UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32787**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Michael A. EDWARDS	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 11 September 2024, counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 days to submit Appellant's assignments of error. The Government opposed 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 16th day of September 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **20 November 2024**.

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

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

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) **MICHAEL A. EDWARDS,** United States Air Force, *Appellant.*	)	No. ACM S32787 11 September 2024

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **20 November 2024**. The record of trial was docketed with this Court on 23 July 2024. From the date of docketing to the present date, 50 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[redacted]

JOYCLIN N. WEBSTER, 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: joyclin.webster.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 Goverment Trial and Appellate Operations Division on 11 September 2024.

Respectfully submitted,

JOYCLIN N. WEBSTER, 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: joyclin.webster.1@us.af.mil

13 September 2024

1IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) MICHAEL A. EDWARDS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32787 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.

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 13 September 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **MICHAEL A. EDWARDS,** United States Air Force *Appellant*	)	No. ACM S32787 9 November 2024

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **20 December 2024**. The record of trial was docketed with this Court on 23 July 2024. From the date of docketing to the present date, 109 days have elapsed. On the date requested, 150 days will have elapsed.

On 27 - 29 February 2024, a special court-martial consisting of officer and enlisted members at Robins Air Force Base, Georgia, found Appellant guilty, contrary to his pleas, of one charge and three specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice (UCMJ). Record of Trial (ROT), Entry of Judgment (EOJ), dated 12 February 2024; Record (R.) at 392. The military judge sentenced Appellant to be reduced to the grade of E-1, to be confined for a total of 60 days[1], and to be discharged from the service with a Bad Conduct Discharge. R. at 431; EOJ.

[1] For Specification 1 of Charge I, Appellant was sentenced to 60 days of confinement. For Specification 2 of Charge I, Appellant was sentenced to 60 days confinement. For Specification 3 of Charge I, Appellant was sentenced to 60 days confinement. Confinement for all Specifications is to run concurrently.

The Convening Authority took no action on the findings or sentence. ROT, Convening Authority Decision on Action – *United States v. Technical Sergeant Michael A. Edwards*, dated 6 Mar 2024.

The ROT is 4 volumes and consists of 10 Prosecution Exhibits, 7 Defense Exhibits, 12 Appellate Exhibits, and 1 Court Exhibit; the transcript is 431 pages. Appellant is not 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. Appellant was advised on his right to a timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

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

Respectfully submitted,

JOYCLIN N. WEBSTER, 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: joyclin.webster.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 Government Trial and Appellate Operations Division on 9 November 2024.

Respectfully submitted,

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: joyclin.webster.1@us.af.mil

13 November 2024

1IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) MICHAEL A. EDWARDS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32787 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 13 November 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **MICHAEL A. EDWARDS,** United States Air Force *Appellant*	)	No. ACM S32787 10 December 2024

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **19 January 2025**. The record of trial was docketed with this Court on 23 July 2024. From the date of docketing to the present date, 140 days have elapsed. On the date requested, 180 days will have elapsed.

On 27 - 29 February 2024, a special court-martial consisting of officer and enlisted members at Robins Air Force Base, Georgia, found Appellant guilty, contrary to his pleas, of one charge and three specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice (UCMJ). Record of Trial (ROT), Entry of Judgment (EOJ), dated 12 February 2024; Record (R.) at 392. The military judge sentenced Appellant to be reduced to the grade of E-1, to be confined for a total of 60 days[1], and to be discharged from the service with a Bad Conduct Discharge. R. at 431; EOJ.

[1] For Specification 1 of Charge I, Appellant was sentenced to 60 days of confinement. For Specification 2 of Charge I, Appellant was sentenced to 60 days confinement. For Specification 3 of Charge I, Appellant was sentenced to 60 days confinement. Confinement for all Specifications is to run concurrently.

The Convening Authority took no action on the findings or sentence. ROT, Convening Authority Decision on Action – *United States v. Technical Sergeant Michael A. Edwards*, dated 6 Mar 2024.

The ROT is 4 volumes and consists of 10 Prosecution Exhibits, 7 Defense Exhibits, 12 Appellate Exhibits, and 1 Court Exhibit; the transcript is 431 pages. Appellant is not 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. Appellant was advised on his right to a timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

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

Respectfully submitted,

JOYCLIN N. WEBSTER, 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: joyclin.webster.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 Government Trial and Appellate Operations Division on 10 December 2024.

Respectfully submitted,

JOYCLIN N. WEBSTER, 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: joyclin.webster.1@us.af.mil

12 December 2024

1IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) MICHAEL A. EDWARDS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32787 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.

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 12 December 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **MICHAEL A. EDWARDS,** United States Air Force *Appellant*	)	No. ACM S32787 10 January 2025

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **18 February 2025**. The record of trial was docketed with this Court on 23 July 2024. From the date of docketing to the present date, 171 days have elapsed. On the date requested, 210 days will have elapsed.

On 27 - 29 February 2024, a military judge sitting as a special court-martial at Robins Air Force Base, Georgia, found Appellant guilty, contrary to his pleas, of one charge and three specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice (UCMJ). Record of Trial (ROT), Entry of Judgment (EOJ), dated 12 February 2024; Record (R.) at 392. The military judge sentenced Appellant to be reduced to the grade of E-1, to be confined for 60 days[1], and to be discharged from the service with a Bad Conduct Discharge. R. at 431; EOJ.

[1] For Specification 1 of Charge I, Appellant was sentenced to 60 days of confinement. For Specification 2 of Charge I, Appellant was sentenced to 60 days confinement. For Specification 3 of Charge I, Appellant was sentenced to 60 days confinement. Confinement for all Specifications is to run concurrently.

The Convening Authority took no action on the findings or sentence. ROT, Convening Authority Decision on Action – *United States v. Technical Sergeant Michael A. Edwards*, dated 6 Mar 2024.

The ROT is 4 volumes and consists of 10 Prosecution Exhibits, 7 Defense Exhibits, 12 Appellate Exhibits, and 1 Court Exhibit; the transcript is 431 pages. Appellant is not currently confined.

The undersigned counsel is currently assigned 19 cases; 17 cases are pending before this Court (16 cases are pending AOEs). To date, five case have priority over the present case.

1. *United States v. Gray*, No. ACM 40648 –The ROT is 4 volumes consisting of 7 Prosecution Exhibits, 9 Defense Exhibits, and 20 Appellate Exhibits. The verbatim transcript is 399 pages. Counsel has finished reviewing the record of trial and is drafting the AOE.

2. *United States v. Cabrie*, No. ACM 40615 – The ROT is 3 volumes and consists of 5 Prosecution Exhibits, 6 Defense Exhibits, and 12 Appellate Exhibits; the transcript is 138 pages. Appellant is not currently confined. Counsel has begun, but not completed her review of the record of trial.

3. *United States v. Capers*, No. ACM 40641 – The electronic ROT is 1 volume and consists of 3 Prosecution Exhibits, 5 Defense Exhibits, 14 Appellate Exhibits, and 4 Court Exhibits; the transcript is 405 pages. Counsel has begun, but not completed, her review of the record of trial.

4. *United States v. Griffin*, No. ACM 40642 – The ROT is 6 volumes and consists of 24 Prosecution Exhibits, 29 Defense Exhibits, 30 Appellate Exhibits, and 1 Court Exhibits; the transcript is 605 pages. Appellant is currently confined. Counsel has begun, but not completed, her review of the record of trial.

5. *United States v. Anderson*, No. ACM 40654 – The ROT is 12 volumes and consists of 15 Prosecution Exhibits, 14 Defense Exhibits, and 96 Appellate Exhibits; the transcript is 1229 pages. Appellant is currently confined. Appellant is currently confined. Counsel has begun, but not completed, her review of the record of trial.

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. Appellant was advised on his right to a timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

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

Respectfully submitted,

JOYCLIN N. WEBSTER, 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: joyclin.webster.1@us.af.mil

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Respectfully submitted,

JOYCLIN N. WEBSTER, 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: joyclin.webster.1@us.af.mil

13 January 2025

1IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) MICHAEL A. EDWARDS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32787 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 13 January 2025.

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* *v.* Technical Sergeant (E-6) **MICHAEL EDWARDS** United States Air Force *Appellant*	**BRIEF ON BEHALF OF APPELLANT OUT OF TIME**[1] Before Panel No. 1 Case No. ACM S32787 Tried at Robins Air Force Base, Georgia, on 27-29 February 2024 before a special court-martial, Lieutenant Colonel Tyler Musselman, Military Judge, presiding.

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

Assignments of Error

I.

THE EVIDENCE IS NOT LEGALLY AND FACTUALLY SUFFICIENT TO SUSTAIN THE APPELLANT'S CONVICTIONS FOR DOMESTIC VIOLENCE AS (1) THE ALLEGED VICTIM WAS NOT AN "INTIMATE PARTNER" OF TSGT EDWARDS AS DEFINED BY STATUTE AND (2) NOTWITHSTANDING THIS FATAL CHARGING ERROR, THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO ESTABLISH TSGT EDWARDS' GUILT BEYOND A REASONABLE DOUBT.

[1] Due to an inadvertent calendaring error, where counsel erroneously entered 20 February 2025 as the due date, this Brief was submitted after the deadline set by this Honorable Court. This oversight was not due to bad faith, and upon discovering the discrepancy in dates, counsel took immediate action to correct the error. TSgt Edwards bears no responsibility for this delay.

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION IN EXCLUDING EVIDENCE OF JH'S PRIOR INCONSISTENT STATEMENTS.

III.

THE SENTENCE IS INAPPROPRIATELY SEVERE.

Statement of the Case

Technical Sergeant (TSgt) Michael A. Edwards was tried by a special court-martial by military judge alone at Robins Air Force Base, Georgia, on 27-29 February 2024. (R. at 1).

Contrary to his pleas, TSgt Edwards was found guilty of three specifications of Article 128b, UCMJ, for domestic violence. For Specification 1, he was found guilty of grabbing JH and causing her to fall into furniture, except for the words "and pushing her." (R. at 392; Entry of Judgment (EOJ), dated Feb. 12, 2024.) For Specification 2, he was found guilty of grabbing JH and wrapping his arm around her neck. (R. at 392; EOJ). For Specification 3, he was found guilty of grabbing JH's hair and punching her in the face. (R. at 392; EOJ). The military judge acquitted TSgt Edwards of one specification in violation of Article 131b, UCMJ, for obstruction of justice. (R. at 392; EOJ).

The military judge sentenced TSgt Edwards to be reduced to the grade of E-1, to be confined for 60 days for each specification (to run concurrently), and to be discharged from service with a bad conduct discharge. (R. at 431). The convening authority took no action. (Convening Authority Decision on Action – *United States v. Technical Sergeant Michael A. Edwards*, dated Mar. 6, 2024.).

Statement of Facts

TSgt Michael Edwards and JH met through an online dating site in early 2021 (R. at 101). At the time, JH was living in Augusta, Georgia, with her teenage son and working as a nanny (R. at 141). After dating for several months, including a period when TSgt Edwards was temporarily stationed in Japan, they discussed moving in together (R. at 101-102). TSgt Edwards ultimately purchased a home in Macon, Georgia, and JH and her 15-year-old son moved in with him in June 2021 (R. at 102-103, 142).

Their romantic relationship lasted approximately one year before ending in June 2022 (R. at 141-142). Despite the breakup, TSgt Edwards allowed JH and her son to continue living in his home under an informal arrangement where she would occasionally contribute to groceries and pay the gas bill (R. at 60 and 113). They effectively divided the house, with JH and her son living on one side and TSgt Edwards on the other (R. at 143). The home had an alarm system that would chime and alert TSgt Edwards whenever doors were opened (R. at 143-144). TSgt Edwards had established rules about when residents could return home, including that she could not leave after 10:00 PM, and if she was not back by midnight, she could not return until morning (R. at 114).

By June 2023, JH had secretly secured a new apartment and planned to move out, though accounts differ on the timeline. (R. at 118). She testified that she planned to move within five days, though she had told TSgt Edwards and others it would be two weeks (R. at 138-139). She planned to gradually move small items without

TSgt Edwards noticing and then move everything else while he was away for a weekend (R. at 139).

On 4 June 2023, despite the house rules, JH returned to TSgt Edwards' residence around 0300 after watching movies at a friend's house (R. at 114, 144). At approximately 0800-0900 the next morning, TSgt Edwards entered her bedroom while she was on the phone with a friend and began demanding his house key, telling her she was "disrespecting him and disrespecting his rules" (R. at 114). JH claimed that TSgt Edwards told her she was "not allowed in or out of the house anymore without his permission" and that "only he can let [her] in" (R. at 116).

When they both spotted her purse containing the house key, they raced to grab it (R. at 116-117). After she reached the key first, she claims TSgt Edwards grabbed her wrist and a struggle ensued (R. at 122 and 130). During this struggle, JH stated she lost her balance and fell into a dresser, though when initially asked about the fall, she said, "I don't remember. I think it was really, like, in the struggling with the key back and forth that I just kind of lost balance." (*Compare* R. at 122 *with* 128). She later testified that TSgt Edwards caused her to fall. (R. at 129).

JH then provided an account of what she claims happened next: TSgt Edwards grabbed her right arm from behind and put her in a headlock with his right arm while attempting to grab the key from her right hand with his left arm (R. at 156-157). While in this position, with her face pressed against his chest, JH testified that she was able to "slightly turn" and bite his chest (R. at 124). She claimed she had difficulty breathing during this hold and thought TSgt Edwards "might have killed" her. (R. at

132). Immediately after biting him, she testified that TSgt Edwards grabbed her hair and punched her in the face (R. at 124-125).

TSgt Edwards provided a different account to police, stating simply, "I grabbed her keys, she attacked me, she bit my chest." (R. at 377). After the altercation, TSgt Edwards called 911 and requested law enforcement to respond to his home so that JH could be removed from his property. (R. at 196).

When Corporal JS arrived at the scene, she was greeted by TSgt Edwards, who informed her that he had been bitten by JH (R. at 196). Corporal JS asked if he wanted to press charges against her (R. at 197). Upon encountering JH, Corporal JS observed only "a small red mark" on JH (R. at 197). JH did not express to Corporal JS that she felt she needed medical treatment. (R. at 136). The body camera footage after the officers arrived shows JH calmly standing near TSgt Edwards and asking if she could return later to retrieve items (Pros. Ex. 6). Corporal JS testified that the situation "was surprisingly calm for a domestic call [. . .] they're not yelling at each other, there's no going back and forth." (R. at 223-224).

Corporal JS was unable to determine who was the primary aggressor, given the conflicting accounts and the presence of injuries to both parties (R. at 224-225). She testified that she informed both parties that, "they needed to separate so that she need -- it's his home, she needed to leave, or they both could go to jail since they both had injuries." (R. at 197).

Photographs show a bite mark on TSgt Edwards' chest that appears to be straight-on rather than at an angle (R. at 158-59). JH did not seek immediate medical

attention because she "felt that nobody was gonna believe her." (R. at 136). She later went to the hospital only after others convinced her to go (R. at 136).

Additional facts are included in the Argument section below.

ASSIGNMENTS OF ERROR

I.

THE EVIDENCE IS NOT LEGALLY AND FACTUALLY SUFFICIENT TO SUSTAIN THE APPELLANT'S CONVICTIONS FOR DOMESTIC VIOLENCE AS (1) THE ALLEGED VICTIM WAS NOT AN "INTIMATE PARTNER" OF TSGT EDWARDS AS DEFINED BY STATUTE AND (2) NOTWITHSTANDING THIS FATAL CHARGING ERROR, THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO ESTABLISH TSGT EDWARDS' GUILT BEYOND A REASONABLE DOUBT.

Standard of Review

Legal and factual sufficiency are reviewed *de novo*. Article 66(d), UCMJ, 10 U.S.C. § 866(d). *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007).

Law

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all essential elements beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

The UCMJ specifies this Court "may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof." Article 66(d)(1)(B)(i), UCMJ, 10 U.S.C. § 866(d)(1)(B)(i). Factual sufficiency review requires this Court to conduct its own assessment of the evidence while giving

"appropriate deference" to the factfinder's observations of witnesses. Article 66(d)(1)(B)(ii), 10 U.S.C. § 866(d)(1)(B)(ii). If "the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding." Article 66(d)(1)(B)(iii), 10 U.S.C. § 866(d)(1)(B)(iii). As clarified by Harvey, Article 66(d)(1)(B), UCMJ, grants this Court authority to weigh evidence, determine controverted questions of fact, and set aside a conviction if it is "clearly convinced" the verdict is against the weight of the evidence. *United States v. Harvey*, __ M.J. __, 2024 CAAF LEXIS 502, (C.A.A.F. 2024).

But this statutory change does not alter the burden of proof which the evidence must support: beyond a reasonable doubt. *Id*. at *10-12. While some contours of this factual sufficiency review remain subject to further judicial determination, *see*, e.g., *United States v. Csiti*, __ M.J. __, No. 24-0175/AF, 2024 CAAF LEXIS 533 (C.A.A.F. Sep. 11, 2024) (mem.), *Harvey* made clear the determination required to overturn a conviction once factual sufficiency review is triggered: "First, the CCA must decide that the evidence, as the CCA has weighed it, does not prove that the appellant is guilty beyond a reasonable doubt. Second, the CCA must be clearly convinced of the correctness of this decision." *Harvey*, 2024 CAAF LEXIS 502, at *12.

Article 128b, UCMJ, criminalizes domestic violence against a "spouse, intimate partner, or immediate family member." An "intimate partner" is defined as a person with whom the accused has or has had a social relationship of a romantic or intimate nature. This determination considers factors including the length of the relationship,

type of relationship, and frequency of interaction between the persons involved in the relationship. An "intimate partner" can also be based on cohabitation.

