IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **ZACKERY A. LOGAN,** United States Air Force *Appellant*	)	No. ACM 40407 27 March 2023

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **2 June 2023**. The record of trial was docketed with this Court on 2 February 2023. From the date of docketing to the present date, 53 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]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

GRANTED
28 MAR 2023

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

28 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ZACKERY A. LOGAN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40407 Panel No. 2

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

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

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

[redacted]
OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 28 March 2023.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **ZACKERY A. LOGAN,** United States Air Force *Appellant*	)	No. ACM 40407 25 May 2023

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 **2 July 2023**. The record of trial was docketed with this Court on 2 February 2023. From the date of docketing to the present date, 112 days have elapsed. On the date requested, 150 days will have elapsed.

On 27-30 June 2022, pursuant to his pleas,[1] Appellant was convicted by a military judge, sitting as a general court-martial, at McConnell Air Force Base, Kansas, of one charge and four specifications[2] of assault in violation of Article 128, Uniform Code of Military Justice (UCMJ). A panel of officer and enlisted members sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances for 18 months, to be confined for 1 year and 6 months, and to be discharged with a bad-conduct discharge. R. at 654. The convening authority took no

GRANTED
1 JUN 2023

[1] Pursuant to his plea agreement, the Government withdrew and dismissed with prejudice one charge and specification of sexual assault in violation of Article 120, UCMJ, and one specification of assault in violation of Article 128, UCMJ. R. at 657.

[2] The military judge found Appellant guilty of Specification 1 of Charge II, by exceptions and substitutions. R. at 100. Of the excepted words, "pushing her body with his hand and striking her chest," the military judge found Appellant not guilty. *Id.* Of the substituted words, "striking her face," the military judge found Appellant guilty. *Id.*

action on the findings. ROT, Vol. 1, Decision on Action, dated 2 August 2022. The convening authority suspended Appellant's reduction in grade for six months from the entry of judgment and suspended the adjudged forfeitures for a period of six months. *Id*. The convening authority also waived Appellant's automatic forfeitures for a period of six months for the benefit of his dependent children. *Id*.

The record of trial consists of 7 prosecution exhibits, 12 defense exhibits, and 26 appellate exhibits; the trial transcript is 657 pages. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and not yet begun her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 25 May 2023.

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

31 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ZACKERY A. LOGAN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40407 Panel No. 2

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

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

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

[redacted]
OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 31 May 2023.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **ZACKERY A. LOGAN,** United States Air Force *Appellant*	)	No. ACM 40407 21 June 2023

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 **1 August 2023**. The record of trial was docketed with this Court on 2 February 2023. From the date of docketing to the present date, 139 days have elapsed. On the date requested, 180 days will have elapsed.

On 27-30 June 2022, pursuant to his pleas,[1] Appellant was convicted by a military judge, sitting as a general court-martial, at McConnell Air Force Base, Kansas, of one charge and four specifications[2] of assault in violation of Article 128, Uniform Code of Military Justice (UCMJ). A panel of officer and enlisted members sentenced Appellant to be reduced to the grade o forfeit all pay and allowances for 18 months, to be confined for 1 year and 6 months, and to be discharged with a bad-conduct discharge. R. at 654. The convening authority took no

GRANTED
23 JUN 2023

[1] Pursuant to his plea agreement, the Government withdrew and dismissed with prejudice one charge and specification of sexual assault in violation of Article 120, UCMJ, and one specification of assault in violation of Article 128, UCMJ. R. at 657.

[2] The military judge found Appellant guilty of Specification 1 of Charge II, by exceptions and substitutions. R. at 100. Of the excepted words, "pushing her body with his hand and striking her chest," the military judge found Appellant not guilty. *Id.* Of the substituted words, "striking her face," the military judge found Appellant guilty. *Id.*

action on the findings. ROT, Vol. 1, Decision on Action, dated 2 August 2022. The convening authority suspended Appellant's reduction in grade for six months from the entry of judgment and suspended the adjudged forfeitures for a period of six months. *Id*. The convening authority also waived Appellant's automatic forfeitures for a period of six months for the benefit of his dependent children. *Id*.

The record of trial consists of 7 prosecution exhibits, 12 defense exhibits, and 26 appellate exhibits; the trial transcript is 657 pages. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and not yet begun her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 21 June 2023.

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

22 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ZACKERY A. LOGAN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40407 Panel No. 2

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

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

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

[redacted]
OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 22 June 2023.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **ZACKERY A. LOGAN,** United States Air Force *Appellant*	)	No. ACM 40407 25 July 2023

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

Pursuant to Rule 23.3(m)(3) and (m)(6) 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 **31 August 2023**. The record of trial was docketed with this Court on 2 February 2023. From the date of docketing to the present date, 173 days have elapsed. On the date requested, 210 days will have elapsed.

On 27-30 June 2022, pursuant to his pleas,[1] Appellant was convicted by a military judge, sitting as a general court-martial, at McConnell Air Force Base, Kansas, of one charge and four ons[2] of assault in violation of Article 128, Uniform Code of Military Justice (UCMJ). A panel of officer and enlisted members sentenced Appellant to be reduced to the grade [illegible], to forfeit all pay and allowances for 18 months, to be confined for 1 year and 6 months,

GRANTED
28 JULY 2023

[1] Pursuant to his plea agreement, the Government withdrew and dismissed with prejudice one charge and specification of sexual assault in violation of Article 120, UCMJ, and one specification of assault in violation of Article 128, UCMJ. R. at 657.

[2] The military judge found Appellant guilty of Specification 1 of Charge II, by exceptions and substitutions. R. at 100. Of the excepted words, "pushing her body with his hand and striking her chest," the military judge found Appellant not guilty. *Id.* Of the substituted words, "striking her face," the military judge found Appellant guilty. *Id.*

and to be discharged with a bad-conduct discharge. R. at 654. The convening authority took no action on the findings. ROT, Vol. 1, Decision on Action, dated 2 August 2022. The convening authority suspended Appellant's reduction in grade for six months from the entry of judgment and suspended the adjudged forfeitures for a period of six months. *Id*. The convening authority also waived Appellant's automatic forfeitures for a period of six months for the benefit of his dependent children. *Id*.

The record of trial consists of 7 prosecution exhibits, 12 defense exhibits, and 26 appellate exhibits; the trial transcript is 657 pages. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and not yet begun her review of Appellant's case. Through no fault of Appellant, undersigned counsel has been working on other assigned matters[3] and has yet to complete her review of Appellant's case. Counsel is currently assigned 24 cases; 10 cases are pending initial AOEs before this Court. This is military counsel's fourth priority case. The following cases have priority over the present case:

1. *United States v. Pittman*, ACM 40298 - The record of trial is 6 volumes; the trial transcript is 341 pages. There are 14 prosecution exhibits, 13 defense exhibits, and 30 appellate exhibits. Counsel has begun reviewing Appellant's ROT.

2. *United States v. Taylor Jr.*, ACM 40371 - The record of trial is 6 volumes; the trial transcript is 396 pages. There are 6 prosecution exhibits, 12 defense exhibits, and 36 appellate exhibits. Counsel has not yet begun her review of Appellant's ROT.

[3] Since the filing of Appellant's last EOT, counsel filed a lengthy brief in *United States v. Blackburn*, ACM 40303, on 28 June 2023, a reply brief in *United States v. Robles*, ACM 40280, on 29 June 2023, completed her review of the 1473-page *DuBay* transcript in *United States v. Knodel*, ACM 40018, on 7 July 2023, and co-wrote a Supreme Court petition in *United States v. King*, ACM 39583 for submission by 23 July 2023. Since the last EOT, counsel was also off for the 4th of July holiday, and on leave from 14-21 July 2023.

3. *United States v. Gonzalez,* ACM 40375 - The record of trial is 3 volumes; the trial transcript is 107 pages. There are 4 prosecution exhibits, 5 defense exhibits, and 5 appellate exhibits. Counsel has not yet begun her review of Appellant's ROT.

Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

[redacted]

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 25 July 2023.

Respectfully submitted,

[redacted]
JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

27 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ZACKERY A. LOGAN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40407 Panel No. 2

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

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

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

[redacted]

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 27 July 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40407**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Zackery A. LOGAN	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	

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

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Panel 2 and referred to Panel 3 for appellate review.

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (FIFTH)**
	)	
v.	)	Before Panel No. 3
	)	
Staff Sergeant (E-5)	)	No. ACM 40407
ZACKERY A. LOGAN,	)	
United States Air Force	)	23 August 2023
Appellant	)	

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

Pursuant to Rule 23.3(m)(3) and (m)(6) 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 **30 September 2023**. The record of trial was docketed with this Court on 2 February 2023. From the date of docketing to the present date, 202 days have elapsed. On the date requested, 240 days will have elapsed.

On 27 June 2022, pursuant to his pleas,[1] Appellant was convicted by a military judge, sitting as a general court-martial, at McConnell Air Force Base, Kansas, of one charge and four specifications[2] of assault in violation of Article 128, Uniform Code of Military Justice (UCMJ). R. at 1, 18, 100. A panel of officer and enlisted members sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances for 18 months, to be confined for one year and six

[1] Pursuant to his plea agreement, the Government withdrew and dismissed, with prejudice, one charge and specification of sexual assault in violation of Article 120, UCMJ, and one specification of assault in violation of Article 128, UCMJ. R. at 656-57.

[2] The military judge found Appellant guilty of Specification 1 of Charge II, by exceptions and substitutions. R. at 100. Of the excepted words, "pushing her body with his hand and striking her chest," the military judge found Appellant not guilty. R. at 100. Of the substituted words, "striking her face," the military judge found Appellant guilty. R. at 100.

months, and to be discharged with a bad-conduct discharge. R. at 654. The convening authority took no action on the findings. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant Zackery A. Logan*, dated 2 August 2022, at 1. The convening authority suspended Appellant's reduction in grade for six months from the entry of judgment and suspended the adjudged forfeitures for a period of six months. *Id*. The convening authority also waived Appellant's automatic forfeitures for a period of six months for the benefit of his dependent children. *Id*.

The record of trial consists of seven prosecution exhibits, 12 defense exhibits, 26 appellate exhibits, and three court exhibits; the trial transcript is 657 pages. Appellant is not currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and not yet begun her review of Appellant's case. Counsel is currently assigned 15 cases; 9 cases are pending initial AOEs before this Court. Three cases have priority over this case:

1) *United States v. Robles*, ACM 40280 – The record of trial is eight volumes consisting of 19 prosecution exhibits, six defense exhibits, 15 appellate exhibits, and 10 court exhibits; the transcript is 399 pages. Undersigned counsel is reviewing the record of trial in preparation for a potential petition for review at the Court of Appeals for the Armed Forces.
2) *United States v. Stelly*, ACM 40425 – The record of trial is four volumes consisting of three prosecution exhibits, five defense exhibits, and 10 appellate exhibits; the transcript is 109 pages. Undersigned counsel is reviewing the record of trial.
3) *United States v. Daughma*, ACM 40385 – The record of trial is nine volumes consisting of 18 prosecution exhibits, five defense exhibits, 64 appellate exhibits, and one court exhibit; the transcript is 841 pages.

In addition, undersigned counsel, who was previously assigned as an area defense counsel, is detailed to one general court-martial. This trial, *United States v. Quinones-Reyes*, is docketed for the week of 28 August 2023. This trial will take priority over the instant case.

Appellant was advised of his right to a timely appeal. Appellant was advised of this request for an enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time. Furthermore, previously assigned counsel, Maj Jenna Arroyo, has conducted thorough turnover with undersigned counsel. Maj Arroyo will be submitting a motion to withdraw with this Court. Appellant was advised of this forthcoming motion to withdraw and consents to it.

Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

[redacted]

TREVOR N. WARD
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

[redacted]

TREVOR N. WARD
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

25 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ZACKERY A. LOGAN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40407 Panel No. 3

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

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

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

[redacted]

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 25 August 2023.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40407**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Zackery A. LOGAN	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 23 August 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 28th day of August, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **30 September 2023**.

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

FOR THE COURT

[redacted]E, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT OF TIME (SIXTH) OUT OF TIME**
Appellee	)	
	)	
v.	)	Before Panel No. 3
	)	
Staff Sergeant (E-5)	)	No. ACM 40407
ZACKERY A. LOGAN,	)	
United States Air Force	)	25 September 2023
Appellant	)	

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

Pursuant to Rule 23.3(m)(3) and (m)(7) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his sixth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **30 October 2023**. The record of trial was docketed with this Court on 2 February 2023. From the date of docketing to the present date, 235 days have elapsed. On the date requested, 270 days will have elapsed.[1]

On 27 June 2022, pursuant to his pleas,[2] Appellant was convicted by a military judge, [illegible]neral court-martial, at McConnell Air Force Base, Kansas, of one charge and four [illegible][3] of assault in violation of Article 128, Uniform Code of Military Justice (UCMJ). R. at 1, 18, 100. A panel of officer and enlisted members sentenced Appellant to be reduced to the

GRANTED
26 SEP 2023

[1] In a previous filing submitted on 22 September 2023, the motion indicated that "231 days have elapsed." This motion corrects that number. The earlier filing is withdrawn.
[2] Pursuant to his plea agreement, the Government withdrew and dismissed, with prejudice, one charge and specification of sexual assault in violation of Article 120, UCMJ, and one specification of assault in violation of Article 128, UCMJ. R. at 656-57.
[3] The military judge found Appellant guilty of Specification 1 of Charge II, by exceptions and substitutions. R. at 100. Of the excepted words, "pushing her body with his hand and striking her chest," the military judge found Appellant not guilty. R. at 100. Of the substituted words, "striking her face," the military judge found Appellant guilty. R. at 100.

grade of E-1, to forfeit all pay and allowances for 18 months, to be confined for one year and six months, and to be discharged with a bad-conduct discharge. R. at 654. The convening authority took no action on the findings. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant Zackery A. Logan*, dated 2 August 2022, at 1. The convening authority suspended Appellant's reduction in grade for six months from the entry of judgment and suspended the adjudged forfeitures for a period of six months. *Id*. The convening authority also waived Appellant's automatic forfeitures for a period of six months for the benefit of his dependent children. *Id*. Appellant is currently confined.

The record of trial consists of seven prosecution exhibits, 12 defense exhibits, 26 appellate exhibits, and three court exhibits; the trial transcript is 657 pages. Appellant is not currently confined.

Counsel is currently assigned 15 cases; 12 cases are pending AOEs before this Court. One case before the Court of Appeals for the Armed Forces has priority over this case: *United States v. Smith*. On 6 September 2023, C.A.A.F. granted on one issue. In accordance with C.A.A.F.'s order, the appellant's initial brief is due on 6 October 2023. In addition, three cases have priority over this case:

1) *United States v. Knodel*, ACM 40018 – The record of trial is seven volumes consisting of 18 prosecution exhibits, 62 defense exhibits, 24 appellate exhibits, and one court exhibit; the transcript is 727 pages. The *Dubay* record of trial is an additional seven volumes, consisting of 48 appellate exhibits; the transcript is 1,475 pages. Undersigned counsel has completed a review of the *Dubay* record of trial.
2) *United States v. Stelly*, ACM 40425 – The record of trial is four volumes consisting of three prosecution exhibits, five defense exhibits, and 10 appellate exhibits; the transcript is 109 pages. Undersigned counsel is reviewing the record of trial.

3) *United States v. Daughma*, ACM 40385 – The record of trial is nine volumes consisting of 18 prosecution exhibits, five defense exhibits, 64 appellate exhibits, and one court exhibit; the transcript is 841 pages.

Appellant was advised of his right to a timely appeal. Appellant was advised of this request for an enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for an enlargement of time. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet had time to complete review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

Furthermore, good cause exists to grant this enlargement of time out of time. On 22 September 2023, undersigned counsel was teleworking while on leave, with intermittent access to email. On the same date, undersigned counsel submitted a Motion for Enlargement of Time (Sixth) within the seven-day deadline. However, that Motion incorrectly assessed the days lapsed as 231 instead of 232. Undersigned counsel was sent an email concerning this error, but that email was not reviewed until the morning of 25 September 2023 due to the intermittent access. The fault for these errors is solely that of undersigned counsel, not Appellant.

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

Respectfully submitted,

[redacted]

TREVOR N. WARD
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 25 September 2023.

Respectfully submitted,

[redacted]

TREVOR N. WARD
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

26 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ZACKERY A. LOGAN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40407 Panel No. 3

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

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

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

[redacted]

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 26 September 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
Appellee	)	
	)	
v.	)	Before Panel No. 3
	)	
Staff Sergeant (E-5)	)	No. ACM 40407
ZACKERY A. LOGAN,	)	
United States Air Force	)	18 October 2023
Appellant	)	

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his seventh enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **29 November 2023**. The record of trial was docketed with this Court on 2 February 2023. From the date of docketing to the present date, 258 days have elapsed. On the date requested, 300 days will have elapsed.

On 27 June 2022, pursuant to his pleas,[1] Appellant was convicted by a military judge, sitting as a general court-martial, at McConnell Air Force Base, Kansas, of one charge and four specifications[2] of assault in violation of Article 128, Uniform Code of Military Justice (UCMJ). R. at 1, 18, 100. A panel of officer and enlisted members sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances for 18 months, to be confined for one year and six

[1] Pursuant to his plea agreement, the Government withdrew and dismissed, with prejudice, one charge and specification of sexual assault in violation of Article 120, UCMJ, and one specification of assault in violation of Article 128, UCMJ. R. at 656-57.

[2] The military judge found Appellant guilty of Specification 1 of Charge II, by exceptions and substitutions. R. at 100. Of the excepted words, "pushing her body with his hand and striking her," the military judge found Appellant not guilty. R. at 100. Of the substituted words, "striking her," the military judge found Appellant guilty. R. at 100.

GRANTED
20 Oct 2023

months, and to be discharged with a bad-conduct discharge. R. at 654. The convening authority took no action on the findings. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant Zackery A. Logan*, dated 2 August 2022, at 1. The convening authority suspended Appellant's reduction in grade for six months from the entry of judgment and suspended the adjudged forfeitures for a period of six months. *Id*. The convening authority also waived Appellant's automatic forfeitures for a period of six months for the benefit of his dependent children. *Id*. Appellant is currently confined.

The record of trial consists of seven prosecution exhibits, 12 defense exhibits, 26 appellate exhibits, and three court exhibits; the trial transcript is 657 pages. Appellant is not currently confined.

Counsel is currently assigned 18 cases; 13 cases are pending AOEs before this Court. Two cases before the Court of Appeals for the Armed Forces have priority over this case: (1) *United States v. Smith* and (2) *United States v. Robles*. On 5 October 2023, undersigned counsel submitted the initial brief to CAAF for *United States v. Smith*. On 13 October 2023, undersigned counsel submitted the petition for *United States v. Robles*. Undersigned counsel is presently working on the supplement to that petition. In addition, two cases before this Court have priority over this case:

1) *United States v. Stelly*, ACM 40425 – The record of trial is four volumes consisting of three prosecution exhibits, five defense exhibits, and 10 appellate exhibits; the transcript is 109 pages. Undersigned counsel is reviewing the record of trial.
2) *United States v. Daughma*, ACM 40385 – The record of trial is nine volumes consisting of 18 prosecution exhibits, five defense exhibits, 64 appellate exhibits, and one court exhibit; the transcript is 841 pages.

Appellant was advised of his right to a timely appeal. Appellant was advised of this request for an enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for an enlargement of time. Through no fault of Appellant,

undersigned counsel has been working on other assigned matters and has not yet had time to complete review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

[redacted]

TREVOR N. WARD
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 18 October 2023.

Respectfully submitted,

[redacted]

TREVOR N. WARD
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

20 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ZACKERY A. LOGAN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40407 Panel No. 3

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 20 October 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Panel No. 3
Staff Sergeant (E-5) **ZACKERY A. LOGAN,** United States Air Force *Appellant*	)	No. ACM 40407
	)	17 November 2023

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his eighth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **29 December 2023**. The record of trial was docketed with this Court on 2 February 2023. From the date of docketing to the present date, 288 days have elapsed. On the date requested, 330 days will have elapsed.

On 27 June 2022, pursuant to his pleas,[1] Appellant was convicted by a military judge, sitting as a general court-martial, at McConnell Air Force Base, Kansas, of one charge and four specifications[2] of assault in violation of Article 128, Uniform Code of Military Justice (UCMJ). R. at 1, 18, 100. A panel of officer and enlisted members sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances for 18 months, to be confined for one year and six

[1] Pursuant to his plea agreement, the Government withdrew and dismissed, with prejudice, one charge and specification of sexual assault in violation of Article 120, UCMJ, and one specification of assault in violation of Article 128, UCMJ. R. at 656-57.

[2] The military judge found Appellant guilty of Specification 1 of Charge II, by exceptions and substitutions. R. at 100. Of the excepted words, "pushing her body with his hand and striking her chest," the military judge found Appellant not guilty. R. at 100. Of the substituted words, "striking her face," the military judge found Appellant guilty. R. at 100.

months, and to be discharged with a bad-conduct discharge. R. at 654. The convening authority took no action on the findings. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant Zackery A. Logan*, dated 2 August 2022, at 1. The convening authority suspended Appellant's reduction in grade for six months from the entry of judgment and suspended the adjudged forfeitures for a period of six months. *Id*. The convening authority also waived Appellant's automatic forfeitures for a period of six months for the benefit of his dependent children. *Id*. Appellant is currently confined.

The record of trial consists of seven prosecution exhibits, 12 defense exhibits, 26 appellate exhibits, and three court exhibits; the trial transcript is 657 pages. Appellant is not currently confined.

Counsel is currently assigned 18 cases; 14 cases are pending AOEs before this Court. Two cases before the Court of Appeals for the Armed Forces (CAAF) have priority over this case: (1) *United States v. Smith* and (2) *United States v. Robles*. On 6 November 2023, undersigned counsel filed the Supplement to Petition for Grant of Review with CAAF for *United States v. Robles*. Yesterday, on 16 November 2023, undersigned counsel filed the Reply Brief with CAAF for *United States v. Smith*. In addition, two cases before this Court have priority over this case:

1) *United States v. Daughma*, ACM 40385 – The record of trial is nine volumes consisting of 18 prosecution exhibits, five defense exhibits, 64 appellate exhibits, and one court exhibit; the transcript is 841 pages. Undersigned counsel has reviewed the unsealed transcript and exhibits and is conducting legal research. In addition, undersigned counsel filed a Consent Motion to Review Sealed Materials, which was granted by this Court on 30 October 2023.
2) *United States v. Stelly*, ACM 40425 – The record of trial is four volumes consisting of three prosecution exhibits, five defense exhibits, and 10 appellate exhibits; the transcript is 109 pages. Undersigned counsel is reviewing the record of trial.

Appellant was advised of his right to a timely appeal. Appellant was advised of this request for an

enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for an enlargement of time. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet had time to complete review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

[redacted]

TREVOR N. WARD
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 17 November 2023.

