EB, and AB—from Colorado, where AB's boyfriend and friends were, to California to "remove her from the situation." R. at 291, 296-97, 484-85, 488.

2. AB had a habit of exaggerating or lying about both serious and innocuous things.

AB's behavioral issues included her habitually lying or exaggerating. For example, she lied to her parents. R. at 316. She lied to them about her boyfriend smoking and drinking. R. at 342. AB said she lied to TSgt Baumgartner and TSgt JG because telling the truth about what she was doing would result in the same consequences as lying. R. at 372. AB also lied teachers. R.

at 343. She lied to teachers about the same smoking and drinking behaviors her boyfriend engaged in. R. at 343. But her lies did not stop at her parents and her teachers.

AB lied to the police. She lied to police about a crime she committed—shoplifting. R. at 376. She lied to different police about being arrested for shoplifting. R. at 341. She lied to the Office of Special Investigations (OSI) about how the police who confronted her about her shoplifting yelled at her and mistreated her. R. at 346-47. When asked why she lied to OSI, she said it was because she felt "unheard." R. at 347.

On top of all the lies she was caught in, AB's brother, EB, under oath, characterized her as "not really truthful." R. at 405. He also acknowledged how AB previously lied to investigators: "Isn't it true that you also told investigators that you went along with victim's allegations to be supportive of her but decided to not agree with her because she was not telling the truth? Yes." R. at 407.

3. AB's character of exaggerating and lying extended to her testimony at trial.

When confronted at trial about lying to the police, under oath, AB denied lying to the police, saying she "didn't understand the full spectrum." R. at 340. She did not "feel" like she was arrested for her earlier shoplifting behavior. R. at 341. Ultimately, though after her initial denial, she admitted, "I lied to the police." R. at 376. She also claimed, "I never got in trouble before that, so I didn't have a handle on how to handle that kind of situation. I did lie a lot as a kid to get out of trouble, so I did lie." R. at 376.

Furthermore, AB was inconsistent during her testimony about reporting alleged abuse. AB testified that she tried to call the police every time TSgt Baumgartner abused her, but according to her testimony for the charged offenses, she was never the one who actually called the police. R. at 304, 426. While evidence of the inconsistency about her being the proactive one to call the

police was presented at trial, at the same time, there was ample evidence that AB consistently *threatened* to call the police or made *false* reports of abuse. TSgt JG stated AB "has a history of reporting false allegations." R. at 514. For example, during a video recording, Def. Ex. 2, AB made a false claim of her parents beating her, which she admitted was false. R. at 341, 513; Def. Ex. 2. Additionally, evidence presented at trial showed AB was screaming in a hotel room after 10:00 PM for someone to call the police, despite nothing happening beforehand. R. at 493. According to TSgt JG, AB would make countless allegations, "incidences that were determined to be unfounded at the time." R. at 388. For TSgt JG, "There were so many instances of reports of abuse that they [were] confused in [her] head." R. at 501. EB was also a part of this behavior, but it appears EB eventually stopped "supporting" AB's allegations because "she was not telling the truth." R. at 407.

To rehabilitate AB during trial, Trial Counsel asked generalized questions about uncontested factual matters. R. at 376-77.

Additional facts surrounding the charged conduct associated with the assignments of error are included in their respective sections below.

ARGUMENT

I.

TSgt Baumgartner's conviction for touching AB's breasts is not legally or factually sufficient because he did not have the requisite specific intent to "abuse," meaning "physically injure."

Additional Facts

1. The Wrestling Games Played: "Flash the World" and "I Toed You So"

Wrestling or "horseplay" was common in the Baumgartner household. R. at 303, 361, 407. AB would wrestle with her brother, EB. R. at 293. EB would wrestle with TSgt Baumgartner. R.

at 360. TSgt Baumgartner would wrestle with AB. R. at 360. All three of them would wrestle together. R. at 407. AB described what would commonly happen: "We would try to put each other in arm locks, wrestle, just like trying to see who could pin someone on the floor, count to 10 or tap out, just play fighting." R. at 293. TSgt Baumgartner would get EB's arms behind his back. R. at 360. He would pin AB down, tickle her, blow raspberries on her stomach. R. at 293, 360-61. Sometimes the wrestling would get out of control. R. at 360; *but see* R. at 407 (showing EB did not think wrestling "got a little bit out of hand").

When AB hit puberty around age 11, in January 2014, she developed breasts and wore wired bras. R. at 284, 291. On the stand, AB described a game called "flash the world." R. at 292. According to AB, TSgt Baumgartner would grab her by the arms, hold her tight, lift her shirt and bra with his hands, and make her go over to a window. R. at 292. When she was younger, she would laugh. *Id*. TSgt Baumgartner would laugh. *Id*. But as AB got older, she did not laugh anymore. *Id*. She said she would tell him to stop. *Id*. She said "flash the world" happened 20 to 30 times. R. at 292, 349-50. This game was not done for any punishment purpose. R. at 292.

AB also described another game called "I toed you so." R. at 293. According to AB, this game would happen when TSgt Baumgartner would get tired of wrestling. *Id*. He would hold her arms, pulling them towards himself while she was either face up or face down on the couch, and then he would press the ball of his foot into her vagina over her clothes. R. at 294. She testified, "And then at the end, 'I toed you so,'" implying he would say this when he did this. *Id*. She testified EB witnessed "I toed you so" and "was involved in it," too. R. at 361. But EB testified he never saw TSgt Baumgartner do anything "sexual" to AB. R. at 404.

AB also described another game, called "foot wars," which she played with EB and TSgt Baumgartner. R. at 358-59. They would sit on the couch and their feet would be kicking out

at each other. R. at 359. During this game, AB, on occasion, would intentionally make contact with EB's crotch, hitting him. *Id*. She also said she would do the same thing to TSgt Baumgartner, but she said such instances were accidents. *Id*. AB testified that "foot wars" and "I toed you so" were not the same game. She said TSgt Baumgartner did not hit AB back when she kicked him in the crotch and "I toed you so" was not in relation to TSgt Baumgartner hitting AB back. R. at 359.

AB testified for "flash the world" and "I toed you so" that TSgt JG was present for some of these games. R. at 361. TSgt JG was never asked by either party whether this was true.

AB said she confronted her father about "flashing the world" and "I toed you so" when they were alone in her bedroom right before her freshman year. R. at 295. She said she told him she was uncomfortable with what was happening. *Id*. She told the panel members: "We were both in agreeance I was a little too old to be playing those games." *Id*. She thought the games would be over, but, according to her, the games continued. *Id*.

In 2017, sometime after August, AB was living with TSgt Baumgartner, TSgt JG, and EB.[3] R. at 494-95. She was enrolled in charter school, which was primarily online; there were only two days a week she had to go into school. R. at 495-96. At this time, around September or October, AB had expressed a desire to move back to Colorado. R. at 496.

One day, when, according to AB, TSgt JG was out of town "for four days" and EB was at school, TSgt Baumgartner was "trying to mess around" and "wrestle" with AB—"just trying to have fun." R. at 303. AB told him to leave her alone. *Id*. AB testified that TSgt Baumgartner locked her arms, pulled her shirt and bra up, and said, "This is what you want the world to see." *Id*. AB was "so mad." *Id*. TSgt Baumgartner had never said anything like that before, and she

[3] *See* Additional Facts for Issue III, *infra*. There is a brief period of time, after the incident that makes up the facts of Charge II Specifications 2 and 3, where AB is not living with TSgt Baumgartner.

felt humiliated. *Id*. She testified, "It wasn't a game anymore to me." *Id*. After telling both her mother and grandmother what happened—neither of whom provided her with any help—she told her uncle what happened. R. at 304. He eventually called the police. R. at 304. AB stayed in her room, and the police came. *Id*. After, TSgt Baumgartner took AB's phone, but she had a secret phone to talk to her mother, uncle, and boyfriend, Myron. R. at 304, 314.

When TSgt Baumgartner took her phone, AB left the house. R. at 304. At this time, contrary to AB's earlier testimony, TSgt JG was present and videotaping when AB left. R. at 303-04; Def. Ex. A. During that video recording, TSgt JG asked AB what they should tell the police. Def. Ex. A. AB said, "My parents are trying to beat me up." Def. Ex. A. AB admitted during trial no one was trying to beat her up, threaten her, or hit her that day. R. at 315, 341.

TSgt JG testified that two days after the video was taken, AB was out of the house—back to Colorado to live with her uncle (the one who called the police). R. at 496, 499. After about a month, she ran away from her uncle's house and went to live with her boyfriend, Myron. R. at 344-45, 361. She had been "plotting" with him to get her out of California since she had moved. R. at 345. At 14 years old, AB lived with her boyfriend for a couple of years. *Id*. At the time of trial, she was a 19-year-old adult. R. at 284, 712.

At no point did TSgt Baumgartner deny these games occurred. *See* R. at 276-77 (referencing the theme and theory of defense's opening statement). He affirmatively took responsibility for them, recognizing they happened, and they were "wrong." Pros. Ex. 1 at 6. Even years later during a pretext call with OSI designed to get TSgt Baumgartner to say things "they could use against him in court," TSgt Baumgartner did not deny the games happened. R. at 363, 365, 459-60; Pros. Ex. 3. He did deny other allegations of sexual abuse AB levied against him. R. at 459-60; Pros. Ex. 3. This pretext call is the only time AB characterizes the games "flash

the world" and "I toed you so" as "not games." R. at 456; Pros. Ex. 3. Even on the stand, she called and acknowledged this conduct as games. *E.g.*, R. at 295, 303, 358, 377-78.

2. The Members Asked, "Is There a Legal Definition for 'Abuse' . . . ?"

After hearing all the evidence, the court closed for the panel members to deliberate. R. at 650. From 4:01 PM to 7:27 PM, the panel members deliberated. R. at 650, 684. At 7:27 PM, a question was presented to the parties by the members: "Is there a legal definition for 'abuse' the members should be using. We didn't see it in the instructions." R. at 684.

Upon reading this question out loud to the parties, the military judge immediately presented two choices to answer the members' question: (1) tell them to "give the term its common ordinary meaning" or (2) read something along the lines of Military Rule of Evidence (Mil. R. Evid.) 611(d)(2)(B), which contains a definition of "child abuse." R. at 684-85.

Trial Counsel preferred the definition from Mil. R. Evid. 611(d)(2)(B), which, *inter alia*, defined "child abuse" as "sexual abuse." The military judge highlighted the circular problem with this definition:

> The one concern there is a circular definition if we go to [Mil. R. Evid.] 611(d)(2)(B) because . . . you all have an approach where you said by intentionally and unlawfully . . . touching, and then you have past that a different specific intent being the intent to abuse her. So, that as you would agree, something different and something extra The concern there is then the intent to abuse her essentially the intent to deliver . . . Deliver physical or mental injury, sexual abuse or exploitation.

R. at 685.

After this was pointed out, Trial Counsel agreed with using the "common ordinary accepted meaning" definition. R. at 686. This was what Defense Counsel initially asked for, simply saying, "We prefer the first course of action, telling them that there's no definition and to use your common knowledge." R. at 685.

Following this eight-minute discussion, at 7:35 PM, the panel members were instructed as follows: "Members, the term 'abuse' is not further defined under Article 120b, Uniform Code of Military Justice. For that reason, you are instructed to give the term its common ordinary and accepted meaning." R. at 687. Then, the following exchange occurred:

> MJ: To the extent that was responsive to your question, [panel member], does that answer your question?
> PRES: Sir, can I poll the members?
> [The members conferred.]
> PRES: Your Honor, we're comfortable with that.
> MJ: Thank you for that. Are there any additional questions from any of the court members?
> PRES: Yes, Your Honor. We feel like we should be able to wrap up by the night by 8:00 today.

R. at 687. After this unsolicited comment—not question—by the panel president, the military judge emphasized there was no external time constraint on deliberations. R. at 688.

The members reentered their closed session at 7:38 PM. R. at 688. Thirteen minutes later, at 7:51 PM, the members reached their findings. R. at 689. TSgt Baumgartner was found guilty of all charges and specifications. R. at 691.

Standard of Review

This Court reviews issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted).

Law and Analysis

1. Article 120b, UCMJ, contains three distinct theories of liability for intent—abuse, humiliate, degrade.

Article 120b, UCMJ, provides, "Any person subject to this chapter who commits a lewd act upon a child is guilty of sexual abuse of a child and shall be punished as a court-martial may direct." *MCM*, App. 22, para. 45b.a.(c) (2019 ed.). "Lewd act" means any sexual contact with a child. *MCM*, App. 22, para. 45b.a.(h)(5) (2019 ed.). For the definition of "sexual contact," Article

120b, UCMJ, cross references and incorporates the definitions listed in Article 120, UCMJ: "touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person." *MCM*, App. 22, para. 45.g.(2)(A) (2019 ed.). While there are slight variations in the language and the cross references over the years, from 2012 to 2018, the elements and definitions of Article 120b, UCMJ, do not substantively change. *MCM*, App. 22, paras. 45b.a.(h), b.(4)(a) (2019 ed.). Specific intent is always required. *MCM*, App. 22, para. 45b.b.(4)(a)(ii) (2019 ed.).

The elements of sexual abuse of a child as alleged in Specification 1 of Charge I are:

(1) That within the continental United States, on divers occasions, between on or about 1 January 2014 and on or about 1 January 2018, the accused committed a lewd act upon [AB] by unlawfully touching directly her breasts with his hand;

(2) That, at the time, [AB] has not attained the age of 16 years; and

(3) That the accused did so with an intent to abuse her.

R. at 567; *MCM*, App. 22, paras. 45b.a.(h), b.(4)(a) (2019 ed.). As charged here, the Government was required to prove "with an intent to abuse." R. at 567; ROT, Vol. 1, *Charge Sheet*, dated 24 January 2022. However, the word "abuse" is undefined. *MCM*, App. 22, para. 45b.a.(h) (2019 ed.). The members were "instructed to give the term its common, ordinary and accepted meaning." R. at 687.

"[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). Courts "interpret words and phrases used in the UCMJ by examining the ordinary meaning of the language, the context in which the language is used, and the broader statutory context." *United*

States v. Pease, 75 M.J. 180, 184 (C.A.A.F. 2016). "In any such analysis, this court should give meaning to each word of the statute." *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017) (cleaned up).

In *Sager*, the Court of Appeals for the Armed Forces (CAAF) analyzed a clause from Article 120, UCMJ: "asleep, unconscious, or otherwise unaware." *Id*. at 159. There, the CAAF found each word reflected a separate theory of liability by employing the ordinary meaning canon of construction, context, and the canon against surplusage. *Id*. at 161-62. Each word, "asleep," "unconscious," and "otherwise unaware" must be distinct from the other two theories of liability. *Id*. at 162.

The same analysis and logic from *Sager* applies to the interpretation of the statutory construct "with an intent to abuse, humiliate, or degrade." These words, separated by "or," read in context, and analyzed under the canon against surplusage, are each a separate theory of liability with unique definitions. In light of *Sager*, "abuse" must be distinct from the other two theories of liability for intent—"humiliate" or "degrade." *Sager*, 76 M.J. at 161-62.

Merriam Webster defines the verb "abuse" as "to use or treat so as to injure or damage." *Abuse*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/abuse (last visited 18 Apr. 2024); *see also United States v. Pallares-Galan*, 359 F.3d 1088, 1100 (9th Cir. 2004) ("Among the pertinent definitions of 'abuse,' Webster's includes 'misuse . . . to use or treat so as to injure, hurt, or damage.'"). Black's Law Dictionary similarly defines the verb "abuse" as "to injure (a person) physically or mentally." *Abuse*, BLACK'S LAW DICTIONARY (11th ed. 2019). However, "injure," as defined by Merriam-Webster, means "to inflict bodily hurt on." *Injure*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/injure (last visited 18 Apr. 2024).

Merriam-Webster defines "humiliate" as "to reduce (someone) to a lower position in one's own eyes or others' eyes; to make (someone) ashamed or embarrassed." *Humiliate*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/humiliate (last visited 18 Apr. 2024). "Degrade" is defined as "to reduce from a higher to a lower rank or degree." *Degrade*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/degrade (last visited 18 Apr. 2024); *see also Degradation,* BLACK'S LAW DICTIONARY (7th ed. 1999) ("A reduction in rank, degree, or dignity."). To avoid surplusage, "abuse" must mean something distinct from both "humiliate" or "degrade." The only plain language interpretation to avoid overlap would be *physical* injury or harm. "Mentally injure," taken from Black's Law Dictionary or read into "injure" (if ignoring the fact Merriam-Webster's definition of "injure" is "bodily hurt") would include "humiliate," as making someone ashamed or embarrassed is a form of emotional or mental injury. *See also Johnson v. United States,* No. C-13-2405 EMC, 2013 U.S. Dist. LEXIS 173526 (N.D. Cal. Dec. 11, 2023) (order granting motion to dismiss) ("[H]umiliation is a form of emotional distress, which may in certain circumstances support a cause of action for 'intentional infliction of emotional distress.'"). "Degrade" could also be a form of mental injury, as Black's Law Dictionary defines "degradation" as "a reduction in . . . dignity" as well as rank or status. Consequently, to avoid surplusage and align with *Sager*, "intent to abuse" requires "intent to *physically* injure."

As a subcomponent of this definition, though, "intent to physically injure" must be more than simply "intentionally" and "unlawfully" injuring. As the military judge correctly noted when evaluating how to answer the members' question, "intentionally" and "unlawfully" are both charged[4] and must both be different than the specific intent of "intent to abuse." *See* R. at 685.

[4] "[I]ntentionally and unlawfully touching . . . with an intent to abuse." ROT, Vol. 1, *Charge Sheet*, dated 22 January 2022.

Otherwise, if "intentionally" and "unlawfully" touching a particular body part is the same as "intent to physically injure," then "intentional" and "unlawful" are surplusage despite all three (intentionally, unlawfully, and specific intent) being required. There must be "something different and something extra" for the required intent. R. at 685.

This is supported by *United States v. Fosler*, where words of criminality like "intentionally" and "unlawfully" speak to mens rea and the lack of a defense or justification, *not* to the elements of an offense. 70 M.J. 225, 230-31 (C.A.A.F. 2011). The touch must be intentional, it must be done without a defense or lawful justification, and that intentional and unlawful touching must be done "with an intent to abuse," an element of the offense. "Intent to abuse" as "intent to physically injure" would be distinct from the words of criminality otherwise required and does not eliminate intent as an ingredient of the offense. *See In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

2. TSgt Baumgartner's conviction for touching AB's breasts is legally insufficient because no evidence was presented of intent to abuse.

The assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted). The test for legal sufficiency of the evidence is "whether, 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. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)).

No reasonable fact finder could have found TSgt Baumgartner acted with the intent to abuse AB because there is no evidence he intended to physically injure her. Every characterization, even by AB, of "flash the world" was that it was a game.

A complete review of context helps illuminate the lack of evidence for intent to abuse. Wrestling was commonplace in the Baumgartner home and sometimes the wrestling would get out of control. R. at 360. How AB testified "flash the world" happened is consistent with how she testified normal wrestling occurred: "We would try to put each other in arm locks" (R. at 293); TSgt Baumgartner would "lock [her] arms behind [her] back so [she] couldn't move at all" (R. at 292); he would "blow a raspberry on [her] stomach" (R. at 361); he would "lift [her] bra and [her] shirt up" (R. at 292). And they would laugh. R. at 292. "Flash the world" is one of these out-of-control wrestling games. That is all. In fact, AB even calls "flash the world" a game: "My dad named those *games*" (R. at 378) (emphasis added); "Too old to be playing those *games*" (R. at 295) (emphasis added); "Thought the *games* were going to be done" (R. at 295) (emphasis added). TSgt Baumgartner did as well: "Yup those were *games* that got way out of control." R. at 456 (emphasis added); Pros. Ex. 3. The games also happened when other people were present, casting more doubt on either game being done with an intent to abuse AB. R. at 361 (showing TSgt JG was present for "flash the world" and EB for "I toed you so"). It is only in her pretext call with OSI designed to get TSgt Baumgartner to incriminate himself when AB stated, "Those weren't games." R. at 456; Pros. Ex. 3. But they were.

Even if at some point AB did not like this game anymore, there is no evidence of TSgt Baumgartner's intent to physically injure her. It was only right before AB left in 2017 that "it wasn't a game anymore" to AB. R. at 303. *Her* subjective discomfort is not evidence of *his* intent to abuse. Her discomfort is more akin to humiliation or degradation—not an intent to

physically injure her. Her feeling humiliated (R. at 303) during the last instance of "flash the world" also does not inform his intent to abuse her. To conclude that her "discomfort" or "humiliation" constitutes circumstantial evidence of his intent to abuse would ignore the commonsense definition and render "abuse" surplusage to the other theories of liability in Article 120b, UCMJ: "humiliate" or "degrade." If the theory of the Government's case was that TSgt Baumgartner acted with the intent to humiliate or degrade, then it charged its case wrong.

Taking all inferences in favor of the Government, even TSgt Baumgartner knowing the games made AB uncomfortable and then continuing to play the games with her is still not proof of intent to abuse. Without question, as TSgt Baumgartner recognizes, those games were inappropriate and "wrong." Pros. Ex. 1 at 6; R. at 456-57. Years later, he acknowledges he "hurt" AB and caused her "pain," but this is a reflective text, devoid of context, and not relevant to intent at the time of the charged offenses. Pros. Ex. 1 at 3; *see United States v. Hoggard,* 43 M.J. 1, 4 (C.A.A.F. 1995) (explaining in dicta that evidence of a state of mind separated from an actus reus by three to six months is too attenuated to "illuminate [an] appellant's state of mind at the time he" committed the actus reus); *see also United States v. Harrington,* 83 M.J. 408, 415 (C.A.A.F. 2023) ("We decline to adopt a bright-line rule as to when later-in-time conduct may be considered and instead hold that the appropriateness of considering such conduct will turn on the facts of each individual case."). Additionally, with the minimal context available, this text also seems to refer to emotional "hurt" and "pain," not physical pain. Pros. Ex. 1 at 2-3 (showing the text messages are selective, from 2020, and generally about their father-daughter relationship, nothing specific). He never denies playing those games with AB, but all the evidence indicates a lack of intent to *physically injure* her.

Additionally, AB never told her father that his actions physically hurt her, despite Trial Counsel's argument to the contrary. *Compare* R. at 583 *with* R. at 295. AB testified that she told him she was "uncomfortable." R. at 295. Years later, she mentions his actions made her uncomfortable in the pretext phone call as well and that "it hurt," but this is in reference to the "I toed you so" game. R. at 456. Furthermore, AB never testified "flash the world" even caused her physical harm. Simply because this was how the family habitually wrestled does not prove beyond a reasonable doubt TSgt Baumgartner was playing "flash the world" to "abuse" AB, as the term is legally defined. There is no evidence TSgt Baumgartner intended the game to hurt at the time it was happening.

Finally, TSgt Baumgartner never admits he was trying to hurt his daughter. His admissions are all about the conduct. He played these games with AB. These games got "out of control" or went "too far," presumably because they involved sexualized body parts, although TSgt Baumgartner never says this. Nonetheless, these games were never about causing physical injury, pain, or harm. TSgt Baumgartner never admits an intent to abuse and none of the evidence proves he ever had an intent to abuse. No reasonable factfinder could have found "intent to abuse" beyond a reasonable doubt, even weighing every inference in favor of the prosecution. Therefore, the evidence is legally insufficient to sustain the conviction.

3. TSgt Baumgartner's conviction for touching AB's breasts is factually insufficient because AB had significant credibility issues that detract from any possible inference this game was done with an intent to abuse.

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [the appellate court is] convinced of the [appellant]'s guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. "In conducting this unique appellate role, [this Court takes] 'a fresh, impartial look at the evidence,'

applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (quoting *Washington*, 57 M.J. at 399), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018).

A neutral and independent evaluation of the evidence by this Court, upon weighing the evidence and judging the credibility of witnesses,[5] reveals the Government did not prove sexual abuse of a child beyond a reasonable doubt. This Court cannot affirm the findings because AB's account of "flash the world" along with her and the Government's implication the game was done with an intent to abuse is not believable or proven by the evidence.

a. AB's account of "flash the world" is not believable because it is physically impossible.

AB's description of "flash the world" is minimal. She testified, as a part of play fighting, TSgt Baumgartner would lock both of her arms behind her back so she could not move. R. at 292. Then, while holding her arms so she could not move, he would lift AB's shirt and bra up. *Id.* The last time "flash the world" occurred, he lifted her shirt and bra up over her head and said, "This is what you want the world to see." R. at 303. In making her "flash the world" 20-30 times over a period of four years, TSgt Baumgartner's hand would touch AB's breasts. R. at 292, 296. However, AB did not immediately state TSgt Baumgartner would touch her breasts while wrestling; AB had to have this question directly asked to her. R. at 296. This now-19-year-old also did not elaborate how his hands would touch her breasts. *Id*.

This brief description of "flash the world" does not make sense. From a practical perspective, it would be difficult, if not impossible, to lift both a wired bra and a shirt over anyone's

[5] 10 U.S.C. § 866(d) (2019).

head while their arms are locked behind them. TSgt Baumgartner does not deny "flash the world" occurred, but he never admits to touching her breasts or this version of the game, and this description of events does not make physical sense. Coupled with the language AB's claims happened simultaneously and being thrust in front of a window, this behavior in context comes across as exaggerated, especially when AB had several motives to fabricate and a poor character for truthfulness. Since her account of what occurred is not believable on its own, proof beyond a reasonable doubt TSgt Baumgartner committed abusive sexual contact does not exist.

b. AB's account of "flash the world" is not believable because AB had numerous credibility concerns.

When looking at her credibility as a whole, AB was not a credible witness. Her character for truthfulness was in question. The record reveals she was a habitual liar who tends to exaggerate. She was inconsistent with herself on and off the stand and with other witnesses. She had several strong motives to fabricate the allegations of sexual abuse: a strict family, absentee parents, and vindication of her internal narrative. All of these issues come together to cast reasonable doubt on her narrative of "flash the world." "Flash the world" was a game that got out of control, but TSgt Baumgartner never had the intent to abuse his daughter.

i. AB had a poor character for truthfulness.

Throughout trial, the evidence repeatedly showed that AB had a poor character for truthfulness. EB testified, "She's not really truthful." AB lied to everyone: TSgt Baumgartner, TSgt JG, her teachers, the police, and OSI, to name but a few. R. at 316, 341-43, 346-47. AB said she lied to TSgt Baumgartner and TSgt JG because telling the truth about what she was doing would result in the same consequences as lying. In effect, she was trying to get away with bad conduct through more bad conduct since the result was the same. When confronted on the stand about lying to police and OSI, she gave conflicting answers and excuses, but ultimately admitted

she lied. She also admitted she habitually lied: "I did lie a lot as a kid to get out of trouble, so I did lie." R. at 376. She testified that she lied to OSI because she felt "unheard." R. at 347. These two sworn statements say a lot about AB. When she is in trouble, caught in a situation, or wants something, she lies.

Aware of this character for untruthfulness, Trial Counsel attempted to rehabilitate AB, but the attempt was unsuccessful. Trial Counsel's generalized questions did not go to a contested element, like intent or any defense. It was clear she was not lying about *something* happening—just everything else. As a result, AB's character for lack of truthfulness permeated the trial.

ii. AB was inconsistent and demonstrated a character to exaggerate.

AB was also an inconsistent witness who tended to exaggerate. Her threats to call the police for false crimes (and failing to call the police for supposed real crimes) paints AB as a person who seeks attention through false law enforcement reports. This is especially true when considering that there were many false reports of abuse levied by AB over the years. This casts more doubt on the veracity of any allegation made by AB.[6] Again, while TSgt Baumgartner is not contesting the games happened, the overall narrative is critical to his defense and to the Government's failure to prove intent. This is because *any time* AB is inconsistent or exaggerates (*e.g.*, *see* Issues III and IV, *infra* (showing numerous inconsistencies with other witnesses)) that casts doubt on the intent behind the games by highlighting how AB *overall* has a tendency to embellish for self-serving reasons.

Her exaggerations also extended to the discipline she claimed occurred. AB claimed she was body slammed, thrown to the ground, beaten, and paddled as discipline. Despite being pulled

[6] This includes the Santa Maria Inn incident, discussed in Issues III and IV, where EB was a witness.

into parent teacher conferences and claiming she called the police after every time she was "abused," there is no evidence of any injury to AB, except on the night of the Santa Maria Inn incident—when someone else called the police. But even that night, her injuries do not align with her testimony—she would have had extensive injuries based on her account. *See* Issues III-IV, *infra*. This is another exaggeration inconsistent with the evidence.

TSgt JG is the only substantive witness who did not have prior inconsistent statements to consider. AB threw multiple motives and biases at TSgt JG, but in comparison to AB, TSgt JG is a more credible witness given the facts of the case. To that end, TSgt JG provides a very different narrative of the household. AB was defiant, oppositional, angry, and upset—not because she was abused, but because she felt overly controlled. This ties together with AB's motives to fabricate, making AB an unreliable and untrustworthy witness.

iii. AB had at least two strong motives to fabricate.

First, AB's motive to get away from her strict parents and back to her boyfriend adds to the unbelievability of her account. AB had strict parents who tried to discipline AB for bad behavior they deemed wrong. Shoplifting, hanging out with friends who drank and did drugs, skipping school, hiding a secret phone and Facebook account from her parents, doing "inappropriate" activities with a boyfriend at age 14, were all considered "wrong" activities by AB's parents, but AB wanted to live her life that way. AB said it best on the pretext call: "I'm fucking tired of you always trying to tell me that I'm doing something wrong and I'm not." R. at 462.

AB did not like listening to her parent's telling her what to do, understandably, because her bad choices came with consequences. Any time AB did anything wrong or ignored the rules, she

would be disciplined—harshly, according to her. R. at 289-90, 372. *But see* R. at 414 (spanking only), 497-98 (confiscating items and phone).

AB had trouble with authority figures across her life, to include parents, teachers, and police. She wanted to be with her boyfriend, closer to her mother, and away from the people telling her what to do. Her discontent at home was one motive to exaggerate the "abusive" and sexual nature of "flash the world:" she wanted to be relocated to Colorado once the move to California occurred. AB partially got what she wanted on the night of the Santa Maria Inn incident, but it was not permanent. As soon as she reported the games, though, AB was able to get away from her parents, move back to Colorado, run away from her uncle, and live with her boyfriend, Myron. Once the narrative of "sexual abuse" was out there, that is the account AB maintained. Consistent with her character, AB exaggerated and lied about the nature of the games to get what she wanted.

Second, as a child of divorce, AB was torn between her parents and their spouses, which created a parallel motive to fabricate. AB lived in a broken family dynamic where she was always competing with her parents' spouses. She could not be with her mother because of her mother's sex-offender boyfriend, and she never got her father's support in arguments against TSgt JG. It would be a win-win to get out of TSgt Baumgartner's house and back to her boyfriend in Colorado and closer to her mother, which is exactly what happened after she made this report.

iv. AB's motive to fabricate colored her memory, making her less credible.

All of AB's motives to get out of a strict household, away from TSgt JG and TSgt Baumgartner's discipline, and back to her mother and boyfriend, enforce the idea she exaggerated the games to fit her personal narrative. This is supported by Dr. Elaine Bailey's testimony about memory.

Memories are susceptible to a lot of influences. R. at 537. Each time AB claims she is being abused, her memory drifts. R. at 537. As Dr. Bailey provided:

> The effect of retelling the event can be that the memory becomes more consistent with how you're telling the story as opposed to the actual memory. So if you're telling it in an exaggerated fashion, at some point it can be hard to tell what the actual truth was because it can contaminate memory.

R. at 538. AB's "gist memory"[7] is strong and clear: they played these games. But AB's cognitive filters, whether consciously or not, altered her memory.

AB had a schema of TSgt Baumgartner and of herself: "I'm fucking tired of you always trying to tell me that I'm doing something wrong and I'm not." R. at 462, 531. He is in the wrong, and she is not. Her allegations against TSgt Baumgartner fit into her interpretation of the world.

What this all reveals is that these games happened, but the alleged "abusive" nature of them is inaccurate. AB is remembering something innocuous and transforming it into "abusive" to fit her perception of TSgt Baumgartner: the angry, controlling, disciplinarian. However, he did not play these games to physically injure her, as she believes. He just played these games with her—which is all the Government proved. His intent was all about trying to have fun; however misplaced that might be, it is not criminal. All of AB's credibility issues cast doubt on her entire narrative of what happened and cannot provide proof beyond a reasonable doubt for intent to abuse.

c. In light of all of AB's credibility concerns, the Government failed to prove intent to abuse.

Direct proof of intent was lacking. What these games were and why they happened is contested. For "flash the world," none of the evidence indicates TSgt Baumgartner acted with the intent to abuse AB. The same analysis regarding the lack of evidence about intent to abuse—the legal sufficiency argument above—is relevant to this Court's factual sufficiency analysis. *See*

[7] Dr. Bailey explains "gist memory" in her testimony. R. at 544.

pages 21-24, *supra*. This game was conducted in the context of wrestling. Laughing occurred during it. The game was never associated with anger or discipline. All of the direct evidence of intent points to an intent to joke around and have fun.

Any circumstantial evidence of intent comes from how AB painted her relationship with TSgt Baumgartner, but, first, AB was not a credible witness, as discussed, and, second, none of the evidence even shows "intent to abuse." *See* pages 21-24, *supra*. The Government's case on this specification was weak because it relied solely on AB's account of TSgt Baumgartner's display of intent, which had to be strongly inferred, if it exists at all. *Id*. AB painted a picture of TSgt Baumgartner raising her shirt and bra up and exposing her breasts. Arguably, this is unconventional behavior if true, but nothing about this narrative suggests TSgt Baumgartner did this to *physically injure* AB. *Id*. Everything about this was a game, to both of them.

This is not a case where the act itself can indicate intent, especially where no physical injury is being caused. Context is required, and AB's credibility undercuts the Government's ability to prove its case. AB's account of the game is not believable, undermining the Government's case overall. Her motives to fabricate bolster the conclusion that she exaggerated what happened. Her lack of truthfulness, cry-wolf mentality, and inconsistencies further weaken the Government's case. There is very minimal, if any, evidence of intent to abuse. And this Court should not be convinced of TSgt Baumgartner's intent to abuse beyond a reasonable doubt.

Under the factors articulated in *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013), the sentence should be set aside for a rehearing before members, particularly in light of the fact (1) TSgt Baumgartner was originally sentenced by members, (2) this specification was merged with another, and (3) the remaining offenses, should they survive appellate review, are unique—

"sexual abuse of a child with intent to abuse"—or otherwise make up one incident on one specific day.

WHEREFORE, TSgt Baumgartner respectfully requests that this Honorable Court set aside the finding of guilty as to Specification 1 of Charge I, dismiss Specification 1 of Charge I with prejudice, and set aside the sentence for a sentence rehearing.

II.

TSgt Baumgartner's conviction for touching AB's vulva is not legally or factually sufficient because he did not have the requisite specific intent to "abuse," meaning "physically injure."

Additional Facts

The additional facts included in Issue I are herein incorporated.

Standard of Review

This Court reviews issues of legal and factual sufficiency de novo. *Washington*, 57 M.J. at 399 (citation omitted).

Law and Analysis

1. TSgt Baumgartner's conviction for touching AB's vulva is legally insufficient because no evidence was presented of intent to abuse.

The same statement of law from Issue I applies here with the addition of the elements of Specification 2 of Charge I:

> (1) That within the continental United States, on divers occasions, between on or about 1 January 2015 and on or about 1 January 2018, the accused committed a lewd act upon [AB] by unlawfully touching though the clothing her vulva with his foot;
>
> (2) That, at the time, [AB] has not attained the age of 16 years; and
>
> (3) That the accused did so with an intent to abuse her.

R. at 567; *MCM*, App. 22, paras. 45b.a.(h), b.(4)(a) (2019 ed.).

As with "flash the world," the direct and circumstantial evidence does not prove TSgt Baumgartner had the intent to physically hurt AB when playing "I toed you so." "I toed you so" was also a game, and this Court itself cannot be convinced beyond a reasonable doubt the evidence admitted constitutes proof of intent to abuse.

Just like with "flash the world," "I toed you so" started with wrestling and horseplay. R. at 358. AB testified when TSgt Baumgartner would "get tired of wrestling," he would "end it" by grabbing her arms while she was "on the couch on [her] stomach or on [her] back and he would like open his toe and pull [her] arms, so there. It hurt." R. at 293-94. AB described being "pinned" on the couch, trying to get away. R. at 294. She would often scream and yell, but never claimed she screamed or yelled because she was in pain. *Id*. At trial, she testified, "It hurt. I was sore. It was embarrassing." *Id*. She also told TSgt Baumgartner "I toed you so" hurt her during the pretext call with OSI four or more years later. R. at 456. But there was no evidence presented that she told TSgt Baumgartner the game hurt at the time the game was happening or that the game continued after he knew it hurt (years later). At the time "I toed you so" happened, AB only told TSgt Baumgartner the games made her uncomfortable. R. at 295. Continuing this game after knowing she was uncomfortable is not evidence of intent to physically injure AB. As with "flash the world," the Government failed to charge the case correctly if "humiliate" or "degrade" was the theory.

Furthermore, accidentally hurting AB is insufficient because for specific intent, any mistake or ignorance does not need to be reasonable, only honest. *See* Rule for Courts-Marial (R.C.M.) 916(j)(1). TSgt Baumgartner had to intend to physically hurt AB at the time the game occurred. There is no evidence TSgt Baumgartner intended to physically hurt AB or that her screaming and yelling or "sometimes crying" was anything other than a response to horseplay. All

these reactions could have been indicative of an emotional state, but there is no evidence showing TSgt Baumgartner *intended* to hurt AB when he played this game with her. No reasonable or fair inference can imply intent to abuse based on the facts elicited.

