IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Technical Sergeant (E-6) **George E. Lopez** United States Air Force *Appellant*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)** Before Panel No. 1 No. ACM 40148 22 October 2021

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

Pursuant to Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignment of Errors. Appellant requests an enlargement of time for a period of 60 days, which will end on 30 December 2021. The record of trial was docketed with this Court on 1 September 2021. From the date of docketing to the present date, 51 days have elapsed. On the date requested, 120 days will have elapsed.

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

[redacted]
RYAN S. CRNKOVICH, Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force
[redacted]

GRANTED
26 Oct 2021

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was sent via email to the Court and served on the Appellate Government Division on 22 October 2021.

[redacted]

RYAN S. CRNKOVICH, Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force
[redacted]

26 October 2021

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) GEORGE E. LOPEZ, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40161 Panel No. 1

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

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

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
[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 October 2021.

[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,* v. Technical Sergeant (E-6) **George E. Lopez** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)** Before Panel No. 1 No. ACM 40148 21 December 2021

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

Pursuant to Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignment of Errors. Appellant requests an enlargement of time for a period of 30 days, which will end on 29 January 2022. The record of trial was docketed with this Court on 1 September 2021. From the date of docketing to the present date, 111 days have elapsed. On the date requested, 150 days will have elapsed.

On 25 May 2021 and 7-12 June 2021, Appellant was tried by a panel of officer and enlisted members at a general court-martial at Joint Base San Antonio-Lackland, Texas. Record of Trial (ROT) at Vol. 1 – Entry of Judgment (EOJ), dated 25 August 2021. Contrary to his pleas, Appellant was convicted of one charge and five specifications alleging violations of Article 128, UCMJ; one charge and specification of ssault in violation of Article 120, UCMJ; and one charge and three ions alleging violations of Article 134, UCMJ. *Id.* The panel sentenced Appellant to confinement for nine years and six months, reduction to the grade of E-

GRANTED
27 DECEMBER 2021

1, and a dishonorable discharge. *Id*. The Convening Authority took no action on the findings and no action on the sentence in the case. ROT at Vol. 1 – Convening Authority Decision on Action, dated 14 July 2021.

There were 11 written motions filed. The transcript is 1291 pages. There are 35 prosecution exhibits, 39 defense exhibits 79 appellate exhibits, and three court exhibits. Through no fault of Appellant, undersigned counsel has been working other assigned matters and has yet to complete his 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.

[redacted]

RYAN S. CRNKOVICH, Maj, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was sent via email to the Court and served on the Appellate Government Division on 21 December 2021.

[redacted]

Appellate Defense Counsel
AF/JAJA
United States Air Force
[redacted]

22 December 2021

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) GEORGE E. LOPEZ, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40161 Panel No. 1

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

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

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

[redacted]
BRITTANY M. SPEIRS, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
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 December 2021.

[redacted]
BRITTANY M. SPEIRS, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Technical Sergeant (E-6) **George E. Lopez** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)** Before Panel No. 1 No. ACM 40148 21 January 2022

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

Pursuant to Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignment of Errors. Appellant requests an enlargement of time for a period of 30 days, which will end on 28 February 2022. The record of trial was docketed with this Court on 1 September 2021. From the date of docketing to the present date, 142 days have elapsed. On the date requested, 180 days will have elapsed.

On 25 May 2021 and 7-12 June 2021, Appellant was tried by a panel of officer and enlisted members at a general court-martial at Joint Base San Antonio-Lackland, Texas. Record of Trial (ROT) at Vol. 1 – Entry of Judgment (EOJ), dated 25 August 2021. Contrary to his pleas, Appellant was convicted of one charge and five specifications alleging violations of Article 128, UCMJ; one charge and specification of sexual assault in violation of Article 120, UCMJ; and one charge and three specifications alleging violations of Article 134, UCMJ. *Id.* The panel sentenced Appellant to confinement for nine years and six months, reduction to the grade of E-

GRANTED
26 JAN 2022

1, and a dishonorable discharge. *Id*. The Convening Authority took no action on the findings and no action on the sentence in the case. ROT at Vol. 1 – Convening Authority Decision on Action, dated 14 July 2021.

There were 11 written motions filed. The transcript is 1291 pages. There are 35 prosecution exhibits, 39 defense exhibits 79 appellate exhibits, and three court exhibits. Through no fault of Appellant, undersigned counsel has been working other assigned matters and has yet to complete his 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.

[redacted]

RYAN S. CRNKOVICH, Maj, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was sent via email to the Court and served on the Appellate Government Division on 21 January 2022.

[redacted]

Appellate Defense Counsel
AF/JAJA
United States Air Force
[redacted]

25 January 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) GEORGE E. LOPEZ, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40161 Panel No. 1

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

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

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
[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 January 2022.

[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,* v. Technical Sergeant (E-6) **George E. Lopez** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)** Before Panel No. 1 No. ACM 40161 17 February 2022

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

Pursuant to Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignment of Errors. Appellant requests an enlargement of time for a period of 30 days, which will end on 30 March 2022. The record of trial was docketed with this Court on 1 September 2021. From the date of docketing to the present date, 169 days have elapsed. On the date requested, 210 days will have elapsed. This motion has been filed early due to the upcoming holiday and family day.

On 25 May 2021 and 7-12 June 2021, Appellant was tried by a panel of officer and enlisted members at a general court-martial at Joint Base San Antonio-Lackland, Texas. Record of Trial (ROT) at Vol. 1 – Entry of Judgment (EOJ), dated 25 August 2021. Contrary to his pleas, Appellant was convicted of one charge and five specifications alleging violations of Article 128, UCMJ; one charge and specification of sexual assault in violation of Article 120, UCMJ; and one charge and three specifications alleging violations of Article 134, UCMJ. *Id.* The panel sentenced him

GRANTED
22 FEB 2022

to confinement for nine years and six months, reduction to the grade of E-1, and a dishonorable discharge. *Id.* The Convening Authority took no action on the findings and no action on the sentence in the case. ROT at Vol. 1 – Convening Authority Decision on Action, dated 14 July 2021. There were 11 written motions filed. The transcript is 1291 pages. There are 35 prosecution exhibits, 39 defense exhibits 79 appellate exhibits, and three court exhibits. Appellant remains in confinement.

The above-captioned case is presently undersigned counsel's fourth priority before this Court. Undersigned counsel's first priority case before this Court is *United States v. Blow*, which is on remand. In that case, the ROT consists of five volumes, the transcript is 464 pages, there was one written motion filed, there are 28 prosecution exhibits, six defense exhibits, 12 appellate exhibits, and one court exhibit. Undersigned Counsel's second priority case before this Court is *United States v. Goldsmith*. In that case, the ROT is 10 volumes, there were ten written motions filed, the transcript is 1,052 pages, there are four prosecution exhibits, 11 defense exhibits, and three court exhibits. Undersigned counsel's third priority case before this Court is *United States v. Walters*. In that case, the ROT consists of two volumes, there were no written motions filed, the transcript is 93 pages, there were three prosecution exhibits, one defense exhibit, four appellate exhibits, and one court exhibit.

Through no fault of Appellant, undersigned counsel has been working other assigned matters and has yet to complete his 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.

[redacted]
RYAN S. CRNKOVICH, Maj, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was sent via email to the Court and served on the Appellate Government Division on 17 February 2022.

[redacted]

RYAN S. CRNKOVICH, Maj, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force
[redacted]

17 February 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) GEORGE E. LOPEZ, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40161 Panel No. 1

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

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

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
[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 17 February 2022.

[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,* v. Technical Sergeant (E-6) **George E. Lopez** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)** Before Panel No. 1 No. ACM 40161 23 March 2022

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

Pursuant to Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignment of Errors. Appellant requests an enlargement of time for a period of 30 days, which will end on 29 April 2022. The record of trial was docketed with this Court on 1 September 2021. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 25 May 2021 and 7-12 June 2021, Appellant was tried by a panel of officer and enlisted members at a general court-martial at Joint Base San Antonio-Lackland, Texas. Record of Trial (ROT) at Vol. 1 – Entry of Judgment (EOJ), dated 25 August 2021. Contrary to his pleas, Appellant was convicted of one charge and five specifications alleging violations of Article 128, UCMJ; one charge and specification of sexual assault in violation of Article 120, UCMJ; and one charge and three ns alleging violations of Article 134, UCMJ. *Id*. The panel sentenced him ent for nine years and six months, reduction to the grade of E-1, and a

GRANTED
28 MAR 2022

dishonorable discharge. *Id.* The Convening Authority took no action on the findings and no action on the sentence in the case. ROT at Vol. 1 – Convening Authority Decision on Action, dated 14 July 2021. There were 11 written motions filed. The transcript is 1291 pages. There are 35 prosecution exhibits, 39 defense exhibits 79 appellate exhibits, and three court exhibits. Appellant remains in confinement. Undersigned counsel anticipates that civilian appellate defense counsel will soon be filing a notice of appearance with this Court.

The above-captioned case is presently undersigned counsel's third priority before this Court. Undersigned counsel's first priority case before this Court is *United States v. Goldsmith*. In that case, the ROT is 10 volumes, there were ten written motions filed, the transcript is 1,052 pages, there are four prosecution exhibits, 11 defense exhibits, and three court exhibits. Undersigned counsel's second priority case before this Court is *United States v. Walters*. There, the ROT consists of two volumes, there were no written motions filed, the transcript is 93 pages, there were three prosecution exhibits, one defense exhibit, four appellate exhibits, and one court exhibit.

In addition to the above-described cases, undersigned counsel has initial assignments of error briefs pending before this Court in four other cases. He has also been detailed as co-counsel in the case of *United States v. Thompson*, in which the Court of Appeals for the Armed Forces has granted review. The appellant's brief in that case is due on 13 April 2022. Through no fault of Appellant, undersigned counsel has been working other assigned matters and has yet to complete his 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.

[redacted]

RYAN S. CRNKOVICH, Maj, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was sent via email to the Court and served on the Appellate Government Division on 23 March 2022.

[redacted]

RYAN S. CRNKOVICH, Maj, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force
[redacted]

25 March 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) GEORGE E. LOPEZ, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40161 Panel No. 1

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

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

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
[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 March 2022.

[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

NOTICE OF APPEARANCE

UNITED STATES v. LOPEZ, G. ACM: 40161

To the Clerk of this Court and all parties of record, the undersigned hereby enters an appearance as the appellate counsel for the appellant in the above-captioned case, pursuant to Rule 13 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.

4/25/2022
Date

[redacted]
Signature

WILLIAM E. CASSARA [redacted]
Print Name Bar Number

[redacted]
Phone Number E-Mail

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Technical Sergeant (E-6) **George E. Lopez** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)** Before Panel No. 1 No. ACM 40161 22 April 2022

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

Pursuant to Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignment of Errors. Appellant requests an enlargement of time for a period of 30 days, which will end on 29 May 2022. The record of trial was docketed with this Court on 1 September 2021. From the date of docketing to the present date, 233 days have elapsed. On the date requested, 270 days will have elapsed.

On 25 May 2021 and 7-12 June 2021, Appellant was tried by a panel of officer and enlisted members at a general court-martial at Joint Base San Antonio-Lackland, Texas. Record of Trial (ROT) at Vol. 1 – Entry of Judgment (EOJ), dated 25 August 2021. Contrary to his pleas, Appellant was convicted of one charge and five specifications alleging violations of Article 128, UCMJ; one charge and specification of sexual assault in violation of Article 120, UCMJ; and one charge and three specifications alleging violations of Article 134, UCMJ. *Id*. The panel sentenced him to confinement for nine years and six months, reduction to the grade of E-1, and a

dishonorable discharge. *Id.* The Convening Authority took no action on the findings and no action on the sentence in the case. ROT at Vol. 1 – Convening Authority Decision on Action, dated 14 July 2021. There were 11 written motions filed. The transcript is 1291 pages. There are 35 prosecution exhibits, 39 defense exhibits 79 appellate exhibits, and three court exhibits. Appellant remains in confinement.

The above-captioned case is presently undersigned counsel's second priority before this Court. Undersigned counsel's first priority case before this Court is *United States v. Goldsmith*. In that case, the ROT is 10 volumes, there were ten written motions filed, the transcript is 1,052 pages, there are four prosecution exhibits, 11 defense exhibits, and three court exhibits. Undersigned counsel has begun his review in *Goldsmith* and has, to date, read approximately 425 pages of transcript in that case. Undersigned counsel has not yet begun his review of *Lopez*.

In addition to the above-described cases, undersigned counsel has initial assignments of error briefs pending before this Court in four other cases. Undersigned counsel further notes for this Court's consideration that he will be separating from the Air Force and has been approved to take terminal leave beginning on 13 July 2022. Through no fault of Appellant, undersigned counsel has been working other assigned matters and has yet to complete his 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.

[redacted]
RYAN S. CRNKOVICH, Maj, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was sent via email to the Court and served on the Appellate Government Division on 22 April 2022.

[redacted]

RYAN S. CRNKOVICH, Maj, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force
[redacted]

25 April 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) GEORGE E. LOPEZ, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40161 Panel No. 1

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

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

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

[redacted]

JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, 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 25 April 2022.

JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, 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 40161**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
George E. LOPEZ	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 22 April 2022, counsel for Appellant submitted a Motion for Enlargement of Time (Sixth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 29th day of April, 2022,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **29 May 2022**.

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

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Technical Sergeant (E-6) **George E. Lopez** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)** Before Panel No. 1 No. ACM 40161 20 May 2022

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

Pursuant to Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignment of Errors. Appellant requests an enlargement of time for a period of 30 days, which will end on 28 June 2022. The record of trial was docketed with this Court on 1 September 2021. From the date of docketing to the present date, 261 days have elapsed. On the date requested, 300 days will have elapsed.

On 25 May 2021 and 7-12 June 2021, Appellant was tried by a panel of officer and enlisted members at a general court-martial at Joint Base San Antonio-Lackland, Texas. Record of Trial (ROT) at Vol. 1 – Entry of Judgment (EOJ), dated 25 August 2021. Contrary to his pleas, Appellant was convicted of one charge and five specifications alleging violations of Article 128, UCMJ; one charge and specification of sexual assault in violation of Article 120, UCMJ; and one charge and three specifications alleging violations of Article 134, UCMJ. *Id*. The panel sentenced him to confinement for nine years and six months, reduction to the grade of E-1, and a

GRANTED
26 MAY 2022

dishonorable discharge. *Id.* The Convening Authority took no action on the findings and no action on the sentence in the case. ROT at Vol. 1 – Convening Authority Decision on Action, dated 14 July 2021. There were 11 written motions filed. The transcript is 1291 pages. There are 35 prosecution exhibits, 39 defense exhibits 79 appellate exhibits, and three court exhibits. Appellant remains in confinement. Appellant has been advised of his right to a timely appeal, requests for enlargements of time, and Appellant consents to an enlargement of time.

A. Appellate Defense Counsel's Caseload

At present, the above-captioned case is presently undersigned counsel's second priority before this Court. Undersigned counsel's first priority case before this Court is *United States v. Goldsmith*. In that case, the ROT is 10 volumes, there were ten written motions filed, the transcript is 1,052 pages, there are four prosecution exhibits, 11 defense exhibits, and three court exhibits. Undersigned counsel is currently working on an assignment of errors brief in *Goldsmith*.[1] Undersigned counsel has not yet begun his review of *Lopez*. In addition to the above-described cases, undersigned counsel has initial assignments of error briefs pending before this Court in three other

[1] Undersigned counsel notes for this Court's consideration that within the past week the appellant in *Goldsmith* was transferred from a civilian confinement facility, to a facility at JBSA-Lackland, and then to the Naval Brig in Charleston, South Carolina. It is undersigned counsel's understanding that during this transition, the appellant's ROT was not transferred with him. Undersigned counsel has engaged with a number of individuals stationed at JBSA-Lackland to have this matter remedied, and informed the Air Force Appellate Government Division yesterday. Undersigned counsel anticipates that this will be resolved in the near future, but notes that he anticipates this will delay appellant's ability to assist in his appeal and articulate matters he may intend to raise *Grostefon*.

cases. Given undersigned counsel's impending separation from the Air Force (with terminal leave beginning in mid-July 2022)—and consistent with the best interests of his respective clients—he anticipates likely reprioritizing his docket. A finalized determination as to counsel's prioritization of his remaining caseload will likely be made after consultation with his leadership next week.

B. Civilian Appellate Defense Counsel's Caseload

Appellant's civilian defense counsel, Mr. William Cassara, currently has 43 cases on his docket. This includes two cases pending before the Court of Appeals for the Armed Forces (CAAF), 17 cases pending before the Army Court of Criminal Appeals (ACCA), four cases pending before the Navy-Marine Corps Court of Criminal Appeals, five cases before this Court, and seven cases before the Court of Federal Claims. This also includes four clemency petitions and four writs of habeas corpus that he is working. At present, Mr. Cassarra's docket priorities that take precedence over the above-captioned case include a Supplement for a Petition for Grant of Review, a writ of habeas corpus, and an assignment of errors brief before ACCA.

Through no fault of Appellant, undersigned counsel and appellant's civilian defense counsel have been working other assigned matters and have yet to complete their review of Appellant's case. Accordingly, an enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

[redacted]
RYAN S. CRNKOVICH, Maj, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was sent via email to the Court and served on the Appellate Government Division on 20 May 2022.

[redacted]

RYAN S. CRNKOVICH, Maj, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force
[redacted]

24 May 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) GEORGE E. LOPEZ, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40161 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its 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]

JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, 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, to Civilian Defense Counsel, and to the Air Force Appellate Defen[redacted] on 24 May 2022.

[redacted]

JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, 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,* v. Technical Sergeant (E-6) **George E. Lopez** United States Air Force *Appellant*	)))))))))	**MOTION FOR WITHDRAWAL OF APPELLATE DEFENSE COUNSEL** Before Panel No. 1 No. ACM 40161 2 June 2022

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

Pursuant to Rules 12(b), 12.4, and 23.3(h) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel respectfully requests to withdraw as counsel in the above-captioned case. Appellant continues to be represented by his civilian appellate defense counsel, Mr. William Cassara. Additionally, Capt Alex Fleszar has been detailed as substitute military counsel in undersigned counsel's stead. A thorough turnover of the record between counsel has been completed. Undersigned counsel will be separating from the United States Air Force and has been approved to begin terminal leave on 13 July 2022. Due to his caseload, undersigned counsel has not yet begun his review of Appellant's case.

In addition to the above-captioned case, undersigned counsel has four other cases pending initial assignments of error briefs with this Court. He also has five cases pending decisions of this Court. Should this Court decide any of those five cases in the future, undersigned counsel would retain responsibility for filing potential supplements in support of a grant of review before the Court of Appeals

GRANTED
10 JUN 2022

for the Armed Forces (CAAF). Undersigned counsel is also currently working on a petition and supplement to be filed at CAAF in *United States v. Jackson*, which this Court decided on 23 May 2022 in an opinion spanning 74 pages along with a 6-page dissent. Finally, undersigned counsel has two petitions presently pending grants of review before the CAAF—including one case in which the appellant has raised a preserved claim regarding the lack of unanimous verdicts at courts-martial based upon a timely motion he previously raised at trial. Should the CAAF grant review in either of those cases in the near future, Appellant would continue to retain responsibility for drafting briefs on any granted issues.

In light of undersigned counsel's impending separation and his existing caseload, it is in the best interest of Appellant that undersigned counsel be permitted to withdraw and that Appellant instead be represented by Capt Fleszar in addition to his civilian appellate defense counsel. Even if Appellant's current appellate defense team were to complete their review of the record and submit an assignment of errors brief before undersigned counsel departs from the Air Force Appellate Defense Division in six weeks, new counsel would need to be assigned for purposes of reviewing the Government's Answer and filing a reply brief. By permitting undersigned counsel to withdraw and permitting Capt Fleszar to represent Appellant in his stead, one continuous appellate defense team will be able to represent Appellant through review of the record to filing a reply brief.

Moreover, because Appellant's case involves a litigated general court-martial consisting of an 18-volume record of trial and 1,291 page transcript, it is in his best

interest that he be represented by a counsel unconstrained by a soon-approaching separation date. Capt Fleszar's assignment with the Air Force Appellate Defense Division is expected to continue into 2023. Finally, Appellant has been advised of this motion to withdraw as counsel and consents to undersigned counsel's withdrawal. A copy of this motion will be delivered to Appellant following its filing.

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

[redacted]
RYAN S. CRNKOVICH, Maj, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

RYAN S. CRNKOVICH, Maj, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Technical Sergeant (E-6) **George E. Lopez** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)** Before Panel No. 1 No. ACM 40161 21 June 2022

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement of time for a period of 30 days, which will end on 28 July 2022. The record of trial was docketed with this Court on 1 September 2021. From the date of docketing to the present date, 293 days have elapsed. On the date requested, 330 days will have elapsed.