Argument

Under Article 66(d), UCMJ, findings of guilt must be both legally and factually sufficient. Here, the evidence presented against TSgt Edwards fails to meet both standards for the domestic violence convictions.

First, the prosecution failed to establish beyond a reasonable doubt that JH qualified as an "intimate partner" under Article 128b at the time of the June 2023 incident. While JH and TSgt Edwards had a prior romantic relationship, it is uncontested that their dating relationship ended in June 2022, a full year before the alleged assault (R. at 39). After their breakup, their relationship transformed into a purely platonic landlord-tenant arrangement where JH occasionally contributed to groceries and paid the gas bill (R. at 60).

The prosecution's theory that JH qualified as an intimate partner rests solely on their past romantic relationship and continued cohabitation. However, this interpretation improperly stretches Article 128b beyond its intended scope under the specific facts of this case. Several factors demonstrate that JH was merely a tenant, not an intimate partner, at the time of the incident, irrespective of their prior dating relationship, which had long since concluded.

First, TSgt Edwards and JH maintained completely separate living spaces within the home, with JH and her son occupying one side and TSgt Edwards the other (R. at 143). This physical separation reflects the termination of any intimate

relationship and the establishment of a landlord-tenant dynamic. No evidence was presented that they continued to engage in any romantic or sexual conduct with one another or that there was any expectation they would not enter into other dating or romantic with other individuals. Furthermore, they do not share any children.

Second, their financial arrangement was characteristic of a tenant relationship rather than an intimate partnership. JH offered to pay rent and ultimately agreed to contribute to utilities by paying the gas bill (R. at 113). She also offered to move out immediately after the breakup, but TSgt Edwards, as the homeowner, offered to let her stay under this new arrangement in recognition of her difficult financial situation, and not as part of an effort to continue a romantic or intimate relationship with her. (R. at 113).

Third, TSgt Edwards established and enforced typical landlord rules regarding entry times and house access (R. at 114). These restrictions—including a rule that residents could not leave after 10:00 PM and if not back by midnight, could not return until morning due to security systems installed in the home—are consistent with a landlord's authority over tenants rather than the mutual understanding between intimate partners.

Fourth, by June 2023, JH had already secured a new apartment and was secretly planning to move out (R. at 138-139). Her clandestine preparations to leave, including gradually moving small items without TSgt Edwards noticing, demonstrate that any semblance of an intimate relationship had long since ended.

Lastly, the nature of the altercation was fundamentally a landlord-tenant dispute, and did not arise from any aspect of their previous short-term dating relationship. This distinction is crucial as it highlights that the conflict was rooted in issues of property management and living arrangements, rather than the dynamics of a romantic partnership. Additionally, the fact that they continued to reside under the same roof does not necessarily categorize their living situation as the type of cohabitation envisaged under Article 128b.

According to the Merriam-Webster dictionary, "cohabit" primarily possesses two definitions: 1) to live together as or as if a married couple, and 2a) to live together or in company, or 2b) to exist together. *See Merriam-Webster*, https://www.merriam-webster.com/dictionary/cohabit (last visited Feb. 10, 2025). To interpret that the drafters of Article 128b intended to encompass all roommate scenarios within the scope of intimate partnerships would be an overly broad and potentially misleading interpretation. This interpretation would dismiss the nuances inherent in intimate partnerships that are devoid in definitions 2a and 2b. Consequently, within the framework of intimate partnerships, it becomes evident that the first definition, living together as or as if a married couple, is the logical definition in this case. As previously indicated, TSgt Edwards and JH were not cohabiting in the sense of a marital relationship at the time of the incident, which further supports the argument that their situation does not align with the legal intent behind the concept of cohabitation as it relates to intimate partners.

The prosecution's argument that Article 128b applies because they "had been" in a romantic relationship ignores the statute's purpose of protecting current or recently ended intimate relationships (R. at 366). Under the prosecution's interpretation, any former romantic partner who later becomes a tenant would qualify as an "intimate partner" indefinitely—a reading that extends Article 128b far beyond its intended scope.

The military judge's acceptance of this overbroad interpretation effectively transformed a pure landlord-tenant dispute over house keys into a domestic violence case, subjecting TSgt Edwards to enhanced penalties and lifetime consequences under Article 128b rather than charging the incident appropriately under Article 128's general assault provisions.

Secondly, notwithstanding the charging issue, the evidence presented in this case is neither legally nor factually sufficient to sustain the convictions against TSgt Edwards for domestic violence under Article 128b, UCMJ. Legal sufficiency requires that, when viewed in the light most favorable to the prosecution, a reasonable factfinder could find all essential elements of the offense proven beyond a reasonable doubt. Factual sufficiency, on the other hand, requires this Court to independently weigh the evidence and determine whether it is convinced of guilt beyond a reasonable doubt after considering all evidence in the record. In this case, both standards fail due to significant inconsistencies in the prosecution's evidence, contradictions with objective facts, and the presence of substantial reasonable doubt.

The prosecution's case relied almost entirely on the testimony of JH, whose credibility is severely undermined by her inconsistent statements, behavior, and clear motives to fabricate. JH alleged that TSgt Edwards assaulted her during a dispute over house keys. However, this theory lacks logical consistency when examined in light of their respective motives. As the homeowner, TSgt Edwards had little reason to engage in a physical altercation over keys that he could easily render useless by changing locks or making new ones. Conversely, JH had a much stronger motive to resist surrendering the keys because she was planning a secret move-out, needed to retain access to her belongings in the home, and was aware she had risked her access to the home by violating house rules when she returned home at 3:00 AM. Her actions align more closely with someone attempting to maintain unauthorized access to a property rather than someone being victimized. This motive disparity casts significant doubt on JH's version of events and supports TSgt Edwards' claim that he acted in self-defense.

JH's testimony about the alleged assault is furthermore riddled with contradictions and physical implausibility. She claimed that during the altercation, TSgt Edwards grabbed her arm, put her in a headlock, and attempted to take her keys while she bit his chest to escape. However, photographs of the bite mark on TSgt Edwards' chest show it as straight-on rather than angled, which contradicts JH's account of being held in a headlock with her face pressed against his chest (R. at 380-381). This discrepancy raises serious questions about whether her account is truthful or even physically possible.

Moreover, JH testified that she feared for her life during the incident and thought TSgt Edwards "might have killed" her (R. at 132). Yet law enforcement body camera footage taken shortly after the incident shows her calmly interacting with TSgt Edwards and discussing plans to return later to retrieve belongings (R. at 134-35; 223). This calm demeanor is fundamentally inconsistent with someone who had just experienced a life-threatening assault. The stark contrast between JH's dramatic testimony and her observed behavior immediately thereafter undermines her credibility and raises significant doubts about the veracity of her claims.

The objective evidence further contradicts JH's allegations. Corporal JS, the responding officer, observed only a small red mark on JH immediately after the incident (R. at 197). This minor injury does not align with JH's description of being violently assaulted. Additionally, Corporal JS testified that she could not determine who was the primary aggressor after observing injuries on both parties and hearing their conflicting accounts (R. at 223). This indecisiveness from an impartial third party – particularly a trained law enforcement officer who had responded to dozens of prior domestic disputes – underscores the ambiguity surrounding the events and highlights the presence of reasonable doubt.

JH's credibility is also undermined by her pattern of providing inconsistent accounts about key details of the incident. For example, she initially stated that she did not remember how she fell into a dresser during the struggle but later claimed that TSgt Edwards caused her fall.[2] (R. at 122). Similarly, she gave conflicting

2 This inconsistent statement was improperly excluded by the military judge, and is addressed in detail at AOE II.

timelines for her planned move-out date, telling some people it would be within five days while telling others it would take two weeks (R. at 138-139). These inconsistencies further erode confidence in her reliability as a witness.

In contrast to JH's shifting narrative, TSgt Edwards provided a straightforward account of events: "I grabbed her keys, she attacked me, she bit my chest" (R. at 61). His version aligns more closely with the objective evidence and is bolstered by his otherwise commendable character and military service record. TSgt Edwards had served honorably for nearly 15 years and received positive character references from credible witnesses, including his former father-in-law, a retired Air Force Lieutenant Colonel (R. at 423). His demonstrated generosity in allowing JH and her son to continue living rent-free in his home after their breakup further supports his credibility and makes it highly unlikely that he would engage in unprovoked violence, behavior that is entirely inconsistent with his established character and history.

The context of this incident is also critical to understanding its dynamics. The altercation arose from a legitimate dispute over house keys between a homeowner enforcing reasonable rules of which JH was well aware and a non-paying resident who had violated those rules, risking her access to the home. Even the military judge appeared to harbor doubts about JH's account, as evidenced by his decision to acquit TSgt Edwards of obstruction of justice and to except specific language from one specification regarding "pushing" JH into furniture (R. at 392).

When viewed as a whole, the prosecution's case fails to meet both legal and factual sufficiency standards due to significant credibility issues with its primary witness, contradictions between testimony and objective evidence, and unresolved ambiguities surrounding key events. Accordingly, this Court should set aside TSgt Edwards' convictions under Article 66(d), UCMJ.

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

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION IN EXCLUDING EVIDENCE OF JH'S PRIOR INCONSISTENT STATEMENTS.

Standard of Review

A military judge's decision to exclude evidence is reviewed for an abuse of discretion. An abuse occurs when the military judge's findings of fact are clearly erroneous, the judge applies incorrect legal principles, or the application of correct legal principles is unreasonable. See *United States v. Eslinger*, 70 M.J. 193, 197 (C.A.A.F. 2011); *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2009).

Law

Under Military Rule of Evidence (M.R.E.) 613(b), extrinsic evidence of a prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and the adverse party is given an opportunity to examine the witness about it. The rule ensures fairness by allowing witnesses to

address inconsistencies in their statements while providing the opposing party a chance to cross-examine them on those statements.

However, M.R.E. 613(b) must be applied in conjunction with M.R.E. 102, which requires courts to construe evidentiary rules to "secure fairness in administration, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination." This broader purpose underscores that rigid procedural requirements should not trump the truth-seeking function of a court-martial.

Case law supports a flexible approach to applying M.R.E. 613(b). In *United States v. Harrow*, 65 M.J. 190, 199–200 (C.A.A.F. 2007), the court emphasized that evidentiary rules should be applied in a manner that promotes fairness and allows for the presentation of relevant evidence when possible. Additionally, *United States v. Young*, 86 F.3d 944 (9th Cir. 1996), held that a prior inconsistent statement may still be introduced as extrinsic evidence if the opposing party has an opportunity to recall the witness to explain or deny it.

Additional Facts

During trial, defense counsel sought to introduce extrinsic evidence of JH's prior inconsistent statements through TSgt TL regarding how she fell into a dresser during her altercation with TSgt Edwards (R. at 343-344). JH initially testified that she did not remember how she fell but later claimed that TSgt Edwards caused her to fall (R. at 122). Defense counsel attempted to impeach this testimony by introducing TSgt TL's account that JH had previously provided a different

explanation for her fall. The military judge excluded this evidence solely because defense counsel had not confronted JH with her prior inconsistent statements during cross-examination, as required by M.R.E. 613(b) (R. at 343-344).

Defense counsel argued that JH was still available to be recalled as a witness and could have been questioned about these statements at that time (R. at 343). However, the military judge declined to allow this approach and excluded the evidence outright. (R. at 343-344).

Analysis

The military judge abused his discretion by rigidly applying M.R.E. 613(b) without considering whether exclusion served the broader truth-seeking function of the court-martial under M.R.E. 102. JH's credibility was central to the government's case against TSgt Edwards, as her testimony was essentially the only direct evidence supporting his convictions under Article 128b, UCMJ. Her inconsistent accounts regarding how she fell into the dresser were highly relevant to assessing her reliability as a witness and whether her testimony about other aspects of the altercation could be trusted.

The exclusion of TSgt TL's testimony based solely on defense counsel's failure to confront JH during cross-examination was unnecessarily rigid and contrary to case law, emphasizing flexibility in applying evidentiary rules when fairness can still be achieved. In *United States v. Young*, for example, the court held that prior inconsistent statements may still be admitted if opposing counsel has an opportunity

to recall the witness for further questioning—precisely what defense counsel proposed in this case. 86 F.3d at 944.

Here, JH was still available to be recalled as a witness, meaning she could have been given an opportunity to explain or deny her prior inconsistent statements before TSgt TL's testimony was admitted (R. at 343). The military judge failed to consider this alternative approach, which would have satisfied both the procedural requirements of M.R.E. 613(b) and its underlying purpose of ensuring fairness.

Moreover, excluding this impeachment evidence deprived TSgt Edwards of a critical opportunity to challenge JH's credibility effectively—a significant error given that her testimony was riddled with inconsistencies and contradictions already apparent in other parts of her account (R. at 122; 138-139). As noted in *United States v. Harrow*, evidentiary rules should not be applied so rigidly as to prevent relevant and probative evidence from being considered when it is central to determining guilt or innocence. 65 M.J. at 199–200.

Finally, while defense counsel could have recalled JH during their case-in-chief to lay a proper foundation under M.R.E. 613(b), this oversight does not absolve the military judge's error in excluding critical impeachment evidence outright without considering alternatives such as conditional admission subject to recalling JH for further questioning.

Conclusion

The military judge abused his discretion by excluding extrinsic evidence of JH's prior inconsistent statements without considering whether recalling her as a witness

could satisfy M.R.E. 613(b)'s requirements while preserving fairness and truth-seeking in the trial process under M.R.E. 102.

This exclusion materially prejudiced TSgt Edwards by depriving him of critical impeachment evidence necessary to challenge JH's credibility—the linchpin of the government's case against him.

WHEREFORE, TSgt Edwards respectfully requests that this Honorable Court set aside his convictions and sentence due to this evidentiary error.

III.

THE SENTENCE IS INAPPROPRIATELY SEVERE

Standard of Review

Sentence appropriateness is reviewed de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006).

Law

Article 66(d)(1), UCMJ, "provides that [this Court] 'may affirm only . . . the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved.'" *United States v. Flores*, __ M.J. __, 2024 CAAF LEXIS 162, at *8-9 (C.A.A.F. 2024). Fundamentally, this means that this Court must "determine whether it finds the sentence to be appropriate." Id. at *9 (citation omitted).

This Court has "broad discretion to determine whether a sentence 'should be approved,' a power that has no direct parallel in the federal civilian sector." *United States v. Behunin*, 83 M.J. 158, 161 (C.A.A.F. 2023) (quoting 10 U.S.C. § 866(d)(1)).

And, while this Court may not grant relief merely as a matter of clemency, *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (en banc), it is empowered to "do justice." *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010). In assessing sentence appropriateness, this Court considers "the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial." *Sauk*, 74 M.J. at 606 (cleaned up). This Court also takes into consideration "uniformity and evenhandedness of sentencing decisions." *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001).

Analysis

The sentence in this case, particularly the bad conduct discharge, is inappropriately severe given TSgt Edwards' service record and the circumstances of the case. TSgt Edwards has served honorably for nearly 15 years, with positive performance reports throughout his career (R. at 423). His character was attested to by multiple credible witnesses, including high-ranking military members. (R. at 423). Moreover, the context of the incident - arising from a dispute over house keys with a non-paying resident who had violated house rules - suggests this was an isolated incident without any notable injury rather than a pattern of abusive behavior warranting life-altering consequences.

The uncertainty surrounding who was the primary aggressor, as evidenced by the testimony of the responding officer and TSgt Edwards' own injuries (R. at 223), further mitigates the severity of TSgt Edwards' actions.

The military judge sentenced TSgt Edwards to reduction to E-1, 60 days confinement for each specification to run concurrently, and a bad conduct discharge (R. at 431). This sentence fails to adequately account for several mitigating factors:

1. TSgt Edwards' lengthy and otherwise commendable military career, including nearly 15 years of positive service (R. at 423).
2. The isolated nature of the incident, occurring in the context of a legitimate dispute over house rules and property rights.
3. The ambiguity surrounding the events, as evidenced by the responding officer's inability to determine a primary aggressor (R. at 223).
4. TSgt Edwards' demonstrated good character, as attested to by multiple witnesses (R. at 423).
5. His continued support system, including family, church, and fellow service members, which could aid in his rehabilitation without the need for punitive discharge (R. at 424).

The social stigma and career impact of a bad conduct discharge, combined with a reduction in rank and confinement, is more than necessary to address the goals of justice, discipline, and deterrence. See 10 U.S.C. § 856(c)(1). The appellate courts in the military justice system must ensure that a service member's sentence is fair and in line with the proven offense. Even when a sentence is within the bounds of the UCMJ, it still must be fair and proportionate. Imposing overly severe punishments for relatively minor offenses can jeopardize both A1C Gray's rights and the public trust in the military justice system. See, e.g., *United States v. Healy*,

26 M.J. 394 (C.M.A 1988) (underscoring the power of appellate courts to reduce sentences that are inappropriately severe even if they are within the legal limits), *United States v. Lacy*, 50 M.J. 286 (C.A.A.F. 1999) (emphasizing proportionality in sentence to preserve confidence in the military justice system), *United States v. Toohey*, 63 M.J. 353 (C.A.A.F. 2006) (highlighting the duty appellate courts have to ensure justice is done).

The bad conduct discharge is particularly inappropriate given these factors. Such a discharge will have severe, long-lasting consequences on TSgt Edwards' future employment prospects and benefits, which is disproportionate to the nature of the offense and his overall service record. Given these factors, the bad conduct discharge is overly harsh and fails to account for TSgt Edwards' otherwise commendable military career.