Additionally, this was a game that, based on AB's testimony, matched something AB described as "foot wars." R. at 358-59. AB, EB, and TSgt Baumgartner would kick each other in the crotch, or try to push each other off the couch, and this was part of their typical wrestling games. R. at 359. AB denied "foot wars" being the same as "I toed you so," but "I toed you so" was always in the context of play wrestling, just like "flash the world." R. at 358-59. Additionally, EB was involved in "I toed you so," as well. R. at 361. Just like with "flash the world," this game was repeatedly played because wrestling was common in their house. Winning wrestling was done by pinning someone down, and "I toed you so" was a form of pinning AB down. R. at 294. This behavior may be unconventional, but it is not criminal because TSgt Baumgartner lacked the requisite intent to physically hurt AB.

Finally, as with "flash the world," TSgt Baumgartner never admits he was trying to hurt AB. His admissions are all about the actus reus, which he fully acknowledges he did and was "wrong." But being "wrong" is not the same as the Government proving the correct mens rea. These games were never about causing pain. TSgt Baumgartner never admits an intent to abuse and none of the circumstantial evidence demonstrates it. No reasonable factfinder could have found an intent to abuse beyond a reasonable doubt, even weighing every inference in favor of the prosecution.

2. TSgt Baumgartner's conviction for touching AB's vulva is factually insufficient because AB's account is unbelievable and her credibility issues cast serious doubt on TSgt Baumgartner's intent.

Much like with "flash the world," a neutral and independent evaluation of the evidence by this Court, upon weighing the evidence and judging the credibility of witnesses, reveals the

Government did not prove sexual abuse of a child beyond a reasonable doubt. This Court cannot affirm the findings because AB's account of "I toed you so," along with the Government's implication the game was done with an intent to abuse, is not believable or proven by the evidence.

a. AB's account of the "I toed you so" is not believable because it is physically impossible.

As with AB's description of "flash the world," her description of "I toed you so" is physically impossible. AB testified TSgt Baumgartner would grab her arms while she was on the couch on her stomach or on her back and pull them towards him. R. at 294. While doing that, he would push his foot into her crotch, specifically her vulva over her clothes. *Id*. AB would be pinned during this process; she could not move. *Id*.

At trial, AB did not describe where TSgt Baumgartner was when doing this. She does not describe how she is on the couch. She does not describe how they are positioned. She does not describe whether their arms are extended or not. In effect, she does not describe *how* this is possible. Left with only this vague description, it is impossible to understand what was going on in "I toed you so." She does not testify with enough specificity to prove this game happened in this manner beyond a reasonable doubt.

This lack of specificity casts doubt on her narrative and changes the context of the game. It makes it more likely this was an extension of "foot wars," where TSgt Baumgartner would have also been on the couch:

> Q. And you and your brother would play a game called foot battles or something like that?
> A. Foot wars.
> Q. Foot wars. And you guys would sit on the couch and your feet would be struggling, kicking each other?
> A. Yes.
> Q. Your dad would sometimes do that, too?

A. Not as often, but he did.

R. at 358.

Under this arrangement, AB would never be pinned in this position. They would be facing each other, on the couch, and she would be able to wriggle backwards or move on top of TSgt Baumgartner to continue wrestling. Under no circumstance does her being on her stomach make sense. If TSgt Baumgartner was standing, on or off the couch, wrestling with his 11- to 14-year-old child, height differences would make this even more improbable. Arm span is typically comparable to overall height, so arm length would be approximately half an individual's height. It is difficult to imagine how her narrative could be true in this setup. The game happened, TSgt Baumgartner admits that, but there is no evidence *how* it happened, assuming this is even what it was. She is the only source of evidence, and her narrative is unbelievable. Because the evidence does not demonstrate how this game possibly occurred, it is impossible for TSgt Baumgartner to have committed abusive sexual contact beyond a reasonable doubt.

b. AB's account of "I toed you so" is not believable because AB had numerous credibility concerns.

The analysis of AB's credibility provided in Issue I, section 3.b., *supra* (discussing factual sufficiency), is incorporated here as it is equally applicable. AB has serious credibility concerns, and her own brother further highlights those with "I toed you so." Specifically, according to AB, EB witnessed and played "I toed you so." EB's testimony calls this into question: "Isn't it true that you've never witnessed your father do anything sexual to your sister? Yes, sir." R. at 404. AB's version of events is sexual; TSgt Baumgartner, standing over AB, pushing his foot into her vagina hard enough to "make it hurt" would not go unnoticed by EB, especially since AB was allegedly voicing or otherwise expressing her discomfort loudly and clearly. This is another

indicator "I toed you so" did not happen in the way AB describes. More likely than not, it was just "foot wars."

"Foot wars" was a game played consistently with both kids and by both kids. R. at 358-59. AB admits she hit her brother in the crotch. R. at 359. She admits he "kind of" hit her back. *Id*. She admits she hit TSgt Baumgartner in the crotch. *Id*. In this context, "I toed you so" is simply a one-liner for hitting someone in the crotch during a foot war. Knowing this kind of game was being played, it is easy to see how "I toed you so" was "foot wars," or, at minimum, a version of the game, especially since AB's description is so incredible. Consistent with AB's habit of lying to get out of handling difficult situations, when caught on the stand about "foot wars," she denied "foot wars" and "I toed you so" were the same thing. However, based on AB's credibility problems, the context of both "foot wars" and "I toed you so," and the fact EB was present, makes it highly likely these are one in the same.

On top of that, just like with "flash the world," there is no evidence TSgt Baumgartner played "I toed you so" to intentionally physically hurt AB. *See* Issue II.1. on legal sufficiency, *supra*. Even if he accidentally hurt AB, that is not enough for specific intent. *Id*.

Moreover, AB had so many motives to fabricate at the time the allegation surfaced. AB leveraged an accusation of sexual abuse to get her out of the house and back to Colorado and her boyfriend. Once her allegation was out, AB stuck to the narrative, either intentionally or because her memory had been altered (*see* Issue I.3.b.iv. on memory, *supra*). EB, however, did not stick to any narrative. He contradicted his sister about whether he saw anything sexual occurring. Considering she claimed she was screaming, yelling, crying, and saying stop, it is hard to believe EB would be ignorant of this behavior if he was a participant and observer. Either way, the

Government failed to prove "intent to abuse" and this Court should not be convinced beyond a reasonable doubt.

Under the factors articulated in *Winckelmann*, 73 M.J. at 15-16, the sentence should be set aside for a rehearing before members in light of the original sentencing forum and the fact remaining offenses, should they survive appellate review, are unique—"sexual abuse of a child with intent to abuse"—or otherwise make up one incident on one specific day.

WHEREFORE, TSgt Baumgartner respectfully requests that this Honorable Court set aside the finding of guilty as to Specification 2 of Charge I, dismiss Specification 2 of Charge I with prejudice, and set aside the sentence for a sentence rehearing.

III.

TSgt Baumgartner's conviction for grabbing AB by the neck is legally and factually insufficient because there is no evidence he ever touched her neck with his hand as charged.

Additional Facts: The Santa Maria Inn Incident

In moving to California from Colorado, TSgt Baumgartner, TSgt JG, AB, and their two dogs drove across the country. R. at 296-97. They picked EB up before ending their trip in Santa Maria, California, near Vandenberg SFB. *Id*. They stayed at the Santa Maria Inn, a "very nice hotel." R. at 298. They were in a suite, with a pull-out couch in a living room, a jack-and-jill bathroom, and another bedroom. *Id*. The bathroom connected to the living room and the bedroom. *Id*.

Both AB and TSgt JG testified about what initially happened that night. They had very different accounts.

AB testified that on the night they arrived, TSgt Baumgartner and TSgt JG went downstairs for dinner and a drink, and EB and AB went downstairs with them. R. at 299. TSgt JG testified EB and AB made food in the room and did not go downstairs. R. at 491, 504.

AB testified TSgt Baumgartner and TSgt JG left the restaurant early because they were fighting, and TSgt JG was "a little drunk." R. at 299. TSgt JG testified TSgt Baumgarter and her returned to the room to find AB in the bathroom. R. at 491.

AB testified she and EB needed to take the dogs out, so she made a leash out of a boxing wrap. R. at 299. They took the dogs out. *Id.* When they came back upstairs, TSgt JG was "still very drunk" and getting in her face. *Id.* She told AB to hit her, screamed at her, told her "since she was government property [AB] was going to go to jail if [AB] put [her] hands on [TSgt JG]." R. at 299-300. AB testified TSgt Baumgartner pulled TSgt JG away from her and took her to the bedroom. R. at 300.

TSgt JG testified she had no memory of AB walking the dogs, using boxing wraps to do so, or arguing with her about it. R. at 505. Neither party attempted to refresh her memory on these points. *See* R. at 505, 513-14 (showing no further discussion on re-direct or cross). Instead, TSgt JG testified AB would not get out of the bathroom and an argument at the bathroom door occurred. R. at 491. AB called them bad parents. R. at 492. TSgt JG testified AB finally got out of the bathroom and yelled at TSgt Baumgartner. R. at 492. He told her to go to bed. *Id.* He had work at 7:30 AM the next day. *Id.* TSgt JG had no memory of arguing with AB, but remembered AB arguing with TSgt Baumgartner. R. at 505-06.

In a previous statement to police, TSgt JG's narrative was consistent. R. at 388. In a previous statement to police, AB mentions she was told to get out of the bathroom, but also

discussed the boxing wraps and argument with TSgt JG. R. at 384-85. AB did not recall being in the bathroom at trial. R. at 356.

Returning to AB's account of the evening, AB testified she needed to talk to TSgt Baumgartner about all the problems with TSgt JG. R. at 300. She tried to go into the bedroom, but the door was locked, so she went through the bathroom. *Id*. In a previous statement to police, AB stated she wanted to enter the bedroom to "calm things over" between TSgt Baumgartner and TSgt JG who were fighting. R. at 385.

TSgt JG testified AB started screaming, yelling, and pounding on the door when they were in bed. R. at 492. It was past 10:00 PM. R. at 493. AB could not get through the locked bedroom door, so she came through the bathroom. R. at 492. In the bedroom, she started screaming at TSgt Baumgartner. *Id*.

AB testified she and TSgt Baumgartner started yelling and fighting when she was in the bedroom. R. at 301. He ended up coming out of the room into the living room; she does not explain how or why. *Id*. In a previous statement to police, AB said TSgt Baumgartner pushed her out of the room. R. at 385. TSgt JG testified AB, "screaming at the top of her lungs" for someone to call the police, ran out of the bedroom back into the main living area. R. at 493. TSgt Baumgartner chased after the screaming AB. R. at 493, 509.

AB testified:

> I don't necessarily remember what I said, but my dad – so we were yelling. We were yelling a lot, me and my dad. He put – he slapped his hand over my mouth and my nose and pushed me to the wall in a chokehold. And then I was screaming, so then he put his hand over my mouth again, pushed me on the ground. And I can't breathe and I'm looking at my brother and he's sitting there watching me. And then my dad – I get up and we're still fighting. And all of a sudden he had his arm around my throat and his hands were in my mouth and my nose and he was, like, swinging me around, choking me.

R. at 301. AB acknowledged TSgt Baumgartner put his hand over her mouth to stop her screaming. R. at 374. She did not clarify what "chokehold" meant, even when Trial Counsel asked if that mean TSgt Baumgartner's hands were on her throat. R. at 301.

EB was present during this event. R. at 398, 401. He testified he could not recall what occurred. *Id*. A previously recorded statement of his, taken 17 November 2017, several months after the incident, was admitted without objection. R. at 399, 402. In the statement, EB provided:

> [H]e put his hand around her mouth . . . Like her in mouth, and . . . He put his arm . . . Other arm around her neck and like lifted her up and like starting swinging her around My dad came out and started, like, manhandling her.

Pros. Ex. 4 at 00:11-23, 00:37-39;[8] App. Ex. XXVI at 5:40-6:09, 7:39-7:52.[9]

In previous statements to police, AB said she was pushed and slapped by TSgt Baumgartner. R. at 385. At trial, she said she was body slammed, although it was unclear how. R. at 358. She testified she told the police about being body slammed. R. at 309. The policeman who interviewed her that night testified she did not tell him that. R. at 394. EB does not corroborate any pushing, slapping, or body slamming in his statement to police. R. at 398, 401; Pros. Ex. 4.

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[8] Please note, EB stammers or stutters throughout this quote. It is cleaned up for ease of reading and presentation, but the full audio should be listened to.

[9] The file on this appellate exhibit is 10 minutes and 54 seconds long. App. Ex. XXVI. Trial Counsel describes the file as approximately 28 minutes in length. R. at 399. However, the time hacks described on the record are accurate and match this recording. R. at 399-400; App. Ex. XXVI at 5:40-6:09, 7:39-7:52. Additionally, Appellate Exhibit XXXI, which was the portions of the recorded recollection played in open court and which matches Prosecution Exhibit 4, is not identical to what was described on the record. R. at 560-61, 593, 658. Instead of being a single MP3 or WMA file with both cuts merged together, there is also a folder titled "Music" on the disc. *Compare* R. at 593 *with* App. Ex. XXXI. This is the same with Pros. Ex. 4; a "Music" folder exists when none is described on the record. *See* R. at 658-59 (describing how Pros. Ex. 4 will be identical to App. Ex. XXXI so the members can review it). **To the extent any of these discrepancies are error, TSgt Baumgartner affirmatively waives them and does not allege any prejudice.**

After this incident, AB ran out of the hotel room. R. at 301-02. She said she was going to call the police. *Id*. She testified she could not get anyone in the lobby to answer after knocking, so she sat outside—locked out of the hotel—crying. *Id*. A hotel guest, a bachelorette party attendee, testified she found AB outside the bachelorette party's room—inside the hotel and across the hall from the Baumgartner room. R. at 424-426. AB's neck was all red, she had a cut inside her lip, and a mark on her forehead. R. at 426. One of the bachelorette party-attendees took photos and called the police. *Id*.; Pros. Ex. 2.

The police who arrived were reservists in TSgt Baumgartner's unit. R. at 371, 381, 430. They did not know him or of him, but they knew his brother, who had the same last name and worked with them. R. at 430-31. The policeman who interviewed AB only interacted with TSgt Baumgartner on that night and never again. R. at 391. AB was removed from the family and sent to TSgt Baumgartner's brother, who was local. R. at 371, 495. AB was there for either a few days (R. at 302) or two weeks (R. at 495) until she moved back in with TSgt Baumgartner and TSgt JG, either into the hotel (R. at 302) or their new house (R. at 495). AB came back to live with them sometime before September or October of 2017. R. at 496.

Standard of Review

This Court reviews issues of legal and factual sufficiency de novo. *Washington*, 57 M.J. at 399 (citation omitted).

Law and Analysis

The legal and factual sufficiency case law cited in Issue I, *supra*, is also applicable for this issue and is incorporated herein. Evidence not presented at the trial cannot be used to support or reverse a conviction. *United States v. Bethea*, 22 C.M.A. 223, 225 (C.M.A. 1973). Furthermore,

a legal and factual sufficiency determination "should be based on evidence that has been exposed to cross-examination or the right to cross-examine." *Id.*

"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 TSgt Baumgartner with assault of a child under the age of 16 by "grabbing [AB] by the neck with his hand." R. at 569; ROT, Vol. 1, *Charge Sheet*, dated 24 January 2022. Specifically, the elements of battery upon a child under the age of 16 in Specification 2 of Charge II are:

(1) That at or near Santa Maria, California, on or about 27 August 2017, the accused did bodily harm to [AB];
(2) That the accused did so by unlawfully grabbing her by the neck with his hand;
(3) That the bodily harm was done with unlawful force or violence; and
(4) That [AB] was then a child under the age of sixteen years.

R. at 569. *MCM*, pt. IV, para. 54.b.(3)(c) (2016 ed.).

Since "[t]here is no dispute that the government controls the charge sheet," TSgt Baumgartner is entitled to rely on the particular type of force alleged within the specification: "grabbing [AB] by the neck with his hand." *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017). In fact, as the Court of Appeals for the Armed Forces (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).

Here, the Government took a risk and lost because during the key portion of AB's direct examination, there was no mention of "hand" on the throat. In fact, AB only provides a general description of the fight between her and TSgt Baumgartner: "He put . . . pushed me to the wall in a chokehold. And all of a sudden he had his arm around my throat and his hands were in my

mouth and my nose and he was, like, swinging me around, choking me." R. at 301. Immediately, Trial Counsel attempted to clarify this narrative. Trial Counsel asked, "When you say 'choking you,' [AB], was his hand on your neck?" AB responded, "He had me in a head lock." R. at 301. No further clarification occurs. *Id*. There was no evidence presented that TSgt Baumgartner grabbed AB by the neck with his *hand.*

Neither "chokehold" or "head lock" mean TSgt Baumgartner grabbed AB by her throat with his *hand*. Both wrestling terms are common knowledge, and they are both general terms for holding someone's neck with an *arm*. *Chokehold*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/chokehold (last visited 19 Apr. 2024) ("[A] way of holding someone with your arm tightly around their neck so that they cannot breathe easily."); *Headlock*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/headlock (last visited 19 Apr. 2024) ("[E]specially in wrestling, a way of holding an opponent with your arm around their head so that they cannot move."); *Headlock*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/headlock (last visited 19 Apr. 2024) ("[A] hold in which a wrestler encircles an opponent's head with one arm."). Nothing about AB's description is proof of being grabbed by the hand.

All of the other evidence about this incident does not make any distinction between arm or hand either. One of the bachelorettes that found AB testified, "Her dad physically slapped her and then pushed her." R. at 426. She provided that AB's neck was really red too. R. at 426. When police arrived, police only saw an injury to AB's lip, but AB told them TSgt Baumgartner "had choked her and slapped her in the face." R. at 382. However, "choked" is not further described and is a generic term that means an inability to breathe for any number of reasons. *E.g., Choked*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/choked (last visited 1 Jun.

2024) ("[T]o check or block normal breathing of by compressing or obstructing the trachea or by poisoning or adulterating available air."). There is simply no proof TSgt Baumgartner's hand ever grabbed AB's neck, which means the Government failed to prove this offense. This situation is very similar to what happened in *United States v. English*, 79 M.J. 116, 119 (C.A.A.F. 2019).

In *English*, the Government included a specific type of force in the charging language for an Article 120, UCMJ, offense: "grabbing her head with his hands." 79 M.J. at 120. By "narrow[ing] the scope of the charged offense by alleging the particular type of force, [the Government] was required to prove the facts as alleged." *Id.* (citing *Reese*, 76 M.J. at 300-01). "[T]he fulcrum of the defense theory with respect to this offense was that the Government failed to prove the unlawful force alleged." *English*, 79 M.J. at 121. Additionally, even though the victim's testimony "did not strictly conform with [the specification] as drafted, the Government argued it did, and did not seek a finding of guilty by exceptions and substitutions at Appellant's court-martial." *Id.* The offense was factually insufficient, requiring dismissal. *Id.* at 123. Here, the same result must occur because the Government did not prove "hand on neck."

Like in *English*, the defense theory was the Government failed to prove what it charged: "One of the charges is he grabbed me by the neck with his hand. There's no evidence he grabbed her neck with his hands. That is an easy not guilty." R. at 626; *see also* R. at 620 ("That's what's on the charge sheet, that he had his hand around her neck. That's what he's charged with doing. . . . The charge is hands on the neck. Where did that come from?"). This theory and strategy explains some of the tactical decisions made by Defense, like not raising an R.C.M. 917 motion or not objecting to EB's recorded recollection. R. at 401-02; Pros. Ex. 4; App. Ex. XXVI. EB was unable to recall the night of the incident or the interview subsequently admitted, but he somehow testified that his recorded recollection, the contents of which he had no memory of, was accurate. R. at

402. This seems counterintuitive and a basis for objection. However, EB's recorded recollection corroborates that TSgt Baumgartner grabbed AB with his arm, not his hand. R. at 401-02; Pros. Ex. 4; App. Ex. XXVI. The relevant excerpt provides, "He put his arm . . . Other arm around her neck." *Id*. Thus, by relying on the charging scheme, the Defense strategically leveraged an inconsistency that was more credible than AB's exaggerated account and that matched the "headlock" and "chokehold" description, *not* the Government's flawed charging scheme. As Defense put it, this made the specification "an easy not guilty." R. at 626.

Also like in *English*, Trial Counsel falsely argued the evidence conformed to the charge sheet: "The accused . . . grabb[ed] her neck with his hand . . . ." R. at 586. In rebuttal, Trial Counsel went even further:

> Choking and strangling are different charges. This is hands to the neck. Not only is [EB] there, clear about what happened, they corroborate his sister. They corroborate what happened that night. It's not the worst thing in the world, but he choked her. He put his hands on her neck.

R. at 635. But the Government did not prove this. Also like in *English*, the Government did not ask for exceptions or substitutions. R. at 551. And now, exceptions and substitutions under R.C.M. 918(a)(1) are impermissible. *United States v. Lubasky*, 68 M.J. 260, 261, 265 (C.A.A.F. 2010). Furthermore, reviewing courts may not "revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial." *Id.* at 119 (quoting *Dunn v. United States*, 442 U.S. 100, 107 (1979)).

The Government may have simply failed to ask the correct questions, or, even if it did, AB may have never answered that the touching occurred with a hand, and thus the case was charged incorrectly. Either way, the Government failed to present any evidence that TSgt Baumgartner grabbed AB by the neck with his hand. Thus, the evidence is legally and factually insufficient to

support the conviction. As in *English*, the specification must be dismissed. *English*, 79 M.J. at 123 n.7.

Under the factors articulated in *Winckelmann*, 73 M.J. at 15-16, the sentence should be set aside and a rehearing authorized, particularly in light of the sentencing forum, the fact this specification was merged with another, this was an isolated incident, and the other offenses of "sexual abuse of a child with intent to abuse," should they survive appellate review, are highly unusual.

WHEREFORE, TSgt Baumgartner respectfully requests that this Honorable Court set aside the finding of guilty as to Specification 2 of Charge II, dismiss Specification 2 of Charge II with prejudice, and set aside the sentence for a rehearing.

IV.

TSgt Baumgartner's conviction for striking AB on her face is legally and factually insufficient because the Government did not overcome TSgt Baumgartner's parental discipline defense for placing his hand over AB's mouth to stop her screaming at night in a hotel.

Additional Facts

The additional facts provided in Issue III are herein incorporated.

Standard of Review

This Court reviews issues of legal and factual sufficiency de novo. *Washington*, 57 M.J. at 399 (citation omitted).

Law and Analysis

The legal and factual sufficiency case law cited in Issue I, *supra*, is also applicable for this issue. Additionally, the elements of battery upon a child under the age of 16 in Specification 3 of Charge II are:

(1) That at or near Santa Maria, California, on or about 27 August 2017, the accused did bodily harm to [AB];
(2) That the accused did so by unlawfully striking her in the face;
(3) That the bodily harm was done with unlawful force or violence; and
(4) That [AB] was then a child under the age of sixteen years.

R. at 569. *MCM*, pt. IV, para. 54.b.(3)(c) (2016 ed.).

One defense to battery upon a child is parental discipline. When the accused puts "in issue the parental-discipline defense, the Government ha[s] the additional burden of refuting beyond a reasonable doubt [the] defense of parental discipline." *United States v. Rivera*, 54 M.J. 489, 490 (C.A.A.F. 2001); *see* R. at 570 (instructing the panel the defense had been raised). The military justice system has incorporated the Model Penal Code standard for evaluating whether the Government has overcome the defense. *Rivera*, 54 M.J. at 491. This standard provides:

> [(1)] force may be used by parents or guardians when the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and
> [(2)] the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation. . . .

Id. at 491 (citing *United States v. Brown*, 26 M.J. 148, 150-51 (C.M.A. 1988); *United States v. Robertson*, 36 M.J. 190, 191-92 (C.M.A. 1992)) (internal quotations omitted). In *Rivera*, the CAAF noted, "*Brown* established a test of contextual reasonableness in determining when proper parental motive turns to criminal anger, or necessary force becomes a substantial risk of serious bodily harm." *Id*. at 491.

Here, the Government did not overcome the defense of parental discipline because: (1) TSgt Baumgartner possessed a proper motive of preventing AB from screaming in a hotel room after 10:00 PM; and (2) the force he used, slapping his hand over her mouth, was neither designed to cause nor known to create a substantial risk of death, serious bodily injury, disfigurement, extreme pain, extreme mental distress, or gross degradation.

1. TSgt Baumgartner's actions were properly motivated when examined in context with all available evidence.

TSgt Baumgartner acted to prevent AB's continued misconduct of screaming in a hotel room after 10:00 PM. This was appropriate motivation. AB was "screaming at the top of her lungs" for someone to call the police as she ran out of the bedroom after waking her parents up, screaming at them, then running out of the room. R. at 493. AB had no reason to be screaming for someone to call the police. R. at 491-93. TSgt Baumgartner acted to stop this continued, unwarranted behavior. He was not angry and did not seem angry (R. at 509-10), and he told AB to "calm down" because the police would come and there were people next door (R. at 510). AB was misbehaving late at night, would not calm down, and continued to scream as she ran out of the bedroom. That is when TSgt Baumgartner followed her and grabbed her in front of EB in the adjoining room. AB even admits the only reason she had a cut on the inside of her lip was because TSgt Baumgartner "slapped his hand over [her] mouth so [she] would stop screaming." R. at 374. She herself casts doubt on any "improper motive," like criminal anger.

AB was the only one who testified TSgt Baumgartner was angry at the time the conduct happened. She further stated he had never been like this before and speculated alcohol consumption fueled his anger. R. at 374. However, AB's account of TSgt Baumgartner is not credible. No one else corroborates her opinion TSgt Baumgartner was angry. Specifically, TSgt JG testified to the opposite. R. at 509-10. She said TSgt Baumgartner was not angry when AB was screaming and yelling at him in the bedroom. *Id*. TSgt JG did not see the scuffle in the main part of the room, but TSgt Baumgartner was not angry at the outset when AB was screaming and yelling, and the scuffle is immediately afterward. There was no eyewitness who could—or did—testify to anger. *Compare United States v. Thompson*, ARMY 20140974, 2021 CCA LEXIS 624, at *4-5, *7-8 (A. Ct. Crim. App. 17 Nov. 2021) (unpub. op.) (finding criminal anger where

an eyewitness corroborated the victim's account and testified to father's anger, pattern of discipline, use of extreme force, and derogatory language) *with* Pros. Ex. 4 (showing EB could only corroborate the conduct, not the anger).

This is also a unique situation, not comparable to other forms of parental discipline AB, or even EB, experienced, and this unique situation must be analyzed in context. In the past, for discipline, TSgt Baumgartner spanked AB and EB with a paddle, but this was clearly for misconduct *after* it occurred. R. at 414. This was a unique situation where AB was screaming and yelling—without cause—in a hotel room after 10:00 PM. Misconduct was happening in front of TSgt Baumgartner. Under the law, he is allowed to use force to prevent his child's misconduct. Stopping AB from continuing to scream and yell is a proper motivation for slapping his hand over her mouth, which stopped her from continuing to scream and yell.

In closing, Trial Counsel avoided pointing this fact out, instead painting the scene as though TSgt Baumgartner followed AB for no reason, "choked her" and "abused her." R. at 586-87. Trial Counsel is right about one point, though—TSgt Baumgartner's actions were not about stopping AB from running away. R. at 587. She runs away all the time. R. at 388, 494, 513. This was about stopping her from screaming and yelling in the middle of the night in a hotel, and it is obvious he would try to stop her in the suite or before she left the room screaming. TSgt Baumgartner was not motivated by anger or alcohol or an argument with TSgt JG, as AB and Trial Counsel posited, but the mere fact AB was screaming for no reason in a hotel at nighttime.

2. AB's version of events that attempt to inform TSgt Baumgartner's motivation is not credible.

First, AB's narrative of the scuffle is nonsensical. She claims she was pushed into a wall, in a chokehold, after TSgt Baumgartner slapped his hand over her mouth. R. at 301. But when she was pushed into the wall, she was screaming, so she testified he put his hand over her mouth

again. *Id*. There is no explanation for when or how TSgt Baumgartner removed his hand or the chokehold in the first place. Her version is contradictory and unclear. Then, she said she was pushed to the ground when he put his hand over her mouth—but somehow, she could not breathe when she was on the ground. *Id*. It is not clear how she cannot breathe when, based on her narrative, TSgt Baumgartner is not touching her or on the floor with her. She confirmed she was on the floor, though, since the next thing she said was "I get up." *Id*. This whole fight does not make sense, likely because it is exaggerated or fabricated.

Second, AB's testimony does not line up with TSgt JG's, EB's, or the individual from the bachelorette party who found her. AB had a lack of credibility, and her account was further contradicted by two other witnesses and her own statements. To be sure, AB previously told police she entered the bedroom to "try to calm things over" between TSgt Baumgartner and TSgt JG who were arguing. R. at 385. But then, at trial, AB shifts everything to TSgt JG. AB also previously told police she was instructed by her parents to "get out of the bathroom." R. at 384-85. Yet, on the stand, AB does not recall this and her narrative about how and why the fight starts is different. R. at 356.

Furthermore, AB's account of the actual incident changed too. Based on the evidence presented, EB was in the main part of the suite when the incident happened. How AB got into that part of the suite varies between AB and TSgt JG. AB did not testify to this fact, but previously told police TSgt Baumgartner "pushed" her into the suite. Based on the fact the door to the bedroom was locked and the only way out of the bedroom was through the bathroom, this is unbelievable. On top of that, EB's account is clear: TSgt Baumgartner came up behind AB to grab her. Both EB and AB agree she was screaming when she was grabbed. AB testified she was yelling in the bedroom, but she does not elaborate. However, both "screaming" and "yelling" are

inconsistent with AB's version of events both on the stand and previously to police where she suggests TSgt Baumgartner spontaneously attacks her. She is not a credible witness to what happened that night.

All the "body-slamming" testimony further cuts against AB's credibility and version of events. AB agreed on cross she was "body-slammed" and admitted she told police she was "body-slammed" into the floor and was "repeatedly slammed" into the "hard floor." R. at 309, 358. All of this "body slamming" testimony is inconsistent with her version of events on the stand where she was "pushed" into a "wall" and "pushed" to the "ground." R. at 301. Her version is also inconsistent with EB's, who only corroborates her testimony about TSgt Baumgartner's arm around her neck and hand over her mouth. Her injuries are also inconsistent with this "body slamming" account. She would have had serious injuries from being "body slammed" or having her head lifted from the ground and slammed into the ground. Instead, the redness on AB's neck was not apparent to police upon arrival. The injury to her lip was apparent but small and would not have been from her face or body being slammed anywhere. Same with whatever was photographed on her forehead. There were no other injuries to corroborate a "body slam" or her head being lifted and slammed. This is another exaggeration.

Finally, AB's account varies from the disinterested individual's account who found her that night. The bachelorette party attendee testified AB was crouched in a ball in front of the hotel room door crying—across the hall from the Baumgartner room. R. at 424-25. In contrast, AB testified she was locked out of the hotel entirely, sitting outside, crying. R. at 302. AB's level of emotional distress is consistent, but her testimony is inconsistent with another witness—again. This is not inconsequential; AB paints a very benign picture of herself on the stand and downplays her screaming and yelling while exaggerating what happened to her. On direct, AB's testimony is

consistent with her cry wolf mentality, that she always sought to call the police and for whatever reason, could not. However, a disinterested, impartial witness clarifies AB was right across the hall from the Baumgartner room and that the bachelorette party calls the police after AB says she was "physically slapped and pushed."

AB's inconsistent version of events highlights AB's tendency to exaggerate and lie to get what she wants. Her unbelievable account of what occurred lowers the authenticity of her belief that TSgt Baumgartner was angry or otherwise improperly motivated. On top of that, AB herself admits TSgt Baumgartner "slapped his hand over [her] mouth so [she] would stop screaming. And it was just the amount of force he used that made [her] lip cut open." R. at 374. Her own testimony makes it clear TSgt Baumgartner was properly motivated.

Ultimately, TSgt JG's version, in combination with EB's and the bachelorette party attendee's, is the most believable account of what happened. AB's inconsistencies, tendency to exaggerate, and habit of lying to get what she wants all comes together to bring doubt on her opinion of TSgt Baumgartner's motive that night—and the amount of force used. Therefore, the Government did not refute this first prong of the parental discipline defense by showing some improper motive caused TSgt Baumgartner to touch AB.

3. The amount of force TSgt Baumgartner used in context was reasonable.

Under the circumstances, and recognizing the Government *did not prove* TSgt Baumgartner grabbed AB by the throat with his hand, the amount of force used to control and restrain AB to prevent further misconduct was reasonable.

As the CAAF has noted,

> Clearly what is reasonable between a father and his 13-year-old son may be unreasonable with an infant. However, human experience also teaches that a single punch to the torso or head can kill or cause serious bodily injury. This conclusion does not rest on specialized medical knowledge, but rather on the everyday

> common sense and [their] knowledge of human nature and of the ways of the world expected of triers of fact, who have been to the playground, trained in the combat arms, or read the sports page.

Rivera, 54 M.J. at 491 (cleaned up). Here, clearly, what is reasonable between a father and his screaming, yelling, 14-year-old daughter varies if she was younger, doing something different, or was hit or grabbed in a different manner. Human experience indicates putting a hand over a teenager's mouth to stop her screaming is not designed to cause or known to cause *serious* bodily injury, death, *extreme* pain, *extreme* mental distress, disfigurement, or gross degradation. TSgt Baumgartner's action of "slapping" his hand over AB's mouth was reasonable and not excessive.

The amount of force was appropriate under the circumstances. AB received a cut on the inside of her lip caused by the amount of force TSgt Baumgartner used. And, to be clear, he did not put his hand over her mouth while grabbing her by the throat with his hand. He essentially wrestled with her, but not for fun, to stop her from continuing to misbehave. This is unsurprising when wrestling, and clearly terms like "chokehold" and "armlock," were common in that household. How TSgt Baumgartner grabbed AB was not out of the ordinary for that family. Additionally, "manhandling" a screaming 14-year-old by "slapping" a hand over her mouth to stop her screaming is not the same as punching or slapping a 7-year-old in the face as punishment (*Thompson*, 2021 CCA LEXIS 624 at *4-5), repeatedly lashing a child with a cell phone cord (*United States v. Robinson*, ARMY 20220043, 2023 CCA LEXIS 235, at *7-9 (A. Ct. Crim. App. 2 Jun. 2023) (unpub. op)) or a belt as punishment (*Brown*, 26 M.J. at 151), hitting a body part already damaged or in pain with something innocuous (*United States v. Pizarro*, NMCCA 200400713, 2006 CCA LEXIS 341, at *9-11 (N.M. Ct. Crim. App. 19 Dec. 2006) (unpub. op.)), or grabbing and throwing to the ground by her hair a 17-year-old to prevent her from leaving

(*United States v. Stitely*, ACM 37039, 2008 CCA LEXIS 170, at *8-9 (A.F. Ct. Crim. App. 23 Apr. 2008) (unpub. op.)).

In *United States v. Stitely*, this Court found the parental discipline defense was overcome by the Government's presentation of evidence showing that the force used was excessive or unreasonable. 2008 CCA LEXIS 170 at *8-9. AM, the victim, was attempting to leave her parent's home after disclosing years of sexual abuse by her stepfather (the appellant). *Id*. at *5-6. When she spontaneously announced her intent to leave, her mother told her "she was not going anywhere." *Id*. at *5. The appellant told her, "Do you want me to make you sit down and talk?" *Id*. AM had one foot out the door when the appellant grabbed AM by her hair and pulled her back inside. *Id*. at *6. The appellant used enough force to "pull her back inside and force her into a sitting position on the floor, where she slid about a foot." *Id*. at *8-9. AM was 17 years old, not small, and ended up a considerable distance from the door. *Id*. The appellant also "pulled so hard that he yanked out a ball of her hair that fit in the palm of her hand." *Id*. This caused her "extreme pain" for about 15 minutes. *Id*. AM was also "extremely 'tender headed,'" which the appellant knew. *Id*. Even though there was no blood loss or lasting injury, pulling her back inside the house by her hair was evidence of "excessive force." *Id*. at *9-10.

In contrast, TSgt Baumgartner's actions were significantly less egregious, and none of them were designed to cause or known to cause substantial or extreme harm. EB is more credible than AB when it comes to what happened that night. EB said, "He put his hand around her mouth, like her in mouth, and he put his arm -- other arm around her neck and like lifted her up and like starting swinging her around." Pros. Ex. 4. He did not describe anything else. Consistent with TSgt JG's testimony, this description aligns with TSgt Baumgartner following AB out of the bedroom and coming up behind her. It is common sense to infer that TSgt Baumgartner is likely

taller than AB, such that if he were to wrap both arms around her, one would go around her neck area and the other around her head area without either of them needing to move up or down. *See, e.g.*, Def. Ex. E (showing photos of TSgt Baumgartner with EB at various ages). This is consistent with EB's description of one arm going *around* her neck and the other wrapping *around*—or on or in or over—her mouth.

Comparing the available pictures in the record, AB appears to be small and TSgt Baumgartner appears to be larger. *Compare* Def. Ex. E *with* Pros. Ex. 2. The sheer fact he caused so *little* damage to AB indicates a restraint in force. This is not like in *Stitely* where a large 17-year-old was yanked backwards by her hair. Here, a small 14-year-old was, in essence, grabbed from behind to stop her screaming in a public place at nighttime. AB did not testify or report any pain and she did not have any known conditions that would have increased her pain. Slapping a hand over a screaming teenager's mouth is not the type of act designed to cause or known to create a *substantial risk* of causing death, *serious* bodily injury, disfigurement, *extreme* pain, *extreme* mental distress, or gross degradation. AB was upset, but the act of covering her mouth with a hand is objectively not something that would be known to cause *extreme* mental distress under all the circumstances. Consequently, under this contextual analysis, the Government did not overcome the parental discipline defense. Therefore, the evidence is legally and factually insufficient to support the conviction.