Respectfully submitted,

[redacted]

TREVOR N. WARD
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

21 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ZACKERY A. LOGAN, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40407 Panel No. 3

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 21 November 2023.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40407**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Zackery A. LOGAN	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 17 November 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 22d day of November, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than **29 December 2023**.

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

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT OF TIME (NINTH)**
Appellee	)	
	)	
v.	)	Before Panel No. 3
	)	
Staff Sergeant (E-5)	)	No. ACM 40407
ZACKERY A. LOGAN,	)	
United States Air Force	)	21 December 2023
Appellant	)	

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his ninth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **28 January 2024**. The record of trial was docketed with this Court on 2 February 2023. From the date of docketing to the present date, 322 days have elapsed. On the date requested, 360 days will have elapsed.

On 27 June 2022, pursuant to his pleas,[1] Appellant was convicted by a military judge, sitting as a general court-martial, at McConnell Air Force Base, Kansas, of one charge and four specifications[2] of assault in violation of Article 128, Uniform Code of Military Justice (UCMJ). R. at 1, 18, 100. A panel of officer and enlisted members sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances for 18 months, to be confined for one year and six

[1] Pursuant to his plea agreement, the Government withdrew and dismissed, with prejudice, one charge and specification of sexual assault in violation of Article 120, UCMJ, and one specification of assault in violation of Article 128, UCMJ. R. at 656-57.

[2] The military judge found Appellant guilty of Specification 1 of Charge II, by exceptions and substitutions. R. at 100. Of the excepted words, "pushing her body with his hand and striking her with," the military judge found Appellant not guilty. R. at 100. Of the substituted words, "striking her," the military judge found Appellant guilty. R. at 100.

GRANTED
28 DEC 2023

months, and to be discharged with a bad-conduct discharge. R. at 654. The convening authority took no action on the findings. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant Zackery A. Logan*, dated 2 August 2022, at 1. The convening authority suspended Appellant's reduction in grade for six months from the entry of judgment and suspended the adjudged forfeitures for a period of six months. *Id*. The convening authority also waived Appellant's automatic forfeitures for a period of six months for the benefit of his dependent children. *Id*. Appellant is not currently confined.

The record of trial consists of seven prosecution exhibits, 12 defense exhibits, 26 appellate exhibits, and three court exhibits; the trial transcript is 657 pages. Appellant is not currently confined.

Undersigned counsel is currently assigned 18 cases; 14 cases are pending initial AOEs before this Court. One case before the Court of Appeals for the Armed Forces (CAAF) have priority over this case: *United States v. Smith*. Oral argument is scheduled for 16 January 2024, and undersigned counsel is currently preparing for that argument. In addition, seven cases before this Court have priority over the instant case:

1) *United States v. Daughma*, ACM 40385 – The Record of trial is nine volumes consisting of 18 prosecution exhibits, five defense exhibits, 64 appellate exhibits, and one court exhibit. Undersigned counsel has reviewed the sealed and unsealed transcript and exhibits and is conducting legal research.
2) *United States v. Stelly*, ACM 40425 – The record of trial is four volumes consisting of three prosecution exhibits, five defense exhibits, and 10 appellate exhibits; the transcript is 109 pages.

Appellant was advised of his right to a timely appeal. Appellant was advised of this request for an enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for an enlargement of time. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet had time to complete review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully

review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

[redacted]

TREVOR N. WARD
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 21 December 2023.

Respectfully submitted,

[redacted]

TREVOR N. WARD
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

27 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ZACKERY A. LOGAN, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40407 Panel No. 3

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

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

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

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

[redacted]

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 27 December 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT OF TIME (TENTH)**
Appellee	)	
	)	
v.	)	Before Panel No. 3
	)	
Staff Sergeant (E-5)	)	No. ACM 40407
ZACKERY A. LOGAN,	)	
United States Air Force	)	19 January 2024
Appellant	)	

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his tenth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **27 February 2024**. The record of trial was docketed with this Court on 2 February 2023. From the date of docketing to the present date, 351 days have elapsed. On the date requested, 390 days will have elapsed.

On 27 June 2022, pursuant to his pleas,[1] Appellant was convicted by a military judge, sitting as a general court-martial, at McConnell Air Force Base, Kansas, of one charge and four ations[2] of assault in violation of Article 128, Uniform Code of Military Justice (UCMJ). 8, 100. A panel of officer and enlisted members sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances for 18 months, to be confined for one year and six

GRANTED
24 JAN 2024

[1] Pursuant to his plea agreement, the Government withdrew and dismissed, with prejudice, one charge and specification of sexual assault in violation of Article 120, UCMJ, and one specification of assault in violation of Article 128, UCMJ. R. at 656-57.

[2] The military judge found Appellant guilty of Specification 1 of Charge II, by exceptions and substitutions. R. at 100. Of the excepted words, "pushing her body with his hand and striking her chest," the military judge found Appellant not guilty. R. at 100. Of the substituted words, "striking her face," the military judge found Appellant guilty. R. at 100.

months, and to be discharged with a bad-conduct discharge. R. at 654. The convening authority took no action on the findings. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant Zackery A. Logan*, dated 2 August 2022, at 1. The convening authority suspended Appellant's reduction in grade for six months from the entry of judgment and suspended the adjudged forfeitures for a period of six months. *Id*. The convening authority also waived Appellant's automatic forfeitures for a period of six months for the benefit of his dependent children. *Id*. Appellant is not currently confined.

The record of trial consists of seven prosecution exhibits, 12 defense exhibits, 26 appellate exhibits, and three court exhibits; the trial transcript is 657 pages. Appellant is not currently confined.

Undersigned counsel is currently assigned 18 cases; 14 cases are pending initial AOEs before this Court. One case before the Court of Appeals for the Armed Forces (CAAF) has priority over this case: *United States v. Smith*. Oral argument was scheduled for 16 January 2024, but was postponed to 24 January 2024 due to inclement weather. Undersigned counsel is currently preparing for that argument. In addition, one case before this Court has priority over the instant case:

1) *United States v. Daughma*, ACM 40385 – The Record of trial is nine volumes consisting of 18 prosecution exhibits, five defense exhibits, 64 appellate exhibits, and one court exhibit. Undersigned counsel has reviewed the sealed and unsealed transcript and exhibits, is conducting legal research, and drafting an assignment of errors.

Appellant was advised of his right to a timely appeal. Appellant was advised of this request for an enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for an enlargement of time. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet had time to complete review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

[redacted]

TREVOR N. WARD
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 19 January 2024.

Respectfully submitted,

[redacted]

TREVOR N. WARD
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

23 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ZACKERY A. LOGAN, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40407 Panel No. 3

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

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

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

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

[redacted]

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Staff Sergeant (E-5) **ZACKERY A. LOGAN**, United States Air Force *Appellant*	**CONSENT MOTION TO EXAMINE SEALED MATERIALS** Before Panel No. 3 No. ACM 40407 9 February 2024

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

Pursuant to Rules 3.1 and 23.3(f) of this Court's Rules of Practice and Procedure and Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i), Appellant moves for both parties to examine the following sealed materials:

1) **Appellate Exhibits V-VIII and X**. Appellate Exhibits V-VII and X are various filings made by the Government, Defense, and Victim's Counsel concerning Mil. R. Evid. 412. R. at 19-20. Appellate Exhibit VIII is a Defense Motion *in Limine* made pursuant to Mil. R. Evid 404(b). R. at 20. These filings were reviewed by trial and defense counsel and ordered sealed by the military judge. Appellate Exhibit XXVI at 1.
2) **Prosecution Exhibit 1, Attachments 2, 5, and 6**. Prosecution Exhibit 1 is a stipulation of fact which was admitted at trial and used by the trier of fact for both findings and sentencing. R. at 46. The attachments are photographs of named victims. Prosecution Exhibit 1 at 6. They were reviewed by trial and defense counsel and ordered sealed by the military judge. AE XXVI at 1.
3) **Prosecution Exhibits 6 and 7**. Prosecution Exhibits 6 and 7 were admitted at trial and available to the trier of fact at sentencing. R. at 218, 245, 252, These exhibits are

photographs of named victims. Prosecution Exhibit 2 at 1 (listing out the Government's sentencing exhibits). They were reviewed by trial and defense counsel and ordered sealed by the military judge. AE XXVI at 1

4) **Defense Exhibit J**. This exhibit was admitted at trial and available to the trier of fact at sentencing. R. at 474. This exhibit is a video of one of the named victims' interview with security forces. R. at 463. This exhibit was reviewed by trial and defense counsel and ordered sealed by the military judge. AE XXVI at 1

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these matters is reasonably necessary to appellate counsels' responsibilities, undersigned counsel asserts that review of the referenced exhibits is necessary to conduct a complete review of the record of trial and be in a position to advocate competently on behalf of Appellant. Appellant stands convicted of an offense related to the sealed materials admitted at trial. In order to fully present matters to this Court, undersigned counsel requires access to the sealed materials.

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

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

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

Appellate Government Counsel have been consulted about this motion and consents to the relief sought by the Appellant.

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 9 February 2024.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
Office: [redacted]
Email: [redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40407**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Zackery A. LOGAN	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 9 February 2024, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials, requesting both parties be allowed to examine Appellate Exhibits V–VIII and X; Attachments 2, 5, 6 of Prosecution Exhibit 1, Prosecution Exhibits 6–7; and Defense Exhibit J. These exhibits were reviewed by trial counsel and trial defense counsel and ordered sealed by the military judge at trial.

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

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

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

ORDERED:

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

Appellate defense counsel and appellate government counsel may view sealed **Appellate Exhibits V–VIII and X; Attachments 2, 5, 6 of Prosecution Exhibit 1; Prosecution Exhibits 6–7; and Defense Exhibit J** subject to the following conditions:

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

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

FOR THE COURT

[redacted] FE, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**NOTICE OF APPEARANCE OF COUNSEL**
v.	)	Before Panel No. 3
Staff Sergeant (E-5) **ZACKERY A. LOGAN,** United States Air Force *Appellant*	)	No. ACM 40407 12 February 2024

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

To the Clerk of this Court and all parties of record, the undersigned hereby enters an appearance as appellate counsel for Appellant in the above-captioned case, pursuant to Rule 12 of the Rules of Practice and Procedure of the United States Air Force Court of Criminal Appeals. I hereby certify that I am admitted to practice before this court.

Respectfully submitted,

[redacted]

SCOTT HOCKENBERRY, Esq.
Civilian Defense Counsel
Michigan Bar No. P72357
Daniel Conway & Associates
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 12 February 2024.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States AiR Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (ELEVENTH)**
v.	)	Before Panel No. 3
Staff Sergeant (E-5) **ZACKERY A. LOGAN,** United States Air Force *Appellant*	)	No. ACM 40407
	)	15 February 2024

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his eleventh enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **28 March 2024**. The record of trial was docketed with this Court on 2 February 2023. From the date of docketing to the present date, 378 days have elapsed. On the date requested, 420 days will have elapsed.

On 27 June 2022, pursuant to his pleas,[1] Appellant was convicted by a military judge, sitting as a general court-martial, at McConnell Air Force Base, Kansas, of one charge and four specifications[2] of assault in violation of Article 128, Uniform Code of Military Justice (UCMJ). R. at 1, 18, 100. A panel of officer and enlisted members sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances for 18 months, to be confined for one year and six

[1] Pursuant to his plea agreement, the Government withdrew and dismissed, with prejudice, one charge and specification of sexual assault in violation of Article 120, UCMJ, and one specification of assault in violation of Article 128, UCMJ. R. at 656-57.

[2] The military judge found Appellant guilty of Specification 1 of Charge II, by exceptions and substitutions. R. at 100. Of the excepted words, "pushing her body with his hand and striking her chest," the military judge found Appellant not guilty. R. at 100. Of the substituted words, "striking her face," the military judge found Appellant guilty. R. at 100.

months, and to be discharged with a bad-conduct discharge. R. at 654. The convening authority took no action on the findings. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant Zackery A. Logan*, dated 2 August 2022, at 1. The convening authority suspended Appellant's reduction in grade for six months from the entry of judgment and suspended the adjudged forfeitures for a period of six months. *Id*. The convening authority also waived Appellant's automatic forfeitures for a period of six months for the benefit of his dependent children. *Id*. Appellant is not currently confined.

The record of trial consists of seven prosecution exhibits, 12 defense exhibits, 26 appellate exhibits, and three court exhibits; the trial transcript is 657 pages. Appellant is not currently confined. Civilian co-counsel, Mr. Scott Hockenberry, and the undersigned, have completed an initial review of the sealed and unsealed exhibits and transcript. Counsel have identified potential issues and have begun the research and drafting of potential assignments of error. Civilian co-counsel has no cases that are of a higher priority than this case.

Undersigned counsel is currently assigned 19 cases; 15 cases are pending initial AOEs before this Court; only one case before this Court has priority over the instant case:

1) *United States v. Daughma*, ACM 40385 – The Record of trial is nine volumes consisting of 18 prosecution exhibits, five defense exhibits, 64 appellate exhibits, and one court exhibit. Undersigned counsel filed an assignment of errors on 7 February 2024. The Government's answer is due on 8 March 2024, with any reply being due on 15 March 2024.

Appellant was advised of his right to a timely appeal. Appellant was advised of this request for an enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for an enlargement of time. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and

has not yet had time to complete review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

[redacted]

TREVOR N. WARD
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 15 February 2024.

Respectfully submitted,

[redacted]

TREVOR N. WARD
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

20 February 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ZACKERY A. LOGAN, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40407 Panel No. 3

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

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

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

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

[redacted]

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 20 February 2024.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40407**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Zackery A. LOGAN	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 15 February 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Eleventh) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

Appellant's civilian defense counsel "has completed review of the sealed and unsealed exhibits and transcript" and has "identified potential issues" and "begun the research and drafting of potential assignments of error." He "has no cases that are of higher priority than [Appellant's] case." Appellant's military counsel has only one case before this court that has higher priority over Appellant's case.

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 21st day of February, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Eleventh) is **GRANTED**. Appellant shall file any assignments of error not later than **28 March 2024**.

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

FOR THE COURT

[redacted] FE, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (TWELFTH)**
v.	)	Before Panel No. 3
Staff Sergeant (E-5) **ZACKERY A. LOGAN,** United States Air Force *Appellant*	)	No. ACM 40407
	)	18 March 2024

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his twelfth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of ten days, which will end on **7 April 2024**. The record of trial was docketed with this Court on 2 February 2023. From the date of docketing to the present date, 410 days have elapsed. On the date requested, 430 days will have elapsed.

On 27 June 2022, pursuant to his pleas,[1] Appellant was convicted by a military judge, sitting as a general court-martial, at McConnell Air Force Base, Kansas, of one charge and four specifications[2] of assault in violation of Article 128, Uniform Code of Military Justice (UCMJ). R. at 1, 18, 100. A panel of officer and enlisted members sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances for 18 months, to be confined for one year and six

[1] Pursuant to his plea agreement, the Government withdrew and dismissed, with prejudice, one charge and specification of sexual assault in violation of Article 120, UCMJ, and one specification of assault in violation of Article 128, UCMJ. R. at 656-57.

[2] The military judge found Appellant guilty of Specification 1 of Charge II, by exceptions and substitutions. R. at 100. Of the excepted words, "pushing her body with his hand and striking her chest," the military judge found Appellant not guilty. R. at 100. Of the substituted words, "striking her face," the military judge found Appellant guilty. R. at 100.

months, and to be discharged with a bad-conduct discharge. R. at 654. The convening authority took no action on the findings. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant Zackery A. Logan*, dated 2 August 2022, at 1. The convening authority suspended Appellant's reduction in grade for six months from the entry of judgment and suspended the adjudged forfeitures for a period of six months. *Id*. The convening authority also waived Appellant's automatic forfeitures for a period of six months for the benefit of his dependent children. *Id*. Appellant is not currently confined.

The record of trial consists of seven prosecution exhibits, 12 defense exhibits, 26 appellate exhibits, and three court exhibits; the trial transcript is 657 pages. Civilian counsel, Mr. Scott Hockenberry, and the undersigned, have reviewed the entire record, identified several issues, and begun research. Additionally, civilian and undersigned counsel have drafted several of the identified issues; several other issues are not yet drafted. Neither civilian nor undersigned counsel currently have any case which is of a higher priority than the instant one.

Since the last enlargement of time, civilian and undersigned counsel have researched and drafted several assignments of error. In addition, undersigned counsel filed a reply brief in the case of *United States v. Daughma* (ACM 40385) on Friday, 15 March 2024.

Appellant was advised of his right to a timely appeal. Appellant was advised of this request for an enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for an enlargement of time. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet had time to complete review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

[redacted]

TREVOR N. WARD
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 18 March 2024.

Respectfully submitted,

[redacted]

TREVOR N. WARD
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

20 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ZACKERY A. LOGAN, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40407 Panel No. 3

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 430 days in length. Appellant's over a year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 4 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 20 March 2024.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40407**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Zackery A. LOGAN	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 18 March 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Twelfth) requesting an additional ten days to submit Appellant's assignments of error. The Government opposes the motion.

This court held a status conference on 25 March 2024 to discuss the progress of Appellant's case. Lieutenant Colonel J. Peter Ferrell represented the Government, and Captain (Capt) Trevor N. Ward, Mr. Scott Hockenberry and Ms. Megan P. Marinos represented Appellant. Capt Ward expressed that an estimated nine assignments of error will be submitted. Of the nine projected assignments of error, three have been completed by the counsel and the rest are yet to be drafted. Capt Ward stated that he and his co-counsel anticipated filing Appellant's assignments of error brief on or before the requested due date of 7 April 2024.

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 26th day of March, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Twelfth) is **GRANTED**. Appellant shall file any assignments of error not later than **7 April 2024**.

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

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**BRIEF ON BEHALF OF**
Appellee	)	**APPELLANT**
	)	
v.	)	Before Panel No. 3
	)	
Staff Sergeant (E-5)	)	No. ACM 40407
ZACKERY A. LOGAN,	)	
United States Air Force	)	5 April 2024
Appellant	)	

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

ASSIGNMENTS OF ERROR[1]

I.

WHETHER APPELLANT'S PLEAS TO SPECIFICATIONS 1 AND 2 OF CHARGE II WERE IMPROVIDENT WHERE THE *CARE*[2] INQUIRY RAISED AFFIRMATIVE DEFENSES, THE MILITARY JUDGE DID NOT RESOLVE THESE INCONSISTENT MATTERS, AND THE MILITARY JUDGE DID NOT ENGAGE IN AN INQUIRY ON ALL THE AFFIRMATIVE DEFENSES RAISED.

II.

WHETHER APPELLANT'S PLEAS WERE IMPROVIDENT BECAUSE THE MILITARY JUDGE DID NOT EXPLAIN THE DEFENSE OF LACK OF MENTAL RESPONSIBILITY TO APPELLANT, DID NOT SATISFY HIMSELF THAT COUNSEL HAD EVALUATED THE VIABILITY OF THE DEFENSE, AND DID NOT ELICIT FACTS FROM APPELLANT THAT NEGATED THE DEFENSE.

III.

WHETHER APPELLANT'S PLEAS WERE IMPROVIDENT BECAUSE THE MILITARY JUDGE FAILED TO ADEQUATELY ADVISE

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[1] Appellant raises one issue, contained in Appendix A, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[2] *United States v. Care*, 40 C.M.R. 247, 253 (1969)

APPELLANT ON HIS WAIVER OF HIS RIGHT TO TRIAL BY MEMBERS.

IV.

WHETHER APPELLANT KNOWINGLY AND UNDERSTANDINGLY ELECTED A MILITARY JUDGE ALONE FORUM FOR PURPOSES OF FINDINGS.

V.

WHETHER THE MILITARY JUDGE PLAINLY ERRED BY FAILING TO ASSEMBLE THE COURT-MARTIAL PRIOR TO HEARING PLEAS, RECEIVING EVIDENCE, AND RENDERING A VERDICT.

VI.

WHETHER TRIAL COUNSEL ENGAGED IN IMPROPER SENTENCING ARGUMENT BY CONTRADICTING THE STIPULATION OF FACT.

STATEMENT OF THE CASE

On 27-30 June 2022, Staff Sergeant (SSgt) Zackery A. Logan (Appellant) was tried by a General Court-Martial at McConnell Air Force Base, Kansas. R. at 1. Appellant was convicted, pursuant to his pleas, R. at 18, of one specification of assault consummated by a battery upon a spouse, one specification of aggravated assault by strangulation, and two specifications of assault consummated by a battery upon a child, all in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928.[3] R. at 100. Pursuant to the pretrial agreement, the government withdrew and dismissed one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 and one specification of assault consummated by a battery upon a child in violation of Article 128, UCMJ, 10 U.S.C. § 928. R. at 656-57; App. Ex. XIII (Offer for Plea Agreement).

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

Appellant elected trial by members with enlisted representation, R. at 15, and the members sentenced Appellant to a reduction to E-1, forfeiture of all pay and allowances, confinement for 1 year and 6 months, and a bad conduct discharge. R. at 654. The convening authority suspended the adjudged reduction of rank and forfeiture for six months, at which time, absent prior vacation of the suspension, they would be "remitted without further action." Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. Staff Sergeant Zackery A. Logan*, dated 26 August 2022 (Convening Authority Action, dated 26 August 2022).[4] [5] The convening authority approved the remainder of the sentence and took no action on the findings. *Id*.

STATEMENT OF FACTS

Appellant was married to KL in 2012, and the couple remained married continuously through the charged timeframe. PE 1 at 1 (Stipulation of Fact). Appellant and KL had two sons, TL and OL. PE 1 at 2.

1. Offenses against Appellant's wife (Specifications 1 and 2 of Charge II)

Both specifications involving KL, Appellant's wife, arise from the events of 28 December 2020. PE 1 at 1-3.[6] On that date, the family was driving from Kansas to Arkansas to visit KL's family for Christmas. PE 1 at 2. Appellant was driving, KL was in the front passenger seat, and their two sons were in the back seat. PE 1 at 2. At this time, TL was eight years old, and OL was

[4] The convening authority issued an original action on 2 August 2022. ROT, Vol. 1, Convening Authority Decision on Action – *United States v. Zackery A. Logan*, dated 2 August 2022. However, this action contained an error (issuing a reprimand when the sentencing authority had not adjudged a reprimand) and was replaced by the corrected 26 August 2023 action.
[5] The convening authority further waived automatic forfeitures for a period of six months, to be paid to Appellant's spouse. Convening Authority Action, dated 26 August 2022.
[6] There is some indication elsewhere in the record that these events occurred on 29 December 2020. *See, e.g.*, R. at 54. To the extent there is any ambiguity in the exact date, Appellant stipulates that it is irrelevant to this appeal.

five years old. PE 1 at 2. Appellant and KL began arguing over KL's discovery of messages/photo(s) indicative of infidelity on Appellant's phone. PE 1 at 2; R. at 54. KL slapped Appellant in the face. PE 1 at 2. KL told Appellant to pull over to the side of the road and he complied with her demand. PE 1 at 2.