This Court should consider reducing the sentence to a more appropriate level that balances the seriousness of the offense with TSgt Edwards' service record and character. Specifically, this Court should set aside the bad conduct discharge, allowing TSgt Edwards the opportunity to continue serving or, if separated, to do so under more favorable conditions that appropriately reflect his years of honorable service.

WHEREFORE, TSgt Edwards respectfully requests that this Honorable Court re-assess his sentence by setting aside the bad-conduct discharge and restoring his rank.

Respectfully submitted,

CATHERINE M. CHERKASKY, Esq.
Civilian Defense Counsel
Golden Law, Inc.
1330 Avenue of the Americas, 23rd Floor
New York, NY 10019
(949) 491-1661
katie@goldenlawinc.com
NY Bar: 6022842
CA Bar: 266492
IL Bar: 6311030

JOYCLIN N. WEBSTER, 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: joyclin.webster.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 Goverment Trial and Appellate Operations Division on 21 February 2025.

Respectfully submitted,

JOYCLIN N. WEBSTER, 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: joyclin.webster.1@us.af.mil

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) **MICHAEL EDWARDS** United States Air Force *Appellant.*	))))))))))	UNITED STATES' CONSENT MOTION FOR ENLARGEMENT OF TIME (FIRST) OUT OF TIME Before Panel No. 1 No. ACM S32787 20 March 2025

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

Pursuant to Rule 23.3(m)(5)-(6), the United States respectfully requests, out of time, that it be allotted one additional day to file its answer brief in the above captioned case with this Court, making the new due date Tuesday, 25 March 2025. The United States' responsive brief was originally due on Monday, 24 March 2025.

The record of trial was docketed with this Court on 23 July 2024. From the date of docketing to the present date, 240 days have elapsed. On the date requested, 245 days will have elapsed. Appellant filed his brief on 21 February 2025 following four extensions of time.

There is good cause for the enlargement of time in this case. Undersigned counsel fell ill with a high fever on 19 March 2025, which severely limited her ability to prepare the responsive brief. This fever persisted onto the date of this filing and has not yet broken. This motion is being filed out of time due to the sudden and unanticipated onset of undersigned counsel's illness. Appellate Defense Counsel have been consulted and have no objection to this extension of time.

The additional day will accommodate undersigned counsel's preparation and supervisory review of the responsive brief in the above captioned case. No other counsel can provide a response

in this case sooner, as they have been assigned other cases and undersigned counsel has already reviewed the record and is drafting the brief.

WHEREFORE, the United States respectfully requests this Court grant the United States' consent motion for an enlargement of time of one day to file an answer brief in the above captioned case.

[redacted]
REGINA HENENLOTTER, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

[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 20 March 2025.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **MICHAEL EDWARDS** United States Air Force *Appellant.*	)	No. ACM S32787 25 March 2025

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

ISSUES PRESENTED

I.

THE EVIDENCE IS NOT LEGALLY AND FACTUALLY SUFFICIENT TO SUSTAIN THE APPELLANT'S CONVICTIONS FOR DOMESTIC VIOLENCE AS (1) THE ALLEGED VICTIM WAS NOT AN "INTIMATE PARTNER" OF TSGT EDWARDS AS DEFINED BY STATUTE AND (2) NOTWITHSTANDING THIS FATAL CHARGING ERROR, THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO ESTABLISH TSGT EDWARDS' GUILT BEYOND A REASONABLE DOUBT.

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION IN EXCLUDING EVIDENCE OF JH'S PRIOR INCONSISTENT STATEMENTS.

III.

THE SENTENCE IS INAPPROPRIATELY SEVERE.

STATEMENT OF CASE

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

STATEMENT OF FACTS

Appellant's Dating Relationship with JH

JH met Appellant through a dating website in 2020. (R. at 101, 141). They officially started dating in January of 2021. (R. at 141). After getting to know each other through texting and phone calls, they started to meet in person. (R. at 101). Appellant would go to Augusta, GA, where JH was living, to visit her. (Id.). Appellant became JH's boyfriend. (Id.). At first, JH felt Appellant was "very quiet" and "a little shy when [they] were around others, but all together [he] was a very nice person." (Id.). The relationship continued while Appellant was stationed in Japan. (Id.). Appellant bought a house in Macon, GA in 2021. (R. at 103, Pros. Ex. 6). That year, JH and her son moved in with Appellant, but JH was not "on the house at all." (Id.). JH paid the gas bill. (R. at 113).

Eventually, JH and Appellant started to have arguments and broke off their relationship because they "wanted different things." (R. at 112-113). JH asked if Appellant wanted her to move out. (R. at 113). Appellant offered to have he and JH "live together in the house as roommates." (Id.). JH also offered to pay rent, but Appellant and she agreed JH could continue to pay the gas bill instead. (Id.). JH moved into a separate bedroom. (Id.).

A couple months before the incident on 4 June 2023, Appellant imposed rules on JH while she was living with him. (R. at 114). Appellant informed JH she was not allowed to leave the shared residence after 2200, and if she would not return before 0000, she was not allowed into the house until "a decent time in the morning." (Id.). JH did not agree to this rule. (Id.). When JH broke this rule, Appellant threatened to change the locks on the house. (Id.). JH argued that she was not Appellant's "child," and he could not give her a curfew. (R. at 115). JH

pointed out that Appellant wasn't "bothered" when JH entered the house late, to which Appellant responded he could still see what time she came home from his phone. (Id.).

While JH and her son were still living in the house, Appellant followed through on that threat to change the locks. (Id.). Appellant told JH if she wanted the key again, she would have to "ask him nicely." (Id.). When JH first asked for the key back, Appellant said "that's not nice enough." (Id.). When JH asked again, Appellant threw the key at her. (R. at 116). JH still did not agree to obey Appellant's curfew and never did. (Id.).

JH began to secretly plan to move out of Appellant's residence. (R. at 139). She told Appellant she would move out in "2 weeks," but was secretly working with friends to leave the house earlier than that. (Id.). JH did not give Appellant her accurate move out date because she didn't want Appellant to know. (Id.).

Night of Domestic Violence

JH testified that on the morning of 4 June 2023, Appellant came into JH's bedroom and insisted she give him the key. (Id.). JH had returned to the house after 0200 that morning. (R. at 117). Appellant said JH was "not allowed in or out of the house anymore without his permission." (R. 116). JH went to get her purse from the closet in the living room and Appellant followed her. (R. at 116-118). Appellant got in a "tug of war" with JH over the house key, which JH had in her hand. (R. at 120). Appellant grabbed JH, which made her lose balance and fall. (R. at 122-123). JH fell into a dress with the right side of her body. (R. at 123).

JH got up quickly and tried to leave the living room. (Id.). However, Appellant grabbed JH and put her in a "chokehold or headlock." (Id.). JH is about 5 feet, 2 inches and Appellant is about 6 feet tall. (R. at 172). JH's head was pressed down into Appellant's chest area and had the keys still in her right hand. (R. at 124). The more JH struggled to get away, the more

Appellant "would press harder on my face into his body." (Id.). JH had difficulty breathing while in the headlock. (R. at 132). JH "panicked" and feared Appellant might kill her. (Id.).

To get away from Appellant, JH turned and bit him. (R. at 124). JH denied that she bit Appellant when he was holding her key in the air away from her. (R. at 171-172). Appellant let go for a split second, but then he grabbed JH's hair and struck the left side of JH's face. (R. at 124). The hit was very hard and "more like a punch." (R. at 124-125). On a scale of one to ten, JH rated the punch an eight. (R. at 125).

The punch left a bruise on the left side of JH's face. (R. at 126). JH had bruising on her arm and wrist from Appellant grabbing her. (R. at 127, 130). Her neck was bruised from the "headlock." (R. at 128). Her ribs and thigh were bruised from falling into the dresser. (R. at 128-129). These injuries were photographed by the Air Force Office of Special Investigations (AFOSI) 24 and 48 hours after the assault. (Pros. Ex. 1, 2).

After this JH tried to get her phone, but Appellant hit it out of her hand. (R. at 132-133). JH ran to her bedroom and yelled for her son to call the police. (R. at 133). Appellant said, "don't worry, I'll call them myself and [sic] to get you out of my house." (R. at 113).

DH, a forensic nurse, reviewed the AFOSI photographs of JH's injuries. (Pros. Ex. 1, 2). She testified that the bruise on JH's face in the aftermath of the assault was consistent with being struck by a punch or the heel of a hand. (R. at 292). It was "doubtful" that the bruise on JH's face could have been caused by an "unintentional flail" by Appellant. (R. at 292-293). The bruises on JH's arm were also consistent with "grabbing." (R. at 294). DH identified a "fingernail type of injury" and swelling on JH's neck. (R. at 295). JH's description of the headlock aligned with the injury on her neck. (R. at 298). DH clarified that this injury could not have been caused by a fall. (R. at 298-299). The bruising on JH's ribs were consistent with

falling into the dresser. (R. at 300). Finally, the bruising on JH's wrist was consistent with being grabbed. (R. at 303).

DH also testified regarding Appellant's bite mark. (R. at 308). DH stated the bite mark was "superficial." (Id.). DH stated that when a victim bites in "a defensive posture to get away from somebody," the bites are "[g]enerally, more superficial." (R. at 309).

Aftermath of Assault

After Appellant called the police and Corporal JS arrived, Appellant spoke with her outside the house. (R. at 134). Appellant told Corporal JS that "I grabbed her key, she attacked me. She bit my chest." (Pros. Ex. 6). Corporal JS told JH to either leave the house or she was taking JH and Appellant "to jail." (R. at 134). JH told Corporal JS that Appellant hit her, but Corporal JS still said she needed to gather her things and leave the house. (R. at 166). Corporal JS testified that she could see a "red mark" on JH's face that day. (R. at 197). Appellant responded to JH's allegation by telling Corporal JS "she bit me in the chest. I pushed her away. That was it. I didn't hit her." (Pros. Ex. 6). When compared to the photos taken 48 hours after the incident, Corporal JS testified that JH's mark was not "this noticeable" on the day of the incident, 4 June 2023. (R. at 206). On seeing the inside of the house, Corporal JS did not see evidence of a "fight." (R. at 218). JH did not inform Corporal JS of the injuries to her neck, ribs, or thigh. (R. at 219). Corporal JS determined that JH was the one who needed to leave the house because Appellant was the homeowner. (R. at 202). Corporal JS found her interactions with Appellant and JH to be "calm," and testified that JH was "upset" she would have to leave the residence. (R. at 223).

JH got her son and they both packed some belongings to leave the house. (R. at 134). JH's face was "throbbing," and she just wanted to get out of the house at that point. (R. at 136).

JH's son, JH-minor[1], testified that he heard his mother and Appellant arguing but he had headphones on while playing a video game. (R. at 181). JH-minor heard voices but did not hear JH ask him to call the police. (R. at 183). When JH told JH-minor they had to leave the house, JH-minor saw a bruise on his mother's face. (R. at 182).

JH did not immediately go to the hospital because she did not think anyone would believe her based on the way Corporal JS treated her at the scene. (R. at 136). JH also didn't have health insurance. (Id.). However, her friend, LC, and her daughter, AH, ultimately convinced her to seek medical treatment later in the day on 4 June 2023. (R. at 137, 235, 256). When JH called AH, AH heard her mother crying, and JH needed to "get herself back together" during the call. (R. at 254-255). According to AH, JH was "scared to go, and she wasn't sure she could afford going" to the hospital. (R. at 256). After getting to the hospital, JH did not tell the hospital staff the details of how she obtained her injuries. (R. at 176). JH's daughter called the military and informed them of the incident. (R. at 137).

DH testified that victims do not "always report right away and remember everything that happened." (R. at 311). Some common reasons include "fear [of the] police; people feel that they won't be believed; they feel (sic) retribution from friends, family, the system, if you will; they've gotta get to work, and they don't have time; they've got daycare or children that they've gotta get back to." (R. at 313). DH further explained it is possible for a victim not to notice all their injuries in the immediate aftermath of an incident. (R. at 313-314). DH testified that JH might not have noticed her other injuries because she was focused on her face, which was "throbbing." (R. at 318).

Special Agent (SA) AC worked for the Air Force Office of Special Investigations and

[1] Due to their identical initials, JH-minor will be used to describe JH's son.

received training on how to investigate allegations of domestic violence. (R. at 69). SA AC first interviewed JH on 5 June 2023, the day after the incident. SA AC took photographs of JH's injuries. (R. at 73-74; Pros. Ex. 2). These photos included a bruise on JH's left cheek, the back right of JH's neck, JH's right wrist, JH's right tricep, and over her right-side ribs. (R. at 74-75; Pros. Ex. 2). The photos also show scratch marks on JH's left shoulder. (Pros. Ex. 2).

SA AC met with JH the next day, 6 June 2023, and took additional photos (R. at 76; Pros. Ex. 1). SA AC took these additional photos to document the "progression of [the] bruising." (Id.). The photos taken 48 hours after the assault were darker in color and extended further on JH's skin. (Id.). According to SA AC, this was typical of bruising. (R. at 76).

SA AC took pictures of Appellant's chest approximately two to three days after the first interview with JH. (R. at 81; Pros. Ex. 4). A bite mark was visible over Appellant's right pectoral. (Pros. Ex. 4).

One week after the incident, SA AC photographed JH's injuries a third time. (R. at 79; Pros. Ex. 3). After one week, JH's bruising was "slightly less large" and the discoloration was "not as deep." (Id.).

AG, JH's coworker, testified that she saw JH's bruises after the assault. (R. at 264). She also noticed that JH was "very quiet" after the assault. (R. at 265). This was different from JH's usual demeanor, as JH was "a very happy person" prior to the incident. (R. at 264). AG also saw JH "bust out in tears" when JH was asked how she was doing. (R. at 265).

The military judge convicted Appellant of three specifications of domestic violence: (1) for grabbing JH and causing her to fall into furniture; (2) for grabbing JH and wrapping his arm around her neck; and (3) for grabbing JH's hair and punching her in the face. (R. at 392; Entry of Judgement (EOJ)).

ARGUMENT

I.

JH WAS APPELLANT'S "INTIMATE PARTNER" AS DEFINED BY ARTICLE 128B, UCMJ, AND APPELLANT'S CONVICTIONS FOR DOMESTIC VIOLENCE WERE LEGALLY AND FACTUALLY SUFFICIENT.

Standard of Review

Issues of legal sufficiency are reviewed *de novo*. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

"The Court may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with subparagraph (B)." 10 U.S.C. § 866(d)(1)(A). Factual sufficiency is reviewed using the following standard if every finding of guilty is for an offense occurring on or after 1 January 2021[2]:

> (i) In an appeal of a finding of guilty under subsection (b), the Court may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.
>
> (ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—
>
> > (I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
> >
> > (II) appropriate deference to findings of fact entered into the record by the military judge.
>
> (iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the

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

> weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

10 U.S.C. § 866(d)(1)(B).

Law and Analysis

To obtain a conviction for domestic violence, the Government must prove: (a) That the accused committed a violent offense; and (b) That the violent offense was committed against a spouse, intimate partner, or immediate family member of the accused. A "violent offense" includes a violation of Article 128. Exec. Order 14062, 87 Fed. Reg. 4763 at 4777-84 (Jan. 31, 2022). In the present case, the Government had to prove every element of assault consummated by battery under Article 128 to convict Appellant of domestic violence. To accomplish this, the Government had to show: (a) That the accused did bodily harm to a certain person; (b) That the bodily harm was done unlawfully; and (c) That the bodily harm was done with force or violence. (Manual for Courts-Martial (MCM), pt. IV, para. 77.b.(2) (2019 edition)). "Bodily harm" means an offensive touching of another, however slight. Id. at 77.c.(1)(a).

The test for legal sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal citations omitted). This test does not require a court to ask whether it believes the evidence established guilt beyond a reasonable doubt, but rather whether any rational factfinder could do so. United States v. Acevedo, 77 M.J. 185, 187 (C.A.A.F. 2017). The term reasonable doubt, however, does not mean that the evidence must be free from conflict. United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017), aff'd 77 M.J. 289 (C.A.A.F. 2018). In resolving questions of legal sufficiency, the Court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution. United States v. Plant, 74 M.J. 297, 301

(C.A.A.F. 2015). The test for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1973)). As a result, the standard for legal sufficiency involves a very low threshold to sustain a conviction. King, 78 M.J. at 221.

A. Appellant and JH were intimate partners for purposes of Article 128b.

Under Article 128b, an "intimate partner" includes in relevant part "a person with whom one *has been* in a social relationship of *a romantic or intimate nature*, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship." Exec. Order 14062, 87 Fed. Reg. 4763 at 4777-84 (Jan. 31, 2022) (emphasis added). In 2022, JH moved to Macon, GA to live with Appellant as his girlfriend. (R. at 103). They later broke up, but Appellant offered to let JH continue to live in the house and pay the gas bill as she had been doing while they were dating. (R. at 113).

The plain meaning of Article 128b, UCMJ captures past relationships between an accused and victim. This Court "interpret[s] 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). "The ordinary-meaning rule is the most fundamental semantic rule of interpretation." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 69 (Thomas/West 2012) (internal citations omitted). "Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense." Id. Following this guidance, the Court should first consider the plain meaning of the definition of "intimate partner." *See* Cabuhat, 83 M.J. at 767 ("We begin with statutory construction. First, we apply the plain meaning of the phrase.").