On 25 May 2021 and 7-12 June 2021, Appellant was tried by a panel of officer and enlisted members at a general court-martial at Joint Base San Antonio-Lackland, Texas. Record of Trial (ROT) at Vol. 1 – Entry of Judgment (EOJ), dated 25 August 2021. Contrary to his pleas, Appellant was convicted of one charge and five specifications alleging violations of Article 128, UCMJ; one charge and specification of sexual assault in violation of Article 120, UCMJ; and one charge and three specifications alleging violations of Article 134, UCMJ. *Id.* The panel sentenced him to confinement for nine years and six months, reduction to the grade of E-1, and a

dishonorable discharge. *Id.* The Convening Authority took no action on the findings and no action on the sentence in the case. ROT at Vol. 1 – Convening Authority Decision on Action, dated 14 July 2021. There were 11 written motions filed. The transcript is 1291 pages. There are 35 prosecution exhibits, 39 defense exhibits 79 appellate exhibits, and three court exhibits. Appellant remains in confinement; has been advised of his right to a timely appeal, and consents to this request for enlargement of time.

A. Appellate Defense Counsel's Caseload

Counsel is currently assigned 16 cases; 11 cases are pending initial AOEs before this Court. Through no fault of Appellant's, undersigned counsel has been working on other assigned matters and has not yet begun review of Appellant's case. Three cases currently have priority:

1. *United States v. Veerathanongech*, USCA Dkt. No. 22-0205/AF, Crim. App. No. 40005 – This case was docketed at the Court of Appeals for the Armed Forces on 10 June 2022. Counsel is drafting a one-issue Supplement to the Petition for a Grant of Review in this case, due 30 June 2022.

2. *United States v. Injerd*, ACM No. 40111 – This case consists of 29 prosecution exhibits, 24 defense exhibits, and 32 appellate exhibits; the transcript is 743 pages. Counsel has completed review, is discussing options with this Appellant, and is working with assigned co-counsel to complete drafting of the AOE by 1 July 2022.

3. *United States v. Tarnowski*, ACM No. 40110 – The record of trial consists of 10 prosecution exhibits, 11 defense exhibits, one court exhibit, and 59 appellate

exhibits; the transcript is 1138 pages. Counsel has completed review of this case and begun drafting the AOE, due 18 July 2022.

Additionally, counsel anticipates losing a day for pre-operation appointments on 21 June, as well as one week for surgery and convalescent leave scheduled for 22-29 June 2022.

B. Civilian Appellate Defense Counsel's Caseload

Appellant's civilian defense counsel, Mr. William Cassara, currently has 40 cases on his docket. This includes three cases pending before the Court of Appeals for the Armed Forces, 17 cases pending before the Army Court of Criminal Appeals, five cases pending before the Navy-Marine Corps Court of Criminal Appeals, four cases before this Court, and seven cases before the Court of Federal Claims. This also includes four writs of habeas corpus that he is working. At present, Mr. Cassara's docket priorities that take precedence over the above-captioned case include a Supplement for a Petition for Grant of Review, a writ of habeas corpus, and an AOE brief before ACCA.

Through no fault of Appellant's, undersigned counsel and appellant's civilian defense counsel have been working other assigned matters and have yet to complete review of Appellant's case. Accordingly, an enlargement of time is necessary to allow counsel to fully review the case and advise Appellant regarding potential errors.

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

Respectfully submitted,

ALEXANDRA K. FLESZAR, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was sent via email to the Court and served on the Appellate Government Division on 21 June 2022.

Respectfully submitted,

[redacted]

ALEXANDRA K. FLESZAR, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

22 June 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) GEORGE E. LOPEZ, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40161 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its 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]
JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, 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, to Civilian Defense Counsel, and to the Air Force Appellate D[redacted]

[redacted]
JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, 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 40161**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
George E. LOPEZ	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 21 June 2022, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 24th day of June, 2022,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than **28 July 2022**.

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

FOR THE COURT

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

NOTICE OF APPEARANCE

UNITED STATES v. George E. Lopez ACM: 40161

To the Clerk of this Court and all parties of record, the undersigned hereby enters an appearance as the appellate counsel for the appellant in the above-captioned case, pursuant to Rule 13 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.

8 July 2022
Date

[redacted]
Signature

Julie Caruso Haines [redacted]
Print Name

[redacted]

[redacted]

[redacted]
E-Mail

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION TO EXAMINE**
Appellee	)	**SEALED MATERIALS**
	)	
v.	)	Before Panel No. 1
	)	
Technical Sergeant (E-6)	)	No. ACM 40161
George E. Lopez,	)	
United States Air Force	)	8 July 2022
Appellant	)	

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves to examine pages 51-73, 130-132, 380-382 of the verbatim transcript of Appellant's court-martial, as well as Appellate Exhibits (App. Ex.) XX, XXVII, XXVIII, XXIX, XXX, XXXI, and XXXVI, LIII, and LXIV included in Appellant's record of trial. The Appellate Exhibits include: a defense motion to compel the production and discovery of evidence; a defense motion in limine regarding Mil. R. Evid. 412 evidence; the government's response to the motion in limine regarding Mil. R. Evid. 412 evidence; the special victim's counsel's response to the same motion; the military judge's ruling on the same motion; the defense motion to compel discovery of Mil. R. Evid. 513 records; radiology records of the complaining witness; medical records regarding the Mil. R. Evid. 513 motion; messages between Appellant and the complaining witness in the case; and a Child Protective Services Case Report. The transcript pages are from closed hearings in relation to the several motions and responses regarding Mil. R. Evid. 412 and 513 evidence. *See* Record (R.) at 17, 21-22, 50, 107, 129. The exhibits were reviewed by trial and defense counsel and sealed by the military judge. R. at 17, 22, 30, 106-07, 140, 887, 907.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these materials is reasonably necessary to appellate counsel's responsibilities, undersigned counsel asserts that review of the referenced exhibits is necessary to conduct a complete review of the record of trial and be in a position to advocate competently on behalf of Appellant. A review of the record indicates that the military judge allowed some evidence under Mil. R. Evid. 412, but it is impossible to discern what evidence was allowed versus what evidence was prohibited without reviewing the sealed exhibits and sealed portion of the transcript. *See* R. at 95, 377, 586, 599, 887. Appellate counsel must review these materials in order to understand the military judge's rulings on the Mil. R. Evid. 412 issues in this case, to analyze the impact those rulings may have had on Appellant's conviction, and to determine whether Appellant suffered any prejudice.

Furthermore, a review of the entire record of trial is necessary because this Court is empowered by Article 66, Uniform Code of Military Justice (UCMJ), 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, appellate defense counsel must, therefore, examine "the entire record." The sealed materials referenced above must be reviewed to ensure undersigned counsel provides "competent appellate representation." *United States v. May*, 47 M.J. 478, 481, (C.A.A.F. 1998). Accordingly, examination of these exhibits is reasonably necessary since undersigned counsel cannot fulfill her duty of representation under Article 70, UCMJ, without first reviewing the complete record of trial.

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

Respectfully submitted,

[redacted]
ALEXANDRA K. FLESZAR, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

//SIGNED//
William E. Cassara, Esq.
Appellate Defense Counsel
[redacted]

//SIGNED//
Julie Caruso Haines, Esq.
Appellate Defense Counsel
[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 8 July 2022.

Respectfully submitted,

[redacted]t, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

12 July 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) GEORGE E. LOPEZ, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIALS ACM 40161 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States responds to Appellant's Motion to Examine Sealed Materials, dated 8 July 2022. The United States does not object to Appellant's counsel examining any transcript portions or exhibits that were released to both parties at trial, if the United States can also review the sealed portions of the record as necessary to respond to any assignment of error that references the sealed materials. The United States thus respectfully requests that any order issued by this Court also allow appellate counsel for the United States to view the sealed materials.

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

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

[redacted]

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel
Government Trial and
Appellate Counsel Division
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 12 July 2022.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40161**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
George E. LOPEZ	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 8 July 2022, Appellant's counsel moved to examine sealed materials, specifically, pages 51–73, 130–32, and 380–82 of the verbatim transcript, as well as Appellate Exhibits XX, XXVII, XXVIII, XXIX, XXX, XXXI, XXXVI, LIII, and LXIV of Appellant's court-martial. The transcript pages and Appellate Exhibits were sealed by the military judge who presided over Appellant's court-martial. Appellate defense counsel argues it is necessary to review the entire record, including these sealed materials, to ensure undersigned counsel provides "competent appellate representation."

The Government does not object to Appellant's motion, as long as the Government "can also review the sealed portions of the record as necessary to respond to any assignment of error that refers to the sealed materials."

Materials presented or reviewed at trial and sealed, as well as materials reviewed *in camera*, released to trial counsel or defense counsel, and sealed, may be examined by appellate counsel upon "a colorable showing to the reviewing or appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities under the UCMJ, this Manual, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional conduct." Rule for Courts-Martial 1113(b)(3)(B)(i).

The sealed material that Appellant's counsel requests permission to examine were available to both trial counsel and defense counsel, and we find a colorable showing has been made that examination of the materials is reasonably necessary to fulfill the professional responsibilities Appellant's counsel owes to Appellant. This court's order permits counsel for both parties to examine the materials.

Accordingly, it is by the court on this 14th day of July, 2022,

ORDERED:

Appellant's Motion to Examine Sealed Materials is **GRANTED**, subject to the following conditions:

(1) Appellate defense counsel and appellate government counsel may view, **transcript pages 51–73, 130–32, and 380–82,** and **Appellate Exhibits XX, XXVII, XXVIII, XXIX, XXX, XXXI, XXXVI, LIII, and LXIV**. To view these sealed material, counsel will coordinate with the court.

(2) No counsel granted access to the materials may photocopy, photograph, reproduce, disclose, or make available their contents to any other individual without this court's prior written authorization.

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	
	)	Before Panel No. 1
Technical Sergeant (E-6) **George E. Lopez** United States Air Force *Appellant*	)	No. ACM 40161
	)	19 July 2022

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement of time for a period of 30 days, which will end on 27 August 2022. The record of trial was docketed with this Court on 1 September 2021. From the date of docketing to the present date, 321 days have elapsed. On the date requested, 360 days will have elapsed.

On 25 May 2021 and 7-12 June 2021, Appellant was tried by a panel of officer and enlisted members at a general court-martial at Joint Base San Antonio-Lackland, Texas. Record of Trial (ROT) at Vol. 1 – Entry of Judgment (EOJ), dated 25 August 2021. Contrary to his pleas, Appellant was convicted of one charge and five specifications alleging violations of Article 128, UCMJ; one charge and ion of sexual assault in violation of Article 120, UCMJ; and one charge and cifications alleging violations of Article 134, UCMJ. *Id.* The panel him to confinement for nine years and six months, reduction to the grade

GRANTED
25 JULY 2022

of E-1, and a dishonorable discharge. *Id.* The Convening Authority took no action on the findings and no action on the sentence in the case. ROT at Vol. 1 – Convening Authority Decision on Action, dated 14 July 2021. There were 11 written motions filed. The transcript is 1291 pages. There are 35 prosecution exhibits, 39 defense exhibits 79 appellate exhibits, and three court exhibits. Appellant remains in confinement; has been advised of his right to a timely appeal, and consents to this request for enlargement of time.

A. Appellate Defense Counsel's Caseload

Counsel is currently assigned 16 cases; 9 cases are pending initial AOEs before this Court. While undersigned counsel has begun review of this case, through no fault of Appellant's, undersigned counsel has not yet completed her review.

This case, however, is now undersigned counsel's first priority for submitting an initial AOE before this Court. Undersigned counsel filed a motion to examine sealed materials necessary for review, which this Court granted in a 14 July Order. Undersigned counsel will be examining the sealed materials on 21 July 2022.

Additionally, undersigned counsel anticipates losing one day of the intervening time training incoming counsel, as well as four days of pre-approved leave.

B. Civilian Appellate Defense Counsel's Caseload

Appellant's civilian defense counsel, Mr. William Cassara and Ms. Julie Haines, currently have 41 cases on their dockets. This case also represents civilian defense counsel's first priority before this Court. Civilian counsel also have the following pending cases: two before the Court of Appeals for the Armed Forces;

16 before the Army Court of Criminal Appeals; four before the Navy-Marine Corps Court of Criminal Appeals; five before this Court; and six before the Court of Federal Claims. Additionally, civilian defense counsel currently have three pending writs of habeas corpus and four cases before clemency and parole boards. At present, no other case on civilian defense counsel's dockets takes precedence over Appellant's case.

Civilian defense counsel are taking lead on Appellant's AOE, and filed a notice of appearance in this case on 25 April 2022. At the time of the Notice of Appearance, this Court had already granted five enlargements of time and six requests for enlargement had been filed; this Court granted the sixth requested enlargement four days later on 29 April 2022. At this time, civilian defense counsel have reviewed all of the open/non-sealed portions of the record and transcript, and have begun drafting the AOE. Counsel are in the process of advising Appellant on the potential issues in his case and discussing possible options. Through no fault of Appellant's, civilian and undersigned defense counsel have yet to complete the AOE in Appellant's case.

Accordingly, an enlargement of time is necessary to allow counsel to fully advise and consult with Appellant regarding potential errors as well as to complete drafting of the AOE. Counsel will be available for a status conference should this Court require additional information, in accordance with this Court's 24 June Order.

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

Respectfully submitted,

[redacted]
ALEXANDRA K. FLESZAR, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was sent via email to the Court and served on the Appellate Government Division on 19 July 2022.

Respectfully submitted,

[redacted]

ALEXANDRA K. FLESZAR, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

21 July 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) GEORGE E. LOPEZ, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40161 Panel No. 1

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

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

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

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

[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, to civilian defense counsel, and to the Air Force Appellate Defense Division on 21 July 2022.

[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 40161**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
George E. LOPEZ	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 14 July 2022, this court granted Appellant's counsel's motion to examine, *inter alia*, Appellate Exhibit XXXVI. At the time, Appellant's counsel asserted the exhibit was viewed by trial and defense counsel, and that there was a colorable showing that viewing the exhibit was necessary to a fulfillment of counsel's duty to Appellant. The court's order permitted "[a]ppellate defense counsel and appellate government counsel" to view the exhibit.

On 4 August 2022, Appellant's counsel informed the court that Appellate Exhibit XXXVI had only been viewed by the military judge in camera, and never released to trial and defense counsel. Appellant's counsel requested the court reconsider its 14 July 2022 order.

Having reviewed the record of trial, the court concurs with Appellant's counsel's assessment that Appellate Exhibit XXXVI was not released to trial and defense counsel. Additionally no party has asserted through filings that good cause exists to view this exhibit. Accordingly, it is by the court on this 5th day of August, 2022,

ORDERED:

Appellate Exhibit XXXVI may not be viewed by appellate defense counsel or appellate government. The remainder of the court's 14 July 2022 order remains undisturbed.

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Technical Sergeant (E-6) **George E. Lopez,** United States Air Force *Appellant*	)))))))))	**MOTION TO RECONSIDER** Before Panel No. 1 No. ACM 40161 4 August 2022

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

Pursuant to Rules 23.3(k), 31(b), 31(c) and 31.1 of this Honorable Court's Rules of Practice and Procedure ("A.F. CT. CRIM. APP. R."), undersigned counsel hereby respectfully requests reconsideration of this Honorable Court's Order, dated 14 July 2022. This Court issued an interlocutory Order regarding Appellant's Motion to Examine Sealed Materials dated 14 July 2022, within 30 days of filing of the instant motion and while Appellant's case remains pending before this Court. *See* A.F. CT. CRIM. APP. R. 31(b), (c), and 31.1. Good cause exists for reconsideration of this Court's Order, as detailed *infra*. A.F. CT. CRIM. APP. R. 31.1. Undersigned counsel respectfully requests to withdraw the combined motion titled "Motion to Reconsider and Motion for Withdrawal of Appellate Defense Counsel" filed 3 August 2022, and replace it with two separate motions, one for withdrawal of counsel and the instant motion for reconsideration, pursuant to this Honorable Court's Rules of Practice and Procedure.

On 8 July 2022, undersigned counsel filed a Motion to Examine Sealed Materials, including a request to examine Appellate Exhibit XXXVI, a 27-page document. In the motion, undersigned counsel cited the standard set forth in R.C.M. 1113(b)(3)(B)(i) and stated "[t]he [illegible]vere reviewed by trial and defense counsel and sealed by the military judge." Government [illegible]lid "not object to Appellant's counsel examining any transcript portions or exhibits that

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were released to both parties at trial," and further made explicit that Government counsel "would not consent to Appellant's counsel viewing any exhibits that were reviewed in camera but not released to the parties unless this Court has determined there is good cause for Appellant's counsel to do so under R.C.M. 1113." Based on these submissions, this Honorable Court authorized Appellate defense and government counsel to view, in relevant part, the entirety of Appellate Exhibit XXXVI.

At the time of filing the Motion to Examine, Appellant's case was approaching the Ninth Enlargement of Time, for which a motion was filed on 19 July 2022. This Court had previously granted Appellant's Motion for an Eighth Enlargement of Time, but "advised that given the number of enlargements granted thus far, any further requests for an enlargement of time may necessitate a status conference." In an effort to ensure timely progress and review of the case, undersigned counsel began initial review of the record in order to file the Motion to Examine Sealed Materials expediently. Having quickly reviewed the pages of the transcript cited in the Motion to Examine, undersigned counsel held an erroneous belief that Appellate Exhibit XXXVI had been released to both trial and defense counsel, and stated as much in the Motion to Examine, citing to R.C.M. 1113(b)(3)(B)(i) as authority for the request. Shortly after examining the sealed materials, including Appellate Exhibit XXXVI, undersigned counsel began further review of the unsealed portions of the record. It was at this time undersigned counsel reviewed unsealed Appellate Exhibit XXXIX, the Military Judge's Ruling and Order on Defense's Motion to Compel Discovery of Records Pursuant to M.R.E. 513, which detailed that in fact, only five of the twenty-seven pages of Appellate Exhibit XXXVI were released to trial and defense counsel. These released pages were later included in the unsealed portion of record as Appellate Exhibit XLII.

Undersigned counsel's mistaken assertion and erroneous citation to R.C.M. 1113(b)(3)(B)(i), as opposed to R.C.M. 1113(b)(3)(B)(ii), and subsequent review of the entirety of Appellate Exhibit XXXVI, was unknowing, unintentional, and inadvertent. Upon realizing the error, undersigned counsel immediately notified both Appellant's civilian counsel and Appellate Defense Division leadership of only the procedural aspects of the error, without discussing the substance of Appellate XXXVI, in order to seek guidance on the proper course of action in determining whether undersigned counsel should remain assigned to the case.

Undersigned counsel next called the Louisiana State Bar Association's Ethics Counsel and Advisory Service Committee for guidance on the appropriate course of conduct pursuant to her state bar Rules of Professional Conduct. After discussing all—and only—the procedural aspects and implications of the error, undersigned counsel was advised that she was not required to withdraw from the case pursuant to Louisiana State Bar Rules as long as she maintained a "firewall" in relation to any Appellate Exhibit XXXVI material, and was only specifically required to correct the misstatement and miscitation to this Court.

Undersigned counsel then informed Appellant only of the procedural aspects of the error, again without discussing the substance of Appellate Exhibit XXXVI.[1] Undersigned counsel informed Appellant of the potential implications of all possible courses of action, specifically including his entitlement to speedy appellate review and that new military counsel could immediately be detailed to the case. Undersigned counsel further discussed that if she remained as Appellant's military attorney, she would be unable to represent Appellant with respect to any

[1] For purposes of this motion, Appellant provided informed consent for undersigned counsel to relay the information specifically detailed in this paragraph, as well as to represent Appellant's wishes with respect to counsel. *See* Air Force Instruction (AFI) 51-110, Att. 2, Ch. 1, R. 1.6 (11 Dec. 2018) (prohibiting an attorney from revealing information related to representation unless the client provides informed consent).

Mil. R. Evid. 513 related issues in order to ensure the "firewall" with respect to Appellate Exhibit XXXVI. Understanding that newly detailed military counsel would not be so limited in representation and would be detailed within the instant motion, Appellant consented to undersigned counsel's request for withdrawal.

In support of this motion, undersigned counsel researched her obligations under the various Air Force Rules and Standards for Professional Conduct and Practice as well as the Louisiana State Bar Rules of Professional Conduct. In determining the appropriate requests for this motion, discussed *infra*, undersigned counsel maintained Appellant's best interests as undersigned counsel's highest priority, and further expressly sought and considered input from Appellant's civilian counsel, Appellate Defense Division leadership, and the Louisiana State Bar Association's Ethics Counsel and Advisory Committee, without discussing the substance of Appellate Exhibit XXXVI.

Undersigned counsel herein respectfully requests this Court reconsider its Order in the above-captioned case dated 14 July 2022, specifically with respect to granting both appellate trial and defense counsel authority to review Appellate Exhibit XXXVI.[2] The primary purpose of this motion is to correct undersigned counsel's misstatement and miscitation of law with respect to

[2] Seeking to preserve a complete correction of the record by not requesting to amend the original Motion to Examine, and recognizing that motions to strike apply to "filings" and thus may not necessarily include this Court's Orders, undersigned counsel believes that reconsideration is the appropriate form of request for this case. *Compare* A.F. CT. CRIM. APP. R. 23.3(n), Motion to Amend Pleading, *and* (p), Motion to Strike (providing for striking portions of "filings") *with* A.F. CT. CRIM. APP. R. 31(b), 31.1 (providing for reconsideration of an interlocutory order in a case pending before this Court within 30 days of receipt by counsel); *see also* A.F. CT. CRIM. APP. R. 13.1 (defining "filings" as "any pleading or other paper relative to a case and any attachment or appendix"). However, should this Honorable Court interpret its Rules otherwise, undersigned counsel will withdraw the instant motion and file a motion in conformance with this Court's Rules of Practice and Procedure.