After pulling over, KL jumped out of the truck with Appellant's phone, ran away from the highway into the grass on the side of the road, sat down, and tried to open Appellant's phone to finish reading the messages. PE 1 at 2. Appellant approached KL and tried to get her to give his phone back, but KL bit Appellant's arm multiple times. PE 1 at 2. Appellant wrapped his arms around KL to restrain her from biting him, regained his phone, and attempted to remove himself from the situation by walking to a nearby gas station. PE 1 at 2; R. at 54. Appellant walked approximately a quarter mile, with the intent of de-escalating the situation. R. at 54. Appellant told KL she could continue driving without him, and he would get a ride. R. at 54. KL said no and followed Appellant with the family truck, continuously trying to convince him to get back inside. PE 1 at 2; R. at 54. Appellant eventually acquiesced and got back in the truck. PE 1 at 2.

The argument eventually resumed and Appellant informed KL that he wanted to seek a divorce. PE 1 at 2. KL became more upset, stating that she did not want a divorce. PE 1 at 2. KL responded by opening the truck door while it was moving at highway speeds. PE 1 at 2. Appellant's perception was that she was trying to fall out of the truck onto the highway. R. at 54. Appellant grabbed her arm to keep her from falling or leaping out of the truck and held her arm while he slowed down and pulled over. PE 1 at 2. After the truck stopped, KL jumped out and began running towards the highway into moving traffic. PE 1 at 2. KL was yelling that she did not want to live anymore. R. at 54-55. Appellant intervened to save her life, grabbing her from behind and physically dragging her back from the flow of traffic. PE 1 at 2. KL narrowly missed

being struck by two semi-trucks travelling at highway speeds. R. at 55. Appellant eventually got KL back in the truck and the trip continued. PE 1 at 2.

After getting back on the road, KL opened the door at highway speeds "several more times." PE 1 at 2. KL was leaning out of the vehicle, and Appellant was gripping her arm to keep her inside. R. at 55. Appellant again pulled the truck over. PE 1 at 2. By this time, Appellant was "getting to the point of being exhausted." R. at 55. The children were screaming and crying in the back seat. R. at 55. After Appellant pulled over and KL "bolted out of the truck again and ran towards the highway." PE 1 at 2. This happened approximately six times. R. at 55. On each occasion, Appellant intervened to save her life, catching her before she entered the flow of highway traffic. PE 1 at 2. Appellant yelled at KL to get back inside and stop doing what she was doing. PE 1 at 2.

Despite Appellant's entreaties, KL ran towards the highway once more. PE 1 at 2. He again caught her, this time opening the truck door and physically putting her inside. PE 1 at 2. At this point, Appellant slapped KL in the face. PE 1 at 2. During the *Care* inquiry, Appellant explained: "I slapped her in the face and told to wake up and stop doing what you are doing. I told her even though I am an asshole, you have two kids that love you and want you to be in their life." R. at 54. The military judge then asked: "Why did you slap her in the face?" R. at 55. Appellant again endorsed that he had done so to stop her from running into the highway, stating: "At that point, I was exhausted and frustrated, and I really was just trying to stop the entire situation." R. at 55. Upon further inquiry, Appellant repeated that when he slapped KL he "told her to wake up and stop doing what you are doing." R. at 56. The military judge asked if the slap was out of frustration or at attempt to get KL "refocused" in order to avoid her attempting to hurt herself. R.

at 56-57. Appellant endorsed both motivations. R. at 57. He elaborated: "I was trying to get her to reset, so to speak." R. at 57.

Appellant attempted, apparently repeatedly, to call 9-1-1. R. at 54, 57, 584. However, every time he attempted to call 9-1-1, KL ran back towards the highway, so Appellant had to choose whether to remain on the phone or chase after her to prevent her death. R. at 57.

As KL sat in the passenger seat, "she continued to threaten suicide in front of the children." PE 1 at 3. Appellant placed his hand around her throat and squeezed. PE 1 at 3. When asked about this specification during the *Care* inquiry, Appellant explained:

> [D]irectly after I had slapped [KL], she started screaming at "Fuck you. You are an asshole. I don't want to be here anymore. don't want to live anymore." She repeated that again and again in front of the boys. The boys were crying. I remember Tristan saying "It was going to be okay, mom." She continued to threaten to kill herself, and I placed my right hand on her throat and squeezed. *I was not trying to hurt her or to kill her. I just wanted her to stop saying what she was saying in front of the boys*. I did not hold my hand on her throat for very long, maybe five seconds. When it seemed like she relaxed, I let go.

R. at 63-64 (emphasis added). When the military judge again asked Appellant about his motivation for placing his hand around KL's neck, Appellant again stated: "I was just angry and frustrated and trying to get her to just stop talking about hurting herself in front of the kids." R. at 66.

After these charged events, a good Samaritan pulled up behind the family to offer help. PE 1 at 3. KL got out of the truck again. PE 1 at 3. Appellant asked the woman if she would speak with KL while Appellant stayed behind. R. at 64. Appellant told KL that if she wanted to leave with the woman who was helping, she should do so, but KL declined. PE 1 at 3. At Appellant's request the woman followed them to the next town. PE 1 at 3; R. at 64. At that point, the family agreed to continue the approximately one-hour drive to the relatives' house they were planning to visit. PE 1 at 3.

During the sentencing phase of the court-martial, evidence was presented that Appellant lost his brother to suicide, which was very hard on appellant. R. at 285, 294, 569-70. Additionally, KL had threatened to self-harm on prior occasions. R. at 295. These threats were serious. R. at 295. KL was hospitalized after prior threats of self-harm. R. at 295.

2. Forum Selection, Judge Alone Colloquy, and Court Assembly

Prior to hearing his pleas or taking evidence, the military judge correctly inquired of Appellant "[b]y what type of court [he wished] to be tried?" R. at 15. Appellant elected to be tried by "officer and enlisted members." R. at 15. The military judge proceeded to arraign Appellant and heard his pleas, whereby Appellant plead guilty to various specifications of Charge II. R. at 15-18. After hearing his plea of guilty, the military judge informed Appellant that, by pleading guilty, he was giving up his "right to a trial *of the facts* by this court, that is, [his] right to have this court-martial decide whether or not [he was] guilty based upon evidence the prosecution could present and on any evidence [he] may introduce." R. at 24 (emphasis added). The military judge found that Appellant's waiver of his right "to a trial of the facts" was knowing, intelligent, and conscious. R. at 100. Thereafter, the military judge received evidence against Appellant in the form of a stipulation of fact, R. at 25-26, 46, conducted an inquiry pursuant to *Care*, R. at 52-83, and found Appellant guilty of various specifications, R. at 100.

The military judge never informed Appellant that, by pleading guilty, he was giving up his right to a trial by members. Moreover, despite receiving evidence against him and entering a finding of guilt as the trier of fact, the miliary judge never conducted a judge alone colloquy with Appellant pursuant to R.C.M. 903, nor did he assemble the court.[7]

[7] The military judge only assembled the court after findings. R. at 115.

Additional facts necessary to resolve specific issues are provided below.

ARGUMENT

I. APPELLANT'S PLEAS TO SPECIFICATIONS 1 AND 2 OF CHARGE II WERE IMPROVIDENT BECAUSE THE CARE INQUIRY RAISED AFFIRMATIVE DEFENSES, THE MILITARY JUDGE DID NOT RESOLVE THESE INCONSISTENT MATTERS, AND THE MILITARY JUDGE DID NOT ENGAGE IN AN INQUIRY ON ALL THE AFFIRMATIVE DEFENSES RAISED.

Standard of Review

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Byunggu Kim*, 83 M.J. 235, 238 (C.A.A.F. 2023) (citation omitted). A military judge abuses their discretion if they fail to obtain from the accused an adequate factual basis to support the plea – an area where appellate courts afford significant deference – or if his ruling is based on an erroneous view of the law. *Id.* (citation omitted).

Law

Before accepting a guilty plea, a military judge must ensure that there is a factual basis for the accused's plea. *United States v. Moratalla*, 82 M.J. 1, 3 (C.A.A.F. 2021) (citing *Care*, 40 C.M.R. at 253; R.C.M. 910(e)). A factual basis exists if the facts revealed by the accused objectively support the plea. *Id.* (citations omitted). Military appellate courts apply the "substantial basis" test on this issue. *Id.* Specifically, military appellate courts ask whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the Appellant's guilty plea. *Id.* at 3-4 (citation omitted).

Despite the existence of an otherwise adequate basis for a plea, if an accused establishes matters inconsistent with the plea at any time during the proceeding, the military judge must either resolve the apparent inconsistency or reject the plea. *Id. at 4* (citation omitted). An affirmative defense to a charged offense, by definition, constitutes a matter "inconsistent with the plea" of

guilty and therefore the military judge must resolve the apparent inconsistency or reject the plea. *United States v. Hayes*, 70 M.J. 454, 458 (C.A.A.F. 2012). The threshold for inquiry into an affirmative defense is "the 'possible defense' standard," which is intended to serve as a lower threshold than a *prima facie* showing because it is intended as a trigger to prompt further inquiry pursuant to Article 45, UCMJ, and *Care*, not to determine whether the defense is available or whether members in a contested case should be given an instruction. *Id.* Thus, even if an accused does not volunteer all the facts necessary to establish a defense, if he sets up matters raising a *possible defense*, then the military judge is obliged to make further inquiry to resolve any apparent ambiguity or inconsistency. *Id.* at 459 (citation omitted). Adherence to the "possible defense" standard furthers Congress's intent behind Article 45, UCMJ, to ensure "the acceptance of a guilty plea be accompanied by certain safeguards to ensure the providence of the plea, including a delineation of the elements of the offense charged and an admission of factual guilt on the record." *Id.* at 458 (quoting *Care*, 40 C.M.R. at 250) (additional citation omitted).

"[A] military judge must elicit actual facts from an accused and not merely legal conclusions." *Moratalla*, 82 M.J. at 3 (citation omitted). As such, "conclusory responses" are insufficient and "[c]onclusions of law alone do not satisfy the requirements of Article 45, UCMJ and R.C.M. 910(e)." *United States v. Gosselin*, 62 M.J. 349, 352 (C.A.A.F. 2006).

Argument

1. Specification 1 of Charge II (Slap)

Appellant's pleas to Specification 1 of Charge II were improvident because Appellant clearly and repeatedly stated he slapped KL in order to stop her suicidal behavior. Appellant's stated purpose for touching KL undermines any finding that he did so with a criminal state of mind, which would have been necessary for the pleas to be provident. The charged specification could

only be established if Appellant's actions were "done without legal justification or excuse." *MCM*, Part IV, ¶77.c.(2)(a). Yet, Appellant's reason for touching KL was with legal justification.

Appellant first attempted to deescalate the situation, literally walking away and telling his wife to continue without him. R. at 54. After his wife "begged" him to come back, he did so. R. at 54. Thereafter, KL engaged in a series of serious suicidal statements and actions, to include repeatedly opening the car door at highway speeds, and repeatedly running towards traffic. R. at 54-55. Appellant attempted to call the authorities. R. at 54, 57, 584.

At the time of the charged slap, the children were in the backseat "screaming and crying" and Appellant was "getting to the point of being exhausted" after physically restraining his wife from running into traffic six consecutive times. R. at 55. Following this, he slapped her and "told her to wake up and stop doing what you're doing." R. at 55. When the military judge directly asked appellant *why* he slapped his wife in the face, Appellant explained that, in his state of exhaustion and frustration, he "was really just trying to stop the entire situation." R. at 55. Appellant endorsed that he was trying to get KL "refocused" in order to avoid her attempting to hurt herself and "trying to get her to reset, so to speak." R. at 56-57.

The military judge recognized early on that the stipulation of fact raised potential defenses. *See* R. at 44 ("The way that these facts are explained inside the stipulation, there need [sic] to be in my measure a conversation with the accused about whether or not the force that he applied to his then spouse was with the goal of providing for her safety and providing for the safety of others."). During the *Care* inquiry, the military judge attempted to address these potential defenses by quoting the general rule from the *MCM* that it is "not a battery to touch another to attract the other's attention." R. at 53. The military judge continued that: "While some amount of restraint to prevent injury or to provide for the safety of the victim or other may be lawful, an excessive

amount of force even under these circumstances, constitutes a battery." R. at 53.[8] The military judge seems to have engaged in this inquiry to address the defense of justification under R.C.M. 916(c). *See* R. at 44-45 (referencing defense of justification). The military judge did not engage in an inquiry on the defenses of duress or necessity.

The military judge must engage in an inquiry on all the affirmative defenses raised by the stipulation of fact and the accused's statements. In this case, the military judge should have, at a minimum, engaged in an inquiry on the defense of duress and, possibly, the related defense of necessity. The defense of duress applies to circumstances where the "accused reasonably feared immediate death or great bodily injury to himself or herself or another." Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para 5-5 (29 Feb. 2020) (Benchbook); *see also* R.C.M. 916(h). The C.A.A.F. has held that "a threat of suicide could provide the basis for a duress defense." *United States v. Hayes*, 70 M.J. 454, 461 (C.A.A.F. 2012). Appellant's answers certainly raised duress as a "possible defense" and, as such, the military judge was obligated to inquire further into it. Relatedly, Appellant's answers reasonably raised the common law defense of necessity. Necessity is a common law defense similar to duress but broader in scope.[9] The military judge clearly recognized the issue, but his discussion with Appellant failed to properly advise Appellant of the relevant legal standards. This was error.

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[8] While this phrasing does not seem to appear in the Manual, the Benchbook, or military caselaw, it seems apparent that the military judge drew it from an Army case. *Compare United States v. Boyle*, ARMY 20090893, 2011 CCA LEXIS 404, at 5-6 (Army Ct. Crim. App. 11 Dec. 2011) (unpub. op.), *with* R. at 44-45 (referencing *Boyle*).

[9] Based on undersigned counsels' understanding, the applicability of this defense in military courts remains an unsettled question. *See generally United States v. Olinger*, 50 M.J. 365 (C.A.A.F. 1999)

Prior to the charged slap, Appellant repeatedly attempted to remove himself from the situation and deescalate KL's emotions. He expended a great deal of effort stopping KL from killing herself. Appellant repeatedly stated during the *Care* inquiry that he was (understandably), reaching the point of exhaustion. Appellant attempted, apparently repeatedly, to call 9-1-1, but every time he did so, KL ran back towards the highway so appellant had to choose whether to remain on the phone or chase after her to prevent her death. Additionally, these events must be viewed in light of Appellant's history of traumatic family suicide and KL's prior serious suicide threats, for which she was hospitalized. R. at 285, 294, 569-70, 295.[10] These facts were inconsistent with Appellant's plea, yet the military judge did not resolve them nor conduct sufficient inquiry into potential defenses.

2. Specification 2 of Charge II (Strangulation)

The analysis is similar for Specification 2 of Charge II. After Appellant's extensive efforts to disengage, deescalate, and physically stop KL's repeated suicide attempts, KL was still screaming suicidal ideations in front of their young children, yelling that she didn't want to live anymore. R. at 63-64. Appellant's motivation was "want[ing] her to stop saying what she was saying in front of the boys." R. at 63. A distinction may be drawn between the slap, which Appellant endorsed as an attempt to stop KL's suicidal *behavior*, and the strangulation, which Appellant endorsed as an attempt to stop KL's suicidal *statements*. However, it must be remembered that these events occurred in quick succession in a highly volatile and physically exhausting situation. Moreover, as the C.A.A.F. has stated, an accused need not volunteer all the

[10] While this evidence was presented during the sentencing phase, military judges are responsible for resolving matters inconsistent with the plea raised at any time during the proceeding. *Moratalla*, 82 M.J. at 4

facts necessary to establish a defense in order to require further inquiry. *Hayes*, 70 M.J. at 458-59. Under the possible defense standard, the military judge should have made further inquiry into affirmative defenses.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside Appellant's pleas to Specifications 1 and 2 of Charge II as improvident.

II. APPELLANT'S PLEAS WERE IMPROVIDENT BECAUSE THE MILITARY JUDGE DID NOT EXPLAIN THE DEFENSE OF LACK OF MENTAL RESPONSIBILITY TO APPELLANT, DID NOT SATISFY HIMSELF THAT COUNSEL HAD EVALUATED THE VIABILITY OF THE DEFENSE, AND DID NOT ELICIT FACTS FROM APPELLANT THAT NEGATED THE DEFENSE

Standard of Review

Adopted from A.E. I, above.

Law

Adopted from A.E. I, above, with the following additions:

"In military law, lack of mental responsibility is an affirmative defense that an accused must establish by clear and convincing evidence." *United States v. Riddle*, 67 M.J. 335, 338 (C.A.A.F. 2009); Rules for Courts–Martial (R.C.M.) 916(b)(2)). "If there is reason to believe that the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial the military judge and other officers of the court each has the independent responsibility to inquire into the accused's mental condition." *Id.* at 338. (citing R.C.M. 706(a)). "An accused cannot 'make an informed plea without knowledge that he suffered a severe mental disease or defect at the time of the offense.'" *Id.* (quoting *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005)). "Similarly, the military judge cannot conduct the necessary providence inquiry into the accused's pleas 'without exploring the impact of any potential mental health issues on those pleas.'" *Id.* (quoting *Harris*, 61 M.J. at 398).

"Should the accused's statements or material in the record indicate a history of mental disease or defect on the part of the accused, the military judge must determine whether that information raises either a conflict with the plea and thus the possibility of a defense or only the 'mere possibility' of conflict." *Id.* (citation omitted). "The former requires further inquiry on the part of the military judge, the latter does not." *Id.* (citation omitted).

This Court has provided the following guidance on how trial judges should address issues regarding the mental health of the accused:

> Whenever a judge encounters evidence during a guilty plea inquiry which bears on an accused's mental responsibility, the judge should ask defense counsel if an inquiry into the accused's mental condition was made under R.C.M. 706. If it was, the judge should attach the non-privileged portion of the mental inquiry report as an appellate exhibit.
>
> Moreover, whenever evidence of an accused's mental health problems rears its head, the judge should question defense counsel on whether he or she has explored the mental responsibility angle of the case, including whether evidence exists to negate an intent or knowledge element of the offense. The judge should also ask the accused if defense counsel has discussed that issue and how it may apply to the particular case. The judge should accept the guilty plea only if the mental issues are resolved for the record and the accused disclaims any potential mental "defense," full or partial.

United States v. Handy, 48 M.J. 590, 593 (A.F. Ct. Crim. App. 1998).

Argument

At several points during Appellant's trial, the evidence raised the issue of "a history of mental disease or defect on the part of the accused." *See Riddle*, 67 M.J. at 338. In his unsworn statement, Appellant averred that he had attempted suicide twice: once via attempted hanging by a ceiling fan and once by tying a cinderblock to his feet and jumping into a lake. R. at 580-81. Appellant also averred that he was receiving mental health care. R. at 582. Appellant further relayed that he had been diagnosed with mental health conditions, to include depression, anxiety, and seemingly post-traumatic stress disorder. R. at 582. Appellant explained that he was

prescribed mental health medications. R. at 582. Appellant informed the court that his mental health struggles had intensified during the period in question due to "the stress of having my children out of school from the pandemic and the problems I continued to have with [KL]." R. at 582. Appellant referred to his concern about the ability to access mental health services after the trial. R. at 587.

Despite the evidence repeatedly raising the issue of a history of mental disease or defect on the part of the accused, the military judge made no inquiry with either trial defense counsel or Appellant. The mental issues were not resolved and Appellant did not disclaim any potential full or partial mental defenses. The military judge's failure to resolve these issues runs directly afoul of controlling caselaw. This was error.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside appellant's pleas as improvident.

III. APPELLANT'S PLEAS WERE IMPROVIDENT BECAUSE THE MILITARY JUDGE FAILED TO ADEQUATELY ADVISE APPELLANT ON HIS WAIVER OF HIS RIGHT TO TRIAL BY MEMBERS.

Standard of Review

When considering issues related to the waiver of an accused's constitutional rights prior to a plea of guilty, military courts review "de novo the military judge's legal conclusion that Appellant's pleas were provident." *Harris*, 61 at 398; *United States v. Hansen*, 59 M.J. 410, 411-13 (reviewing, de novo, the Appellant's waiver of his constitutional rights).

Law and Argument

When an accused pleads guilty, he waives several constitutional rights including "the right to *trial by jury*." *Hansen*, 59 M.J. at 411 (emphasis added) (citing *Boykin v. Alabama*, 395 U.S. 238, 243 (1969)); *see also United States v. Finch*, 73 M.J. 144, 151 (2014) (Ryan, J., dissenting)

(recognizing that, for a plea of guilty, an accused waives his right to a trial by members). The Supreme Court has held that, in order for a plea of guilty to be knowing and voluntary, an accused needs to be apprised of his "rights to [a] *jury trial*." *United States v. Vonn*, 535 U.S. 55, 69 (2002) (emphasis added).[11] In fact, well before *Vonn*, the Supreme Court had "advised [trial courts] to conduct an on the record examination of the defendant which should include . . . that the defendant understands . . . his right *to a jury trial*." *Boykin*, 395 U.S. at 244 n.7 (emphasis added).

The C.A.A.F., too, requires that an accused be informed of the nature of the rights he waives by pleading guilty. *Harris*, 61 M.J. at 398. But, for reasons unclear, the C.A.A.F. only requires that military judges advise the accused that a guilty plea waives their right to a "*trial of the facts*." *Hansen*, 59 M.J. at 411 (quoting *Care*, 40 C.M.R. at 253). To be sure, "trial of facts" is not a term which naturally means "trial by members" or "trial by jury," even for learned judges. *See, e.g.*, *Garner v. Louisiana*, 368 U.S. 157, 173 (1961) (referring to "trial of the facts" as the proceedings which take place at the trial level, as opposed to those at the appellate level); *United States v. Taylor*, 28 M.J. 256, 1989 CMA LEXIS 1620, at *1 (C.M.A. 1989) (interlocutory order) (discussing a "trial of the facts" as a finding of guilt by a trial court); *United States v. Kelly*, 76 M.J. 793, 795 (A. Ct. Crim. App. 2017), rev'd on other grounds, 77 M.J. 404 (C.A.A.F. 2018) (using "trial of the facts" to refer to a litigated trial, rather than an appeal); *United States v. Tulin*, 14 M.J. 695, 699 (N-M.C.M.R. 1982) (expressing that a plea of guilty results in a waiver of a right to "trial of the facts *before members*"); *United States v. Allen*, No. ACM 39001, 2017 CCA LEXIS 549, at *2 n.2 (A.F. Ct. Crim. App. 11 Aug 2017) (unpub. op.) (referencing Article 73 of the 2012

[11] While some of the Supreme Court jurisprudence in this area involves the interpretation of Fed. R. Crim. Proc. 11(b)(1)(C) and its predecessors, the requirement to inform an accused of which constitutional rights he forfeits during a guilty plea is of constitutional importance. *Boykin*, 395 U.S. at 243.