The plain language of the statute does not require that Appellant and JH have a continued romantic relationship *at the time of the offense.* For JH to be considered Appellant's intimate partner, the Government needed only to show that JH was "a person with whom [Appellant] has been in a social relationship of a romantic or intimate nature." Exec. Order 14062, 87 Fed. Reg. 4763 at 4777-84 (Jan. 31, 2022). The type of relationship and length of the relationship are factors which inform this. (Id.). In United States v. Daddario, an accused was convicted of domestic violence under Article 128b, UCMJ for strangling his "then ex-girlfriend TD" after a "brief dating relationship." 2023 CCA LEXIS 499, at *3 (A.F. Ct. Crim. App. Dec. 1, 2023). Despite conducting a full Article 66, UCMJ review, this Court showed no concerns with the providency of the appellant's plea to the domestic violence offense, despite the victim being an ex-girlfriend at the time of the incident.

JH testified that she and Appellant started dating in January of 2021. (R. at 141). JH and her son moved to Macon, GA, to live with Appellant and continue this romantic relationship. (R. at 103). When the relationship ended in 2022, JH continued to cohabit with Appellant. (R. at 113). She moved into a separate bedroom but continued to pay the gas bill as she had done when they were in a romantic relationship. (R. at 113). This arrangement persisted until 4 June 2023. (R. at 116). A long-term romantic relationship that included living together for a year as boyfriend and girlfriend made Appellant and JH intimate partners under Article 128b. If the brief and concluded dating relationship in Daddario still made TD an intimate partner for a domestic violence conviction, then JH's relationship to Appellant should. Therefore, Appellant's actions qualify as domestic violence under Article 128b, UCMJ.

Appellant contends that he was acting as JH's landlord since their romantic break-up and that JH disobeyed the curfew he lawfully imposed as such. (App. Br. at 9). Despite Appellant's

assertions now, nowhere in the record did either trial counsel or trial defense counsel allege that Appellant was acting within his rights as a landlord to evict JH for failing to follow his curfew. (Id.). A landlord-tenant relationship does not give Appellant the right to remove a tenant or seize their keys without complying with the eviction process. Likewise, Appellant cites to no law or fact in the record to show that the curfew imposed by Appellant on JH was "consistent with a landlord's authority over tenants." (Id.). Appellant's argument also disregards the controlling nature of the curfew Appellant imposed upon JH that started the incident: that of a controlling intimate partner rather than a landlord. (R. at 115). Appellant's attempt to turn his assault of JH into a soured business transaction overlooks the intimate nature of their relationship and cohabitation even a year after their break-up. They were intimate partners cohabiting for a total of two years, not merely two people in with a financial arrangement. (R. at 147). This Court should find that Appellant and JH were intimate partners and affirm the convictions for domestic violence.

B. Appellant has not shown a deficiency of proof in the Government's case to trigger a factual sufficiency review.

Outside of Appellant's contention that JH was not his intimate partner, Appellant has not demonstrated a deficiency of proof in the findings of this case. Our sister services have found that a "general disagreement with a verdict" or with a conclusion of a fact finder is insufficient to establish a deficiency of proof. *See* United States v. Valencia, __ M.J. __, 2024 CCA LEXIS 515, at *12-13 (N-M Ct. Crim. App. Dec. 5, 2024). "[M]inor inconsistencies in the victim['s] testimony" likewise does not "establish a specific deficiency of proof." United States v. Brassfield, 85 M.J. 523, 528 (A. Ct. Crim. App. 2024).

Appellant argues that JH's testimony was not credible because she had a greater motive to fabricate than Appellant. (App. Br. at 12). Specifically, Appellant argues that he had no need

to get into a physical altercation with JH over the keys because he could have changed the locks on the house, whereas JH would need to lie to maintain her "unauthorized access to the property." (Id.). This is, ultimately, just a general disagreement with the credibility determinations made by the trier of fact, the military judge. It is also illogical to suggest that JH had a greater need to fabricate the domestic violence to stay in the residence than Appellant would have had to avoid criminal liability for the domestic violence.

The same is true of Appellant's arguments regarding his bite mark, JH's wounds, and JH's fear during the altercation. (Id. at 12-13). Appellant argues that the bite mark on Appellant does not match JH's testimony. (Id. at 12). JH testified that she only bit Appellant on the chest because he was holding her against him, she couldn't breathe, and she wanted to escape. (R. at 132). DH, the forensic nurse, testified that the bite mark did appear consistent with JH's testimony that she bit Appellant while in a headlock. (R. at 309). DH explained that the bite mark was "superficial" and more in line with "a defensive posture to get away from somebody." (R. at 309).

Appellant argued that because Corporal JH only saw a red mark on JH's cheek on the morning of the incident, it contradicts JH's testimony of being "violently assaulted." (App. Br. at 13). However, it is clear from the photographs of JH's wounds taken 24 hours and 48 hours after the incident that JH's bruising worsened as time passed. (Pros. Ex. 1, 2). It is not "inconsistent" for JH to only have a "red mark" on her cheek when initially speaking with Corporal JS because only a small window of time had passed since Appellant punched her. (R. at 197). Nor does it hurt JH's credibility that Corporal JS opined that she could not determine who the initial aggressor was at the time of the incident, because Corporal JS did not conduct a full interview with JH on that day. (R. at 205).

Appellant also complains that JH's calm interaction with Corporal JS captured on the body camera footage (Pros. Ex. 6) shows she was not a victim because she was too calm while her trial testimony was that she feared for her life. (R. at 132). With respect to JH's demeanor from the body camera footage with Corporal JS, JH did not testify that she was in fear for her life *at that time.* JH testified that she feared Appellant would kill her when he had her in a headlock. (Id.). Furthermore, time had passed since the altercation and Corporal JS's arrival to the residence. Corporal JS testified that she did not immediately respond to the 911 call and instead waited for back-up as it was a domestic situation. (R. at 196). There is no deficiency of proof in JH appearing calm on the body camera footage when she had enough time to settle down while locked in her bedroom away from Appellant and when a police officer did not leave her alone with Appellant again. The scenario that led to JH's fear was past for the moment, and so her calm demeanor does not lower her credibility.

Appellant also draws attention to JH's decision to tell Appellant she was moving out of his residence in two weeks versus her testimony that she was actually moving out within five days of the incident. (App. Br. at 14, R. at 139). However, the record makes clear this was not even a minor inconsistency. JH never deviated in her testimony that she truly planned to leave within five days; she clarified that she told Appellant it would be two weeks because she didn't want him to know when she was leaving and had already begun to fear that he would find her. (R. at 175). For purposes of showing a deficiency of proof, Appellant has failed to articulate how JH misleading Appellant on her move-out date harmed her credibility in court.

Appellant next draws attention to an alleged inconsistency regarding JH's fall into the dresser. (App. Br. at 13). While Appellant claims JH originally didn't remember how she fell, JH actually testified that she "lost balance" and fell but could not recall if she was pushed. (R. at

122). She then clarified for trial counsel that Appellant grabbing her was what caused her to fall and that he fell with her. (R. at 123). This testimony was not an inconsistency. It was normal witness testimony that became more specific once trial counsel asked a more targeted question.

With respect to Appellant's credibility and good military character (App. Br. at 14), trial defense counsel did not introduce this evidence during findings, and so this Court should not consider it when assessing factual and legal sufficiency now.

Finally, Appellant argues that Appellant would not have fought over keys with JH because he could have just changed the locks. (App. Br. at 12). JH testified that Appellant changed the locks on her before when she broke his curfew. (R. at 115). However, Appellant's own words to Corporal JS contradict this argument: less than a minute into the body camera footage, Appellant told Corporal JS that the altercation started when he "grabbed" JH's house keys. (Pros. Ex. 6). While he stated JH then attacked him, his statement still bolsters JH's version of events that the incident *did start* because of the keys. This undercuts Appellant's argument that he wouldn't have started the fight and would have just changed the locks again.

Appellant's argument only amounts to a disagreement with the fact-finder's conclusions at trial. This Court should follow our sister services and find that Appellant has failed to establish a specific showing of a deficiency in proof.

C. This Court should not be clearly convinced that the finding of guilt was against the weight of the evidence.

If this Court finds that Appellant did allege a deficiency in proof, it still should not grant Appellant relief. The findings of guilt for domestic violence were not against the weight of the evidence.

While the Government has a heavy burden of persuasion, it need not prove its case to a mathematical certainty. United States v. Kloh, 27 C.M.R. 403, 406 (C.M.A. 1959). The

Government may meet its burden of proof with direct or circumstantial evidence. *See generally* United States v. Maxwell, 38 M.J. 148, 150-51 (C.M.A. 1993). Military jurisprudence has long held that "direct evidence of a crime or its elements is not required for a finding of guilty; circumstantial evidence may suffice." United States v. Hart, 25 M.J. 143, 147 (C.M.A. 1987) (affirming a conviction based on circumstantial evidence); *see also* United States v. Davis, 49 M.J. 79, 83 (C.A.A.F. 1998) (finding sufficient evidence of premeditation based on circumstantial evidence of intent). And the Supreme Court has "never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required." Desert Palace, Inc. v. Costa, 539 U.S. 90, 100 (2003); *see* Holland v. United States, 348 U.S. 121, 140 (1954) ("Circumstantial evidence … is intrinsically no different from testimonial evidence.").

The Government proved beyond a reasonable doubt that Appellant did bodily harm to JH, who was his intimate partner at the time. JH testified that Appellant grabbed her, caused her to fall into the dresser, put her in a headlock, and after she bit him, grabbed her hair and punched her in the face. (R. at 123-125). Photographic evidence of JH's injuries covered the first 48 hours after the incident and showed significant bruising. (Pros. Ex. 1,2).

JH's version of events was corroborated more than it was contested. Shortly after the incident, JH told Corporal JS that Appellant had hit her. (R. at 166). Her cheek, arm, back, and leg were deeply bruised 48 hours after the incident. (Pros. Ex. 1, 2).

An expert forensic nurse testified that JH's injuries were consistent with her testimony. AH testified that her mother was tearful that day when JH called her. (R. at 254). AG testified that following the incident, JH went from a "very happy person" to a "very quiet" person and that she would burst into tears when asked if she was okay. (R. at 265).

Focusing specifically on the bite to Appellant's chest, JH never denied biting Appellant. JH always said it was because Appellant head her in a headlock. (R. at 123-124). JH also denied biting Appellant because he was holding her keys above her. (R. at 171).

Appellant told Corporal JS that "[he] grabbed her key, she attacked me. She bit my chest." (Pros. Ex. 6). Considering the logistics of the fray, Appellant's version makes little sense. JH did not bite his arm or hand, which might have made sense since if Appellant was only trying to take her keys from her. Instead, she bit down on his chest in self-defense. (R. at 123-124). It only makes sense for JH to have bitten Appellant's chest if he was grappling her and holding her to him. Otherwise, it is difficult to contemplate how JH would have gotten so close to Appellant and bitten him. As JH explained, this bite was to induce Appellant to release her because she was struggling to breathe and afraid he would kill her. (R. at 132). DH, the forensic nurse, also testified that the bite mark was "superficial," which was consistent with someone biting to be released as opposed to biting as the initial aggressor. (R. at 308).

Appellant's attack on JH was unlawful and not in self-defense. He had no right to impose an arbitrary curfew on JH while she was living in his house, and her breaking that curfew did not give him the right to attack her in the name of reclaiming his house keys. Even if this Court accepted that Appellant was acting in self-defense after JH bit him, the level of force Appellant used went far beyond self-defense. Appellant did not just act to get JH away from him. He grabbed her hair and punched her in the face. (R. at 124; Pros. Ex. 1). Then he slapped her phone out of her hand. (R. at 132-133). JH testified that *she* was the one who fled from Appellant after the beating and locked herself in her bedroom. (R. at 133). Appellant crossed the line by beating JH the way he did and cannot reasonably rely on the theory of self-defense to

undo his actions. This Court should not be clearly convinced that the weight of the evidence was against the finding of guilt and should not set aside Appellant's conviction.

Because Appellant's conviction is factually sufficient, it meets the lower standard for legal sufficiency. A rational factfinder could have found all the elements of domestic violence beyond a reasonable doubt, as the military judge did in this case. Therefore, Appellant is unentitled to relief and this Court should deny this assignment of error.

D. If this Court finds Appellant and JH were not intimate partners, it should affirm Appellant's conviction for the lesser included offense[3] of assault consummated by battery.

If this Court is not persuaded that JH was Appellant's intimate partner, it should still affirm the findings for the lesser included offense of assault consummated by battery.

This Court may "narrow the scope of an appellant's conviction to that conduct it deems legally and factually sufficient." United States v. English, 79 M.J. 116, 120 (C.A.A.F. 2019). This authority includes the decision to set aside a finding of guilt and affirm a lesser included offense. Article 66(f)(1)(A)(i), UCMJ.

"An offense is a lesser included offense when it is 'necessarily included in the offense charged.'" United States v. Smith, 2023 CCA LEXIS 196, at *49 (A.F. Ct. Crim. App. May 5, 2023), citing United States v. Medina, 66 M.J. 21, 24 (C.A.A.F. 2008) (quoting Article 79, UCMJ). CAAF explained that:

> The "elements test" determines whether an offense is "necessarily included in the offense charged" under Article 79, UCMJ. We have applied the elements test in two ways. The first way is by comparing the statutory definitions of the two offenses. An offense is a lesser included offense of the charged offense if each of its elements is necessarily also an element of the charged offense.

United States v. Armstrong, 77 M.J. 465, 469-70 (C.A.A.F. 2018) (citations omitted).

[3] Trial counsel stated there were no lesser included offenses. However, this Court is not bound by trial counsel's position. United States v. Budka, 74 M.J. 220 (C.A.A.F. 2015)

Assault consummated by battery can be a lesser included offense of Article 128b, and it is so here. To sustain a conviction for domestic violence in violation of Article 128b, the Government needed to prove beyond a reasonable doubt that Appellant committed a "violent offense" against JH. Exec. Order 14062, 87 Fed. Reg. 4763 at 4777-84 (Jan. 31, 2022). A "violent offense" includes a violation of Article 128. (Id.). The Government had to prove every element of assault consummated by battery under Article 128 to convict Appellant of domestic violence. The Government had to show: (a) That the accused did bodily harm to a certain person; (b) That the bodily harm was done unlawfully; and (c) That the bodily harm was done with force or violence. (MCM, pt. IV, ¶ 77.b.(2)). Bodily harm is "an offensive touching of another, however slight." (Id. at 77.c.(1)(a)).

The Government proved Appellant committed three assaults consummated by battery beyond a reasonable doubt. JH testified that Appellant grabbed her to retrieve her house key. (R. at 122-123). This escalated into a struggle where Appellant caused JH to fall against the dresser. (R. at 123). Appellant then put JH in a headlock, and she struggled to breathe. (R. at 123-124). When JH bit Appellant to escape his hold, Appellant grabbed her hair and punched her in the face. (R. at 124). DH testified that JH's injuries were consistent with her testimony of Appellant's attack to get the house keys. As explained above, there was no credible argument that Appellant was acting in self-defense during this altercation. Grabbing JH, putting her in a headlock, and punching her in the face were all commissions of bodily harm done unlawfully with force or violence.

If this Court is not convinced that Appellant committed domestic violence, it should use its authority under Article 66(f)(1) to affirm his conviction for the lesser included offense of assault consummated by battery.

II.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY EXCLUDING EVIDENCE OF JH'S PRIOR INCONSISTENT STATEMENTS.

Additional Facts

On direct examination, JH testified that she "lost balance" and fell during the struggle. (R. at 122). She couldn't recall if she was pushed, but Appellant grabbing her caused her to fall and he fell with her. (R. at 123).

Trial defense counsel called their defense paralegal, TL, in their case in chief to testify regarding their phone call with JH on 8 February 2024. (R. at 341). Trial defense counsel wanted to introduce an out of court statement by JH about the fall into the dresser. (R. at 341). Trial counsel objected that foundation had not been for a prior inconsistent statement. (R. at 335). The military judge overruled the objection because trial defense counsel was still attempting to lay the foundation to admit the out of court statement. (R. at 336). TL testified that during a phone call, JH stated she "didn't know how she fell into the dresser, but that she fell with the defendant." (R. at 336). On cross-examination, TL clarified that JH said there was "pushing and pulling over a key." (R. at 338). TL also clarified that he could not remember the exact question the trial defense counsel had asked JH about the fall. (Id.). TL could not recall if trial defense counsel had asked JH how she fell into the dresser. (R. at 339).

On redirect examination, trial defense counsel sought to elicit more testimony about what JH said in that phone call. (R. at 339). Trial counsel objected again because there was no foundation for an inconsistent statement based on TL's previous answers. (R. at 340). Trial defense counsel originally tried to use an exception to the hearsay rule to introduce JH's prior statement. (R. at 341). However, the military judge said the hearsay rule offered by trial defense

counsel was not applicable. (R. at 342). Turning to Military Rules of Evidence (Mil. R. Evid.) 613, the military judge found that trial defense counsel had not met the foundation to introduce extrinsic evidence of JH's prior inconsistent statement because they had not cross-examined her on the statement. (R. at 343). Trial defense counsel argued trial counsel could recall JH to let her explain the statement, but trial counsel pointed out it was not the Government's responsibility to correct the defense's mistake. (Id.). The military judge sustained trial counsel's objection and stated he would not consider any of TL's testimony on JH's prior statements. (R. at 344). Trial defense counsel did not call JH as a witness in their case-in-chief.