Appellate Exhibit XXXVI,[3] and thus enable this Honorable Court to reconsider its Order regarding this exhibit based on a corrected understanding of the facts and law. Undersigned counsel seeks to reiterate that the misstatement and miscitation contained in the original motion were made unknowingly, unintentionally, and inadvertently, and that the instant motion was submitted as soon as possible following receipt of all relevant information and ethical guidance in the wake of identifying the error. Undersigned counsel has not discussed and will not discuss the substance or content of Appellate Exhibit XXXVI with any individual. At base, as detailed *supra*, good cause exists for reconsideration of this Court's 14 July 2022 interlocutory Order as undersigned counsel unintentionally and inadvertently caused this Court to rule with respect to Appellate Exhibit XXXVI based on an inaccurate factual and legal basis. A.F. CT. CRIM. APP. R. 31.1; AFI 51-110 Att. 7, Ch. 2, Sec. VIII, Standard 4-8.4(b) *and* Att. 3, Item 27. Appellant has been advised of the contents of this motion and a copy of this motion will be delivered to Appellant following its filing.

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

Respectfully submitted,

[redacted]

ALEXANDRA K. FLESZAR, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

[3] *See*, *e.g.*, AFI 51-110, Att. 7, Ch. 2, Sec. VIII, Standard 4-8.4(b) (requiring appellate counsel be accurate in references to the record and authorities upon which counsel rely in the presentation of a case) *and* Att. 3, Item 27 (requiring clarification and correction of any attorney's misstatements or miscitations to the Court).

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 4 August 2022.

Respectfully submitted,

[redacted]t, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR WITHDRAWAL OF APPELLATE DEFENSE COUNSEL**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **George E. Lopez,** United States Air Force *Appellant*	)	No. ACM 40161 4 August 2022

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

Pursuant to Rules 12(b), 12.4, and 23.3(h) of this Honorable Court's Rules of Practice and Procedure ("A.F. CT. CRIM. APP. R."), undersigned counsel hereby respectfully requests to withdraw as counsel in the above-captioned case. Appellant's consent to the withdrawal, the reasons for the withdrawal, and the provisions made for Appellant's continued representation are detailed *infra*. A.F. CT. CRIM. APP. R. 12(b). Undersigned counsel respectfully requests to withdraw the combined motion titled "Motion to Reconsider and Motion for Withdrawal of Appellate Defense Counsel" filed 3 August 2022, and replace it with two separate motions, one for reconsideration and the instant motion for withdrawal of counsel, pursuant to this Honorable Court's Rules of Practice and Procedure.

On 8 July 2022, undersigned counsel filed a Motion to Examine Sealed Materials, including a request to examine Appellate Exhibit XXXVI, a 27-page document. In the motion, undersigned counsel cited the standard set forth in R.C.M. 1113(b)(3)(B)(i) and stated "[t]he exhibits were reviewed by trial and defense counsel and sealed by the military judge." Government "not object to Appellant's counsel examining any transcript portions or exhibits that d to both parties at trial," and further made explicit that Government counsel "would to Appellant's counsel viewing any exhibits that were reviewed in camera but not

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released to the parties unless this Court has determined there is good cause for Appellant's counsel to do so under R.C.M. 1113." Based on these submissions, this Honorable Court authorized Appellate defense and government counsel to view, in relevant part, the entirety of Appellate Exhibit XXXVI.

At the time of filing the Motion to Examine, Appellant's case was approaching the Ninth Enlargement of Time, for which a motion was filed on 19 July 2022. This Court had previously granted Appellant's Motion for an Eighth Enlargement of Time, but "advised that given the number of enlargements granted thus far, any further requests for an enlargement of time may necessitate a status conference." In an effort to ensure timely progress and review of the case, undersigned counsel began initial review of the record in order to file the Motion to Examine Sealed Materials expediently. Having quickly reviewed the pages of the transcript cited in the Motion to Examine, undersigned counsel held an erroneous belief that Appellate Exhibit XXXVI had been released to both trial and defense counsel, and stated as much in the Motion to Examine, citing to R.C.M. 1113(b)(3)(B)(i) as authority for the request. Shortly after examining the sealed materials, including Appellate Exhibit XXXVI, undersigned counsel began further review of the unsealed portions of the record. It was at this time undersigned counsel reviewed unsealed Appellate Exhibit XXXIX, the Military Judge's Ruling and Order on Defense's Motion to Compel Discovery of Records Pursuant to M.R.E. 513, which detailed that in fact, only five of the twenty-seven pages of Appellate Exhibit XXXVI were released to trial and defense counsel. These released pages were later included in the unsealed portion of record as Appellate Exhibit XLII.

Undersigned counsel's mistaken assertion and erroneous citation to R.C.M. 1113(b)(3)(B)(i), as opposed to R.C.M. 1113(b)(3)(B)(ii), and subsequent review of the entirety of Appellate Exhibit XXXVI, was unknowing, unintentional, and inadvertent. Upon

realizing the error, undersigned counsel immediately notified both Appellant's civilian counsel and Appellate Defense Division leadership of only the procedural aspects of the error, without discussing the substance of Appellate XXXVI, in order to seek guidance on the proper course of action in determining whether undersigned counsel should remain assigned to the case.

Undersigned counsel next called the Louisiana State Bar Association's Ethics Counsel and Advisory Service Committee for guidance on the appropriate course of conduct pursuant to her state bar Rules of Professional Conduct. After discussing all—and only—the procedural aspects and implications of the error, undersigned counsel was advised that she was not required to withdraw from the case pursuant to Louisiana State Bar Rules as long as she maintained a "firewall" in relation to any Appellate Exhibit XXXVI material, and was only specifically required to correct the misstatement and miscitation to this Court.

Undersigned counsel then informed Appellant only of the procedural aspects of the error, again without discussing the substance of Appellate Exhibit XXXVI.[1] Undersigned counsel informed Appellant of the potential implications of all possible courses of action, specifically including his entitlement to speedy appellate review and that new military counsel could immediately be detailed to the case. Undersigned counsel further discussed that if she remained as Appellant's military attorney, she would be unable to represent Appellant with respect to any Mil. R. Evid. 513 related issues in order to ensure the "firewall" with respect to Appellate Exhibit XXXVI. Understanding that newly detailed military counsel would not be so limited in

[1] For purposes of this motion, Appellant provided informed consent for undersigned counsel to relay the information specifically detailed in this paragraph, as well as to represent Appellant's wishes with respect to counsel. *See* Air Force Instruction (AFI) 51-110, Att. 2, Ch. 1, R. 1.6 (11 Dec. 2018) (prohibiting an attorney from revealing information related to representation unless the client provides informed consent).

representation and would be detailed within the instant motion, Appellant consented to undersigned counsel's request for withdrawal.

In support of this motion, undersigned counsel researched her obligations under the various Air Force Rules and Standards for Professional Conduct and Practice as well as the Louisiana State Bar Rules of Professional Conduct. In determining the appropriate course of conduct, undersigned counsel maintained Appellant's best interests as undersigned counsel's highest priority, and further expressly sought and considered input from Appellant's civilian counsel, Appellate Defense Division leadership, and the Louisiana State Bar Association's Ethics Counsel and Advisory Committee, without discussing the substance of Appellate Exhibit XXXVI.

In an abundance of caution, in recognition of Appellant's best interests, and with Appellant's consent, undersigned counsel respectfully requests to be permitted to withdraw as counsel. Appellate Defense Division leadership has detailed Capt Samantha Golseth as substitute military counsel in undersigned counsel's stead. A.F. CT. CRIM. APP. R. 12.4. Capt Golseth's assignment with the Air Force Appellate Defense Division is expected to continue into 2024, enabling continuous representation by a single appellate defense team from filing of the Assignment of Error through final conclusion of Appellant's case. Given Appellant's continued representation by civilian counsel, and undersigned counsel's limited review of the record, detailing new military appellate counsel should not significantly impede representation of Appellant's case. With the exception of any information regarding any of the sealed materials in this case,[2] undersigned counsel will ensure that a thorough turnover of the record is completed, in

[2] Presuming the continued application of the provision of this Court's Order dated 14 July 2022, regarding prior written authorization before release of any information related to sealed materials, undersigned counsel will not relate or convey the contents of *any* sealed materials—regardless of release to trial and defense counsel—to any other individual without this Court's prior written authorization.

a manner that prevents any risk of contamination of newly detailed counsel. A.F. CT. CRIM. APP. R. 12.4.

Undersigned counsel seeks to reiterate that the misstatement and miscitation contained in the original motion were made unknowingly, unintentionally, and inadvertently, and that the instant motion was submitted as soon as possible following receipt of all relevant information, consent of Appellant, and ethical guidance in the wake of identifying the error. Undersigned counsel has not discussed and will not discuss the substance or content of Appellate Exhibit XXXVI with any individual, and submits that good cause exists for withdrawal, to ensure Appellant receives military appellate counsel unlimited in her representation and unhindered by the necessity of maintaining a "firewall" between military and civilian counsel. A.F. CT. CRIM. APP. R. 12(b).

Appellant continues to be represented by his civilian appellate defense counsel, Mr. William Cassara and Ms. Julie Haines, who have completed review of the unsealed portions of the record and identified potential errors in Appellant's case. *Id*. Appellant has been advised of the contents of this motion and consents to undersigned counsel's withdrawal. *Id*. A copy of this motion will be delivered to Appellant following its filing. *Id*.

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

Respectfully submitted,

[redacted]t, 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 4 August 2022.

Respectfully submitted,

[redacted]t, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Technical Sergeant (E-6) **George E. Lopez** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TENTH)** Before Panel No. 1 No. ACM 40161 18 August 2022

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a tenth enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement of time for a period of 30 days, which will end on 26 September 2022. The record of trial was docketed with this Court on 1 September 2021. From the date of docketing to the present date, 351 days have elapsed. On the date requested, 390 days will have elapsed.

On 25 May 2021 and 7-12 June 2021, Appellant was tried by a panel of officer and enlisted members at a general court-martial at Joint Base San Antonio-Lackland, Texas. Record of Trial (ROT) at Vol. 1 – Entry of Judgment (EOJ), dated 25 August 2021. Contrary to his pleas, Appellant was convicted of one charge and five specifications alleging violations of Article 128, UCMJ; one charge and ı of sexual assault in violation of Article 120, UCMJ; and one charge and cations alleging violations of Article 134, UCMJ. *Id.* On 12 June 2021, the panel sentenced him to confinement for nine years and six months, reduction to

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the grade of E-1, and a dishonorable discharge. *Id*. The Convening Authority took no action on the findings and no action on the sentence in the case. ROT at Vol. 1 – Convening Authority Decision on Action, dated 24 August 2021. There were 11 written motions filed. The transcript is 1291 pages. There are 35 prosecution exhibits, 39 defense exhibits, 79 appellate exhibits, and three court exhibits. Appellant remains in confinement; has been advised of his right to a timely appeal, and consents to this request for enlargement of time.

A. Appellate Defense Counsel's Caseload

Counsel is currently assigned 12 cases; 8 cases are pending initial AOEs before this Court. On 12 August 2022, this Court granted a Motion for Withdrawal of Appellate Defense Counsel, permitting the withdrawal of Capt Alexandra Fleszar, and undersigned counsel was detailed as substitute military counsel. Undersigned counsel is newly detailed but has begun review of this case and this case is now undersigned counsel's first priority for submitting an initial AOE before this Court. Undersigned counsel anticipates filing a motion to examine sealed materials as soon as practicable to further this review.

Undersigned counsel anticipates losing one day for leave on 19 August 2022, one day for undersigned counsel to participate in training on 6 September 2022, and six days for undersigned counsel to travel to Oklahoma City, Oklahoma, prepare for trial, and act as trial defense counsel, from 9-14 September 2022[1]. Prior to these

[1] Undersigned counsel also notes, during the requested period, there will be one HAF and FOA JA Family Day, on 2 September 2022, and one Federal Holiday, on 5 September 2022.

dates, undersigned counsel also anticipates losing hours periodically to conduct pre-trial interviews and preparation as trial defense counsel prior to 9 September 2022.

B. Civilian Appellate Defense Counsel's Caseload

Appellant's civilian defense counsel, Mr. William Cassara and Ms. Julie Haines, currently have 42 cases on their dockets. This case also represents civilian defense counsel's first priority before this Court. Civilian counsel also have the following pending cases: three before the Court of Appeals for the Armed Forces; 19 before the Army Court of Criminal Appeals; three before the Navy-Marine Corps Court of Criminal Appeals; five before this Court; and five before the Court of Federal Claims. Additionally, civilian defense counsel currently have three pending writs of habeas corpus and four cases before clemency and parole boards. At present, no other case on civilian defense counsel's dockets takes precedence over Appellant's case.

Civilian defense counsel are taking lead on Appellant's AOE, and filed a notice of appearance in this case on 25 April 2022. At the time of the Notice of Appearance, this Court had already granted five enlargements of time and six requests for enlargement had been filed; this Court granted the sixth requested enlargement four days later on 29 April 2022. At this time, civilian defense counsel have reviewed all of the open/non-sealed portions of the record and transcript, and have drafted parts of the AOE. Counsel have consulted with the Appellant on several potential issues in his case. Through no fault of Appellant's, civilian and undersigned defense counsel have yet to complete the AOE in Appellant's case.

Accordingly, an enlargement of time is necessary to allow newly detailed counsel to request to examine sealed materials, view the sealed materials, if granted, and complete drafting of the AOE. Counsel will be available for a status conference should this Court require additional information.

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

Respectfully submitted,

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

//SIGNED//
William E. Cassara, Esq.
Appellate Defense Counsel
[redacted]

//SIGNED//
Julie Caruso Haines, Esq.
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was sent via email to the Court and served on the Appellate Government Division on 18 August 2022.

Respectfully submitted,

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

18 August 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) GEORGE E. LOPEZ, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40161 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its 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 over two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 5 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

[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, to civilian defense counsel, and to the Air Force Appellate Defense Division on 18 August 2022.

[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	)	**APPELLANT'S**
Appellee	)	**MOTION TO EXAMINE**
	)	**SEALED MATERIALS**
v.	)	
	)	Before Panel No. 1
Technical Sergeant (E-6)	)	
GEORGE E. LOPEZ,	)	No. ACM 40161
United States Air Force	)	
Appellant	)	26 August 2022

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i), 1113(b)(3)(B)(ii), and 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, Technical Sergeant George E. Lopez, Appellant, hereby moves this Court to permit his counsel to examine pages 51-73, 130-132, 380-382 of the verbatim transcript of Appellant's court-martial, as well as Appellate Exhibits (App. Ex.) XX, XXVII, XXVIII, XXIX, XXX, XXXI, XXXVI, LIII, and LXIV included in Appellant's record of trial.[1] The Appellate Exhibits include: a defense motion to compel the production and discovery of evidence; a defense motion in limine regarding Mil. R. Evid. 412 evidence; the government's response to the motion in limine regarding Mil. R. Evid. 412 evidence; the special victim's counsel's response to the same motion; the military judge's ruling on the same motion; the defense motion to compel discovery of Mil. R. Evid. 513 records; medical records regarding the Mil. R. Evid. 513 motion; messages between Appellant and the complaining witness in the case; and a Child Protective Services Case Report. The transcript pages are from closed hearings in relation to the several motions and responses regarding Mil. R. Evid. 412 and 513 evidence. *See* Record (R.) at 17, 21-22, 50, 107, 129. With exception for App. Ex. XXXVI,

[1] Pages 51-73, 130-132, 380-382 of the verbatim transcript of Appellant's court-martial appear to be present on the Trial Transcript website available through FLITE, however, undersigned counsel has not viewed them.

which is discussed separately below, each exhibit was produced and/or reviewed by trial and defense counsel and sealed by the military judge. R. at 17, 22, 30, 106-07, 140, 887, 907.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these materials is reasonably necessary to appellate counsel's responsibilities, undersigned counsel asserts that review of App. Ex. XX, XXVII, XXVIII, XXIX, XXX, XXXI, LIII, and LXIV and pages 51-73, 130-132, 380-382 of the verbatim transcript of Appellant's court-martial is necessary to conduct a complete review of the record of trial and be in a position to advocate competently on behalf of Appellant. A review of the record indicates that the military judge allowed some evidence under Mil. R. Evid. 412, but Appellate Defense Counsel cannot discern what evidence was allowed versus what evidence was prohibited without reviewing the sealed exhibits and sealed portions of the transcript. *See* R. at 95, 377, 586, 599, 887. Appellate counsel must review these materials in order to understand the military judge's rulings on the Mil. R. Evid. 412 issues in this case, to analyze the impact those rulings may have had on Appellant's conviction, and to determine whether Appellant suffered any prejudice.

Furthermore, a review of the entire record of trial is necessary because this Court is empowered by Article 66, Uniform Code of Military Justice (UCMJ), 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, appellate defense counsel must, therefore, examine "the entire record." The sealed materials referenced above must be reviewed to ensure undersigned counsel provides "competent appellate representation." *United States v. May*, 47 M.J. 478, 481, (C.A.A.F. 1998). Moreover, Air Force regulations governing professional duties and conduct of appellate defense counsel impose upon counsel, *inter alia*, a duty to provide

"competent representation,"[2] perform "reasonable diligence,"[3] and to "give a client his or her best professional evaluation of the questions that might be presented on appeal…[to] consider all issues that might affect the validity of the judgment of conviction and sentence…[to] advise on the probable outcome of a challenge to the conviction or sentence...[and to] endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance."[4] Accordingly, examination of XX, XXVII, XXVIII, XXIX, XXX, XXXI, LIII, and LXIV and pages 51-73, 130-132, 380-382 of the verbatim transcript of Appellant's court-martial is reasonably necessary since undersigned counsel cannot fulfill her duty of representation under Article 70, UCMJ, without first reviewing the complete record of trial.

In accordance with R.C.M. 1113(b)(3)(B)(ii), this Court may permit examination of sealed materials reviewed in camera but not released to trial counsel or defense counsel for good cause. Appellate Defense Counsel has good cause to see App. Ex. XXXVI, the mental health records of A.C., the named victim, because A.C.'s credibility is paramount as the sole witness to multiple offenses, to include an alleged sexual assault and strangulation. Moreover, A.C. is the only adult witness to the allegation that Appellant endangered the welfare of his two sons while he assaulted their mother, A.C. If A.C.'s mental health records discuss a diagnosis, such as a personality disorder, wherein a common symptom may include lying or fabricating, this information would be relevant to A.C.'s credibility.[5]

Under Mil. R. Evid. 513(d)(2), there is no privilege for a communication between a patient and psychotherapist when one spouse is charged with a crime against a child of either spouse.

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[2] Air Force Rules of Professional Conduct (AFI 51-110, Attachment 2), Rule 1.1.
[3] *Id*., Rule 1.3.
[4] Air Force Standards for Criminal Justice (AFI 51-110, Attachment 7), Standard 4-8.3(b).
[5] *See* Ford, C. V., King, B. H., & Hollender, M. H. (1988). Lies and liars: Psychiatric aspects of prevarication. *The American Journal of Psychiatry*, 145(5), 554–562. https://doi.org/10.1176/ajp.145.5.554

Here, Appellant was married to A.C. and charged with a crime against his sons, who are also the children of A.C. While this exception to Mil. R. Evid. 513 appears to apply in this situation, without the current ability to review App. Ex. XXXI, Defense Motion in Limine to Admit Evidence under Mil. R. Evid. 513, or the portions of the transcript in which this motion was discussed, undersigned counsel cannot evaluate whether Trial Defense Counsel was ineffective or even which exception under Mil. R. Evid. 513 was argued to apply in this matter. Furthermore, A.C.'s mental health records do not appear to be cumulative of any other information contained within the record. Finally, without the opportunity to examine App. Ex. XXXVI, undersigned counsel cannot evaluate whether the Military Judge abused his discretion when he decided not to release the records to counsel.

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

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

//SIGNED//

William E. Cassara, Esq.
Appellate Defense Counsel
[redacted]

//SIGNED//
Julie Caruso Haines, Esq.
Appellate Defense Counsel


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 26 August 2022.

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

30 August 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) GEORGE E. LOPEZ, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIALS No. ACM 40161 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States responds to Appellant's Motion to Examine Sealed Materials, dated 26 August 2022. The United States does not object to Appellant's counsel examining any transcript portions or exhibits that were released to the parties if the United States can also review the sealed portions of the record as necessary to respond to any assignment of error that references the sealed materials. The United States thus respectfully requests that any order issued by this Court also allows appellate counsel for the United States to view the sealed materials.

The United States does not consent to Appellant's counsel viewing any exhibits that were reviewed *in camera* but not released to the parties unless this Court has determined there is good cause for Appellant's counsel to do so under R.C.M. 1113. In particular, the United States objects to Appellant's counsel viewing App. Ex. XXXVI, the mental health records of A.C., who is the named victim in the case. Appellant's counsel has not articulated good cause for the release of such records and merely surmises that *if* A.C. had been diagnosed with a personality disorder, "wherein a common symptom may include lying or fabricating, [and *if* this diagnosis was documented in her records,] th[e] information would be relevant to A.C.'s credibility." (App. Mot. at 3.) This speculative justification is wholly inadequate to meet the "good cause" standard under R.C.M. 1113(b)(3)(B)(ii).