Under the factors articulated in *Winckelmann*, 73 M.J. at 15-16, the sentence should be set aside for a rehearing before members, particularly in light of the sentencing forum, the fact this specification was merged with another, this was an isolated incident, and the remaining offenses—"sexual abuse of a child with intent to abuse," should they survive appellate review—are unusual.

WHEREFORE, TSgt Baumgartner respectfully requests that this Honorable Court set

aside the finding for Specification 3 of Charge II.

V.

The convening authority's prima facie consideration of sex and race during panel member selection was improper under *United States v. Jeter*.

Additional Facts

On 19 January 2022, the convening authority selected 15 out of 20 officers and six out of ten enlisted members for TSgt Baumgartner's court-martial. Def. App. A at 1. Of the 15 officers selected, nine were men and six were women. *Id*.; Def. App. B at 25-27, 31-33, 37-56. Only one officer member identified as "African American" on the data sheets: Captain AE. Def. App. B at 48. Three officers who were not selected identified as "Caucasian" males. Def. App. B at 23, 29, 35.

On 23 September 2022, the convening authority detailed 11 new court members, all officers, and excused three female and seven male officers from the original panel. ROT, Vol. 1, *Special Order A-14*, dated 23 September 2022. One of the excused women was Capt AE, the only African American on the requested officer-only panel. *Id*.; R. at 18-19. In replacing the excused officer members, the convening authority selected three women and eight men. *Id*.; Def. App. B at 1-22. Women were replaced one for one. *Id*. Of the newly selected women, only one identified on her data sheet as "African American": Major JE. Def. App. B at 17.

Standard of Review

Where no objection is made, court-martial composition issues are reviewed for plain error. *United States v. King*, 83 M.J. 115, 120-21 (C.A.A.F. 2023). 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. *Id*. "[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be 'plain' at the time of

appellate consideration.'" *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008) (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)). Relatedly, "[a]n appellant gets the benefit of changes to the law between the time of trial and the time of his appeal." *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019); *see also Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021).

"[W]henever an accused makes a prima facie showing that race played a role in the panel selection process at his court-martial, a presumption will arise that the panel was not properly constituted." *United States v. Jeter*, 84 M.J. 68, 70 (C.A.A.F. 2023). The Government may then seek to rebut that presumption. *Id*. Should the Government be unable to rebut the presumption, automatic reversal occurs. *Id*. at 74. *See Weaver v. Massachusetts*, 582 U.S. 286, 301 (2017) (granting "automatic relief to defendants who prevailed on claims alleging race . . . discrimination in the selection of the petit jury"); *Batson v. Kentucky*, 476 U.S. 79, 100 (1986) ("If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed."); *see also Johnson*, 520 U.S. at 466 (citing Supreme Court precedent for the proposition that cases *not* governed by Federal Rule of Criminal Procedure Rule 52(b) are "structural errors" without a prejudice analysis).

Law and Analysis

1. The CAAF recently overruled precedent permitting consideration of race during member selection and in doing so, did the same for consideration of gender too.

"The Equal Protection Clause . . . forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black." *Batson*, 476 U.S. at 97. This statement is no less true in the military justice system where the convening authority is allowed to arbitrarily select members based on race to create a more diverse

panel, or one representative of the accused's race. *Jeter*, 84 M.J. at 73. In extending *Batson* to panel member selection, the CAAF unequivocally articulated, "It is impermissible to exclude or intentionally include prospective members based on their race." *Id.* "Just as in the civilian context, a convening authority may not draw up a members panel pursuant to the neutral criteria of Article 25, UCMJ, only to have discriminated at other stages of the process." *Id*. at 74.

However, at the time of TSgt Baumgartner's court-martial, *United States v. Crawford* provided that convening authorities *could* use race to select a panel when it was "in favor of, not against, an accused." 15 C.M.A. 31 (1964). Consequently, military appellate courts did "not presume improper motives from inclusion of racial and gender identifiers on lists of nominees for court-martial duty." *United States v. Loving*, 41 M.J. 213, 285 (C.A.A.F. 1994).

Taking note of race during panel selection became further extended in *United States v. Smith*, a case about gender, providing:

> As we interpret Article 25 in light of *Crawford*, Congress has not required that court-martial panels be unrepresentative of the military population. Instead, Congress has authorized deviations from the principle of representativeness, if the criteria of Article 25 are complied with. Thus, *a commander is free to require representativeness in his court-martial panels and to insist that no important segment of the military community -- such as blacks, Hispanics, or women -- be excluded from service on court-martial panels*.

27 M.J. 242, 249 (C.M.A. 1988) (emphasis added). Not only could race be used to make a panel more representative of the accused's race, but race could also be considered to make a more diverse panel, representative of the military community. Then, based on this extension of *Crawford*, the CAAF in *Smith* noted, "In our view, a convening authority may take gender into account in selecting court members, if he is seeking in good faith to assure that the court-martial panel is representative of the military population." *Id.* As such, at the time of TSgt Baumgartner's trial, both race and gender could be considered to create a panel.

Last year, though, *Jeter* explicitly stated *Batson* had abrogated *Crawford*'s encouragement to use race when deciding who should be appointed to a panel: "A person's race simply 'is unrelated to his fitness as a juror.'" *Jeter*, 84 M.J. at 73 (quoting *Batson,* 476 U.S. at 87). *Jeter* did not consider the question of using gender as a basis for juror fitness. However, it is clear through the abrogation of *Crawford* by *Batson, Smith* is similarly abrogated by *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127 (1994).

J.E.B. followed *Batson* and extended *Batson*'s holding to gender: "We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality." 511 U.S. at 129. Like with race, "[i]ntentional discrimination on the basis of gender by state actors violates the Equal Protection Clause." *Id*. The Supreme Court also wrote:

> Failing to provide jurors the same protection against gender discrimination as race discrimination could frustrate the purpose of *Batson* itself. Because gender and race are overlapping categories, gender can be used as a pretext for racial discrimination. Allowing parties to remove racial minorities from the jury not because of their race, but because of their gender, contravenes well-established equal protection principles and could insulate effectively racial discrimination from judicial scrutiny.

Id. at 145. It is clear, then, gender, like race, cannot be a proxy for court member selection, whether gender or race is intentionally "included" or "excluded." To "include" one (women/African Americans) means "excluding" another (men/Caucasians). "The exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system." *Id*. at 142 n.13.

2. TSgt Baumgartner has made a prima facie showing that race and gender considerations impermissibly entered the panel selection process.

Here, similar to *Jeter*, the fact that race and gender were even on the court-member data sheets raises a prima facie showing race and gender entered the panel selection process. Every court member data sheet included race and gender. Def. App. B. "Although racial identifiers are

neutral," they operate as a "practice [that] makes it easier for those to discriminate who are of a mind to discriminate." *Jeter*, 84 M.J. at 74 (citing *Avery v. Georgia*, 345 U.S. 559, 562 (1953)). The existence of race and gender on the data sheets, coupled with the fact *Crawford* and its progeny were still good law, is enough for a prima facie showing that considerations of both race and gender entered the selection process. What solidifies that showing though, is the one for one swap of women and African Americans on the panel.

On top of replacing three women with three women, the convening authority replaced an African American woman for an African American woman. Def. App. A; Def. App. B at 17, 19, 21, 41, 48, 54; ROT, Vol. 1, *Special Order A-14*, dated 23 September 2022. This replacement, without reviewing race and gender characteristics, is statistically improbable; it is arguably statistically impossible. It also raises the question of how almost two identical women[10] (on paper) were presented to the convening authority for consideration and how two almost identical women (on paper) were ultimately selected *without* the consideration of race and gender at *any* point in the panel selection process. *See Jeter*, 84 M.J. at 74 (noting how it is possible impermissible criteria can enter the selection process *before* the convening authority makes a selection).

Neither gender nor race can serve as a proxy for qualifications to serve. Each African American woman was qualified to serve, but the fact the convening authority replaced—and was able to replace—one African American woman for another African American woman bespeaks racial and gender discrimination. "The exclusion of even *one* juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system." *J.E.B.*, 511 U.S. at 142 n.13 (emphasis added). Major JE was chosen over someone else; based on *Jeter*, it does

[10] In comparing their data sheets, more than just their race and gender are similar.

not matter who.[11] To intentionally select a woman over a man or an African American officer over a Caucasian officer means gender or race were actually considered.

Even if the selection of three women (one of whom identified as African American) was a benign attempt to ensure a "representative panel," that justification has been abrogated and is plain error. Considering *Jeter*'s relationship to *Batson, J.E.B.* compels the same abrogation of using gender to also create a "representative panel." *Smith*, 27 M.J. at 249. Furthermore, it should be noted both Capt AE and Maj JE were the only African Americans on each set of selected panel members. This is a stark reminder of the words of Justice Blackmun: "[G]ender can be used as a pretext for racial discrimination." *J.E.B.*, 511 U.S. at 145.

3. The convening authority's use of race and gender is plain and obvious error.

On appeal, the error of using race and gender during member selection is clear. *Jeter*, 84 M.J. at 73-74. *Jeter* was decided 25 September 2023, several months after TSgt Baumgartner's case was docketed with this Court on 8 February 2023, and it is the current law on appeal. Since the law changed while his case was on appeal, TSgt Baumgartner only has to show the convening authority's use of race and gender is plain error *now*, at the time of appellate consideration. *Johnson*, 520 U.S. at 468. He has done so.

[11] *Jeter* is distinguishable from *Batson* in that *Jeter* is not ultimately a "*Batson* challenge" case, although it was presented by the appellant that way. *Jeter*, 84 M.J. at 70. The bottom line of *Jeter* is race cannot be used intentionally in the panel selection process. That race entered the selection process is all that needs to be shown. To the extent this Court believes *Jeter* still requires a *Batson*-like prima facie showing, TSgt Baumgartner is a white male (Def. Ex. D); the convening authority, at the outset, did not select three white males, selecting six women instead (Def. App. A; Def. App. B); and when seven men and three women could not participate, the convening authority replaced women one for one (ROT, Vol. 1, *Special Order A-14*, dated 23 September 2022). Therefore, TSgt Baumgartner has raised the inference the convening authority selected panel members to exclude white males, preferring members who were not white or not male. Because TSgt Baumgartner was unable to obtain the 1st Indorsement to Special Order A-14, which would contain the second pool of members, he is unaware whether additional white men were excluded from the venire.

The obvious use of race during panel selection is plain error and a bar on gender-conscious panel selection flows naturally from *J.E.B.* and *Smith*'s—via *Crawford*'s—abrogation. As in *Jeter*, TSgt Baumgartner has made a prima facie showing based on the circumstances of his case, including the racial and gender identifier in the questionnaires, the one for one substitution of female and African American panel members, and "importantly, the command's understandable belief that the *Crawford* case—which not only authorized but essentially encouraged the consideration of race [and gender]—was still good law." *Jeter*, 84 M.J. at 74. In light of *Jeter*, there is plain and obvious error. *Harcrow*, 66 M.J. at 159 (quoting *Johnson*, 520 U.S. at 468). Therefore, TSgt Baumgartner has met both burdens, the prima facie showing and plain and obvious error.

4. Automatic reversal is required if the Government cannot rebut this prima facie showing.

TSgt Baumgartner reserves the right to respond to any rebuttal matters to his prima facie showing, of which response may include a request for a factfinding hearing under *United States v. DuBay*, 17 C.M.A. 147, 149 (1967). If the Government is unable to rebut this showing, though, automatic reversal is required. *Vasquez v. Hillery*, 474 U.S. 254, 262-64 (1986) ("When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm."). *Jeter*, *Vasquez*, and *Batson* illustrate this is a structural issue that is unamenable to harmless error review. *Id*. at 263-264. *Cf*. *Johnson*, 520 U.S. at 466 (requiring a prejudice analysis for ostensibly structural issues due to the mandate of Federal Rule of Criminal Procedure Rule 52(b), which does not apply to the military justice system).

WHEREFORE, TSgt Baumgartner respectfully requests that this Honorable Court set aside all the findings of guilty and the sentence and order a rehearing.

VI.

TSgt Baumgartner received ineffective assistance of counsel when his trial defense counsel inexplicably failed to present favorable evidence that would have undermined AB, the only witness whose credibility mattered at trial.

Additional Facts

The additional facts provided in Issues I-IV are herein incorporated.

TSgt JG was the only fact witness the Defense called. R. at 479. She provided a highly conflicting account of AB's testimony for the night of the Santa Maria Inn incident. *See* Issues III and IV, *supra.* She also testified to all of AB's behavioral problems. *See* Statement of Facts and Issue I, *supra.* But much was also left unsaid and unclarified.

During cross examination, Trial Counsel attempted to attack TSgt JG's memory, motive, and bias. Part of this attack included the following line of questioning:

> Q. You met [TSgt Baumgartner] in 2011 when you were at tech school together?
> A. Yes, sir.
> Q. And he was still married to [his second wife] at that time, right?
> A. Yes, sir.
> Q. Actually, [TSgt Baumgartner] had just recently had another child with [his second wife], correct?
> A. Yes.
> Q. And it was [A][12]?
> A. Yes, sir.
> Q. And was *it your idea for him to sign away his parental rights to [A]*?
> A. *No, sir.*
> Q. *You never wanted children*, correct?
> A. I didn't have a preference, sir.
> Q. Okay. You *actually have told people that if you had children you might drown them in the bathtub*?
> A. I don't remember saying that.
> Q. In 2011 to 2013, you dated [TSgt Baumgartner] but you didn't live together, right?
> A. Yes.

[12] This child is only referred to by his first name at this point in the record, although he has the same initials as AB. R. at 285, 499. For clarity, only his first initial is used, and this is not a reference to AB.

> Q. In 2013, you got married to [TSgt Baumgartner] while the kids were away, correct?
> A. Yes, sir.
> Q. You didn't have them -- have a wedding ceremony or any type of ceremony with the kids involved?
> A. No, sir.

R. at 499-500 (emphasis added). Additionally, Trial Counsel suggested alcohol consumption affected TSgt JG's actions and memory on the night of the Santa Maria Inn incident, consistent with AB's testimony. R. at 299, 505. Furthermore, Civilian Defense Counsel previously elicited from AB that she and TSgt Baumgartner had talked money-related matters before her pretextual call with OSI. R. at 366. Specifically, AB testified she wanted to get a car and needed help with financing. *Id*. She asked if TSgt Baumgartner would "co-sign on a car," and he refused. *Id.* It is unclear exactly when this conversation occurred, but it appears to be "a day or two" before the pretextual call on 22 March 2021. R. at 366, 452. Civilian Defense Counsel mentions this briefly in closing: "She's hitting up for money for a car, asking for advice. He tells her no. Literally, shortly thereafter, she's in there with OSI trying to get him, to entrap him and get him to say things." R. at 611.

Civilian Defense Counsel conducted TSgt JG's direct and redirect. R. at 481-499, 513-14. At no point did Civilian Defense Counsel ask TSgt JG to clarify her alcohol consumption, knowing AB's version of events. R. at 299. Additionally, redirect as a whole consisted of four questions. R. at 513-14. Civilian Defense Counsel still did not clarify TSgt JG's ability to recall on that night, focusing on false allegations instead. *Id*. Furthermore, Civilian Defense Counsel did not rehabilitate TSgt JG after Trial Counsel insinuated she would drown her children in a bathtub.

TSgt JG's declaration, filed by separate motion this same date, lays out the favorable evidence that Civilian Defense Counsel failed to present. Def. App. C. Specifically, TSgt JG was not "drunk," as AB testified, but only had one alcoholic beverage on the night of the Santa Maria

Inn incident. *Id*. at 1. She also would have clarified the insinuations made by Trial Counsel about her relationship with children, to include (1) there was no basis for the drowning comment, (2) she did not suggest TSgt Baumgartner give up custody of one of his children, and (3) the circumstances of their marriage were innocuous, but AB was upset because she was not a flower girl. *Id*. at 1-2. She also would have testified about the timing of AB's allegations and provided clarity about AB's motive to fabricate relating to money. *Id*. at 2; R. at 366. Specifically, AB had the conversation about money and co-signing for the car before her interview with OSI, not just before her pretext call with OSI. *Id*.; *compare* ROT, Vol. 4, *Report of Investigation* at 7, para. 2-9 (showing AB's interview was on 8 March 2021) *with* Def. App. C (showing financial conversation took place in December 2020).

Standard of Review

This Court reviews claims of ineffective assistance of counsel *de novo*. *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007) (citing *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006)).

Law and Analysis

When reviewing claims for ineffective assistance of counsel, this Court is bound by the two-part test outlined by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *United States v. Scott*, 24 M.J. 186, 187 (C.M.A. 1987). Under *Strickland*, the appellant has the burden of demonstrating: (1) a deficiency in counsel's performance that is "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment;" and (2) that the deficient performance prejudiced the defense through errors "so serious as to deprive the defendant of a fair trial." *Strickland*, 466 U.S. at 687.

In order to satisfy the deficiency prong of *Strickland*, Appellant has to show his defense counsel's performance fell below an objective standard of reasonableness, according to the prevailing standards of the profession. *Id*. at 688. The Court of Appeals for the Armed Forces set out a three-part test to determine if a defense counsel's performance was deficient. Specifically, this Court must determine:

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

United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (alterations in original) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)).

Here, in a closely contested case, TSgt JG was the only fact witness who consistently contradicted AB's narrative and provided various motives to fabricate. It was ineffective assistance for Civilian Defense Counsel to not (1) explain her alcohol consumption on the night of the Santa Maria Inn incident, (2) rehabilitate her after Trial Counsel insinuated various motives and biases that could have only originated from AB, and (3) fail to clarify a third motive to fabricate that Defense used but was inadequately pieced together.

When TSgt JG testified as a defense witness, the Civilian Defense Counsel predominantly focused her testimony on the incident that occurred at the Santa Maria Inn, the allegation of physical assault discussed in Issues III and IV, *supra*. R. at 481-514. However, inexplicably, Civilian Defense Counsel failed to develop certain key facts from that night TSgt JG knew that would have rebutted AB's testimony. The most glaring point not addressed in her direct was the failure to have TSgt JG contradict AB's testimony that when TSgt JG and TSgt Baumgartner came up to the room after dinner, TSgt JG was "a little drunk, was drunk . . . was still very drunk." R. at

299. TSgt JG was not drunk at all. Def. App. C. This would have been a perfect illustration of AB's willingness to lie under oath and embellish events to get what she wants. *See* Issue I, section 3.b, *supra* (discussing AB's character for truthfulness and motives to fabricate). It would have also further demonstrated AB's bias against TSgt JG, showing how she would lie under oath to put TSgt JG in the worst possible light.

Relatedly, another glaring failure occurred after the Government cross-examined TSgt JG. During cross, Trial Counsel attempted to discredit TSgt JG by trying to expose her bias, effectively likening her to an evil stepmother who did not like children and married TSgt Baumgartner without AB's or EB's knowledge. Trial Counsel went so far as to suggest TSgt JG would drown her children in a bathtub.

On redirect, Civilian Defense Counsel failed to provide TSgt JG an opportunity to explain her responses. R. at 500. If Civilian Defense Counsel had questioned her more on redirect, TSgt JG would have responded by explaining her brief answers on cross-examination. The highly prejudicial questions about drowning her children and trying to get TSgt Baumgartner to give up custody of a child would have been explained, leaving the members with a poor impression of the Government and AB. This picture of TSgt JG negatively impacted her credibility, when in reality it should have negatively impacted AB. AB was left out of the wedding, disliked TSgt JG, and felt unheard. *See* Issue I, section 3.b.iii. The last time she admitted she felt unheard, she was providing an excuse about why she lied to OSI. R. at 347. Instead of this picture being painted, the biases AB painted about TSgt JG remained unchallenged. Had this information been elicited, AB's credibility would have been further diminished and the pattern of her being someone who lies to get what she wants would have been further solidified. Considering the Government's case

about the sexual abuse allegations relied solely on AB's version of events, any attack on her credibility was critical.

Additionally, Civilian Defense Counsel failed to question TSgt JG about other facts known by her regarding the sexual abuse allegations. An additional motive why AB would have lied about the sexual abuse allegations could have been developed had Civilian Defense Counsel clarified the financial situation AB was in, which was unclear in AB's direct. TSgt JG states that just before AB made these claims in the OSI investigation, she asked TSgt Baumgartner for money, asked if he would co-sign a car loan, and even asked if she could move back in with them. Def. App. C at 2. By not granting AB's requests, AB's relationship with TSgt Baumgartner became worse. As a result, when OSI interviewed her in 2021, she saw an opportunity to revisit and embellish her previous allegations that had gone nowhere four years earlier. This was another chance to be "heard." When added to AB's history of lying and the other motives to misrepresent that are raised by the evidence and addressed in the other assigned errors, it becomes clearer why legal authorities and TSgt Baumgartner's chain of command did not take legal or disciplinary action against him based on AB's abuse claims that were investigated and discredited in the years 2017 to 2018. It reinforced what Trial Counsel opened the door on during TSgt JG's cross: AB had a history of false reporting, and this court-martial was another example of a false allegation of abuse.

There is no reasonable explanation why Civilian Defense Counsel did not have TSgt JG address these additional facts under oath as set forth in her Declaration. Given that TSgt JG was the only fact witness called by Defense in their case-in-chief, it was critical to bring out every favorable fact that contradicted AB's testimony and undermined her credibility, as she was the only witness who provided an incriminating version of events. As such, at the time of trial, "there

was tremendous upside and virtually no downside" in eliciting this information. *United States v. Palik*, _M.J. _, 2024 CAAF LEXIS 181, at *20 (C.A.A.F. 2024). As the legal and factually sufficiency analyses above show, anything to undermine AB and erode her credibility could have changed the outcome of this case. Consequently, failing to do so fell "measurably below the performance ordinarily expected of fallible lawyers." *Gooch*, 69 M.J. at 362 (cleaned up). In this closely contested case, there is a reasonable probability that, absent the errors, there would have been a different result. *Id*.

WHEREFORE, TSgt Baumgartner respectfully requests that this Honorable Court set aside all the findings of guilty and the sentence and order a rehearing.

CONCLUSION

The Government's case relied on a 19-year-old with a character for untruthfulness and a history of false reporting, who had various motives driving her to exaggerate under oath. TSgt Baumgartner never disagreed that "flash the world," "I toed you so," or the Santa Maria Inn incident happened, but his conviction for all of these offenses required more than just an admission these acts occurred.

Specifically, the sexual abuse convictions required an intent to abuse, meaning physically injure, which the Government never proved. The Santa Maria Inn incident is legally and factually insufficient because the Government did not prove what it charged and did not overcome the parental discipline defense. The Defense could have shown these deficiencies in the Government's case had Civilian Defense Counsel effectively directed and redirected TSgt JG, but he failed to do so. Overall, the Government's case on these critical points was weak, and the fairness of TSgt Baumgartner's court-martial was further undermined by the fact the Convening Authority impermissibly used race and gender to create the panel that ultimately convicted him.

Consequently, neither TSgt Baumgartner's convictions nor his sentence can stand.

Respectfully submitted,

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
samantha.castanien.1@us.af.mil
(240) 612-4770

Frank J. Spinner

FRANK J. SPINNER
Attorney at Law
1420 Golden Hills Road
Colorado Springs, Colorado
lawspin@aol.com
(719) 233-7192

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 3 June 2024.

Respectfully submitted,

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
Email: samantha.castanien.1@us.af.mil

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION TO EXCEED PAGE LIMIT**
v.	)	Before Panel No. 3
Technical Sergeant (E-6) **JAMES P. BAUMGARTNER,** United States Air Force, *Appellant*.	)	No. ACM 40413
	)	3 June 2024

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 Honorable Court's Rules of Practice and Procedure, Appellant moves to file his Assignment of Error brief in excess of this Court's 50-page limit. Appellant respectfully requests 71 pages for his opening brief. Good cause exists for this motion because of the length and complexity of the case. The record of trial is seven volumes consisting of six Prosecution Exhibits, 17 Defense Exhibits, 44 Appellate Exhibits, and one Court Exhibit. The transcript is 797 pages. In addition, the case contains many legal issues relevant to this Court's review. Appellate defense counsel identified, and are submitting, six assignments of error. Additional length is required to thoroughly brief these issues.

WHEREFORE, Appellant respectfully requests this Honorable 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
Email: samantha.castanien.1@us.af.mil

GRANTED
7 JUN 2024

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 3 June 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
Email: samantha.castanien.1@us.af.mil

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION TO ATTACH DOCUMENTS**
v.	)	Before Panel No. 3
Technical Sergeant (E-6) **JAMES P. BAUMGARTNER,** United States Air Force, *Appellant*.	)	No. ACM 40413
	)	3 June 2024

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

Pursuant to Rules 23(b) and 23.3(b) of this Honorable Court's Rules of Practice and Procedure, Appellant moves to attach the following documents to the Record of Trial:

- **Def. App. A**: 1st Indorsement, SpOC/CC, Selection of Court Members, *United States v. Technical Sergeant James P. Baumgartner* – 21 January 2022
- **Def. App. B**: Relevant Court Member Data Sheets (redacted) – various dates
- **Def. App. C**: Declaration of TSgt [JG] – 3 June 2024

Def. Apps. A and B are relevant and necessary to this Court's evaluation of the assignment of error relating to improper panel constitution. Def. App. C is relevant and necessary to this Court's evaluation of the assignment of error relating to ineffective assistance of counsel.

1. Relevance and Necessity of Def. Apps. A and B

On 19 January 2022, the convening authority selected 15 officers and six enlisted members for TSgt Baumgartner's court-martial. Record of Trial (ROT), Vol. 1, *Special Order A-7*, dated 21 January 2022. On 23 September 2022, the convening authority detailed 11 new court members, all officers, and excused what appears to be three female and seven male officers from the original panel. ROT, Vol. 1, *Special Order A-14*, dated 23 September 2022. In replacing the excused officer members, the convening authority selected what appears to be three women and eight men. *Id*.

These documents are relevant to assess the panel makeup and selection process in light of *United States v. Jeter*, 84 M.J. 68, 70 (C.A.A.F. 2023). To raise a presumption the panel was not properly constituted because impermissible criteria were used, the burden is on the Appellant to make a prima facie showing. To do so, the Appellant must reference the 1st Indorsement, which details who was available for selection, and the court member data sheets, which reveal whether race and gender were available for consideration. Def. App. A; Def. App. B.

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 resolvable by those materials. The CAAF recently approved of allowing consideration of panel member information in *United States v. King*, 83 M.J. 115, 121 (C.A.A.F. 2023) when "the record did not provide the [court of criminal appeals] with information about the circumstances under which [a panel member] had been relieved or excused, and the documents were necessary to resolve the question of whether the panel was improperly constituted." Def. Apps. A and B are necessary to this Court's evaluation of assignments of error relating to proper panel constitution, which are reasonably raised by materials in Appellant's record, but not fully resolvable from the materials in the record.

Additionally, Rule for Court-Martial (R.C.M.) 1112(f)(1)(B) requires the pre-trial advice under Article 34, Uniform Code of Military Justice (UCMJ), to be attached to the record. The pretrial advice attached to TSgt Baumgartner's record does not include, as an attachment, the General Court-Martial Convening Authority (GCMCA) 1st Indorsement. However, there is a slip sheet in the Pretrial Section of the ROT for a document titled, "CA Referral Memo w Attachments Located as Attachment in Section 34 of ROT." ROT, Vol. 3, *US v. Baumgartner Slip Sheet CA*

Referral Memo w Attachments Located As Attachment In Section 34 of ROT. This appears to be a reference to the GCMCA 1st indorsement, considering the 1st indorsement is from the convening authority and "direct[s] the charges and specification be referred to trial before a general court-martial." Def. App. A. The GCMCA's 1st indorsement to the Staff Judge Advocate's pre-trial advice is completely omitted from the record, contrary to the slip sheet's suggestion it is located as an attachment elsewhere.

Assuming the GCMCA 1st Indorsement is a required attachment to the record and it is omitted via an erroneous slip sheet, this omission would be the type of issue a motion to attach could correct. *See Jessie*, 79 M.J. 445; *United States v. Garron*, 2023 CCA LEXIS 67, *4-5 (attaching missing preliminary hearing documents to the record through a motion to attach). This is not an incomplete ROT issue requiring remand. *Id.*; *United States v. Jones*, 2022 CCA LEXIS 584, *10 (A.F. Ct. Crim. App. Oct. 17, 2022) (unpub. op.). To the extent this Court disagrees, TSgt Baumgartner **waives** the remedy of remanding the ROT to correct this issue and requests the 1st Indorsement be attached by virtue of this motion to resolve the improper panel member selection.

2. Relevance and Necessity of Def. App. C

Def. App. C is an affidavit from TSgt JG, a witness who testified at TSgt Baumgartner's court-martial on behalf of the defense. TSgt JG explains in her affidavit that she possessed information known to trial defense counsel that was not elicited at trial that would have undermined the complaining witnesses' testimony and credibility. She was prepared to testify to this information, but was never asked to do so.

As already stated for Def. Apps. A and B, the CAAF has held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the

record." *Jessie*, 79 M.J. at 444. Here, the ineffective assistance of counsel issue raised as an assignment of error revolves around how trial defense counsel failed to effectively direct and redirect TSgt JG. This affidavit is relevant to the resolution of this issue by providing the Court the necessary background as to what TSgt JG knew and could have testified to if directed, which is otherwise not apparent or clear from the record as a whole.

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

Respectfully submitted,

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
Email: samantha.castanien.1@us.af.mil

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 3 June 2024.

Respectfully submitted,

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
Email: samantha.castanien.1@us.af.mil

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO MOTION TO ATTACH
v.	)	Before Panel No. 3
Technical Sergeant (E-6) **JAMES P. BAUMGARTNER** United States Air Force *Appellant.*	)	No. ACM 40413
	)	10 June 2024

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 24 April 2024.

Opposition to Motion to Attach

The United States opposes the attachment of court member data sheets and the 1st Indorsement, Selection of Court Members, United States v. Technical Sergeant James P. Baumgartner, because they are 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 does not oppose the Declaration of TSgt [JG].

This Court is reviewing this case pursuant to Article 66(d)[1], UCMJ. When reviewing whether findings of guilt are correct in law and fact in accordance with Article 66, a "CCA

[1] References in Jessie to Article 66(c), UCMJ, are to the version of the statue in effect before implementation of the Military Justice Act of 2016, as incorporated into the 2019 Manual for Courts-Martial, United States. The substantive language of the previous Article 66(c) is now found in Article 66(d) and has not materially changed. Therefore, Jessie's references to Article 66(c) should be presumed to apply to the post-2019 Article 66(d).

cannot consider matters outside the 'entire record.'" Id. at 444. The "entire record" includes those matters listed in R.C.M. 1103(b)(2)-(3) and the briefs and arguments counsel present "regarding matters in the record of trial and 'allied papers.'" Id. at 440-41. "[T]he practice of considering material outside the record should not be expanded beyond the context of Article 55, UCMJ, and the Eighth Amendment." Id. at 445.

The Court may consider matters outside the record where: (1) such documents are "necessary for resolving issues raised by materials in the record"; and (2) the issues are not "fully resolvable by those materials" already in the record. Id. at 444-45. The default is a rule of exclusion "because the text of Article 66(c), UCMJ, does not permit the [courts of criminal appeals] to consider matters that are outside the entire record." Id. at 445. This rule of exclusion reflects the notion that, for military justice proceedings to be "truly judicial in nature," appellate courts cannot consider information when it "formed no part of the record." *See* United States v. Fagnan, 30 C.M.R. 192, 195 (U.S.C.M.A. 1961).

Here, Appellant asks this Court to attach court member data sheets and the accompanying 1st Indorsement to the Selection of Court Members on the grounds that they are "necessary to resolve [Appellant's] assignment of error and determine whether the court-martial panel was properly constituted." (App. Mot. at 2.) In the assignment of error, Appellant asserts that the presence of racial and gender identifiers therein—along with the fact that his court-martial preceded the decision in United States v. Jeter, 84 M.J. 68 (C.A.A.F. 2023)[2]—"gives rise to a presumption that impermissible criteria was allowed to enter the court member selection process." (App. Br. at 59.)

[2] In Jeter, our superior court held that "[i]t is impermissible to exclude or intentionally include prospective members based on their race." 84 M.J. at 73.

The problem for Appellant, however, is that the issue he alleges—impermissible use of race and gender in court member selection—can only be raised using matters currently outside the record. (*See generally* App. Mot. at 2; App. Br. at 60-62.) Appellant has not articulated how the issue of improper member selection is raised by any materials *currently* in the record, such that the attachment of court member data sheets or the Indorsement would be necessary to resolve it. Jessie, 79 M.J. at 442. This situation is distinguishable from Jeter, where prior to voir dire, trial defense counsel challenged the makeup of the panel, citing a "systematic exclusion of members based on race and gender." Jeter, 84 M.J. at 71. The military judge found that there was no "evidence that there [was] an exclusion—a systematic, purposeful exclusion of any minority members or women or even rank, or you know position, staff or anything like that based on its face," and denied the motion. Id. In this case there were no objections or motions about improper panel constitution, nor were there any related objections at trial. Appellant cannot—and has not—pointed to anything in the transcript, exhibits, or allied papers that even *hints* at improper panel constitution.

Appellant, for his part, suggests that the attachment of the court member data sheets to documents provided to the convening authority—such as the pretrial advice, which *is* included in the record—is sufficient to raise the issue of which he complains.[3] (App. Mot. at 2.) But just as the mere fact of an appellant's sentence to confinement did not "raise[] an issue regarding [the confinement facility's] policies," Jessie, 79 M.J. at 444, the fact that member data was referred to on other pretrial papers within the record does not—without more—raise the issue of improper

[3] Though the member data sheets were attached to the pretrial advice and subsequent requests for replacement members given to the convening authority, they were omitted from the Record of Trial in accordance with DAFMAN 51-203, *Records of Trial*. Moreover, while the pretrial advice is required per R.C.M. 1112(f)(1)(B), neither this section of the R.C.M. nor DAFMAN 51-203 require inclusion of the indorsement to the advice.

panel constitution based on race. *Cf*. Jeter, 84 M.J. at 71 (where the trial defense litigated the issue of "systematic exclusion of members based on race and gender" at the trial level); *see also* United States v. Loving, 41 M.J. 213, 285 (C.A.A.F. 1994) ("We will not presume improper motives from inclusion of racial…identifiers on lists of nominees for court-martial duty."). The *issue* of improper panel selection was not "raised by materials in the record," so outside materials are not necessary, and therefore not authorized, to resolve it. Jessie, 79 M.J. at 444-45.

CONCLUSION

Because there is nothing in the extant record that raises the issue of member nominations based on race or gender, the court member data sheets and indorsement to the pretrial advice are neither necessary nor relevant. Jessie, 79 M.J. at 442. For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's motion to attach court member data sheets.

[redacted]
ZACHARY T. EYTALIS, Colonel, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

FOR [redacted]
MARY ELLEN PAYNE
Associate Chief
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 the Air Force Appellate Defense Division on 10 June 2024.

ZACHARY T. EYTALIS, Colonel, 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 40413**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
James P. BAUMGARTNER	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 3 June 2024, Appellant submitted a motion to attach the documents listed below to the record. The Government opposes the motion.

> Def. App. A: 1st Indorsement, SpOC/CC, Selection of Court Members, *United States v.* [*Appellant*] – 21 January 2022[;]
>
> Def. App. B: Relevant Court Member Data Sheets (redacted) – various dates[; and]
>
> Def. App. C: Declaration of [Technical Sergeant JG] – 3 June 2024.

The court has considered Appellant's motion, the Government's opposition, and the applicable law. The court grants Appellant's motion; however, it specifically defers consideration of the applicability of *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020), and related case law to the attachments until it completes its Article 66, UCMJ, review of Appellant's entire case.

Accordingly, it is by the court on this 12th day of June 2024,

ORDERED:

Appellant's Motion to Attach is **GRANTED**.

FOR THE COURT

[redacted]

FLEMING E. KEEFE, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**UNITED STATES' MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 3
Technical Sergeant (E-6) **JAMES P. BAUMGARTNER**, United States Air Force *Appellant*	)	No. ACM 40413 15 June 2024

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

Pursuant to Rule 23.3(m)(5), the United States respectfully requests that it be given **14 days** after this Court's receipt of a declaration or affidavit from trial defense counsel to submit its answer so that it may incorporate statements provided by Appellant's trial defense counsel in response to the specified ineffective assistance of counsel issue.[1]

This case was docketed with the Court on 8 February 2023. Since docketing, Appellant has been granted thirteen (13) enlargements of time. Appellant filed his brief with this Court on 3 June 2024. This is the United States' first request for an enlargement of time. As of the date of this request, 493 days have elapsed since docketing.

There is good cause for the enlargement of time. Appellant has raised various areas in which he claims his trial defense counsel were ineffective. (App. Br. at 64-70.) The United States cannot prepare its answer to the allegations of ineffective assistance of counsel without a statement from the trial defense counsel. An enlargement of time is necessary to ensure trial defense counsel have time to review the allegations before they draft and submit a statement to

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

the Court, and to give the United States sufficient time to incorporate trial defense counsel's statements into its answer. Moreover, additional time is needed for drafting and supervisory review before the United States files its answer.

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

[redacted]

ZACHARY T. EYTALIS, Colonel, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

For [redacted]

MARY ELLEN PAYNE
Associate Chief
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 the Appellate Defense Division on 15 June 2023.