Standard of Review

A military judge's decision to exclude evidence is reviewed for an abuse of discretion. United States v. Bowen, 76 M.J. 83, 87 (C.A.A.F. 2017). "An abuse of discretion occurs when a court's findings of fact are clearly erroneous or the decision is influenced by an erroneous view of the law." United States v. Simmermacher, 74 M.J. 196, 199 (C.A.A.F. 2015) (citation omitted). It can also be an abuse of discretion if the military judge "applies correct legal principles to the facts in a way that is clearly unreasonable" or "fails to consider important facts." Id. (citation omitted). This standard is strict and calls for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous. United States v. Erikson, 76 M.J. 231, 234 (C.A.A.F. 2017) (citations omitted).

Law and Analysis

Under Mil. R. Evid. 613(b), Extrinsic Evidence of a Prior Inconsistent Statement:

> Extrinsic evidence of a witness' prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires.

The military judge did not abuse his discretion by enforcing the requirements of Mil. R. Evid. 613(b). "Fairness" does not require a military judge to help trial defense counsel or give them additional leeway. "An accused, alike with the Government, must deal fairly with the court." United States v. Wolfe, 24 C.M.R. 57, 60 (U.S. C.M.A. 1957). The military judge initially allowed trial defense counsel to lay foundation for the admission of the evidence. After they did so, and on renewed objection from trial counsel, the military judge correctly found that trial defense counsel was using the wrong theory of admissibility, and that they had not properly taken the alleged inconsistent statement up with JH on cross-examination. (R. at 343). While Appellant says United States v. Harrow emphasized "fairness" in evidentiary rulings (App. Br. at 16, 18), CAAF used no such language, and the facts of these two cases are distinct. 65 M.J. 190, 199–200 (C.A.A.F. 2007). In Harrow, the military judge abused his discretion because he made a ruling based on a misunderstanding of the law: he did not understand that "an inability to recall or a non-responsive answer *may* present an inconsistency for purposes of M.R.E. 613." Id. at 200 (citation omitted). Id. Here, there was no inability to recall or non-responsive answer from JH's testimony. She had not been questioned about the alleged inconsistent statement at all.

The military judge had a range of choices available to him, United States v. St. Jean, 83 M.J. 109, 114 (C.A.A.F. 2023), and he was not under any obligation to apply United States v. Young, 86 F.3d 944 (9th Cir. 1996) for trial defense counsel's benefit. Young said a military judge should allow introduction of extrinsic evidence of an inconsistent statement so long as the witness would be permitted to explain it. Id. at 949. However, that case is not binding on military courts and has been cited by military courts only once for an unrelated reason. *See* United States v. Ivey, 53 M.J. 685 (A. Ct. Crim. App. 2000). The fact that trial defense counsel

wanted a round-about way for JH to explain her statement didn't obligate the military judge to give them one. An abuse of discretion requires more than a different of opinion. Furthermore, the military judge did not bar trial defense counsel from calling JH as a witness in their case in chief, as which point they could have asked her directly about her alleged prior statement in the phone call. (Id.). Trial defense counsel chose to rest their case after TL was excused. (R. at 344). The military judge understood the law and properly applied it against trial defense counsel. Though Appellant's opinion differs, this decision was within the range of choices available to the military judge and was not arbitrary or erroneous.

If this Court does find the exclusion of this evidence was an abuse of discretion, it should not find that Appellant was prejudiced. As part of a de novo review of the nonconstitutional error for whether this exclusion had a substantial influence on the military judge's verdict, this Court considers four factors: (1) the strength of the government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question. United States v. Berry, 61 M.J. 91, 97-98 (C.A.A.F. 2005).

For the first factor, the Government had a strong case against Appellant. JH's testimony was consistent and corroborated by photographs of her injuries and a forensic nurse's expert testimony. For the second factor, the defense case focused on attacking JH's credibility and portraying her as the initial aggressor. But the defense's case was weak because JH had virtually no inconsistencies. She told Corporal JS from the beginning that Appellant attacked her first. (Pros. Ex. 6). JH clarified how she fell with Appellant into the dresser and why she originally told him she would move in two weeks instead of five days. (R. at 123-123, 139). Both these factors favor the Government since the Government's case was strong independent of this evidence, and the Defense's case was weak.

For the third factor, this evidence had little materiality because JH had already testified in substantially the same way. Trial counsel asked JH if she was pushed, and JH said she did not remember. (R. at 122). JH said she "lost balance" in the struggle for the key. (Id.). Appellant fell as well. (R. at 123). When asked more specifically by trial counsel, JH said she lost balance because Appellant grabbed her. (Id.). TL stated that during the phone call, JH said she "didn't know how she fell into the dresser, but that she fell with [Appellant]." (R. at 336). When cross-examined, TL said JH had said there was "pushing and pulling over a key." (R. at 338). TL's testimony of what JH said during the phone call did not demonstrate an inconsistent statement. JH testified almost identically to how she apparently spoke with TL on the phone call. In comparing these two statements, not only are they not "diametrically opposed" but they are also not evasive or a change in JH's position. United States v. Damatta-Olivera, 37 M.J. 474, 478 (C.M.A. 1993). Even if the testimony had been admitted, it would not have led the factfinder to the conclude that JH had fabricated the incident or to have otherwise diminished her credibility. The statements were cumulative, and this factor should favor the government because the evidence was not material.

Finally, the quality of the evidence does not support Appellant because while it was allegedly JH's statement, TL could not remember the full question asked by trial defense counsel. Without the full context, the factfinder would have been left to wonder whether the alleged inconsistency was generated by the specific question that JH had been asked. Thus, the evidence was of low quality and little probative value.

The military judge did not abuse his discretion in excluding TL's testimony regarding JH's prior statements, but even if he did, the evidence would not have substantially influenced the military judge's verdict. Therefore, this Court should deny this assignment of error.

III.

APPELLANT'S SENTENCE IS NOT INAPPROPRIATELY SEVERE.

Additional Facts

Trial counsel called AG and AH to testify during pre-sentencing about how JH's behavior changed after the incident. (R. at 401, 405). In her victim impact statement, JH explained that she suffered nightmares from the incident and "was barely able to sleep the first month after." (Court Ex. A). JH was filled with shame from what happened and hid the injuries inflicted by Appellant because she "did not want people looking at me different with pity." (Id.). She was afraid to leave her house even just to visit the gym or grocery store for fear of seeing Appellant. (Id.). JH suffered panic attacks from seeing men who resembled Appellant. (Id.). She began and continued to seek mental health counseling through the trial. (Id.).

Trial defense counsel did not call any witnesses but offered several character letters. (Def. Ex. B-E). Appellant also made a written and verbal unsworn statement. (R. at 416).

The military judge sentenced Appellant to 60 days confinement, reduction to the rank of Airman Basic, and a bad conduct discharge. (ROT, Vol 1).

Standard of Review

This Court reviews the appropriateness of an appellant's sentence *de novo*. *See* United States v. McAlhaney, 83 M.J. 164, 166 (C.A.A.F. 2023).

Law and Analysis

Pursuant to Article 66(d), UCMJ, this Court "may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." 10 U.S.C. § 866(d). The purpose of such review is "to ensure 'that justice is done and that the accused gets the punishment he deserves.'" United

States v. Joyner, 39 M.J. 965, 966 (A.F.C.M.R. 1994) (quoting United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988)).

In assessing sentence appropriateness, this Court considers "the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." United States v. Hamilton, 77 M.J. 579, 587 (A.F. Ct. Crim. App. 2017) (citations omitted).

Although this Court has discretion to determine whether a sentence is appropriate, it has "no power to 'grant mercy.'" 77 M.J. at 587 (citing United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010)); *see also* United States v. Walters, 71 M.J. 695, 698 (A.F. Ct. Crim. App. 2012) ("[W]e are not authorized to engage in exercises of clemency."). Thus, as long as a sentence is not inappropriately severe, this Court may affirm it even if it is not what this Court would have adjudged:

> By affirming a sentence, we do not necessarily mean that it is the sentence we would have adjudged had we been the sentencing authority. The numerous permutations and combinations of sentencing alternatives available to the sentencing authority are so broad that, normally, there will not be only one sentence that is appropriate for a particular appellant. Thus, it may be more fitting for this Court to find that a particular sentence "is not inappropriate," rather than "is appropriate."

United States v. Joyner, 39 M.J. 965, 966 (A.F.C.M.R. 1994).

The maximum punishment for Appellant's three convictions of domestic violence at a special court-martial was a bad conduct discharge, forfeiture of two-thirds pay per month for twelve months, and confinement for twelve months. (MCM, App. 2, ¶ 19(a)). The same maximum punishment was available even in the event this Court only affirms the findings for the lesser included offense of assault consummated by battery. (Id.).

Appellant's sentence was not inappropriately severe, and Appellant's sentence was appropriate based on his actions. Appellant continues to implicitly argue that the altercation was JH's fault. He described it as "a dispute over house keys with a non-paying resident who had violated house rules." (App. Br. at 20). Appellant also argued this was an "isolated incident without any noticeable injury." (Id.). These assertions fly in the face of the record. In the first place, JH never agreed to obey Appellant's curfew rule. (R. at 115). She specifically told him she was not his "child," and he couldn't give her a curfew like that. (Id.). Secondly, she was not a non-paying resident because she had paid the gas bill the entire time she lived in the house. (R. at 113). Thirdly, this was not an isolated incident but an escalation of a prior one: Appellant had already changed the house locks on JH once to control her access to the residence. (R. at 115). Now, he got into a fight with her for the key itself. Finally, JH's face, neck, right-side ribs, right arm, and right wrist were covered in dark bruises from Appellant's attack. (Pros. Ex. 1, 2). These were all noticeable injuries. Appellant hit JH so hard that, according to AG, there were still bruises visible on JH's body 10 to 14 days after the incident. (R. at 403). In addition to this, Appellant lied to Corporal JS and denied hitting JH even when there was already a "red mark" forming on JH's cheek. (Pros. Ex. 6). Appellant's attempt to downplay the severity of his domestic violence is not persuasive.

JH's unsworn statement explained the pain and fear she endured following Appellant's attack, which include nightmares and panic attacks when she left her house. (Court Ex. A). AG testified that JH started crying when asked if she was okay. (R. at 265). AG also testified that JH's injuries also impacted her work because she needed to be physical with her physical therapy patients. (Id.). AG saw JH was "slow" and "in pain" while stretching her patients. (Id.). JH's

daughter, AH, said her mother was "more frightened and shaken up" after the domestic violence. (R. at 407).

Considering the above, Appellant's actions and the pain and suffering inflicted on JH make a bad conduct discharge an appropriate sentence. But on top of that, trial defense counsel did not provide a particularly strong sentencing argument. While Appellant had decent performance report across his nearly 15 years of service, that is not enough to mitigate the severity of his convictions. (Pros. Ex. 9, 10). After serving over a decade in the military at the time of the offense, Appellant should have known what acceptable behavior was. As a Technical Sergeant, Appellant was expected to lead by example for junior airman. Instead, he started an argument with JH that escalated into committing multiple acts of domestic violence against JH. That is not the standard expected of anyone in the Air Force, let alone a non-commissioned officer. Appellant's reduction to Airman Basic and bad conduct discharge were both appropriate sentences, as was his brief period in confinement.

Regarding rehabilitative potential, Appellant also provided character letters that described Appellant as a good neighbor and a "pleasant" man (Def. Ex. B-E), but none of these letters came from people who had been in an intimate relationship or cohabited with Appellant. As JH made clear in her impact statement, she is the one who learned what Appellant is really like. JH is the one who had nightmares because of Appellant's attack and lived in fear of running into Appellant on the street. (Court Ex. A). Furthermore, rehabilitative potential is not specific to military service. It includes Appellant's rehabilitative potential to be "useful and constructive" in "society." RCM 1001(b)(5). Appellant did apologize to JH in his unsworn statement, but he also implicitly placed some blame for his actions on his lack of a father figure and the way his

older siblings "acted out." (R. at 416-417). This demonstrated that Appellant was not entirely taking responsibility for his actions, and did not have high rehabilitative potential.

Appellant received far less than the maximum allowable sentence for his convictions. Appellant's sentence was not inappropriately severe, nor would it harm the public's faith in the military justice system as he contends. (App. Br. at 22). This Court should preserve Appellant's full sentence to ensure "that justice is done and that the accused gets the punishment he deserves." United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988). To do otherwise would be grant mercy, which is not within this Court's power to do. Appellant's punishment is appropriate *even if* this Court only affirms his sentence for assault consummated by battery. Therefore, this Court should not grant sentencing relief under this assignment of error.

CONCLUSION

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

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

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 25 March 2025.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* *v.* Technical Sergeant (E-6) **MICHAEL EDWARDS** United States Air Force *Appellant*	**REPLY TO APPELLEE'S ANSWER TO ASSIGNMENTS OF ERROR** Before Panel No. 1 Case No. ACM S32787 1 April 2025

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

REPLY BRIEF ON BEHALF OF APPELLANT

ARGUMENT

I.

THE GOVERNMENT FAILED TO PROVE THAT JH WAS AN "INTIMATE PARTNER" UNDER ARTICLE 128b, UCMJ, 0.THE TIME OF THE ALLEGED OFFENSE.

The Government's theory of guilt under Article 128b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928b, rests almost entirely on an expansive and legally unsupportable definition of "intimate partner" that would effectively criminalize any dispute between former romantic partners who happen to share a residence—regardless of how long ago their relationship ended or how transactional their current arrangement has become. This overbroad interpretation contradicts both statutory language and common sense, while creating dangerous precedent for future cases.

The relevant legal authorities—10 U.S.C. § 928b(c)(3), 18 U.S.C. § 921(a)(32), and the President's Executive Order No. 14062 amending the Manual for Courts-

Martial—make clear that the term "intimate partner" demands more than a past romantic relationship or shared residence. The Government's case rests on a misapplication of that standard and, as such, TSgt Edward's Article 128b conviction should be set aside.

A. Statutory and Regulatory Framework Requires Present, Substantive Intimacy

The Government's position reduces to a single flawed syllogism: (1) JH and TSgt Edwards once had a romantic relationship; (2) They continued to reside in the same house; (3) Therefore, JH remained an "intimate partner" indefinitely. (Answer Brief (hereinafter Gov. Ans.) at 10-11.) This reasoning ignores the qualifying language in Executive Order No. 14062, which requires courts to evaluate "the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved." 87 Fed. Reg. 4763, 4780 (Jan. 31, 2022).

Notably, the Government entirely fails to reasonably address the temporal question—whether the romantic or intimate nature of a relationship must exist at or near the time of the alleged offense. This omission is telling because the record unequivocally establishes that any romantic relationship between TSgt Edwards and JH terminated approximately one year before the incident. (R. at 142.) The Government cannot dispute this critical fact, so it simply ignores the timing issue altogether.

Article 128b criminalizes domestic violence committed against "a spouse, an intimate partner, or an immediate family member." 10 U.S.C. § 928b(b)(1). Under 18 U.S.C. § 921(a)(32), an "intimate partner" means "with respect to a person, the spouse

of the person, a former spouse of the person, a person who shares a child in common with the person, and a person who cohabitates or has cohabitated with the person." Although this language appears broad, it is not without limits. Executive Order No. 14062, which amended the 2022 Manual for Courts-Martial, provides important clarification:

> (3) *Intimate partner*. The term "intimate partner" means-
>
> > (a) one's former spouse, a person with whom one shares a child in common, or a person with whom one cohabits or with whom one has cohabited as a spouse; or
> >
> > (b) a person with whom one has been in a social relationship of a romantic or intimate nature, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

Exec. Order No. 14062, 87 Fed. Reg. 4763, 4780 (Jan. 31, 2022).

This definition explicitly requires a fact-specific inquiry into whether the relationship was romantic or intimate in nature—not merely whether it existed at all. The decisive question in this case should be whether that intimacy existed at the time of the alleged offense.

B. The Government Failed to Establish a Continuing Romantic or Intimate Relationship

While the Government introduced evidence that TSgt Edwards and JH began dating and cohabitated for a time, the record makes clear that the romantic relationship began in 2021, (R. at 141), and ended in 2022. (R. at 142.) JH testified that she moved into a separate bedroom, refused Edwards's attempts to impose curfews, and actively planned to leave the residence. (R. at 113-115, 138-140.) By

June 2023, the date of the incident, they were not a couple, shared no children, and lived independent lives under the same roof. (See R. at 142, 113-115, 138-140.)

The Government's assertion that past romantic involvement and continued cohabitation alone satisfy the statutory standard is both legally and factually flawed. (Gov. Ans. at 10-11.) There was no evidence that TSgt Edwards and JH maintained an emotional, physical, or otherwise intimate partnership in the year leading up to the altercation. The "type of relationship," "frequency of interaction," and "length of relationship," (Exec. Order No. 14062. at 4780), all support the conclusion that the romantic connection had dissolved. By all accounts, their relationship more closely resembled that of estranged roommates or landlord/tenant, not intimate partners.

C. The Government's Arguments Misapply the Law and Mischaracterize the Facts

The Government relies on *United States v. Daddario*, 2023 CCA LEXIS 499 (A.F. Ct. Crim. App. Dec. 1, 2023) (unpub. op.),[1] to support its position, but that reliance is misplaced. In *Daddario*, this Court stated that one of the named victims in the case, TD, was the ex-girlfriend of the appellant at the time of the strangulation. (*Id.* at *3.) This was contradictory to the Government's contention in their Answer that TD was the appellant's girlfriend at the time of the strangulation. (Government Answer to Assignment of Error, 2, Aug. 3, 2023.) There is no justification for this contradiction in the filings. (*Compare Id.* with *Daddario* at *3.) However, even if TD was the appellant's ex-girlfriend at the time, the opinion goes on to state that the

[1] Pursuant to Rule 18(e), the unpublished opinion is appended to this filing, sans a motion to attach.

appellant was trying to reestablish the romantic relationship at the time of the assault, and it was the TD's rejection that spurred the appellant's assault. This relationship dynamic fundamentally differs from the relationship between TSgt Edwards and JH. By the time of the charged offense, it is indisputable that all romantic elements of the relationship between TSgt Edwards and JH had long ceased, and their interactions were largely transactional and landlord/tenant in nature.