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40161**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
George E. LOPEZ	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 14 July 2022, this court granted Appellant's counsel's motion to examine sealed materials, specifically, transcript pages 51–73, 130–32, and 380–82, and Appellate Exhibits XX, XXVII, XXVIII, XXIX, XXX, XXXI, XXXVI, LIII, and LXIV, of Appellant's court-martial. At the time, Appellant's counsel asserted all exhibits were viewed by trial and defense counsel, and that there was a colorable showing that viewing the exhibits were necessary to a fulfillment of counsel's duty to Appellant. The court's order permitted "[a]ppellate defense counsel and appellate government counsel" to view the above-referenced exhibits and transcript pages.

On 4 August 2022, Appellant's counsel informed the court that Appellate Exhibit XXXVI had only been viewed by the military judge in camera, and never released to trial and defense counsel. Appellant's counsel requested the court reconsider its 14 July 2022 order.

On 5 August 2022, this court concurred with appellate defense counsel's assessment that Appellate Exhibit XXXVI was not released to trial and defense counsel and ordered Appellate Exhibit XXXVI may not be viewed by appellate defense counsel or appellate government counsel. In the court's 5 August 2022 order, it noted that the remainder of the court's 14 July 2022 order remained undisturbed.

On 26 August 2022, Appellant's new counsel filed a motion to examine sealed materials, specifically, pages 51–73, 130–32, and 380–82 of the verbatim transcript, as well as Appellate Exhibits XX, XXVII, XXVIII, XXIX, XXX, XXXI, XXXVI, LIII, and LXIV of Appellant's court-martial. The transcript pages and appellate exhibits were sealed by the military judge who presided over Appellant's court-martial. Appellate defense counsel argues it is necessary to review the entire record, including these sealed materials, to ensure counsel provides "competent appellate representation."

With respect to transcript pages 51–73, 130–32, and 380–82, and Appellate Exhibits XX, XXVII, XXVIII, XXIX, XXX, XXXI, LIII, and LXIV, the court notes that its 14 July 2022 order permits appellate defense counsel and appellate government counsel to view the transcript pages and exhibits. Moreover, in its response to Appellant's motion, the Government does not appear to object to appellate defense counsel viewing these transcript pages and exhibits, as long as the Government "can also review the sealed portions of the record as necessary to respond to any assignment of error that refers to the sealed materials."

"Materials reviewed in camera by a military judge, not released to trial counsel or defense counsel, and sealed may be examined by reviewing or appellate authorities. After examination of said materials, the reviewing or appellate authority may permit examination by appellate counsel for good cause." Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(ii).

With respect to Appellate Exhibit XXXVI, Appellant argues that good cause exists to review these records that were not previously released to trial or defense counsel during Appellant's court-martial. Specifically, Appellant argues that the exhibit contains mental health records of AC, Appellant's spouse and the named victim in Appellant's court-martial. Appellant's motion claims that AC's "credibility is paramount," and that "if [AC]'s mental health records discuss a diagnosis, such as a personality disorder, wherein a common symptom may include lying or fabricating, this information would be relevant to [AC]'s credibility." Appellant further argues that an exception to Military Rule of Evidence 513 exists in this case.

The Government objects to Appellant's counsel viewing Appellate Exhibit XXXVI, and argues that Appellant's counsel "has not articulated good cause for the release of such records." The Government argues that Appellant's motion relies on speculation and fails to meet the "good cause" standard under R.C.M. 1113(b)(3)(B)(ii).

The court finds that Appellant has failed to establish good cause under R.C.M. 1113(b)(3)(B)(ii). Appellant's motion does not appear to allege that a diagnosis pertinent to credibility exists in the records; instead, it merely notes that a diagnosis "such as a personality disorder," if one existed, would be relevant to the named victim's credibility. Ultimately, Appellant's motion fails to articulate a basis that Appellate Exhibit XXXVI contains matters pertaining to the named victim's credibility, or to anything related to Appellant's case.

Accordingly, it is by the court on this 1st day of September, 2022,

ORDERED:

Appellant's Motion to Examine Sealed Materials is **GRANTED IN PART AND DENIED IN PART**. Specifically, Appellant's motion is **GRANTED**

with respect to transcript pages 51–73, 130–32, and 380–82 and Appellate Exhibits XX, XXVII, XXVIII, XXIX, XXX, XXXI, LIII, and LXIV, subject to the following conditions:

(1) Appellate defense counsel and appellate government counsel may view transcript pages 51–73, 130–32, and 380–82, and Appellate Exhibits XX, XXVII, XXVIII, XXIX, XXX, XXXI, LIII, and LXIV. To view these sealed material, counsel will coordinate with the court.

(2) No counsel granted access to the materials may photocopy, photograph, reproduce, disclose, or make available their contents to any other individual without this court's prior written authorization.

It is further ordered:

Appellant's Motion to Examine Sealed Materials with respect to Appellate Exhibit XXXVI is **DENIED.**

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Technical Sergeant (E-6) **GEORGE E. LOPEZ** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (ELEVENTH)** Before Panel No. 1 No. ACM 40161 16 September 2022

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an eleventh enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement of time for a period of 30 days, which will end on 26 October 2022. The record of trial was docketed with this Court on 1 September 2021. From the date of docketing to the present date, 380 days have elapsed. On the date requested, 420 days will have elapsed. Undersigned counsel anticipate this will be final request for an enlargement of time.

On 25 May 2021 and 7-12 June 2021, Appellant was tried by a panel of officer and enlisted members at a general court-martial at Joint Base San Antonio-Lackland, Texas. Record of Trial (ROT) at Vol. 1 – Entry of Judgment (EOJ), dated 25 August 2021. Contrary to his pleas, Appellant was convicted of one charge and five specifications alleging violations of Article 128, UCMJ; one charge and specification of sexual assault in violation of Article 120, UCMJ; and one charge and specifications alleging violations of Article 134, UCMJ. *Id.* On 12 June 2021,

GRANTED
22 SEP 2022

the panel sentenced him to confinement for nine years and six months, reduction to the grade of E-1, and a dishonorable discharge. *Id*. The convening authority took no action on the findings and no action on the sentence in the case. ROT at Vol. 1 – Convening Authority Decision on Action, dated 24 August 2021. There were 11 written motions filed. The transcript is 1291 pages. There are 35 prosecution exhibits, 39 defense exhibits, 79 appellate exhibits, and three court exhibits. Appellant remains in confinement; has been advised of his right to a timely appeal, and consents to this request for enlargement of time.

A. Military Appellate Defense Counsel's Caseload

Undersigned military counsel has 15 clients and is presently assigned 10 cases pending initial AOEs before this Court. One case pending a reply brief before this Court has priority over the present case: *United States v. Brown*, ACM No. 40066 – Counsel has completed review of the record, the initial AOE, and the Government's answer to the AOE, and is working with co-counsel to complete drafting of the Appellant's reply.

In this matter, on 12 August 2022, this Court granted a Motion for Withdrawal of Appellate Defense Counsel, permitting the withdrawal of Capt Alexandra Fleszar, and undersigned counsel was detailed as substitute military counsel. Since filing EOT 10, undersigned military counsel lost eight days for leave, training, and to appear as trial defense counsel, in addition to losing periodic time to complete trial defense interviews and preparation before trial. Undersigned military counsel has begun briefing one issue for inclusion in the initial AOE.

B. Civilian Appellate Defense Counsel's Caseload

Appellant's civilian defense counsel, Mr. William Cassara and Ms. Julie Haines, currently have 46 cases on their dockets. This case also represents civilian defense counsel's first priority before this Court. Civilian counsel also have the following pending cases: three before the Court of Appeals for the Armed Forces; 20 before the Army Court of Criminal Appeals; three before the Navy-Marine Corps Court of Criminal Appeals; four before this Court; and six before the Court of Federal Claims. Additionally, civilian defense counsel currently have three pending writs of habeas corpus and seven cases before clemency and parole boards. At present, no other case on civilian defense counsel's dockets takes precedence over Appellant's case.

Civilian defense counsel are taking lead on Appellant's AOE, and filed a notice of appearance in this case on 25 April 2022. At the time of the Notice of Appearance, this Court had already granted five enlargements of time and six requests for enlargement had been filed; this Court granted the sixth requested enlargement four days later on 29 April 2022. At this time, civilian defense counsel have reviewed all of the open/non-sealed portions of the record and transcript, and have drafted parts of the AOE. On 15 September 2022, undersigned counsel filed a Motion to Copy, Retain, and Transmit Sealed Materials in this case to civilian defense counsel and are awaiting the Government's position on this motion and the Court's ruling. Counsel have consulted with the Appellant on several potential issues in his case.

Through no fault of Appellant's, counsel have yet to complete the AOE in Appellant's case.

Accordingly, an enlargement of time is necessary to allow all counsel to view the sealed materials, if granted, and complete drafting of the AOE. Counsel will be available for a status conference should this Court require additional information.

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

Respectfully submitted,

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

//SIGNED//
William E. Cassara, Esq.
Appellate Defense Counsel
[redacted]

//SIGNED//
Julie Caruso Haines, Esq.
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was sent via email to the Court and served on the Appellate Government Division on 16 September 2022.

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

20 September 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) GEORGE E. LOPEZ, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40161 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time, dated 16 September 2022.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstance, it should not take any appellant over one year, much less over 400 days, to submit an assignment of error to this Court. If Appellant's new enlargement motion is granted, the defense delay in this case will be 420 days in length. Appellant's excessive delay practically guarantees this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed over three-quarters of the 18-month standard for this Court to issue a decision, which only leaves a mere 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.

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, 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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 20 September 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Technical Sergeant (E-6) **GEORGE E. LOPEZ** United States Air Force *Appellant*	)	**APPELLANT'S MOTION FOR LEAVE TO FILE MOTION TO COPY, RETAIN, AND TRANSMIT SEALED MATERIALS** Before Panel No. 1 No. ACM 40161 15 September 2022

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

Pursuant to Rule 23(d) of Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for leave to file a motion to copy, retain, and transmit pages 51-73, 130-132, 380-382 of the verbatim transcript of Appellant's court-martial, as well as Appellate Exhibits (App. Ex.) XX, XXVII, XXVIII, XXIX, XXX, XXXI, LIII, and LXIV included in Appellant's record of trial to Appellant's non-local lead Appellate Defense Counsel. Pursuant to the same rule, the motion for leave to file the pleading and the pleading have been combined herein.

On 1 September 2022, this Court granted Appellant's Motion to Examine Sealed Materials in part, providing appellate defense counsel and appellate government counsel may view transcript pages 51-73, 130-32, and 380-82, and Appellate Exhibits XX, XXVII, XXVIII, XXIX, XXX, XXXI, LIII, and LXIV.

Appellant is represented by undersigned counsel, Ms. Julie Caruso Haines, and Mr. William E. Cassara. Appellant requests this Court's permission for undersigned counsel to create and securely retain and transmit digital copies of the

transcript pages 51-73, 130-32, and 380-82, and Appellate Exhibits XX, XXVII, XXVIII, XXIX, XXX, XXXI, LIII, and LXIV to Ms. Julie Caruso Haines and Mr. William E. Cassara, who are not located in National Capital Region, to facilitate counsel's preparation of Appellant's Assignment of Errors.

If this Court grants Appellant's request, undersigned counsel proposes the following procedure for effecting the Court's order, subject to any directive by this Court. Undersigned counsel will scan and create an electronic file containing the sealed material. Undersigned counsel will then electronically transmit that file to undersigned counsel's official, encrypted email account. Undersigned counsel will retain a copy of that electronic file—with clear markings to indicate it contains sealed material—exclusively on the Air Force Appellate Defense Division's secure electronic drive. Undersigned counsel will securely transmit a copy of the electronic file to Ms. Julie Caruso Haines and Mr. William E. Cassara via DoD SAFE, and they will securely store the file with clear markings to indicate it contains sealed material.

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

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Capt, 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 Government Trial and Appellate Operations Division on 15 September 2022.

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

19 September 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) GEORGE E. LOPEZ, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIALS No. ACM 40161 Before Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States responds to Appellant's Motion to Copy, Retain, and Transmit Sealed Materials, dated 15 September 2022. The United States does not object to Appellant's military counsel's request to copy, retain, and transmit pages 51-73, 130-132, 380-82 of the verbatim transcript (the "sealed materials"), as well as Appellate Exhibits XX, XXVII, XXVIII, XXIX, XXX, XXXI, LIII, and LXIV in the record of trial for the purpose of providing the sealed material to Appellant's civilian defense counsel, Ms. Julie Caruso Haines and Mr. William E. Cassara.

The United States respectfully requests, however, that this Court order that the sealed material be transmitted by secure means and that appellate defense counsel is solely responsible for (1) disposing of the sealed material after appellate review is complete; and (2) confirming that disposal with this Court.

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 19 September 2022.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40161**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
George E. LOPEZ	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 1 September 2022, this court granted Appellant's motion to view transcript pages 51–73, 130–32, 380–82 of Appellant's court-martial, and Appellate Exhibits XX, XXVII, XXVIII, XXIX, XXX, XXXI, LIII, and LXIV of the record of trial; appellate government counsel were also allowed to view such materials.

On 15 September 2022, Appellant's counsel submitted a Motion for Leave to File Motion to Copy, Retain, and Transmit Sealed Materials. Specifically, Appellant seeks to copy, retain, and transmit to Appellant's lead appellate defense counsel, Ms. Julie Caruso Haines and Mr. William E. Cassara, by secure means transcript pages 51–73, 130–32, 380–82 of Appellant's court-martial, and Appellate Exhibits XX, XXVII, XXVIII, XXIX, XXX, XXXI, LIII, and LXIV of the record of trial because his civilian appellate defense counsel, Ms. Julie Caruso Haines and Mr. William E. Cassara, who are employed outside the National Capital Region, to facilitate counsel's preparation of Appellant's assignments of error. Appellant further proposes his military appellate defense counsel, Captain Samantha P. Golseth, scan and create an electronic file of the sealed portion of the above identified materials, save a copy solely on the Air Force Appellate Defense Division's secure electronic drive, and securely transmit a copy of the file to Ms. Caruso Haines and Mr. Cassara via DoD SAFE.

In its 19 September 2022 response to Appellant's motion, the Government states that it does not oppose Appellant's request to copy and transmit the sealed materials to Appellant's civilian appellate defense counsel. However, it does request this court order the sealed material be transmitted by secure means, that Appellant's counsel be solely responsible for disposing of the electronic copies of sealed material once appellate review is complete, and that Appellate counsel confirm such disposal with this court.

Accordingly, it is by the court on this 22d day of September 2022,

ORDERED:

Appellant's Motion for Leave to File Motion to Copy, Retain, and Transmit Sealed Materials is **GRANTED**. Appellant's military appellate defense counsel, Captain Golseth, is authorized to scan a hard copy of transcript pages 51–73, 130–32, 380–82 of Appellant's court-martial, and Appellate Exhibits XX, XXVII, XXVIII, XXIX, XXX, XXXI, LIII, and LXIV of the record of trial. Further, Captain Golseth is authorized to then email the scanned sealed materials to Ms. Caruso Haines and Mr. Cassara password-protected via DoD SAFE.

Except as specified in this order, no counsel will photocopy, photograph, or otherwise reproduce the sealed material, nor disclose nor make available its contents to any other individual, without this court's prior written authorization.

Once all pleadings in this case are filed with the court, appellate defense counsel shall destroy all copies of the sealed materials created and transmitted. Appellate defense counsel will provide confirmation to this court and to appellate government counsel that all such copies have been destroyed.

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Technical Sergeant (E-6) **GEORGE E. LOPEZ** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TWELFTH)** Before Panel No. 1 No. ACM 40161 19 October 2022

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a twelfth enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement of time for a period of 30 days, which will end on 25 November 2022. The record of trial was docketed with this Court on 1 September 2021. From the date of docketing to the present date, 413 days have elapsed. On the date requested, 450 days will have elapsed. Undersigned counsel promises this will be final request for an enlargement of time. While undersigned counsel anticipated no further enlargements of time would be required beyond our eleventh request, undersigned civilian counsel are currently preparing for argument on 25 October 2022 before the United States Court of Appeals for the Armed Forces (C.A.A.F.) in *United States v. Anthony A. Anderson*, No. 22-0205/AF, and need to speak with Appellant prior to submission of his AOE.

May 2021 and 7-12 June 2021, Appellant was tried by a panel of officer a d members at a general court-martial at Joint Base San Antonio-Fort

GRANTED
24 Oct 2022

Sam Houston, Texas. Record of Trial (ROT) at Vol. 1 – Entry of Judgment (EOJ), dated 25 August 2021. Contrary to his pleas, Appellant was convicted of one charge and five specifications alleging violations of Article 128, UCMJ; one charge and specification of sexual assault in violation of Article 120, UCMJ; and one charge and three specifications alleging violations of Article 134, UCMJ. *Id.* On 12 June 2021, the panel sentenced him to confinement for nine years and six months, reduction to the grade of E-1, and a dishonorable discharge. *Id.* The convening authority took no action on the findings and no action on the sentence in the case. ROT at Vol. 1 – Convening Authority Decision on Action, dated 24 August 2021. There were 11 written motions filed. The transcript is 1291 pages. There are 35 prosecution exhibits, 39 defense exhibits, 79 appellate exhibits, and three court exhibits. Appellant remains in confinement; has been advised of his right to a timely appeal, and consents to this request for enlargement of time.

A. Military Appellate Defense Counsel's Caseload

Undersigned military counsel has 16 clients and is presently assigned 12 cases pending initial AOEs before this Court. No case takes priority over this case. Since filing our eleventh request for an enlargement of time (EOT 11), undersigned military counsel has completed briefing of one issue for inclusion in the initial AOE and aided lead civilian defense counsel in their issue drafting. Since EOT 11, undersigned military counsel has acted as trial defense counsel for a retirement eligible member pending court-martial, which has included completing lengthy interviews and trial preparation. Additionally, counsel attended a C.A.A.F. new

counsel orientation on 22 September 2022, Joint Appellate Advocacy Training on 29-30 September 2022, and has participated in four moot arguments to facilitate preparation of other military counsel. Undersigned military counsel will also be preparing for and participating in four additional moot arguments on 21-24 October 2022 and will attend oral arguments at C.A.A.F on 25 October 2022. Lastly, undersigned military counsel will travel to and participate in the Appellate Advocacy Training at the University of North Carolina from 25-28 October 2022.

B. Civilian Appellate Defense Counsel's Caseload

Appellant's civilian defense counsel, Mr. William Cassara and Ms. Julie Caruso Haines, currently have 46 cases on their dockets. This case also represents civilian defense counsel's first priority before this Court. Civilian counsel also have the following pending cases: three before the Court of Appeals for the Armed Forces; 20 before the Army Court of Criminal Appeals; three before the Navy-Marine Corps Court of Criminal Appeals; four before this Court; and six before the Court of Federal Claims. Additionally, civilian defense counsel currently have three pending writs of habeas corpus and seven cases before clemency and parole boards. At present, no other case on civilian defense counsel's dockets takes precedence over Appellant's case.

Civilian defense counsel are taking lead on Appellant's AOE, and filed a notice of appearance in this case on 25 April 2022. At the time of the Notice of Appearance, this Court had already granted five enlargements of time and six requests for enlargement had been filed; this Court granted the sixth requested enlargement four

days later on 29 April 2022. At this time, civilian defense counsel have reviewed all portions of the record and transcript, and are drafting the AOE. On 22 September 2022, this Court permitted undersigned military counsel, Capt Golseth, to scan and transmit to civilian counsel the following: transcript pages 51-73, 130-32, 380-82 of Appellant's court-martial, and Appellate Exhibits XX, XXVII, XXVIII, XXIX, XXX, XXXI, LIII, and LXIV of the record of trial, which totaled 1,539 pages. Counsel have consulted with the Appellant on several potential issues in his case but need to speak with Appellant again before filing his AOE. Through no fault of Appellant's, counsel have yet to complete the AOE in Appellant's case.

Accordingly, an enlargement of time is necessary to allow all counsel to speak with Appellant and complete drafting of the AOE. Counsel will be available for a status conference should this Court require additional information.

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

Respectfully submitted,

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

//SIGNED//
William E. Cassara, Esq.
Appellate Defense Counsel
[redacted]

//SIGNED//
Julie Caruso Haines, Esq.
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was sent via email to the Court and served on the Appellate Government Division on 19 October 2022.

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

20 October 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) GEORGE E. LOPEZ, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40161 Panel No. 1

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstance, it should not take any appellant over one year to submit a brief to this Court. If Appellant's new motion is granted, the defense delay in this case will be 450 days in length. Appellant's over one 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 over two-thirds of the 18-month standard for this Court to issue a decision, which only leaves approximately 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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 20 October 2022.

[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,*	)	**APPELLANT'S MOTION TO EXCEED PAGE AND WORD LIMIT**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **GEORGE E. LOPEZ** United States Air Force *Appellant.*	)	No. ACM 40161 28 November 2022

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

Pursuant to Rule 23.3(q) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves for leave to exceed the 20,000 word and 50 page limit of Rule 17.3 for Appellant's brief.