ZACHARY T. EYTALIS, Colonel, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
(808) 372-7022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**UNITED STATES' MOTION TO COMPEL DECLARATIONS OR AFFIDAVITS**
v.	)	Before Panel No. 3
Technical Sergeant (E-6) **JAMES P. BAUMGARTNER**, United States Air Force *Appellant*	)	No. ACM 40413 15 June 2024

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

Pursuant to Rule 23.3(e) of this Honorable Court's Rules of Practice and Procedure, the United States hereby requests this Court to compel Appellant's trial defense counsel, Mr. Michael Waddington and Capt Anna Sturges to provide affidavits or declarations in response to Appellant's allegation of ineffective assistance (IAC) of counsel. In his assignments of error, Appellant claims he received ineffective assistance when trial defense counsel failed to clarify a key witness's alcohol consumption and rehabilitate this witness's attitude toward children after trial counsel asked a question that insinuated that the witness was inclined to drown her children in a bathtub. (App. Br. at 65.) Appellant also asserts that it was ineffective assistance of counsel not to conduct the following inquiries with the witness: 1) the basis for the drowning comment; 2) that the witness did not suggest that Appellant give up custody of his children; 3) the circumstances of her marriage to Appellant; and 4) the victim's motive to fabricate allegations against Appellant. (App. Br. at 66.)

On 12 June 2024, civilian defense counsel responded to undersigned counsel that they would only provide an affidavit or declaration by order by this Court. To prepare an answer under the test set out in United States v. Polk , 32 M.J. 150, 153 (C.M.A. 1991), the United

States requests that this Court compel trial defense counsel to provide an affidavit or declaration. A statement from Appellant's counsel is necessary because the record is insufficient to answer Appellant's IAC allegations, since it provides no information about trial defense counsels' strategic decisions as they relate to Appellant's specific assertions of ineffectiveness. Thus, the United States requires statements from both trial defense counsel to adequately respond to Appellant's brief. *See* United States v. Rose, 68 M.J. 236, 236 (C.A.A.F. 2009); United States v. Melson, 66 M.J. 346, 347 (C.A.A.F. 2008). In fact, this Court cannot grant Appellant's ineffective assistance of counsel claim without first obtaining statements from both trial defense counsel. *See* Rose, 68 M.J. at 237; Melson, 66 M.J. at 347.

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

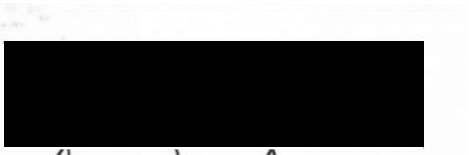
ZACHARY T. EYTALIS, Colonel, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
(808) 372-7200

For 

MARY ELLEN PAYNE
Associate Chief
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 the Air Force Appellate Defense Division on 15 June 2024.



ZACHARY T. EYTALIS, Colonel, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
(808) 372-7200

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40413**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
James P. BAUMGARTNER	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 3 June 2024, Appellant, through counsel, submitted an assignments of error brief alleging, *inter alia*, that trial defense counsel were ineffective "when his trial defense counsel inexplicably failed to present favorable evidence that would have undermined AB, the only witness whose credibility mattered at trial."

On 15 June 2024, the Government filed a Motion to Compel Declarations or Affidavits and a Motion for Enlargement of Time. The Government requests this court compel Appellant's trial defense counsel, Mr. Michael Waddington and Captain Anna Sturges, to provide declarations or affidavits in response to the claimed ineffective assistance of counsel. According to the Government's motion, Appellant claims that his trial defense counsel failed to clarify the alcohol consumption of Appellant's former spouse (JG)–also a key witness—and rehabilitate JG's attitude toward children after trial counsel asked a question that insinuated that the witness was inclined to drown her children in a bathtub. Appellant further asserts that his trial defense counsel were ineffective for not conducting the following inquiries:

(1) the basis for JG's alleged drowning comment;

(2) that JG did not suggest that Appellant give up custody of his children;

(3) the circumstances of JG's marriage to Appellant; and

(4) the victim AB"s motive to fabricate allegations against Appellant.

According to the Government, Appellant's trial defense counsel collectively indicated they would not provide declarations or affidavits without an order by this court.

In its motion for an enlargement of time, the Government requests 14 days after the court's receipt of declarations or affidavits to submit its answer. Appellant did not file a response to the motions.

The court has examined the claimed deficiencies and finds good cause to compel declarations. The court cannot fully resolve Appellant's claims without piercing the privileged communications between Appellant and trial defense counsel. Considering that Government has not had an opportunity to conduct discovery of the facts and circumstances underlying the claims—because trial defense counsel have stated they would not provide information except by an order from this court—the court is not disposed to require Government to answer on an expedited timeframe.

Accordingly, after considering the Government's motions, the deficiencies alleged by the Appellant, case law, and this court's Rules of Practice and Procedure, it is by the court on this 26th day of June, 2024,

ORDERED:

The Government's Motion to Compel Declarations or Affidavits is **GRANTED**. Mr. Michael Waddington and Captain Anna Sturges are each ordered to provide a declaration to the court that is a specific and factual response to each of Appellant's stated claims, as listed *supra*, that they were ineffective.

A responsive declaration by each counsel will be provided to the court not later than **26 July 2024.** The Government shall deliver a copy of the responsive declarations to Appellant's counsel.

It is further ordered:

The Government's Motion for Enlargement of Time is **GRANTED**. The Government's answer to Appellant's assignments of error brief will be filed not later than **14 days** after Government has received a declaration or affidavit from each trial defense counsel that is responsive to this order.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) **JAMES P. BAUMGARTNER,** USAF United States Air Force *Appellant.*	)))))))))	UNITED STATES' MOTION TO ATTACH DOCUMENTS Before Panel No. 3 No. ACM 40413 23 July 2024

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

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

- Appendix A – Declaration of Mr. Michael Waddington, dated 22 July 2024 (3 pages)
- Appendix B – Declaration of Captain Anna Sturges, dated 22 July 2024 (3 pages)

The attached declarations are responsive to this Court's order directing Mr. Michael Waddington and Captain Anna Sturges to provide declarations responsive to Appellant's assignments of error concerning whether he received ineffective assistance of counsel. (Court Order, dated 26 June 2024.) Appellant claims his trial defense counsel were ineffective. (App. Br. at 64-69.) These declarations are necessary to resolve these assignments of error.

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)). Accordingly, the attached

documents are relevant and necessary to address this Court's order and Appellant's assignments of error.

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

[redacted]
ZACHARY T. EYTALIS, Colonel, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(808) 612-4800

[redacted]
MARY ELLEN PAYNE
Associate Chief
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 the Air Force Appellate Defense Division on 23 July 2024.

ZACHARY T. EYTALIS, Colonel, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(808) 372-7022

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40413**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
James P. BAUMGARTNER	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 23 July 2024, the Government submitted a motion to attach the following documents to the record: post-trial declarations from each of Appellant's trial defense counsel, Mr. MW and Capt AS. The Government avers that these declarations are responsive to this court's 26 June 2024 order wherein the court granted Government's motion to compel declarations from Appellant's trial defense counsel to resolve Appellant's assignment of error claiming that his trial defense counsel were ineffective. Appellant did not oppose the motion.

The court has considered the Government's motion and the applicable law. The court grants the Government's motion; however, it specifically defers consideration of the applicability of *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020), and related case law to the attachments until it completes its Article 66, UCMJ, review of Appellant's entire case.

Accordingly, it is by the court on this 31st day of July 2024,

ORDERED:

The Government's Motion to Attach is **GRANTED**.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee, v. Technical Sergeant (E-6) **JAMES P. BAUMGARTNER,** USAF Appellant.	))))))))))	**UNITED STATES ANSWER TO ASSIGNMENTS OF ERROR** Before Panel No. 3 No. ACM 40413 5 August 2024

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

ZACHARY T. EYTALIS, Colonel, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(808) 372-7022

MARY ELLEN PAYNE
Associate Chief, Government Trial and Appellate Counsel Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800

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UNITED STATES,	)	
Appellee,	)	**UNITED STATES ANSWER TO**
	)	**ASSIGNMENTS OF ERROR**
v.	)	
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	)	Before Panel No. 3
Technical Sergeant (E-6)	)	
JAMES P. BAUMGARTNER, USAF	)	No. ACM 40413
Appellant.	)	
	)	5 August 2024

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

ISSUES PRESENTED

I.

WHETHER APPELLANT'S CONVICTION FOR SEXUAL ABUSE OF A CHILD BY TOUCHING AB'S BREASTS WITH AN INTENT TO ABUSE IS LEGALLY AND FACTUALLY SUFFICIENT.

II.

WHETHER APPELLANT'S CONVICTION FOR SEXUAL ABUSE OF A CHILD BY TOUCHING AB'S VULVA WITH AN INTENT TO ABUSE IS LEGALLY AND FACTUALLY SUFFICIENT.

III.

WHETHER APPELLANT'S CONVICTION FOR ASSAULT CONSUMMATED BY A BATTERY – "GRABBING AB BY THE NECK WITH HIS HAND" – IS LEGALLY AND FACTUALLY SUFFICIENT.

IV.

WHETHER APPELLANT'S CONVICTION FOR ASSAULT CONSUMMATED BY A BATTERY – STRIKING AB ON HER FACE – IS LEGALLY AND FACTUALLY SUFFICIENT UNDER THE PARENTAL DISCIPLINE DEFENSE.

V.

WHETHER THE CONVENING AUTHORITY'S PRIMA FACIE CONSIDERATION FO SEX AND RACE DURNG PANEL MEMBER SELECTION WAS IMPROPER UNDER UNITED STATES V. JETER.

VI.

WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL DEFENSE COUNSEL FAILED TO PRESENT FAVORABLE EVIDENCE AT TRIAL.

STATEMENT OF CASE

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

STATEMENT OF FACTS

AB is Appellant's daughter and at the time of the trial in September 2022 she was 19 years old. (R. at 284.) EB is Appellant's son and at the time of trial he was 18 years old. (R. at 285.) AB was approximately two or three years old at the time Appellant and her mother divorced. (R. at 286.)

When AB was about four years old, she started living with Appellant and continued to live with him, on and off, until 2017. (R. at 287.) Appellant married JG in 2013 when AB was in the fourth or fifth grade. (R. at 288.) When Appellant married JG, AB continued to live with him and JG. (Id)

Discipline at Appellant's household

When Appellant was married to JG, Appellant was the primary disciplinarian; JG would ground AB, but Appellant would use a paddle and spank AB for misbehavior. (R. at 289.) AB remembered coming home from school on one occasion and Appellant showed her a Facebook page that AB had created but not told Appellant about. (R. at 290.) Appellant took AB to the garage and created a paddle. (Id.) When Appellant finished making the paddles he woke AB, and they went upstairs where Appellant proceeded to beat AB with the paddle for having a Facebook page. (Id.) Appellant stored the paddle under AB's bed so that AB knew where it would be when Appellant needed it. (Id.) This was not the only time Appellant used physical force to discipline AB; she also remembered times where he would "body slam" her to the ground when she would try to run. (Id.)

"Flash the world"

AB testified that she hit puberty in the fifth grade. (R. at 291.) Around the time AB hit puberty, she testified that she and Appellant would engage in an activity he called "flash the world." (R. at 292.) During this activity, Appellant would lock AB's arms behind her back so she could not move (Id.) Appellant would then lift up her wired bra and shirt and make her go toward the window while Appellant would laugh at her. (Id.) This activity was not part of a punishment and initially they would both laugh. (Id.)

As AB started to get older, AB would tell Appellant to stop and would try to pull her shirt down when he tried to pull it up. (R. at 292.) AB started wearing clothing that she believed would make it more difficult for Appellant to pull up over her head. (R. at 293.) Just before her freshman year of high school, AB told Appellant that this activity made her feel uncomfortable; they both agreed that she was too old to be engaging in this activity. (R. at 295.) Despite these

protests and acknowledgement that AB was too old, Appellant continued with "flash the world" 20-30 more times. (R. at 292.)

In 2017, Appellant, JG, AB, and EB moved to Santa Maria, California. (R. at 303.) AB lived with Appellant for approximately two months. (R. at 303.) A few days before she left, AB was alone with Appellant in his house; JG was out of town and EB was at school. (Id.) Appellant was trying to "mess around" or wrestle with AB—he was trying to have fun. (Id.) AB did not want to wrestle or "mess around" with Appellant and was telling him to leave her alone. (Id.) Appellant next ended up locking AB's arms behind her back and pulling her bra and shirt over her head. (Id.) Appellant stated words to the effect of "this is what you want the world to see." (Id.) AB was screaming at him, telling him to get off her; she was mad, humiliated, and felt like she did not want to be in her body anymore. (Id.)

AB reported this incident to her mother and later reported the incident to her uncle who later reported it to the police. (R. at 303-304.) After the police were notified, AB moved in with her uncle. (R. at 305.)

I "toed" you so

On occasion, AB, EB, and Appellant would wrestle. (R. at 293.) While wrestling, they would try to put each other in locks and see who could pin one another on the floor and count to 10. (Id.) When Appellant would get tired of wrestling, Appellant would grab AB's arm and pull them toward him while she was on the couch—on her stomach or on her back. (R. at 293-294.) Appellant would then place his toe on AB's vagina, over her clothing and say, "I toed you so." (R. at 294.) AB would tell him to stop and would sometimes cry, sometimes yell, and try to get away. (R. at 294.) AB reported that this hurt, she would be sore, and it was embarrassing. (Id.)

Just before her freshman year of high school, AB remembered talking to Appellant about his activity. (R. at 295.) AB told Appellant that she felt uncomfortable with these activities; and they both agreed that she was too old to be engaging in "I toed you so." (Id.) However, even after this conversation, Appellant engaged in both "I toed you so" and "flash the world." (Id.)

Appellant text messages of remorse

Prosecution Exhibit 1 is a seven-page document that contains text messages between AB and Appellant. (Pro. Ex. 1 at 1-7.) The messages are dated 24 June 2020 and described AB and Appellant reflecting on Appellant's upbringing of AB. (Id.) During the text conversation, AB described her plans after she completes her "GED." (Id. at 7.) Appellant and AB then engaged in the following exchange:

> A: That's great!!
> I know you can do it
> You are so smart
> Flash the world, and I towed you was so wrong of me…
>
> AB: Thank you it means a lot coming from you
>
> A: I don't know what I was thinking
> But it wasn't wrignt [sic]
> Right!!!
> I hope you can forgive me for that

(Pros. Ex. 1 at 7.)

Pretext phone call

Prosecution Exhibit 3 contains an audio recording of a pretext phone call between AB and Appellant. (Pros. Ex. 3.) The call was conducted on 22 March 2021 with Appellant, AB, and agents from the Air Force Office of Special Investigations (OSI) present for the phone call. (R. at 452.) During the conversation AB stated to Appellant that she had questions about why certain things "went the way they did." (R. at 454.)

AB. I can't get over the things that you did out of anger towards me.

A. Okay. Well, I also wish I had the why, but I don't.

AB. You don't know the why—have the why for what you did?

A. Yeah, I don't have a why. People handle stress a lot differently than other people, and if you remember that's an extremely stressful time. You were talking about the yelling and the screaming, that was in both directions not just mine.

AB. No. I 'm not talking about the yelling and screaming.

A. So, like I said, there's no why, which is why I prepped you ahead of time. Sometimes things just happen without reasoning.

AB. What do you mean prepped me ahead of time?

A. I told you if you're looking for a why you're probably not going to get it.

AB. Well, you sit up here and I have all these issues, but when I try to get over them you don't even care to help. When you're half of why I am why I am.

A. See, and that's why you're not going to get over it because you blame everybody else.

AB. But I didn't -- I didn't do this to myself.

A. Right.

AB. **Like the flashing the world and the toes, flashing the world and.**

A. **Yep, those were games that got way out of control.**

AB. **Those weren't games. I told you how that made me uncomfortable and you didn't even care.**

A. **It's not that I didn't care.**

AB. **Well, what was it? When I'm telling you that what you're doing is making me uncomfortable and you just went ahead –**

A. **I don't have any answers for you. I'm sorry.**

AB. You don't even sound sorry.

A. How does sorry sound?

AB. Genuine. Like you care a little bit. That—I don't know, a lot of things that you did literally broke your own daughter and you just don't seem to care and carry on with life like nothing ever happened.

A. I'm sure that that's your perspective.

AB. **No, that's not a perspective. It why [sic] did my breasts have to be shown? What did I do to deserve that? Like outside of the window and why—why the toes? That made—it hurt. My vagina hurt. And not even that, that made me uncomfortable to sit there after that happened all the time. And to think like what the hell is even going on. All you can sit there and say is you don't have any answers. There is no answers to why?**

A. **Yes, that is correct. Unfortunately, that is what happened.**

(R. at 450-457.)

AB. I want a genuine apology. That [sic] all I want. The outrage, the fucking abuse, sexual abuse, all that shit. I just want a fucking genuine apology. Hello?

AB. What, I don't get an apology?

A. Apology for giving you just a horrible life?

AB. **No, apologizing for the toeing and the flashing and the abuse, like a real fucking apology.**

A. **You think that's going to change anything?**

AB. Yeah. Yeah, I do think it would change a lot.

A. I'm sure I gotta go. I gotta get back to work.

AB. Okay.

A. Okay. Try to find some help, okay?

(R. at 462-463.)

At one point during the pretext call, AB described a situation in which she was living with Appellant and was pretending to sleep. (R. at 459.) AB asked Appellant if he remembered coming into AB's room in the middle of the night and put his hand under AB's shirt and then started moving his hand to her pants. (Id.) AB then shifted in bed and Appellant removed his hand and then left the room. (Id.) In response, Appellant stated "Yeah, that definitely wasn't' me;" and "That never happened." (Id.) AB provided some more detail, including a more definite timeframe, but Appellant still denied he was responsible for this action. (R. at 460.)

AB's cross examination

During cross examination, trial defense counsel challenged AB's credibility and motives.

a. AB testified on direct examination that her mother did not "badmouth" Appellant. (R. at 306.) AB later admitted that she told OSI that Appellant "raped" her mother. (R. at 308.) AB stated that her mother described sexual conduct but had not used the word "rape." (Id.)

b. AB admitted that in the past she had lied to Appellant, her mother, JG, and her teachers on various occasions. (R. at 316, 343.) She frequently lied to them about her school attendance, her friends, and their involvement with illegal drugs. (R. at 342.)

c. AB's was arrested for shoplifting and told the security that she did not steal. (R. at 339-340.) AB later admitted to a judge that she shoplifted. (R. at 340.)

d. AB admitted that Defense Exhibit B had depicted AB making statements that her parents were trying to "beat" her; AB admitted that no one had beat her when she made that comment. (R. at 341.)

e. Defense counsel questioned AB about a discussion AB had with her friends about the possibility of levying false allegations against her mother's boyfriend (a convicted sex-offender) so that he would return to prison. (R. at 342.) AB stated that she did not recall this conversation. (Id.)

f. AB admitted that she had plotted with her boyfriend to run away from home while she was living with Appellant in California. (R. at 345.)

g. AB testified that the police who responded to an incident in Santa Maria, California, were yelling at her; but later stated that the police did not yell at her. (R. at 346-347.) AB stated that she told OSI the police were mistreating her because she felt "unheard." (R. at 347.)

h. AB testified that Appellant had only pulled her shirt over her head on one occasion while in California; however, when she reported the incident to the police, she stated that Appellant had lifted her shirt 25 times in California. (R. at 349.) AB explained the disparity by stating she remembered one specific encounter that prompted her to report the behavior. (R. at 350.)

i. Defense counsel also asked AB if she remembered her mother asking AB to make false allegations against her father to secure an advantage in legal proceedings. (R. at 351.) AB denied knowledge of this behavior. (R. at 351.)

j. Shortly before AB conducted a pretext phone call to Appellant with OSI, AB had another conversation with Appellant. (R. at 366.) In this conversation AB asked Appellant to co-sign for an auto loan; Appellant refused to do so. (Id.)

ARGUMENT

I.

APPELLANT'S CONVICTION FOR TOUCHING AB'S BREASTS IS LEGALLY AND FACTUALLY SUFFICIENT BECAUSE HE COMMITED THE ACT WITH THE REQUISITE SPECIFIC INTENT—TO "ABUSE" HER.

Additional Facts

During deliberations, the members asked if there was a legal definition for "abuse." (R. at 684.) The military judge instructed the members that the term "abuse" was not further defined in the Uniform Code of Military Justice and to give the term its common and ordinary meaning. (R. at 687.)

Standard of Review

The standard of review for factual and legal sufficiency is de novo. United States v. McAlhaney, 83 M.J. 164, 166 (C.A.A.F. 2023).

Law

Article 120b(c) provides that any person who commits a lewd act upon a child is guilty of sexual abuse of a child. 10 USCS § 920b(c).

The term "lewd act" means any sexual contact with a child. 10 USCS § 920b(h)(5).

The test for a factual sufficiency is whether, "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [this Court is] convinced of appellant's guilt beyond a reasonable doubt." United States v. Rosario, 76 M.J. 114, 117 (C.A.A.F. 2017). The test for legal sufficiency is whether, "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, 297-298 (C.A.A.F. 2018). The legal sufficiency assessment "draw[s] every reasonable inference from the evidence of record in favor of the prosecution." Id. (emphasis added) (quoting United States v. Plant, 74 M.J. 297, 301 (C.A.A.F. 2015)). An assessment of legal and factual sufficiency is limited to the evidence produced at trial. United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993).

Analysis

In this case, the Government alleged that Appellant committed the offense of sexual abuse of a child in violation of Article 120b, UCMJ. (*Entry of Judgment*, 4 November 2022, ROT. Vol. 1 at 1) Based on the charging, the Government was required to prove beyond a reasonable doubt that Appellant committed a lewd act upon AB by touching her breast with his hand *with an intent to abuse AB*. (Id.)

a. The natural and ordinary meaning of "abuse" is not limited to "physically injure."

Appellant asserts that the only possible definition of "abuse" under 10 USCS § 920b is physical injury or harm. (App. Br. at 18.) Appellant therefore argues that the Government failed to prove its case against Appellant because it failed to offer evidence that Appellant intended to abuse or "physically injure" AB when Appellant touched her breasts with his hand. (Id. at 21.) In support of his argument, Appellant relies on the dictionary definitions of abuse. (App. Br. at

19-20.) Appellant's argument is without merit because in making his argument, Appellant "cherry picked" various definitions of "abuse" to arrive at a definition that required "physically injury." (Id.) A more comprehensive review of the sources relied upon by Appellant reveals a broader and more nuanced definition for the term "abuse" that support Appellant's conviction.

Appellant selectively pieces together the definition of "abuse" in order to make his case. Appellant cites "abuse" in the Merriam Webster dictionary and states that the verb means "to use or treat so as to injure or damage." (App. Br. at 19.) This definition is incomplete because Merriam Webster also defines "abuse" as "physical maltreatment" and provides "child abuse" and "sexual abuse" as sub-definitions of "physical maltreatment." Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/abuse. Accessed 18 Jun. 2024. Merriam Webster defines "Maltreat," as "to treat cruelly or roughly: abuse." Id. Therefore, based on Appellant's own source, to abuse, or to physically maltreat, or to treat someone or something "cruelly or roughly" does not require physical injury. Accordingly, based on this definition, the Government was not required in offer evidence that Appellant intended to physically injure AB.

The result is the same with Black's Law Dictionary which defines "abuse "as follows:

> Abuse, 1. To damage (a thing). 2. To depart from legal or reasonable use in dealing with (a person or thing); to misuse. 3. To injure (a person) physically or mentally. 4. In the context of child welfare, to hurt or injure (a child) by maltreatment. In most states, a finding of abuse is generally limited to maltreatment that causes or threatens to cause lasting harm to the child.

Black's Law Dictionary 5 (11th ed. 2019).

Definitions two through four apply to " a person" or "a child"—none of which require "physical injury." Id. Indeed, these definitions (two through four) are broad enough to include both physical and emotional or mental harm. (Id.) The most specific definition is that which applies

to a child, which provides that "abuse" is generally limited (in most states) to maltreatment that *causes or threatens* to cause lasting harm to the child. (Id.) Within this definition there is no absolute requirement that the "hurt" be "lasting" or that it be physical in nature. Rather, the "hurt" suffered could be short or long-term and physical or emotional (mental) in nature. Therefore, while abuse or harm may result in an injury to a child, no definition cited by Appellant is so exacting as to require that Appellant operated with an intent to physically injure AB. (App. Br. at 19.) In fact, using the definitions cited by Appellant, the Government was only required to present evidence that Appellant intended to maltreat AB; or stated differently—that his actions were done with an intent to inflict physical or emotional harm on AB.

b. A finding that "abuse" requires an intent to physically injure is not consistent with a holistic reading of the statute and would render other portions of the same statute superfluous (surplusage).

Appellant insists that the only way to avoid surplusage is for the term "abuse" to mean physical injury. (App. Br. at 21.) Yet, such a reading is inconsistent with a holistic reading of the statute because if "abuse" required an intent to inflict physical injury some portions of the statute would simply not make sense. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. United States v. Chin, 75 M.J. 220, 224 (C.A.A.F. 2016) citing United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988) ("Statutory construction ... is a holistic endeavor.").

A more detailed reading of the statute and its use of the word "abuse" reveals the oddity with Appellant's proposed definition. For example, the offense of "sexual abuse of a child" requires that one commit a "lewd act" upon a child. 10 USC § 920b(c). A "lewd act" is broadly defined by the same statute and in addition to "sexual contact" with a child, it includes exposing

one's genitalia or intentionally communicating indecent language to a child with an intent to *abuse, humiliate, or degrade any person…*10 § 920b(h)(5)(B)-(C). Exposing one's genitalia or communicating indecent language requires zero physical contact with a child. Indeed, these lewd acts could be accomplished remotely through the use of "communication technology." Id. Therefore, equating an intent to abuse with an intent to inflict a physical injury makes no sense when these offenses, exposure and indecent language, require neither physical contact nor presence, yet still fall under the umbrella of "sexual abuse of a child." Adopting Appellant's definition of abuse would completely upend the definition of a "lewd act" committed through exposure or indecent language with an intent to abuse and require an element that is ostensibly absent from these offenses. Indeed, requiring physical injury would transform indecent language and exposure to something completely different from what is included in the statute. As a result, a finding that abuse requires an intent to physically injure is not consistent with a holistic reading of the statute and should be rejected by this Court.

A finding that an intent to "abuse" requires an intent to inflict physical injury also creates the exact surplusage problem Appellant is seeking to avoid with his interpretation of 10 USC § 920b because interpreting "abuse" to require physically injure would render other portions of the statute superfluous. More specifically, if abuse means, as Appellant suggests, to physically injure, there would be no difference between a sexual assault that is committed with an *intent to abuse* under 10 USC § 920b(b) and the rape of a child that is committed by *using force* 10 USC § 920b(a) because both offenses would require physical injury.

Rape, sexual assault, and sexual abuse of a child require either a sexual act or sexual contact with a child. *See* 10 USC § 920b(a) - (c). The term "sexual act" includes *inter alia,*

> …the penetration, however slight, of the vulva or penis or anus of another by any part of the body or any object, with an intent to **abuse**,

> humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

10 USCS § 920(g)(1)(C) (emphasis added).

The term "sexual contact" means

> touching, or causing another person to touch, either directly or through the clothing, the vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to **abuse**, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

10 USCS § 920(g)(2) (emphasis added)

As a result, different theories of rape, sexual assault, and abuse of a child require an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. Id.

If as Appellant asserts, the definition of "abuse" includes physical injury, that definition would equally apply to all sections 10 USC § 920b. The same definition of abuse would apply under a theory of a sexual act and Appellant's conviction (sexual contact) because it is a fundamental rule of statutory construction that "unless the context indicates otherwise, words or phrases in a provision that were used in a prior act pertaining to the same subject matter will be construed in the same sense." United States v. Edwards, 46 M.J. 41, 43 (C.A.A.F. 1997). Therefore, abuse under all sections of 10 USC § 920b would require "physical injury." However, such a reading would mean that there would be no difference between a sexual assault that is committed with an intent to abuse under 10 USC § 920b(b) and the rape of a child that is committed by using force 10 USC § 920b(a). This is because "force," is defined as the "use of physical strength or violence as is sufficient to overcome, restrain, **or injure a child."** 10 USC § 920b(h)(2)

Appellant's proposed definition of abuse impermissibly renders a portion of the same statute superfluous. *See* Sager, 76 M.J. 158 at 162 (citing Yates v. United States, 135 S. Ct. 1074,

1085, 191 L. Ed. 2d 64 (2015)) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.") This is because abuse that requires physical injury is no different than the use of physical force sufficient to injure a child. Both of these situations equally require some use of force that results in an injury. Therefore, while abuse may include an injury, limiting its definition in such a manner impermissibly and unnecessarily creates surplusage.

c. Appellant's conviction for touching AB breasts is legally and factually sufficient because sufficient evidence supported a finding that he did so with an intent to abuse.

Sufficient testimonial and circumstantial evidence support a finding that Appellant touched AB's breasts with an intent to abuse or maltreat her. Contrary to Appellant's assertion, no evidence that Appellant intended to physically injure AB is necessary and even a cursory review of the evidence reveals that "flash the world" was not a game. (App. Br. at 22.)

Appellant first asserts that "flash the world" was wrestling that got out of control. (App. Br. at 22.) It was not. AB testified that in elementary school she wore a training bra; toward the end of the fifth grade AB started puberty and wore wired bras. (R. at 291.) During this time, Appellant engaged in an activity that he termed "flash the world." (R. at 292.) Appellant would lock AB's arms behind her back so she could not move and then lifted up her bra and shirt before making her go near a window. (Id.) Common sense suggests that aside from the physical restraint, this activity has nothing to do with wrestling. No wrestling, not at a middle school, high school, college, or a professional match involves pulling up a bra so as to expose an individual's breasts. Calling this activity wrestling does not make it so.

Appellant also asserts that this activity was just a game that go out of control. (App. Br. at 22.) It was not. A game means a "physical or mental competition conducted according to rules with the participants in direct opposition to each other." Merriam-Webster.com Dictionary,

Merriam-Webster, https://www.merriam-webster.com/dictionary/game. Accessed 24 Jun. 2024. This activity was not a game. There was no competition, no rules, no winners, or losers in this "game." AB and Appellant may have characterized this activity as a "game" but neither her nor Appellant's characterization of this activity made is so. (R. at 378, 295.)

That Appellant engaged in this activity with an intent to abuse or physically maltreat AB was readily apparent to the objective observer—no middle school-aged female should be forced to expose her breasts to the outside world or to have her father touch her breasts. However, in addition to this objective common-sense finding, there is also evidence Appellant knew that the "games" were "out of control." (R. at 456.) He also characterized the "games" as inappropriate and wrong and that he didn't know what he was thinking. (Pros. Ex. 1 at 6-7) And while these admissions were made later in time, they are still probative of his state of mind at the time of abuse and evidence.

Appellant cites United States v. Hoggard, 43 M.J. 1, 4 (C.A.A.F. 1995) to diminish the significance of Appellant's later admissions that "flash the world" was inappropriate. (App. Br. at 23.) In Hoggard, the Court found that appellant's later-in-time behavior with *other women* in *other circumstances* did not relate back and "illuminate" appellant's state of mind with respect to the victim in the current case. Hoggard, 43 M.J. at 4 (emphasis added). This situation is distinguishable because Appellant's admission that flash the world was "wrong" does not relate to another person or victim or other circumstances. Instead, Appellant is discussing the wrongfulness of his conduct with AB, related to the charged offense.

Appellant's reliance on United States v. Harrington, is also not helpful. In Harrington, the Court was concerned with when later in time *conduct* may be considered to discern appellant's intent at the time of a particular offense. 83 M.J. 408, 415 (C.A.A.F. 2023) (emphasis

added) Here, Appellant did engage in any sort of later-in-time *conduct*, instead, he verbally expressed remorse for having engaged in "flash the world." (Pro. Ex. 1 at 6-7.) This situation is also distinguishable from Harrington, because the evidence was not circumstantial conduct, but rather direct evidence of how Appellant viewed his own conduct.

That Appellant's conduct was cruel, inappropriate, and done with an intent to abuse AB is further underscored by the fact that AB told him that she was uncomfortable and changed her dress to prevent him from being able to engage in the activity; Appellant nevertheless continued pulling up her bra and shirt to expose her breasts. (R. at 292-293, 295.) Appellant even appears to acknowledge that his activities humiliated and degraded AB but continues to assert that the intent to "physically injure" AB is a necessary predicate to finding he abused her. (App. Br. at 22-24.) It is not. All that is required is that Appellant harbor an intent to maltreat or abuse—to treat her cruelly. And this is exactly what the evidence demonstrated. Appellant's contact with AB's wired bra and breasts and lifting her shirt over her head was not proper treatment; it was not how a parent is expected to treat their child under any circumstances. It was cruel; and his conviction is legally and factually sufficient.,

d. Any credibility issues with AB's testimony were resolved by Appellant's corroborating statements.

Appellant asserts that AB's account of "flash the world" along with the Government's implication that the activity was done with an intent an intent to abuse is not believable or proven by the evidence. (App. Br. at 25.) In support of this assertion, Appellant points to AB's credibility issues. (App. Br. at 26.) However, Appellant fails to give sufficient weight to the fact that Appellant admitted that this activity occurred and expressed remorse for it in unsolicited text messages and in a pretext phone call with the Air Force Office of Special Investigation (OSI). (Pros. Ex. 1 at 6-7; Pros. Ex. 3; R. at 456-457; 462-463)

During a recorded pretext conversation between AB and Appellant, AB described "flash the world" to Appellant and demanded to know why Appellant had made her show her breasts outside the window even though she had expressed that it made her feel uncomfortable. (R. at 456.) Appellant did not question AB's description of the events, but instead stated, "Yes, that is correct. *Unfortunately, that is what happened.*" (R. at 457.) (emphasis added) Appellant continued that he could not provide any answers as to why he engaged in this conduct. (R. at 457.) Not once did Appellant question the validity of the accusation; instead, Appellant validated and confirmed AB's in-court testimony. This is not the case where Appellant denied that his activity occurred. Nor is this the case where the conviction hangs on the testimony of one witness with dubious credibility issues. Rather, AB testimony is believable precisely because it dovetails with Appellant's admissions. Indeed, the combination and consistency of Appellant's admissions, on two separate occasions, and AB's testimony provided overwhelming evidence that this crime occurred.

There is also evidence that Appellant was actively listening during the pretext phone call such that there should be no doubt of his asset to having engaged in "flash the world." After AB complained of the circumstances surrounding "flash the world," Appellant stated, "Yes, that is correct. Unfortunately, that is what happened." (R. at 457.) However, when AB described another situation in which she accused Appellant of fondling her in her sleep, Appellant pushed back and stated that it was definitely not him. (R. at 459.) The juxtaposition of these accusation and Appellant's acknowledgement of the first, but not of the second, demonstrated that Appellant was actively listening to the conversation and did not misspeak or erroneously agree with an accusation.

In sum, the members were not forced to blindly believe AB's testimony. Instead, her testimony was corroborated and propped up by Appellant's own admissions, which taken together provided sufficient evidence to support Appellant's conviction.

e. "Flash the world" was physically possible.

Appellant also asserts that this activity, "flash the world" was physically impossible. (App. Br. at 25.) Appellant fails to give sufficient weight to the fact that AB was a child in elementary school and middle school when this activity occurred, and that Appellant was a full-grown adult. (R. at 296.) The resulting imbalance in size and strength likely provided Appellant with the ability to hold her hands behind her back while he lifted her shirt and bra. The mechanics of the activity also make touching AB's breast unavoidable because Appellant would have to reach under her wired bra to lift it up to expose her breasts. AB also testified that Appellant engaged in this activity his hands would touch her breasts. (R. at 296.) That AB did not immediately state that Appellant touched her breast and had to be asked directly by trial counsel is of little significance. (App. Br. at 25.) AB was describing what happened to her from her perspective and did not participate in drafting the charges. That her testimony may be imprecise or that trial counsel has to ask a direct question did not diminish her credibility.

In sum, the Government correctly pursued a theory that Appellant touched AB's breast with an intent to abuse her. While the term abuse is not defined in the UCMJ, its common and ordinary meaning is to maltreat—which means to treat roughly or cruelly. An intent to inflict physical injury is not required. Adopting Appellant's definition of abuse is not consistent with a holistic reading of the statute because it upends the definition of sexual abuse of a child committed through indecent exposure or language. Appellant's definition also renders other portions of the statute as surplusage. There is sufficient circumstantial evidence Appellant acted

with an intent to abuse. "Flash the world" exceeds any definition of wrestling and was not a game. Appellant continued to engage in this activity even after AB told him that it made her feel uncomfortable. And while Appellant claims that AB has creditably issue, these issues were resolved by the fact that Appellant's admissions corroborated AB's in-court testimony. As a result, any rational trier of fact could have found all elements beyond a reasonable, and this Court should be convinced of appellant's guilt beyond a reasonable doubt. Accordingly, this Court should affirm Appellant's conviction.

WHEREFORE, the United States respectfully requests that this Honorable Court affirm Appellant's convictions and sentence.

II.

APPELLANT'S CONVICTION FOR TOUCHING AB'S VULVA IS LEGALLY AND FACTUALLY SUFFICIENT BECAUSE HE COMMITTED THE ACT WITH THE REQUISITE INTENT—TO ABUSE HER.

Standard of Review

The standard of review for factual and legal sufficiency is de novo. United States v. McAlhaney, 83 M.J. 164, 166 (C.A.A.F. 2023).

Law and Analysis

The United States adopts the law and analysis from Appellant's first assignment of error to the extent Appellant challenges the definition of "abuse" and asserts that it must include an intent to inflict physical injury. As discussed in more detail above, adopting Appellant's definition of abuse, to require physical injury, is not supported by the plain language, common sense reading of the dictionary definitions cited by Appellant; it is not consistent with a holistic reading of the statute, and creates an issue of surplusage.

a. Sufficient direct and circumstantial evidence supported a finding that Appellant touched, through AB's clothing, AB's vulva with his foot with an intent to abuse her.