The fact that JH paid the gas bill or shared a physical residence does not transform their dynamic into one of legal intimacy. If the statutory standard were interpreted to cover any prior romantic partners who cohabitated and shared financial responsibilities at any point in time, the "intimate partner" definition would lose all functional limitations—contravening both the statutory text and the executive interpretation.

Perhaps the most troubling aspect of the Government's argument is its suggestion that TSgt Edwards' enforcement of house rules—including restrictions on entry times—evinces the type of controlling behavior characteristic of intimate partner abuse. (Gov. Ans. at 11.) This reasoning fails to distinguish between the legitimate authority a property owner has to establish rules for occupants and the coercive control that can exist in abusive intimate relationships.

As the record demonstrates, TSgt Edwards implemented house rules in direct response to JH's pattern of triggering the security system at wee hours of the morning. (R. at 143-144.) His motives could have been to preserve the peaceful

enjoyment of his own home—not controlling JH as a partner. When this arrangement became untenable, he requested the return of his house key and called law enforcement to mediate the dispute when it became hostile. (R. at 196.) These are the actions of a frustrated landlord, not an abusive intimate partner.

D. The Statutory Framework Does Not Support the Government's Definition of "Intimate Partner."

The Government's interpretation stretches the statutory definition of "intimate partner" far beyond its intended scope. Congress and the President deliberately included qualifying language—requiring consideration of present romantic dynamics, not just historical ones. *See* Exec. Order No. 14062, at 4780. The Government's interpretation would render any former cohabitant or ex-partner a permanent "intimate partner," thereby undermining both due process and the targeted purpose of Article 128b.

Such an interpretation would sweep in a vast range of living situations and relationships that bear little resemblance to what Congress and the President intended to regulate under the domestic violence statute. It would invite overcriminalization in cases like this, where the facts simply do not support an inference of domestic violence between intimate partners.

Conclusion

At the time of the alleged offense, JH did not meet the statutory definition of "intimate partner" under Article 128b, as incorporated through 10 U.S.C. § 928b(c)(3), 18 U.S.C. § 921(a)(32), and Exec. Order No. 14062. The Government attempts to transform a straightforward landlord-tenant dispute into a domestic violence case by

stretching the definition of "intimate partner" beyond recognition. The facts clearly establish that TSgt Edwards and JH were not in a romantic or intimate relationship at the time of the incident. Their cohabitation was a pragmatic arrangement following the termination of their romance which had concluded a full year earlier. Because JH was not TSgt Edwards' "intimate partner" as defined by Article 128b, the legal predicate for the domestic violence conviction is missing. This Court should therefore set aside the findings and sentence.

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

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION IN EXCLUDING EVIDENCE OF JH'S PRIOR INCONSISTENT STATEMENTS.

In a case where credibility was the linchpin of the Government's theory, the military judge erred by excluding testimony from defense paralegal TL concerning a prior inconsistent statement made by JH—the Government's sole eyewitness. The Defense sought to admit testimony that JH previously stated she "didn't know how she fell into the dresser," a statement that starkly diverged from her trial testimony, where she ultimately claimed she fell because Appellant grabbed her. (*Compare* R. at 343-344, *with* R. at 122.) The exclusion of this testimony significantly impaired the Defense's ability to challenge JH's credibility and deprived TSgt Edwards of a meaningful opportunity to test the reliability of the Government's version of events.

A. Mil. R. Evid. 613(b) Should Have Been Applied Flexibly in the Interest of Justice.

While Mil. R. Evid. 613(b) requires that a witness be given an opportunity to explain or deny a prior inconsistent statement, it expressly permits admission "if justice so requires." This safeguard is particularly vital in a trial where the conviction rests almost entirely on the testimony of a single witness whose version of events evolved under questioning. The military judge's rigid interpretation—refusing to allow the Defense to admit TL's testimony because the statement was not first raised on cross-examination—prioritized technical procedure over justice.

B. The Excluded Statement Was Highly Material and Not Cumulative.

The Government contends that JH's statement was merely cumulative of her in-court admission that she "lost balance" and could not recall if she was pushed. Gov. Ans. at 24. However, the prior statement—an unequivocal "I don't know how I fell"—was distinct and potentially more damaging to her credibility. (*Compare* R. at 122, *with* 128-129.) The inconsistency undercut the Government's effort to frame the fall as an intentional act by TSgt Edwards and supported the Defense's theory that any fall was accidental or unintentional. This nuance was crucial in a case lacking direct physical evidence to prove intent. The exclusion of this impeachment evidence deprived the Defense of an essential tool for raising reasonable doubt.

C. The Exclusion Had a Substantial Influence on the Findings.

Even assuming arguendo that the military judge's exclusion of JH's prior inconsistent statement was not an outright legal error, its impact on the proceedings was far from harmless, it is clear it had a substantial influence on the findings. "For

nonconstitutional evidentiary errors, the test for prejudice 'is whether the error had a substantial influence on the findings.'" *United States v. Kohlbek*, 78 M.J. at 334 (quoting *United States v. Fetrow*, 76 M.J. 181, 187 (C.A.A.F. 2017)). "In conducting the prejudice analysis, this Court weighs: (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *Id*. (citations omitted) (internal quotation marks omitted). Each of these factors supports a set aside of the findings and sentence.

1. Strength of the Government's Case

The Government's case rested almost exclusively on the testimony of JH, whose account was uncorroborated by any third-party eyewitnesses and contradicted in key respects by contemporaneous evidence. There was no forensic or surveillance evidence directly linking TSgt Edwards to an intentional act of violence, and the physical evidence—such as the bite mark—raised legitimate questions about the accuracy of JH's description of the incident. Given this context, the Government's case was not strong; it depended entirely on the factfinder crediting JH's version of events over TSgt Edwards's. This first factor weighs heavily in favor of setting aside the findings and sentence.

2. Strength of the Defense Case

The Defense's strategy centered on impeaching JH's credibility by pointing to inconsistencies in her testimony and highlighting gaps in the Government's physical evidence. In a credibility battle, where both parties agree a confrontation occurred

but dispute its nature and escalation, the ability to challenge the reliability of the sole government witness is not merely important—it is essential. The exclusion of impeachment material undercut the Defense's ability to present a cohesive narrative and left its case significantly disadvantaged. This second factor likewise favors setting aside the findings and sentence.

3. Materiality of the Excluded Evidence

The excluded statement—JH's prior admission that she "didn't know how she fell into the dresser"—was not tangential. (R. at 336.) It struck at the heart of a key disputed fact: whether JH's fall and resulting injuries were caused by an intentional act of violence or were incidental to a struggle over keys. This detail had implications for both the element of bodily harm and the degree of intent required to sustain a domestic violence conviction. Moreover, because JH's trial testimony suggested she had gained clarity over time regarding the fall, the excluded statement undermined the consistency of her narrative and supported the Defense theory of embellishment or reconstruction. Thus, this evidence was highly material and probative.

4. Quality of the Evidence

While brief, the prior inconsistent statement was clearly articulated and relayed by a competent witness (TL), who directly participated in the Defense team's pretrial preparation. The statement was not speculative or vague; it was a direct admission of uncertainty regarding a key moment in the alleged assault. Furthermore, the Government would have had the opportunity to rehabilitate JH on this point—either by recalling her or cross-examining TL. The excluded evidence was,

therefore, reliable and of sufficient quality to influence the factfinder's assessment of JH's credibility.

Taken together, these factors reveal that the exclusion of the prior inconsistent statement had a substantial influence on the findings. It deprived the Defense of a critical tool to confront the Government's only eyewitness and likely affected the factfinder's perception of both parties. In a close credibility case, where conviction hinged on the narrative of a single witness, this Court should have grave doubt as to whether the verdict was unaffected by the error.

D. The Substantial Inconsistencies Within the Government's Evidence Undermine the Legal and Factual Sufficiency of the Conviction.

Beyond the evidentiary error, the Government's case suffers from material contradictions and implausibility that raise serious doubts about the conviction's integrity. JH's shifting accounts of how she fell—first stating uncertainty, then offering specificity only after suggestive questioning—undermine her credibility and signal post hoc narrative shaping. Her calm demeanor captured on body-worn camera footage stands in stark contrast to her dramatic testimony of fearing for her life, a disparity the Government attributes to a short time-lapse that does not plausibly explain such a radical emotional shift. (Gov. Ans. at 15.)

Further, objective physical evidence fails to corroborate critical aspects of JH's account. Notably, the bite mark on TSgt Edwards' chest—a key factual point—was inconsistent with JH's version of events. (*Compare* R. at 156-157, *with* 124.) According to JH, the bite occurred while she was in a restrictive headlock. (R. at 156-

157.) Yet photographs introduced at trial depict a direct bite mark inconsistent with that physical position, casting further doubt on the accuracy of her testimony.

The Government insists that minor discrepancies in witness testimony do not rise to the level of legal or factual insufficiency. (Gov. Ans. at 12-15.) While that may be true in isolation, the record here reveals a pattern of significant inconsistencies. Each may appear manageable when viewed individually, but collectively, they paint a portrait of unreliability. This cumulative effect demands heightened scrutiny, especially when a conviction hinges entirely on the account of one witness.

WHEREFORE, TSgt Edwards respectfully requests that this Honorable Court set aside his convictions and sentence due to this evidentiary error.

III.

IF THE CONVICTION IS AFFIRMED ONLY AS TO THE LESSER INCLUDED OFFENSE OF ASSAULT CONSUMMATED BY BATTERY UNDER ARTICLE 128, THIS COURT SHOULD REASSESS THE SENTENCE AND REDUCE ACCORDINGLY

Should this Honorable Court find the evidence legally or factually insufficient to sustain the conviction for domestic violence under Article 128b, but sufficient to affirm the lesser included offense of assault consummated by battery under Article 128, 10 U.S.C. § 928, UCMJ, a sentence reassessment is both required and warranted. The military judge imposed the original sentence in light of the enhanced punitive exposure and stigma associated with a domestic violence conviction, and those considerations no longer apply upon reduction to a lesser charge.

A. The Legal Standard Requires Sentence Reassessment Upon Partial Affirmance

When an appellate court sets aside one or more findings of guilt, it must either reassess the sentence or order a rehearing on the sentence. *See United States v. Winckelmann*, 73 M.J. 11, 15 (C.A.A.F. 2013). A reassessment may be conducted only if the court is confident that the "sentence would have been at least of a certain magnitude" had the prejudicial error not occurred and that the sentence actually imposed was not influenced by the error. *United States v. Sales*, 22 M.J. 305, 307-308 (C.M.A. 1986).

In setting aside the intimate partner element of the Article 128b conviction, the conviction changes from a statute carrying a maximum punishment that permits up to three years additional confinement due to the domestic violence enhancement under Article 128b, to one with a maximum of six months confinement (for assault consummated by battery). Therefore, based on the punitive exposure, it cannot be said with confidence that the sentence would have remained the same.

B. The Military Judge Likely Relied on the Domestic Violence Label in Adjudging the Sentence

In this case, the stigma and consequences associated with a domestic violence conviction likely informed the original sentence. Convictions under Article 128b carry collateral implications—both within the military system and beyond—affecting firearm rights, career prospects, and future liberty interests. See, e.g., 18 U.S.C. § 922(g)(9) (prohibiting firearm possession following a conviction for a misdemeanor crime of domestic violence). These concerns are not triggered by a conviction under Article 128 alone.

By contrast, assault consummated by battery does not carry the same collateral consequences or social stigma. Affirming only this lesser offense removes the basis for any punitive discharge and undermines the justification for significant confinement.

C. The Underlying Conduct Does Not Support a Harsh Sentence Absent the Domestic Violence Designation

Even assuming some level of culpability, the nature of the conduct—an attempt to retrieve house keys following a personal disagreement—does not warrant severe punishment. There was no sustained physical attack, no weapon involved, and no pattern of abuse presented. JH herself stated she could not recall exactly how she fell, and the Government presented no evidence of injury beyond the incidental contact. Moreover, the fact that TSgt Edwards promptly called law enforcement undermines the notion that his conduct was predatory or controlling in a way that merits heightened punishment. There is a meaningful change in the sentencing calculus when the basis for labeling the conduct "domestic violence" is removed.

D. A Conviction for Article 128 Alone Does Not Warrant a Punitive Discharge or Significant Confinement Under the Circumstances of This Case

When evaluating the appropriate sentence for an assault consummated by battery under Article 128, the nature of the offense, the degree of harm caused, and the accused's overall military record are essential considerations. Article 128 is a misdemeanor-level offense, and in cases involving isolated, low-level physical contact or evidence of ongoing abuse, courts can impose lesser forms of punishment that fall short of punitive discharge or substantial confinement. *See generally* Article 128

(noting that assault consummated by battery can carry up to six months' confinement but does not require a punitive discharge).

Here, the record demonstrates that the physical contact at issue was limited in scope and duration. There was no use of a weapon, no evidence of premeditation, and no injury requiring medical treatment. JH testified that she could not recall exactly how she fell into the dresser, and there is no indication of ongoing violence or a pattern of coercive control. TSgt Edwards initiated the call to law enforcement, suggesting a desire to de-escalate rather than conceal or escalate the situation.

Additionally, there is no indication in the record that TSgt Edwards had any prior disciplinary history or negative performance evaluations that would justify characterizing this offense as part of a broader behavioral pattern. Absent such aggravation, the sentence should not unreasonably impose career-ending consequences such as a punitive discharge for first-time misconduct.

For these reasons, if the Court affirms only the lesser included offense of assault consummated by battery, the sentence should be reassessed and reduced to reflect the limited scope of the misconduct. At most, an appropriate sentence might include a reprimand and a reduction in grade. Alternatively, the matter should be remanded for a new sentencing hearing under Article 66(f), 10 U.S.C. § 866(f), UCMJ, to ensure the sentence is tailored to the offense actually sustained on appeal.

WHEREFORE, TSgt Edwards respectfully requests that this Honorable Court reassess his sentence by setting aside the bad-conduct discharge and restoring his rank.

Respectfully submitted,

CATHERINE M. CHERKASKY, Esq.
Civilian Defense Counsel
Golden Law, Inc.
1330 Avenue of the Americas, 23rd Floor
New York, NY 10019
(949) 491-1661
katie@goldenlawinc.com
NY Bar: 6022842
CA Bar: 266492
IL Bar: 6311030

JOYCLIN N. WEBSTER, 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: joyclin.webster.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 Goverment Trial and Appellate Operations Division on 1 April 2025.

Respectfully submitted,

JOYCLIN N. WEBSTER, 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: joyclin.webster.1@us.af.mil

APPENDIX

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40351

UNITED STATES
Appellee

v.

Andrew M. DADDARIO
Staff Sergeant (E-5), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 1 December 2023

Military Judge: Matthew P. Stoffel.

Sentence: Sentence adjudged 24 May 2022 by GCM convened at Hill Air Force Base, Utah. Sentence entered by military judge on 18 August 2022: Dishonorable discharge, confinement for 24 months, reduction to E-1, and a reprimand.

For Appellant: Major David L. Bosner, USAF.

For Appellee: Colonel Naomi P. Dennis, USAF; Lieutenant Colonel Thomas J. Alford, USAF; Captain Olivia B. Hoff, USAF; Captain Jocelyn Q. Wright, USAF; Mary Ellen Payne, Esquire.

Before RICHARDSON, DOUGLAS, and WARREN, *Appellate Military Judges*.

Judge WARREN delivered the opinion of the court, in which Senior Judge RICHARDSON, and Judge DOUGLAS joined.

WARREN, Judge:

A military judge sitting as a general court-martial convicted Appellant, in accordance with his pleas and pursuant to a plea agreement, of two specifications of assault consummated by a battery (one against his spouse SD and one against his intimate partner KR) and two specifications of domestic violence (one against his spouse SD and one against another intimate partner TD), in violation of Articles 128 and 128b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 928, 928b.[1,2] The military judge sentenced Appellant, within the agreed-upon sentencing parameters established in Appellant's plea agreement, to a dishonorable discharge, confinement for 24 months, reduction to the grade of E-1, and a reprimand.[3] The convening authority took no action on the findings or sentence.

Appellant raises three issues on appeal, which we have consolidated as follows: (1) whether the military judge erred when he admitted a written victim unsworn statement from KR during the sentencing hearing; and (2) whether trial defense counsel was ineffective by (a) failing to object to the admission of that statement when KR was not physically present to offer it at the court-martial, (b) referencing the wrong law in his clemency memorandum to the convening authority, and (c) advising Appellant, after sentence was adjudged in his court-martial, that Appellant would "automatically" earn two-for-one post-trial confinement credit for each day spent in the Weber County Jail.[4]

Finding no error that materially prejudiced a substantial right of Appellant, we affirm the findings and sentence.

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[1] The charged time frame for the assault consummated by a battery against SD was "on or about 14 January 2018." As such, the applicable punitive article is found in the *Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*). Unless indicated otherwise, all other references to the UCMJ and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

[2] The charged time frame for both domestic violence convictions occurred after 1 January 2019; as such, Article 128b, UCMJ, to the 2019 *MCM*, applies. *See* National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 532(a)–(b), 132 Stat. 1636, 1759–60 (2018).

[3] A total of six charges consisting of 11 specifications were referred against Appellant. Pursuant to the plea agreement, the convening authority dismissed all remaining charges and specifications with prejudice after the entry of sentence for the offenses to which Appellant pleaded guilty.