Appellant's brief is 136 pages and 44,285 words, excluding the title page, table of contents, table of authorities, signature pages, and appendix. The brief exceeds the maximum word and page limit primarily due to the length and complexity of the case. The Record of Trial included 1,291 pages of trial transcript, 11 written motions, 35 prosecution exhibits, 39 defense exhibits, 79 appellate exhibits, and three court exhibits. Additionally, the brief contains numerous quotations from the record and quotations to binding precedent while tackling eight separate issues.

GRANTED

1 DEC 2022

WHEREFORE, Appellant respectfully requests this motion be granted.

[redacted]
WILLIAM E. CASSARA, Esq.
Appellate Defense Counsel
[redacted]

[redacted]
SAMANTHA P. GOLSETH, Capt, 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 28 November 2022.

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**BRIEF ON BEHALF OF APPELLANT**
Appellee	)	
	)	
v.	)	
	)	Before Panel No. 1
	)	
Technical Sergeant (E-6)	)	No. ACM 40161
GEORGE E. LOPEZ,	)	
United States Air Force	)	
Appellant	)	28 November 2022

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

WILLIAM E. CASSARA, Esq.
Appellate Defense Counsel
[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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ASSIGNMENTS OF ERROR[1]

I.

THE SPECIFICATION OF CHARGE III FAILS TO STATE AN OFFENSE BECAUSE IT FAILED TO ALLEGE WHETHER THE CHILD ENDANGERMENT WAS BY DESIGN OR BY CULPABLE NEGLIGENCE.

II.

THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUPPORT THE FINDINGS OF GUILTY FOR ASSAULT CONSUMMATED BY A BATTERY IN SPECIFICATIONS 1-4 OF CHARGE I AND FOR SEXUAL ASSAULT IN THE SPECIFICATION OF CHARGE II.

III.

APPELLANT WAS PRESUMPTIVELY PREJUDICED BY THE ABSENCE FROM THE RECORD OF TRIAL OF MOTIONS, EVIDENCE, AND RULINGS FROM THE FIRST ITERATION OF THE COURT-MARTIAL UPON WHICH THE MILITARY JUDGE AND THE PARTIES RELIED FOR THIS COURT-MARTIAL.

IV.

THE SENTENCE TO CONFINEMENT OF NINE YEARS AND SIX MONTHS IS INAPPROPRIATELY SEVERE.

V.

THE DEFENSE COUNSELS' FAILURES AND ERRORS DENIED APPELLANT THE EFFECTIVE ASSISTANCE OF COUNSEL.

VI.

THE MILITARY JUDGE ABUSED HIS DISCRETION BY NOT INSTRUCTING THE PANEL ABOUT PARTIAL LACK OF MENTAL RESPONSIBILITY FOR THE CHILD ENDANGERMENT SPECIFICATION.

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[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant respectfully requests that this Court consider the matters contained in the Appendix.

VII.

APPELLANT WAS DEPRIVED OF HIS RIGHT TO A UNANIMOUS VERDICT AS GUARANTEED BY THE SIXTH AMENDMENT, THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE, AND THE FIFTH AMENDMENT'S RIGHT TO EQUAL PROTECTION.

STATEMENT OF THE CASE

On 25 May and 7-12 June 2021, Technical Sergeant [TSgt] George E. Lopez [Appellant] was tried at Joint Base San Antonio-Fort Sam Houston, Texas, and Joint Base San Antonio-Lackland, Texas, before a general court-martial composed of officer and enlisted members.[2] Contrary to his pleas, Appellant was convicted of sexual assault, assault consummated by a battery (five specifications), child endangerment, and kidnapping (two specifications), in violation of Articles 120, 128, and 134 of the Uniform Code of Military Justice [UCMJ]; 10 U.S.C. §§ 920, 928, and 934 (2016). Entry of Judgment.[3] The military judge sentenced Appellant to confinement for nine years and six months, reduction to the grade of E-1, and a dishonorable discharge. Entry of Judgment. The military judge credited Appellant with five

[2] The Government originally preferred one charge and one specification of rape and one charge and one specification of assault consummated by a battery against Appellant on 12 December 2018. App. Exs. VI, XIV. The originally charged specification of assault consummated by a battery alleged a single instance of strangulation. App. Exs. VI, XIV. The charges were referred to trial by general court-martial on 27 March 2019. App. Exs. VI, XIV. In an 11 January 2021 RCM 802 conference, the military judge and the parties discussed flaws in the convening orders. App. Exs. VI, XIV. On 12 January 2021, the convening authority ordered the withdrawal and dismissal of the charges and specifications without prejudice. App. Exs. VI, XIV. On 14 January 2021, the Government preferred charges anew. App. Exs. VI, XIV. The convening authority referred these charges and specifications to trial by general court-martial on 23 January 2021. App. Exs. VI, XIV.

[3] The panel acquitted Appellant of wrongfully communicating a threat in Specification 4 of Charge III. In Specification 1 of Charge I, the panel excepted the word "forearm" and substituted the words "upper extremity" in convicting Appellant of assault consummated by a battery. Finally, the military judge dismissed Specification 5 of Charge I as an unreasonable multiplication of charges with the Specification of Charge II subject to the finding of guilty for the Specification of Charge II surviving appellate review. Entry of Judgment.

days of pretrial confinement credit toward the sentence to confinement. *Id*. On 24 August 2020, the convening authority took no action on the findings or sentence. Convening Authority Decision on Action.

STATEMENT OF THE FACTS

Background

Appellant and AC[4] met in high school and married in 2008. R. at 433. Their sons, GL and NL, were born in 2009 and 2011, respectively. R. at 662-63, 685. AC's sister, GP, lived with the family in a single-family house in San Antonio, Texas. R. at 433-34. Appellant and AC's bedroom was on the ground floor, as was GP's bedroom. R. at 442. The boys' rooms and a loft were on the second floor. R. at 442, 666.

After Appellant redeployed to Texas from Turkey in May 2017, AC demanded that Appellant sign a medical release so that she could access his medical records because Appellant "had been lying about his PTSD[5] sessions while he was in Turkey, that he was not going to." R. at 507-508. She told Appellant that if he planned to consume alcohol, she needed to be there because "[h]e talks a lot about his times in Iraq, and he either gets really angry about Iraq times, or really depressed." R. at 508. AC felt embarrassed when Appellant talked about Iraq. R. at 509.

On 1 January 2018, AC considered her marriage to be "a business-type relationship," in which she and Appellant "fought a lot" and "mentioned divorce a lot." R. at 435. She testified that she ripped up her marriage certificate in the fall of 2017 and that she and Appellant had not

[4] AC filed for divorce from Appellant in May 2018. R. at 482, 608. Shortly thereafter, she married OC and changed her name from AL to AC. R. at 608. While the Charge Sheet refers to her as AL, all references to her in the Record of Trial [ROT] are as AC. She is referred to as AC throughout the remainder of this brief.

[5] Posttraumatic Stress Disorder.

shared a bed or had sex since her birthday on 28 December 2017, largely because she was dissatisfied with how he chose to celebrate her birthday. R. at 443, 514, 587.

31 December 2017 – 1 January 2018

On New Year's Eve 2017, Appellant and AC continued to fight about her birthday and she told him that she was done with their relationship. R. at 499. Shortly thereafter, Appellant and GL attended a party at a neighbor's house. R. at 435-36. AC felt angry that Appellant did not stick around to work on their relationship. R. at 510. AC stayed home with NL, who felt ill. R. at 435, 436, 492.

Appellant and GL came home around midnight. R. at 437. AC noticed that Appellant had been drinking. R. at 437, 501. AC testified that they argued about his drinking and his lie that he was on call that night:

> We had made this agreement that if he was going to drink, I would be there because prior to – when he came back from Turkey [in 2017], he started his PTSD sessions, and he was put on restricted work because driving triggered his PTSD, as well as drinking. So, I was basically the one driving around everywhere, and as far as drinking goes, we had this pact where he would drink if I'm there.

R. at 437.

AC threw her rings at Appellant and announced that she was "done" with the marriage. R. at 438, 511. She did this because

> [t]here's no talking to him when he's like that. He's just – he just reverts back to times in Iraq or I don't understand him. I don't care, and I'm not talking about Iraq. I'm not talking about any of that. I'm talking about us. So, I was extremely frustrated, and I had already been frustrated with him prior.

R. at 438.

Appellant left the house. R. at 438, 502. He returned home around 0200 and, although he had been drinking, he did not stumble or otherwise appear incapacitated. R. at 439. They

argued and AC left the house. R. at 440, 511. When she returned, Appellant was gone. R. at 440. AC knew that fireworks triggered Appellant's PTSD. R. at 515. She was concerned that the New Year's Eve fireworks would spark a PTSD episode, so she got in her car to look for Appellant. R. at 440.

GP left for work around 0645. R. at 400. Shortly thereafter, Appellant returned home and went to the loft. R. at 442, 516. AC followed him into the loft because she wanted to talk. R. at 444, 516, 517. She testified:

> He started acting weird. He started [saying] that he was a possum and went towards the corner of the loft and kind of put himself in this life [sic] fetal position and started saying "Don't yell at me; don't hurt me. Don't hurt me." I'm just looking at him like what are you talking about? I'm nowhere near you. I'm by the stairs, and he is just saying how he doesn't deserve to be called a soldier. That when he was in Iraq, he was like a possum. So, I was like okay, I not asking you about that. I'm just asking you where were you? He told me he was outside in the backyard the whole time and that he could hear me looking for him and stuff. He was just out there the entire time.

R. at 444.

Appellant lay on the couch and asked AC not to hit him. R. at 517. AC insisted that she was "done" and returned to her bedroom downstairs. R. at 444.

Sometime later, Appellant entered the bedroom, where AC laid in bed. R. at 444. AC testified that Appellant took AC's cell phone from the floor, "started yelling like a drill sergeant," and demanded the password to unlock her phone. R. at 445, 518. She deliberately turned her back on him. R. at 445. On 7 January 2018, however, AC told the Bexar County Sheriff's Office that she was not in her room when Appellant took her phone; instead, her written statement said, "I then told him that he could keep [my phone] and [I] walked back to my room and laid down." R. at 519; App. Ex. XLVII. When confronted with the discrepancy, AC

admitted that she gave Appellant her phone, told him that he could keep it, and did not ask for it back from him. R. at 520.

According to AC, Appellant climbed on top of AC and yelled at her, "Do you love me? Tell me you love me!" R. at 445. He had never done that before. R. at 455. Appellant wrapped his arm around AC's neck while squeezing her abdomen with his legs. R. at 445, 527. AC felt like she could not breathe anymore. R. at 446.

AC testified that when NL woke, Appellant told him "that he was just playing with mommy" and that he should go back to sleep. R. at 447. NL fell asleep. R. at 528. Appellant announced that there would be a "family meeting" so that AC could "feel and learn the pain I've caused him over the years. . . ." R. at 447. Appellant "was kind of talking to himself – mumbling stuff" and then he yelled like a drill sergeant for AC to sit somewhere else in the room. R. at 447-48. When she did not move quickly enough for him, he charged at her, grabbed her, and "body slam[med]" her to the floor with his hands multiple times. R. at 448, 528.

AC asked Appellant, "why are you doing this and to me?" R. at 448. GL entered the room and asked why the internet did not work for his iPad. R. at 448, 528. Appellant locked the door and announced a family meeting. R. at 448. Appellant said, "that's a good question. I'm not really sure, but how does murder/suicide sound to you?" R. at 448. Appellant had never said anything like that. R. at 448. AC went into "survival mode." R. at 448. She asked Appellant to consider their boys, but he replied, "oh, it doesn't matter. They're little. They won't remember this anyway." R. at 448.

AC testified that Appellant took her phone and the boys' iPads and moved them to the first-floor office. R. at 452, 453, 523. On 4 January 2018, however, AC told a Family Advocacy

social worker that Appellant placed the devices in the corner of the master bedroom. R. at 523-24, 640, 776.

AC pleaded with Appellant to leave. R. at 450. She reminded him, "you're so close to your retirement in your military career. I know that means a lot to you. You just started counseling for PTSD. Just go." R. at 450. It seemed that Appellant was going to leave when "it was like something snapped in him and he was like no, you're just telling me what I want to hear." R. at 450. He pushed her toward the bed and strangled her throat from behind. R. at 450. GL told Appellant to stop. R. at 451. Appellant stopped and sat in the corner of the bedroom. R. at 451.

NL left the room and Appellant ran after him. R. at 451. AC told NL to listen to Appellant and not provoke him. R. at 452. Appellant brought NL back to the bedroom and warned him not to leave again or else Appellant would get physical with him. R. at 452.

Appellant told the boys that he was "playing with mom." R. at 452. She disputed this statement and told the boys to leave. R. at 452. The boys fled the room and Appellant chased after them. R. at 453. AC left the room and screamed for help in the backyard, but she did not use the emergency button on the security system near the house's entrance. R. at 453, 524-25, 529, 640. AC testified that Appellant grabbed her and shoved her toward the fence. R. at 454, 529. AC testified that she suffered injuries to her mouth, lip, and hands. R. at 454. According to AC, Appellant grabbed her, carried her to the living room, and punched her face twice. R. at 454-55, 530. She testified that Appellant put her in the bedroom, where she and the boys sat on the bed. R. at 455-56.

Appellant told AC that if she told the boys to leave, he would get physical with them. R. at 456, 533. On 7 January 2018, AC wrote a statement for the Bexar County Sheriff's Office

recounting what occurred. R. at 533. In this statement, provided six days after the alleged incident, AC made no mention of Appellant threatening to hit the boys if she disobeyed him. R. at 533.

AC testified that Appellant drank water and vomited on her as she sat on the bed but forbade her from changing her clothes. R. at 456, 538-39. He told AC that he found himself "suddenly curiously aroused" and told the boys to go in the closet. R. at 456.

AC alleged that Appellant got on top of her in the bed. R. at 457-58. He slapped her when she refused his kisses. R. at 458. As AC tried to push Appellant off her, he pinned her to the bed with his hands. R. at 458, 640. He got up, removed his pants,[6] and attempted anal sex with AC but she moved to avoid this act[7]. R. at 458-59. According to AC, Appellant penetrated her vagina, ejaculated inside her, and pulled up her underwear and pajama pants. R. at 459.

AC testified that she was convinced that Appellant would kill himself and her. R. at 460. The boys knocked on the closet door and Appellant opened it. R. at 461. Appellant insisted that he was in charge and that they would have a family meeting. R. at 461. He told AC that she needed a reminder of who was in charge. R. at 462. She alleged that Appellant grabbed her, threw her on the bed, and strangled her a third time. R. at 462. When asked how this manner of strangulation differed from the first and second ones, AC answered, "They were the same." R. at 462.

At some point, Appellant, AC, and the boys left the room. R. at 466. While the boys sat in the living room, AC and Appellant entered the kitchen where he warmed up some leftover

[6] AC testified that Appellant wore a sweater and khaki pants. R. at 460; Pros. Ex. 11.
[7] AC testified that she and Appellant had never engaged in anal sex prior to 1 December 2018. R. at 458.

meat.[8] R. at 466. Appellant warned AC not to say anything to GP when she returned from work or he would hurt GP. R. at 466.

Regarding Appellant's demeanor, AC testified:

> When we moved out of my bedroom into the kitchen, he brought up my aunt who committed suicide. He started asking questions as to how does she do that, and he knows that. He said, oh yeah, she took pills, right. Well, do you know how many pills she took? As he is talking and mentioning that, he's looking for, I guess, medicine, his medicine in the kitchen cabinets. He starts asking how many pills he could take, and that was more hurt to what I was already going through.
>
> He seemed like he lost like, he didn't care any more what was going to happen to him. He mentioned how he knew that he was going to go to jail, and that he didn't want to go to jail, and that he'd rather die.

R. at 449.

Appellant demanded GP's phone when she came home around 1530. R. at 401, 402, 412, 466. GP sensed something was wrong and ran toward the door, but Appellant grabbed her and "body slammed" her to the floor with his hands. R. at 403, 466. GP wanted to know what was going on and Appellant told her that they would have a family meeting.[9] R. at 467. He told her to "cooperate." R. at 405. AC testified that Appellant pointed a kitchen knife toward AC and GP. R. at 405, 467. AC told GP to listen to Appellant. R. at 405. Appellant asked if he should "make this a combo." R. at 405, 428. GP did not know what that meant, but she feared that Appellant would kill her. R. at 405.

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[8] On 1 January 2017, AC told a detective that the boys asked for a snack, Appellant permitted GP to prepare a snack and take it upstairs with the boys, and that GP later made a second snack for one of the boys. R. at 548, 549. At trial, however, AC testified that Appellant prepared this "meat" snack only for himself and that GP was home when he did so. R. at 548.

[9] Although AC testified that Appellant used the phrase "family meeting" multiple times throughout the day, she told the Bexar County Sheriff's Office that he uttered the phrase only once. R. at 541.

Appellant grabbed a bottle of pills from a kitchen cabinet[10] and ingested several pills. R. at 405, 469. He vomited. R. at 469. Appellant said they were muscle relaxers but AC could not verify this. R. at 469. He called his brother, EL. R. at 469. Appellant gave the phone to AC who told EL that he needed to call 911 because Appellant had taken pills and had hurt her. R. at 470.

GP and the boys went upstairs. R. at 406, 417, 468. According to AC, Appellant called his mother and told her that he did some really bad things to AC and that he was probably going to jail. R. at 468-69.

Appellant gave AC her phone. R. at 470. She called 911 and said that her husband had intentionally overdosed on pills. R. at 470-71; Pros. Ex. 25. She reported that Appellant was trying to throw up and that she did not know how many pills he ingested. R. at 471; Pros. Ex. 25. When the dispatcher asked AC to hold on, AC said that she could not "[b]ecause he'll probably hurt me." R. at 472; Pros. Ex. 25. The dispatcher asked AC how Appellant would hurt her and she answered, "He already did." R. at 472; Pros. Ex. 25. AC told the dispatcher, "I need to let you go. . . . I don't want to provoke him." R. at 472; Pros. Ex. 25. The dispatcher asked how Appellant had hurt her, but AC hung up. R. at 472; Pros. Ex. 25. AC testified that she did not tell the dispatcher about the sexual assault because Appellant was staring at her. R. at 473.

Appellant asked AC what he should do. R. at 473. AC heard police car sirens and she told Appellant that he should just wait for the cops outside and not let the boys see him get arrested. R. at 473. Appellant waited outside. R. at 474.

[10] AC testified that Appellant took the pills from a cabinet "to the right of the stovetop on top," but that this cabinet was not visible in the photos of Pros. Ex. 10. R. at 476.

The Investigation

Deputy PM and Deputy DP of the Bexar County Sheriff's Office responded to the dispatch about a possible suicide and assault. R. at 710, 712, 743. They arrived at Appellant's house and saw Appellant talking on his phone outside the house. R. at 708-709, 712. As they approached, Appellant raised his hands. R. at 748. Deputy PM asked Appellant, "what's going on?" R. at 709. According to the deputy, Appellant answered, "I did some cruel and unusual things." R. at 709. When asked whether he assaulted and sexually assaulted his wife, Appellant answered, "yes." R. at 710. Deputy PM did not ask Appellant about the pills he ingested. R. at 714. He asked if Appellant had been diagnosed with any kind of mental disorder and Appellant told him about his PTSD diagnosis. R. at 714.

Deputy DP heard Appellant say, "I did it." R. at 743. He did not remember Appellant saying anything else. R. at 743, 749. He did not remember Appellant saying that he did cruel and unusual things. R. at 743, 749.

After Deputy PM arrested Appellant and placed him in the police cruiser, Deputy DP entered the house, observed that AC was crying, and proceeded to the master bedroom to secure the scene. R. at 745. There was clothing everywhere and the sheets were messed up. R. at 745.

Investigator AP, the senior Crime Scene Unit investigator, documented the scene at the direction of Investigator AV, the Handling Investigator. R. at 751-52. Investigator AP collected the bedsheet and observed a makeshift bed and pillow on the floor next to the bed. R. at 753. The only piece of evidence Investigator AV asked Investigator AP to recover was the bedsheet. R. at 758. The sheet did not appear to be wet, nor did it have any visible stains on it. R. at 762.

Investigator AP photographed AC. R. at 754; Pros. Ex. 10. AC's lip and eyes appeared swollen in the photos. R. at 475-76; Pros. Ex. 10. Her lip appeared scratched. R. at 476; Pros.

Ex. 10. AC's right foot had a small scratch abrasion and her left wrist had some redness on it. R. at 754; Pros. Ex. 10. AC testified that she sustained the scratches when Appellant pushed her in the backyard. R. at 476.

Investigator AP also photographed GP and Appellant. R. at 755-56; Pros. Exs. 11, 13. She saw no wounds or injuries on Appellant. R. at 756, 763.

No photos were taken of the pill bottle in the kitchen or of Appellant's upper body or hands. R. at 917, 918.

AC consented to a sexual assault forensic examination [SAFE] at the hospital. R. at 477, 951, Pros. Ex. 15. AC reported penile penetration to her vulva and anus, but the nurse examiner found no trauma to any part of the vulva or anus.[11] R. at 954, 957; Pros. Ex. 15. AC also reported non-fatal manual strangulation, during which she thought she would die.[12] R. at 958-59; Pros. Ex. 15. The nurse examiner found no physical evidence of strangulation, nor did she observe any respiratory distress.[13] R. at 960-61, 978; Pros. Ex. 15. She observed a bruise on each of AC's arms.[14] R. at 963, 975; Pros. Ex. 15. The nurse examiner believed that she collected fingernail scrapings from AC but did not annotate it on her report. R. at 983; Pros. Ex. 15.