M.C.M. as authorizing a new "*trial of the facts* when there has been a trial"); *United States v. al Nashiri*, 191 F. Supp. 3d 1308, 1327 n.29 (Ct. Mil. Comm. Rev. 2016) (referring to a "trial of the facts" as any matter litigated before a fact finder).

When Appellant plead guilty, he gave up his right to a trial by members. Despite this, the military judge never informed Appellant that he would be giving up this right. Instead, the military judge merely informed Appellant that he was giving up his right to "a trial of the facts." While the C.A.A.F. and various Courts of Criminal Appeals (C.C.A.) have used the terms "trial of the facts" and "trial by members" interchangeably since *Care*, the use of the former phrase is inartful, confusing, and in many cases, misleading. As various courts at all levels have articulated, a "trial of the facts" refers to any litigated matter before a factfinder. This, of course, means that a "trial of the facts" is distinct from a trial before members or a jury trial. After all, one can have a "trial of the facts" before a military judge alone instead of a jury. While a person who pleads guilty undoubtedly forfeits his right to contest a matter—therefore giving up a "trial of the facts"—this is separate and distinct from the forfeiture of an accused's constitutional right to a trial by members.[12] By failing to advise Appellant of his right to trial before members, the military judge did not establish that Appellant knowingly and voluntarily waived his rights. This renders the military judge's acceptance of his guilty plea invalid.

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[12] This case is distinct from many plea deal cases where an accused may, as a condition of his plea, forfeit his right to elect members for both findings and sentence. *See, e.g.*, *United States v. Riley*, 72 M.J. 115, 124 (C.A.A.F. 2013) (Stucky, J., dissenting). In such cases, the military judge conducts the judge alone colloquy required by R.C.M. 903. Benchbook at para. 2-1-3. However, as discussed in A.E. IV *infra*, the military judge in this case did not conduct that colloquy. Therefore, there is no evidence in the record to demonstrate that Appellant intelligently, knowingly, or consciously, waived his constitutional right to a trial by members.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside Appellant's pleas as improvident.

IV. APPELLANT DID NOT KNOWINGLY AND UNDERSTANDINGLY ELECT A MILITARY JUDGE ALONE FORUM.

Standard of Review

The question of an accused's waiver to his right to trial by members is a question of law which military courts review de novo. *United States v. St. Blanc*, 70 M.J. 424, 427 (C.A.A.F. 2012).

Law and Argument

A military accused has a right to trial by members, should he so elect. *Id.* at 427. Rule for Courts-Martial 903 "protects the forum selection right . . . by ensuring that an accused's waiver of the right to trial by members is knowing and voluntary." *Id*. Relevantly, R.C.M. 903(c)(2)(A) requires a military judge to "[a]scertain whether the accused has consulted with defense counsel and has been informed of the identity of the military judge and of the right to trial by members." R.C.M. 903(c)(2)(A). In practice, "the military judge should inquire personally of the accused to ensure the accused's waiver of the right to trial by members is knowing and understanding." R.C.M. 903(c)(2)(A), discussion. The C.A.A.F. "expect[s] military judges to inform accused persons, on the record, of their right to trial by courts-martial and to trial by judge alone, and to obtain from the accused either an oral waiver on the record or a written waiver." *United States v. Turner*, 47 M.J. 348, 350 (C.A.A.F. 1997).

When a military accused elects to be tried by a military judge alone, the military judge must conduct the requisite colloquy. *Id*. at 350; *see generally United States v. Parkes*, 5 M.J. 489 (C.M.A. 1978) (finding that a military judge's colloquy with the accused was sufficient evidence that the accused knowingly and understandingly waived his right to trial by members); *United*

States v. Jenkins, 42 C.M.R. 304 (C.M.A 1970) (finding that a request for a military judge alone may be enough to demonstrate an knowing decision).

As articulated in A.E. III *supra*, Appellant did not elect to be tried by a military judge alone. Rather, he merely waived his right to a trial on the merits (i.e., "trial of the facts"). But, should this Court conclude that "trial of the facts" means "trial by members," the logical consequence of that election is that the Appellant chose to be tried by a military judge for findings. As such, the military judge was required to conduct the R.C.M. 903(c)(2)(A) colloquy. This did not happen. As a result, the Appellant was never informed of his right to a trial by members. *See supra* A.E. III; Benchbook at para 2-1-3. Nor did Appellant submit an oral or written waiver of this decision. *Supra* A.E. III; *Turner*, 47 M.J. at 350.

In *United States v. Adad*, No. 202000213, 2021 CCA LEXIS 58 (N-M. Ct. Crim. App. 9 Feb 2021) (unpub. op.), the Navy-Marine Court of Criminal Appeals (Navy-Marine Court) found error when the military judge failed to meet the requirements of R.C.M. 903. 2021 CCA LEXIS 58, at *2-4. However, the Navy-Marine Court went on to find that there was no prejudice for several reasons, including that the Appellant signed a plea agreement electing to be tried by a judge alone and "most importantly, prior to findings, the military judge recognized his earlier oversights and remedially addressed them with the parties." *Id*. at *4. Distinct from *Adad*, these factors do not exist in this case. The plea agreement makes no mention of Appellant electing trial by a military judge alone. And "most importantly," the military judge did not recognize his error at any time during the trial, let alone before entering findings. As such, not only did the military judge err, but such error prejudiced Appellant.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside Appellant's findings and sentence.

V. THE MILITARY JUDGE PLAINLY ERRED BY FAILING TO ASSEMBLE THE COURT-MARTIAL PRIOR TO HEARING PLEAS, RECEIVING EVIDENCE, AND RENDERING A VERDICT.

Standard of Review

This Court reviews issues related to court-martial assembly for plain error. *United States v. Metzger*, ACM No. S30547, 2004 CCA LEXIS 296, at *3 (A.F. Ct. Crim. App. 20 Dec 2004) (unpub. op.). "Under a plain error analysis, the [appellant] has the burden of demonstrating that: (1) there was error; (2) the error was plain and obvious; and (3) the error materially prejudiced a substantial right of [the appellant]." *United States v. Davis*, 76 M.J. 224, 230 (C.A.A.F. 2017).

Law and Argument

R.C.M. 911 provides that a "military judge shall announce assembly of the court-martial." This Court has said that "assembly is not dependent upon actual announcement by the military judge, but occurs 'when the voir dire of members begins.'" *United States v. Urich*, ACM No. 36823, 2008 CCA LEXIS 472, at *9-10 (A.F. Ct. Crim. App. 20 Oct 2008) (unpub. op.) (quoting *United States v. Hawkins*, 24 M.J. 257, 258-59 (C.M.A. 1987)); *Metzger*, 2004 CCA LEXIS 296, at *2-3. The Navy-Marine Court has also reviewed this issue finding error when the military judge's "lapse" caused the court not to be assembled until after findings. *Adad*, 2021 CCA LEXIS 28, at *5.

In this case, there was error and that error was plain and obvious because the military judge did not assemble the court until after the findings phase of trial, in contravention of R.C.M. 911's plain language. R. at 115. While this Court's caselaw suggests that the utterance of the words "the court is now assembled" is unnecessary to effectuate R.C.M. 911, this Court has made clear that other triggers for assembly occur in or around empanelment (i.e., voir dire). Therefore, even if the military judge merely failed to utter the "magic words," assembly did not occur until, at the

earliest, the venire was empaneled. This was well after findings were entered against Appellant. Therefore, there was error, and that error was plain and obvious.

Moreover, this error caused material prejudice to Appellant. Here, the trial court was not assembled during findings. Nevertheless, the court took Appellant's pleas, received incriminating evidence against him, and rendered a guilty verdict. The prejudice is clear because a court not assembled is no court at all; nevertheless, this unassembled court received evidence and rendered a guilty verdict.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside Appellant's findings and sentence.

VI. TRIAL COUNSEL ENGAGED IN IMPROPER SENTENCING ARGUMENT BY CONTRADICTING THE STIPULATION OF FACT.

Standard of Review

Assertions of prosecutorial misconduct and improper argument are reviewed de novo. *See United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018); *United States v. Flores*, 69 M.J. 366, 369 (C.A.A.F. 2011) (citation omitted).

If proper objection is made at trial, military appellate courts review for prejudicial error. *Andrews*, 77 M.J. at 398 (citing *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005)). If no objection is made, military appellate courts review for plain error. *See id*. "Plain error occurs when (1) there is error, (2) the error is clear or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *Id.* at 401 (quoting *Fletcher*, 62 M.J. at 179). Therefore, this Court must determine: (1) whether trial counsel's argument amounted to clear, obvious error; and (2) if so, whether there was "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *United States v. Lopez*, 76 M.J. 151, 154 (C.A.A.F. 2017) (quoting *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016)).

Law

"Improper argument is one facet of prosecutorial misconduct." *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017) (citing *United States v. Young*, 470 U.S. 1, 7-11, 105 S. Ct. 1038, 84 L. Ed. 2d 1(1985)). "A prosecutor proffers an improper argument amounting to prosecutorial misconduct when the argument 'overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'" *Norwood*, 81 M.J. at 19 (cleaned up).

Counsel should limit their findings arguments to the evidence of record, as well as all reasonable inferences fairly derived from such evidence. *United States v. Bodoh*, 78 M.J. 231, 237 (C.A.A.F. 2019) (quotation marks and citations omitted). Therefore, when argument goes "beyond the facts established in the record" or the reasonable inferences "drawn from the evidence," this "constitute[s] error." *Id.* at 237-38 (*quoting United States v. Paxton*, 64 M.J. 484, 488 (C.A.A.F. 2007)). An exception to this general rule allows trial counsel to comment during argument on contemporary history or matters of common knowledge within the community. *Id.* at 238 (quotation marks and citations omitted). These matters include routine personnel actions such as military status and permanent change of station moves, a military branch's "zero tolerance" drug policy during sentencing, and any other matter upon which servicemembers in general have a common fund of experience and knowledge, through data notoriously accepted by all. *Id.*

In assessing prejudice, military courts should look "at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial." *United States v. Erickson*, 65 M.J. 221, 224 (C.A.A.F. 2007) (citing *Fletcher*, 62 M.J. at 184). This determination is based on "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence to support the conviction." *United*

States v. Norwood, 81 M.J. 12, 19 (C.A.A.F. 2021) (citing *United States v. Voorhees*, 79 M.J. 5, 12 (C.A.A.F. 2019)).[13] Where improper argument occurs during the sentencing portion of the trial, appellate courts look to whether or not they can be confident that the appellant was sentenced on the basis of the evidence alone. *Witt*, 83 M.J. at 285 (citation omitted).

R.C.M. 811(e) provides that, "unless properly withdrawn or ordered stricken from the record, a stipulation of fact that has been accepted is binding on the court-martial and may not be contradicted by the parties thereto." This rule "precludes the Government from evidencing facts at a court-martial which 'contradict' those agreed to in an accepted stipulation of fact." *United States v. Terlep*, 57 M.J. 344, 348 (C.A.A.F. 2002).

Argument

During the Government's sentencing argument, assistant trial counsel told the panel: "The only thing that stopped the accused from strangling [KL] to death that night was the stranger that pulled up that noticed something was wrong with that situation and stopped to intervene." R. at 623. This inflammatory argument went beyond the facts of record, was not a reasonable inference drawn therefrom, and directly contradicted the stipulation of fact. Regarding this incident, the stipulation of fact, which the government agreed to–and presumably drafted–stated that the stranger did not pull up until "[a]fter the strangulation[.]" Pros. Ex. 1, page 3.

It is always improper for counsel to go beyond the evidence of record in arguments. However, Appellant submits it is particularly improper when the government itself stipulated the

[13] In the sentencing context, the third factor may be better articulated as the weight of the evidence supporting the adjudged sentence. *See United States v. Erickson* 65 M.J. 221, 224-26 (C.A.A.F. 2007); *see also United States v. Witt*, 83 M.J. 282, 286-87 (C.A.A.F. 2023) (Hardy, J., concurring) (discussing challenges with applying the *Fletcher* factors, developed to evaluate improper findings argument, to evaluate improper sentencing argument.

truth of the evidence. *See* R.C.M. 811(e). As the good Samaritan did not pull up until *after* the strangulation, it was not a reasonable inference that her arrival was the only thing that stopped Appellant from continuing the strangulation to the point of murder. If the government did not think this sequence of events was accurate, it did not have to stipulate it. Once the government agreed to stipulate to the evidence, however, it could not contradict it in argument.

Regarding prejudice, the severity of the misconduct was high, with the prosecution essentially telling the panel that Appellant had committed attempted murder. No curative measures were adopted. Regarding the third element, the weight of the evidence supporting the adjudged sentence, Appellant received a rather severe sentence, especially given the significant mitigating and extenuating circumstances presented. On this record, this Court should not be confident that Appellant was sentenced on the basis of the evidence alone.

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

Conclusion

WHEREFORE, Appellant respectfully requests this Honorable Court set aside Appellant's pleas as improvident and set aside the findings and sentence as articulated above.

Respectfully Submitted,

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APPENDIX A

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

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY DESIGNATING THE COMPLAINANT'S FATHER AS A CRIME VICTIM AND PERMITTING HIM TO GIVE VICTIM IMPACT EVIDENCE DURING SENTENCING, OVER DEFENSE OBJECTION.

Additional Facts

During sentencing, the Government called KL's adoptive father, ST, to testify. R. at 340. After giving testimony about the impact of the alleged crimes on KL, R. at 342-54, the Government inquired of ST: "is there anything else about the impacts of the accused's crimes on your daughter or your grandson *or you* that you would like the members to know?" R. at 354 (emphasis added). Trial defense counsel objected to the elicited evidence for "improper [victim] impact" regarding ST. R. at 354-55. The Government responded that they were seeking to designate ST as a crime victim under R.C.M. 1001(c)(2)(A).[14] R. at 354-55. Trial defense counsel opposed this designation. R. at 355. Thereafter, the military judge designated ST as a crime victim, R. at 357, and allowed ST to testify that "it has been incredibly difficult and stressful that my daughter and my grandchild have been abused. It is very hurtful. If I am being completely honest, it makes me incredibly angry." R. at 364.

Standard of Review

This Court reviews a military judge's decision to accept victim impact evidence for an abuse of discretion. *See, e.g.*, *United States v. Dunlap*, No. ACM 39535, 2020 CCA LEXIS 14, at

---

[14] The Government initially articulated that the evidence fell within R.C.M. 1001(b)(4), but the military judge re-directed Government counsel to victim designation under R.C.M. 1001(c)(2)(A). R. at 354, 356-57.

*13 (A.F. Ct. Crim. App. 4 Mar. 2020) (unpub. op.) (citing *United States v. Hutchins*, 78 M.J. 437, 444 (C.A.A.F. 2019)); *United States v. Da Silva*, No. ACM 39599, 2020 CCA LEXIS 213, at *48 (A.F. Ct. Crim. App. 25 Jun. 2020) (unpub. op.) (citing *United States v. Barker*, 77 M.J. 377, 383 (C.A.A.F. 2018)). An abuse of discretion occurs when the military judge: "(1) bases a ruling on findings of fact that are not supported by the evidence; (2) uses incorrect legal principles; (3) applies correct legal principles in a clearly unreasonable way; or (4) does not consider important facts. *United States v. Ramirez*, __ M.J. __, 2024 CAAF LEXIS, at *4 (C.A.A.F. 2024).

Law and Argument

There are limits to who may be designated as a crime victim. The *MCM* provides that a crime victim is a "person who has suffered *direct* physical, emotional, or pecuniary harm as a result of the commission of an offense." R.C.M. 1001(c)(2)(A) (emphasis added). There must be a "clear nexus between the [appellant's] offenses and the harm suffered in order to conclude a person is a 'victim' under the rule." *Dunlap*, 2020 CCA LEXIS 148, at *18. While this Court has held that the parent of a *minor* child may be designated as a crime victim because they could suffer emotional or pecuniary harm,[15] *United States v. Schauer*, 83 M.J. 575, 579-80 (A.F. Ct. Crim. App. 9 Mar. 2023), no Court of Criminal Appeals has ever held that the parent of a non-murder, *adult* victim could be so designated. In fact, such a broad reading of R.C.M. 1001(c)(2)(A) would allow a "confusingly incredible number," R. at 357, of people to be designated as victims.

Here, the military judge abused his discretion by designating ST as a crime victim under R.C.M. 1001(c)(2)(A). The military judge's analysis of the R.C.M. 1001(c)(2)(A) designation is

[15] As the *Schauer* Court articulated, the harm suffered by the parents of minor children is often clear: emotional and pecuniary harm necessarily follows from certain offenses against minor children. *Schauer*, 83 M.J. at 579-80.

just two sentences long: "I find that this father could be – and grandfather could be a crime victim for the purposes of even the narrowed definitions within 1001(c). When I say narrow, I mean harder to reach standards than might be more generally available in other forms." R. at 357. At no point in this analysis does the military judge mention the relevant text of the rule, to include the words "*direct* physical, emotional, or pecuniary harm." Moreover, the military judge references no case law from this court, including this Court's guidance in *Dunlap* which advises that military judge's must find a clear nexus between the misconduct and the harm. To be sure, the military judge made no findings of fact with regard to the directness of the purported harm and the alleged misconduct, despite being prompted by the defense counsel. R. at 357. This is a clear abuse of discretion; not only did the military judge fail to make findings on the directness of the harm, he also failed to provide any analysis of the issue based on the text of the rule or applicable caselaw. As such, ST's designation as a crime victim, and the victim impact evidence he offered to the trier of fact was improper.

There was prejudice to Appellant because the trier of fact heard impermissible victim impact evidence from ST that aggravated the purported effects of Appellant's misconduct. Because this case involved sentencing by members, it is difficult to assess how much weight the members placed on this impermissible evidence. However, it is clear that Appellant received a harsh sentence: a year and a half of confinement and a bad-conduct discharge. This Court cannot be confident that any portion of the adjudged sentence was not impacted by this evidence.

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 5 April 2024.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' MOTION TO EXCEED PAGE LIMIT
v.	)	Before Panel No. 3
Stagg Sergeant (E-5) **ZACKERY A. LOGAN** United States Air Force *Appellant.*	)	No. ACM 40407 6 May 2024

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

Pursuant to Rule 17.3 and 23.3(q) of this Honorable Court's Rules of Practice and Procedure, the United States moves to exceed this Court's 50-page limit on filings.

Rule 17.3 provides that "filings shall not exceed either 50 pages or 20,000 words, excluding indices, tables, attachments, and appendices." There is good cause for exceeding the page limit. The United States' answer to Appellant's assignments of error—which raised seven substantive issues, including one claim of error pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)—is 52 pages, totaling 15,838 words. Exceeding the page limit was necessary to sufficiently address each issue.

WHEREFORE, the United States respectfully requests that this Honorable Court grant this motion to exceed the 50-page limit.

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 6 May 2024.

[redacted]

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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,	)	
Appellee,	)	**UNITED STATES' ANSWER TO**
	)	**ASSIGNMENTS OF ERROR**
v.	)	
	)	
	)	Before Panel No. 3
Stagg Sergeant (E-5)	)	
ZACKERY A. LOGAN	)	No. ACM 40407
United States Air Force	)	
Appellant.	)	6 May 2024

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

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	Before Panel No. 3
Staff Sergeant (E-5) **ZACHARY A. LOGAN** United States Air Force *Appellant.*	)	No. ACM 40407
	)	6 May 2024

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

ISSUES PRESENTED

I.

WHETHER APPELLANT'S PLEAS TO SPECIFICATIONS 1 AND 2 OF CHARGE II WERE IMPROVIDENT WHERE THE CARE[1] INQUIRY RAISED AFFIRMATIVE DEFENSES, THE MILITARY JUDGE DID NOT RESOLVE THESE INCONSISTENT MATTERS, AND THE MILITARY JUDGE DID NOT ENGAGE IN AN INQUIRY ON ALL THE AFFIRMATIVE DEFENSES RAISED.

II.

WHETHER APPELLANT'S PLEAS WERE IMPROVIDENT BECAUSE THE MILITARY JUDGE DID NOT EXPLAIN THE DEFENSE OF LACK OF MENTAL RESPONSIBILITY TO APPELLANT, DID NOT SATISFY HIMSELF THAT COUNSEL HAD EVALUATED THE VIABILITY OF THE DEFENSE, AND DID NOT ELICIT FACTS FROM APPELLANT THAT NEGATED THE DEFENSE.

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[1] United States v. Care, 40 C.M.R. 247 (C.M.A. 1969) (requiring the military judge to make a finding that the accused made a knowing, intelligent, and a conscious waiver to accept the guilty plea).

III.

WHETHER APPELLANT'S PLEAS WERE IMPROVIDENT BECAUSE THE MILITARY JUDGE FAILED TO ADEQUATELY ADVISE APPELLANT ON HIS WAIVER OF HIS RIGHT TO TRIAL BY MEMBERS.

IV.

WHETHER APPELLANT KNOWINGLY AND UNDERSTANDINGLY ELECTED A MILITARY JUDGE ALONE FORUM FOR PURPOSES OF FINDINGS.

V.

WHETHER THE MILITARY JUDGE PLAINLY ERRED BY FAILING TO ASSEMBLE THE COURT-MARTIAL PRIOR TO HEARING PLEAS, RECEIVING EVIDENCE, AND RENDERING A VERDICT.

VI.

WHETHER TRIAL COUNSEL ENGAGED IN IMPROPER SENTENCING ARGUMENT BY CONTRADICTING THE STIPULATION OF FACT.

VII.[2]

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY DESIGNATING THE COMPLAINANT'S FATHER AS A CRIME VICTIM AND PERMITTING HIM TO GIVE VICTIM IMPACT EVIDENCE DURING SENTENCING, OVER DEFENSE OBJECTION.