[4] Issue (3) was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

I. BACKGROUND

Appellant physically assaulted his spouse and two intimate partners on three separate occasions between January 2018 and August 2020. First, Appellant kicked his then wife SD in the face in January 2018 (Specification 1 of Charge IV) and pointed a firearm at her head while he held his finger on the trigger for 15 seconds in December 2019 (Specification 1 of Charge V)—the latter incident causing her to have a panic attack. On or about 5 April 2020, Appellant strangled his then ex-girlfriend TD after Appellant invited TD to his house claiming he was having suicidal ideations (Specification 3 of Charge V).[5] Once TD arrived, Appellant sought to reinitiate their brief dating relationship. When she declined, Appellant strangled her with a force of "7" on a 1-to-10 scale and with such force that she struggled to get free of his choke hold. As she struggled to break free, TD heard a "popping noise" in her left ear followed by pain that persisted for three to four weeks. Finally, over the course of one evening in August 2020, Appellant forcefully grabbed and held his then girlfriend KR (a civilian) by the wrists four separate times after an argument where she informed Appellant that she wanted to end their three-month-long dating relationship. The wrist grabbing occurred in conjunction with Appellant repeatedly holding KR on his bed as she attempted to leave the house (Specification 3 of Charge IV).

On 18 May 2022, Appellant entered into a plea agreement and agreed to plead guilty to Specifications 1 and 3 of Charge IV and Specifications 1 and 3 of Charge V. In exchange for his guilty pleas to the four specifications, the convening authority and Appellant agreed to a dishonorable discharge and agreed to confinement limitations. The plea agreement specified a sentence limitation of no less than 4 months and no more than 6 months for Specification 1 of Charge IV, and no less than 12 months and no more than 24 months for each of the remaining guilty-plea offenses, with all terms of confinement to run concurrently. There were no other limitations on the sentence.

II. DISCUSSION

A. Victim Impact Statement

Appellant contends that the military judge committed plain error when he did not *sua sponte* exclude KR's entire written victim unsworn statement because neither KR nor an "authorized representative" was physically present at the court-martial to deliver her statement during presentencing proceedings. For the first time on appeal, Appellant argues that a victim's right to be reasonably heard is tethered to the physical presence of the crime victim or designee at the presentencing proceeding pursuant to Rule for Courts-Martial

[5] TD was an active-duty military servicemember at the time of this incident.

(R.C.M.) 1001(a)(3)(A). Appellant further argues that even if physical presence of the victim was not required, the military judge ought still to have refused admission of KR's victim unsworn statement at sentencing because surrounding circumstances adduced at trial failed to evince KR's clear intent to have it offered at Appellant's court-martial. We disagree. Instead, we hold that Appellant waived this issue when his trial defense counsel made a knowing and tactical decision *not* to object upon these grounds at trial when given an opportunity to do so. Further, we choose not to pierce that waiver.

1. Additional Background

The military judge received a total of three victim unsworn statements at trial, one each from SD, TD, and KR. But whereas both SD and TD were represented by victims' counsel, KR was not. SD's counsel offered SD's written victim impact statement as a court exhibit on her behalf and SD read it verbatim for the court. TD's counsel admitted TD's written victim impact statement as a court exhibit on her behalf, but neither she nor her counsel read it verbatim for the court. Trial counsel offered KR's four-page, signed and dated victim impact statement to the court-martial. Given the physical absence of KR, prior to admitting KR's victim unsworn statement, the military judge asked if there was "something that would reflect a desire that [KR] be heard in this proceeding through this written statement[.]" Trial counsel then provided Appellate Exhibit III: an email correspondence between trial counsel and KR on 6 May 2022 containing KR's submission of her typed, four-page, unsworn statement as an attachment. That email correspondence reflected trial counsel expressly advising KR of the trial date, plea negotiations, and of KR's right to submit a victim unsworn statement.

In transmitting her written victim unsworn statement to trial counsel, KR relayed both her determination to write it and her fear in submitting it. The entirety of KR's brief email transmittal to trial counsel reads:

> Hello [trial counsel],
>
> *Here is the statement for this case*. Let me know if you could access the document.
>
> Would [Appellant] read my statement? I would be extremely uncomfortable if he can. I just don't want him to come for me. I [had] been putting this off when we first talk[ed] about it because of my experiences I have with him. We left [o]n really horrible terms. *I knocked it out to rip off the band-aide* [sic]. I know there is stuff in place for that not to happen but it scares me to the core to [sic] the possibility.

(Emphasis added).

Trial defense counsel raised no objection to how KR's statement was provided to the court (*i.e.*, trial counsel physically delivering it), nor any objection based on KR's absence in the courtroom. In his post-trial affidavit concerning this issue, Appellant's circuit defense counsel, Major (Maj) AB, explains:

> If I were to object, I believed that the legal office could and would find a way to correct the foundational defects mentioned by appellate defense counsel. If the legal office were to in fact provide live testimony or additional foundation, such testimony would be more impactful than the unsworn statement as provided.

Instead, the only objections to KR's written victim unsworn statement at trial concerned some discrete objections to the substance of the statement. To resolve those objections, trial counsel and trial defense counsel agreed to redact some portions of the unsworn statement. After noting the resolution of those objections on the record and without further objection, the military judge admitted KR's victim unsworn statement. Trial counsel did not read KR's written victim unsworn statement into the record.

Sentencing arguments by both trial counsel and trial defense counsel focused primarily on the stipulated facts and Appellant's statements during his guilty plea inquiry. Trial counsel made little use of KR's victim impact statement—it received a passing mention consisting of only three transcribed lines of trial counsel's sentencing argument that spanned 111 lines total.[6] In the end, the military judge sentenced Appellant to the minimum period of confinement permitted under the plea agreement for the offense against KR: 12 months.

2. Law

a. ***Waiver***

When an appellant does not raise an objection to the admission of evidence at trial, we first must determine whether the appellant waived or forfeited the objection. *See United States v. Sweeney*, 70 M.J. 296, 303–04 (C.A.A.F. 2011). "'Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993) (additional citation omitted)). While appellate courts ordinarily do not ascribe waiver based upon mere failure to object, a *purposeful decision* not to object, when cognizant of the underlying issue, may constitute waiver. *United States*

[6] The three lines read: "Your Honor, in her statement, [KR] again talks about the small amount of physical pain of her wrists being held and how it left red marks, but she goes much deeper into the mental anguish that this caused, how to this day she's still terrified of [Appellant]."

v. Davis, 79 M.J. 329, 331–32 (C.A.A.F. 2020) (holding where appellant does not just fail to object but rather affirmatively declines to object to the military judge's instructions, and offers no additional instructions, despite counsel's knowledge of applicable precedents, appellant waives all objections to the instructions); *United States v. Swift*, 76 M.J. 210, 217 (C.A.A.F. 2017) (holding that appellant's failure to object to admission of his confession constituted waiver); *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009) (holding that appellant's entry into a stipulation of expected testimony at trial expressly waived objection that witness be physically produced for trial, and to the substance of the stipulation).

If the appellant waived the objection, then the appellant is "preclude[d] . . . from raising the issue before either the Court of Criminal Appeals or [the United States Court of Appeals for the Armed Forces (CAAF)];" however, we still have an affirmative obligation under Article 66(d), UCMJ, 10 U.S.C. § 866(d), to examine the entire record to determine whether "to leave an [appellant's] waiver intact or to correct the error." *United States v. Chin*, 75 M.J. 220, 223 (C.A.A.F. 2016). That said, despite this authority "we will only ignore waiver in the most deserving cases." *United States v. Blanks*, No. ACM 38891, 2017 CCA LEXIS 186, at *22 n.11 (A.F. Ct. Crim. App. 17 Mar. 2017) (unpub. op.), *aff'd*, 77 M.J. 239 (C.A.A.F. 2018).

b. Plain Error

Where a discrete objection was not waived, but rather merely forfeited, then a plain error standard of review applies. *See United States v. Tyler,* 81 M.J. 108, 113 (C.A.A.F. 2021) ("While the military judge is the gatekeeper for unsworn victim statements, an accused nonetheless has a duty to state the specific ground for objection in order to preserve a claim of error on appeal."). Thus, for forfeited objections at trial, we review claims of erroneous admission of a victim unsworn statement for plain error. *United States v. Halter*, No. ACM S32666 (f rev), 2022 CCA LEXIS 254, at *10–11 ((A.F. Ct. Crim. App. 4 May 2022) (unpub. op.). Under the plain error standard, an appellant must show "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *Id.* at *11 (quoting *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007)).

In assessing for possible error, we review de novo a military judge's interpretation of R.C.M. 1001(c) as a question of law. *United States v. Barker*, 77 M.J. 377, 382 (C.A.A.F. 2018) (citation omitted). If there is plain error in the admission of a victim statement under R.C.M. 1001, the test for prejudice "is whether the error substantially influenced the adjudged sentence." *Id.* at 384 (citation omitted). When determining whether an error had a substantial influence on a sentence, this court considers the following four factors: "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the

materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Bowen*, 76 M.J. 83, 89 (C.A.A.F. 2017). An error is less likely to be prejudicial if the fact was already obvious from the other evidence presented at trial. *See United States v. Cunningham*, 83 M.J. 367, 372 (C.A.A.F. 2023) (first citing *United States v. Edwards*, 82 M.J. 239, 241 (C.A.A.F. 2022), and then citing *United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007) (quoting *United States v. Cano*, 61 M.J. 74, 77–78 (C.A.A.F. 2005) (noting error likely to be harmless where evidence concerned "would not have provided any new ammunition")) (affirming a finding of no prejudice where vast majority of contents of improperly admitted victim impact statement were already presented through admissible trial and presentencing evidence).

3. Analysis

This case initially calls upon us to first determine if Appellant waived his objections to the admission of KR's unsworn statement. Second, assuming we were to reach the merits of the issue, Appellant's assignment of error presents two discrete inquiries: (1) whether Article 6b, UCMJ, 10 U.S.C. § 806b, or R.C.M. 1001(c), requires a victim to be physically present at a court-martial in order to exercise the reasonable right to be heard, and (2) whether it was error for trial counsel to physically deliver KR's independently drafted victim unsworn statement.

We conclude that Appellant waived the issue he now wishes to assert for the first time on appeal, namely: whether there was inadequate foundation for KR's unsworn statement because she was not physically present. Trial defense counsel affirmed under oath in their post-trial declarations that they made a purposeful and tactical decision not to object to KR's absence from the court-martial to avoid a more compelling form of her statement from being offered, namely: KR potentially delivering the statement telephonically where the emotional impact of the statement would likely be enhanced. Whatever the tactical merits of that decision (discussed at Section II.B, *infra*), that was not a failure to recognize the issue by trial defense counsel—it was an affirmative decision not to object.

Our conclusion is the same whether Appellant's counsel correctly understood the applicable law or not. Circuit defense counsel's declaration demonstrates that both he and appellate defense counsel believed that a crime victim must be physically present to exercise her right to be reasonably heard: "I believed that the legal office could and would find a way to correct the *foundational defects* mentioned by appellate defense counsel." (Emphasis added). Even assuming Appellant's counsel are incorrect (*see* analysis at Section II(B)(3), *infra*), that does not change the fact that Appellant's trial defense counsel "intentionally relinquished" what they perceived to be a "known right."

When specifically queried by the military judge as to whether the Defense had any objections to KR's written victim unsworn statement, trial defense counsel made a tactical decision not to object based on KR's absence at trial or any purported lack of clear intent by KR to submit her written unsworn statement for consideration at trial. Trial defense counsel raised only substantive objections to KR's unsworn statement with the military judge, and informed the judge that the parties had come to an agreement to overcome those substantive objections. In so doing, trial defense counsel waived the issue now raised on appeal as to the foundational requirements of KR's victim unsworn statement because "under the particular facts of this case, . . . 'counsel consciously and intentionally failed to save the point and led the trial judge to understand that counsel was satisfied.'" *United States v. Elespuru*, 73 M.J. 326, 329 (C.A.A.F. 2014) (quoting *United States v. Mundy*, 2 C.M.A. 500, 503 (C.M.A. 1953)).

Finally, we have also evaluated whether to exercise our authority under Article 66(d), UCMJ, to act despite Appellant's waiver (*Chin,* 75 M.J. at 223). We decline to do so.[7]

B. Ineffective Assistance of Counsel

Notwithstanding Appellant's waiver as to the substantive admissibility of KR's written victim impact statement, Appellant endeavors to attack that decision by his trial defense counsel, asserting that his counsel were ineffective by "failing" to object when the victim herself did not physically offer the victim impact statement at the court-martial. He also makes a separate claim of ineffective assistance of counsel relating to clemency, asserting that his trial defense counsel referenced the wrong law in his clemency memorandum to the convening authority submitted on Appellant's behalf, wherein counsel requested relief the convening authority had no power to grant. Finally, Appellant personally asserts one of his trial defense counsel was ineffective by advising him, after sentence was adjudged in his court-martial, that Appellant would "automatically" earn two-for-one post-trial confinement credit for each day spent in the Weber County Jail.

1. Additional Background

This court received post-trial declarations from both Appellant and his trial defense counsel in regards to the factual predicate for Appellant's claims that

[7] For the reasons set forth in our analysis of Appellant's ineffective assistance of counsel claims, *infra*, we conclude that piercing Appellant's waiver is unnecessary as there was no error, plain or otherwise, in permitting a crime victim to submit her independently drafted written unsworn statement through the instrumentality of trial counsel.

his counsel were ineffective at trial.[8] We will summarize these declarations in turn as they bear on each of Appellant's claims: (a) trial defense counsel's decision not to further object to KR's unsworn statement; (b) trial defense counsel's clemency submission; and (c) trial defense counsel's post-trial discussions with Appellant regarding confinement credit.

a. Decision Not to Further Object to KR's Written Victim Unsworn Statement

Appellant's post-trial declaration provides no additional facts on this assignment of error.

The circuit defense counsel, Major (Maj) AB, explained his tactical decision to forego objecting to KR's victim unsworn statement on the grounds that KR was not present at trial. Maj AB explained that the Defense made a calculated judgment to forego objecting to prevent a potentially more effective form of the statement (*see* Section II.A.1, Additional Background, *supra*).

b. Clemency Submission

Appellant's post-trial declaration did not address Captain (Capt) NW's alleged ineffective representation concerning clemency. That is, Appellant provided no indication in his declaration as to what, if any, different clemency request he would have made but for Capt NW's erroneous citation of law in his clemency memorandum submitted on Appellant's behalf.

Capt NW conceded in his post-trial declaration that he cited the wrong version of Article 60, UCMJ, 10 U.S.C. § 860, in his clemency memorandum to the convening authority.

c. Post-trial Discussions of Confinement Credit

In his post-trial declaration, Appellant alleges that in a meeting after the conclusion of his court-martial, his defense counsel told him that "all Air Force inmates who spend time at Weber County get 2:1 credit for each day at the facility" given the substandard conditions typically encountered by Air Force inmates there. Appellant attached a declaration from his fiancée, who also attended this meeting; her declaration echoes Appellant's recitation of events.

Capt NW disputes, in part, Appellant's version of their post-trial discussion on confinement credit. According to Capt NW, all his communications concerning post-trial confinement credit were highly conditional, emphasizing that *if*

[8] Both of Appellant's trial defense counsel provided declarations in response to an order of this court regarding Appellant's allegations that his counsel were ineffective in their representation of him at trial.

conditions were sufficiently substandard *then* Appellant could petition for additional confinement credit. He stated:

> During my representation of [Appellant], we had many discussions about confinement and the calculation of time. Largely these conversations took place inside the confines of the attorney-client relationship. We discussed numerous ways in which he *might* receive additional credit for his time in confinement. We discussed the credit he would receive for "good behavior" and my understanding that for every eight days he served in confinement he would receive one day of credit as long he did not have any misconduct or behavioral issues.
>
> . . . .
>
> I believe I did advise [Appellant] that *if* his condition[s] were bad enough, he *could potentially* receive additional confinement credit for time served, and I believe I did use 2-for-1 credit as an example. I explained my understanding of 2-for-1 credit meant that for every 1 day of confinement he *could* get 2 days of credit *if* his conditions at Weber County were bad enough or in violation of Air Force or Department of Defense Standards.

(Emphasis added).

2. Law

The Sixth Amendment[9] guarantees an accused the right to effective assistance of counsel at all phases of trial and post-trial processing. *See United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (trial); *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001) (post-trial processing). In assessing the effectiveness of counsel, we apply the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and begin with the presumption of competence announced in *United States v. Cronic*, 466 U.S. 648, 658 (1984). *See Gilley*, 56 M.J. at 124 (citing *United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000)). To prevail on an ineffective assistance of counsel claim, an appellant bears the burden of demonstrating both deficient performance from defense counsel, and prejudice. *Datavs,* 71 M.J. at 424 (citation omitted). Ultimately, we conduct de novo review for ineffective assistance of counsel claims. *Id.* (citation omitted). If an appellant's factual allegations, even if true, do not constitute prejudicial ineffective assistance of counsel, we need not resolve those issues of fact and instead may resolve the issue based solely upon prejudice.

[9] U.S. CONST. amend. VI.

Id.[10] Indeed, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *United States v. Captain*, 75 M.J. 99, 103 (C.A.A.F. 2016) (alteration and omission in original) (quoting *Strickland*, 466 U.S. at 697; and then citing *Datavs*, 71 M.J. 424–25).

a. Deficient Performance

"An appellate court's evaluation of attorney performance is made from counsel's perspective at the time of the conduct in question." *United States v. Marshall*, 45 M.J. 268, 270 (C.A.A.F. 1996) (citing *Strickland*, 466 U.S. at 689).