[11] The nurse examiner testified that lack of genital trauma following an allegation of sexual assault is common for women, like AC, who have had vaginal deliveries or previous intercourse. R. at 957-58.
[12] The nurse examiner testified that choking is a blockage of the airway from an internal structure, such as food, and strangulation is an impediment to the airway from outside. R. at 958.
[13] The nurse examiner testified that, in the ten strangulation cases for which she conducted a forensic exam, some victims had physical signs of strangulation, but more victims had no physical signs. R. at 963.
[14] To be precise, the nurse examiner observed ecchymosis, which is a discoloration on the skin due to a change in the blood pressure which causes blood vessels to burst. R. at 976. Merely pressing on the skin can cause ecchymosis. R. at 976.

The nurse examiner also conducted a SAFE exam on Appellant who was previously vasectomized. R. at 711, 801, 813, 971, 980; Def. Ex. A. AC's DNA was detected on Appellant's penile and underpants swabs. R. at 818; Pros. Ex. 19. AC's nucleated cellular material was also detected on Appellant's penile and underpants swabs. R. at 796. Appellant's semen and DNA were detected on AC's vaginal and rectal swabs. R. at 822, 835; Pros. Exs. 19, 21. No sperm was detected.[15] The DNA testing could not determine when or how the DNA was deposited. R. at 825. Male ejaculate or semen can be detected in the vaginal vault or cervix for three-to-four days after penile penetration. R. at 839. The bedsheets were not tested for any serological or biological fluids. R. at 825.

On 4 January 2018, AC told the Family Advocacy social worker that Appellant sexually assaulted her in the master bedroom closet with the doors closed while the boys were in the bedroom. R. at 534, 776. On cross-examination, AC claimed that she did not recall making this allegation to the social worker. R. at 534. AC also told the social worker that Appellant physically abused her, brandished a knife, and body slammed GP. R. at 785-86. She alleged that Appellant said he was not going to jail so he and she needed to figure out the murder-suicide plan. R. at 786.

In late 2019 or early 2020, AC gave her iPhone 6S to a law enforcement official, but she deleted messages from Appellant and deactivated her Facebook Messenger account before turning it in. R. at 521. She did not provide her Apple watch or the boys' iPads to any law enforcement official. R. at 521, 522. BJ, the Government expert in digital forensics, extracted some data from AC's iPhone pursuant to her limited consent. R. at 847, 856; Pros. Ex. 23. On 1 January 2018, there was an outgoing call at 0455 and the next outgoing call, to 911, occurred at

[15] No sperm would be detected in a vasectomized male's semen. R. at 824.

1835. R. at 852-53. There was no other activity on the phone during those hours. R. at 853, 866. BJ did not recover any text messages, Facebook Messenger messages, or any other communication between AC and Appellant for the relevant time frame even though he understood that the two had communicated during that time. R. at 859.

AC Initiated Contact with Appellant

A Bexar County judge issued a protective order prohibiting Appellant from having any contact with AC, the boys, and GP. R. at 551-52, 554-55; App. Ex. XLVIII. The order expired in early March. R. at 554; App. Ex. XLVIII. Appellant was also subject to a military protective order which expired in mid-2018. R. at 555.

Appellant was hospitalized after the alleged incident. R. at 478, 551. Despite the two protective orders, AC voluntarily tried to visit Appellant at Brooke Army Medical Center [BAMC]. R. at 556. She was unsuccessful, so she enlisted the aid of Appellant's cousin, KG, to relay a message to Appellant that she had received medical care and that she did not need Appellant anymore. R. at 556-57, 558. AC denied initiating any other communication with Appellant while he was hospitalized. R. at 559. On cross-examination, the Circuit Defense Counsel [CDC] impeached AC with a note that she gave KG to pass to Appellant. R. at 561-62. AC's note to Appellant stated, "Please know I don't hate you and I truly forgive you, and for as long as you keep trying to fight and work with your PTSD," "I will keep by your side," "You're the love of my life. I love you more than ever," and "I miss you very much, babe, but right now we both need to be strong in our faith and love for each other." R. at 561; App. Ex. XLIX. AC promised Appellant that they would get through this time together but that he had to continue PTSD treatment and fight for his family. R. at 578. AC initially insisted that she did not recall this note and its contents, but later admitted that she voluntarily wrote the note. R. at 560-61,

564. The military judge admitted the contents of the note as a prior consistent statement to test AC's credibility under Mil. R. Evid. 613. R. at 562.

AC's GoFundMe Fundraiser

AC took a ninety-day emergency leave from her job and she and the boys lived with a friend in California. R. at 478. Before they drove to California, AC set up a GoFundMe fundraiser on 13 January 2018. R. at 573-74; App. Ex. LI. Even though AC had a personal bank account into which her paycheck was deposited and access to a joint account with Appellant, she requested donations for relocation expenses because she did not feel safe living in the same area as Appellant. R. at 574, 577; App. Ex. LI. Appellant was still hospitalized and not living in his home. R. at 577. AC raised approximately $3000. R. at 575. About two months later, AC bought a $1400 purse. R. at 576; App. Ex. LII.

On 27 February 2018, investigators from the Air Force Office of Special Investigations [AFOSI] interviewed AC. R. at 564-65. She told them that she last communicated with Appellant on 1 January 2018. R. at 566, 570; App. Ex. L. To the contrary, AC continued to communicate with Appellant the entire time she stayed in California. R. at 580.

Return to Texas

AC and the boys returned to Texas at the end of March 2018 because she wanted to resume a family life with Appellant. R. at 480, 484. She elaborated:

> George and I – the previous fights that we would have was always due to like [his] PTSD and him being able to separate PTSD and just our marital problems. He spoke about balancing his career and family life. So, every time we had an argument, it was always him going back to – like you know what you got into it when you married me, military or refer back to his times in Iraq as kind of like a scapegoat to not talk about our problems. I was thinking about how I know he had been in the mental ward. He was finally on people's radar as far as his PTSD – getting the proper help that he needed, getting the counseling, having people. He was on people's radar. I

> kind of felt that the comfort in a sense that is finally addressing those issues, and maybe with him addressing those issues and getting the proper help and everything, we would have a chance and there was hope for us to work out our marriage. Aside from that, I also really did think that it was just an isolated situation; that he finally just snapped from years of not being able to reach out and talk or deal with that part of his life.

R. at 480.

When AC returned to Texas, she kissed Appellant outside a restaurant in Castroville. R. at 583, 588. Later that night, they engaged in consensual sex. R. at 589. They continued to see each other, sometimes with family and friends, and sometimes just by themselves while they lived in separate residences. R. at 583, 596. They continued to have consensual sex two to three times a week for months. R. at 589, 590. Appellant frequently visited the family home, but because of the military protective order, he and AC devised a system for getting him in the house without their military neighbors seeing him. R. at 584. AC and Appellant met in another subdivision, where Appellant snuck into her car and covered himself with blankets. R. at 585. While AC told the various prosecutors that she and Appellant had communicated and seen each other, she did not divulge their consensual sexual activity until a November 2019 motions hearing, which occurred in the first iteration of the case. R. at 606.

AC claimed that as the investigation proceeded, she questioned whether she should give him another chance. R. at 481. Appellant asked her not to divorce him and not to testify against him. R. at 481. According to AC, Appellant told AC he wanted her to feel all of the pain and all of the humiliation that she put him through for years and that he did it in front of the boys to hurt her. R. at 481.

AC filed for divorce at the end of May 2018 because Appellant "act[ed] like he was a single person," he promised to do things with the boys and then did not, and he forgot Mother's

Day and their wedding anniversary. R. at 481, 482, 486. Among other things, Appellant promised to take GL fishing in May 2018 but he went fishing without his son. R. at 487, 648. AC tried to reach Appellant by phone and Facebook messages. R. at 488. She told him that she would press charges against him and testify. R. at 489.

In May or June 2018, family friends visited AC and Appellant at their home. R. at 583. 1008, 1010. VR knew of AC's allegations against Appellant but she did not observe any tension between AC and Appellant. R. at 1009, 1011. VR agreed to the visit because AC assured her that Appellant was going to church and counseling. R. at 1016. During a coffee date, AC told VR that she had reconnected with OC, her now-husband. R. at 1011, 1012. Nonetheless, AC also told VR that "things are better than ever" regarding her sex life with Appellant and that they had engaged in *new* sexual activities. R. at 1011, 1012, 1014. Because the topic of AC and Appellant's sex life was the first thing AC discussed on the coffee date, VR understood that AC was excited about the opportunity to talk about her sex life "uncensored." R. at 1014-15.

On 5 July 2018, AC and Appellant exchanged flirty text messages and she sent him sexually provocative photos of herself. R. at 592-93; App. Ex. LIII. Appellant replied with an emoji and the words "I love." R. at 594; App. Ex. LII. AC responded, "Not enough." R. at 594; App. Ex. LIII. They discussed a possible sexual act but worried about someone from his unit seeing him at her house. R. at 596. AC sent more provocative photos and wrote, "too bad," meaning that he was missing out on being intimate with her. R. at 596; App. Ex. LIII. She wrote, "Hope this reminds you of what you have and not fighting for." R. at 599; App. Ex. LIII. Appellant indicated that he wanted to come over and AC told him that he needed "to do a lot better than this" and "Hurry up, get your ass over here." R. at 600; App. Ex. LIII. AC picked up Appellant in her car and snuck him in her house, where they briefly engaged in a consensual

penetrative sex act. R. at 600. Appellant stopped when he realized that AC was not as enthusiastic as he understood her to be. R. at 601.

The next day AC texted Appellant that she wanted him to feel what it was like to lose her and to fight harder for their marriage. R. at 601; App. Ex. LIII.

AC Alleged Appellant Admitted He Planned the Incident

AC claimed, in March or May 2018, Appellant told her that he was not drunk on 1 January 2018, that his PTSD did not make him assault her, and that he intended to hurt her and he wanted her to feel the humiliation and pain he felt when they argued. R. at 638, 645. According to AC, Appellant hurt her in front of the kids so that it would hurt her more. R. at 638. AC testified, "He told me how – well, he asked how did I not see that coming. He said, 'You think you're so smart.' He's like 'how did you not see that that was going to happen?'" R. at 649-50, 659. In a prior motions hearing, AC testified that, starting in May 2018, Appellant made admissions to her in "bits" and that it came out in the course of conversations." App. Ex. XLVIII. AC changed her testimony at trial when the CDC asked her if she shared Appellant's purported admissions with their longtime friends, the R family, prior to their visit at the end of May or the start of June 2018. R. at 591, 659. AC responded, "I find out all these things at once." R. at 659. Nonetheless, after Appellant allegedly made these statements, AC allowed Appellant to supervise her children and VR's children during the R family's visit. R. at 659.

AC did not document these admissions. R. at 660. Indeed, she did not tell any prosecutor or law enforcement official about Appellant's alleged admission until 2019, despite earlier conveying to the Government that she wanted to participate in a prosecution of Appellant in early fall 2018. R. at 614, 618-19. At trial, AC testified that she told her Special Victims Counsel [SVC] about Appellant's admission around the time of her divorce. R. at 613. This was

the first time AC alleged that she told someone in 2018 about these undocumented, unrecorded admissions. R. at 613.

AC Divorced Appellant

AC testified that she decided to divorce Appellant in May 2018. R. at 608. On re-cross-examination, AC claimed that Appellant made the above admissions after she informed him that she intended to file for divorce at "[t]he end of May into the summer." R. at 659. Several days after the alleged incident, however, AC told a Child Protective Services [CPS] investigator that she had already decided to divorce Appellant and prohibit him from seeing their sons.[16] R. at 615-16. AC denied telling Appellant that GL wanted to live with him in July 2018. R. at 623. Appellant's CDC impeached AC with her 3 July 2018 text to Appellant which stated that GL wanted to live with his dad. R. at 624; App. Ex. LIV.

AC's attorney filed for divorce until 24 July 2018. R. at 608; App. Ex. LIV. Before AC filed for divorce, she reconnected with OC. R. at 606. She spoke with OC for more than seven minutes on the day of the alleged incident and remained in sporadic contact with him until June 2018 when they communicated more frequently. R. at 607-608, 611. By the time AC's and Appellant's marriage was dissolved in November 2018, AC and OC were a couple and they later married. R. at 613.

Although a civilian court order permitted Appellant to visit with his sons, AC decided in 2019 to disregard the order and prevent Appellant from seeing his sons. R. at 625. AC also ignored Appellant's requests to AC's SVC to see his children. R. at 625.

[16] The military judge admitted parts of GL's and NL's 4 January 2018 statements to a CPS investigator as prior consistent statements to rebut the Defense allegation of improper influence pursuant to Mil. R. Evid. 801(d)(1)(B)(i). R. at 890-91, 901, 992, 994, 1001; Pros. Exs. 29, 30.

Money in Exchange for Testifying Against Appellant

On 10 September 2018, AC instructed her SVC to inform the Government that she did not want to participate in the case against Appellant. R. at 618. On 27 September 2018, she changed her mind. R. at 618. Around that time, AC learned that she was eligible to receive one month's rent money from a Texas program if she remained an active participant in the prosecution of Appellant. R. at 619-20. AC subsequently moved to terminate Appellant's parental rights and she married OC. R. at 626.

Other Witnesses' Accounts

GL testified that he was "locked in" his parents' bedroom and that he saw Appellant on top of AC and that Appellant choked her. R. at 667, 668, 673. He saw Appellant punch, push, and body slam AC. R. at 667, 676. He also saw Appellant vomit on AC and cuss at her. R. at 667, 668. GL felt shocked and confused. R. at 673. He recalled eating chicken in the kitchen with NL when GP came home. R. at 669-70, 678. GL testified that AC ran into the backyard, that Appellant chased her, and that he saw Appellant "doing something" to AC, but he did not know what. R. at 670. Appellant told GL "we're sleeping now," so GL went in the closet; Appellant did not tell him to get in the closet. R. at 670-71. While GL was in the closet, he heard his father speak, but he heard nothing else. R. at 671. He remembered Appellant talking about a family meeting or family time. R. at 672. GL testified that he was in the closet alone, that the closet door was open, and that NL "was just sleeping on the floor" of the bedroom. R. at 680.

NL did not see Appellant hurt AC in any way. R. at 691. The only thing he knew was that GL told him that their dad choked their mom with water. R. at 691. He did not remember either his mother or his father saying anything that day. R. at 691. He did not eat anything or

see GP that day, but he remembered knocking on his parents' bedroom door when he felt hungry. R. at 692, 695, 701. He remembered knocking on the neighbors' door for help so that Appellant would stop preventing GL and him from leaving the house, but the neighbors did not answer the door. R. at 692-93. He wanted the neighbors to call the police so that Appellant would stop what he was doing, which was preventing GL and NL from leaving the house. R. at 692, 693. NL testified that Appellant "put us in the closet" and he felt scared. R. at 690, 94. After he and GL got out of the closet, Appellant gave the phone to AC to call the police. R. at 694. NL recalled that GL cried that day. R. at 692. He did not see GP at all that day. R. at 695. He denied going upstairs to the loft. R. at 700. NL did not remember living anywhere but Texas. R. at 698-99.

AC insisted that she did not talk to her sons about what happened, but "I do ask them if they want to talk about it." R. at 621. She denied telling them that Appellant had grabbed a knife during the alleged incident, that Appellant strangled her, and that Appellant hit GP in the head. R. at 622. GL testified, however, that AC showed him a photo of bruises on her face and told him that Appellant grabbed a knife. R. at 675. AC admitted that she told her sons that some people had looked inside Appellant's brain and concluded that he had planned the alleged incident for a month. R. at 622. On cross-examination, NL did not know whether AC had told him about Appellant choking her or hitting GP in the head. R. at 705. He denied that AC told him that Appellant had planned the alleged incident for months. R. at 703. Major [Maj] HS, Appellant's former detailed defense counsel, testified that the Defense team interviewed NL in January 2021. R. at 1030. AC accompanied NL and observed the interview. R. at 1030, 1032. NL relayed that AC told him that Appellant had hit or punched GP in the face and that Appellant had planned the incident for a long time. R. at 1030, 1035, 1037. NL had no independent

memory of seeing Appellant punch GP; instead, he repeated what his mother told him.[17] R. at 1037. Maj HS recalled that both children looked at AC for approval during the interview. R. at 1032-33.

Appellant's brother, EL, testified that Appellant called him around 0200-0300 on 1 January 2018 to say that he was hiding from AC in a ditch. R. at 730. EL told Appellant to go home and sleep in the garage. R. at 730. Appellant called EL later that afternoon.[18] R. at 731; App. Ex. LVIII. Appellant slurred his words and said that he had been drinking and taking muscle relaxers. R. at 731, 734; App. Ex. LVIII. Appellant told EL that he was going to get the Big Chicken Dinner and go to jail for twenty years. R. at 735; App. Ex. LVIII. Appellant talked about suicide and EL begged him not to do it. R. at 735. AC interrupted the conversation and told Appellant to throw up. R. at 735, 737, 738. EL heard his brother vomit. R. at 738.

Additional facts necessary to resolve the assigned errors are contained in the arguments below.

ERRORS AND ARGUMENT

I.

THE SPECIFICATION OF CHARGE III FAILS TO STATE AN OFFENSE BECAUSE IT FAILED TO ALLEGE WHETHER THE CHILD ENDANGERMENT WAS BY DESIGN OR BY CULPABLE NEGLIGENCE.

Additional Facts

Specification 1 of Charge III alleges an offense in violation of Article 134, UCMJ:

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[17] NL testified that he did not know whether he told the Defense team that AC told him that Appellant had been planning the alleged incident for months. R. at 704. He insisted that he "didn't hear it" because he was "in the truck." R. at 703-704, 705. He did not remember the meeting in a big room with his mother and the Defense team. R. at 705.

[18] EL lived in San Diego. R. at 729. Appellant called him around 1500 San Diego time, which was 1700 Texas time. R. at 734.

> In that TECHNICAL SERGEANT GEORGE E. LOPEZ, United States Air Force, 502d Logistics Readiness Squadron, Joint Base San Antonio-Lackland, Texas, at or near San Antonio, Texas, on or about 1 January 2018, was responsible for the care of his two sons, [GL] and [NL], children under the age of 16 years, and did endanger their welfare by locking them in a room while he assaulted their mother, [AC], in their presence, and that such conduct was of a nature to bring discredit upon the armed forces.[19]

Charge Sheet.

On 14 January 2021, the Defense requested a Bill of Particulars from the Government.[20] R. at 144. Among other things, the Defense requested "What act or acts of assault are alleged as part of effectuating the charged child endangerment?" App. Ex. XVI.

On 21 March 2021, the Government provided the requested Bill of Particulars to the Defense. R. at 144; App. Ex. XVI. In response to the question about when the alleged child endangerment occurred in relation to the alleged sexual assault, the Government averred:

> The child endangerment begins with TSgt Lopez puts the children in the bedroom and keeps them there against their will. This is evidenced by [GL's] fear and desire to call 911 and [NL's] action of running outside to the neighbors to get help. The child endangerment continued through to when TSgt Lopez put the boys in the closet while he sexually assaulted AC. It continued during Charge I, Spec 6, when TSgt Lopez grabbed and pushed [GP] to the ground in front of the boys.

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[19] The Government originally preferred Specification 1 of Charge III without the terminal element, but on 19 March 2021, the Government added the terminal element as a major change without objection from the Defense. R. at 141-42, Charge Sheet.

[20] Several pages of the 14 January 2021 Defense Request for Bill of Particulars are missing from Appellant's ROT. The Defense Request for Bill of Particulars is not included as a separate appellate exhibit, nor does it appear in the Pretrial and Allied Papers; instead it is included in Attachment 17 to App. Ex. XVI, the Defense Motion to Dismiss for Unreasonable Multiplication of Charges. The Request for Bill of Particulars is apparently a four-page document, yet the second and third pages are missing from Appellant's ROT. App. Ex. XVI. Based on the Government Response to Request for Bill of Particulars, which is Attachment 18 to App. Ex. XVI, it appears that the Defense requested "When is the alleged child endangerment in relation to the alleged sexual assault?" immediately preceding the question "What act or acts of assault are alleged as part of effectuating the charged child endangerment?" App. Ex. XVI.

App. Ex. XVI.

In response to the question about what acts or acts of assault are alleged as part of effectuating the charged child endangerment, the Government answered, "Charge I, Specifications 1, 2, and 5." App. Ex. XVI.

Motion to Dismiss for Failure to State an Offense

In a 7 June 2021 Article 39(a), UCMJ, session, the Defense orally moved to dismiss Specification 1 of Charge III for failure to state an offense because the specification did not allege a mens rea, such that it failed to provide proper notice to Appellant whether he needed to defend against a mens rea of culpable negligence or a mens rea of by design.[21] R. at 141, 142. Appellant's CDC argued that the mens rea is an element that must be charged. R. at 143.