STATEMENT OF CASE

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

[2] This issue was raised in the appendix pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

STATEMENT OF FACTS

Appellant's Crimes Against KL

Appellant and his wife, KL, were married on 17 May 2012 and share two sons, TL and OL. (Pros. Ex. 1 at 1.) On 28 December 2020, while driving from Kansas to Arkansas to visit family for Christmas, KL discovered a picture of another woman on Appellant's phone. (Id. at 2.) Their two sons were sitting in the back seat of the truck. (Id.) KL and Appellant engaged in a verbal argument, and KL slapped Appellant on the face while he was driving. (Id.) As a result, Appellant pull over to the side of the road. (Id.) KL then jumped out of the truck with Appellant's phone and ran away from the highway to the grass side of the road. (Id.) KL tried to access Appellant's phone to finish reading the messages. (Id.) Appellant tried to take his phone from KL's hands by leaning over from behind. (Id.) KL then bit Appellant's arm multiple times, so Appellant wrapped his arms around her and did not let go until KL let go of his phone. (Id.) Appellant retrieved his phone and walked to a nearby gas station. (Id.) KL followed Appellant to the gas station in the vehicle. (Id.) Eventually Appellant returned to the vehicle, and he and KL began to argue again. (Id.) While Appellant was driving the truck, KL opened the truck door while the vehicle was moving at highway speeds. (Id.) Appellant then grabbed KL's arm, slowed the vehicle down, and pulled over to the side of the highway. (Id.) At this point, KL left the truck and began running towards the highway. (Id.) Appellant left the truck and grabbed KL "at which point he bear-hugged her from behind (her back to his chest) and carried her back to the shoulder of the highway and shoved her." (Id.) KL returned to the truck. (Id.) KL opened the truck door several more times and Appellant "held tight to her arm." (Id.)

Once again, Appellant pulled off the highway to a partially graveled driveway. (Id.) Once the truck stopped, KL left the truck and ran towards the highway more than once. (Id.)

When Appellant caught her the final time, "he opened the truck door and shoved her in the truck." (Id.) While KL was sitting in the passenger seat, he struck her face with his hand. (Id.) When Appellant struck KL's face with his hand, he did so with unlawful force. (Id.) Appellant acknowledged that he could have avoided striking KL if he wanted to. (Id.) In his Care inquiry with the military judge, Appellant said that while KL was sitting at the passenger seat of the vehicle, "[s]he [was not] making any moves to go towards the highway." (R. at 56.) The military judge explained to Appellant that there could be an amount of restraint that could be needed to prevent injury or provide for the safety of a victim or others. (Id.) Appellant admitted that slapping KL was intentional, and although he slapped her to avoid her hurting herself again, Appellant stated that "at that point, [he was] frustrated and had a lack of control." (R. at 56-57.) Finally, Appellant acknowledged that had he exercised control over himself under the circumstances, he would not have slapped KL. (Id. at 57.) Before slapping KL, to try to reorient her, Appellant could have waited for her to calm down or called 911. (Id.) Appellant knew that when he slapped KL in the passenger seat, KL was not in harms way because KL was not running towards the highway. (Id.) In sum, Appellant did not believe he had any legal justification for striking KL on the face. (Pros. Ex. 1 at 3.)

After Appellant slapped KL, while she continued sitting in the passenger seat of the car, KL made multiple suicidal threats in front of the children, who were still sitting in the back seat. Appellant "put his hand around KL's throat and squeezed." (Id. at 3.) When KL reported the incident to law enforcement, she said that when Appellant strangled her, she began seeing stars. (Id.) Appellant explained that while he strangled KL, it seemed like she could not breathe. (R. at 65.) KL could not fight Appellant off because "she basically went limp." (Id.) Appellant strangled KL because she continued to threaten to kill herself. (R. at 64-64.) Appellant stated

that he knew that the strangulation "was not necessary to get [KL] to stop attempting to hurt herself." (R. at 65.)

While Appellant was talking to KL, preceding the strangulation, Appellant explained that he could have left and moved around to the other side of the car. (Id. at 65.) Appellant was not afraid that KL planned to hurt him. (R. at 66.) When the military judge talked about lawful justification, "such as engaging in a touch to provide for the safety of a victim or others," Appellant affirmed that when he strangled KL, it was not about her safety. (Id.) Appellant "was angry and frustrated and trying to get [KL] to stop talking about hurting herself in front of the kids." (Id.) Appellant knew he had other options other than strangling KL. (Id. at 67.) He could have closed the door and walked away, keeping himself between her and the highway, should she run towards the highway again. (Id.) Or he could have called for help. (Id.)

Around the time Appellant let go of KL's neck, a stranger pulled up behind Appellant's vehicle and asked if everything was okay. (R. at 64.) KL and the stranger spoke, but Appellant did not know what they talked about. (Id.) Afterward, Appellant asked KL if she wanted to take the boys and drive, and he would stay behind and call his mom. (Id.) KL declined and did not want to leave Appellant. (Id.) The stranger followed them to the next town. (Id.) After arriving to the next town, KL calmed down. (Id.) KL and Appellant agreed to continue to drive another hour to Appellant's mother's residence. (Id.)

Appellant's Plea Agreement

On 23 June 2022, Appellant submitted an offer for a plea agreement. (App. Ex. XIII.) The convening authority accepted the plea agreement offer. (Id.) The plea agreement permitted a term of confinement between one and five years. (Id. at 2.) The plea agreement had no other limits on other punishments. Based on Appellant's guilty plea alone, without the plea agreement

limitations, the maximum punishment authorized by law was reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for 9 years and six months, and a dishonorable discharge. (R. at 81.) The plea agreement involved dismissal of charges. In exchange for Appellant's guilty pleas, the convening authority dismissed with prejudice one specification of sexual assault in violation of Article, UCMJ, and one specification of assault consummated by battery upon a child under the age of 16 in violation of Article 128, UCMJ. (App. Ex. XIII; *Entry of Judgement*, 20 June 2022, ROT Vol. 1.) Had this been a fully litigated trial on all referred specifications, the maximum punishment could have been, reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for 40 years, and a dishonorable discharge.

Appellant understood that he had a legal and moral right to plead not guilty at a court-martial and leave the government with the burden of proving his guilt beyond a reasonable doubt by legal and competent evidence. (App. Ex. XIII at 1.) Appellant also waived his right to a "trial of the facts," his right to confront witnesses against him, and his right to avoid self-incrimination. (Id. at 2.)

Appellant's Guilty Plea

Before taking pleas, the military judge noted no concerns were raised to his attention about Appellant's ability to fully participate in his court-martial or "focus on these proceedings and meaningfully participate in his defense." (R. at 11.) At that, the military judge acknowledged the potential for high emotions and reiterated the court's willingness to take breaks as needed. (Id.) The military judge informed Appellant of his right to be tried by a court consisting of eight panel members or to be tried by military judge alone. (R. at 14-15.) Appellant understood the difference between trial before members and trial before military judge

alone. (R. at 15.) Appellant chose to be tried by officer and enlisted members. (Id.) At arraignment, Appellant pleaded guilty. (R. at 15-18; App. Ex. XIII.)

The military judge told Appellant that by pleading guilty he was giving up his "right to a trial of the facts by this court." (R. at 24.) After the Care inquiry, the military judge found that Appellant's plea of guilty was made voluntary. (R. at 100.) And the military judge found that Appellant made a "knowingly, intelligently, and consciously waived his rights against self-incrimination, to a trial of the facts by a court-martial, and to be confronted by witnesses made against [Appellant]." (Id.) Lastly, the military judge informed Appellant that he could request to withdraw his plea at any time before the sentence is announced. (Id.) In accordance with Appellant's pleas, the military judge found Appellant guilty. (Id.)

The military judge did assemble the court after findings, but before voir dire of the members for sentencing. (R. at 115.) Before pleading guilty, Appellant elected a panel of officer and enlisted members. (R. at 15.) Per his elections, a panel of members, consisting of both officer and enlisted members, sentenced Appellant. (R. at 654.) At no point did trial defense counsel object to the military judge's right advisements about Appellant's choice to plead guilty, and they did not object to the military judge assembling the court until after findings.

Additional relevant facts are included in the analysis below.

ARGUMENT

I.

APPELLANT'S PLEAS TO CHARGE II, SPECIFICATIONS 1-2, WERE PROVIDENT BECAUSE AFFIRMATIVE DEFENSES DID NOT APPLY IN APPELLANT'S CASE.

Standard of Review

This Court reviews a military judge's decision to accept a plea of guilty for an abuse of discretion. *See* United States v. Forbes, 78 M.J. 279, 281 (C.A.A.F. 2019) (citation omitted). In reviewing the providence of a plea, a military judge abuses his discretion only when there is "a substantial basis in law and fact for questioning the guilty plea." United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008) (internal quotation marks and citation omitted). "[T]he military judge's determinations of questions of law arising during or after the plea inquiry are reviewed de novo." Id. at 321.

Law

"[A]ppellant bears the burden of establishing that the military judge abused [his] discretion, i.e., that the record shows a substantial basis in law or fact to question the plea." United States v. Phillips, 74 M.J. 20, 21-22 (C.A.A.F. 2015) (citation omitted). A providence inquiry into a guilty plea must establish that the accused himself believes he is guilty and "the factual circumstances as revealed by the accused himself objectively support that plea." United States v. Higgins, 40 M.J. 67, 68 (C.M.A. 1994) (citation omitted). If an accused brings up matters inconsistence with the plea, Article 45, UCMJ, requires the military judge to resolve apparent inconsistences or reject the plea. "A variance from the requirements of this article is harmless error if the variance does not materially prejudice the substantial rights of the accused." Article 45, UCMJ.

The "possible defense" standard is the threshold for inquiring into a potential affirmative defense during a guilty plea colloquy. United States v. Hayes, 70 M.J. 454, 458 (C.A.A.F. 2012). This standard is a "lower threshold than a prima facie showing because it is intended as a trigger to prompt further inquiry pursuant to Article 45, UCMJ," and Care. Id. Moreover, the "possible defense" standard ensures "the acceptance of a guilty plea be accompanied by certain safeguards to insure the providence of the plea, including the delineation of the elements of the offense charged and admission of factual guilt on the record" in line with Article 45, UCMJ. Id. (citing Care, 40 C.M.R. at 250). "Not every mitigating statement or word requires further inquiry. Thus, a military judge is not required to reopen a plea and inquire further where an accused raises the 'mere possibility of a defense.'" Id. (citing United States v. Shaw, 46 M.J. 460, 462 (C.A.A.F. 2007)).

The Rules for Courts-Martial outline various affirmative defenses. For example, the defense of duress:

> Is a defense of any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury of the accused did not commit the act. The apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threated, this defense shall not apply.

R.C.M. 916(h). In United States v. Logan, our superior Court addressed the defense of duress. 47 C.M.R. 1, 3 (C.M.A. 1973). The appellant pleaded guilty to conspiracy to commit larceny and larceny. Id. at 1. The appellant testified that he received many phone calls from an unidentified person who conveyed threats against his wife and children if the appellant did not cooperate in the theft of the items charged. Id. at 2. The appellant's statement in mitigation that

he received phone calls threatening his family's safety did not raise a possible defense of duress because his family was a thousand miles away and the appellant "did not attribute his motivation for committing the offenses solely to his alleged fear for their safety." Id.

For the defense of justification to apply, the death, injury, or act must be done in the performance of a legal duty. R.C.M. 916(c). The duty must be imposed by statute, regulation, or order, such as the use of force by a law enforcement officer because the duty to apprehend is imposed by lawful authority. R.C.M. 916(c), Discussion.

Although not mentioned in the Manual for Courts-Martial, the common law defense of necessity "is available to one who intentionally causes a harm or evil contemplated by an offense, provided that the justifying circumstances result in lesser net harm or evil as intended by the actor." United States v. Olinger, 50 M.J. 365, 366 (C.A.A.F. 1999). In other words, the defense of necessity was traditionally seen as a "choice of evils" defense. United States v. Rockwood, 52 M.J. 98, 113 (C.A.A.F. 1999). The defense of necessity has never been directly recognized in the military, "possibly owning to a concern that 'private moral codes will be substituted for legislative determinations, resulting in a necessity exception that swallow the rule of law.'" Id.

Analysis

A. There was no factual basis to question Appellant's guilty plea to Charge II, Specification 1 (Slapping KL's Face).

Appellant's pleas to Charge II, Specification 1, were provident because there was no substantial basis in law and fact questioning Appellant's guilty plea about affirmative defenses, such as duress. Appellant asserts that the defense of duress applies to circumstances where the "accused reasonably feared immediate death or great bodily injury to himself or herself or another." (App. Br. at 11.) But Appellant fails to comprehend that for a defense of duress to

apply, the "apprehension must reasonably continue throughout the commission of the act." R.C.M. 916(h). There was no apprehension at the time Appellant slapped KL because she was not running towards oncoming traffic. (R. at 57.) Instead, she was sitting inside the vehicle, negating any apprehension that might support a defense of duress. (Id.)

Mainly, Appellant asserts that the military judge should have engaged in an additional inquiry on the defense of duress. Yet the military judge did discuss with Appellant if he had legal justification to commit the act – whether any restraint could be needed to prevent injury or provide for the safety of a victim or others. (R. at 56.) Although Appellant admitted that he slapped KL intentionally to avoid KL from hurting herself, he also said that "at that point, [he was] frustrated and had a lack of control." (R. at 56-57.) The defense of duress did not apply because the apprehension must continue throughout the commission of the act and that did not happen here. And no further inquiry was necessary because Appellant stated point blank that KL was sitting in the passenger seat, and therefore KL was not in any danger, such as running towards the highway. (*See* R. at 57.) Appellant told the military judge that he should have waited for KL to calm down or call first responders for assistance rather than slapping her. (Id.) He agreed with the military judge during the Care inquiry that this was a different situation, compared to when KL was running towards the highway and in harms way. (R. at 57-58.)

The restraint applied when Appellant grabbed KL's arm as she opened the truck door, while the vehicle was moving at highway speeds, could be needed to provide for the safety of KL and therefore the defense of duress could have applied. (*See* Pros. Ex. 1 at 2.) But that was not what Appellant pleaded guilty to. Instead, Appellant pleaded guilty to slapping KL while she was sitting in the passenger seat of the truck, with no intent to leave or run away. (R. at 58). The apprehension of KL hurting herself was not prevalent while she was sitting in the truck because

during this timeframe, she was not running towards oncoming vehicular traffic. *See* R.C.M. 916(h).

Appellant claims that these events must be viewed in light of Appellant's history of traumatic suicide and KL's prior suicidal threats. (App. Br. at 12.) While Appellant is correct in that a threat of suicide could provide a basis for a defense of duress, it did not apply here for reasons discussed above. *See* Hayes, 70 M.J. at 461. The threat of KL running towards the highway to commit suicide was not present when she was simply sitting in the truck. At the time it was administered, the slap itself was not necessary to prevent KL from committing suicide. Appellant knew he had other alternatives to slapping KL, such as waiting for KL to calm down or call 911 for help. Thus the defense of duress did not apply.

Appellant states that the military judge engaged in an inquiry with him "to address the defense of justification under R.C.M. 916(c). (App. Br. at 11.) This defense also did not apply because Appellant was not acting under any legal authority when he harmed KL. *See* R.C.M. 916(c). Appellant did not present any evidence he had any legal duty imposed by statute, regulation, or order to slap his wife with no justifiable explanation. *See* Rockwood, 52 M.J. at 112 (rejecting the defense of justification when the appellant cited no legal authority that suggested that he had a duty to abandon his post).

Moreover, Appellant argues that his Care inquiry raised the common law defense of necessity. (App. Br. at 11.) Assuming the defense of necessity applies in the military context, Appellant did not provide any reasoning why the defense of necessity was applicable. For the defense to apply, the evidence had to show that the justifying circumstances resulted in a lesser evil. *See* id. Again, KL was sitting in the car, and was not running towards imminent danger.

As a result, Appellant was not faced with a "choice of evils." *See* Rockwood, 52 M.J. at 113. For these reasons, the defense of necessity did not apply.

There was only a mere possibility that the defenses of duress, justification, and necessity could have applied in Appellant's case and the military judge explored these defenses, even though he did not have to do so. *See* Hayes, 70 M.J. at 462. But based on Appellant's admissions that harming KL was not about her safety, that he could have walked away, or called law enforcement negated any further inquiry from the military judge.

For these reasons, the defense of duress, justification, and necessity did not apply to Charge II, Specification 1, there was no factual basis to question Appellant's guilty plea, and Appellant's guilty plea was provident. Thus, the military judge did not abuse his discretion because the theoretical affirmative defenses did not conflict with Appellant's guilty plea.

B. There was no factual basis to question Appellant's guilty plea to Charge II, Specification 2 (Strangulation).

Similarly, Charge II, Specification 2 was also provident because the defense of duress did not apply, and nothing in the record created a substantial basis to question Appellant's guilty plea. Appellant failed to articulate why strangling KL was justified other than trying to stop KL's suicidal statements in front of the children. (App. Br. at 12.) The military judge discussed with Appellant whether there was legal justification to his actions. Notably, Appellant knew and testified that strangling KL "was not necessary to get [KL] to stop attempting to hurt herself." (R. at 65.) In fact, Appellant was angry and frustrated at KL. (R. at 66.) Appellant admitted that he had other options, such as closing the passenger door and walking away to keep himself between KL and the highway should she run towards the highway again. (Id.) When asked "it is fair to say that this was not about your wife's safety when you decided to strangle her," Appellant agreed under oath that it was not about KL's safety. (R. at 66.) Appellant stated that

he "was just angry and frustrated to get her to stop talking about hurting herself in front of the kids." (Id.) Thus, there was no reasonable apprehension that anyone would have been killed or suffered bodily injury if Appellant did not strangle KL. *See* R.C.M. 916(h).

Our superior Court has rejected the defense of duress when the apprehension itself did not attribute to the appellant's motivation for committing the offenses solely to his alleged fear for safety of others. Logan, 47 C.M.R. at 3. Here, we know Appellant's motivation for strangling, and even striking KL, was instilled in his anger and frustration towards her and not her safety. *See* Logan, 47 C.M.R. at 3. Appellant's arguments are not persuasive and offer no substantial basis for finding a conflict with his guilty pleas. *See* id. For these reasons, the defense of duress did not apply.

There was also no lawful justification for strangling KL, and therefore the defense of justification also did not apply. *See* R.C.M. 916(c). When Appellant strangled KL, he was not performing a legal duty imposed by statute, regulation or order, that justified his actions.

Moreover, the defense of necessity did not apply for the same reasons it did not apply for Charge II, Specification I. Appellant's actions did not result in a lesser evil at the very moment he strangled KL. *See* Olinger, 50 M.J. at 366. In fact, his actions created more evils, in that he choked KL almost to the state of unconsciousness – to the point where she saw stars merely to prevent her from making suicidal ideations. Appellant was never faced with the "choice of evils," and could have walked away at any moment before strangling KL. (R. at 66.)

The defense of duress, justification, and necessity did not apply and Appellant's guilty plea to Charge II, Specification 2, was provident. Thus, the military judge did not abuse his discretion in accepting Appellant's guilty plea because affirmative defenses did not conflict with Appellant's guilty plea. This court should deny this assignment of error.

II.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE DID NOT CONDUCT AN ADDITIONAL INQUIRY ABOUT APPELLANT'S MENTAL HEALTH HISTORY.

Standard of Review

The United States incorporates the standard of review from Issue I above.

Law

The United States incorporates the law from Issue I above along with the following additions. An accused must establish by clear and convincing evidence that lack of mental responsibility is an affirmative defense. Article 50a, UCMJ; United States v. Riddle, 67 M.J. 335, 338 (C.A.A.F. 2009). Mental disease or defect, alone, does not constitute a defense. R.C.M. 916(k)(1). This affirmative defense applies when an accused, as a result of the mental disease or defect, could not appreciate the nature and quality or the wrongfulness of his acts. Riddle, 76 M.J. at 341. If there is any reason to believe that an accused lacked mental responsibility of any offense or lacks capacity to stand trial, the military judge and officers of the court have the independent duty to inquire into the accused's mental condition under R.C.M. 706. Id. at 338. CAAF has explained when it is appropriate for the military judge to determine whether history of mental disease raises a conflict with the plea:

> A military judge can presume, in the absence of contrary circumstances, that the accused is sane and, furthermore, that counsel is competent. Shaw, 64 M.J. at 463. Should the accused's statements or material in the record indicate a history of mental disease or defect on the part of the accused, the military judge must determine whether that information raises either a conflict with the plea and thus the possibility of a defense or only the "mere possibility" of conflict. Id. at 462 (citation and quotation marks omitted). The former requires further inquiry on the part of the military judge, the latter does not. Id. This is a contextual determination by the military judge. Id. at 464. However, we have

> additionally indicated that it is prudent, but we emphasize not always required, to conduct further inquiry when a significant mental health issue is raised, regardless of whether a conflict has actually arisen. Id.

Id. at 338. The lack of mental responsibility:

> Is an affirmative defense to any offense that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect was unable to appreciate the nature and quality or the wrongfulness of his or her acts. Mental disease or defect does not otherwise constitute a defense.

R.C.M. 916(k)(1).

Analysis

Appellant now asserts that "the evidence at trial raised the issue of 'a history of mental disease or defect.'" (App. Br. at 14.) Moreover, Appellant avers that in his unsworn statement, he stated that he had attempted suicide twice, he received mental health care, and was diagnosed with mental health conditions, including depression, anxiety, and post-traumatic stress disorder. (Id.) Lastly, Appellant stated in his unsworn statement that his "mental health struggles had intensified during the period in question due to the 'stress of having [his] children out of school from the pandemic and the problems [he]continued to have with [KL].'" (Id.) Despite these assertions, the record did not establish that Appellant could have proven, by clear and convincing evidence, that as a result of his mental illnesses he could not appreciate the nature and quality of the wrongfulness of his criminal actions. *See* R.C.M. 916(k)(1). In fact, the record showed that Appellant appreciated the nature and quality of his wrongfulness. For example, as for the crimes against KL, Appellant admitted during the Care inquiry that what he did was wrong and acknowledged that he could have waited for KL to calm down or called 911 for help. (R. at 57.) Appellant explained to the military judge that he was frustrated and angry. (R. at 56-57.) The record did not reveal any evidence of Appellant's lack of ability to appreciate the nature and

quality of his wrongfulness acts. The record raised potentially a mere possibility of the defense that did not require additional inquiry from the military judge. *See* Riddle, 67 M.J. at 338.

Trial defense counsel here did not request an R.C.M. 706 hearing. The military judge also noted that no concerns were raised about Appellant's ability to fully participate in his court-martial. (R. at 11.) This case is much like Shaw, in which the appellant provided an unsworn statement during the presentencing hearing that mentioned that he had been previously diagnosed with bipolar disorder. *See* 46 M.J. at 461. CAAF recognized that "[a]side from responding to defense counsel's question on the issue, [the appellant] provided no further evidence that his condition affected his mental responsibility." Id. Our superior Court found that the appellant's reference to his history of bipolar disorder only raised a mere possibility of a conflict with his plea and it was therefore not an abuse of discretion for the military judge to accept the plea without conducting further inquiry into the appellant's mental health. Id. at 464. This case was no different. Although Appellant provided information about his mental health history, he provided no evidence of how his alleged medical condition affected his mental responsibility for the crimes he committed. *See* id.