Appellant asserts that "I toed you so" was a "game" that started with "wrestling and horseplay" (App. Br. at 33.) Appellant further asserts that Appellant could not have an intent to abuse AB, because when the activity was occurring, Appellant only knew that it made AB feel uncomfortable, and not that it hurt or injured AB. (Id.) Appellant's argument is without merit. "I toed you so" was not a game, and this activity was separate from any wrestling that occurred in the household. AB also expressed to Appellant that she was in pain when this activity was occurring by crying and screaming for him to stop. Her testimony provided direct evidence that Appellant placed his toe over her vulva and her protests and expression of pain provided strong circumstantial evidence that Appellant acted with an intent to abuse or maltreat AB.

AB described the wrestling in Appellant's household as play fighting or pinning someone of the floor and counting to 10. (R. at 293.) She testified that when Appellant would get tired of wrestling, Appellant would engage in a separate activity entitled "I toed you so":

> A: He would -- the way to end it was he'd grab my arms, sometimes my brother's. He would grab my arms and I would be on the couch on my stomach or on my back, and he would, like, open his toe and -- and pull my arms, so there. It hurt. And sometimes I was crying. Sometimes I wasn't crying. And then at the end, "I toed you so."
>
> Q: When you said he would put his toe or his foot on you, where on you would he put his toe?
>
> A: My vagina.
>
> Q: Is that over the clothing?
>
> A: Yes.
>
> Q: And what was your reaction when he did that?

> A: I would tell him to stop. And I would be screaming and just, like, yelling at him. I would try to get away, but I can't, and I was pinned on the couch.
>
> Q: When he was pinning you to the couch, how was he pinning you?
>
> A: With his foot, pushing me in my vagina.

(R. at 293-294.)

When Appellant engaged in "I toed you so," the wrestling match was over. And even if this represented an extension of the wrestling, common sense suggests that no appropriate wrestling match permits using an opponent's genitals to gain a tactical advantage. In addition, if AB was lying down on the couch on her stomach, and Appellant had hold of both her arms, common sense suggests that there was no way for her to get up and escape and it would therefore make no sense for Appellant to place his foot over her genital. In other words, even if this were a wrestling match, such a maneuver, on behalf of the Appellant, was completely unnecessary, without justification, and it therefore represented an activity apart from the wrestling match.

The circumstances surrounding this activity supported a finding that Appellant acted with an intent to abuse or maltreat AB. Similar to "flash the world," Appellant's placement of his foot on AB's vulva through her clothing represented maltreatment or abuse of AB. It was not part formal discipline, part of a game, or appropriate horseplay. In short there was no conceivable benefit or purpose to Appellant repeatedly placing his toe over her vulva and even Appellant characterized this behavior as "unconventional" (App. Br. at 34.) The unjustified and unnecessary contact with AB's vulva over her clothing is enough to support a finding that Appellant did so with an intent to physically maltreat or abuse her. However, additional evidence also supports this finding because Appellant's maltreatment resulted in AB asking Appellant to stop, screaming, and crying. (R. at 293.) AB's response should have made it

abundantly clear to Appellant that he was abusing or physically maltreating AB. Therefore, while Appellant may not have harbored an intent to "physically injure" AB, the evidence supported a finding that he intended to treat her cruelly or abuse her.

Appellant asserts that there was no evidence presented that AB *told* Appellant that the activity hurt her at the time the "game" was happening; and therefore, Appellant could not have had an intent to abuse AB. (App. Br. 33) (emphasis added). However, the circumstantial evidence that Appellant knew he was hurting or maltreating AB is overwhelming. Appellant ignores AB's testimony that the activity hurt, she would sometime cry during it, and would tell Appellant to stop. (R. at 293.) Appellant places no weight on the fact that Appellant's actions caused AB, not even a middle-school aged child, to cry out of pain and instead brushes this activity off as "horseplay." (App. Br. at 33.) Appellant would therefore have to be deaf and blind to not comprehend that he was hurting or maltreating AB during this activity. It is unclear what more AB could have done to protest Appellant's actions if screaming for him to stop and crying were not enough. As a result, and contrary to Appellant's assertion, any mistake of fact that he was not hurting AB was not honest. (App. Br. at 33.) Accordingly, a reasonable factfinder could have found an intent to abuse beyond a reasonable doubt.

b. "I toed you so" was physically possible.

Appellant asserts that AB's description of "I toed you so" was physically impossible. (App. Br. at 35.) It was possible and AB provided an adequate description of the behavior. (R. at 292-294.) It is not challenging to imagine AB lying on the couch as she described, on her stomach or on her back. It is not difficult to imagine Appellant standing over her on the couch. Nor is it difficult to imagine Appellant taking both of her arms and pinning her down with his toe over her genitals. Appellant's claim that AB did not provide enough specificity is unpersuasive.

Appellant also asserts that "I toed you so" could have been an extension of "foot wars;" and that positioning of "foot wars" would have made it impossible for Appellant to pin AB down on the couch. (App. Br. at 36.) Not so. AB testified that "foot wars" were different from "I toed you so." (R. at 358-359.) Foot wars described an activity where AB and her brother or father would sit facing one another on the couch and their feet would struggle to kick each other. (R. at 359.) When trial defense counsel suggested that Appellant tapped AB in the crotch in response to her tapping Appellant in the crotch, she stated that never happened. (Id.) AB also testified that "I toed you so" was not related to Appellant tapping AB with his foot in the crotch; AB stated that "I toed you so" never involved just a tapping on the crotch. (R. at 360.) As a result, AB clearly differentiated "I toed you so" from "foot wars" and Appellant's attempt to confound the two is unpersuasive.

c. Any credibility issues with AB's testimony were resolved by Appellant's corroborating statements.

Similar to the analysis related to "flash the world," Appellant asserts that AB has serious credibility concerns. (App. Br. at 36.) However, and similar to the above analysis, Appellant fails to consider the fact that much of AB's testimony is corroborated by Appellant. First, Appellant acknowledged via text message that both "flash the world" and "I toed you" were "wrong" and that he "[didn't] know what [he] was thinking." (Pros. Ex. 1 at 7.)

During a recorded pretext call between AB and Appellant, AB questioned Appellant with respect to "I toed you":

> Q: -- why the toes? That made -- it hurt. My vagina hurt. And not even that, that made me uncomfortable to sit there after that happened all the time. And to think like what the hell is even going on. All you can sit there and say is you don't have any answers. There is no answers to why.
>
> A: Yes, that is correct. Unfortunately, that is what happened.

(Pros. Ex. 3; R. at 456-457.)

Appellant did not question the comment about the toes and the fact that the toe made her vagina hurt. Instead of protesting the behavior, Appellant confirmed that is what happened. (R. at 457.) What is not apparent from the transcript, is that it took 47 seconds for Appellant to provide that answer to AB – thereby suggesting deep deliberation on the part of Appellant. (R. at 591-592.)

A later exchange during the pretext call further demonstrated that Appellant was not just passively listening and agreeing to whatever AB said. At one point during the call, AB asked Appellant if he remembered coming into her bedroom at night while drunk and reaching up her shirt while she was asleep. (R. at 459.) Appellant responded by pushing back and stated that it definitely was not him. (Id.) This exchange demonstrated that Appellant is actively listening to the conversation and selecting the portions he does not agree with. As a result, the fact that he did not protest the comment about the toes making her vagina hurt underscores the fact that this behavior did occur and that he was responsible.

Appellant asserts that AB's own brother (EB) undercuts AB's testimony because he testified that he had never witnessed his father do anything sexual to his sister. (App. Br. at 36.) It does not. First, as described above, Appellant agreed that both "flash the world" and "I toed you" did in fact occur and expressed remorse for both. (Pros. Ex. 3 at 7; R. at 457.) Second, the fact that AB and Appellant both had a name for the behavior separate from "foot wars" also suggested that AB was telling the truth. (Id.; R. at 358.) Moreover, if the event were only foot wars, it is unclear why Appellant would express remorse for the behavior. Finally, AB testified that her brother never witnessed Appelland force AB to "flash the world." (R. at 361.) This suggested that Appellant knew that the world was wrong, and he excluded his son from witnessing such an overt sexual abuse. Appellant was similarly able to hide "I toed you" through

the use of horseplay and wrestling. EB, 14 months younger, likely had no idea what exactly Appellant was doing with his toe an even if he did know he was unlikely to be able to attach any significance to the act. (R. at 285.) AB's crying and the screaming to stop could have easily been confounded with the wrestling which again provided the perfect cover for Appellant to abuse his daughter. Therefore, that AB's younger brother did not witness any sexual behavior is not significant and unpersuasive.

In sum, the Government correctly pursued a theory that Appellant touched AB's vulva through her clothing with an intent to abuse her. While the term abuse is not defined in the UCMJ, its common and ordinary meaning is to maltreat – treatment that does not require physical injury. Indeed, and as discussed in the first assignment of error, adopting Appellant's proposed definition of abuse would upend sexual abuse committed through indecent language or exposure with an intent to abuse and transform it into an entirely different offense. Requiring physical injure would also render other portions of the statute as surplusage. There is sufficient circumstantial evidence Appellant acted with an intent to abuse. "I toed you" exceeds any definition of wrestling and was not a game. There was no reason for Appellant to place his toe over AB's vulva and such an action represented maltreatment or abuse. Appellant's intent to abuse her is underscored by AB's response to the abuse in that she cried and told him to stop. And while Appellant claims that AB has creditably issue, these issues are resolved by the fact that Appellant's admissions corroborated AB's in-court testimony. As a result, any rational trier of fact could have found all elements beyond a reasonable, and this Court should be convinced of appellant's guilt beyond a reasonable doubt.

WHEREFORE, the United States respectfully requests that this Honorable Court affirm Appellant's convictions and sentence.

III.

APPELLANT'S CONVICTION FOR GRABBING AB BY THE NECK IS LEGALLY AND FACTUALLY SUFFICIENT BECAUSE THERE IS SUFFICIENT EVIDENCE APPELLANT TOUCHED HER NECK WITH HIS HAND AS CHARGED.

Additional Facts

In August 2017, Appellant and his wife (JG), AB, and their dogs traveled from Colorado to Vandenberg Space Force Base (SFB) as part of a permanent change of station (PCS). (R. at 296.) On the way to Vandenberg SFB they stopped in Long Beach, California to pick up AB's younger brother, EB. (R. at 297.) When they arrived at Vandenberg SFB there was no on-base billeting, so they ended up checking into a suite at the Santa Maria Inn. (Id.)

At the time AB was approximately 14 years old and EB was approximately 12-13 years old. (R. at 298-299.) AB and EB planned on sleeping on the pull-out sofa in the living room of the suite. (R. at 298.)

At some point after checking into the hotel, Appellant and JG went to the restaurant in the hotel. (R. at 299.) They returned early because JG was drunk and both of them were arguing; after returning they both went to their separate bedroom (Id.)

While Appellant and JG were, AB decided to take the dogs out for a walk. (Id.) However, one of the dog leashes was in the bedroom where Appellant and JG were arguing. (Id.) AB did not want to interrupt Appellant and JG to get the leash and instead decided to make a dog leash out of JG's boxing glove wraps—the wrap that goes underneath the glove. (Id.) After making the leash, AB and her EB took the dogs out for a walk. (Id.)

When AB and EB returned to the room, they discovered JG in the living room of the suite; she was upset that AB had used the boxing glove wrap for a dog leash. (R. at 299-300.) JG got in AB's face and started yelling at her that she had ruined the boxing gloves. (Id.)

Appellant heard the yelling and exited the bedroom and pulled JG back into the bedroom. (R. at 300.)

AB wanted to discuss the issue with her Appellant, and knocked on the bedroom door but did not get a response. (R. at 300.) AB then decided to enter the bedroom through the bathroom door to talk to Appellant. (Id.) When AB was able to speak with Appellant they started yelling and fighting. (R. at 301.) AB testified to the following:

> A: We started yelling and fighting. And he ended up coming out of the room. I don't necessarily remember what I said, but my dad -- so we were yelling. We were yelling a lot, me and my dad. He put -- he slapped his hand over my mouth and my nose and **pushed me to the wall in a chokehold**. And then I was screaming, so then he put his **hand** over my mouth again, pushed me on the ground. And I can't breathe and I'm looking at my brother and he's sitting there watching me. And then my dad -- I get up and we're still fighting. And all of a sudden he had his arm around my throat and his hands were in my mouth and my nose and he was, like, swinging me around, choking me.
>
> Q: When you say "choking you," Lexie, [sic] was his hand on your neck?
>
> A: He had me in a head lock. Headlock.
>
> Q: What was going through your mind when he had you in that headlock?
>
> A. My dad hit me, but he never did that to me before. That was really intimidating. I didn't understand, like, how he could go that far because he never choked me before. So when he did that, it just -- I felt the anger. I felt it inside of him. Just going from when I was younger, he was my best friend. I loved my dad. **So, just looking when he first was choking me, looking into his eyes, and I -- how could you look me in the eyes while you're doing that.**

(R. at 301) (emphasis added).

On redirect, AB provided the following information:

> Q: The way your dad reacted that night, did he ever react that way before?

> A: No.
>
> Q: What made it different.
>
> A. I have a feeling it was alcohol.
>
> Q. But what do you believe was different?
>
> A. **The fire in his eyes.** It didn't even look like my dad anymore. **When I looked at him, it was like everything was going black and his face was getting distorted.** It just didn't even look like my dad anymore. And I could just feel when he grabbed me that he wasn't even there.

(R. at 374.) (emphasis added)

Appellant eventually relented and AB exited the room. (R. at 301.) When she returned, AB could not get back into the hotel, so she sat outside and cried. (R.at 302.)

As a result of the fight, AB's mouth was bleeding, and her neck was red with "choke marks." (Pros. Ex. 2 at 1-5; R. at 302, 383-384.)

EB was also present for the encounter. (R. at 398-401.) He testified he could not recall what occurred. (Id.) His previously recorded statement was admitted into evidence where he provided the following information:

> [H]e put his hand around her mouth . . . Like her in mouth, and . . . He put his arm . . . Other arm around her neck and like lifted her up and like starting swinging her around. . . . My dad came out and started, like, manhandling her.

(Pros. Ex. 4 at 00:11-23, 00:37-39.)

JG was present for the argument between Appellant and AB but stayed in the bedroom and did not see the alternation between AB and Appellant. (R. at 509.)

During findings argument trial defense counsel argued that there was no evidence that Appellant grabbed AB by the neck and stated to the panel members that this was an "easy not guilty." (R. at 626.)

The members found Appellant guilty of Specification 2 of Charge II without the use of exceptions and substitutions. (*Entry of Judgment*, 4 November 2022, ROT. Vol. 1 at 2.)

Standard of Review

The standard of review for factual and legal sufficiency is de novo. United States v. McAlhaney, 83 M.J. 164, 166 (C.A.A.F. 2023).

Law and Analysis

The United States adopts the law from the first assignment of error.

In this case, Specification 2 of Charge II provided that Appellant:

> Did, at or near Santa Maria California, on or about 27 August 2017, unlawfully grab A.B., a child under the age of 16 years, by the hand with his neck.

(*Entry of Judgment*, 4 November 2022, ROT, Vol. 1 at 2.)

As a result, the Prosecution was charged with proving beyond a reasonable doubt that Appellant unlawfully grabbed AB by the neck with his hand. (Id.) The Prosecution did so.

a. The members considered the evidence that AB did not directly testify that Appellant grabbed her by the neck with his hand.

The member's guilty finding with respect to Specification 2 of Charge II demonstrated that the members drew reasonable inferences from the evidence to support their finding that Appellant grabbed AB by the hand with the neck. Trial defense counsel highlighted the issue to the members during closing argument when he suggested that Specification 2 of Charge II was an "easy not guilty" because there was no evidence Appellant grabbed her neck with his hands

(R. at 626.) As a result, this comment supported a finding that this matter was something that was indeed considered by the members and does not represent an oversight.

The members likely considered the testimony of both EB and AB in making their determination that Appellant did in fact grab AB by the neck with her hand. In addition to testifying that Appellant put his hand around AB's mouth and put his arm around her neck, he also testified "[m]y dad came out and started, like, manhandling her." (Pros. Ex. 4 at 00:11-23, 00:37-39.) A reasonable inference from this testimony is that when Appellant first came out of the bedroom he was acting out of anger and took actions in addition to putting his hands around her mouth and putting his arm around her neck. The specific actions that he took are revealed by AB's testimony.

b. AB's description of Appellant's assault consisted of three components—the first of which supported a finding that Appellant used his hand to grab AB by the neck

AB testified to (3) three components of the assault. The first component consists of the following:

> He put -- he slapped his hand over my mouth and my nose and **pushed me to the wall in a chokehold**. And then I was screaming…

(R. at 301.)

A reasonable inference from this testimony is that Appellant placed one of his hands on AB's neck to put her in a "chokehold." AB's use of the word "pushed" suggested that Appellant was using his hand rather than his arms to place AB in a "chokehold." Had he been using his arms and placed her in a headlock, common sense suggests that she would have been "pulled" instead of being pushed in a chokehold. The fact that she was pushed with Appellant's hand, as opposed to being placed in a headlock is further supported by the following testimony:

> So, just looking when he first was choking me, looking into his eyes, and I -- how could you look me in the eyes while you're doing that.

(Id.)

AB was referring to the first part of the assault (chokehold) and testified that Appellant was looking her in the eyes while choking her. She consistently testified on cross examination that she was able to look at his face during the choking. (R. at 374.) This testimony suggested that Appellant was using his hand because a traditional headlock using one's arms would be accomplished by standing behind the victim rather than standing in front of the victim. In fact, it is impossible to put an individual in a "headlock" with one's arms and still be able look the victim of the headlock in the eye. While it is possible that Appellant used his forearm to push her against the wall, the testimony suggested that Appellant was trying to prevent AB from screaming and therefore breathing. As a result, it is a reasonable inference that Appellant would use his hand over his forearm to stop her from breathing and being able to yell. This theory of assault is a reasonable inference from the evidence and is consistent with EB's testimony in that Appellant first "manhandled" AB.

The second component of the assault is also consistent with EB's description of Appellant manhandling AB. AB testified that after being choked, Appellant pushed her to the ground where she could not breathe. (R. at 301.)

The third component of the assault is also consistent with EB's testimony in that AB testified that she got up, and they were still fighting. (Id.) While on her feet, Appellant put his arm around her throat and his hands in her mouth and nose and he was "swinging [her] around, choking [her]." (Id.) It is a reasonable inference from this testimony that when AB testified that she was in a "headlock" she was referring to the third component of the assault where her feet

did not reach the floor, and she was swing. (Id.) That this was a separate component of the assault is evidenced from the fact that Appellant could not simultaneously put one hand over AB's mouth, choke her, pick her up so that she was swinging, and look her in the eye. Common sense suggests that the lifting up and the swinging would require use of Appellant's arms while he was behind her. It is difficult to imagine picking up a 14-year-old female with one's arms and swinging her when standing in front of her. (R. at 298-299.) The initial chokehold, however, did not involve swinging, was described using the word "pushed" and necessitated a face-to-fact posture. As a result, a reasonable inference from the evidence is that Appellant used his hand to grab her neck during the initial chokehold.

AB's version of events is supported not only by EB's testimony but also that of a bachelorette at the party who testified that AB's neck was red, there was a mark on her forehead, and she had a fat lip. (R. at 426.)

Appellant's reliance on the formal dictionary definitions of chokehold, choke head lock is not persuasive. (App. Br. at 44.) Appellant concedes that the term choke is defined as, *inter alia*, to block normal breathing of by compressing or obstructing the trachea. (Id. at 45.) Appellant could have choked AB with his arm, knee, foot, or hand. The red neck is evidence that Appellant used one of these methods to choke AB. And a reasonable inference from the evidence is that he used his hands to choke her when he did so by looking into her eyes.

Lastly, Appellant's reliance on United States v. English is misplaced. In English, the specification read in pertinent part: "[Appellant], did, commit a sexual act upon Ms. D.E., to wit: penetrating her mouth with his penis, by unlawful force to wit: *grabbing her head with his hands*" (emphasis added). 79 M.J. 116, 119 (C.A.A.F. 2019). During trial D.E. testified that she could not remember if appellant grabbed her head. (Id.) On cross examination, in response to

"did he grab your head…?" D.E. stated "No, he just put it in my mouth." (Id.) As a result, in English there was no way to draw a reasonable inference from the evidence to conclude that the appellant used his hands to grab D.E.'s head because her testimony specifically foreclosed that possibility.

Here, the situation is distinguishable because AB did not foreclose the drawing of a reasonable inference from the evidence. On the contrary, the way she described the initial choking assault, one is forced to the conclusion that Appellant must have used his hand to grab her by the neck and choke her if he was still able to maintain eye contact with her. It is impossible to put someone in a headlock using one's arms and still be able to maintain such eye contact. Given this conclusion, there was no need for the Prosecution to ask for instructions on exceptions and substitutions.

In sum, trial defense counsel pointed out what he believed to be a lack of evidence with regard to Specification 2 of Charge II in that Appellant did not grab AB's neck with his hand. He characterized the specification as an "easy" not guilty. However, a careful reading of the testimony revealed that when Appellant initiated the assault, he "pushed" her with one hand over her mouth while choking her with the other hand. This is consistent with EB's testimony in that Appellant manhandled AB. During this initial assault, AB was able to maintain eye contact with Appellant. A reasonable inference from the evidence is that Appellant used his hand to choke AB during this initial assault. It was only later that Appellant forced her to the ground. And then, also consistent with EB's testimony, when AB stood up, Appellant was able to put her in a headlock and swing AB from side to side. As a result, any rational trier of fact could have found all elements beyond a reasonable, and this Court should be convinced of appellant's guilt beyond a reasonable doubt.

WHEREFORE, the United States respectfully requests that this Honorable Court affirm Appellant's convictions and sentence.

IV.

APPELLANT'S CONVICTION FOR STRIKING AB ON HER FACE IS LEGALLY AND FACTUALLY SUFFICIENT BECAUSE THE GOVERNMENT OVERCAME APPELLANT'S PARENTAL DISCIPLINE DEFENSE FOR PLACING HIS HAND OVER AB'S MOUTH TO STOP HER FROM SCREAMING IN THE HOTEL.

Additional Facts

The additional facts provided in assignment of error III are relevant to this assignment of error.

Prosecution Exhibit 3 contains an audio recording of a pretext phone call between AB and Appellant. (Pros. Ex. 3.) The call was conducted on 22 March 2021 with Appellant, AB, and agents from OSI present for the phone call. (R. at 452.) During the conversation AB discussed the incident at the Santa Maria Inn. (R. at 457.)

> AB. And not even just that, the whole Santa Maria, I don't know what happened. I kind of went to the [unintelligible] and [JG] was all in my face [unintelligible] because you were choking me. My lip was bloody and everything and nothing happened. You didn't even care. Like, how could you be so angry at someone that didn't even do anything to you? That literally defends [sic] was against you. It would be one thing if like someone was charging at you and that's how you reacted. That's never been the case. You make me out to be crazy in your own house. That never made sense to me.
>
> A. I don't think we're going to get anywhere with this conversation today, [AB].

(R. at 457.)

Standard of Review

The standard of review for factual and legal sufficiency is de novo. United States v. McAlhaney, 83 M.J. 164, 166 (C.A.A.F. 2023).

Law and Analysis

The United States adopts the law from the first assignment of error.

When an appellant raises the parental-discipline defense, the Government has the additional burden of refuting beyond a reasonable doubt appellant's defense of parental discipline. United States v. Rivera, 54 M.J. 489, 490 (C.A.A.F. 2001). Force may be used by parents or guardians when the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation. Id. at 491. CAAF has applied a test of contextual reasonableness in determining when proper parental motive turns to criminal anger, or necessary force becomes a substantial risk of serious bodily harm. Id. (citing United States v. Brown, 26 M.J. 148, 150-151 (C.M.A. 1988)).

a. Appellant's use of force had nothing to do safeguarding or promoting the welfare of a minor or the punishment or prevention of misconduct.

Appellant asserts that he possessed the proper motivation for the use of force against AB in that he was preventing AB's continued misconduct of screaming in a hotel after 2200 hours. (App. Br. at 49-50.) Appellant asserts that AB was yelling without a purpose. (Id.) However, the evidence supports a finding that AB's behavior was precipitated by JG's drunken intimidation of AB, Appellant's disregard for AB's welfare and safety, and a later call for police assistance in response to Appellant's assault.

This is not the case of a crying infant or child who was crying simply for the purpose of misbehaving. Instead, AB's yelling was the result of JG's intimidation and neglect that resulted in an argument between Appellant and AB. AB testified that on the evening in question Appellant and JG returned from having dinner in the hotel restaurant and that JG was still "very

drunk." (R. at 299.) At some point after returning from the restaurant, JG noticed that AB had used her boxing-glove wrap as a makeshift leash to walk one of their dogs. (Id.) A drunken JG accused AB of destroying her boxing-gloves. (Id.) AB testified that JG became angry and started yelling in AB's face and was trying to intimidate her; "[JG] …started getting in my face trying to fight me or waiting for me to do something to her." (R. at 299-300.) Appellant pulled JG into the bedroom and locked the bedroom door; however, at the same time AB sought to discuss JG's aggressive behavior with Appellant. (Id.) AB then walked through the bathroom to the bedroom; and when she arrived in the bedroom, an argument ensued. (R. at 300.) AB next described the situation as "we were yelling a lot." (R. at 301.) At some point during the yelling, both departed the bedroom and Appellant used force against AB by placing his hand over her mouth and nose and pushing her to the wall in a chokehold. (R. at 301.) When Appellant let go of AB, she left the room yelling that she was going to call the police. (R. at 301, 492.)

AB's argument with Appellant and her later request to call the police were not the result of misbehavior that needed to be corrected, but rather it was the result of a legitimate grievance with JG and a later request for police assistance. Appellant's use of force also had nothing to do with safeguarding or promoting the welfare of a minor. AB actions posed no risk of harm to herself or any other person. At most, she may have alerted some of their neighbors to an argument—a not uncommon occurrence in a hotel. Instead, this use of force was the result of Appellant's failure to safeguard or promote the welfare of a minor who was being intimidated by JG. Had JG not threatened or intimidated AB there would have been no argument or yelling and had Appellant not assaulted AB there would have been no cries to call the police.

b. Appellant's use of force was excessive and driven by anger.

Even assuming Appellant had some justification for the use of force against AB, the degree of force he applied was excessive and motivated by anger. Appellant asserts that he was not angry and did not seem angry on the evening that he used force against AB. (App. Br. at 49.) In making this point, Appellant relies on JG's testimony. (Id.; R. at 510.) The problem is that JG is not a reliable source. She was not present for Appellant's use of force against and expressed difficulty remembering what transpired that evening. (R. at 510.) The eyewitnesses to Appellant's use of force were AB and EB—both of whom described Appellant driven by anger and who used excessive force. See United States v. Stitely, 2008 CCA LEXIS 170 (A.F. Ct. Crim. App. 2008) (unpub. op.) (finding that the parental discipline defense was overcome by showing that the use of force was excessive or unreasonable).

For starters, EB's testimony is indicative of Appellant being an individual driven by anger and excessive use of force. According to a past recollection recorded, EB described Appellant's actions as follows:

> [Appellant] put his hand around her mouth . . . Like her in mouth, and . . . He put his arm . . . Other arm around her neck and like lifted her up and like starting swinging her around My dad came out and started, like, manhandling her.

(Pros. Ex. 4 at 00:11-23, 00:37-39.)

This testimony described a grown adult male who took it upon himself to lift up his 14-year-old daughter and "swing" her around, place hand on her mouth, an arm around her neck, and "manhandle" her. EB's description of Appellant's behavior was also consistent with AB's testimony that Appellant was angry at the time he was using force against her. She testified in part

> …[Appellant] never choked me before. So when he did that, it just -- **I felt the anger. I felt it inside of him.** Just going from when I was younger, he was my best friend. I loved my dad. So, just looking when he first was choking me, looking into his eyes, and I -- how could you look me in the eyes while you're doing that.

(R. at 301) (emphasis add).

Choking is not spanking, it's not a slap, it is not tugging a stubborn child. Common sense suggests that choking or a chokehold is a serious assault that is designed to deprive a victim of oxygen. In this case, the choking demonstrated excessive use of force and undermined Appellant's assertion that he was only disciplining his child to prevent misconduct. Common sense suggests that depriving a person of oxygen is not a *rational* form of discipline because it is likely to escalate the situation because instead of recovering from a slap or a spank, the victim now has to struggle to breathe. And while choking does not per se prove ill will, it certainly undermined a claim that Appellant was operating with a proper intent. *See* Rivera, 54 M.J. at 492 (finding that while punching with closed fist does not prove ill motive; it may more readily allow the factfinder to infer ill motive and undermine a claim of proper intent).

In order to further demonstrate that Appellant was operating under fit of anger, one need only compare this discipline with Appellant's past discipline of AB. For example, when Appellant discovered that AB had a secret Facebook page, he did not immediately punish AB, but instead took hours to deliberate as to the appropriate punishment. (R. at 290.) At that time, he did not immediately choke her, put her in headlock, or manhandle her. (Id.) Therefore, the fact that Appellant took no time to deliberate on the appropriate punishment also suggested that he acted out of rage or anger instead of out of reason.

The near non-existent consequences of AB screaming or yelling also supported the finding that Appellant acted out of anger and that the degree of force used against AB was

unreasonable and excessive. Appellant points out that any yelling happened after 2200 hours on numerous occasions because this is the only aggravating factor related to the yelling. (App. Br. at 12, 40, 48, 49, 50.) There is no allegation that AB posed any threat to any person, pet, or property. The absolute worst thing that could have happened as a result of some yelling or "screaming" is a complaint from hotel management to keep the noise down. Appellant's use of force was therefore unreasonable because it was designed to protect nothing. (App. Br. at 53.) Given the lack of any physical consequences, Appellant's best course of action would have been to do nothing and let her stop yelling on her own. Instead, and out of anger, Appellant put AB in a choke, deprived her of oxygen, held and swung her around the room in an effort to spare no person or property from injury or damage.

Appellant points to the lack of serious physical injury to demonstrate that Appellant's use of force was reasonable. (App. Br. at 54, 56.) Appellant states that the "sheer fact he caused so *little damage* to AB indicates a restraint in force." (App. Br. at 56.) However, our superior court has aptly noted, "[a] rule that requires physical evidence of injury invites one blow too many." Rivera, 54 M.J. at 492. Accordingly, overcoming the parental discipline defense requires no injury and the existence of any, as in this case, therefore not only corroborated the use of force but was also indicative of force that was unreasonable and excessive.

c. AB' version of events was credible.

Appellant asserts that AB's version of events was contradictory and unclear. (App. Br. at 51.) It was not, and Appellant's assertions are conclusory at best. There was nothing contradictory or unclear about Appellant pushing AB to a wall in chokehold with one of his hands and then placing his other hand over her mouth. (R. at 299-301.) Appellant has two hands—he used one to cover her throat in a chokehold and one to cover her mouth.

Appellant claims that it was unclear how AB could not breath when she was pushed to the ground. (App. Br. at 51.) There is nothing extraordinary or unclear about a full-grown adult male being able to push a 14-year-old female to the ground. And the fact that AB could not breath when she was on the ground is easily explained by Appellant's hand remaining over her mouth or her neck—or both.

Appellant asserts that AB's version of events did not "line up" with JG, EB, or the individual from the bachelorette party who found her. (App. Br. at 51.) This is not true with respect to AB's use of force. First, JG testified that she did not witness the alternation in the living room. (R. at 493.) Therefore, Appellant's assertion that her version of events is the most believable lacks merit. (App. Br. at 53.) Second, the individual from the bachelorette party witnessed injuries on AB consistent with the beating she received from Appellant. (R. at 425-426.) She testified that AB had a mark on her forehead, a fat lip, and her neck was "really red." (Id.) Finally, EB's description of the abuse was consistent with AB's in that Appellant swung her around and manhandled AB. (Pros. Ex. 4 at 00:11-23, 00:37-39.) This evidence supported AB's version of events with respect to Appellant's use of force against and a finding that AB was a credible witness.

Appellant's description of other inconsistencies does not diminish AB's version of events or her credibility. Appellant attaches significance to how AB and Appellant moved from the bedroom to the main part of the suite. (App. Br. at 51.) Appellant asserts that it is "unbelievable" that Appellant pushed AB through the bathroom, to the main part of the suite. (Id.) This is not impossible, and it does nothing to undercut AB's credibility with respect to the use of force in the main part of the suite.

Appellant takes umbrage with AB's use of the word "body slam." (App. Br. at 52.) Appellant asserts that AB only admitted that she told the police Appellant "body slammed" her on cross examination; on direct examination she stated that she was "pushed" into a "wall" and "pushed" to the "ground." (App. Br. at 52.) This testimony does not undercut AB's testimony. The consistency in the testimony is that under all circumstances, AB's description of Appellant's use of force involved forcing her to the ground and continuing to assault her. Whether AB used the term "body slam" or "pushed" is insignificant especially when one considers the difference in size and the way AB may have perceived the assault while it was happening.

Appellant also points to another insignificant inconsistency with the respect to the individual from the bachelorette party. (App. Br. at 52.) The individual from the bachelorette party testified that she found AB in a state of emotional distress in front of the hotel room, across the hall from Appellant's room. (R. at 424-425.) AB testified that she was crying outside of the hotel. (R. at 302.) Appellant acknowledges that the testimony regarding the emotional distress was consistent but points to the different locations. (App. Br. at 52.) Yet Appellant fails to articulate the significance of the difference in location and how that undercut AB's credibility. This is especially true provided that JG testified that after AB left the room, she and Appellant looked down the hallway, and she was gone. (R. at 494.) JG's testimony supports AB's testimony that at one point she was locked out of the hotel. The relevant evidence is that of the assault, the visible injuries, and the emotional distress—not where AB may have been crying.

Similarly, Appellant attaches significance to the fact that AB told the police that she was instructed to get out of the bathroom but on the stand did not recall this narrative. (App. Br. at 51.) AB likely did not recall being asked to get out of the bathroom because it was insignificant. Common sense suggests that arguments about the bathroom are commonplace when multiple

people are living together and there is only one bathroom—such is the case in a hotel room. Even JG described this situation regarding the bathroom as a "small argument." (R. at 491) However, the real cause of the argument was what AB described on the stand and to the responding police officer—that JG was unhappy that AB used her boxing glove wraps to walk the dog. (R. at 299-300; 383-384.) AB's testimony was therefore consistent with what she reported to the responding officer on the night in question; and the fact that she did not remember the "small argument" about getting out of the bathroom is insignificant because it was dwarfed by JG subsequent intimidation related to the boxing glove wraps and Appellant's abuse.

In sum, the Government overcame the parental discipline defense by proof beyond a reasonable doubt. The use of force was not designed to prevent AB's misconduct or to preserve her well-being. AB at first argued with Appellant over JG's drunken intimidation of her and then yelled for the police because of Appellant's physical abuse of her. Appellant's physical abuse was not designed to protect person or property, was fueled by anger, and was excessive and unreasonable. Lastly, Appellant's use of force was corroborated her physical injuries, by EB, and an independent bystander.

WHEREFORE, the United States respectfully requests that this Honorable Court affirm Appellant's convictions and sentence.

V

APPELLANT HAS NOT MADE A PRIMA FACIE SHOWING THAT THE CONVENING AUTHORITY CONSIDERED RACE OR GENDER AND IS THEREFORE NOT ENTITLED TO A PRESUMPTION THAT THE PANEL WAS IMPROPERLY CONSTITUTED.

Additional Facts

On 21 January 2022, Special Order A-7 detailed 15 officer and six enlisted members (21 members) to try Appellant at a General Court Martial. (*Special Order A-7*, ROT Vol 1., 21

January 2022.) Eight months later, on 23 September 2022, Special Order A-14 excused all the enlisted and 10 officer members identified in Special Order A-7; the special order also detailed 11 new officer members. (*Special Order A-14*, ROT Vol 1., 23 September 2022.)

Appellant's court-marital first convened on 25 July 2022 for motions and arraignment. (R. at 1.) Approximately two months later, on 26 September 2022, the court-martial convened a second time, during which it completed voir dire and impaneled eight members. (R. at 242; App. Ex. XXV.)

When detailing members, the convening authority received a list of proposed members and their data sheets, which included copies of each nominee's personnel data in a Single Unit Retrieval Format (SURF). (*Receipt of Service – Court Member Data Sheets*, ROT, Vol 4.) The convening orders and underlying member selection documents were provided to the defense. (Id.) At no point did the defense file any motions regarding court martial composition.

On appeal, Appellant alleged—for the first time—that his panel had been improperly constituted. (See App. Br. at 57-63.) To support this claim, Appellant moved this Court to attach the court member data sheets considered by the convening authority. (App. Mot. to Attach.) The United States timely opposed Appellant's Motion on the grounds that the data sheets were 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). (United States Response to Mot. to Attach.) This Court granted Appellant's motion to attached, but "specifically defer[red] consideration of the applicability of Jessie and related case law to the attachment(s) until it completes its Article 66, Uniform Code of Military Justice, review of Appellant's entire case." (Order, 26 June 2024.)

Standard of Review

When no objection is made at the trial level, this Court reviews court-martial composition issues for plain error. United States v. King, 83 M.J. 115, 121 (C.A.A.F. 2023). Under plain error review, Appellant bears the burden of establishing that (1) there is error; (2) the error is clear or obvious; and (3) the error materially prejudiced a substantial right. Id. at 123. "[F]ailure to establish any one of the prongs is fatal to a plain error claim." United States v. Bungert, 62 M.J. 346, 348 (C.A.A.F. 2006).