The Government opposed the motion as out of time and because the Government had provided a Bill of Particulars. R. at 144-45. The Government announced that its proposed instructions[22] "made clear that it believes this is a culpable negligence crime and not a crime by design" and that Appellant was not prejudiced because the maximum punishment for child endangerment by culpable negligence is much lower than for the same offense by design R. at 145. The Government argued that child endangerment by culpable negligence is a general intent crime and that the mens rea is necessarily implied. R. at 145-46, 148. Appellant's CDC argued that the failure to charge a mens rea had double jeopardy implications, that the Defense was not

[21] The Defense initially raised the issue as an objection to the Government's proposed instructions, but later clarified that it sought dismissal of the offense. R. at 142, 143. The Defense also stated that it made a tactical decision not to raise the motion to dismiss the specification prior to the 23 April 2021 motions deadline. R. at 142.

[22] The Government provided proposed instructions to the Defense on 31 May 2021. R. at 145. The CTC averred that the Defense timely returned the proposed instructions with "thoughts and edits." R. at 145. The proposed instructions are not contained in Appellant's ROT.

on notice, and that the Government cannot pick a mens rea in the "lead up to trial" via the proposed instructions. R. at 151.

The Military Judge's Ruling

The military judge denied the motion to dismiss for failure to state an offense in a 10 June 2021 written ruling. App. Ex. LXVI. The military judge found that the Government's proposed instructions "included culpable negligence as part of the third element of Specification 1 of Charge III and provided a definition of culpable negligence" and that "[t]he defense indicated it objected 'to a culpable negligence instruction where the prosecution failed to provide notice of a *mens rea* in the charged offense.'" App. Ex. LXVI (emphasis in original).

The military judge determined that child endangerment by culpable negligence is a general intent offense because child endangerment by design "adds a specific intent element and alleges an offense of which child endangerment by culpable negligence is a lesser included offense." App. Ex. LXVI. He distinguished this Article 134 offense from that alleged in *United States v. Fosler*,[23] in which "the terminal elements present options for different offenses, not a greater offense and an LIO." App. Ex. LXVI. He added, "As noted in *Bryant*,[24] general intent does not ordinarily need to be separately alleged, which is likely why AFCCA did not list it as part of the elements of child endangerment by culpable negligence in *Lafontaine*,[25] even though evincing an understanding that culpable negligence was required for a finding of guilt." App. Ex. LXVI.

[23] 70 M.J. 225 (C.A.A.F. 2011).
[24] *United States v. Bryant*, 39 C.M.R. 180 (A.B.R. 1968).
[25] *United States v. Lafontaine*, 2017 CCA LEXIS 523 (A.F. Ct. Crim. App. 2 Aug. 2017) (unpub. op.). In *LaFontaine*, this Court was tasked with determining whether the accused's plea for child endangerment by culpable negligence was provident. *Id*. It is not a case about the mens rea necessary for child endangerment, contrary to the military judge's statement in his ruling. App. Ex. LXVI.

Next, the military judge concluded that "[e]ven if culpable negligence is, on its own, an essential element of the offense, I find the specification necessarily implies culpable negligence" because it put Appellant on notice that he endangered his sons' welfare, in that "he subjected them to a reasonable probability . . . of harm" by locking them in a room while he assaulted their mother. App. Ex. LXVI. In other words, "the specification alleges that TSgt Lopez used unlawful force or violence causing an offensive touching by at least culpable negligence against AC in the presence of his sons in a way that subjected them to a reasonable probability of harm to his sons' welfare." App. Ex. LXVI.

The military judge concluded that, although a bill of particulars cannot save a facially deficient specification, "the bill of particulars and other information noted in the facts section above are relevant regarding notice, fairness and how narrowly or broadly the language in the specification should be read." App. Ex. LXVI. The Defense "understood it needed to defend against a charge of child endangerment." App. Ex. LXVI. Additionally, "[g]iven the tactical nature of the defense's approach and lack of surprise, a broader reading of the language of the specification is warranted. That said, even a narrow but reasonable reading of the specification, as outlined in the previous paragraph [of what the specification alleges], supports a finding that culpable negligence is necessarily implied in the specification." App. Ex. LXVI.

In finding that Specification 1 of Charge III alleges an offense, the military judge concluded: (1) it alleges every element of the charged offense expressly or by necessary implication; (2) it includes the essential elements of the offense; (3) provides notice of the charge; and (4) protects Appellant against double jeopardy for child endangerment by culpable negligence against his sons by assaulting their mother in their presence. App. Ex. LXVI.

During a discussion on instructions, the military judge summarized his ruling. R. at 1049. The Defense noted that, in his cross-examination of AC regarding her claim that Appellant had planned the alleged incident for an extensive period of time, AC's testimony "suggest[ed] design. . . ." R. at 1049-50. The military judge responded:

> [S]o I see this different from [*Fosler*], because in [*Fosler*], the terminal elements are different ways to commit an offense, whereas this is actually listed as an LIO. So, the child endangerment by culpable negligence is an LIO of design, and so it's a lesser offense. And so it's not – you can only do one or the other. It's that if you do the greater [then] you have done the lesser. And so, yes, if you're charging it and you haven't charged the greater, then you're just looking at the lesser."

R. at 1050.

The Military Judge's Instructions

The military judge instructed the panel that the third element of the offense of child endangerment, in violation of Article 134, UCMJ, was that Appellant "endangered [GL and NL's] welfare through culpable negligence by locking them in a room while he assaulted their mother, [AC], in their presence." R. at 1077-78. Next, he defined "culpable negligence." R. at 1078.

Standard of Review

Whether a specification states an offense is question of law reviewed de novo. *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012).

Law

The Sixth Amendment provides that an accused shall "be informed of the nature and cause of the accusation" against him. U.S. Const. amend. VI. Further, the Fifth Amendment provides that no person shall be "deprived of life, liberty, or property, without due process of law," and no person shall be "subject for the same offence to be twice put in jeopardy." U.S.

Const. amend V. Thus, when an accused servicemember is charged with an offense at court-martial, each specification will be found constitutionally sufficient only if it alleges, "either expressly or by necessary implication," "every element" of the offense, "so as to give the accused notice [of the charge against which he must defend] and protect him against double jeopardy." *United States v. Turner*, 79 M.J. 401, 403 (C.A.A.F. 2020) (quoting *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994) (internal quotation marks omitted) (quoting RCM 307(c)(3)). In other words, this is a three-prong test requiring (1) the essential elements of the offense; (2) notice of the charge; and (3) protection against double jeopardy. *Dear*, 40 M.J. at 197. When an element is not alleged expressly, this Court must determine whether it was alleged by necessary implication. *Turner*, 79 M.J. at 404. The interpretation of a specification in such a manner as to find that an element was alleged by necessary implication is disfavored. *Ballan*, 71 M.J. At 12-14.

Rule for Courts-Martial [RCM] 907(b)(1)(B) provides that a charge or specification shall be dismissed at any stage of the proceedings if "[t]he specification fails to state an offense." "[W]hen [a] charge and specification are first challenged at trial, we read the wording . . . narrowly and will only adopt interpretations that hew closely to the plain text." *Id*. at 403 (quoting *Fosler*, 70 M.J. at 230). "Hewing closely to the plain text means we will consider only the language contained in the specification when deciding whether it properly states the offense in question." *Id*. (citing *United States v. Sutton*, 68 M.J. 455 (C.A.A.F. 2010). If a specification fails to state an offense, the appropriate remedy is dismissal of that specification unless the Government can demonstrate that this constitutional error was harmless beyond a reasonable doubt. *Id*. (citing *United States v. Humphries*, 71 M.J. 209, 213 n.5 (C.A.A.F. 2012).

"[W]here defects in a specification are raised for the first time on appeal, dismissal of the affected charges or specifications will depend on whether there is plain error – which, in most cases, will turn on the question of prejudice. *United States v. Cotton*, 535 U.S. 625, 631-32 (2002) (applying plain error review); *United States v. Sinks*, 473 F.3d 1315, 1320-21 (10th Cir. 2007) (applying plain error, not harmless, error review); *see also Ballan*, 71 M.J. at 31-36; *United States v. Girouard*, 70 M.J. 5, 10-12 (C.A.A.F. 2011) (footnote and citations omitted). In a plain error analysis of defective indictments, "[the] [a]ppellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." *Girouard*, 70 M.J. at 11 (citing *United States v. Powell*, 49 M.J. 160, 463-65 (C.A.A.F. 1998)); *see also Cotton*, 535 U.S. at 631-32; *United States v. Paige*, 67 M.J. 442, 449 (C.A.A.F. 2009 (citations omitted).

The elements of child endangerment, in violation of Article 134, UCMJ, are:

> (1) That the accused had a duty for the care of a certain child;
>
> (2) That the child was under the age of 16 years;
>
> (3) That the accused endangered the child's mental or physical health, safety, or welfare through design or culpable negligence; and
>
> (4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Manual for Courts-Martial, United States (2016 ed.) [2016 MCM], pt. IV, ¶ 68a.(b).

The explanation of the offense distinguishes between child endangerment by culpable negligence and child endangerment by design. Design "means on purpose, intentionally, or according to plan and requires specific intent to endanger the child," whereas culpable negligence

> is a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. In the context of this offense, culpable negligence may include acts that, when viewed in the light of human experience, might foreseeably result in harm to a child, even though such harm would not necessarily be the natural and probable consequences of such acts. In this regard, the age and maturity of the child, the conditions surrounding the neglectful conduct, the proximity of assistance available, the nature of the environment in which the child may have been left, the provisions made for care of the child, and the location of the parent or adult responsible for the child relative to the location of the child, among others, may be considered in determining whether the conduct constituted culpable negligence.

Id. at ¶ 68a.(c)(1)-(2).

The MCM lists maximum punishments for six types of child endangerment – three types of child endangerment by design and three types of child endangerment by culpable negligence. *Id*. at (1)-(6). The lowest maximum sentence to confinement is confinement for one year for other cases by culpable negligence and the highest maximum sentence to confinement is confinement for eight years. *Id*. Each of the three sample specifications provides the Government with the option of charging an accused of child endangerment by design or by culpable negligence with the sample phrases "and that such conduct (was by design) (constituted culpable negligence)." *Id*. at ¶ 68a.(f). These options are similar to the options in each sample specification for charging an accused with conduct violating Clause 1, Clause 2, or both Clauses 1 and 2 of Article 134, UCMJ, with the sample phrases "and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces)." *Id*.

Argument

Specification 1 of Charge III fails to state an offense because it failed to allege, either expressly or by necessary implication, the essential element of whether the conduct endangering GL and NL was by design or by culpable negligence. Accordingly, Appellant was not on notice whether he needed to defend himself against child endangerment by design or by culpable negligence. Finally, the failure to allege "by design" or "by culpable negligence" exposed Appellant to double jeopardy.

At trial, the Defense initially characterized the issue as an objection to the Government's proposed instructions, but both the parties and the military judge ultimately recognized the issue as a motion to dismiss for failure to state an offense. The Defense also initially characterized the issue as a failure to allege a mens rea and argument on the motion centered on whether child endangerment is a general intent offense or a specific intent offense.

On appeal, however, Appellant avers that the issue was imprecisely framed and analyzed at trial. The issue is not whether child endangerment by culpable negligence is a general intent crime or whether this offense is a LIO of child endangerment by design, as the military judge concluded; instead, the issue is that the specification failed to state an offense because it failed to allege an essential element expressly or by necessary implication, the failure did not put Appellant on notice what he needed to defend himself against, and the failure exposed Appellant to double jeopardy. In other words, the issue is not whether the endangering conduct can be criminalized under Article 134, UCMJ, but whether the wording of the specification satisfies constitutional requirements. *See Fosler*, 70 M.J. at 230.

1. <u>The specification failed to allege the third element of the offense expressly or by necessary implication.</u>

Because Appellant challenged Specification 1 of Charge III at trial, this Court will "read the wording . . . narrowly and will only adopt interpretations that hew closely to the plain text." *Turner*, 79 M.J. at 403 (quoting *Fosler*, 70 M.J. at 230). The specification plainly fails to expressly allege the third element of the offense: that Appellant endangered GL's and NL's welfare through design or culpable negligence. The third element of the offense provides the Government with options for charging Appellant with conduct that endangered the children's "mental or physical health, safety, or welfare." The Government elected to charge Appellant with endangering the children's welfare. Next, the third element of the offense provides the Government with options for charging Appellant with conduct that endangered the children's welfare "by design or culpable negligence." Although the Government elected one of the options for "mental or physical health, safety, or welfare," the Government failed to elect one of the options for whether Appellant committed the charged acts through design or culpable negligence. Similarly, although each sample specification provides the Government with options for charging Appellant with conduct that endangered the children's welfare by design or through culpable negligence, the Government failed to do so. The Government knew how to make an election among conduct that was prejudicial to good order and discipline, service-discrediting, or both, yet failed to do so for whether Appellant committed the charged acts through design or culpable negligence.

The Government failed to allege the third element by necessary implication. It defies logic that an essential element can be alleged by necessary implication when there are explicit options for how to charge an accused. This is especially true where the options, as here, are mutually exclusive. Either Appellant endangered his children's welfare by "on purpose, intentionally, or according to plan [with a] specific intent to endanger" the children or he did so

with "a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission." Hewing closely to the plain text of the specification, it is obvious that the absence of the required language for the essential element meant that there was nothing to imply, and certainly not necessarily.

2. Appellant was not on notice of what he was required to defend against.

At trial, the Government insisted that Appellant was on notice because of its response to the request for a Bill of Particulars and its proposed instructions. Nothing in the Bill of Particulars addressed whether the endangering conduct was by design or through culpable negligence. The Government's response answered the Defense questions as to when the endangering conduct occurred in related to the alleged sexual assault and what act or acts of assault constituted the endangering conduct. The Government provided a narrative answer to the first question and merely listed which specifications of Charge I constituted the alleged acts effectuating the child endangerment. Nothing in the Government's response addressed whether Appellant committed the acts by design or through culpable negligence.[26] Next, the Government's proposed instructions constituted insufficient notice because the Government provided them on 31 May 2021, six days after Appellant was arraigned and the parties litigated several pretrial motions for this iteration of the court-martial. Furthermore, the proposed instructions were not a charging instrument – they were just some draft thoughts by the Government which did not bind the Government or properly notify Appellant of the element he needed to defend himself against.

[26] The Government did not address, either in the Bill of Particulars or on the record, why it took more than two months to respond to the Defense request for a Bill of Particulars. App. Ex. XVI.

The military judge's conclusion that the specification necessarily implied culpable negligence because it put Appellant on notice that he endangered his sons' welfare, in that "he subjected them to a reasonable probability . . . of harm" by locking them in a room while he assaulted their mother is illogical. There is nothing in the charged language to support this conclusion especially when the military judge stated that Appellant "used unlawful force or violence causing an offensive touching by at least culpable negligence against AC in the presence of his sons. . . ." App. Ex. LXVI. Putting aside for the moment that the Government charged endangering acts toward the children and not AC, the military judge acknowledged the ambiguity, or lack of notice, in the specification when he stated that Appellant acted "by at least culpable negligence." Essentially, the military judge acknowledged that Appellant acted, at minimum, by culpable negligence, but that he may have acted by design. The point is that Appellant did not know whether he needed to defend himself against an accusation that he acted "on purpose, intentionally, or according to plan [with a] specific intent to endanger" the children or he acted with "a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission."

Finally, the military judge faulted the Defense for its tactic in not telling the Government that it failed to allege the third element of the offense. The Defense is not required to assist the Government in prosecuting Appellant, but it must be noted that the Government knew how to amend a specification. It already did so on 19 March 2021, when it added the terminal element of Specification 1 of Charge III as a major change. The Government could have added "by design" or "through culpable negligence" at the same time but failed to do so. The Defense did not object to the Government's addition of the terminal element, even though the addition constituted a major change. It is reasonable to assume that the Defense would not have objected

to the addition of the requisite language of the third element of the offense, but the bottom line is that the Defense had no obligation to perfect the Government's case against Appellant.

3. The failure to allege the third element exposed Appellant to double jeopardy.

The military judge concluded that child endangerment through culpable negligence was a LIO of child endangerment by design. R. at 1050. He stated, "you can only do one or the other. It's that if you do the greater [then] you have done the lesser. And so, yes, if you're charging it and you haven't charged the greater, then you're just looking at the lesser." R. at 1050. He made this statement immediately after the Defense noted that AC testified that Appellant had planned the alleged incident for a long time, meaning that the Government's witness had provided potential evidence of child endangerment by design, which exposed Appellant to a possible prosecution for the greater offense. The military judge failed to address the Defense's contention, which leads to one conclusion: Appellant is at risk of being prosecuted again for the same acts. For this reason, the Government cannot demonstrate that this constitutional error was harmless beyond a reasonable doubt.

4. Appellant prevails under a plain error analysis.

Should this Court conclude that Appellant's challenge of the specification on appeal differs from the challenge at trial, Appellant still prevails under a plain error analysis.[27] For the reasons stated above, the Government's failure to allege the third element of the offense was plain and obvious error. Because Appellant remains exposed to the possibility of prosecution for the same charged acts, thanks to AC's testimony, the failure to allege the third element of the offense materially prejudiced Appellant's substantial right to protection from double jeopardy.

[27] Appellant maintains that the challenge of the specification at trial preserved the issue and that the form of the challenge does not mandate a plain error analysis, but should this Court disagree, Appellant still prevails.

Conclusion

WHEREFORE, because of error prejudicial to the substantial rights of Appellant, he respectfully requests that this Honorable Court set aside and dismiss the finding of guilty for Specification 1 of Charge III and reassess the sentence.

II.

THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUPPORT THE FINDINGS OF GUILTY FOR ASSAULT CONSUMMATED BY A BATTERY IN SPECIFICATIONS 1-4 OF CHARGE I AND FOR SEXUAL ASSAULT IN THE SPECIFICATION OF CHARGE II.

Standard of Review

Questions of legal and factual sufficiency are reviewed de novo. *United States v. Bright*, 66 M.J. 359, 363 (C.A.A.F. 2008); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

Article 66(d), UCMJ, mandates that this Court review the legal and factual sufficiency of the evidence and affirm only those findings of guilty which this Court finds correct in law and in fact. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). Such a review involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency. *Washington*, 57 M.J. at 399. The term "reasonable doubt" does not mean that the evidence must be free from conflict. *United States v. Wheeler*, 76 M.J. 565, 568 (A.F. Ct. Crim. App. 2017) (citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)). It does, however, mean "a conscientious doubt, based upon reason and common sense, and arising from the state of the evidence" and "proof that leaves you firmly convinced of the accused's guilt."

Dept. of the Army Pam. 27-9, Military Judges' Benchbook (Benchbook), para. 2-5 (29 Feb. 2020).

The test for legal sufficiency is "whether, considering the evidence in a light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003); *United States v. Pabon*, 42 M.J. 404, 405 (C.A.A.F. 1995) (*quoting Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The test for factual sufficiency is, "whether after weighing the evidence in the record of trial, and making allowances for not having personally observed the witnesses, [this Court is] convinced of [appellant's] guilt beyond a reasonable doubt." *Walters*, 58 M.J. at 396 (*citing Turner*, 25 M.J. at 325)). This Court must be convinced of appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325.

The Elements of Assault Consummated By a Battery

In Specification 1 of Charge I, the panel convicted Appellant of unlawfully strangling AC on the neck with his upper forearm on divers occasions on or about 1 January 2018. In Specification 2 of Charge I, the panel convicted Appellant of unlawfully grabbing and pushing AC down to the ground with his hands on or about 1 January 2018. In Specification 3 of Charge I, the panel convicted Appellant of unlawfully pushing AC on the head with his hand on or about 1 January 2018. In Specification 4 of Charge I, the panel convicted Appellant of unlawfully striking AC in the face with his hand on divers occasions on or about 1 January 2018. R. at 1183; Entry of Judgment.

The elements of assault consummated by a battery, in violation of Article 128, UCMJ, are:

(1) That the accused did bodily harm to a certain person; and

(2) That the bodily harm was done with unlawful force or violence.

2016 MCM, pt. IV, ¶ 54.b.(2).

The Elements of Sexual Assault

In the Specification of Charge II, the panel convicted Appellant of committing a sexual act upon AC, by penetrating her vulva with his penis, by causing bodily harm to her, to wit: penetrating her vulva with his penis, without her consent on or about 1 January 2018. R. at 1183; Entry of Judgment.

The elements of sexual assault, in violation of Article 120, UCMJ, are:

(1) That the accused committed a sexual act upon another person by causing penetration, however slight, of the vulva or anus or mouth by the penis; and

(2) That the accused did so by causing bodily harm to that other person.

MCM, pt. IV, ¶ 45.b.(3)(b)

Argument

The evidence is legally and factually insufficient to support the findings of guilty for Specifications 1-4 of Charge I, The Specification of Charge II, and Charge II for six reasons: (1) AC had no credibility; (2) the physical evidence did not support the convictions; (3) AC gave wildly inconsistent accounts of the alleged incident; (4) AC agreed to testify only after learning she could get money from the state government; (5) Deputy DP did not hear Appellant say, "I did cruel and unusual things."; and (6) the shoddy investigation failed to pursue relevant evidence.