The burden is on the appellant to demonstrate deficient performance. *Datavs*, 71 M.J. at 424 (citation omitted). "[C]ourts 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Id.* (quoting *Strickland*, 466 U.S. at 689) (additional citation omitted). We consider the following questions to determine whether the presumption of competence has been overcome: (1) whether appellant's allegations are true, and *if so*, is there a reasonable explanation for counsel's actions; (2) whether defense counsel's level of advocacy falls measurably below the performance ordinarily expected of fallible lawyers; and (3) if defense counsel were ineffective, whether there is a reasonable probability that, absent the errors, there would have been a different result. *See 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)); *see also United States v. Akbar*, 74 M.J. 364, 386 (C.A.A.F. 2015) (applying same standard for defense counsel's performance during sentencing proceedings). When considering the last question, "some conceivable effect on the outcome" is not enough; instead, an appellant must show a "probability sufficient to undermine confidence in the outcome." *Datavs*, 71 M.J. at 424 (internal quotation marks and citations omitted).

In assessing claims of ineffective assistance of counsel, we do not look at the success of the defense attorney's strategy "but rather whether counsel made an objectively reasonable choice in strategy from the alternatives available at the time." *United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001) (citation omitted). In making this determination, courts must be "highly

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[10] We are cognizant that Courts of Criminal Appeals do not "decide disputed questions of fact pertaining to a post-trial claim, solely or in part on the basis of conflicting affidavits submitted by the parties." *United States v. Ginn*, 47 M.J. 236, 243 (C.A.A.F. 1997). Instead, we review the six principles for determining whether a hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967) (per curiam), is appropriate under *Ginn*. *Id.* at 248. Here we determine that the first *Ginn* factor is applicable: "if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in [the] appellant's favor, the claim may be rejected on that basis." *Id.*

deferential" to trial defense counsel and make every effort "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*, 466 U.S. at 689. This specifically applies to sentencing. *See United States v. Stephenson*, 33 M.J. 79, 80 (C.M.A. 1991) (concluding that it was not deficient performance to decline to call a character witness at a sentencing hearing to avoid harmful rebuttal evidence).

"When a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion . . . , an appellant must show that there is a reasonable probability that such a motion would have been meritorious." *United States v. Beagu*e, 82 M.J. 157, 167 (C.A.A.F. 2022) (omission in original) (quoting *United States v. Harpole*, 77 M.J. 231, 236 (C.A.A.F. 2018)). Relatedly, "[d]efense counsel do not perform deficiently when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so." *Datavs,* 71 M.J. at 424 (first citing *Gooch*, 69 M.J. at 362–63 (holding a decision not to risk a mistrial where counsel had strategic reasons for keeping the assembled panel was not deficient performance); and then citing *Stephenson*, 33 M.J. at 80 (holding to decline to call a witness during sentencing hearing in order to avoid rebuttal evidence is not deficient performance)). In reviewing the decisions and actions of trial defense counsel, this court does not second-guess strategic or tactical decisions. *See United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993) (citations omitted). It is only in those limited circumstances where a purported "strategic" or "deliberate" decision is unreasonable or based on inadequate investigation that it can provide the foundation for a finding of ineffective assistance. *See United States v. Davis*, 60 M.J. 469, 474 (C.A.A.F. 2005). For this reason, defense counsel receive wide latitude in making tactical decisions. *Cullen v. Pinholster*, 563 U.S. 170, 195 (2011) (citing *Strickland*, 466 U.S. at 689).

b. Prejudice

Military appellate courts apply the same prejudice standard as defined by The United States Supreme Court when assessing claims of ineffective assistance of counsel. To establish prejudice, an appellant must:

> demonstrate a *reasonable probability* that, but for counsel's unprofessional errors, *the result of the proceeding would have been different*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. Counsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Harrington v. Richter, 562 U.S. 86, 104 (2011) (emphasis added) (internal quotation marks and citations omitted); *cited with approval, Datavs*, 71 M.J. at 424. Once again, it is an appellant who bears the burden to demonstrate prejudice. *Id*. This general analytical framework for prejudice is then calibrated to the particular trial phase at issue. Pertinent to this case, "prejudice" for ineffective assistance in the sentencing phase of the court-martial requires us to "look to see 'whether there is a reasonable probability that, but for counsel's error, there would have been a different result.'" *Captain*, 75 M.J. at 103 (citation omitted).

3. Analysis

a. Admissibility of Victim Unsworn Statement

Analyzing deficient performance in this case requires considering the underlying substantive law concerning victim unsworn statements, because, if there was no support in law for defense counsel to raise an issue at trial, there could be no "deficient performance" as a consequence. *See Beague*, 82 M.J. at 167.

In analyzing how a crime victim may exercise their statutory and regulatory right to be reasonably heard in sentencing, the CAAF held in *Barker* that "the introduction of statements under this rule is prohibited without, at a minimum, either the presence *or request of the victim*." *Barker*, 77 M.J. at 382 (emphasis added) (footnote and citations omitted). The CAAF then elaborated on the importance of the independent decision of crime victims to exercise their rights in *United States v. Hamilton*, reasoning: "the right to be reasonably heard requires that the victims be contacted, *given the choice to participate in a particular case*, and, if they choose to make a statement, offer the statement themselves, through counsel, or through a 'victim's designee' where appropriate." 78 M.J. 335, 339–40 (C.A.A.F. 2019) (emphasis added) (citations omitted). Read together, *Barker* and *Hamilton* essentially require two prerequisites to admit an absent crime victim's unsworn statement under R.C.M. 1001A (now R.C.M. 1001(c)): (1) the crime victim's knowledge of the court-martial; and (2) the crime victim's intent for the statement to be offered for sentencing consideration at the court-martial at the time the statement is offered. *See Hamilton*, 78 M.J. at 341; *Barker*, 77 M.J. at 383.

Applying these principles, we find no deficient performance in this case because neither Article 6b, UCMJ, nor R.C.M. 1001 require the physical presence of an unrepresented crime victim at court-martial to be "reasonably heard." We find nothing in the plain language of the substantive provisions of law dealing with admissibility of victim unsworn statements at sentencing (*i.e.*, Article 6b, UCMJ, and R.C.M. 1001(c)) that requires a victim to personally enter the

courtroom and present their statement to the military judge.[11] Those provisions of law merely state that a victim has the right to be reasonably heard.

Our holding is not novel. This court found no error in a crime victim providing their oral victim unsworn statement telephonically in *United States v. Clark-Bellamy*, No. ACM 39709, 2020 CCA LEXIS 391, at *16–17 (A.F. Ct. Crim. App. 27 Oct. 2020) (unpub. op.). This court reasoned that physical presence of the victim at trial is *not* a prerequisite to admissibility of that victim's unsworn statement at sentencing stating: "[W]e disagree with Appellant's proposition that a victim (or representative) who is not *physically* present at the sentencing hearing forfeits his or her right to make a statement. R.C.M. 1001A conveys a personal right to the victim and does not expressly mandate physical presence." *Id.*

Indeed, our approach is consistent with that of our superior court. In interpreting the prerequisites for presenting a victim unsworn statement at court-martial, the CAAF proposed two methods: "either presence *or* the request of the victim." *Barker*, 77 M.J. at 382 (emphasis added). The disjunctive "or" is significant because it indicates that a "request" need not involve physical presence.

Synthesizing CAAF's reasoning in *Barker* and the accompanying line of cases, we see three foundational prerequisites were met for consideration of KR's unsworn victim statement in this case: (1) KR created it; (2) KR had *knowledge* of Appellant's court-martial; and (3) KR *intended* for the statement to be offered at Appellant's court-martial at the time the statement was offered. *See United States v. Harrington*, 83 M.J. 408, No. 22-0100, 2023 CAAF LEXIS 577, at *20 (C.A.A.F. 10 Aug. 2023); *Hamilton,* 78 M.J. at 341; *Barker,* 77 M.J. at 383. Accordingly, any objection by trial defense counsel would have been futile.

Relatedly, there was no deficient performance in trial defense counsel's decision not to object to trial counsel's physical "delivery" of the written victim unsworn statement at trial. Trial counsel was acting as a mere *instrumentality* of KR's independent exercise of her right to be reasonably heard at sentencing

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[11] Appellant effectively would have us disregard the CAAF's construction of R.C.M. 1001(c) in *Barker* in deference to a related but *distinct* provision in R.C.M. 1001(a)(3), to wit: that a military judge has a duty to advise any crime victim "who is present" that they have a right to be reasonably heard at sentencing. We decline to do so. R.C.M. 1001(a)(3) does not restrict a crime victim's right to be reasonably heard; it merely provides an additional mechanism by which the President sought to ensure that crime victims have *actual notice* of their right to be reasonably heard. By contrast, R.C.M. 1001(c) deals with the substantive aspects of admissible forms and content for victim unsworn statements.

via submitting a written victim unsworn statement under R.C.M. 1001.[12] This is wholly distinguishable from the situation in *United States v. Edwards,* where the CAAF found reversible error in trial counsel's assistance in assembling and creating the unsworn statement in the format of a video, and from the facts in *Harrington* where the CAAF found non-reversible error where trial counsel "assisted" victims in delivering their oral unsworn statements via a question-and-answer format. *See Harrington*, 2023 CAAF LEXIS 577, at *26; *United States v. Edwards*, 82 M.J. 239, 241 (C.A.A.F. 2022). Each of those cases turned upon a determination that trial counsel's substantive involvement in producing the unsworn statement ran afoul of "the principle that an unsworn victim statement belongs solely to the victim or the victim's designee." *Harrington*, 2023 CAAF LEXIS 577, at *20 (citing *Edwards*, 82 M.J. at 241). As none of those predicate circumstances were present here, there was no deficient performance in not raising a futile objection.[13]

Second, even assuming R.C.M. 1001(c) did not permit admission of a written victim unsworn statement from an absent crime victim at pre-sentencing proceedings we find that trial defense counsel's strategic decision not to object to KR's statement was one of those *tactical decisions* which do not fall "measurably below" the standards expected of fallible lawyers. *See Dewrell,* 55 M.J. at 133 (quoting *Strickland*, 446 U.S. at 690) ("strategic defense counsel choices made after thorough investigation of the facts are virtually unchallengeable"). We are persuaded by the affidavit from the circuit defense counsel that this decision was carefully considered and undertaken to avoid a potentially more persuasive and evocative form of that statement (*i.e.*, that trial counsel would be able to get in touch with KR to provide her statement orally over the phone, replete with more emotion and passion than the mere written word). We disagree with Appellant's suggestion that those assessments and concerns by trial

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[12] We do *not* hold that all trial counsel "solicitations" of victim unsworn statements from unrepresented victims would satisfy what may be identified as the "independent decision doctrine" of *Barker* and *Hamilton*. These cases are highly fact-dependent and require a case-by-case analysis to determine whether under the circumstances a crime victim made a knowing and independent decision to submit an unsworn statement.

[13] We also decline Appellant's invitation to interpret our ruling in *United States v. Bailey*, No. ACM 39935, 2021 CCA LEXIS 380, at *14–15 (A.F. Ct. Crim. App. 30 Jul. 2021) (unpub. op.), *rev. denied*, 82 M.J. 103 (C.A.A.F. 2021), to find deficient performance in this case. In *Bailey*, this court held that the military judge erred in permitting a trial counsel to read a written victim unsworn statement into the record. *Id.* We find *Bailey* factually distinguishable. Unlike in *Baile*y, where trial counsel's act of reading the written victim unsworn statement aloud literally consisted of a different form of the statement (*i.e.*, "oral" versus "written"), here trial counsel's mere offering of the independently drafted victim unsworn statement did not change the nature of the statement (*i.e.*, it was offered as a written victim unsworn statement and remained so).

defense counsel were unreasonable. Trial defense counsel's risk analysis and subsequent decision—to allow a less impactful form of the evidence in an effort to neutralize what might otherwise be emotionally impactful statement—in this case did not fall measurably below standards expected of fallible lawyers.

In the absence of any "deficient performance" by his trial defense counsel, Appellant is entitled to no relief for this assignment of error. *Datavs,* 71 M.J. at 424 (citation omitted).

b. Clemency Submission

Given Capt NW's concession that he cited to an inapplicable version of Article 60, UCMJ,[14] in clemency and, as a consequence, requested clemency relief that the convening authority was not empowered to give (*i.e.*, reduction in confinement from 24 to 12 months), we will assume without deciding that the "deficient performance" prong of the *Strickland* standard is satisfied and proceed to a prejudice analysis.

Appellant failed to demonstrate there is a reasonable probability that, but for counsel's error, there would have been a different result. He has failed to identify what, if anything, he would have changed in his clemency submission but for counsel's misstatement of the law. Appellant is silent in his post-trial declaration about what alternate clemency he was interested in. Appellant's burden is not satisfied by counsel merely suggesting what Appellant "could" have done if given an opportunity to re-submit clemency, but rather what Appellant *would* have done absent the initial clemency error. We find Appellant has failed in his burden to demonstrate prejudice resulting from trial defense counsel's purportedly deficient performance in seeking clemency.

c. Post-Trial Discussions of Post-Trial Confinement Credit

In turning to address Appellant's final ineffective assistance of counsel claim, we opt to resolve this assignment of error based upon the lack of prejudice. *See Datavs,* 71 M.J. at 424–25.

Appellant essentially argues that he felt a false sense of hope from his trial defense counsel's discussions with him concerning post-trial confinement credit. However, Appellant fails to provide a nexus between that false hope and any impairment it had on a substantial right.[15] Absent that nexus there can be

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[14] In accordance with the CAAF's decision in *United States v. Brubaker-Escobar,* 81 M.J. 471, 474 (C.A.A.F. 2021) (per curiam), it was Article 60, UCMJ (2016 *MCM*), which applied during Appellant's post-trial processing.

[15] For example, Appellant does not claim trial defense counsel's error caused him to suffer substandard post-trial confinement conditions or affected the exercise of his

no prejudice; no "different outcome" is made possible by the absence of the alleged deficient conduct.

III. CONCLUSION

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

right to request relief from any such conditions. Appellant also raises no claim that he would have entered a different plea or declined to enter into a plea agreement altogether, had he been "properly advised" on what amounts to *post hoc* advice on a collateral matter. *See United States v. Furth*, 81 M.J. 114, 117 (C.A.A.F. 2021) (citation omitted) (noting that when ineffective assistance of counsel concerning plea negotiations and a decision to plead guilty are concerned: *"[I]n order to satisfy the 'prejudice' requirement, [an appellant] must show that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial*." (Emphasis added).). We also note that calculations of other forms of potential confinement credit are generally considered to be collateral matters. *See, e.g.*, *United States v. McNutt*, 62 M.J. 16, 19 (C.A.A.F. 2005) (holding issues of good credit time and parole eligibility are collateral matters). Accordingly, any erroneous advice here would only be prejudicial if it materially influenced Appellant's decision to plead guilty.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* *v.* Technical Sergeant (E-6) **MICHAEL EDWARDS** United States Air Force *Appellant*	**MOTION TO ATTACH** Before Panel No. 1 Case No. ACM S32787 1 April 2025

TO THE HONORABLE JUDGES OF THE

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Pursuant to Rules 18(e), 23, and 23.3 of this Honorable Court's Rules of Practice and Procedure, TSgt Edwards move to attach the Government's Answer from the separate case of *United States v. Daddaro*, 2023 CCA LEXIS 499 (A.F. Ct. Crim. App. Dec. 1, 2023) (unpub opin.).[1]

In *Daddaro*, the opinion of the Court noted that the victim was the appellant's ex-girlfriend, implying by its holding that she held the status of intimate partner of the appellant despite not being in a relationship with the appellant at the time of the offense. *See Id* at 3. However, the Government's Answer in *Daddaro* identifies the same individual as the appellant's "girlfriend," at the time of the offense. Attachment at 2. This contradicts the notion that she was an "ex-girlfriend." This conflicting characterization is significant because, in the present case, the Government relies on the ex-girlfriend designation to draw parallels from *Daddaro*. Thus, the

[1] Pursuant to Rule 18(e), the unpublished opinion was appended to the Reply to Appellee's Answer to Assignments of Error, sans a motion to attach.

Government's prior statements could bear upon the credibility of its current arguments regarding the legal and factual framework underpinning the nature of the relationship at issue here.

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 Government's reasoning in this case heavily relies on the assertion the present case mirrors the factual situation in *Daddaro*. Because the Government's prior filing described the victim as a "girlfriend" rather than an ex-girlfriend, this document is relevant and necessary for assessing whether the Government's position in the current appeal is consistent with or undermined by its previous statements. *Id.*

The attachment is also relevant and necessary to provide this Court with a complete and transparent record of the Government's earlier statements regarding this key issue. Further, considering the attachment will promote judicial economy and fairness by allowing this Court to comprehensively evaluate the arguments presented in the TSgt Edwards' Assignment of Error and Reply as well as the Government's Answer.

WHEREFORE, TSgt Edwards requests this Court grant this motion to attach.

Respectfully submitted,

CATHERINE M. CHERKASKY, Esq.
Civilian Defense Counsel
Golden Law, Inc.
1330 Avenue of the Americas, 23rd Floor
New York, NY 10019
(949) 491-1661
katie@goldenlawinc.com
NY Bar: 6022842
CA Bar: 266492
IL Bar: 6311030

JOYCLIN N. WEBSTER, 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: joyclin.webster.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 Goverment Trial and Appellate Operations Division on 1 April 2025.

Respectfully submitted,

JOYCLIN N. WEBSTER, 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: joyclin.webster.1@us.af.mil