Law & Analysis

Pursuant to Article 25, "[w]hen convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in the opinion of the convening authority, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." 10 U.S.C.S. § 825(e)(2). Absent contrary indication, military appellate courts presume that the convening authority acted in accordance with Article 25, UCMJ, in "carr[ying] out the duties imposed upon him by the Code and the Manual." United States v. Bess, 80 M.J. 1, 10 (C.A.A.F. 2020) (citing United States v. Wise, 6 C.M.A. 472, 478, 20 C.M.R. 188, 194 (1955)).

Here, Appellant contends that the existence of race and gender on the court-member data sheets was a prima facie showing that race and gender entered the panel selection process. (App. Br. at 60.) Appellant also contends that the replacement of three women with three women, and the replacement of an African-American panel member with another African American further raised a prima facie showing that race and gender entered the panel selection process. (R. at 61.) But as discussed below, Appellant's claim fails for two reasons; first, because this Court cannot consider the data sheets, since they are not "necessary to resolve an issue raised by the record."

Jessie, 79 M.J. at 444. And second, the replacement panel is not statistically significant when considered in light of the available court members; and therefore, the replaced members do not support a finding that either race or gender were considered. Appellant has failed to demonstrate clear or obvious error related to the court-member selection process and is therefore unentitled to relief.

a. This Court cannot consider the data sheets because they are not necessary to resolve an issue raised by the record.

Appellant's claim fails first and foremost because the court member data sheets are not "necessary to resolve an issue raised by the record." Jessie, 79 M.J. at 444. This Court is reviewing this case pursuant to Article 66(d)4, UCMJ. When reviewing whether findings of guilt are correct in law and fact in accordance with Article 66, a "CCA cannot consider matters outside the 'entire record.'" Id. at 444. The "entire record" includes those matters listed in R.C.M. 1103(b)(2)-(3) and the briefs and arguments counsel present "regarding matters in the record of trial and 'allied papers.'" Id. at 440-41. "[T]he practice of considering material outside the record should not be expanded beyond the context of Article 55, UCMJ, and the Eighth Amendment." Id. at 445.

This Court may consider matters outside the record where: (1) such documents are "necessary for resolving issues raised by materials in the record"; and (2) the issues are not "fully resolvable by those materials" already in the record. Id. at 444-45. The default is a rule of exclusion "because the text of Article 66, UCMJ, does not permit the [courts of criminal appeals] to consider matters that are outside the entire record." Id. at 445. This rule of exclusion reflects the notion that, for military justice proceedings to be "truly judicial in nature," appellate courts cannot consider information when it "formed no part of the record." *See* United States v. Fagnan, 30 C.M.R. 192, 195 (C.M.A. 1961).

Under this framework, Appellant's claim regarding impermissible use of race and gender in court member selection fails because it can only be raised using matters that were, until recently, outside the record. Appellant cannot articulate how the issue of improper member selection is raised by any materials in the record before this Court granted his motion to attach, such that this Court's review of court member data sheets would be necessary to resolve it. Jessie, 79 M.J. at 442. The attachment of the court member data sheets to documents provided to the convening authority—such as the pretrial advice—is insufficient to raise the issue of which Appellant complains.[1] (App. Mot. at 60.) Just as the mere fact of an appellant's sentence to confinement did not "raise[] an issue regarding [the confinement facility's] policies," Jessie, 79 M.J. at 444, the fact that member data was referred to on other pretrial papers within the record does not—without more—raise the issue of improper panel constitution based on race. *See* United States v. Loving, 41 M.J. 213, 285 (C.A.A.F. 1994) ("We will not presume improper motives from inclusion of racial…identifiers on lists of nominees for court-martial duty.")

Critically, there were no motions about improper panel constitution, nor were there any related objections at trial. (See generally R. at 19-258; see also Exhibit Index, ROT, Vol. 2.) The word "race" appeared one time, indicating that individuals of different races and not just individuals with oppositional behavior, could be a victim. (R. at 546.) Similarly, the word "gender" only appears once—which had nothing to do with the selection of any panel member. (R. at 185.) Had Appellant, at any point, objected to the composition of his court martial, he might have a better argument that this Court should consider the data sheets. But he did not, and his failure to do is fatal to his claim.

[1] Though the member data sheets were attached to the pretrial advice and subsequent requests for replacement members given to the convening authority, they were omitted from the Record of Trial in accordance with DAFMAN 51-203, Records of Trial.

Our superior Court has emphasized that "[i]t is important 'to encourage all trial participants to seek a fair and accurate trial the first time around.'" United States v. Causey, 37 M.J. 308, 311 (C.A.A.F. 1993) (quoting United States v. Frady, 456 U.S 152, 163 (1982)). Thus, appeal is not the time to adjudicate this issue for the first time by attaching material from outside the record, especially where Appellant (1) made no objection to the panel selection process, and (2) by extension, deprived the United States of the opportunity to rebut any prima facie case he might have made.

Ultimately, Appellant cannot point to anything in the transcript, exhibits, or allied papers that even hints at this issue, such that this Court would be authorized to consider the court-member data sheets. The issue of improper panel selection was not "raised by materials in the record," so outside materials are not necessary, and therefore not authorized, to resolve it. Jessie, 79 M.J. at 444-45. Absent the data sheets, Appellant cannot even come close to making a prima facie showing that race or gender entered the member selection process. Accordingly, Appellant's claim fails, and he is unentitled to relief.

b. Racial identifiers on personnel data sheets, without more, do not establish a prima facie case that race played a role in the court member selection process.

Even if this Court considers the data sheets submitted by Appellant, his argument still fails. In detailing prospective members to court-martial duty, the convening authority may not "exclude or intentionally include prospective members based on their race." United States v. Jeter, 84 M.J. 68, 73 (C.A.A.F. 2023). Thus, "whenever an accused makes a prima facie showing that race played a role in the panel selection process at his court-martial, a presumption will arise that the panel was not properly constituted." Id. at 70. Citing the presence of racial identifiers on certain member data sheets and SURFs, as well as the fact that Jeter had not been decided at the time of his court-martial, Appellant asserts that he has made such a showing. This

Court should be unpersuaded. "Prima facie" means "at first sight" or "on first appearance." Black's Law Dictionary (4th pocket ed. 2011). Here, there is nothing that suggests "at first sight" that "race played a role in the panel selection process." Jeter, 84 M.J. at 69. The mere presence of racial identifiers and timing of a court-martial—without more—are insufficient to make this showing.

To start, military courts "will not presume improper motives from inclusion of racial … identifiers on lists of nominees for court-martial duty." Loving, 41 M.J. at 285. This holds true even after Jeter, in which our superior Court confirmed that "racial identifiers are neutral." 84 M.J. at 74. In Jeter, the solicitation of racial identifiers was but one of the conditions which justified a presumption that race entered the selection process. Id. In finding that the appellant had made the required prima facie showing, the Court of Appeals for the Armed Forces specifically noted the existence of evidence that "two African American members on the original convening order were subsequently removed pursuant to the first amendment to the convening order; and three other courts-martial with African American accuseds were convened by this convening authority before all-white panel members." 84 M.J. at 74.

This demonstrates that it was not the racial identifiers, standing alone, which established the prima facie case in Jeter. Rather, it was the fact that "the effect of the subsequent amending convening orders replacing the original panel of ten members with nine all-white members at least has the appearance of excluding members of Appellant's cognizable racial group from his court martial panel." United States v. Jeter, 81 M.J. 791, 796-97 (N-M Ct. Crim. App. 2021). In this context, the racial identifiers were a pertinent factor because they might have been used to contribute to that perceived exclusion. *See* Jeter, 84 M.J. at 74 ("Although racial identifiers are neutral, they are capable of being used for proper as well as improper reasons.")

Jeter is clear that a prima facie showing is one where the appellant demonstrates, at a minimum, an appearance that race "played a role" in court-martial composition. 84 M.J. at 69. Appellant has not made that showing. Appellant asserts that the amended convening order is prima facie evidence that race played a role in selecting the members because one black company-grade officer was replaced by another black company-grade officer. (App. Br. at 61.) Appellant asserts, with no evidence, that such a replacement is "statistically improbable" and "statistically impossible." (Id.) It is not. Appellant ignores the broader context of the member selection process. The 1st indorsement entitled, Selection of Members, *United States v. Technical Sergeant James P. Baumgartner*, provided that the convening authority used Article 25, UCMJ criteria to select the members and not the member's race:

> By reason of they age, education, training, experience, length of service, and judicial temperament under Article 25, UCMJ, I select the following individual to service as member in the court-martial of *United States v. TSgt James P. Baumgartner*.

(App. Mot. to Attach., App. A).

The convening authority followed the Article 25 criteria because the selection of officer members appears to have been conducted on the basis of rank or experience with the majority of the members selected being company-grade officers (majors and captains). (Id.) The convening authority selected two of three colonels, two of four lieutenant colonels, all five majors, five out of six captains, and one of two lieutenants. (Id.) If the officer was a field grade officer there was a 57% chance of being selected and if a company grade officer there was an approximate 85% chance of being selected.

There is zero evidence that the convening authority used race to select these members. On the contrary, the evidence demonstrates that the convening authority selected almost every available officer member for service with some exception for the highest and lowest ranked

individuals. In total, the convening authority initially selected fifteen of the available 20 officers. (Id.) If an officer's name appeared on that list, he or she had a 75% chance of being selected regardless of any other criteria. Of the fifteen selected members, five company-grade officers (majors and captains) identified as a race other than Caucasian; these individuals identified as follows: "mixed (2)," "Hispanic (2)," or "African American (1)." (App. Mot. to Attach., App. B).

There is also no evidence that once selected, the convening authority used race to excuse any of these members. Common sense suggests that through the passage of time from January 2022 to September 2022, many of the selected members would have PCS'd during the summer rotation. It is therefore reasonable to assume that additional members would have to be selected. Indeed, the convening authority excused 10 members or two-thirds of the officers previously selected. (*Special Order A-14*, ROT Vol 1., 23 September 2022.) This number of excusals therefore necessitated a completely new selection of officer members. Notably, this is not the case where a single minority was excused and then replaced by a member of the same race. Instead, this was a complete revamping of the convening order, where more than half of the original number of members required replacement.

Appellant suggests that this one for one replacement was motivated by race. (App. Br. at 61.) However, he ignores the fact that five minority individuals who were excused, were replaced by only two individuals who identified as other than Caucasian. This was not a one for one minority swap, but rather the proper selection of available officer members to sit at a court-martial.

That one of the newly selected members, out of a pool of available members, identified as a company-grade African American officer was not, as Appellant asserts with no evidence,

statistically "improbable or impossible." (App. Br. at 61.) "Impossible" suggests that there is only one African American company grade officer, and "improbable" suggests that such an individual is exceeding rare. Common sense and a cursory review of the ranks in the Air Force suggest that both assertions are without merit.

Accepting that there are African American company grade officers in the United States Air Force and dispensing with the notion that their service on a court-marital is neither improbable nor impossible, Appellant has not pointed to anything about his court-martial's composition that suggests the racial identifiers on the court member data sheets "played a role in the panel selection process." Jeter, 84 M.J. at 69. He also has not provided any evidence akin to that in Jeter which even remotely suggests that the convening authority detailed members based on their race—quite possibly because there is nothing to point to, which is what his trial defense seemed to think. *Cf.* Jeter, 84 M.J. at 71 (where the court-martial's composition was objected to and litigated at the trial level).

The fact that Appellant's court-martial occurred before Jeter does not make up for the lack of evidence. To hold otherwise would effectively endorse the presumption of improper panel constitution in every single court-martial that (1) convened prior to Jeter and (2) used member data sheets with racial identifiers, without individualized consideration of the facts in each case. Such indiscriminate application of the presumption is impermissible. *See* Batson v. Kentucky, 476 U.S. 79, 95 (1986) (noting that trial courts must conduct a factual inquiry that "takes into account all possible explanatory factors" when faced with claims of jury discrimination). Moreover, convening authorities are presumed to act in accordance with Article 25, UCMJ, absent evidence to the contrary, Bess, 80 M.J. at 10, and this Court should not let Appellant force it to presume otherwise.

Where there is no appearance of racially motivated member selection, there is no prima facie showing. Such is the case here. Appellant has not made a prima facie showing that "race played a role in the panel selection process," Jeter, 84 M.J. at 69, and is therefore unentitled to the presumption that his panel was improperly constituted. Further, because he has failed to make the required showing, he cannot demonstrate clear error and is unentitled to relief.

c. There is no evidence that the convening authority impermissibly considered gender.

Appellant also contends that gender was impermissibly used to detail members to his court martial and asks this Court to apply the same principles from Jeter to his claim. (App. Br. at 61-62.) The Government recognizes that "gender is not an Article 25, UCMJ, factor, and selection on the basis of gender is generally prohibited." United States v. Riesbeck, 77 M.J. 154, 162 (C.A.A.F. 2018). But as Appellant concedes, Jeter did not address whether gender was an appropriate consideration in member selection. (App. Br. at 60.) Thus, the presumption in Jeter does not extend to claims of gender discrimination in member selection, especially under a plain error analysis. 84 M.J. at 71. But even assuming arguendo that it did, Appellant's claim fails because he has failed to make a showing that gender played a role in the court-martial composition process.

In asserting that the convening authority impermissibly considered gender, Appellant points to the fact that out of the 10 officers the convening authority excused, three were women; and of the 11 officers selected for replacement, three were also women. (App. Br. at 61.) According to Appellant, this action "bespeaks gender discrimination." (Id.) However, Appellant offers zero authority for this proposition and again ignores the composition of the selection pool.

In total, female officers comprised roughly 31% of the pool of officers – nine of the 29 member data sheets were for female officers. (App. Mot. to Attach., App. B). There was a 31%

chance that a randomly selected officer from the member pool would be female. In other words, if the convening authority blindly picked 10 officers, he was likely to select three female officers. That number increases when one considers that the convening authority previously preferred company grade officers and that all of the female officers selected to replace the excused members were company-grade officers—two captains and one major. Therefore, there is absolutely no evidence, statistically or otherwise, that the convening authority considered gender when he selected replacement member.

In effect, Appellant asks this Court to presume that instead of selecting members who were "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament," the convening authority simply tried to "balance the gender composition of the detailed members." (Id.) But as discussed supra, the numbers and genders of the members do not support this finding and this Court presumes the opposite—that convening authorities act in accordance with Article 25, UCMJ—absent evidence to the contrary. Bess, 80 M.J. at 10. Just as "a prima facie claim of discrimination is not established by the absence of minorities on a single panel," Loving, 41 M.J. at 286, neither is a prima facie claim of discrimination established by the detailing of women to a particular panel. There is no evidence that the convening authority impermissibly considered gender—accordingly, Appellant is unable to demonstrate error, much less clear error, and is therefore unentitled to relief.

WHEREFORE, the United States respectfully requests that this Honorable Court affirm Appellant's convictions and sentence.

VI.

TRIAL DEFENSE COUNSEL WERE NOT INEFFECTIVE BECAUSE APPELLANT CAN NEITHER PROVE DEFICIENCY NOR PREJUDICE.

Additional Facts

JG and AB's relationship

JG, Appellant's spouse, was the only fact witness called by trial defense counsel. (R. at 481.) She testified that AB was "troubled." (R. at 486.) She stated that AB would regularly skip school, hung out with kids that used drugs, she was caught shoplifting, was belligerent and "very argumentative," and would at times "run off." (R. at 486, 494.) JG stated that AB had two Facebook accounts, one that JG and Appellant knew of and one in which AB engaged in illegal activities. (R. at 487-488.) Similarly, AB also had two cellphones, one that Appellant and JG provided and another one that they confiscated from her. (R. at 495.) JG testified with regard to efforts that she and Appellant took to improve AB's behavior such as involving her in sports, taking her to church, and counseling. (R. at 486-487.)

In order to remove AB from what JG described as "bad influences," JG and Appellant decided to move the family from Colorado to California. (R. at 488.) AB was not happy about the move from Colorado to California. (Id.)

JG testified that she did not provoke fights with or yell at AB. (R. at 488-489.) On the contrary, JG stated that when she would discuss AB's bad behavior with her, AB would yell and scream. (R. at 489.) JG stated that AB was "disrespectful" most of the time. (R. at490.)

Move to California & Santa Maria Incident

JG stated that when they arrived in California, they stayed at the Santa Maria Inn. (R. at 490.) After checking into the hotel, Appellant and JG went to dinner at the hotel restaurant; AB and EB stayed in the hotel room. (R. at 491.) When JG returned to the room, JG discovered AB

was taking a bath. (Id.) JG needed to use the bathroom and asked AB to leave; JG and AB had a small argument at the door. (Id.)

During direct examination, Trial Defense Counsel asked three questions to JG about an argument with AB that stemmed from AB's use of JG's boxing glove wraps to walk their dogs. (R. at 505-506.) JG did not remember anything about boxing wraps. (Id.)[2]

JG stated that when AB exited the bathroom, AB got into an argument with Appellant about "having to get out of the bathroom." (R. at 491.) JG stated that AB said that both she and Appellant were "bad parents." (R. at 492.) At that time JG stated that AB "wasn't screaming but was kind of yelling. It wasn't super escalated." (R. at 492.)

At some time after 2200 hours, JG and Appellant went to the bedroom and locked the door. (R. at 492.) They later heard AB "pounding on the door and screaming that she needed to talk to her father." (Id.) AB was repeating the same concern, that Appellant was a "bad parent." (Id.) AB then entered Appellant and JG's bedroom through the connecting bathroom and started "screaming" at Appellant. (Id.) JG then stated that AB ran out through the bathroom into the main living area and Appellant followed her. (R. at 493.) JG described AB's demeanor in that she was "screaming at the top of her lungs" and that she wanted to "call the cops." (Id.) JG stated that after AB ran into the living area, she did not hear much; it was about 30 seconds and AB was out of the hotel room. (Id.) JG did not witness any "scuffle" or physical contact between AB and Appellant. (Id.) JG and Appellant later looked outside the hotel room but did not see AB. (R. at 494.) JG and Appellant next waited for the police to arrive. (Id.)

JG and AB's relationship post Santa Maria fight

[2] AB testified that JG was upset because AB had used JG's boxing-glove wraps as a leash to walk their dogs. (R. at 299.) AB also described the use of the box-glove wraps to the responding on the night of the assault. (R. at384-385.)

Following the incident at the hotel, AB stayed with other relatives for about two weeks before she moved in with Appellant and JG. (R. at 495.) JG and Appellant tried to integrate AB into the community by making her attend church and enrolling AB in a charter school. (R. at 495.) Despite these efforts, arguments between AB and Appellant and JG persisted; and much to Appellant's and JG's dismay, AB maintained a relationship with some individuals in Colorado, and AB wanted to move back there. (R. at 495-496.)

During JG's testimony, trial defense counsel admitted Defense Exhibit A which depicted an argument between AB and JG. (R.at 496.) The argument occurred when Appellant and JG discovered that AB retrieved a cellphone that Appellant and JG had previously confiscated. (R. at 496-497.) AB had been using this cellphone to contact her boyfriend in Colorado. (R. at 497.) In the video, AB threatened that she was going to call the police and report that Appellant and JG "beat her up." (R. at 498; Def. Ex. A.) JG testified that neither she nor Appellant had any physical contact with AB and that no one was trying to beat her up. (R. at 498.) JG further relayed that in the course of dealing with AB she had made similar false allegations on several occasions. (Id.)

Cross examination of JG

On cross examination, trial counsel questioned if it was her idea for Appellant to sign away parental rights for one of his children; JG responded "no." (R. at 500.) JG stated that she did not have a preference about wanting children. (Id.) Trial counsel then asked, "You actually have told people that if you had children you might drown them in a bathtub?" (Id.) JG testified that she did not remember making this comment regarding children. (Id.) JG stated that Appellant's children were away when she and Appellant were married. (Id.)

JG also testified that AB was not generally a bad kid. (R. at 501.) And that before AB's behavior escalated, JG told a social worker that the kids [EB and AB] were overall good kids and did what they were supposed to do. (Id.)

When question about EB reporting of JG to child social services for physical abuse, JG responded that there were so many instances of reports of abuse that they are "confused" in her head. (Id.)

JG admitted that during the stay at the Santa Maria Inn, she was arguing with Appellant. (R. at 503.) She stated that she and Appellant went to the hotel restaurant to have dinner and a drink. (Id.) When JG returned to the hotel room, she noticed that AB was in the bathroom, but did not remember arguing with her – only Appellant. (R. at 505.)

JG did not remember any argument that she had with JG regarding JG using her boxing glove wrist wraps to walk their dog. (Id.)

JG remembered AB later entering their bedroom through the bathroom and arguing with Appellant. (R. at 506.) AB then exited the bedroom through the bathroom; Appellant followed but JG stayed in the bedroom. (R. at 509.) JG admitted that she was not in the living area and did not see any that transpired there between AB and Appellant. (R. at 510, 511.)

Re-direct examination of JG

During re-direct examination, trial defense counsel asked why JG reported to the police officers, those who responded to the incident in Santa Maria, about AB's "bad" history and what was going on in her life. (R. at 513.) After restating the question, JG testified that she reported this information to the police officers because JG had a history of making false allegations. (Id.)

Standard of Review

Allegations of ineffective assistance are reviewed de novo. United States v. Scott, 81 M.J. 79, 84 (C.A.A.F. 2021).

Law and Analysis

a. Ineffective assistance of counsel

The Sixth Amendment guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; United States v. Strickland, 466 U.S. 668, 686 (1984). "In order to prevail on a claim of ineffective assistance of counsel (IAC), an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing Strickland, 466 U.S. at 698). "Appellate courts do not lightly vacate a conviction in the absence of a serious incompetency which falls measurably below the performance… of fallible lawyers." United States v. DiCupe, 21 M.J. 440, 442 (C.M.A. 1986) (quotations omitted) (citing United States v. DeCoste, 624 F.2d 196, 208 (D.C. Cir. 1979)). If an appellant has made an "insufficient showing" on even one of the elements, this Court need not address the other. Strickland, 466 U.S. at 697.

Military courts use a three-part test to determine whether the presumption of competence has been overcome: (1) are appellant's allegations true, and if so, is there a reasonable explanation for counsel's actions; (2) if the allegations are true, did defense counsel's level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers; and (3) if defense counsel was ineffective, whether there is a reasonable probability that, absent the errors, there would have been a different result. United States v. Gooch, 69 M.J. 353, 362

(C.A.A.F. 2011) (citing United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)) (quotations omitted).

b. Cross Examination/re-direct

Defense counsels are not required to cross-examine or re-direct a witness. Indeed, they are only ineffective if their failure to examine falls below the standards set forth under Strickland. *See* Brown v. United States, 625 F.2d 210 (9th Cir. 1979); Sallie v. State, 587 F.2d 636 (4th Cir. 1978). Dissenting opinion United States v. Murphy, 50 M.J. 4, 32 (C.A.A.F. 1998).

Our superior Court has stated that it is not looking for perfection, but rather we are seeking to ensure that military accused are represented by "reasonably competent" counsel, and that the results obtained at trial are reliable. Murphy, 50 M.J.at 8.

c. Re-direct of JG was consistent with a strategy of not reinforcing issues raised on cross examination, but instead refocusing the panel member on AB's history of false allegations.

While JG was the only fact witness called by the defense, she lacked the foundation to directly contradict AB's narrative because she did not witness any of Appellant's alleged crimes. JG did not witness Appellant's physical abuse of AB at the hotel in Santa Maria because she was in a different room. (R. at 493, 509.) And there was nothing in her testimony or declaration about witnessing any sexual abuse. (R. at 481-513; App. Mot. to Attach. App. C.) Therefore, the relevance of JG's testimony was to undermine AB's credibility by demonstrating prejudice toward Appellant and a motive to fabricate. (R. at 483-484; 488-489; Capt Ann Sturges Declaration, dated 22 July 2024; Mr. Michael Waddington Declaration, dated 22 July 2024). Once trial defense counsel established AB's prejudice toward Appellant and a motive to fabricate, the strategy on redirect was to minimize the matters raised on cross examination and refocus the panel members on AB's history of false allegations. (Capt Sturges Declaration; Mr. Waddington Declaration).

Trail defense counsel effectively demonstrated AB prejudice toward Appellant and that she had a motive to fabricate. JG testified on direct that AB believed Appellant was a "bad man." (R. at 484.) The first time that AB and JG were alone together AB informed JG that Appellant had raped and beat AB's mother. (Id.) Trail defense counsel was then able to run through all of AB's indiscretions to including shoplifting, drug use, belligerent and disrespectful behavior, and a boyfriend who remained in Colorado after AB moved to California; this was all in an effort to establish that AB had a motive to fabricate the allegations because she wanted to move out of Appellant's house. (R. at 486, 495-497.) JG also testified that AB had a history of making false allegations. (R. at 497.) JG provided detailed about a video in which AB claimed that her parents (JG and Appellant) had beat her up; JG testified that at that time no one had either threated AB or laid a hand on her. (R. at 498.) Overall, trial defense counsel was able to establish that AB was a "troubled" child who not only had the capacity to steal and lie, but also had a motive to make up the allegations against Appellant. (R. at 486.)

JG was able to provide some context to the abuse allegations but seemed to not remember significant portions of the evening and digging into JG's memory of the incident risked undermining her testimony. JG testified that she and Appellant left AB and EB in the hotel room while she and Appellant went to the hotel restaurant. (R. at 491.) When she returned to the hotel room, JG testified that she and AB had a "small argument" at the bathroom door. (Id.) She then testified that AB continued arguing about how she and Appellant were bad parents—but it was not "super escalated." (R. at 492.) However, JG was unable to provide any more details about the argument. JG had no memory of AB's use of her boxing glove wraps to walk their dogs—what AB claimed precipitated the argument. (R. at 299, 353, 384, 505.) Instead, the next thing that JG remembered was falling asleep and waking to AB knocking on their bedroom door. (R.

at 492.) She remembered that AB entered their bedroom through the bathroom door, some screaming, and Appellant following AB to the main living area. (R. at 493.) JG did not witness any of the alleged abuse. (Id.) As a result, JG testimony about what happened in the hotel was of limited value because there were significant portions of the evening she could not remember.

On cross examination, trial counsel attempted to demonstrate that JG did not like children. Trial counsel asked about a statement that JG made about drowning children, encouraging Appellant to sign away his parental rights, and never wanting children of her own. (R. at 500-501.) However, JG effectively answered these questions. She did not remember making a statement about drowning children, denied encouraging Appellant to sign away parental rights, and stated that she had no preference with regard to having children of her own. (R. at 500.) As a result, re-direct examination was limited so as not to focus the members on the inflammatory questions on cross examination, but rather to keep the focus on AB's credibility. (Sturges & Waddington Declaration).

JG's level of intoxication

Appellant asserts that trial defense counsel's re-direct examination of JG was ineffective because it failed to contradict AB's testimony that described JG's level of intoxication. (App. Br. at 67.) AB testified that JG was "a little drunk…was still very drunk." (R. at 299) Appellant asserts that defense counsel failed to set the record straight and have JG testify that she was not drunk at all. (App. Br. at 67-68.) Appellant's argument is without merit.

Trial defense counsel did not raise JG's level of intoxication on redirect because JG testified on cross examination that she went to a restaurant (not a bar) and had a drink. (Waddington & Sturges Declaration) Trial defense counsel did not want to highlight the alcohol consumption because JG did in fact drink on the night in question and could not remember

portions of the night in question. (Id.) Common sense suggests that if JG could not remember parts of the night, she may have had more than one drink. Focusing on JG's alcohol consumption therefore may have impacted JG's credibility and distracted the members from JG's main points of testimony—that AB had credibility issues. And, contrary to Appellant's assertion, raising the alcohol consumption on re-direct would have done nothing to diminish AB's credibility. (App. Br. at 68.) JG admitted that she had a drink and common sense suggests that she would have had the scent of alcohol in her breath. This fact, combined with the fact that JG became angry with AB for using her boxing glove wraps to walk their dogs, supports AB's *assumption* that JG was drunk. (R. at 298-300.) In other words, it was irrelevant if JG were drunk or not because it was reasonable for AB to assume JG was drunk given the fact that she just returned from the hotel restaurant, she admitted to drinking, she had the scent of alcohol on her breath, and she became angry. Therefore, attempting to clarify JG's level of intoxication would have done nothing to advance Appellant's case, and the decision not to raise it was part of a reasonable strategy.

Drowning children and relinquishment of rights comment

Appellant next asserts that trial defense counsel was ineffective because he did not allow JG to explain the comment about drowning children, encouraging Appellant to give up his parental rights, or excluding AB from their wedding. (App. Br. at 68.) Trial defense counsel was not ineffective in avoiding these issues on redirect. Doing so represented part of a strategy to keep the members focused on AB's lack of credibility. With regard to the drowning comment, JG did not remember saying it and trial counsel offered no external evidence to impeach JG. (R. at 500.) Trial defense counsel made the strategic decision to not bring it up on re-direct because JG did not remember making this statement and trial defense counsel did not know how JG

would have elaborated; defense counsel determined that no explanation would have advanced the case or rehabilitated the witness. (Waddington & Sturges Declarations). Instead, asking the question again risked distracting the panel members and underscoring unfavorable information. The decision not to raise this issue was part of a reasonable strategy.

Similar to the above, there was no reason to redirect JG with respect to the question that she encouraged Appellant to relinquish his paternal rights. (Waddington & Sturges Declaration). When asked if it was her idea for Appellant to relinquish these rights JG responded "No, sir." (R. at 500.) As a result, this evidence was not before the panel and there was no way for her to give a more favorable answer for the defense. The decision not to raise this denial was part of a reasonable strategy to keep the members focused on AB's credibility.

Appellant also asserts that it was ineffective not to raise AB's disappointment with JG for not being a flower girl in her wedding. (R. at 66.) It was not ineffective to not ask this question. Defense counsel determined that this potential motive was weak and irrelevant. (Waddington Declaration). There was no wedding ceremony or any flower girls and the proposition that AB fabricated the allegations because she was not a flower girl at a non-existent wedding "strained credulity." (Id.) Therefore, not asking about AB participation as a flower girl was also part of the defense strategy to maintain credibility.

Appellant's refusal to co-sign for an auto loan

Appellant asserts that it was error to not question JG about Appellant's refusal to consign for an auto loan for AB. (App. Br. at 69.) Appellant asserts that the refusal to co-sign provided AB with a motive to embellish her allegations of sexual abuse. (Id.) It did not. Trial defense counsel did not ask these questions because the allegations of sexual abuse were made well in advance Appellant's refusal to consign for the loan. (Waddington & Sturges Declaration).

Defense counsel pointed out that there were posts in which Appellant acknowledged that "toeing" and "flash the world" were wrong; and that these posts predated Appellant's refusal to co-sign for the auto loan. (Sturges Declaration) Therefore, the refusal to co-sign for the loan had nothing to do with the allegations of sexual abuse and as with the flower girl evidence, raising this issue risked not only distracting the members but also diminishing the defense's credibility.

Sexual abuse allegations

Lastly, Appellant asserts that it was ineffective for trial defense counsel to not question JG about "other facts known by her regarding the sexual abuse allegations." (App. Br. at 69.) It was not. JG's declaration was devoid of any information that she had about the sexual abuse allegations. (App. Mot. to Attach. App. C) The only point that JG was able to offer was that Appellant had installed cameras in the home to protect Appellant from any false claims by AB. (Id.) The fact that Appellant may have installed some cameras in the house was hardly exculpatory, and trial defense counsel had good reason not to approach this subject.

Trial defense counsel was aware of statements Appellant made to the Air Force Office of Special Investigations (OSI) that were highly prejudicial but were not offered into evidence by trial counsel. (Waddington & Sturges Declarations). Appellant disclosed to OSI that "flash the world" and "toeing" were "nasty to think about;" and Appellant described a specific time, years prior, when he realized the behavior was inappropriate and told AB that they could not do it anymore. (Id.) Trial defense counsel decided not to ask JG questions about the sexual abuse because they were concerned that trial counsel would offer this evidence in rebuttal or cross examination. (Id.) For example, if on direct or re-direct examination, JG stated that Appellant *never* would have engaged in the sexual abuse because of his character or because of the

cameras, trial counsel could have challenged this assertion with Appellant's admissions to OSI. This cross examination would have overshadowed JG's testimony about AB credibility; rather the members would most likely remember Appellant's admissions to OSI and nothing of AB's adolescent behavior. Therefore, the decision not to inquire into the sexual abuse allegation was part of a strategy to keep the members focused on AB and her credibility.

Appellant asserts that there was no downside to asking the above-identified questions about intoxication, drowning children comment, flower girl, financial motive, or questions about the sexual abuse. (App. Br. at 69-70.) The opposite is true. There was a considerable downside to each of these issues/questions. Focusing on alcohol consumption risked diminishing JG's credibility and her perception of the evening. Examining in detail the genesis of the "drowning children" comment provided no conceivable benefit and risked distracting the members. The flower girl and financial motive questions risked damaging defense counsel credibility; and the sexual abuse allegation risked upending any perceived benefit from JG's testimony. As a result, the decision not to inquire, or not to inquire into these matters further, was part of deliberate strategy to keep the members focused on AB's credibility.

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

Appellant's trial defense counsel performed adequately. As the Supreme Court warned, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 446 U.S. at 668 (emphasis added).

To establish the element of deficiency, the appellant must first overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional

assistance." Strickland, 466 U.S. at 689. And the question here "is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011) (internal citations and quotations omitted).

Appellant has failed to show any evidence that trial defense counsel's performance amounted to incompetence under prevailing professional norms. This is not the case where the trial defense counsel did not know the law, missed a deadline, or failed to make a case dispositive motion. Rather, trial defense counsel are being questioned because they did not haphazardly approach Appellant's case by "throwing spaghetti at the wall" to see what stuck. Instead, trial defense counsel used JG's testimony to effectively question AB's credibility by painting her as troubled youth, who stole, lied, and had a motive to fabricate an outlandish story to get out of Appellant's house. (R. at 483-500.) Trial defense counsel was able to keep the witness and the members focused on AB's credibility.

Appellant has not demonstrated that trial defense counsel's actions amounted to incompetence and has therefore not overcome the strong presumption that trial defense counsel performed adequately. Thus, he cannot prevail on his claim of ineffective assistance of counsel.

e. There is not a reasonable probability that if trial defense counsel had asked the additional questions on re-direct, there would have been a different result.

Even if this Court were to determine that trial defense counsel was ineffective in failing to rehabilitate JG, Appellant cannot show a that asking these questions would have changed the result of the trial. *See* McConnell, 55 M.J. at 482.

To succeed on a claim of ineffective assistance of counsel, Appellant must show that his "counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." Richter, 562 M.J. at 104. Appellant has failed to make this showing.

Despite Appellant's claim to the contrary, explaining JG's alcohol consumption on the night of the Santa Maria incident would have had no impact on the result of trial. (App. Br. 67, 69.) First, regardless of her level of intoxication she was not present to witness the abuse in the hotel room because she did not follow Appellant out to the living area. (R. at 509.) Sober or drunk, she had nothing probative to offer about Appellant's abuse of AB. Second, and again contrary to Appellant's assertion, delving into JG's alcohol consumption would not have been an illustration of AB's willingness to lie and embellish. (App. Br. at 68.) JG did have a drink and presumably had alcohol on her breath. (R. at 503.) When JG got in AB's face and started screaming that she (JG) was "Government property" and that AB was going to go to jail if AB put her hand on her, it was reasonable for AB to assume that JG was drunk. (R. at 300.) Afterall, common sense suggests that these are not the actions of a rational sober person.

The record supports a finding that JG was able explain her alcohol consumption such that no re-direct was necessary. On cross examination, JG testified that she had *a drink* and corrected trial counsel's assertion that she went to a bar; she went to a *restaurant*. (R. at 503.) Given JG's answer, it is difficult to imagine what more she would have said on re-direct. On the other hand, raising this issue on re-direct may have damaged JG's credibility, because despite the fact that she only had a drink, there were portions of the night that she did not remember. (R. at 505.) Common sense suggests that her inability to remember portions of the evening may be indicative of more alcohol consumption. Therefore, questioning JG's level of intoxication on re-direct was not only unnecessary but also threatened her credibility.

Appellant also overstates the damage trial counsel inflicted on JG during cross examination and fails to articulate how this damage had any impact on the result of the trial. (R. at 68.) JG did not remember making the statement about drowning children. (R. at 500.) JG did

not encourage Appellant to give up his parental rights. (Id.) She described the children at one point as "good kids." (R. at 501.) And when asked if AB was a bad kid, she responded "not generally." (Id.) As a result, the record does not support a finding that JG was painted as what trial counsel described as an "evil stepmother." (App. Br. at 68.) Yet even assuming that the panel members viewed JG in a negative light, this perspective had no bearing on the result of trial.

JG's testimony had no impact on the result of trial because JG had no personal knowledge of any of the alleged offenses; her testimony was only relevant to AB's credibility. (Waddington Declaration) And while JG was able to paint AB as a troubled youth who stole, frequently lied, and whose friends' used drugs, all of her testimony had been raised on AB's cross examination. (R. at 486.) AB admitted on cross examination that she lied to Appellant, JG, her mother, and the police about her school attendance, stealing, and involvement with illegal drugs. (R. at 308, 340.) She admitted that she falsely accused Appellant and JG of beating her up. (R. at 340.) AB admitted that she plotted to run away from home with her boyfriend while living with Appellant. (R. at 345.) She also admitted that Appellant had refused to cosign for an auto loan shortly before participating in a pretext phone call with OSI. (R. at 366.)

In short, while JG was able to damage AB's credibility, the overwhelming damage to her credibility occurred during AB's cross examination. (R. at 306-350.) Yet no attack on AB's credibility could have overcome the significant corroborating evidence that supported AB's testimony. Appellant all but confessed to the sexual abuse in the form of text messages and the pretext phone call. (R. at 450-457; Pros. Ex. 1 at 1-7.) And with regard to the physical abuse, it was EB's testimony and that of an objective bystander that corroborated AB's testimony. (Pros.