Shaw emphasized two important principles – an accused is presumed to be sane, and counsel is presumed to be competent. United States v. Glenn, 66 M.J. 64, 66 (C.A.A.F. 2008). In Glenn, the appellant was diagnosed with cyclothymic disorder, but there was no testimony indicating that this mood disorder, without more, would be a defense to his offenses. Id. Relying on Shaw, CAAF held that although the appellant provided mitigation evidence that he suffered from mental health problems, it did not raise a substantial basis in law and fact for questioning his guilty plea. Id. Here, Appellant's references to his mental health history were nothing more than evidence in mitigation. Like Glenn, nothing in the record demonstrated that

Appellant's mental health illnesses proved he lacked mental responsibility at the time he committed his crimes. *See* id. Thus, Appellant was presumed to be sane. *See* id.

In United States v. Workneh, this Court found that the appellant had a gambling problem, but there was no evidence that the gambling addiction rendered him unable to appreciate the nature and quality or the wrongfulness of his acts. ACM 38928, 2017 CCA LEXIS 219, at *15 (AF. Ct. Crim. App. 24 March 2017) (unpub. op.). As a result, this Court found that the appellant had no diagnosed mental disease "calling into question his ability to appreciate the nature or wrongfulness of his offenses." Id. at *16. At that, this Court mentioned that the Care inquiry did not call into question the appellant's lack of mental responsibility because the appellant repeatedly stated that he had no legal justification or excuse for his actions, and that he could have avoided engaging in the criminal conduct. Id. at *16. The same can be said in this case. Appellant raised his alleged mental health issues in presentencing proceedings, but provided no nexus between his mental illness and his lack of ability to appreciate the nature or wrongfulness of his crimes. *See* id. Further, Appellant's Care inquiry did not call into question his lack of mental responsibility because he stated he had no legal justifications, he knew what he did was wrong, and he could have avoided the criminal activity. *See* id.; (Pros. Ex. 1 at 2-4, 6).

For these reasons, the military judge did not abuse his discretion by not conducting further inquiry into Appellant's history of mental illnesses. Thus, this Court should deny this assignment of error.

III.

APPELLANT'S PLEAS WERE PROVIDENT DESPITE THE FACT THAT THE MILITARY JUDGE DID NOT SPECIFICALLY ADVISE APPELLANT ON HIS WAIVER OF HIS RIGHT TO A TRIAL BY MEMBERS BEFORE HIS GUILTY PLEA.

Additional Facts

At arraignment, Appellant elected to be tried by officer and enlisted members. (R. at 15.) Appellant eventually pleaded guilty before a military judge alone forum. (R. at 24-100.) Appellant was sentenced by a panel of enlisted and officer members. (R. at 115, 654.) The military judge assembled the court once the panel members were sworn before voir dire for sentencing. (R. at 115.)

Before Appellant pleaded guilty, the military judge informed him that he would give up three important rights as for the offenses to which he pleaded guilty to:

> First, the right against self-incrimination, that is the right to say nothing at all.
>
> Second the right to a *trial of the facts*, buy this court, that is your right to have this court-martial decide whether or not you are guilty based upon the evidence the prosecution would present and on nay evidence you may introduce.
>
> Third, the right to be confronted by and to cross-examine any witness called against you.

(R. at 24.) The military judge also explained that if Appellant wished to continue with his guilty plea, he would place Appellant under oath, and he would question Appellant to determine whether he was guilty. (R. at 25.) Appellant understood this right and acknowledged, "Yes, Your Honor." (R. at 25.)

Standard of Review

The United States incorporates the standard of review from Issue I above.

Law

Our superior Court requires that military judges advise an accused that a guilty plea waives his or her right to a "trial of the facts." United States v. Hansen, 59 M.J 410, 411 (C.A.A.F. 2004). An accused waives several constitutional rights when pleading guilty. Id. (citing Care, 18 C.M.A. at 538-39). These constitutional rights typically include the right to trial by jury, the right to confront one's accuser, and the privilege against self-incrimination. Id. But these rights apply differently in the context of the UCMJ. Id. For example, military members subject to the code do not enjoy a Sixth Amendment right to a jury trial. United States v. Roland, 50 M.J. 451, 456 (C.A.A.F. 1999). But service members have a right to members who are fair and impartial. Id. Service members have a statutory right to a trial by members. Article 16, UCMJ. Recently, CAAF recognized that "the Sixth Amendment right to a jury trial has never applied in the military justice system." United States v. Anderson, 83 M.J. 291, 296 (C.A.A.F. 2003) *cert denied*, 2024 U.S. LEXIS 827, *1; *see also* Whelchel v. McDonald, 340 U.S. 122, 127 (1950) (emphasizing that the right to a jury trial guaranteed by the Sixth Amendment does not apply to court-martials). So military members have no Sixth Amendment right to a unanimous verdict. Anderson, 83 M.J at 298.

For these reasons, military members are constitutionally guaranteed to a "trial of the facts" and not a jury trial under the Sixth Amendment. When an accused pleads guilty:

> The record must also demonstrate that the military judge or president personally addressed the accused, advised him that his plea waives his right against self-incrimination, *his right to a trial of the facts by a court-martial*, and his right to be confronted by the witnesses against him, and that he waives such rights by his plea.

Care, 18 C.M.A. at 541 (emphasis added).

In Hansen, the government acknowledged that the military judge was not thorough in his review of the appellant's constitutional rights and waiver. 59 M.J. at 412. But CAAF mentioned that "a particular incantation [was] not required." Id. Instead, an accused must be aware of the "*substance of his rights and voluntarily waives them*." Id. (emphasis added). In Hansen, the military "judge addressed the substance of each of the rights in the course of his Care inquiry and on the basis of the entire record properly concluded [that the appellant] 'knowingly, intelligently, and consciously waived [his] rights against self-incrimination, to a trial of the facts by this court-martial, and to confront the witnesses against [him].'" Id. Trial defense counsel did not challenge the judge's statement. Id. While military judges should advise the accused of the rights he waived, CAAF has declined to adopt a "per se rule that a failure to fully advise an accused mandates reversal." Id. (quoting United States v. Harris, 26 M.J. 729, 732 (C.M.R. 1988)). Thus, the issue is not whether there is conformity to what our superior Court had in mind in Care, but "the combination of all the circumstances leads the court to conclude that the accused's plea was informed and voluntary." Id.

Analysis

Appellant fails to acknowledge that he was not constitutionally entitled to a trial by members. Appellant argues that his guilty plea was improvident because the military judge did not adequately advise him on his waiver of his right to trial by members. (App. Br. at 16.) Appellant is correct in that the military judge did not advise him about his right to a trial by members when he pleaded guilty. But the Sixth Amendment right to a jury trial simply did not apply. *See* Anderson, 83 M.J. at 296. What did apply in Appellant's case was the right to a "trial of the facts." And Appellant's plea agreement correctly stated that he waived his right to a "trial of the facts," his right to be confronted by witnesses against him, and his right to avoid

self-incrimination. (App. Ex. XIII.) The military judge, who followed the benchbook's procedural guide, also informed Appellant that he had a right to a "trial of the facts," and it was his right to have this court-martial decide whether he was guilty based on the evidence the prosecution would have presented. (R. at 24.) Thus, Appellant knew that by pleading guilty he gave up the right to have the prosecution prove his guilt beyond a reasonable doubt by legal and competent evidence or in other words a "trial of the facts." (R. at 85; App Ex. XIII.)

Appellant cites cases to show that a jury trial, or trial by members, and "trial of the facts" are not the same. (App. Br. at 16.) That is correct. A trial of the facts is a proceeding at the trial level. Garner v. Louisiana, 368 U.S. 157, 173 (1961). Because these terms are not the same, Appellant argues that the military judge erred in not also advising him of his right to a trial by members. (App. Br. at 17.) Still, Appellant fails to recognize that in the guilty plea context, he did not have to be advised of his right to a trial by members. When Appellant gave up his right to a trial of the facts, he gave up the right to have either the military judge or the members sit as the fact finder.

Appellant's arguments disregard Supreme Court precedent, military law, and our standards of practice. The military judge's benchbook specifically has the language in guilty plea inquiries that an accused has a right to a "trial of the facts by this court." Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judge's Benchbook*, para. 2-2-1, 2-2-9 (29 February 2020). Appellant's contentions lack merit. He was not constitutionally entitled to a trial by members, but entitled to a "trial of the facts," which he voluntarily and knowingly waived. Thus, the military judge did not abuse his discretion in accepting Appellant's guilty plea.

Appellant argues that the military judge erred by failing to conduct the judge alone colloquy required by R.C.M. 903 during the guilty plea inquiry. (App. Br. at 17 n.12.) But this

omission does not mandate reversal because the record demonstrated that Appellant was aware of the substance of his rights. The military judge told Appellant that he gave up a "trial of the facts," that is his right to have this court-martial decide whether Appellant was guilty. (R. at 24.) Then the military judge told Appellant that he would place him under oath and question him to determine whether he was guilty. (R. at 25.) Appellant told the military judge that he understood these rights. (Id.) Next trial counsel placed Appellant under oath and the military judge continued with Appellant's guilty plea without any objection. (Id.) Like the appellant in Hansen, Appellant here was aware of the substance of his rights and voluntarily waived them without any challenge from trial defense counsel. *See* Hansen, 59 M.J. at 412. The issue is not whether there was conformity to what our superior Court had in mind in Care, but "the combination of all the circumstances leads the court to conclude that the accused's plea was informed and voluntary." Id. Here, we know that Appellant knew the difference between military judge alone and trial by members because Appellant pleaded guilty before a military judge alone and was sentenced by a panel of members. (R. at 14-15; R. at 115.) Thus, the combination of all the circumstances that occurred in Appellant's court-martial should lead this Court to conclude that Appellant's guilty pleas were informed and voluntary because he was aware of the substance of his rights. *See* Harris, 26 M.J. at 732.

Appellant intelligently, knowingly, and consciously waived his rights by pleading guilty. And the military judge, who followed the benchbook, did not abuse his discretion when he advised Appellant of his right to a "trial of the facts" and accepted his guilty plea. In sum, Appellant's guilty plea, in its entirety, was provident, and this Court should deny this assignment of error.

IV.

APPELLANT VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY ELECTED A MILITARY JUDGE ALONE FORUM FOR PURPOSES OF FINDINGS.

Additional Facts

The United States incorporate the additional facts in Issue III above.

Standard of Review

The United States incorporates the standard of review in Issue III above.

Law and Analysis

The United States incorporates law in Issue III above.

Appellant's assertion that he did not knowingly elect a military judge alone forum lacks merit. The military judge did advise appellant of his forum options before his pleas. (R at 14-15.) Most telling was the military judge's explanation that if Appellant wished to continue with his guilty plea, he would place Appellant under oath, and he would ask Appellant questions and determine whether he was guilty. (R. at 25.) When asked if he understood this, Appellant responded "Yes, Your Honor." (Id.) By pleading guilty, Appellant gave up his right to be tried by members, and therefore elected a military judge alone forum for findings. (*See* id.)

Article 16, UCMJ, guarantees the statutory right to a trial by members. United States v. Turner, 47 M.J. 348, 350 (C.A.A.F. 1997). Failure to waive a trial by members either in writing or verbally on the record is a nonjurisdictional procedural error. Id. In Turner, the record of trial as a whole made it clear that the military judge alone selection was the appellant's choice, and that the error, obtaining the appellant's forum choice from counsel rather than the appellant, did not materially prejudice the substantial rights of the appellant. Id. at 349. The military judge did explain his rights to a trial with members or a trial by judge alone. Id. at 350. The appellant

did not object and there was no evidence that he was coerced or was incompetent to make a knowing and intelligent waiver. Id. So while there was a violation of Article 16, UCMJ, there was still substantial compliance with the statute. Id. The same can be said in this case. While the military judge did not conduct a specific colloquy in accordance with R.C.M. 903(c)(2)(A) per the benchbook, he did at first advise Appellant of his forum rights. (R. at 14-15.) Assuming error, the record nonetheless demonstrated substantial compliance to Article 16, UCMJ.

Appellant argues that "should this Court conclude that 'trial of the facts' means 'trial by members,' the logical consequence of that election is that Appellant chose to be tried by a military judge for findings." (App. Br. at 19.) Thus, the military judge was required to conduct the R.C.M. 903(c)(2)(A) colloquy. (Id.) For reasons discussed in Issue III, "trial of the facts" does not mean trial by members. Appellant's argument fails when he states he was never informed of his right to a trial by members, because he was. (R. at 14-15.) The military judge did discuss forum options prior to arraignment. (R. at 14-15.) Even if the military judge here was required to conduct a more specific colloquy under R.C.M. 903(c)(2)(A), failure to do so was not prejudicial error. The discussion in R.C.M. 903 explains waiver of the right to trial by members:

> Ordinarily the military judge should inquire personally of the accused to ensure that the accused's waiver of the right to trial by members is knowing and understanding. The military judge should ensure the accused understands that the approval of a request for trial before military judge alone under Article 16(b)(3) or (c)(2)(B) means that the military judge will determine the findings and, if the accused is found guilty of any charge and specification, the sentence. *See* R.C.M. 1002. Failure to do so is not error, however, where such knowledge and understanding otherwise appear on the record.

R.C.M. 903, Discussion. Here, there was evidence elsewhere in the record that showed Appellant's knowledge and understanding of his right to a trial by members and therefore any

deviance from R.C.M. 903 in this case does not mandate reversal. *See* Hansen, 59 M.J. at 412. The record as a whole showed substantial compliance with Article 16, UCMJ, in that Appellant made a voluntary and intelligent waiver and agreed to be tried by the military judge alone during his guilty plea. *See* id. As stated previously, the military judge informed Appellant that if he wished to continue with the guilty plea, the military judge would "question [Appellant] to determine whether [he is] guilty." (R. at 25.) Appellant told the military judge that he understood this. Appellant never expressed any confusion during the proceedings about his rights or made any objections.

The record demonstrated that Appellant knew the difference between being tried by military judge alone or a panel of members. (R. at 14-15.) We know he knew the difference because his presentencing proceedings was before a panel of members, both officers and enlisted. If Appellant was not satisfied with his choices, he had until announcement of his sentence to at least object or withdraw his guilty plea. (R. at 100.) None of this occurred. The circumstances of Appellant's court-martial showed that he made a voluntary and intelligent waiver of his rights when he pleaded guilty.

The military judge also asked Appellant, before findings were announced, whether Appellant had a chance to consult his defense counsel. (R. at 98.) Appellant was satisfied with the advice of his counsel and admitted that pleading guilty was in his best interest. (R. at 98-99.) Nothing in the record undermined trial defense's counsel's competence, and trial defense counsel are presumed to be competent. By pleading guilty, Appellant received his end of the bargain. Appellant faced up to 40 years of confinement and a dishonorable discharge had his case been fully litigated on all specifications referred. The panel sentenced Appellant to the reduction of the grade to E-1; to forfeit all pay and allowances for 18 months, to be confined for one year and

six months, and to be discharged with a bad-conduct discharge. (R. at 654.). His rights were not materially prejudiced, and this Court should not grant Appellant any relief.

Appellant relies on United States v. Adad, No. 202000213, 2021 CCA LEXIS 58 (N.M. Ct. Crim App. 9 February 2021) (unpub. op.) to show that he was prejudiced. (App. Br. at 19.) In Adad, the military judge failed to obtain the appellant's forum election, but the court found no prejudice because the appellant signed a plea agreement electing to be tried by miliary judge alone. Id. at *4. Appellant argues that this case is distinguishable because his plea agreement did not elect to be tried by a military judge alone. (Apr. Br. at 19.) Although Appellant's plea agreement did not mention a military judge alone election, this distinction did not rise to the level of prejudice. Here, the military judge advised Appellant of his forum election rights at arraignment, reviewed Appellant's stipulation of fact and plea agreement, and most importantly advised Appellant that if he wish to continue with his guilty plea the military judge would determine his guilt. The military judge here took similar safeguards to those outlined in Adad where the court found no prejudice. *See* Adad, unpub. op. at *4. Appellant fails to demonstrate that, but for this error, he would not have pleaded guilty before a military judge alone. So, Appellant suffered no prejudice.

Appellant voluntarily, knowingly, and intelligently elected a military judge alone forum by agreeing to plead guilty per a plea agreement. Thus, the military judge did not abuse his discretion when he accepted Appellant's guilty pleas. Appellant's guilty pleas were provident, and this Court should deny this assignment of error.

V.

THE COURT-MARTIAL WAS LAWFULLY CONVENED, AND THE MILITAY JUDGE COMMITTED NO ERROR IN ACCEPTING APPELLANT'S PLEAS BEFORE ASSEMBLING THE COURT.

Additional Facts

At arraignment, Appellant elected to be tried by officer and enlisted members. (R. at 15.) Appellant pleaded guilty before a military judge alone forum. (R. at 24-100.) Appellant was sentenced by a panel of enlisted and officer members. (R. at 115, 654.) The military judge assembled the court once the panel members were sworn before voir dire. (R. at 115.)

Standard of Review

If an issue is forfeited, this Court reviews it for plain error. United States v. Tunstall, 72 M.J. 191, 193 (C.A.A.F. 2013). Forfeiture is the failure to make the timely assertion of a right. United States v. Davis, 79 M.J. 329, 331 (C.A.A.F. 2020).

Under the plain error standard, an appellant "bears the burden of establishing: (1) there is error; (2) the error is clear or obvious; and (3) the error materially prejudiced a substantial right." United States v. Robinson, 77 M.J. 294, 299 (C.A.A.F. 2018). To establish plain error, "all three prongs must be satisfied." United States v. Gomez, 76 M.J. 76, 79 (C.A.A.F. 2017) (internal quotation marks omitted) (quoting United States v. Bungert, 62 M.J. 346, 348 (C.A.A.F. 2006)). The third prong is satisfied if the appellant shows "a reasonable probability that, but for the error [claimed], the outcome of the proceeding would have been different." United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017) (citation omitted) (internal quotation marks omitted).

Law and Analysis

The military judge committed no error when he did not assemble the court-martial prior to Appellant's guilty plea inquiry and guilty verdict. In fact, the military judge properly assembled the court-martial once the members were sworn in before voir dire in accordance with the UCMJ and Rules for Courts-Martial. (R. at 115.) A military judge shall announce assembly of the court under R.C.M. 911. Announcing the assembly of the court-martial is important because:

> Assembly of the court-martial is significant because it marks the point after which: substitution of the members and military judge may no longer take place without good cause (*see* Article 29, R.C.M. 505, 902, 912); the accused may no longer, as a matter of right, request trial by military judge alone or withdraw such a request previously approved (*see* Article 16, R.C.M. 903(d)); and the accused may no longer request, even with the permission of the military judge, or withdraw from a request for members (*see* Article 25(c)(2), R.C.M. 903(d)).

R.C.M. 911, Discussion. In a general or special court-martial, Article 16, UCMJ, allows an accused, before a court is assembled, to request a court composed of a military judge alone.

The UCMJ fixes no specific point in the court-martial for assembly. Analysis of Rules for Courts-Martial, Manual for Courts-Martial, United States A21-61 (2016 ed.). The purpose of R.C.M. 911 is to require an overt manifestation of assembly in order to mark the point where the opportunity to make free elections has ended. Id. The failure to make an announcement has no substantive effect other than to leave open a dispute as to whether a change in composition of the court-martial or panel was timely. Id. The concept of assembly comes from Article 29, UCMJ which details that "the military judge shall announce the assembly of a general or special court-martial *with members*." Article 29, UCMJ (emphasis added). Here, in line with Article 29,

UCMJ, after the panel of members were sworn, the military judge assembled the court. (R. at 115.) Thus, the military judge committed no error based on the plain language of Article 29.

The R.C.M 911 announcement of assembly is important because it marks the point after which certain substitution of members and a military judge may no longer take place without good cause. Further, an accused may no longer as a matter of right request trial by military judge alone or withdraw a request previously approved. R.C.M. 911. The safeguards and underpinnings of R.C.M. 911 implicating Article 29, UCMJ, were not at play in Appellant's court-martial, especially given that he pleaded guilty during the findings portion of his court-martial. At no point did Appellant show any reservations of his forum choices. As explained in Issue III and IV, Appellant was properly advised of his rights, waived his right to a "trial of the facts," and opted to plead guilty before a military judge alone.

The purpose of assembly is to mark when the opportunity to substitute the composition of the court freely has ended. As a result, assembly has no substantive effect in the context of guilty pleas because an accused can withdraw his plea of guilty at anytime before the announcement of his sentence. Even the benchbook does not require the military judge to assemble the court in the guilty plea colloquy. D.A. Pam. 27-9, para. 2-2-1 – 2-2-9. Thus, the safeguards in R.C.M. 911 were not implicated during Appellant's guilty plea inquiry, and the military judge committed no error in only assembling the court-martial once panel members were sworn in prior to voir dire.

Assuming error, any error was harmless and certainly did not impact Appellant's substantial rights. At trial, Appellant did not object to any irregularity in the process and did not challenge the military judge's acceptance of Appellant's guilty plea and finding Appellant guilty after the Care inquiry and before the assembly of the court. Now, Appellant asserts that not

assembling the court was error and caused material prejudice because the trial court "took Appellant's pleas, received incriminating evidence against him, and rendered a guilty verdict. The prejudice is clear because a court not assembled is no court at all…." (App. Br. at 21.) But Appellant cites no authority for this claim. In fact, military courts have found no prejudice when a court martial was not assembled under R.C.M. 911.

In United States v. Mull, the appellant pleaded guilty to wrongful use of a controlled substance and fraudulent enlistment, and the military judge failed to assemble the court. 76 M.J. 741, 742 n.1 (AF. Ct. Crim. App. 2017). This Court recognized that assembly of the court-martial is significant for various reasons. Id. (citing R.C.M. 911, Discussion). But found that the military judge's omission had no substantive effect on the proceedings and therefore was harmless. Id. The same can be said for this case. While the military judge did not assemble the court before Appellant's guilty plea, he did assemble the court before the voir dire of the members. (R at 115.) The omission had no substantive effect on Appellant's proceedings given the lack of objection from trial defense counsel. *See* Mull, 76 M.J. at 742 n.1.

In United States v. Marrero-Alvarez, the court found that failing to announce that the court-martial was assembled as an oversight when the record demonstrated that the appellant was not deprived of the protections under R.C.M. 911. NMCCA 201600011, 2016 CCA LEXIS 258, at *2 (N.M. Ct. Crim. App. 26 April 2016) (unpub. op.). The appellant was advised of his forum selection rights at arraignment and signed and submitted a plea trial agreement where he elected to be tried by military judge alone and understood his forum rights and the military judge's explanation. Id. The court found substantial compliance with Article 16, UCMJ. Id. Although Appellant's plea agreement did not elect to be tried by military judge alone, the military judge did inform Appellant that if he wished to continue to plead guilty the military judge would

determine his guilt and Appellant understood this. (R. at 25.) Like Marrero-Alvarez, Appellant was also advised of his forum selection rights at arraignment. *See* Marrero-Alvarez, unpub. op. at *2. Unlike Marrero-Alverez, the military judge here did assemble the court once the panel members were sworn in for presentencing proceedings. (R. at 115.) For these reasons, this Court should find substantial compliance to Article 16, UCMJ, and find that failing to announce that the court-martial was assembled, prior to the guilty plea inquiry, was an oversight that did not result in any prejudice to Appellant.