Ex. 4 at 00:11-23, 00:37-39; R. at 425-426.) JG simply lacked the foundation or personal knowledge to challenge any of this corroborating evidence and therefore impact the result of the trial.

In sum, Appellant has failed to demonstrate that his counsel's performance was deficient. Instead, the evidence and the declarations reveal that his counsel employed a viable and well-thought-out strategy to attack AB's credibility and establish a motive to fabricate. Trial defense counsel limited their re-direct examination of JG so as to keep the members focused on these issues. Moreover, in light of JG's lack of personal knowledge about any of the alleged offenses and AB's cross examination, JG lacked the foundation to have any meaningful impact of the result of the trial. Since Appellant has not overcome the presumption of competent representation, this Court should deny Appellant's claims and affirm the findings and sentence in this case.

WHEREFORE, the United States respectfully requests that this Honorable Court affirm Appellant's convictions and sentence.

CONCLUSION

The United States respectfully requests this Honorable Court deny Appellant's claims and affirm the sentence in this case.

[redacted]
ZA , USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(808) 372-7022

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800

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 via electronic means on 5 August 2024.

ZACHARY T. EYTALIS, Colonel, USAF
Appellate Government Counsel,
Government Trial and Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(808) 372-7022

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee,	)	**UNITED STATES MOTION TO FILE ANSWER BRIEF IN EXCESS OF PAGE LIMIT**
v.	)	
	)	Before Panel No. 3
Technical Sergeant (E-6) **JAMES P. BAUMGARTNER,** USAF Appellant.	)	No. ACM 40413
	)	5 August 2024

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 Honorable Court's Rules of Practice and Procedure, the United States respectfully moves to file its answer brief in excess of the page and word limit, prescribed by this Court. The United States' answer is 68 pages, excluding the index, table of contents, and certificate of service; and it is approximately 23,000 words.

There is good cause to grant this motion. Appellant raised six assignments of error—many of which contain multiple sub-arguments and different theories of relief. For example, the first two assignments of error contain nearly a dozen sub-issues and arguments that the Government had to address. The Government also had to spend considerable time analyzing Appellant's claim of ineffective assistance of counsel. While the issue was easily raised, the Government's analysis required consideration and analysis of the entire record including c[illegible]m two defense counsel. In total, Appellant's brief is 63 pages excluding the i[illegible]uthorities, and certificate of service. Therefore, in order to properly address

GRANTED
8 AUG 2024

Appellant's arguments, and identify the relevant facts and law necessary for resolution of the issues raised, the United States is required to exceed this Court's page limit in its brief.

WHEREFORE, the United States respectfully requests this Honorable Court grant its Motion to File Answer Brief in Excess of the word count and page limit.

[redacted]

ZACHARY T. EYTALIS, Colonel, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(808) 372-7022

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800

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 via electronic means on 5 August 2024.

ZACHARY T. EYTALIS, Colonel, USAF
Appellate Government Counsel,
Government Trial and Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(808) 372-7022

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

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENTOFTIMETO FILE REPLY BRIEF (FIRST)**
v.	)	
	)	Before Panel No. 3
Technical Sergeant (E-6) **JAMES P. BAUMGARTNER,** United States Air Force,	)	No. ACM 40413
Appellant.	)	8 August 2024

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

Pursuant to Rule 23.3(m)(3) and 23.3(m)(7) of this Honorable Court's Rules of Practice and Procedure, Technical Sergeant (TSgt) James Baumgartner hereby moves for an enlargement of time to file his Reply Brief. TSgt Baumgartner requests an enlargement for a period of seven days, which will end on **22 August 2024.** The record of trial was docketed with this Court on 8 February 2023. From the date of docketing to the present date, 547 days have elapsed. On the date requested, 561 days will have elapsed.

From 26 to 29 September 2022, Appellant was tried by a general court-martial at Schriever Space Force Base, Colorado. Contrary to his pleas, the panel of officer members found Appellant guilty of one charge and two specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b; and one charge and three ications of assault consummated by a battery upon a child under sixteen years in violation icle 128, UCMJ, 10 U.SC. § 928.[1] R. at 61, 92,691. The members sentenced Appellant to

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[1] After the members' guilty finding, as relief for an unreasonable multiplication of charges, the military judge set aside and dismissed one of the assaults consummated by a battery, conditioned upon one of the sexual abuse charges surviving appellate review. R. at 796. The military judge also consolidated the remaining assaults consummated by a battery into a single specification. *Id.*

a reprimand, reduction in grade to E-1, confmement for three years, and a dishonorable discharge. R. at 792. The convening authority took no action on the fmdings and approved the sentence in its entirety. Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action - United States v. TSgt James P. Baumgartner,* dated 12 October 2022.

The record of trial is seven volumes consisting of six Prosecution Exhibits, 17 Defense Exhibits, 44 Appellate Exhibits, and one Court Exhibit. The transcript is 797 pages. Appellant is currently confmed.

TSgt Baumgartner filed his Assignment of Error (AOE) Brief with this Court on 3 June 2024. TSgt Baumgartner raised six issues in the AOE Brief. One of those issues was ineffective assistance of counsel, which TSgt Baumgartner hired civilian appellate defense counsel, Mr. Frank Spinner, to take lead on investigating, researching, and writing. Part of the ineffective of assistance of counsel issue required submitting a declaration by TSgt JG, TSgt Baumgartner's wife and one of the witnesses in the case.

The Government secured affidavits for the ineffective assistance of counsel issue, which were attached to the record on 31 July 2024. The Government then filed its Answer Brief on 5 August 2024, wherein it used and cited the affidavits to respond to the assignment of error. This Court approved the Government's motion to exceed page and word limit in its Answer Brief today, 8 August 2024. Without a request for an EOT, TSgt Baumgartner's reply would be due in seven days, on 15 August 2024.

Good Cause Exists to Grant This Motion

Undersigned counsel are cognizant and appreciate that this Court already granted several enlargements of time to file the Appellant's Brief. However, there has been insufficient time to consult with TSgt Baumgartner and his wife, TSgt JG, regarding preparation of a Reply Brief.

Upon receipt of the trial defense counsel's declarations, a copy was immediately provided to TSgt JG for review and comment. Before that could be accomplished, the Government filed their Answer Brief. Because TSgt JG was the primary witness called by the defense on the merits, she was provided a copy of the Government's Answer Brief to see how the defense counsel's declarations were being referenced. Before TSgt JG could respond further, it was learned that she was departing for Miramar Brig in San Diego, California, today to visit with TSgt Baumgartner over the weekend. It was agreed with the undersigned counsel that she would print the documents and provide them to TSgt Baumgartner so he could also be aware of the arguments being made and provide input.

TSgt JG will return to Colorado Springs on 12 August and meet with undersigned counsel on 13 August to discuss the way forward, which includes whether an additional rebuttal declaration will be submitted by TSgt JG. It is anticipated that it may take a number of days to prepare a rebuttal declaration and incorporate it into the Reply Brief. Next week undersigned counsel will also be working on other appellate cases that have been delayed multiple times at this Court and the Navy-Marine Corps Court of Criminal Appeals. A seven-day enlargement of time will allow the undersigned counsel sufficient time to prepare a rebuttal declaration and Reply Brief that meets ethical and professional standards.

Additionally, pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provide the following information. Civilian appellate defense counsel, Mr. Spinner, represents multiple clients, both at the trial and appellate levels. TSgt Baumgartner' s case is his first priority.

Military appellate defense counsel has 32 cases; 23 cases are pending before this Court (14 cases are pending AOEs) and nine cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). TSgt Baumgartner' case is military appellate defense counsel's first

priority. Military appellate defense counsel has reviewed the Answer Brief and begun researching and drafting for four out of the five parts of the Reply Brief she is responsible for.

TSgt Baumgartner was advised of his right to a timely appeal and has authorized undersigned civilian counsel to request enlargements of time as needed to provide effective assistance of counsel. TSgt Baumgartner has provided limited consent to disclose a confidential communication with counsel. TSgt Baumgartner respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully Submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
samantha.castanien.l@us.af.mil
(240) 612-4770

FRANK J. SPINNER
Attorney at Law
1420 Golden Hills Road
Colorado Springs, Colorado
lawspin@aol.com
(719) 233-7192

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 on 8 August 2024.

[redacted]

FRANK J. SPINNER
Attorney at Law
1420 Golden Hills Road
Colorado Springs, Colorado
lawspin@aol.com
(719) 233-7192

12 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) JAMES P. BAUMGARTNER, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR FOR ENLARGEMENT OF TIME FOR REPLY BRIEF ACM 40413 Panel No. 3

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States does not oppose Appellant's Motion for Enlargement of Time to file a Reply to the United States' Assignments of Error.

WHEREFORE, the United States respectfully requests that this Court grant 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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 12 August 2024.

[redacted]

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

Filed 22 August 2024

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

Technical Sergeant (E-6)
JAMES P. BAUMGARTNER,
United States Air Force,
Appellant.

Before Panel No. 3

No. ACM 40413

REPLY BRIEF ON BEHALF OF APPELLANT

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
E-mail: samantha.castanien.1@us.af.mil
Phone: (240) 612-4770

FRANK J. SPINNER
Attorney at Law
1420 Golden Hills Road
Colorado Springs, Colorado
E-mail: lawspin@aol.com
Phone: (719) 233-7192

Counsel for Appellant

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Appellant, Technical Sergeant (TSgt) James P. Baumgartner, pursuant to Rule 18(d) of this Court's Rules of Practice and Procedure, files this Reply to the Government's Answer (Ans.), dated 5 August 2024. In addition to the arguments in his opening brief (Appellant's Br.), filed on 3 June 2024, TSgt Baumgartner submits the following arguments for the issues listed below.

I.

TSgt Baumgartner did not touch AB's breasts with the requisite intent, which, as the Government helps to highlight, is *cruel intent to physically harm*, a definition of "abuse" consistent with the rest of the theories of liability and overall statute.

Intent to abuse *at least* means intent to physically injure, as the Government concedes, although in its concession, it calls injury "harm." This is semantics—intent to abuse means intent to *physically* harm or injure.[1] The "physical" limitation is what matters. As the Supreme Court has often reiterated, construing statutory language is not merely an exercise in ascertaining "the outer limits of [a word's] definitional possibilities." *Dolan v. United States Postal Serv.*, 546 U.S. 481, 486 (2006). The Government's over expansive definitions do just that, attempt to push the outer limits of the definition without consideration of the surrounding words in the statute. However, the Government does make one helpful observation about the level of severity to be read into the "intent to physically harm": the intent must be "cruel." Ans. at 17, 23, 25. Nevertheless, when applying this more precise definition involving cruelty, the Government still errs by

[1] The Government accuses TSgt Baumgartner of "cherry picking" definitions of "abuse." Ans. at 17. However, it fails to appreciate "abuse," as a mens rea, is not a noun—it is "to abuse," a verb. "Intent to abuse" is about the verb abuse, which is what TSgt Baumgartner defined using the dictionary: "to use or treat so as to injure or damage." Abuse (*v.*), MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/abuse (last visited Aug. 13, 2024). "Abuse" is not equivalent to "physical maltreatment," or "child abuse" or "sexual abuse," all nouns. *See id.* (defining the *noun*); Ans. at 17 (using the noun definition rather than the verb). That is a circular definition with no meaning. Touching a child—the actus reus—is not sexual abuse of a child unless there is a requisite intent, and that intent is what is lacking clarity and definition.

conflating actus reus with mens rea as it did throughout its brief in trying to argue that the acts are the same as internalized specific intent.

1. Intent to "abuse" means *cruel* intent to *physically* harm or injure.

The interpretive maxim *noscitur a sociis*, known as the associated words canon, counsels that "a word is known by the company it keeps." *McDonnell v. United States*, 579 U.S. 550, 569 (2016) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). "[T]his canon 'is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Id*. (quoting *Jarecki*, 367 U.S. at 307). Additionally, "The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)." Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 107 (2012) (referring to the negative implication canon) [hereinafter READING LAW]. The negative implication canon supports the inference that words or meanings not mentioned in a statutory listing as an associated group were excluded by deliberate choice, not inadvertence. *Barnhart v. Peabody Coal Co*., 537 U.S. 149, 168 (2003). "Abuse" is a word with many meanings, as demonstrated by the parties' briefings, but "abuse" informed by these two canons, along with the canon against surplusage, limits the breadth of statute in two ways via "the context in which the language is used." *United States v. Pease*, 75 M.J. 180, 184 (C.A.A.F. 2016).

First, interpreting "abuse" through its associated words means "abuse" cannot be *less severe* than the other theories. *See, e.g., People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 879 F.3d 1142, 1147 (11th Cir. 2018) (analyzing "harm" and "harass" by comparing them to "pursue, hunt, shoot, wound, kill, trap, capture, or collect"). "Abuse" is more closely

associated to "humiliate," "harass,"[2] and "degrade," than "arouse" or "gratify." Article 120(g)(2), UCMJ. Applying the associated words canon, "abuse" should have an equal degree of severity as these three other terms. Whereas criminalizing any amount of gratification or arousal is clearly the intent of Congress, *see Manual for Courts-Martial* (*MCM*), *United States* (2016 ed.), App. 23, para. 45b, there is something different about the first string of terms, as seen from the definitions of humiliate, harass, and degrade. Each term has a heightened level of severity inherent to it: humiliate is more than embarrass; degrade is more than shame; and harass is more than annoy, it is to annoy chronically. *Harass*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/harass (last visited Aug. 13, 2024). Congress chose these particular words for a reason, and the exclusion of the lesser versions informs the definitions of them all. *See Barnhart*, 537 U.S. at 168 (using the negative implication canon to justify excluded words in an associated group were excluded deliberately, not accidentally). Combining the associated words canon with the negative implication canon means "abuse" cannot be less severe than the other words specifically chosen by Congress for their specific meanings. This is why there must be a "cruel" intent to physically harm as discussed *infra* when analyzing the Government's proposed definitions. *See infra* Section I.1.a.-b.

Second, interpreting "abuse" through the canon against surplusage and *United States v. Sager*, 76 M.J. 158 (C.A.A.F. 2017), means "abuse" must have a meaning distinct and different from humiliate," "harass," "degrade," "arouse" and "gratify." Otherwise, some of the intents specifically enumerated by Congress would be rendered meaningless surplusage. This is why it is

[2] While incorporated into the definition for "sexual contact" in Article 120b(h)(1) and (h)(5)(A), Uniform Code of Military Justice (UCMJ), "harass" was not discussed in the original brief because it is missing from the other definitions of "lewd act" in Article 120b(h)(5), UCMJ. It was inadvertently overlooked. However, "harass" is another possible theory of liability that "abuse" cannot incorporate.

clear that "intent to abuse" cannot encompass "intent to humiliate, harass, or degrade." The Government can charge all three in the same specification, should it desire, but each specific intent has its own meaning, not to be conflated with another. *Sager*, 76 M.J. at 162; *see also United States v. Riggins*, 75 M.J. 78, 84 (C.A.A.F. 2016) (highlighting that lack of consent, one theory of liability, is not the same as placing someone in fear, a different theory of liability, under Article 120, UCMJ).

a. The Government's definitions are too broad and do not survive the statutory canons of interpretation.

Congress's intent to capture only certain types of distinct harm with a certain level of severity becomes clearer when looking at the Government's proposed definitions in response to "intent to physically injure." The Government, in all its attempts to argue that "intent to abuse" should not be limited to "intent to physically injure," cannot articulate what intent to abuse as it defines it looks like. In fact, it switches definitions halfway through its argument from intent to "emotionally harm" to "maltreat," meaning intent to "treat cruelly or roughly." Ans. at 17-18. But none of these definitions are correct.

i. Intent to "emotionally harm" fails the canon against surplusage, the associated words canon, and the negative implication canon.

Starting with the Government's first definition, if intent to abuse included "intent to emotionally harm," the definition of intent to "abuse" would absorb "humiliate" or "degrade," which are *emotional* injuries. This would violate *Sager*, that each word in a statute must be given distinct meaning. By taking the plain meaning of abuse, "to use or treat as to injure or damage," and reading it against the other words in the statute to avoid surplusage, the result is "abuse" is limited to "physically injure." This is the common, ordinary, plain meaning of the word that remains after applying canons of statutory interpretation.

The Government counters with the curious proposition that if "abuse" was limited to "physically injure" no one could expose themselves or speak indecently to a child "with an intent to abuse," *see* Article 120b(h)(5)(B)-(C), UCMJ, as no physical touch is required to speak indecently or display genitalia through communication technology. However, the "broader statutory context" does not make the word "abuse," when defined as physically harm, meaningless for certain crimes against children. *Pease,* 75 M.J. at 184. Instead, even though indecent language and indecent exposure may not involve physical touch, "the broad range of schemes covered by the statute is limited only by a criminal's creativity." *United States v. Norton*, 108 F.3d 133, 135 (7th Cir. 1997). A criminal could speak indecently or expose himself to a child *intending* for the child to be physically harmed in the process. Simply because intending physical harm in the "traditional" context of those crimes might not be the most common intent, that does not make the interpretation of "abuse" as "physically injure" absurd or incorrect. The Government's argument that someone could not expose themselves to a child with an intent to abuse if "abuse" meant "intent to physically injure" is inaccurate and misses the ultimate point—that "abuse" must mean something different from the other theories of liability identified in the statute.

The lack of severity inherent in "intent to emotionally harm" is the other reason why it is too broad a definition. "Intent to emotionally harm" would lower the severity of the other associated words, like "humiliate." Intentionally embarrassing a child—something parents are frequently known to do to their children, particularly their teenagers—would qualify as "intent to emotionally harm," but "embarrass" is not equivalent to "humiliate." If "abuse" can be as minimal as "intent to embarrass," a type of emotional harm distinct from the other theories of liability thereby complying with *Sager*, "embarrassment" is still *less severe* than "humiliate." Therefore, despite obeying the canon against surplusage, defining "abuse" this way would fail the associated

words canon. It is simply not as severe, as evidenced by the other words Congress chose. Linking back to the negative implication canon, the fact Congress selected the words it did, suggests those are the only forms it intended. READING LAW at 107 ("The expression of one thing implies the exclusion of others . . . ."). Not just any other form of emotional injury can be swept up in the term "abuse;" it has to be equal in severity to the specifically selected words around it. Consequently, "intent to emotionally harm" is too broad and lacks the requisite level of severity to properly define "intent to abuse."

ii. "Intent to maltreat" causes notice issues, as well as failing all three canons of statutory interpretation, but highlights "intent to physically harm" must include "cruel."

The Government's second definition about "maltreat," meaning to "treat roughly or cruelly" has similar problems. At the outset, if intent to abuse is "intent to treat roughly," there is a notice problem. Parents are allowed to touch their children and treat them roughly—that is the point of the parental discipline defense. The parental discipline defense assumes some force is applied and "to treat roughly" would be consuming of that defense, no matter where a parent touched a child. *United States v. Rivera*, 54 M.J. 489, 492 (C.A.A.F. 2001). Although, "intent to physically injure" has the same problem, so the Government's overexpansive definition helps illuminate that the definition of "abuse" has to be able to distinguish between innocuous touches and a specific "design for some evil." *Morissette v. United States*, 342 U.S. 246, 265 (1952). This is done by analyzing what level of severity is required. "Abuse" is more than "rough" and more akin to "cruel."

Spanking would qualify as to "treat roughly" or "physically harm" and meets the elements of sexual abuse of a child under the government's definition of "abuse." Spanking, though, is not sexual abuse of a child due to the inherent severity required by the term "abuse." *See Rivera*, 54 M.J. at 492 (noting a "spank" *per se* does not risk serious injury). This logic is built into the

parental discipline defense: spanking is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation. *See id.* Similar to harass, humiliate, and degrade, there is something beyond mere "intent to physically harm"[3] that the Government's definition of "to treat roughly" illuminates, and that is severity. *United States v. Whitely*, NMCCA 201500060, 2016 CCA LEXIS 188 (N.M. Ct. Crim. App. Mar. 29, 2016) exemplifies this principle.

In *Whitely*, the appellant was charged with and convicted of sexual abuse of a child with the intent to "abuse, humiliate, or degrade, or arouse or gratify his own sexual desires." *Id*. at *11. That appellant had an "escalating sexual fixation on spanking and sexual sadism." *Id*. at *3.

> When he spanked [the children], he had them remove their pants and underwear and position themselves to prop up their hips to better expose their buttocks and genitalia. He sought excuses to implement his "punishment," shifting his standards and getting ever stricter. He ritualistically spanked the girls using his hand and a number of household implements. He sometimes spread their buttocks apart and talked specifically about striking "the sweet spot" between the girl's anus and vagina.

Id. at *11-12. He also spanked his sexual partners in the same way before having forceful, sometimes nonconsensual sex, and he possessed sadistic child pornography focused on spanking. *Id*. at *12. This fact pattern demonstrates clear intent to physically injure, humiliate, or degrade, *along with* an intent to arouse or gratify. Yet, this is *more than* just an intent to physically or even emotionally harm. The conduct is particularly severe; there is intentional cruelty about it. This inherent level of severity is what the intent component of Article 120b, UCMJ, is to cover: sadistic intent to physically harm a child, something as equally severe as humiliating or harassing or degrading a child through sexualized means. Therefore, while the Government's definition "to

[3] It does not have to be *extreme* or *gross*, like in the parental discipline defense ("extreme pain or mental distress or gross degradation"), but it must be more than mere intent to harm. *Rivera*, 54 M.J. at 492.

treat cruelly" is insufficient on its own, to treat cruelly incorporated into "intent to physically harm" properly defines "intent to abuse."

b. Through the canons of statutory interpretation, intent to abuse must have a severity level of "cruel."

Through that lens, by reading "abuse" with the company of words it keeps, cruel intent to physically harm is the correct interpretation for two reasons. First, it is distinct from the other theories listed. *Sager*, 76 M.J. at 161. It does not incorporate "humiliate," "harass," or "degrade." By being constrained to "physical harm," it does not read in other emotional harms Congress did not specify, consistent with the negative implication canon. READING LAW at 107. Interpreting "intent to abuse" as "intent to emotionally harm" would violate this canon by incorporating other enumerated specific intents and many more non-enumerated ones. Congress did not say any "intent to harm," but made specific choices about intentional types of harms: "harass," "humiliate," and "degrade," along with "abuse." "Abuse," being so generic, cannot consume the rest of the itemized theories of liability, but must mean something different and apart from the rest. Second, by incorporating an equivalent level of severity captured by the other surrounding terms, "*cruel* intent to physically harm" does not lower the severity of itself or any term. "Humiliate" and "degrade" have a level of malice to them, whereas "harass" has a repeated and excessive degree to it that creates malice. Each term has a similar degree of malice or severity that "intent to physically harm" alone does not.

As a final matter, the Government's switch between definitions from "emotionally harm" to "maltreat" meaning "to treat roughly or cruelly" mid-argument highlights the Government does not know how to define abuse properly, lending more to the argument that neither did the panel members. This confusion about what "abuse" really means is reasonable doubt on the mens rea element. When both parties have to guess at what the "common ordinary meaning" of abuse is

that withstands statutory interpretation, this Court cannot be confident the required mens rea element was proven beyond a reasonable doubt. This is not a general intent crime where committing the act is enough. Under the rule of lenity, "ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *United States v. Davis*, 588 U.S. 445, 464 (2019). Based on all the competing definitions of "abuse," the rule of lenity should ultimately control and favor TSgt Baumgartner.

2. The "holistic" statutory interpretations proposed by the Government are legally incorrect and miss the main point.

Before diving into the application of the definition of "abuse," it is important to point out the Government conflates mens rea with actus reus in its discussion of rape and sexual assault. Specifically, when discussing specific intent for penetration of an object for rape and sexual assault (specific intent crimes), "intent to physically injure" for "intent to abuse" is a mens rea element, not the actus reus element of "by force." The Government confuses the two by saying "force" would be redundant in these other crimes if "abuse" was "physically injure," which is incorrect.

Specific intent "require[s] some specialized knowledge or design for some evil beyond the common-law intent to do injury." *Morissette*, 342 U.S. at 265. Intending to do something is different than intending to do something with a specific state of mind. The charging scheme here evidences that alone: "[I]ntentionally and unlawfully touching . . . with an intent to abuse." Record of Trial (ROT), Vol. 1, *Charge Sheet*, January 22, 2022. Abusive sexual contact, whether against an adult or a child, is a specific intent crime—an intentional touching occurs *with a specific intent in mind.* Article 120(g)(2), UCMJ; Article 120b(h)(1).

"General intent merely requires the intent to perform the actus reus even though the actor does not desire the consequences that result." *United States v. Haverty*, 76 M.J. 199, 207 (C.A.A.F. 2017) (cleaned up). "[A] general intent mens rea would require only that Appellant intended to

commit the conduct," not necessarily with particular consequences or intent in mind. *United States v. Voorhees*, 79 M.J. 5, 16 (C.A.A.F. 2019). Rape and sexual assault under the UCMJ are general intent crimes, *except for* when penetration occurs with an object. *United States v. McDonald*, 78 M.J. 376, 380 (C.A.A.F. 2019); 10 U.S.C. § 920(g)(1).

It is incorrect to say if "intent to abuse" is "intent to physically injure," then rape or sexual assault with an object using force with an "intent to abuse" is surplusage. The Government's argument conflates actus reus with mens rea and general intent with specific intent. The *act* of "by force" is not the same as *specific intent* to physically harm. Someone could penetrate another person with a finger without the intent to physically harm them but still do so using force, like holding a knife to their throat.[4] That person may feel nothing, the perpetrator may intend no physical harm, but *legally* force has been used. Ultimately, there is no surplusage with these crimes involving force if "abuse" is "intent to physically injure." These are different legal concepts and different elements that the Government appears to conflate.

However, it is worth addressing this conflation of actus reus and mens rea because this is how the Government argues "intent to abuse" is met here, by equating the two. When the Government attempts to apply its definition of "intent to abuse," it does not focus on TSgt Baumgartner's state of mind or his intended consequences, i.e., his specific intent, but on the act and the nature of the conduct, i.e., the actus reus. The Government argues what TSgt Baumgartner *did* was cruel. That is not the same thing as saying TSgt Baumgartner had a "cruel intent to physically injure." The "cruel intent to physically injure" is something beyond and something more than the actus reus. The argument conflates the intentional nature of the act—and the

[4] Not to mention, force does not necessarily require injury, as the Government's citation to 10 U.S.C. § 920b(h)(2) points out—"overcome" and "restrain" are not the same as "injure."

Government's opinion of it—with specific intent. These are two separate elements. Like the military judge noted, there must be a specific intent beyond the "unlawful" and "intentional" acts, i.e., something more than an act done a certain way. R. at 685; *see also In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). The Government failed to address this, and the broader statutory context does not contradict the definition of "abuse" being "cruel intent to physically harm."

3. No matter the definition of "abuse," the Government failed to prove the required specific intent for "flash the world."

Whatever definition is adopted—although cruel intent to physically harm is the correct interpretation—TSgt Baumgartner did not intend to abuse AB when playing the game called "flash the world."

AB and TSgt Baumgartner described and treated "flash the world" like a game. R. at 378 ("My dad named those games"); R. at 295 ("Too old to be playing those games," "Thought the games were going to be done."); R. at 456 ("Yup those were games that got way out of control."). All of TSgt Baumgartner's admissions about the game go to the fact the games occurred, not his *intent in playing the game.* The Government failed to prove intent to abuse at trial and fails to demonstrate it on appeal as well, falling into the same conclusory pattern: this is "not how a parent is expected to treat their child under any circumstance." Ans. at 23. That is not specific intent, and in fact, sounds a lot more like the intent required for child endangerment, "culpable negligence . . . A duty to care for his daughter's well-being and his actions could have foreseeably damaged her mental health." *See, e.g., United States v. Stradtmann*, 2024 CAAF LEXIS 286, *3 (C.A.A.F. 2024). This is not the same as specific intent to abuse, but this is what the Government essentially argues. The Government's entire argument both on appeal and at trial centered on how weird this

behavior was and how no parent should be doing something like this. This argument is predicated on a different and lower mens rea, like general intent, which fails to meet the elements for this offense. *See United States v. Poynor*, No. ACM 39185, 2018 CCA LEXIS 367, *13 (A.F. Ct. Crim. App. May 2, 2018) (listing levels of mens rea in order: general intent, negligence, recklessness, knowledge, or specific intent) (*citing Haverty*, 76 M.J. at 203-04 (listing negligence lower than recklessness)).

For legal sufficiency, taking all of TSgt Baumgartner's admissions in favor of the Government, the touching happened. The touching was "wrong." But "wrong" is not proof beyond a reasonable doubt the touching was done with an intent to abuse. It is only proof it was done intentionally. To this point, though, TSgt Baumgartner never admits to touching AB's breasts. The admissions the Government hangs its hat on are about "showing" her breasts (i.e., flashing). R. at 456. Which is what he says is "correct. Unfortunately, that is what happened." R. at 457. He does not have to touch her breasts to do this. Appellant's Br. at 25-26. This goes to the additional point that AB did not initially testify TSgt Baumgartner touched her breasts. R. at 292. It was pulled from her like an afterthought. R. at 296. Ultimately, though, none of these admissions discuss his intent. "Wrong" is not specific intent; intent to "abuse" is. R. at 567; *MCM* (2019 ed.), App. 22, paras. 45b.a.(h), b.(4)(a). TSgt Baumgartner intended to play "flash the world," but not with an intent to abuse, but rather an intent, albeit ill-advised, to have fun.

If the Government proved anything about TSgt Baumgartner's intent, it proved intent to humiliate or degrade. But intent to *abuse* has to be something distinct and different from intent to humiliate or intent to degrade. *Sager*, 76 M.J. at 161-62. The Government never proves this. This is the crux of the problem. Whatever "intent to abuse" means, it has to be distinct from "intent to degrade" and distinct from "intent to humiliate." *Id*. The members were not instructed on those

other two intents, but the evidence and argument discuss "humiliate," so the situation is ripe for conflating the uncharged theories of liability with the one the Government chose to charge. For this Court's analysis, though, to comply with *Sager*, to prove "intent to abuse," the evidence has to show something distinct from "intent to humiliate," or AB being humiliated, or "intent to degrade," or AB being degraded.

This ties into factual sufficiency. TSgt Baumgartner's admissions are not as damning as the Government makes them. The chopped, nonsensical statements by AB during the pretext call lack the embellished color of her testimony. *Compare* R. at 456 *with* R. at 291-93. TSgt Baumgartner is only admitting to pieces of what AB claims on direct, and neither AB nor TSgt Baumgartner offer intent. In fact, that is the whole point of the pretext call: the why. R. at 454, 456. Why did these games happen? To abuse her? To humiliate her? To sexually gratify TSgt Baumgartner? AB certainly tries to suggest the latter when she throws out obvious sexual touching that TSgt Baumgartner immediately denies. R. at 459. This highlights, again, that there is a difference between doing something and with what intent something is done.

On review for factual sufficiency, this specification cannot survive because AB's lack of credibility outweighs her testimony and there is no evidence of intent to abuse. This is wrestling; it is an arm lock (R. at 293), it is blowing raspberries on her stomach (R. at 361), it is horseplay (R. at 358, 407). As TSgt Baumgartner acknowledges, it was "wrong" to play these kinds of wrestling games as she got older, but that does not prove beyond a reasonable doubt his intent, especially when this kind of conduct is happening *in front of witnesses*, like TSgt JG, TSgt Baumgartner's wife, or EB, AB's brother. R. at 361. There is no evidence TSgt Baumgartner had a cruel intent towards his daughter such that he cruelly intended to harm her. Instead, this case rests entirely on AB's credibility. She provides the description for the games. R. at 291-94. She

disclaims the games being anything else (like "foot wars," for example). R. at 359. But, she has significant credibility problems. Appellant's Br. at 26-30 (walking through AB's motives and credibility problems). And all the Government says is he admitted the games happened. It is not a debate the games, "flash the world" and "I toed you so," happened. The pivotal question is what these games actually were—AB's version or out of control wrestling—and why they happened—to abuse or for fun, even though the games were arguably inappropriate. AB's brother, EB, was just as involved in these games—and he is the one who labels AB, his own sister, as "not really truthful." R. at 405. Those two had been through a lot together: divorce, moving, multiple stepmothers, a military upbringing. Appellant's Br. at 8-10. And yet, in the end, EB testified that he stopped going along with AB because she was not telling the truth. R. at 407. AB is not a credible witness. Based on all the evidence presented to the factfinder, the Government failed to prove TSgt Baumgartner touched AB's breasts with an intent to abuse her.

TSgt Baumgartner respectfully requests that this Court set aside the finding of guilty as to Specification 1 of Charge I, dismiss Specification 1 of Charge I with prejudice, and set aside the sentence for a sentence rehearing. Appellant's Br. at 31-32 (citing and analyzing the factors under *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013)).

II.

TSgt Baumgartner did not touch AB's vulva with the requisite intent—"cruel intent to physically harm"—while participating in a wrestling game AB falsely exaggerated.

The same definition of abuse analyzed in "flash the world" applies here: "cruel intent to physically harm." The definition does not change between the games. Nevertheless, the Government fails to appreciate AB's lack of credibility and the level of severity needed to constitute "intent to abuse" when analyzing "I toed you so."

AB provided the only description of "I toed you so," despite EB "being involved in it" too. R. at 361. The Government ignores EB's involvement in "I toed you so," and downplays EB's credibility as a witness by saying EB is "14 months younger" and "likely had no idea" what was happening with TSgt Baumgartner's toe. Ans. at 31-32. Based on AB's description, his toe was obviously going straight into AB's crotch. R. at 294. EB would have to be "deaf and blind" to miss that. At the time of trial, EB, an 18-year-old E-3 in the United States Army, testified he never saw anything sexual happen between TSgt Baumgartner and AB. R. at 404. His denial of "anything sexual" happening between AB and TSgt Baumgartner provides a different perspective of "I toed you so," one that was not sexual. Instead, the fair inference from the record is "I toed you so" was not what AB described, but something else like "foot wars." While AB denies this, knowing "foot wars" was being played and what it was, it is easy to see how "I toed you so" was "foot wars," or, at minimum, a version of the game, especially since AB's description is so incredible. *Compare* R. at 358-61 ("foot wars") *with* R. at 293-94 ("He would grab my arms and I would be on the couch on my stomach or on my back, and he would, like, open his toe and -- and pull my arms, so there.").

TSgt Baumgartner's "admission" of "I toed you so" occurring is not the same as corroborating the embellished version AB recites on direct. *Compare* Pros. Exs. 1, 3 *with* R. at 294. His "admission" is only that a game called "I toed you so" occurred. *Id*. Factually, all he "admits" to as "correct" and "that is what happened" is her fragmented statement about "why the toes?" R. at 456. This is still only about an act, not intent. The Government had complete discretion over charging TSgt Baumgartner, yet it chose to charge a specific intent crime. *MCM* (2019 ed.), App. 22, paras. 45b.a.(h), b.(4)(a). In doing so, if TSgt Baumgartner did not have a

cruel intent to hurt AB, he cannot be convicted. *See supra* Section I.1 (applying the canons of statutory interpretation to define "abuse").

The Government questioned why TSgt Baumgartner would feel remorse if "I toed you so" was just the game "foot wars," during which he hit his daughter in the crotch. Ans. at 31. However, it is reasonable for a person to feel bad for hitting anyone in the crotch, intentionally or not, because it would hurt. Regardless, that does not mean TSgt Baumgartner had the requisite intent. If AB and EB are hitting each other in the crotch during foot wars, and TSgt Baumgartner also plays this game with them, it is easy to see how "I toed you so" as a game develops. The name of this game is a dumb pun, a "dad joke"[5]: "I toed you so. It hurt." Meaning, *I toed you so it hurt; I told you so it hurt; I told you it hurt.* Any parent would reasonably feel bad for hitting their child in the crotch, especially knowing it could hurt after it was done to them. That is wrong, but it is not "*cruel* intent to physically harm." Even if it was a game that could intentionally cause some amount of pain, that harm does not rise to the level of severity required to be "intent to abuse." If "humiliate," "degrade," and "harass" all have equal levels of severity, so too does "abuse." Even assuming this was a game designed to cause some amount of physical harm (people are kicking each other—some amount of pain seems inherent, same with wrestling in general, in fact), there is nothing *cruel* about this game in the context of foot wars.

AB's general discomfort with the games, some sort of vague emotional harm, does not rise to the requisite level of severity. Moreover, AB's feelings are not evidence of TSgt Baumgartner's intent, and they do not outweigh the overwhelming evidence that this was a physical wrestling

[5] "[A] wholesome joke of the type said to be told by fathers with a punchline that is often an obvious or predictable pun or play on words and usually judged to be endearingly corny or unfunny." *Dad Joke* (*n.*), MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/dad%20joke (last visited Aug. 13, 2024).

game. Screaming, crying, and saying stop are all expected in a physical game, to include when people are hurt. There is additionally no testimony from AB as to whether TSgt Baumgartner would stop when she said stop or cried—assuming either is true. R. at 294. Nevertheless, that does not mean TSgt Baumgartner cruelly intended to physically hurt AB. Accidentally hurting her is insufficient. In saying that TSgt Baumgartner would have to be "deaf and blind" to not comprehend he was hurting or "maltreating" AB during "I toed you so," the Government is essentially arguing this act—which should not be believed in the first place—is so egregious TSgt Baumgartner must have intended to cruelly physically harm AB. But when the only evidence of this act comes from 19-year-old with a history and character of lying, this argument rests on AB's credibility. Appellant's Br. at 26-30 (explaining AB's credibility concerns).