Appellant cites to Adad, where the Court found error–but no material prejudice to the appellant's substantial rights–when the military judge's "lapse" caused the court no to be assembled. (App. Br. at 20.) Although Adad and Mull suggest that it was error when the military judge did not assemble the court-martial before a guilty plea, these cases do not give any reasoning why the lack of assembly before a guilty plea resulted in error, and their conclusions are not supported by the UCMJ or Rules for Courts-Martial. As explained above, assembly is tied to Article 29, UCMJ, which governs assembly and impaneling of members, and the detail of new members and military judge–a rule of law not discussed in either the Adad or Mull opinions. Assembling the court-martial after findings in this case did not have any substantive effect on Appellant's court-martial and certainly no prejudicial impact. *See* Mull, 76 M.J. at 742 n.1; Adad, unpub. op. at *5.

Under to R.C.M. 504(a), and contrary to Appellant's argument, the court-martial was convened. At the initial Article 39(a) session, the military judge explained Appellant's rights to a trial with members or a trial by judge alone. (R. at 14-15.) After this instruction, Appellant said that he understood the choices, and he elected trial before a court-martial composed of officer and enlisted members. (R. at 15.) Acting on behalf of and in the presence of Appellant,

trial defense counsel entered Appellant's pleas of guilty. (R. at 18.) Appellant in no way objected.

Under Article 39(a), UCMJ, the military judge can perform judicial functions of the court, including "enter[ing] findings of guilty upon an accepted plea of guilty." R.C.M. 803, Discussion. Since Article 39(a), UCMJ, authorizes the procedure followed in Appellant's case, the findings were not affected and the safeguards of Article 16, UCMJ, were not violated.

Appellant argues that "assembly did not occur, until at the earliest, the venire was empaneled. This was well after findings were entered against Appellant" and therefore the error was plain and obvious. (App. Br. at 20-21.) Appellant relies on United States v. Urich, ACM 36823, 2008 CCA LEXIS 472, at *89 (A.F. Ct. Crim. App. 20 October 2008) (unpub. op.). Urich, stated that "assembly is not dependent upon the actual announcement by the military judge, but occurs 'when the voir dire of the members begins.'" Id. at *9-10 (internal citations omitted). Appellant improperly relies on Urich to state that there was error because assembly occurred after findings. A closer reading of Urich reveals that the appellant pleaded guilty because consistent with his pleas, he was found guilty of multiple violations of Article 112a UCMJ. Id. at *1. The failure to assemble the court did not cause any prejudicial error to the substantial rights of the appellant. Id. at *10-11. Much like this case, the appellant in Urich was also sentenced by a panel of members. Id. at *6-7. Still this Court found no prejudice when the military judge did not formally announce that the court had been assembled as required by R.C.M. 911. *See* id. at *9-10. This Court should conclude the same in this case. But even more so here, the military judge did assemble the court after the members were sworn for presentencing proceedings, further demonstrating compliance with R.C.M. 911 and the lack of prejudicial error by the military judge.

Appellant fails to articulate why he should receive relief under the plain error standard because he has not shown "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *See* Lopez, 76 M.J. at 154. Even if the military judge said the magic words and assembled the court-martial after his pleas and before conducting the Care inquiry, the outcome of the proceedings would not have been different. Appellant would have continued to plead guilty and move on to presentencing proceedings before a panel of members.

The record established that Appellant was not deprived of any of the protections afforded by the UCMJ or the Rules for Courts-Martial. The military judge committed no error in accepting Appellant's pleas before assembling the court. Even if there was error, under the plain error standard, this Court should find no clear or obvious error and no prejudice to Appellant's substantial rights. Thus, this Court should deny this assignment of error.

VI.

TRIAL COUNSEL'S SENTENCING ARGUMENT DID NOT AMOUNT TO PROSECUTORIAL MISCONDUCT AND APPELLANT DID NOT DEMONSTRATE PLAIN ERROR.

Additional Facts

The stipulation of fact stated, "[a]fter the strangulation, a stranger pulled up behind [KL and Appellant] to see if they needed help." (Pros. Ex. 1 at 3.) During Appellant's Care inquiry, the military judge asked Appellant to describe the conduct underlying Specification 2, Charge II – assault by strangulation. Appellant stated:

> During the same incident the night of 28 December 2020, directly after I had slapped [KL], she started screaming at 'Fuck you. You are an asshole. I don't want to be here anymore. I don't want to live anymore.' She repeated that again and again in front of the boys. The boys were crying. I remember [TL] saying, 'It was going to be okay, mom.' She continued to threaten to kill herself, and I placed

> my right hand on her throat and squeezed. I was not trying to hurt her or to kill her. I just wanted her to stop saying what she was saying in front of the boys. I did not hold my hand on her throat for very long, maybe five seconds. When it seemed like she relaxed, I let go. Around that time, a stranger pulled up behind us and asked us if everything was okay.

(R. at 63-64.)

During presentencing, both KL and Appellant provided an unsworn statement (R. at 485; 580-588.)

KL described the impact of Appellant strangling her:

> I can still feel the pressure of your hand around my neck, feeling like my oxygen was being cut off, and feeling like the life was sucked out of me. I can still feel the panic intensifying inside of me as I remember thinking that you were going to kill me in front of the kids. I can still feel my self desperate for air and grasping for breath. I can still remember everything going black and feeling myself slipping away as you are using your bare hands to strangle me. I can remember thinking that this it; this is how I die. I can still hear you screaming at me to stop. Me to stop. As if I'm the one that is strangling you. As if I'm the one that is cutting off your oxygen. When I woke back up, I could hear the kids screaming.

(Court Ex. C at 2.)

Appellant described the same incident in his unsworn statement stating:

> Directly after I slapped [KL], she started screaming at me 'Fuck you, you're an asshole; I don't want to be here anymore; I don't want to live anymore.' She repeated that again and again in front of the boys. The boys were crying. I remember [TL] saying that it was going to be okay, Mom. She continued to threaten to kill herself and I placed my right hand on her throat and squeezed. I was not trying to hurt her or to kill her. I just wanted her to stop saying what she was saying in front of the boys. I did not hold my hand on her throat for very long, maybe five seconds and when it seemed like she had relaxed, I let go. Around that time a stranger pulled up behind us and asked us if everything was okay.

(R. at 585.)

Before sentencing argument, the military judge said to the panel members, "[y]ou are advised that the arguments of the trial counsel and her recommendations are only her individual suggestions and may not be considered as the recommendation or opinion of anyone other than such counsel." (R. at 621.) Trial counsel's sentencing argument was direct and spanned less than five pages of the transcript. (R. at 622-626.)

During her sentencing argument, trial counsel argued, "[t]he only thing that stopped the accused from strangling [KL] to death that night was the stranger that pulled up that noticed something was wrong with that situation and stopped to intervene." (R. at 623). Trial counsel also argued that Appellant's crimes "warrant reduction to the grade of E-1, 3 to 5 years confinement, and a dishonorable discharge." (R. at 626). Trial defense counsel never objected.

Standard of Review

This Court reviews claims of improper argument de novo; and when no objection was made at trial, the error is forfeited, and this Court reviews for plain error. United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019) (citation omitted). "Plain error occurs when (1) there is error, (2) the error is clear or obvious, and (3) the error results in material prejudice to a substantial right of the accused." Id. (internal quotation marks omitted).

Law

Prosecutorial misconduct is generally defined as "action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." United States v. Hornback, 73 M.J. 155, 159-60 (C.A.A.F. 2014) (citations omitted).

In determining whether prejudice exists as a result of prosecutorial misconduct, military courts balance three factors: "(1) the severity of the misconduct, (2) the measures adopted to

cure the misconduct, and (3) the weight of the evidence supporting the conviction." United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005). In United States v. Halpin, this Court extended this test to improper sentencing arguments. 71 M.J. 477, 480 (C.A.A.F. 2013). Reversal for an improper sentencing argument is appropriate only if "trial counsel's comments, taken as a whole, 'were so damaging that [the Court] cannot be confident that [the appellant] was sentenced on the basis of the evidence alone.'" United States v. Frey, 73 M.J. 245, 259 (C.A.A.F. 2014) (quoting Halpin, 71 M.J. at 480).

During sentencing argument, "the trial counsel is at liberty to strike hard, but not foul, blows." United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000). As a zealous advocate for the government, trial counsel may "argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." Id. CAAF "has consistently cautioned counsel to limit arguments on findings or sentencing to evidence in the record and to such fair inferences as may be drawn there from." United States v. Paxton, 64 M.J. 484, 492 (C.A.A.F. 2007) (quoting United States v. White, 36 M.J. 306, 208 (C.M.A. 1993)).

Unsworn statements offered by an accused during presentencing proceedings are not evidence. United States v. Provost, 32 M.J. 98, 99 (C.M.A. 1991). Yet they are permissible means to introduce information before a court-martial, even when that information would not be otherwise admissible under the Military Rules of Evidence . *See* United States v. Grill, 48 M.J. 131, 133 (C.A.A.F. 1998). Unsworn statements, however, are "not wholly unconstrained." Id. Along with being subjected to military judges' limiting instructions, trial counsel may rebut matters raised in an accused's unsworn statement, as well as comment on those same matters during the Government's sentencing argument. United States v. Barrier, 61 M.J. 482, 484 (C.A.A.F. 2005) (citations omitted).

Analysis

A. Trial counsel properly argued reasonable inferences drawn from Appellant's unsworn statements.

Appellant challenges trial counsel's argument and states that trial counsel talked about facts which contradicted those agreed to in the stipulation of facts. (App. Br. 23.) In this case, trial counsel reiterated facts in evidence and argued reasonable inferences aimed at the information brought forth by Appellant in his unsworn statement. At no point did trial counsel introduce facts that would contradict the stipulation of fact and never impermissibly invited members to sentence Appellant because a strangers arrival stopped Appellant from committing murder.

First, the stipulation of fact did not make clear that Appellant released his hands from KL before the stranger approached. (Pros. Ex. 1 at 3.) Second, the stipulation of fact did not clearly state what "after the strangulation" meant. (Id.) Third, Appellant informed the court during the Care inquiry that "she seemed like she couldn't breathe," and "she basically went limp." (R. at 65.) Fourth, Appellant created ambiguity about the arrival of the stranger when he stated in his unsworn statement that he "placed [his] right hand on her throat and squeezed… [he] did not hold [his] hand on her throat for very long, maybe five seconds and when it seemed like she had relaxed, [he] let go. Around that time a stranger pulled up behind us." (R. at 585). It was a reasonable inference for trial counsel to conclude that Appellant stopped strangling KL when the stranger appeared. It was reasonable to conclude that at that time the stranger appeared, Appellant was no longer strangling KL. In turn it was reasonable for trial counsel to argue that the only thing that stopped Appellant from strangling KL to death was a stranger who approached and intervened. The record demonstrated that Appellant's action kept escalating throughout the night from slapping KL to strangling her.

Here, trial counsel's sentencing argument did not contradict the stipulation of fact in violation of R.C.M. 811(e), but commented on statements made during Appellant's Care inquiry coupled with information brought forth by Appellant in his unsworn statement. Trial counsel's argument did not imagine new facts which would tend to contradict the stipulation of fact in this case, but was simply a reasonable characterization of the evidence or unsworn statements made available for the member's consideration.

Appellant takes a portion of trial counsel's statements out of context to make it seem impermissible. The statements are not "hard blow[s]," let alone "foul one[s]," *See* Baer, 53 M.J. at 237. And we know that Appellant did strangle KL to the point where she could not breathe and went limp. So it was a reasonable inference that Appellant strangled KL to the point where she could not breathe and faced imminent death. The information properly supported trial counsel's reasonable inference that Appellant the only thing that stopped Appellant from strangling KL was the approach of the stranger. Trial counsel's argument was not plain and obvious error.

B. Assuming error, Appellant fails to demonstrate plain error and the members rejected trial counsel's recommendation.

Even assuming arguendo there was error, Appellant simply cannot meet his burden under the plain error standard. Arguments by counsel are not evidence. United States v. Clifton, 15 M.J. 26, 29 (C.M.A. 1983). Further, in balancing the three Fletcher factors, any error was harmless.

1. The severity of misconduct, if any, was low and trial defense counsel's tactical decision to address the alleged error prevented the need for curative measures.

In analyzing the first Fletcher factor, assuming plain error, the severity of the misconduct was low and did not impact Appellant's substantial rights since Appellant made no effort to object to any of trial counsel's comments either during or after argument. And because no objection was made, there was no need for the court to take curative measures. Appellant's trial defense counsel showed the minimal impact trial counsel's argument had on the case when he chose to not object. And failure to object to trial counsel's argument is "some measure of the minimal impact of [the] prosecutor's improper argument." United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001).

After all, trial defense counsel "was in the best position to determine the prejudicial effect of the argument." United States v. Scamahorn, NMCCA 200201583, 2006 CCA LEXIS 71, at *42 (N.M. Ct. Crim. App. 27 March 2006) (unpub. op.). Appellant's counsel should be unable to sit silently through possible objections during sentencing argument—making no attempt to cure the alleged errors—and then claim on appeal that the argument was so prejudicial that it requires set aside of the sentence.

Trial defense counsel's lack of objection was a "tactical decision." *See* Darden v. Wainwright, 477 U.S. 168, 182 (1986) (finding no prejudice from prosecutorial misconduct where a defense counsel made "tactical decision[s]" in case strategy). After allowing trial counsel's arguments to proceed, without interruption, defense counsel aptly re-framed the debate: "[c]ontrary to what you just heard that the only thing that stopped him from killing her was a stranger arriving. Not the case. He stopped in that moment." (R. at 629.)

Defense counsel's own argument explains why he allowed trial counsel's argument – he did not think that the argument was effective. Defense counsel managed to cast Appellant as

someone who, in the heat of the moment, could recognize his wrong and employ self-control. The allegedly improper comments were neutralized by trial defense counsel's argument. Thus, Appellant's tactical decision to counter, rather than object to trial counsel's earlier argument should not be held against the United States. *See* United States v. Norwood, 81 M.J. 12, 24 (C.A.A.F. 2021) (Sparks, J., dissenting) ("Defense counsel in this case was best situated to determine which parts of trial counsel's argument were worth objecting to and which were not."). Rather than object, trial defense counsel chose to rebut the statement made by trial counsel in his own sentencing argument. This proved successful, as Appellant avoided the maximum possible punishment per the plea agreement, and trial counsel's request for three to five years of confinement. *See* United States v. Gulley, NMCM 94 00626, 1995 CCA LEXIS 495, at *5 (N.M. Ct. Crim. App. 27 Sepember 1995) (unpub. op.) (finding no plain error when trial defense counsel declined to object and echoed trial counsel's "send a message" argument theme by arguing the appropriate message was already sent by the fact that the appellant was tried by a public court-martial); United States v. Palacios Cueto, 82 M.J. 323, 335 (C.A.A.F. 2022) (finding no prejudice, in part, because "[c]civilian defense counsel also effectively responded to most of what trial counsel said, especially with respect to the suggestion that justice required a finding of guilt."). Instead of trial counsel's recommendation of three to five years, Appellant received one and a half years of confinement, which was far less than the statutory maximum punishment of nine years and six months of conferment. (R. at 654.) Trial defense counsel aptly rebutted trial counsel's comments in argument and dissipated the effect of any improper argument.

2. The standard instructions given by the military judge along with trial defense counsel's argument were sufficient to cure any alleged improper argument by trial counsel.

Absent any objection from trial defense counsel, the military judge did not give specific curative instructions. But he did give the standard instruction, "argument by counsel is not evidence. Counsel are not witnesses. If the facts as you remember them differ from the way counsel state the facts, it is always your memory of the facts that controls." (R. at 639.) The military judge's instruction was enough to neutralize Appellant's complaint that the members heard trial counsel add facts that contradicted the stipulation of fact. After all, members are presumed to follow the judge's instructions. United States v. Ricketts, 50 C.M.R. 567, 570 (C.M.A. 1975). The military judge provided the members "complete and correct instructions," and informed them "it is always your memory of the facts that controls." *See* Palacios Cueto, 82 M.J. at 334. This was considered a curative measure. *See* id.

Trial counsel's arguments in response to evidence in the record and reasonable inferences drawn from it did not amount to clear or obvious error. Nor did any of the arguments individually or in total materially prejudiced any substantial right. While Appellant attempts to label his 18-month confinement sentence severe, it fell far below the statutory maximum for the crimes he pleaded guilty to, below the terms of the plea agreement, and below trial counsel's request. Thus, trial counsel's argument did not result in any prejudice to Appellant. Thus, this Court should find that the severity of any misconduct was low and therefore did not result in any prejudice to Appellant.

3. The overwhelming weight of the evidence supporting the sentence adjudged heavily weighs in the Government's favor.

Though Fletcher recommended a balancing of all three factors, it did not assign a particular value to each or comment whether these factors should be weighed equally. In Halpin, CAAF found that the third Fletcher factor, the weight of the evidence supporting the sentence, weighed "so heavily in favor of the Government" that it could be fully confident the appellant was sentenced based on the evidence alone. 71 M.J. at 480. This Court should likewise find the third Fletcher factor so heavily weighs in the Government's favor as to deny relief.

As in Halpin, the weight of evidence supporting the sentence adjudged was strong. Trial counsel's one sentence in controversy paled in comparison to the evidence published to the members. Appellant slapped his wife. (Pros. Ex. 1 at 2.) Appellant's crimes did not stop there. Shortly after slapping KL, he strangled KL to the point where she could not breathe and saw stars. (Pros. Ex. 1 at 3.) This all occurred in front of the children sitting in the back seat of the car. (Id.) Appellant was also found guilty of slapping TL, Appellant's eldest son, two times. (Pros. Ex. 1 at 4-6.) And these incidences, left TL with injuries. (Id.)

Trial counsel's argument could not possibly have inflamed the panel member's passions more than the crimes for which Appellant was found guilty. The repeated violence committed against KL and TL was horrific. And this Court can be confident that Appellant was appropriately sentenced because of his heinous crimes and not because of any overreach during trial counsel's arguments. This Court should find that trial counsel's argument was not plain and obvious error. But even if this Court finds that trial counsel's argument was error, Appellant has not met his burden under the plain error standard warranting relief because Appellant suffered no prejudice. This Court should deny this assignment of error.

VII.[3]

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE ALLOWED KL'S FATHER PROVIDE VICTIM IMPACT EVIDENCE DURING PRESENTENCING PROCEEDINGS.

Additional Facts

During the Care inquiry, the military judge asked Appellant about the events succeeding KL's strangulation, including KL's interaction with her father, ST:

> At some point, [KL] called her father, [ST], and asked him to come pick her pick her up from her mother-in-law's house. Mr. [ST] came to pick up [KL] and the youngest son, [OL], in his vehicle the day after they drove to Arkansas. [TL] remained with [Appellant].

(R. at 35.) Appellant admitted that those facts were true. (R. at 36.)

During the presentencing phase of Appellant's court-martial, ST testified under oath. (R. at 340-54, 364-70). During the first 14 pages of ST's direct examination transcript, ST testified, without objection. (R. 340-54.) ST described the circumstances preceding KL and TL coming to live with him. (R. at 341.) ST talked about his phone call with KL, who was distraught, crying, and sobbing. (R. at 342-43.) KL described to ST that she found a picture of another woman on Appellant's phone and that Appellant punched KL repeatedly and strangled her to the point of unconsciousness. (Id.) ST also testified, without objection, to being "alarmed" upon seeing a bruise on TL's buttocks in 2019 when TL was getting into the bathtub, and finding out it was from Appellant spanking him–an act that was withdrawn and dismissed per the plea agreement. (R. at 344-45; *Entry of Judgement*, 20 June 2022, ROT Vol. 1.) ST described,

[3] This issue was raised in the appendix pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

without objection, that after KL and TL moved in with him, TL had a nervous habit of chewing his fingernails and demonstrated timidity around authority figures. (R. at 345.) ST testified to finding TL crying three times because of what Appellant had done to him and being "alarmed" by it. (R. at 347-51.) ST testified about consoling TL, who was having sleep problems from nightmares "more times than [he] can numerate." (R. at 351-52.) ST then talked about KL's difficulty sleeping and trying to console her daily because of her uncontrollable crying that resulted from Appellant's crimes. (R. at 352-53.)

Circuit trial counsel then asked, "[s]ir, is there anything else about the impacts of the accused's crimes on your daughter or your grandson or you that you would like these members to know?" (R. at 354.) ST responded, "[i]t has a been a difficult transition for us all. It has been very difficult for me as a father and as a grandfather." (Id.) Circuit defense counsel objected based on "[i]mproper impact." (Id.) Circuit trial counsel proposed the testimony as evidence in aggravation, casting ST as a victim of the offenses against his child, KL, and grandson, TL. (Id.)

After circuit defense counsel clarified their objection on the directness of impact on ST, the military judge overruled Appellant's objection, because the testimony was "admissible evidence under [R.C.M] 1001(b)(4) in the sense that it includes evidence of psychological impact upon an individual who is the victim of an offense committed by the accused." (R. at 357.) The military judge also found that ST could be a crime victim under even the narrower definition in R.C.M. 1001(c). (Id.) The military judge conducted an Mil. R. Evid. 403 balancing test and found that the probative value of ST's testimony was not substantially outweighed by the risk of unfair prejudice. (R. at 358.) The record showed that the military judge admitted ST's testimony as matters in aggravation under R.C.M. 1001(b)(4), but recognized that ST's testimony was proper under R.C.M. 1001(c) as victim impact.

ST finally testified in response to whether there was anything else he would like the panel members to know:

> It has been incredibly difficult and stressful to deal with the knowledge that my daughter and my grandchild have been abused. It is very hurtful. If I am being completely honest, it makes me incredibly angry.

(R. at 364.)

Standard of Review

The Court reviews a military judge's decision to admit a victim statement for abuse of discretion. United States v. Edwards, 82 M.J. 239, 243 (C.A.A.F. 2022).

Law

Rules for Courts-Martial, Rule 1001(c) defines "crime victim" and "victim impact":

> (A) Crime victim. For purposes of this subsection, a crime victim is an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty or the individual's lawful representative or designee appointed by the military judge under these rules.
>
> (B) Victim impact. For purposes of this subsection, victim impact includes any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty.

Further, R.C.M. 1001(b)(4) provides victim of offenses to provide evidence in aggravation:

> Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused….

A military judge abuses his discretion when his "findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." United States v. Miller, 66 M.J. 306, 307 (C.A.A.F. 2008) (citations omitted). A

court should find more than a mere difference of opinion. Instead, the military judge's ruling must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous. United States v. Uribe, 80 M.J. 442, 451 (C.A.A.F. 2021) (internal citations omitted).

When there is error related to the presentation of victim statements under R.C.M. 1001(c), the test for prejudice is whether the error substantially influenced the adjudged sentence. United States v. Barker, 77 M.J. 377, 384 (C.A.A.F. 2018) (internal citation omitted). When determining whether an error had a substantial influence on a sentence, this Court considers the next 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). When a "fact was already obvious from…testimony at trial" and that evidence "would not have provided any new ammunition," an error is likely to be harmless. United States v. Harrow, 65 M.J. 190, 200 (C.A.A.F. 2007).

Analysis

Appellant claims that the military judge abused his discretion when he received improper victim impact evidence from ST. (App. Br. at 25.) This argument is meritless because the military judge did not abuse his discretion in finding that ST could qualify as a crime victim as defined by R.C.M. 1001(c)(2)(A) and that his testimony complied with the definition of victim impact in R.C.M. 1001(c)(2)(B) and R.C.M. 1001(b)(4). In any event, any arguable error was harmless.

Appellant claims that "[t]he military judge's analysis of the R.C.M. 1001(c)(2)(A) designation is just two sentences long: 'I find that this father could be – and grandfather could be a crime victim for the purposes of even the narrowed definitions within 1001(c). When I say

narrow, I mean harder to reach standards than might be more generally available in other forms.'" (App. Br. at 26-27.) But this is not an accurate depiction of the record. In fact, the military judge continued his ruling after referencing R.C.M. 1001(c):

> I find that this evidence, because it does impact a victim, even under this narrower definition, is admissible evidence under 1001(b)(4) in the sense that it includes evidence of psychological impact upon an individual who is the victim of an offense committed by the accused. That is a definition that comes from R.C.M. 1001(b)(4). Putting those things together, I find that as a matter of law, he could be considered a crime victim within the sense that this is being offered under 1001(b)(4) evidence in aggravation. Specific to the testimony that he intends to give, I find that it survives a 403-balancing test alone. Not explicitly stated, the court has an independent responsibility and has been, as reflected on the record, has been managing that independent responsibility adjudicating whether or not withstanding and particularized objections, certain information, or evidence or testimony is admissible. *See* Rule for Courts-Martial 913(c)(4). I generally allow you all to try your cases; and still if there is [an] objection that is adjacent to 403, 401, or similar type objections, I will tend to treat the objection in that way. Even casting this objection as an objection under 403, I find that the probative value of this information is not substantially outweighed by the risk of unfair prejudice. His demeanor and affect has already demonstrated this point, and perhaps more powerful forms than words, in the way that he delivered his testimony so far. Confusion of the issues, waste of time is very, very short, and misleading the members as well. To the extent that it is cumulative or coextensive with some of the affect or demeanor that this court has observed in the presentation of his testimony so far, I find that the narrow focus of this essentially the government asking anything that you want offer, it has been very difficult on him as a father and a grandfather, I will overrule the objection and allow the member[s] to hear that. I have a follow-up question for the trial. How so he gives a truthful answer, but we would expect it to be in line with what he had said before, which is that it is very difficult to see what his daughter and his grandsons have gone through. I find that that information, again, has some probative value as I have described it is not substantially outweighed; and again, it is not cumulative because it puts a very clear point on it, and it hasn't been stated in the words quite yet. I will allow that. After that, you are going to yield in the cross.

(R. at 357-58.) This passage demonstrated that the military judge properly applied the correct law in determining that ST's testimony was proper evidence – whether it be proper victim impact or matters in aggravation. Contrary to Appellant's argument, the military judge did not make an off-the-cuff ruling that ST's testimony was admissible in some form. The military judge's ruling was not clearly erroneous or arbitrary.

Appellant mischaracterizes the military judge's ruling, arguing that the military judge stated that such a broad reading of R.C.M. 1001(c)(2)(A) would allow a "confusingly incredible number" of people to be designated as victims. (App. Br. at 26.) But the military judge was not criticizing R.C.M. 1001(c)(2)(A) as creating a confusing or incredibly large number of victims. To the contrary, the military judge was emphasizing that despite the large number of different definitions for "crime victim," R.C.M. 1001(c) and its "more constrained definition" of a crime victim would still consider ST a crime victim. (R. at 357.)

Appellant represents that "no Court of Criminal Appeals has ever held that the parent of a non-murder, *adult* victim could be so designated [as a crime victim]." (App. Br. at 26.) Still, one of the victims about whom ST was hurt and angry about was his minor grandchild, TL. Moreover, based on ST's testimony, he was responsible for the safety and well-being of both KL and TL. They stayed with ST at his home, and he was involved in removing KL and her children from the situation after Appellant attacked her. It is hardly difficult to understand the notion that ST was psychologically harmed by Appellant's crimes against his daughter and grandson. *See* United States v. Schauer, 83 M.J. 575, 579-80 (A.F. Ct. Crim. App. 2023) (citing United States v. Dunlap, ACM 39567, 2020 CCA LEXIS 148, at *25-26 (A.F. Ct. Crim. App. 4 May 2020) (unpub. op.) ("[A] parent responsible for the safety and well-being of children and who witnesses

the suffering of those children may be harmed as much as, if not more than, the children themselves.").

Assuming, for argument's sake, there was error in treating ST as a victim and admitting his statement about being hurt and angry from Appellant's crimes against ST's child and grandson, any such error was harmless. ST testified extensively, without objection, about his love for his family, as well as his observations about Appellant's crimes and their impact on the victims. Thus, even if ST had not made that one statement to which Appellant objected, any rational fact-finder would have known that ST was hurt and angry as a result of Appellant's crimes.

The one statement to which Appellant objected to was not "new ammunition" and it did not substantially influence the adjudged sentence. The strength of the government's case was strong. Appellant pleaded guilty to harming KL and OL. Further, the members were provided with the stipulation of fact detailing the assaults and their aftermath, along with photos of injuries. (*See* Pros. Ex. 1.) At that, both KL and TL either testified during the presentencing hearing or provided an unsworn victim impact statement. (R. at 386-404; Court Ex. C.) As for the materiality and quality of the evidence in question, after trial defense counsel's objection was overruled, ST made a brief statement about how he felt after his loved one's were attacked by Appellant. Most of his testimony was unobjected to. Appellant was sentenced to reduction to E-1, total forfeitures for 18 months, one and a half years of confinement, and a bad conduct discharge–below the maximum punishments allowed per the plea agreement, which maxed confinement to five years and authorized a dishonorable discharge. (Ap. Ex. XIII.) The agreement required a minimum term of confinement of one year. Appellant received six more months above his minimum sentence requirement and three and a half years below the maximum

term of confinement allowed per the plea agreement. For these reasons, ST's objected testimony did not substantially influence the adjudged sentence. Thus, there was no error, certainly not harmful error, and Appellant is not entitled to relief. This Court should deny 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.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 6 May 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**REPLY BRIEF ON BEHALF OF**
Appellee	)	**APPELLANT**
	)	
v.	)	Before Panel No. 3
	)	
Staff Sergeant (E-5)	)	No. ACM 40407
ZACKERY A. LOGAN,	)	
United States Air Force	)	13 May 2024
Appellant	)	

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

ARGUMENT

I. APPELLANT'S PLEAS TO SPECIFICATIONS 1 AND 2 OF CHARGE II WERE IMPROVIDENT BECAUSE THE *CARE*[1] INQUIRY RAISED AFFIRMATIVE DEFENSES, THE MILITARY JUDGE DID NOT RESOLVE THESE INCONSISTENT MATTERS, AND THE MILITARY JUDGE DID NOT ENGAGE IN AN INQUIRY ON ALL THE AFFIRMATIVE DEFENSES RAISED.

1. The Government's law section contains inaccuracies.

Defining the justification defense, R.C.M. 916(c) states: "A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful." The Government represents that: "The duty *must* be imposed by statute, regulation, or order." Appellee Br. at 10 (citing R.C.M. 916(c), Discussion) (emphasis added). The MCM, however, says: "The duty *may* be imposed by statute, regulation, or order." R.C.M. 916(c), Discussion (emphasis added).

The Government also cites to *United States v. Rockwood*, 52 M.J. 98 (C.A.A.F. 1999) attributing to the Court of Appeals for the Armed Forces (CAAF) the theory that the justification

[1] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969)

defense may not have been directly recognized by the military because of concern that "private moral codes will be substituted for legislative determinations, resulting in a necessity exception that swallow the rule of law." Appellee's Br. at 10 (citing *Rockwood*, 52 M.J. at 113). The Government makes it sound like this concern was expressed by the CAAF itself. In fact, however, the court was quoting a commentator's article. *Rockwood*, 52 M.J. at 113. What's more, directly after quoting this commentator's speculation, the CAAF disavowed it, stating: "To the extent [the commentator] is referring to situations not involving the flouting of military authority, he surely goes too far." *Id.* at 113 n.17. Thereafter, the CAAF largely endorses a necessity defense, except in situations where it might entail the flouting of military orders. *Id.* ("There is, for example, no reason why the drowning situation [a previously provided example of a necessity defense] would not provide a defense."). Indeed, in *Rockwood*, the military judge instructed on what the CAAF characterized as a necessity defense and the CAAF approvingly noted that "the military judge formulated the instruction in a manner that comported well with general civilian criminal law." *Id.* at 114. Reading the Government brief gives a highly inaccurate picture of the *Rockwood* case, with the Government making it sound like the CAAF rejected the justification defense when, in fact, it largely endorsed the defense, except where it might entail disobedience to military orders. *Cf.* Appellee Br. at 12 (stating that the CAAF rejected the justification defense in a military-duty situation but omitting that the CAAF largely endorsed the defense settings not implicating the abandonment of military duties).

2. Appellant's apprehension at the time of the charged conduct.

The Government argues that a duress defense did not apply because (1) duress requires the "apprehension must reasonably continue throughout the commission of the act," and (2) "[t]here was no apprehension at the time Appellant slapped KL" because she was in the car at the time rather than actively running towards traffic. Appellee Br. at 10-11 (quoting R.C.M. 916(h)). The Government repeats this argument several more times and concludes: "The apprehension of KL

hurting herself was not prevalent while she was sitting in the truck because during this timeframe, she was not running towards oncoming vehicular traffic." Appellee Br. at 11-12.

Nowhere in its conclusory arguments that Appellant's apprehension had stopped because KL was in the truck does the government address that, shortly before the charged slap, KL "bolted *out of the truck* again and ran towards the highway." PE 1 at 2 (emphasis added). Her exit from the truck began a series of approximately six bolts towards the highway traffic. R. at 55. Given this factual backdrop, the mere fact that KL was in the truck at the time rather than actively running towards traffic in no way foreclosed the "possible defense" standard necessary to trigger further inquiry, particularly given Appellant's multiple statements that he slapped KL in order to stop her suicidal behavior, and after what can only be described as extraordinary steps to disengage, deescalate, and protect KL from repeated credible attempts at suicide.

As such, the Government theory as to why appellant's apprehension had ended is not particularly convincing. More fundamentally, however, the Government merely offers a theory that, if accepted by a factfinder, would preclude the defense. That, of course, is not the standard. The standard is whether Appellant's statements raised the issue (the possible defense standard). *United States v. Hayes*, 70 M.J. 454, 458 (C.A.A.F. 2012). The fact that the Government has a theory that might defeat the defense in no way eliminates the need for inquiry.

3. The military judge did not explain or resolve the defenses of duress or necessity.

After vigorously arguing that the defenses of duress, justification, and necessity were not raised by the "possible defense" standard, the Government puzzlingly states that the military judge did, in fact, "explore[] these defenses, even though he did not have to do so." Appellee Br. at 13. This is a confusing contention. As noted in Appellant's opening brief, the military judge engaged in a short inquiry that seemed to be aimed at the defense of justification. Appellant Br. at 10-11 (citing R.C.M. 916(c); R. at 44-45). However, the military judge clearly did *not* explain the defenses of duress or

necessity nor resolve any ambiguity or inconsistency with respect to the applicability of these defenses. Despite contending that the military judge did, in fact, explore these defenses, the Government points to nothing in the record that would support such a contention.

4. Specification 2 of Charge II (Strangulation)

Both sides largely anchor their arguments with respect to Specification 2 to the similar considerations at play in Specification 1. As such, Appellant rests on his prior filing for this issue.

II. APPELLANT'S PLEAS WERE IMPROVIDENT BECAUSE THE MILITARY JUDGE DID NOT EXPLAIN THE DEFENSE OF LACK OF MENTAL RESPONSIBILITY TO APPELLANT, DID NOT SATISFY HIMSELF THAT COUNSEL HAD EVALUATED THE VIABILITY OF THE DEFENSE, AND DID NOT ELICIT FACTS FROM APPELLANT THAT NEGATED THE DEFENSE

The fundamental problem with the Government's brief on this issue is that it jumps past the standard for further inquiry into mental responsibility, instead immediately jumping straight to the merits' standard. The Government argues that "the record did not establish that Appellant could have proven, by clear and convincing evidence, that as a result of his mental illnesses he could not appreciate the nature and quality of the wrongfulness of his criminal actions." Appellee Br. at 16 (citing R.C.M. 916(k)(1)). This is the merits standard. It is not the standard to trigger further inquiry. It would not be expected that the evidence about Appellant's mental health struggles – presented largely during sentencing – would articulate a fully perfected defense. As this Court explained in *United States v. Handy*, when "evidence of an accused's mental health problems rears its head" the military judge should ensure the issue is resolved by, *inter alia*, asking defense counsel if they have considered the issue and asking the accused if they have discussed the issue with their counsel. 48 M.J. 590, 593 (A.F. Ct. Crim. App. 1998); *see also Hayes*, 70 M.J. at 459 ("Even if an accused does not volunteer all the facts necessary to establish a defense, if he sets up

matter raising a possible defense, then the military judge is obliged to make further inquiry.") (quotation omitted).

The Government never contends that the military judge took the actions directed in *Handy* (it is clear from the record he did not), nor does the Government contest that "evidence of an accused's mental health problems rear[ed] its head" at trial. Instead, the Government attempts to increase the threshold necessary to trigger an inquiry in clear contradiction to precedent.

The Government attempts to analogize this case to cases like *United States v. Shaw*, 46 M.J. 460 (C.A.A.F. 2007), and *United States v. Glenn*, 66 M.J. 64 (C.A.A.F. 2008), where the appellants merely mentioned they had diagnosed mental health conditions. Appellee Br. at 17-18. However, the mental health evidence here was (1) much more extensive and (2) more intertwined with the charged conduct than the cited cases. This is especially so since Appellant endorsed that his mental health struggles had intensified during the charged timeframe due to "the stress of having my children out of school from the pandemic and the problems I continued to have with [KL]." R. at 582.

III. APPELLANT'S PLEAS WERE IMPROVIDENT BECAUSE THE MILITARY JUDGE FAILED TO ADEQUATELY ADVISE APPELLANT ON HIS WAIVER OF HIS RIGHT TO TRIAL BY MEMBERS.

1. Military members do enjoy a right to a "trial by members."

The Government argues that because military members do not have a Sixth Amendment[2] right to a "trial by jury" there is no requirement to advise accused persons of their right to a trial by members. Appellee Br. at 20, 21-22. But this is a distinction without a difference; as CAAF has held, an accused has an equal right to a trial by members. *United States v. Hansen*, 59 M.J. 410,

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

411 (C.A.A.F. 2004) (explaining that an accused waives several constitutional rights by pleading guilty, including a right to trial by members). Notably, in another section of their brief, it appears that the Government conceded this issue, admitting that: "[b]y pleading guilty, *Appellant gave up his right* to be tried by members." Appellee's Br. at 24 (emphasis added).

2. A right to a "trial of the facts" is different from a right to a "trial by members."

As Appellant argued in his opening brief, a right to a "trial of the facts" is distinct from a right to a "trial by members." Appellant's Br. at 16-18. While Appellant was advised that he was giving up his right to a "trial of the facts," he was never advised that he was also giving up his right to "trial by members." This is problematic in the guilty plea context.

The Government concedes that there is a difference: "[a] trial of the facts is a proceeding at the trial level." Appellee's Br. at 22. The Government's argument also seems to encapsulate this difference. For example, the Government contends that the military judge's colloquy informed Appellant that he was giving up his "right to have the prosecution prove his guilt beyond a reasonable doubt by legal and competent evidence or in other words a 'trial of the facts.'" Appellee's Br. at 22. Here, the Government agrees that the military judge's colloquy about "trial of the facts" isn't the same as a colloquy about "trial by members;" rather, a "trail of the facts" is about contesting facts at a litigated trial.

Despite this, the Government goes on to argue that when an accused forfeits his right to a "trial of the facts" he gives up his "right to have either the military judge or the members sit as the fact finder." Appellee's Br. at 22. This argument demonstrates the Government's confusion about this issue. After all, there is a factfinder even during a guilty plea hearing. *See, e.g.*, *United States v. Eddy*, 41 M.J. 786, 791 (A.F. Ct. Crim. App. 1995) (referring to a military judge sitting as "factfinder" for a guilty plea inquiry).

Try as they may, the Government cannot make a "trial of the facts" be the same as a "trial by members." Because they are not the same, the mere advisement of a right to a "trial of the facts" is insufficient to satisfy the requirement that an accused be advised of his right to a "trial by members."

IV. APPELLANT DID NOT KNOWINGLY AND UNDERSTANDINGLY ELECT A MILITARY JUDGE ALONE FORUM.

1. Being placed under oath and questioned is insufficient for a knowing and understanding election.

The Government concedes that the military judge failed to conduct a military judge alone colloquy in this case. Appellee's Br. at 25. Nevertheless, the Government argues that Appellant knowingly elected a military judge alone forum because "the military judge [explained] that . . . he would place Appellant under oath, and he would ask Appellant questions." Appellee's Br. at 24. This is a far cry from what is required by law. R.C.M. 903; *United States v. Turner*, 47 M.J. 348, 350 (C.A.A.F. 1997) (requiring military judges to inform an accused of their right to a trial by military judge alone and to obtain from them either an oral or written waiver); *United States v. Adad*, No. 202000213, 2021 CCA LEXIS 58 (N-M Ct. Crim. App. 9 Feb 2021) (unpub. op.) (finding error when the military judge failed to explicitly obtain a waiver). Tellingly, the Government cites to no case where merely informing an accused that he would be placed under oath and questioned was sufficient for R.C.M. 903 purposes.

2. The Benchbook informs that a colloquy was required.

In another section of their answer, the Government uses the Benchbook as a shield to justify the military judge's decision not to inform Appellant of his right to a trial by members. Appellee's Br. at 23 (arguing that because the military judge followed the Benchbook, he did not abuse his discretion by failing to inform Appellant of his right to a trial by members). But interestingly, the

Government fails to recognize that in many guilty plea cases, the Benchbook requires the military judge alone colloquy due to the accused's relinquishment of their right to trial by members. *Compare United States v. Riley*, 72 M.J. 115, 124 (C.A.A.F. 2013) (Stucky, J., dissenting) (recognizing that many plea deals require an accused to elect military judge alone) and *Adad*, 2021 CCA LEXIS 58 (demonstrating a case where the military judge erred by failing to conduct a judge alone colloquy for a guilty plea case), *with* Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para 2-1-3 (29 Feb. 2020) (Benchbook).

The Government cannot have it both ways. If the Benchbook is enough to shield a military judge in one instance, it can also be a sword to demonstrate a military judge's failure to conduct the requisite colloquy in another.

3. The Government's reliance on Adad *is misplaced.*

The Government further argues that the military judge "took similar safeguards to those outlined in *Adad*." Appellee's Br. at 27. This is simply not true. In *Adad*, the military judge recognized that he failed to conduct the R.C.M. 903 inquiry *prior to findings* and addressed that oversight with the parties. 2021 CCA LEXIS 58, at *4. This never happened in this case. In fact, it does not appear the military judge ever recognized this oversight, and he certainly took no efforts to "remedially address[]" it with the parties. *Id*. Moreover, the plea deal in this case was distinct from the one in *Adad*—in *Adad*, the accused specifically waived his right to trial by members in the plea agreement. *Id*. In this case, Appellant did not waive this right in the plea agreement or otherwise. *See, e.g.*, App. Ex. XIII.

V. TRIAL COUNSEL ENGAGED IN IMPROPER SENTENCING ARGUMENT BY CONTRADICTING THE STIPULATION OF FACT.

1. When the stipulation says "after the strangulation" it means "after the strangulation."

In this assignment of error, Appellant takes issue with the Government's sentencing argument that: "The only thing that stopped the accused from strangling [KL] to death that night was the stranger that pulled up that noticed something was wrong with that situation and stopped to intervene." Appellant Br. 21-24. Given that the stipulation of fact clearly states that the stranger did not pull up until "[a]fter the strangulation," Appellant contends this argument went beyond the facts of record and impermissibly contradicted the stipulation of fact. *See* Pros. Ex. 1, page 3. The Government seems to maintain on appeal that despite happening "after the strangulation," the stranger's arrival caused the strangulation to stop; or, perhaps, that the stranger actually arrived during the strangulation, but this still did not contradict the stipulation. *See* Appellee Br. at 40-42. To the extent the Government argues that the stipulation's language "after the strangulation" means "during the strangulation," Appellant disagrees on a textual level. The stipulation is clear and unambiguous, and it means what it says: "after the strangulation" means "after the strangulation."

2. Effect cannot precede cause.

As a later event cannot cause a prior event, trial counsel's sentencing argument contradicted the stipulation of fact. The Government's attempt to argue that a subsequent event can impact a preceding one is unique, but should leave this Court unconvinced.

3. The government continues to exaggerate the severity of Appellant's actions

Ironically, in attempting to defend its prior exaggeration of Appellant's actions in sentencing, the Government continues to exaggerate Appellant's actions. The Government refers to Appellant's actions as "horrific" and "heinous." Appellee Br. at 43. Heinous means "shockingly atrocious or odious." HEINOUS, Black's Law Dictionary (11th ed. 2019). Horrific, while not

defined by Black's, is an equally extreme term. *See, e.g.*, *United States v. Parker*, 73 M.J. 914, 921 (A.F. Ct. Crim. App. 2014) (describing physically molesting two young toddlers and child pornography offenses as "horrific."). Appellant's actions towards his wife were taken as a last resort after she had slapped and bit him, and credibly attempted suicide multiple times. Prior to the charged actions, Appellant engaged in extensive efforts to disengage, deescalate, and call 9-1-1. Appellant's striking of his son—for which he profusely apologized and took responsibility for—was the action of a frustrated young father navigating the challenging terrain of correcting the behavioral challenges of a child during a pandemic. The Government's continued hyperbole is misplaced.

Conclusion

WHEREFORE, Appellant respectfully requests this Honorable Court set aside Appellant's pleas as improvident and set aside the findings and sentence.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 13 May 2024.

Respectfully submitted,

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