Looking at this relationship as a whole, the truth of this situation comes forward. TSgt Baumgartner was a tired father just trying to keep his teenage daughter away from bad and illegal influences. AB, his daughter, felt overcontrolled and unheard. When she was forced to move away from where she wanted to be in Colorado, AB manipulated the narrative at the time (her initial report)—and continued it when it is brought up again years after the fact (with OSI)—to get away from her controlling parents, back to her boyfriend, and assert agency over her life as a teenager. Appellant's Br. at 26-30 (going step-by-step through AB's motives and credibility problems). AB can lie and twist all the facts she wants,[6] but she cannot opine about what was going on in TSgt Baumgartner's head. The Government paints the same picture AB did, with no corroborating evidence other than TSgt Baumgartner's tired acknowledgement the games happened. But as an evidentiary standard, proof beyond a reasonable doubt requires the one and

[6] *See* Appellant's Br. at 10-12, 26-30 (explaining AB's poor character for truthfulness, her character to exaggerate, her minimum of two motives to fabricate, and application of cognitive filters to all of the above).

only witness on a topic testifies *credibly*. *United States v. Blackburn*, No. ACM 40303 (f rev), 2024 CCA LEXIS 129, *23 (A.F. Ct. Crim. App. Apr. 4, 2024). AB does not testify credibly, and the Government takes liberties with her already implausible description, ultimately resting its argument on its disapproval of what games TSgt Baumgartner played with his children. *See* Ans. at 28 (repeatedly commenting on the game not being "appropriate" and "unnecessary" and "unjustified"). But that is not a showing of specific intent.

TSgt Baumgartner respectfully requests that this Court set aside the finding of guilty as to Specification 2 of Charge I, dismiss Specification 2 of Charge I with prejudice, and set aside the sentence for a sentence rehearing. Appellant's Br. at 38 (analyzing the *Winckelmann* factors).

III.

There is no evidence, not even a reasonable inference, TSgt Baumgartner grabbed AB by the "neck with his hand" when AB only testifies about "chokeholds" and "headlocks."

There is no evidence TSgt Baumgartner "choked" AB in the manner the Government charged. In *English*, the Army Court of Criminal Appeals found that the evidence in the record did not support the charged language of how the accused sexually assaulted someone. *United States v. English*, 79 M.J. 116, 120 (C.A.A.F. 2019). Specifically, the named victim did not say he "grabbed her head with his hands" when he put his penis in her mouth. *Id*. The Government argues this is distinct from what AB said here because she at least testified to looking at TSgt Baumgartner "in the eyes" when the incident occurred, the inference being that the only way TSgt Baumgartner could have "choked" her is with his hand. Ans. at 37-40. However, that is not true, *see, e.g.,* Ans. at 39 (choking can be with an arm, knee, or foot), and this case is identical to *English* such that this specification must be dismissed.

To first clarify the facts, the meager evidence the Government relies on to say TSgt Baumgartner grabbed AB with his hand is *only* that AB could look him in the eyes when he was "first" choking her. *See* Ans. at 37-39 (arguing there are "two chokings"). The other supporting evidence the Government cites is misleading. First, it is possible to "push" someone into a wall when they are in a "chokehold;" someone comes up behind them, grabs them with an arm around the neck, then pushes them forward into a wall in that chokehold position. Second, AB's brother's (EB's) comment about "manhandling" does not corroborate there being some sort of extended assault, or "two chokings;" rather, "manhandling" was a summary of the assault he just described: TSgt Baumgartner grabbed AB around the neck with his *arm not his hand.* It is clear "manhandling" is a summary of what EB just described because he starts the new sentence with "[m]y dad came out and started," meaning TSgt Baumgartner came out of the bedroom and started the incident; this is repeating the beginning of what happened. Pros. Ex. 4. Therefore, the only evidence suggesting TSgt Baumgartner put his hand on AB's neck is AB's testimony that they were face-to-face at some point in her incredible version of events.

Just because AB could "[look] into his eyes" during her version of events *still* does not mean the Government proved beyond a reasonable doubt—even taking every favorable inference for the Government—that TSgt Baumgartner choked AB *with his hand.* AB never says he put his "hand" on her neck. As the Government concedes, TSgt Baumgartner "could have choked AB with his arm, knee, foot, or hand," because the word "choking" is not specific. Ans. at 39. In "choking" someone with any of those body parts, people could look into each other's eyes. But AB does not say simply choking; she gets more specific with "chokehold" and "headlock." These are specific terms any military member knows based on their "everyday common sense and knowledge of human nature and of the ways of the world expected of triers of fact, who have been

to the playground, trained in the combat arms, or read the sports page." *Rivera*, 54 M.J. at 491 (cleaned up). All AB testifies to is "chokehold" and "headlock." This situation is exactly what happened in *English* and provides, frankly, even less obvious "reasonable inferences" than what happened in *English*.

The named victim in *English* testified, "[W]hile her hands were fastened with duct tape, 'Appellant forced his penis into my mouth.'" *English*, 79 M.J. at 119 (cleaned up). But the record was devoid of how the appellant put his penis in the victim's mouth. *Id*. at 119-120.[7] She could not and did not testify that he used his hands to grab her head to do it. A completely reasonable inference, though, is that this appellant used his hands during this attack as this victim's hands were duct taped. *Id*. at 119. While she cannot remember the exact details, only that he "shoved it in [her] mouth," it would be common sense he used his hands to accomplish this assault. Yet, the CAAF found the Government did not prove what it charged because the victim could not recall how that appellant had "just kind of shoved it in," and set aside the specification with prejudice. *Id*. at 123.

This case is no different. AB, when asked specifically, does not say TSgt Baumgartner used his hands. She repeatedly says "chokehold" and "headlock." This is like *English* in that the record is silent on whether TSgt Baumgartner used his hands *ever* on AB's neck. It is also a stronger case than in *English* because mere use of the words "chokehold" and "headlock" foreclose the possibility he used his hands.

[7] At trial, the defense counsel in *English* claimed the victim testified, "No, he just put it in my mouth." *English*, 79 M.J. at 120. The CAAF, in its opinion, does not state whether this proffer of evidence was correct. Neither does the Army Court of Criminal Appeals. *United States v. English*, 78 M.J. 569 (A. Ct. Crim. App. 2018) ("[T]he record of trial is completely silent."). Based on what both courts provide, it does not appear the victim actually testified to this.

To entertain the Government's version and "reasonable inferences" would be to disregard *English.* To force oral sex, it would seem reasonable to infer that hands are going to have to be used somehow, but neither the Army Court of Criminal Appeals nor the CAAF used "common sense" or "reasonable inference" to find the Government proved the offense. *English*, 79 M.J. at 120, 122. The record was "silent" as to how that appellant forced his penis into the named victim's mouth. *English*, 78 M.J. at 576. If this Court thinks there were two chokings, the same result occurs here. AB says "chokehold," not hand on neck, for the "first choking." She testified, "[H]e slapped his hand over my mouth and my nose and pushed me to the wall in a *chokehold*." R. at 301 (emphasis added). AB's testimony is silent on what body part is used to effectuate this act, just like in *English.* As neither the Army Court of Criminal Appeals nor the CAAF jumped to conclusions when analyzing how a man's penis was put into a woman's mouth when her hands were duct taped, this Court cannot jump to the conclusion about what body part was used for this supposed "chokehold." The Government did not prove what it charged.

This is even an easier case than *English* because the facts demonstrate only one choking and AB's choice of words forecloses proof of TSgt Baumgartner's hand on her neck. EB does not corroborate AB's version of events. Pros. Ex. 4. EB says TSgt Baumgartner grabbed AB with his arm around her neck. *Id*. Once. *Id*. The elaborate and dramatic version AB provides suggests she was choked multiple times—not to mention body slammed in various versions. R. at 301, 309, 358. EB does not corroborate her. In fact, he *contradicts* her. There is no dispute TSgt Baumgartner grabbed AB, only how he grabbed AB. This ties into the issue of parental discipline because neutrally looking at all the facts available reveals TSgt Baumgartner had a valid reason for grabbing AB the way he did, consistent with EB's and TSgt JG's narrative: AB was screaming and yelling for no reason in a hotel room after 10:00 PM. R. at 492-93. The Government says

TSgt JG is not believable because she does not see the incident. Ans. at 44. She did not testify to the incident *because* she did not see it. R. at 493. She testified to the *lead up*, which she *did* see. R. at 490-93, 503-10. Her testimony of everything she *did* see and *was* a part of is a believable and consistent version of events, unlike AB's various exaggerated claims, which include saying TSgt JG described herself as "government property" and told AB to hit her in the face.[8]

The Government covers only one version of events, AB's, which, in total, is unbelievable. She is contradicted by her brother (Pros. Ex. 4), by TSgt JG (R. at 490-93, 503-10), by the bachelorette party attendee (R. at 424-26), by the police (R. at 385, 394), and by *herself* in prior statements to police (R. at 309, 394). This is before even assessing all her motives to fabricate, like how much she hated the move to California, TSgt JG, and TSgt Baumgartner. Appellant's Br. at 10-12, 28-29. Additionally, AB testified, "I did lie a lot as a kid to get out of trouble." R. at 376. AB is not a credible witness. This Court cannot affirm a conviction on the testimony of one witness who does not testify credibly. *Blackburn*, 2024 CCA LEXIS 129, at *23.

Instead, a neutral review of the evidence shows EB's version, coupled with what TSgt JG testified to as the initiation of the dispute, is the credible version of events that night. TSgt Baumgartner grabbed AB from behind as she ran out of the bedroom, through the bathroom, screaming. He grabbed her after she was already screaming to stop her from screaming. In doing so, he "manhandled her" *once* by putting his arm around her neck in a "chokehold" or in a "headlock." He did not grab her by the neck with his hand, and AB never said he did. No one says he did. The photographs support that as well, as there are no lasting marks or fingerprints after the incident that are noticeable. R. at 426; Pros. Ex. 2. The Government failed to elicit supporting evidence for what it charged from AB, even when attempting to ask AB directly. R. at

[8] R. at 300, 355.

301. She never provides TSgt Baumgartner grabbed her by the neck with his hand. It is not that she does not remember. She clearly states "headlock" when asked if his hands were around her neck. R. at 301. Like the named victim in *English*, something happened, but the Government failed to prove the conduct it chose to charge. Just like in *English*, AB forecloses the drawing of any reasonable inference that TSgt Baumgartner used his hand.

To save this specification, the Government tries to argue there were two chokings, and the trial counsel is only asking about the second one when he clarifies. R. at 301. But this is not consistent with any other version of the evidence. EB said there is only one incident of TSgt Baumgartner's "arm around her neck." Pros. Ex. 4. In every previous version AB provided, there is one instance of choking. She said this to the police. R. at 385. She said this to the bachelorette party attendee. R. at 382. But, in her other versions, as drawn on out cross, there is also body slamming and punching. R. at 358. On the stand, she remained inconsistent, making a more elaborate version of the incident. *Compare* R. at 301 with R. at 382, 385 (showing the bachelorette party attendee and police officer only repeating he "choked her and slapped her in the face"). AB's version is not credible. But EB, who had every opportunity to lie for his sister at the time of the offense in 2017, does not corroborate anything other than one instance of TSgt Baumgartner wrapping his arm around AB's neck and "manhandling her." If the Government thought there were two instances at the time of trial, it should have been clearer in its clarifying questions. Instead, now on appeal, there is insufficient evidence.

TSgt Baumgartner respectfully requests that this Court set aside the finding of guilty as to Specification 2 of Charge II, dismiss Specification 2 of Charge II with prejudice, and set aside the sentence for a rehearing. Appellant's Br. at 47 (citing *Winckelmann* factors).

IV.

TSgt Baumgartner striking AB in the face with his hand to prevent continued misconduct must be independently analyzed under the parental discipline defense, which proves the Government did not overcome the defense.

1. The Government's argument focuses incorrectly on the "choking," not the slap over AB's mouth.

The parental discipline defense applied to both specifications at the Santa Maria Inn, the "chokehold" and the "slap" to the mouth. The military judge instructed the members to this effect:

> The prosecution's burden of proof to establish the guilt of the accused not only applies to the elements of the offenses of battery upon a child under the age of 16 years as alleged in *Specifications 2 and 3* of Charge II, but also to the issue of parental discipline. In order to find the accused guilty of these *offenses*, you must be convinced beyond a reasonable doubt that the accused's *acts* were not within the authority of parental discipline as I have defined that term, or that the force used was unreasonable or excessive.

R. at 571 (emphasis added). These were separate specifications for findings, and the parental discipline defense applied to each. *Id.*; *see* R. at 796 (merging the specifications "for findings" *after* the member's found TSgt Baumgartner guilty and after he was sentenced). Even on appeal, where these specifications are merged "for findings," the parental discipline defense still applies independently to each use of force because the defense would show one of the charged uses of force constituting battery was legally justified. *See, e.g., United States v. Johnson*, 54 M.J. 67, 68 (C.A.A.F. 2000) (showing how the military judge excepted "hugging" because it was consensual, i.e., not unlawful). This is no different than the members excepting language not proven at trial or this Court finding language legally or factually insufficient on appeal. *Id*. at 68-70 (showing how the members used exceptions and substitutions and the CAAF determined the touching was not offensive, i.e., not unlawful).

The unreasonable multiplication of charges on this incident allows the Government to muddy the waters on appeal with this particular specification, but the "choking" and the "striking"

remain independent of each other as to their legal and factual sufficiency. Naturally, the facts of one could support the facts of the other, but the Government does not argue this. Instead, the Government appears to say the "strike to the face" was not reasonable because TSgt Baumgartner "choked" AB. Ans. at 45-46. The Government blends the conduct and the parental discipline defense into one use of force, "choking," which is not correct. The argument is not about whether TSgt Baumgartner had a valid reason for "choking" AB with his hand (which he did not do and is not guilty of in fact). Instead, the focus of this issue is whether the Government overcame the parental discipline defense when TSgt Baumgartner used fore to "strike to her face." The Government did not.

The "choking," what evidence actually exists on the matter, does not demonstrate TSgt Baumgartner was motivated by an improper purpose like criminal anger. Instead, TSgt Baumgartner had a valid purpose for grabbing AB: to stop her unwarranted screaming and misbehavior in a hotel room. R. at 492-93. This lawful purpose extends to the "strike to the face."

Screaming or yelling at night in a public place like a hotel when other people are sleeping is misbehavior. In *Stitely*, this Court found the appellant was motivated by a proper purpose to stop his daughter from leaving—even when she was running away from sexual abuse by that same appellant. *United States v. Stitely*, ACM 37039, 2008 CCA LEXIS 170, *8 (A.F. Ct. Crim. App. Apr. 23, 2009*)* ("The appellant's actions clearly satisfy the first prong of the parental discipline defense. The evidence of record indicates that when the appellant grabbed A.M.'s hair and pulled her back inside, he was trying to prevent misconduct, i.e., trying to keep his then 17-year-old step-daughter from running away from home."). Parental discipline is valid for something as innocuous as "disobeying a parent's request to put away clothing and to not waste computer paper." *United States v. Thompson*, ARMY 20140974, 2021 CCA LEXIS 624, *7 (A. Ct. Crim. App. Nov. 17,

2021). TSgt Baumgartner had a proper purpose here: AB was throwing a tantrum, screaming at night in a hotel room for someone to call the police for no reason. R. at 492-93.

When motivated by a proper purpose, as here, a parent, like TSgt Baumgartner, can use reasonable force to stop misbehavior. *Rivera*, 54 M.J. at 49. Simply because the Government would have let AB scream and scream until she stopped or until the police were called or until a complaint was filed with hotel management, does not mean that is the only legal way to handle the situation. *See* Ans. at 46 ("Appellant's best course of action would have been to do nothing and let her stop yelling on her own."). The law allows TSgt Baumgartner to use parental discipline, that is reasonable force, to prevent misconduct. In putting his hand over AB's mouth, he did have a proper purpose, his action did not rise to the level of criminal anger, and the force used was reasonable.

AB is the only one who says TSgt Baumgartner was angry. R. at 301. But AB had a schema of TSgt Baumgartner in her mind, one that permeated the trial: he was an angry man. R. at 301, 372-73, 454-55; *see also* R. at 581, 587, 591, 635-36 (Trial Counsel arguing theme of anger in closing). She believed he had anger issues. *Id*. She wove anger issues through her pretext call. R. at 454-55. Yet, TSgt JG denied TSgt Baumgartner had anger issues, only stating TSgt Baumgartner said he himself had anger issues. R. at 502. But whatever "anger issues" TSgt Baumgartner thought he had, that "admission" is not attached to this event. R. at 454. It is generalized in the pretext call: "Well, it's not angry towards you. It's just angry in general, which is what I'm seeking help with. If that makes any sense." *Id*. This statement is long after any incident with AB and before TSgt Baumgartner is pending any new allegations by AB. *See* Pros. Ex. 3 (announcing the date of the pretext call, March 22, 2021, at the beginning). It is also long after AB's repeated false claims of abuse throughout her teenage years. R. at 501, 513-14. In the

pretext call, he is tired of dealing with AB, and it shows. *See* Pros. Ex. 3 (revealing TSgt Baumgarter and AB appear to have had this kind of conversation before). The long pauses in the pretext call are not evidence of TSgt Baumgartner's guilt, but rather how tired TSgt Baumgartner is of AB's false reporting. R. at 513; see also R. at 501 (noting "so many instances of reports of abuse").

Furthermore, EB's recorded recollection does not corroborate AB's belief TSgt Baumgartner was angry; he only corroborates his actions. The "choking" is not evidence of anger itself because (1) "choking" as the Government charged and alleged did not occur, and (2) the evidence of AB being put in a "chokehold" is informed by the context. TSgt Baumgartner was attempting to restrain AB, who was "screaming at the top of her lungs" for someone to call the police unprompted. R. at 493. At that point, TSgt JG had directly witnessed everything between TSgt Baumgartner and AB. R. at 490-93. Her testimony refutes AB's self-serving version of events of a spontaneous attack. TSgt Baumgartner was not motivated by anger but rather by a proper purpose of controlling AB's misbehavior right in front of him. Again, the Government's argument about overcoming this defense rests on the "choking" and AB's credibility, but in context, the "choking" was TSgt Baumgartner grabbing AB from behind to get her to stop misbehaving and is separate from the "strike" to the face.

2. <u>The Government did not overcome the parental discipline defense because AB's inconsistent versions of events show TSgt Baumgartner lawfully put his hand over AB's mouth.</u>

The Government only provides one of AB's versions of events from that night, depicting her as a reasonable child, trying to address her grievances about her mean stepmother, TSgt JG. Ans. at 43. According to AB, she had a verbal argument with her father and was spontaneously attacked. R. at 301. But in other versions of the night that AB provides, she affirms the only reason he slapped his hand over her mouth or otherwise covered her mouth is to stop her

unprompted screaming. R. at 374. The Government never engages with this fact. Instead, the Government claims AB only started yelling for the police *after* the fight, but that is neither a fair nor correct reading of AB's testimony or the other conflicting accounts of what happened that night. *See* Ans. at 43 (citing R. at 301, 492) (providing AB says she is leaving to call the police *after the incident* and showing AB was screaming at the top of her lungs *before the incident began*).

Even in AB's version of events, she was yelling before TSgt Baumgartner used any amount of force on her. "We were yelling a lot, me and my dad. He put – he slapped his hand over my mouth . . . ." R. at 301. She reiterated that she was screaming and yelling before the incident happened. R. at 348. She admitted why TSgt Baumgartner did what he did: "He slapped his hand over my mouth so I would stop screaming. And it was just the amount of force he used that made my lip cut open." R. at 374. The evidence does not support AB screaming and yelling only after the incident is over, as she leaves the room. It is not even clear she is screaming and yelling at that point. R. at 301 (noting after he let her go, she just leaves). It is the exact opposite; AB's screaming and yelling triggers the incident, which is consistent with TSgt JG's testimony:

> A. We got ready for bed, and we went to bed.
> Q. Okay. And then what?
> A. We woke up to [AB] pounding on the bedroom door and *screaming that she needed to talk to her father*. Basically the same thing, he was a bad parent, [TSgt Baumgartner] wasn't a good parent, and then we told her to go back to bed.
> Q. Okay. I'm going stop you there. So, she's banging on the door. *You said she's screaming.* Can you give us a little bit more information, some more details?
> A. The door was locked, so because she couldn't get through the bedroom door she went through the bathroom. There was a closet door that was not able to be locked. So, she came through there and *started screaming right at James in the bedroom.*
> Q. Do you remember what time this was?
> A. It was after 10 o'clock.
> Q. Okay. And then what? Did you try to fight her at all that night?
> A. No.
> Q. So, what happened next?
> A. She ran out of the -- through the bathroom into the main living area and [TSgt Baumgartner] followed her.
> Q. What was her demeanor like at that point?

A. *She was screaming at the top of her lungs.*
Q. Like screaming what?
A. *That she wanted somebody to call the cops.*
Q. Okay. What else?
A. After she ran into the living area, I didn't hear much. It was about 30 seconds, and she was out of the hotel room door.

R. at 492-93 (emphasis added).

In one line, the Government says TSgt JG is not "a reliable source" because she did not see TSgt Baumgartner grab AB and "expressed difficulty remembering what transpired that evening." Ans. at 44. For the memory point, the Government cited the record at 510, but there is nothing about this excerpt that suggest TSgt JG had any memory concerns. The only thing TSgt JG arguably "expressed difficulty remembering" is the fight between her and AB about "boxing wraps," where AB described TSgt JG as a drunk trying to get AB to hit her. R. at 299-300, 353. But TSgt JG denied all of the other collateral points around this fight AB testified to, like trying to physically fight AB. R. at 488-89, 493. This is not memory issue, but an inconsistency between witnesses about the argument that occurred that night. Between AB and TSgt JG, TSgt JG is more credible because AB had so many drawn-out credibility issues.

AB was biased against her father—not because he actually did the things she claims he did—but because she was "fucking tired of [him] always trying to tell [her] that [she's] doing something wrong and [she's] not." R. at 462. To her, TSgt Baumgartner is the man who raped her mom (R. at 484), the man who married a woman who said she never wanted kids and would drown her kids in the bathtub (R. at 500), the man who made her move away from her boyfriend (R. at 345, 488). But each of these schemas are grounded in AB's own struggles: that she is the child of divorce who felt she had to compete with her parents' spouses (Pros. Ex. 1 at 5) and that she wanted to live her own life the way she wanted without someone telling her what to do (Appellant's Br. at 10 (describing all the bad behaviors and choices AB was exhibiting)). All of

this comes together to cast serious doubt on AB's credibility, her version of events, and her belief about TSgt Baumgartner's anger in the moment—along with all of her other claims.

TSgt Baumgartner respectfully requests that this Court set aside the finding for Specification 3 of Charge II, dismiss Specification 3 of Charge II with prejudice, and set aside the sentence for a rehearing. Appellant's Br. at 56 (citing *Winckelmann* factors).

V.

The data sheets raise a prima facie showing that the convening authority considered sex and race during panel member selection, which went unrebutted by the Government, requiring automatic reversal.

1. The Court should consider the court-member data sheets because they are relevant to determine whether the panel was properly constituted, an issue raised by materials in the record.

This Court, in granting TSgt Baumgartner's motion to attach the court-member data sheets to the record of trial, deferred resolving whether it is permitted to consider the data sheets until reviewing the case. Order, *United States v. Baumgartner*, No. ACM 40413 (A.F. Ct. Crim. App. Jun. 12, 2024). This Court is permitted to consider the court member data sheets because they are necessary to "resolv[e] issues raised by materials in the record." *United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020); *accord. United States v. Willman*, 81 M.J. 355, 358 (C.A.A.F. 2021) ("In addition to permitting consideration of any materials contained in the 'entire record,' our precedents also authorize the [Courts of Criminal Appeals] to supplement the record to decide any issues that are raised, but not fully resolved, by evidence in the record."). Contrary to the Government's arguments, the issue of whether the panel was properly constituted is raised by the record for two reasons.

First, a properly constituted panel is an essential part of every court-martial required for jurisdiction. *See United States v. King*, 83 M.J. 115, 121-22 (C.A.A.F. 2023); *United States v. Riesbeck*, 77 M.J. 154, 162-63 (C.A.A.F. 2018) (noting courts must "scrutinize carefully any

deviations from the protections designed to provide an accused servicemember with a properly constituted panel" and "even reasonable doubt concerning the use of impermissible selection criteria for members cannot be tolerated"). For example, "[a] court-martial composed of members who are barred from participating by operation of law, or who were never detailed by the convening authority, is improperly constituted and the findings must be set aside as invalid" because such error is jurisdictional. *United States v. Adams*, 66 M.J. 255, 258 (C.A.A.F. 2008). This is because the convening authority must personally select members who are "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." 10 U.S.C. § 825(e)(2). The sheer fact a court-martial occurred raises the issue of jurisdiction "in the record." The data sheets and 1st Indorsement go to that issue and whether the convening authority selected members outside of the Article 25, UCMJ, criteria, to include on the basis of race and gender.

Second, the composition of the panel and the panel member data sheets are, in fact, raised during review of the "entire record." *Jessie*, 79 M.J. at 440-41. The record of trial contains both the convening orders detailing panel members and attempts to include at least one of the documents used by the convening authority to select panel members. ROT, Vol. 1, *Special Order A-7*, January 21, 2022; ROT, Vol. 1, *Special Order A-14*, September 23, 2022; *see* ROT, Vol. 3, *US v. Baumgartner Slip Sheet CA Referral Memo w Attachments Located As Attachment In Section 34 of ROT*.[9] The convening orders alone raise the issue of gender-based selection on their face; it

[9] One of the 1st Indorsements was erroneously omitted from the record. There is a slip sheet in the Pretrial Section of the ROT for a document titled, "CA Referral Memo w Attachments Located as Attachment in Section 34 of ROT." This appears to be a reference to the 1st Indorsement, considering the 1st Indorsement is from the convening authority and it "direct[s] the charges and specification be referred to trial before a general court-martial." Def. App. A. Consequently, this document was technically included in the record of trial, despite being erroneously omitted via slip sheet.

looks like women were swapped one for one. ROT, Vol. 1, *Special Order A-7*, January 21, 2022; ROT, Vol. 1, *Special Order A-14*, September 23, 2022. Names like "Lauren," "Ashlie," "Samantha," "Jamilia," "Kimberly," and "Andrea" betray gender because they are common female names, or, at least, provoke the presumption of a particular gender, the ultimate determination of which can be resolved by the data sheets.

Finally, the fact that TSgt Baumgartner did not raise this issue at trial does not prevent this Court from considering the court-member data sheets and deciding this issue. *See* Ans. at 53 (noting how race and gender were never brought up at trial during panel selection). The Government's approach would eviscerate the well-established concept that "an appellant gets the benefit of changes to the law between the time of trial and the time of his appeal." *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019); *see also Edwards v. Vannoy*, 593 U.S. 255, 262 (2021). At the time of TSgt Baumgartner's court-martial, it was still permissible for the convening authority to select potential panel members by considering race and gender. *United States v. Smith*, 27 M.J. 242, 249 (C.M.A. 1988) (citing *United States v. Crawford*, 15 C.M.A. 31, 40-41 (C.M.A. 1964)). Because of *Crawford*'s progeny, *United States v. Jeter* specifically excuses any failure to preserve the issue at trial because the changed landscape could not be anticipated. 84 M.J. 68, 74 (C.A.A.F. 2023). Consequently, even though this issue was not raised at trial, this Court is well within its authority to consider the court-member data sheets when deciding whether TSgt Baumgartner's court-martial panel was properly constituted.

2. <u>The evidence presents a prima facie showing that the convening authority considered gender and race when selecting panel members, and the Government did not rebut this presumption, meaning TSgt Baumgartner is entitled to relief.</u>

The decision by the CAAF in *Jeter* changed the landscape for considering panel selection by prohibiting the use of race for *any* purpose when selecting panel members. 84 M.J. at 69. The

Government fails to appreciate the import of this change, continuing to rely on old precedents in an attempt to counter the prima facie showing that the convening authority considered race and gender[10] when selecting members. For instance, the Government points to *United States v. Loving*, 41 M.J. 213 (C.A.A.F. 1994), highlighting the proposition that "military courts 'will not presume improper motives from inclusion of racial . . . identifiers on lists of nominees for court-martial duty.'" Ans. at 53, 55 (quoting *Loving*, 41 M.J. at 285 (alteration in original)). After *Jeter*, the question is no longer whether there were improper motives; rather, *any* use of race or gender is impermissible, regardless of the motive. *See* 84 M.J. at 73–74.

A prima facie showing is a low standard, and the presence of racial and gender identifiers on court-member data sheets can meet this standard in the absence of rebuttal. *See United States v. Proctor*, 81 M.J. 250, 255 (C.A.A.F. 2021) (noting that a prima facie showing is a low burden). The Government quotes part of one of the definitions of "prima facie" from Black's Law Dictionary, but the full definition of the term when it is used as an adjective is: "Sufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it may later be proved to be untrue." Prima Facie, BLACK'S LAW DICTIONARY (11th ed. 2019). On first examination here, the inclusion of racial and gender identifiers on court-member data sheets provided to the convening authority for use when selecting panel members seems to indicate the convening authority considered that information to select panel members. This satisfies the definition of prima facie. However, there is even more to the showing here.

[10] *Jeter*'s reasoning regarding race also applies to gender, as TSgt Baumgartner detailed in his initial brief. Appellant's Br. at 60.

The additional facts cited in *Jeter* regarding the prima facie showing for race are comparable to what is shown here for both race and gender. 84 M.J. at 73–74. First, like in *Jeter*, no statement or any information from the convening authority or staff judge advocate clear up this situation. Nothing in the convening authority's 1st Indorsement says otherwise; the convening authority says he considered the Article 25, UCMJ, criteria, but he did not say whether he *lawfully at the time* considered gender or race. Def. App. A. It was previously permissible, and even encouraged, to consider race and gender when selecting panel members if that consideration was for an inclusive purpose. *Jeter*, 84 M.J. at 69–70 (citing *Crawford*, 15 C.M.A. 31); *Smith*, 27 M.J. at 242. Thus, at the time of TSgt Baumgartner's court-martial, the convening authority could consider race and gender after and apart from considering the Article 25, UCMJ, criteria. The prima facie showing suggests the convening authority tried to do just that, especially by selecting members to achieve gender inclusivity[11]—and to not lose the only prospective panel member identifying as African American.

The Government relies upon a presumption that the convening authority acted in accordance with Article 25, UCMJ. Ans. at 58 (citing *United States v. Bess*, 80 M.J. 1, 10 (C.A.A.F. 2020)). The fault in this argument is that, at the time, the convening authority was allowed to consider these factors for inclusive purposes, so that presumption does not make it less likely the convening authority considered race and gender. *See Jeter*, 84 M.J. at 72, 74. If anything, it makes it *more* likely race and gender were considered. The Government's argument stretches this presumption beyond its limits by effectively encouraging this Court to presume the

[11] If this Court concludes the convening authority's consideration of these factors did not fall within the narrow circumstances that previously authorized departure from Article 25, UCMJ, *see Riesbeck*, 77 M.J. at 162–63, then the prima face showings still raise the matter of improper considerations.

convening authority had the clairvoyance to know not to do something that was allowed at the time but would later be deemed prohibited. Such an application of the presumption referenced in *Bess* would be illogical, and the CAAF specifically rejected such reasoning in *Jeter*, stating, "[N]either the trial participants nor the lower court could have anticipated our conclusion that *Crawford* is abrogated, thereby changing the legal landscape." 84 M.J. at 74.

Like in *Jeter*, the excusal of members shows a conscious assessment of race and gender. An analysis of one of the convening orders shows the convening authority excused three women and ten men, and when seeking to replace those members, he selected the exact same number of women he previously excused. "At first sight," the one-for-one swap of women, and specifically the one-for-one swap of women who identified on their data sheets as African American, is something that raises a valid inference of racial and gender conscious panel selection. Because TSgt Baumgartner was unable to obtain and attach the second 1st Indorsement for the second selection pool (for the replacement members), no one knows how many women *could* have been selected. It is irrelevant at this point. The Government refused to rebut, clarify, or cleanse this situation. Instead, TSgt Baumgartner has shown on the face of the documents in the record and on those he could attach that three women were excused and then three more women were selected. On top of that, one woman identifying as African American was excused and one woman identifying as African American was selected. Lest we forget, "[G]ender can be used as a pretext for racial discrimination." *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 145 (1994). When a convening authority selects three women to replace three women who were excused, along with one African American member for another, it appears on first examination the convening authority considered gender when making the selections.

The Government makes much ado about how any panel member had a 75% chance of being selected. Ans. at 56-58. Given the number of people offered and recommended to the convening authority, the Government's logic is the one woman who identified as African American had a high chance of being selected anyway, without consideration of race or gender. However, this is not the same as saying the convening authority *did not* consider race or gender. The Government elects not to rebut the prima facie showing, instead—perhaps inadvertently—choosing to support through statistical analysis a prima facie showing of panel stacking through the subordinates' selection of panel members. How is it, "at first sight," that the convening authority is able to select three women to replace three women and one of those women happens to replace the exact racial identity of the other? Because, upon first and unrebutted examination, it appears either the convening authority intentionally considered race and gender when replacing the individuals he excused *or someone else did for him* when proposing members for his selection.

The convening authority may rely on subordinates to nominate potential court members. *United States v. Benedict*, 55 M.J. 451, 455 (C.A.A.F. 2001). However, "[w]hen the request for nominations does improperly include or exclude certain members," the court must "ensure that those actions do not taint the selection by the convening authority." *United States v. Roland*, 50 M.J. 66, 69 (C.A.A.F. 1999). *Jeter* emphasized this point as well: "Just as in the civilian context, a convening authority may not draw up a members panel pursuant to the neutral criteria of Article 25, UCMJ, *only to have discriminated at other stages of the process*." 84 M.J. at 74 (emphasis added). In fact, the CAAF in *Jeter* reversed on this very concept, that race entered the selection process at some point and went unrebutted:

> The use of a race-conscious component in the selection process combined with the *absence of any evidence in the record addressing how and by whom selection was made* from this pool of members leaves us to seriously question whether the

> impermissible criterion of race might have found its way into the selection process—*possibly even before the convening authorities made their selections*.

Id. (emphasis added). The same can be said here, especially if the convening authority was, as the Government argues, statistically assured to pick three women for three women, or one African American woman for another. Ans. at 57.

Altogether, these circumstances are sufficient to raise the presumption that the convening authority considered race and gender in a manner seemingly permissible at the time but which, as a result of *Jeter*, now constitutes plain error at the time of appellate review. *See United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008) (stating "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be 'plain' at the time of appellate consideration"). The Government offers no rebuttal to the prima facie showing of race and gender entering the selection process at any point, focusing instead on refuting the existence of a prima facie showing. The Government could have sought additional information from the convening authority and the staff judge advocate, as in *Jeter*, 84 M.J. at 73, but it did not. Consequently, there is an unrebutted prima facie showing the convening authority impermissibly considered race and gender when selecting panel members.

TSgt Baumgartner respectfully requests that this Court set aside all the findings of guilty and the sentence and order a rehearing.

VI.

TSgt Baumgartner received ineffective assistance of counsel when his trial defense counsel inexplicably failed to present favorable evidence at trial.

The Government stated civilian trial defense counsel's performance did not demonstrate incompetence and that "[t]his is not the case where the trial defense counsel did not know the law." Ans. at 73. In fact, trial defense counsel demonstrated that he did not know the law as he failed to

properly challenge the trial counsel's inflammatory cross-examination question posed to TSgt JG, TSgt Baumgartner's wife, alleging that she "told people that if [she] had children [she] might drown them in a bathtub." R. at 500.

Because trial defense counsel did not object to the question under relevancy grounds, M.R.E. 401, 402 and 403, or even seek an Article 39(a), UCMJ, hearing to make the Government lay a foundation and establish relevancy, the Government never articulated relevancy and a good faith basis for asking the question. In other words, the trial counsel would have been required to articulate the rule of evidence allowing this question to be asked, whether under M.R.E. 608(c) to show bias or some other rule. David A. Schlueter, Stephen A. Saltzburg, Lee D. Schinasi & Edward J. Imwinkelried, MILITARY EVIDENTIARY FOUNDATIONS, § 5-12[2], *Proof of Bias Through Statement*, at 236, (Matthew Bender & Co. 2013); *see, e.g.*, *United States v. Hunter*, 17 M.J. 738 (A.C.M.R. 1984).

To establish good faith for asking the question, trial counsel would have been required to identify the "people" TSgt JG purportedly talked to and the time and place the alleged statement was made. The judge could have then assessed not only whether the question was permissible under the appropriate rule of evidence, but also assess whether a M.R.E. 403 balancing test would have precluded trial counsel from asking the question.

Had trial defense counsel made an appropriate objection, recognizing that both he and TSgt JG were surprised by the question, this matter could have been handled outside the presence of court members in a way that would have potentially been resolved favorably for the defense.

Simply asking the question amounted to a highly inflammatory attack on TSgt JG's credibility and character. The failure to challenge the question or otherwise rebut it made it more

likely the court members would disregard all the testimony provided by the only witness called by the defense in their case in chief.

In his declaration, civilian trial defense counsel attacked his own witness without admitting any knowledge of the rules of evidence and how they could have been employed in this situation, including his failure to challenge the highly inflammatory and prejudicial evidence. The declarations do not provide reasonable explanations for failing to rehabilitate TSgt JG when any attack on her character would lower her credibility.

TSgt Baumgartner respectfully requests that this Court set aside the findings of guilty and the sentence and order a rehearing.

Respectfully submitted,

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
samantha.castanien.1@us.af.mil
(240) 612-4770

[redacted]

FRANK J. SPINNER
Attorney at Law
1420 Golden Hills Road
Colorado Springs, Colorado
lawspin@aol.com
(719) 233-7192

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 22 August 2024.

Respectfully submitted,

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
Email: samantha.castanien.1@us.af.mil