1. AC had no credibility.

On New Year's Even 2017, AC had been furious with her husband – not just because she found his celebration of her 28 December 2017 insufficient, and not just because their marriage had been a "business-type relationship" full of fights and threats of divorce for years, but because Appellant broke their pact that he would only drink alcohol if she was present and he drank alcohol at the neighbor's party while she stayed home with NL. This pact was not an agreement or meeting of the minds between two people; rather, this was an ultimatum from AC because she was sick and tired of dealing with Appellant's PTSD. She feared that the New Year's Eve fireworks would trigger yet another PTSD episode and she had no patience for another episode, especially after he had been drinking. Just as she expected, Appellant "revert[ed] back to times in Iraq." AC did not care about Iraq and did not want to talk about it again. When Appellant came home for the final time that night, he retreated to the loft. AC, still hot about Appellant drinking without her and not fighting for their family, followed him upstairs. From a fetal position in the loft, Appellant shouted at unseen ghosts, "Don't yell at me; don't hurt me. Don't hurt me." He insisted that he was a possum. AC had seen this PTSD episode before – how many times had Appellant said that he was like a possum in Iraq? – and she was finally done with Appellant and her marriage.

AC testified that Appellant brutally attacked and sexually assaulted her in their home and that she feared for her life as her husband threatened to kill them both in a murder-suicide, but she was so desperate to see him and remind him of her love that she tried to visit him while he was in a mental health unit at BAMC, despite the existence of two protective orders. When hospital personnel turned AC away, she solicited her cousin to pass a note to Appellant. She forgave Appellant and promised to keep by his side as long as he fought his PTSD demons and fought for their family. She professed her enduring love for Appellant – "You're the love of my

life. I love you more than ever. I miss you very much, babe, but right now we both need to be strong in our faith and love for each other." AC initially lied at trial about the existence of the note and the sentiments therein, but when confronted with the note, she finally admitted that she voluntarily wrote the note.

Fresh from this profession of love and commitment, AC crowdsourced approximately $3000 from sympathetic friends, even though she had her own bank account. AC took this money from her friends while Appellant was still involuntarily hospitalized and was not a risk to anyone and could not withdraw any money from their joint account. Then she spent nearly half that sum on a designer purse.

On the very day AC returned to Texas, she contacted Appellant and asked him to meet her at a restaurant in a city where they would not be recognized by any Air Force personnel. AC and Appellant had consensual sex that night and on many occasions over the next few months. Their newfound pleasure in each other and their relationship was so great that they devised a scheme to smuggle Appellant into the family home so that no military neighbors, who knew of the protective orders, would see them together. AC told a friend that her marriage and sex life was "better than ever" and she relished the opportunity to speak uncensored about her revitalized sex life. This "better than ever" marriage and sex life occurred while law enforcement personnel investigated AC's allegations against Appellant and questioned her about whether she remained in contact with him. AC lied to every investigator. She also lied to the prosecutors about the nature of her and Appellant's relationship, claiming only that they were in touch and had seen each other. AC maintained this deception until she was impeached at a November 2019 pretrial motions hearing.

Before, during, and after the alleged incident, AC believed that Appellant had experienced a PTSD episode triggered by the New Year's Eve fireworks and exacerbated by his consumption of alcohol. She believed that the alleged incident was an isolated episode, so much so that she trusted her sons and her dear friend's children with Appellant. Months later, when she felt that Appellant was no longer fighting as hard for their family as she wanted because he forgot Mother's Day and did not take GL fishing, she claimed that Appellant told her that he had planned the alleged incident for months and that he wanted her to feel all the pain and humiliation he had felt for years. Even after Appellant allegedly told AC that he planned the attack, she remained in the marriage, welcomed VR's family to her home, and told VR about a new sexual activity with Appellant. Even after Appellant allegedly told AC that he plotted the attack, she continued to send flirty texts and sexually provocative photos of herself to him. They fantasized about a certain sexual act but feared that someone from his unit would see him at her house. She taunted him with more provocative photos of herself and demanded that he get his "ass" over to their house where they later had sex. When Appellant discerned that AC was not as enthusiastic about the act as he expected her to be, he stopped, meaning he believed that she had withdrawn her consent.

AC's story – that Appellant was not in the throes of a terrifying PTSD episode and that he plotted the day-long assault – is not believable given her utter lack of credibility, mendacity to investigators and the prosecutors, and conduct after the incident – including her desperate efforts to remind Appellant of her love, their months-long sexual and emotional relationship, and her remaining committed to her marriage until she concluded that Appellant did not fight hard enough for their family. Thus, for those specifications for which AC's testimony was the

linchpin of the Government's case –Specifications 1-4 of Charge I and the Specification of Charge II – the evidence is legally and factually insufficient to support the findings of guilty.

2. The physical evidence did not support the convictions.

Because Appellant did not contest at trial, nor does he contest on appeal, that his penis penetrated AC's vulva on or about 1 January 2018, the testimony by the Government's expert witnesses was irrelevant, especially because the DNA testing could not determine when or how Appellant's DNA and semen were deposited on AC's vaginal and rectal swabs. The nurse examiner found no trauma to AC's vulva or anus, but a lack of genital trauma following an allegation of sexual assault is common among women, like AC, who have had vaginal deliveries or intercourse.

Despite a day-long physical attack, AC had few physical injuries which corresponded to the intense attacks she described. Indeed, Investigator AP's photos of AC revealed a swollen lip and eyes, a scratched lip, a small scratch abrasion on the right foot, and some redness on the left wrist. AC insisted that Appellant had thrown her into the backyard fence, punched her in the face repeatedly, and body slammed her multiple times. The Family Advocacy social worker testified that AC appeared to be in pain and seemed uncomfortable. R. at 771. Given the level of violence and intensity AC described, one would expect her injuries to be more severe. Additionally, AC testified that she scratched Appellant's hands and upper shoulder/chest area and that her fingernails extended past her fingertips, but Appellant did not have any scratches on his upper body. R. at 537, 538.

The digital forensic evidence was as irrelevant as the SAFE exams. Although the alleged incident occurred on 1 January 2018, AC did not give her iPhone to the investigators until later in 2019 or 2020. While AC's phone showed no activity between 0455 and 1835 on 1 January

2018, she deleted huge swaths of her phone before giving it to the investigators and then limited her consent as to what they could search. She deleted all texts, Facebook Messenger messages, and all other communications with Appellant before handing over her phone. While she provided her phone, she refused to provide her Apple watch or the boys' iPads. These devices were likely linked to her iPhone and would have provided highly relevant evidence. AC's failure to provide these devices indicated her fear that evidence contradicting her testimony would be discovered. At a bare minimum, she knew that her phone would contain all the communication between her and Appellant that she lied about to the investigators and the prosecutors.

3. AC gave wildly inconsistent accounts of the alleged incident.

On 7 January 2018, six days after the alleged incident, AC told the Bexar County Sheriff's Office that she and Appellant fought four times between 31 December 2021 and 1 January 2018. R. at 505; App. Ex. XLVII. At trial, she claimed they fought only three times. When confronted with the discrepancy, AC answered, "So, well it depends basically." R. at 505. This pattern repeated itself throughout AC's testimony: when confronted with her statement, she either vacillated – "well it depends basically" – or she claimed not to remember – "I don't remember exactly what I wrote on the statement." R. at 505 *et seq*.

AC told the Bexar County Sheriff's Office that she was not in her bedroom when Appellant took her phone; she wrote, "I then told him that he could keep [my phone] and [I] walked back to my room and laid down." R. at 519; App. Ex. XLVII. At trial, however, she embellished her story and claimed that Appellant yelled at her as if he was a drill sergeant, picked up her phone from the floor, and demanded the password. When confronted with the discrepancy, she admitted that her account to the Sheriff's Office was true.

On 4 January 2018, AC told the Family Advocacy social worker that Appellant placed her phone and her children's devices in the corner of the master bedroom. At trial, however, she insisted that Appellant placed the devices in the first-floor office.

AC testified that Appellant strangled her the same way each time by wrapping his arm around her neck as she lay face-up on the bed and that he squeezed her abdomen with his legs. Regarding the second alleged strangling, however, AC testified that Appellant strangled her from behind. This is not the "same" and AC's accounts were irreconcilable.

AC's account differed from her children's accounts, most notably NL's testimony that he did not see Appellant hurt AC in any way, GL's testimony that he was in the closet alone, NL's testimony that he did not eat anything, go upstairs to the loft, or see GP at all that day. NL did not even remember living in California. The boys clearly struggled during their testimony, either because of their age, because their recollections faltered, or because they confused their own memories with what AC told them about the day, as Maj HS testified. The boys' testimony, especially NL's was unreliable and heavily influenced by AC. NL testified that AC and OC told him to "say the truth and don't lie," but, because of his tender age and AC's repeated discussion of her version of events, it is likely that NL repeated what he was told and not what he remembered.

Most crucially, AC told the social worker that Appellant shoved her in the closet and penetrated her vagina and that she kept quiet because she knew the boys were right outside the closet door. At trial, however, she maintained that Appellant sexually assaulted her on the bed while the boys were in the closet. These accounts are irreconcilable. AC knew they were irreconcilable and claimed not to remember her statement to the social worker in an effort to avoid being caught in a lie at trial.

4. AC agreed to testify only after learning she could get money from the state government.

On 10 September 2018, AC instructed her SVC that she did not want to participate in the prosecution of Appellant, which meant that her children also would not participate. She gave this instruction months after Appellant allegedly told her that he planned the attack. At trial, however, AC insisted that she chose to participate after learning that Appellant planned the attack. These two accounts are irreconcilable. AC agreed to testify not because Appellant revealed that he planned the attack, but because she learned that she was eligible for free money from the Texas state government so long as she remained an active participant in the prosecution of Appellant.

5. Deputy DP did not hear Appellant say, "I did cruel and unusual things."

The Government's theory of the case was that Appellant did cruel and unusual things. Some of the first words of the Government's opening statement were, "When they asked, 'Did you sexually assault your wife,' [Appellant] said, 'Yes. I did some cruel and unusual things.'" R. at 393. The Government reiterated Appellant's alleged statement in the last words of the opening statement and again in the closing argument and the slides for the closing argument. R. at 395, ; App. Ex. LXIX. Of the twenty-seven times that the word "cruel" was used at trial, the Government uttered it 17 times during the merits phase and twice during the presentencing phase. R. at 393, 395, 709, 710, 1088, 1089, 1092, 1093, 1099, 1102, 1260, 1269.

Unfortunately for the Government, Deputy DP, who stood next to Appellant and Deputy PM, never heard Appellant say that he did "cruel and unusual things." Deputy DP heard Appellant say, "I did it." Had Appellant made such a distinct, memorable statement as "I did cruel and unusual things," Deputy DP would have recalled it. The deputies' recollections were irreconcilable.

6. The shoddy investigation failed to pursue relevant evidence.

Despite AC reporting Appellant's suicide attempt to 911 and Appellant's admission to Deputy PM that he suffered from PTSD, no investigator photographed or collected the bottle of pills from the kitchen. Despite the disarray in the bedroom, the only item collected was a single bedsheet which was not tested for DNA, semen, vomit, or other biological substances. The police photographer did not photograph Appellant's upper body or hands despite AC's contention that she scratched him and fought back. There was no analysis of the fingernail scrapings collected from AC's fingernails. No investigator contacted the neighbors whose houses NL ran to for help, despite the possibility of home video surveillance at their front doors. No investigator searched for or collected the knife that Appellant allegedly brandished.

This Court's fresh, impartial look at the evidence gives no deference to the trial court's decision on factual insufficiency. *See Washington*, 57 M.J. at 399. Even when considering the evidence in a light most favorable to the prosecution, a reasonable factfinder could not have found all the essential elements of both sexual assault and assault consummated by a battery beyond a reasonable doubt. *See Walters*, 58 M.J. At 396. In light of this fresh, impartial look at the evidence and not having personally observed the witnesses, particularly AC and her admitted mendacity, this Court cannot be convinced of Appellant's guilt beyond a reasonable doubt.

Conclusion

WHEREFORE, because of error prejudicial to the substantial rights of Appellant, he respectfully requests that this Honorable Court set aside the findings of guilty for Specifications 1-4 of Charge I, the Specification of Charge II, and Charge II, and reassess the sentence.

III.

APPELLANT WAS PRESUMPTIVELY PREJUDICED BY THE ABSENCE FROM THE RECORD OF TRIAL OF

MOTIONS, EVIDENCE, AND RULINGS FROM THE FIRST ITERATION OF THE COURT-MARTIAL UPON WHICH THE MILITARY JUDGE AND THE PARTIES RELIED FOR THIS COURT-MARTIAL.

Additional Facts

On 12 December 2018, the Government preferred one charge containing one specification alleging rape by unlawful force of AC on or about 1 January 2018 and one charge containing one specification alleging assault consummated by a battery of AC on or about 1 January 2018, in violation of Articles 120 and 128, UCMJ. App. Ex. VI.

Over Appellant's waiver, a preliminary hearing pursuant to Article 32, UCMJ, was conducted on 16 January 2019. App. Ex. VI. The two charges and their specifications were referred to a general court-martial on 27 March 2019. App. Ex. VI. The military judge scheduled a pretrial motions hearing for the week of 26 August 2019 and scheduled the trial for the week of 9 September 2019. App. Ex. VI.

On 14 August 2019, the Defense requested a delay in filing motions and for requests for the production of witnesses due to significant outstanding discovery and witness access issues. App. Ex. VI. The outstanding discovery included CPS records for GL and NL, as well as phone records. App. Ex. VI. The military judge granted the request. App. Ex. VI.

The military judge granted the parties' request for additional continuances and scheduled a pretrial motions hearing for 25-26 November 2019 and scheduled trial for 30 March 2020. App. Ex. VI.

The military judge presided over a pretrial motions hearing on 25 November 2019. App. Ex. VI. The following day, the military judge issued a new scheduling order with an additional motions hearing for 26-27 March 2020. App. Ex. VI.

Because of travel limitations resulting from the pandemic, the motions hearing was rescheduled for 23 July 2020 and trial was rescheduled for 11 January 2021. App. Ex. VI.

On 11 January 2021, the military judges and the parties participated in several RCM 802 conferences but the parties never went on the record, nor was the court-martial assembled. App. Ex. VI. The RCM 802 conferences focused on errors in the selection of panel members and in the issuance of convening orders. App. Ex. VI.

On 12 January 2021, the convening authority ordered the withdrawal and dismissal of the charges and specifications without prejudice. App. Ex. VI.

On 14 January 2021, the Government preferred the current charges and specifications anew. R. at Charge Sheet; App. Ex. VI. That same day, Appellant waived his right to a preliminary hearing and no hearing was conducted. App. Ex. VI. The convening authority referred the current charges and specifications to a general court-martial on 23 January 2021. App. Ex. VI.

None of the motions or rulings which were the subject of the aforementioned Article 39(a), UCMJ, hearings are included in the ROT. Nonetheless, the parties and the military judge referenced and relied on the motions and rulings from the first iteration of trial in Appellant's court-martial. The Defense referenced a 2019 motion for speedy trial and cross-examined AC about the November 2019 motions hearing multiple times. R. at 115, 552, 557, 559, 606, 608, 620, 655. Additionally, the Defense clemency submission, dated 23 June 2021, references "the military judge's ruling to admit prior inconsistent statements by [AC]." R. at Clemency Submission. The ROT does not contain these motions or rulings.

Standard of Review

Whether a ROT is incomplete is a question of law reviewed de novo. *United States v. Davenport*, 73 M.J. 373, 376 (C.A.A.F. 2014). "The requirement that a record of trial be complete and substantially verbatim in order to uphold the validity of a verbatim record sentence is one of jurisdictional proportion that cannot be waived." *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000); *see also* RCM 1112(b)(1) (2019).

Law

A complete record of the proceedings and testimony shall be prepared in each general court-martial case in which the adjudged sentence includes a discharge or a sentence to confinement of twelve months or more. Art. 54(c)(2), UCMJ, 10 U.S.C. § 854(c)(2) (2019). Each general court-martial shall keep a separate record of the proceedings in each case brought before it. RCM 1112(a). Additionally, the ROT shall include "[a] substantially verbatim recording of the court-martial proceedings," and any appellate exhibits. RCM 1112(b). A ROT is incomplete or defective if it fails to comply with the requirements of RCM 1112(b). RCM 1112(d)(2).

"Insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one." *Henry*, 53 M.J. at 111. Thus, the question is whether motions and rulings from the first iteration of Appellant's court-martial, which included Appellant's arraignment and the introduction and admission of testimonial and documentary evidence, upon which the military judge and the parties relied in the second iteration of Appellant's court-martial, are substantial. If so, the absence of these motions, evidence, and rulings is presumptively prejudicial and the Government must rebut the

presumption. *Id*. The question of whether an omission in a ROT is substantial can be a question of quality as well as quantity. *See United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982).

Argument

The ROT is not substantially verbatim because it omits the motions, evidence, and rulings upon which the military judge and the parties relied during the second court-martial. There is no question that the parties filed motions, that the court-martial received evidence, including AC's testimony in November 2019, that the military judge issued rulings, and that the evidence and the rulings from the first referred general court-martial was referenced, discussed, and relied upon at the second referred general court-martial.

If a court-martial results in a punitive discharge or a sentence of confinement for two years or more, the accused is entitled to full appellate review of that court-martial. Article 66(b)(3), UCMJ, 10 U.S.C. § 866(b)(3) (2019). This right to automatic appellate review co-exists with the statutory requirement for a verbatim ROT when the sentence triggers the automatic review. When the ROT is substantially verbatim, the accused will receive the statutorily provided appellate review. The converse is true: when the ROT is not substantially verbatim, as it was not here, the accused will not receive the full appellate review to which he is entitled.

This Court should find that ROT is not verbatim, and therefore incomplete, because of the absence of the motions, evidence, and rulings from the first iteration of the court-martial upon which the military judge and the parties relied for the second iteration of Appellant's court-martial. Because of the absence, appellant did not receive the full appellate review contemplated by Article 66(b). This is presumptively prejudicial.

Conclusion

WHEREFORE, because of error prejudicial to the substantial rights of Appellant, he respectfully requests that this Honorable Court set aside the convening authority's Decision on Action and the Entry of Judgment. Further, if the absent motions, evidence, and rulings are not presented for appellate review, Appellant respectfully requests that this Honorable Court set aside the findings of guilty and the sentence and restore all rights, property, and privileges to Appellant.

IV.

THE SENTENCE TO CONFINEMENT OF NINE YEARS AND SIX MONTHS IS INAPPROPRIATELY SEVERE.

Facts

The Government Sentencing Case

The government's sentencing case consisted of sworn testimony from AG,[28] AC's unsworn statement, GP's unsworn statement, a videotaped unsworn statement from NL, Appellant's Personal Data Sheet, and Appellant's Enlisted Performance Reports [EPRs]. R. at 1233, 1229; Ct. Exs. A-C, Pros. Exs. 31, 32.

AG, a close friend of AC, testified that AC was shocked by the events of 1 January 2018 and that she worried about her children, her job, and her finances. R. at 1233. AC needed extra help with the boys and "had to work twice as hard now, because now she was a single parent." R. at 1223. AG testified that the incident had a tremendous impact on GL, who went from being a typical kid to someone who acted like an adult and who was rude and rebellious. R. at 1225. AC was upset by the change in GL's behavior. R. at 1226. The alleged incident made AC a

[28] AG preferred to use her middle name as her first name. R. at 1018.

stronger and more responsible woman who grew closer to God. R. at 1226. AG also testified that AC and Appellant "saw each other" "two or three times" after the incident. R. at 1227. Appellant "used to kind of like drive by [the family home] . . . after they stopped their communication" and that "it kind of got a little bit awkward for [AC]." R. at 1020.

AC gave an unsworn statement.[29] R. at 1229. She stated that Appellant's actions caused her so much hurt and made her question every aspect of her life. R. at 1229-30. She believed that Appellant manipulated the faults in their marriage and made her feel guilty and like she deserved what happened. R. at 1230. Even though she and Appellant had a complicated relationship, she wanted to fight for her marriage. R. at 1230. AC's faith enabled her to leave her toxic marriage. R. at 1230. She struggled to watch her boys try to understand what had happened and her boys struggled to talk about Appellant. AC knew that she would have to help them understand as they grew older. R. at 1230. She felt weak, humiliated, and guilty that she could not protect herself or her children. R. at 1230. AC experienced a lot of stress after the incident and had to "flee to a friend's house out of state for a sense of security." R. at 1230. She developed ulcers. R. at 1230. AC worried that Appellant would hurt her or the boys again and she wanted to learn how to trust people again. R. at 1231. AC stated that her status as Appellant's wife did not give him "full range" over her body and that he intentionally hurt her in every way possible, leaving psychological scars. R. at 1231. She prayed that the experience did not continue to negatively impact her life and her children's lives. R. at 1231.

[29] AC's unsworn statement was published to the members as Court Exhibit A. R. at 1231; Ct. Ex. A.

GP gave an unwritten sworn statement in which she described feeling more vigilant and easily spooked since 1 January 2018. Ct. Ex. B. She experienced a flashback at work, developed trust issues, and hoped to recover from the fear she felt. Ct. Ex. B.

GL's unsworn statement consisted of a twenty-seven second video in which he asked Appellant why he did what he did three years ago, stated that he was shocked, and wondered why it happened. R. at 1232; Ct. Ex. C.

Appellant's Personal Data Sheet informed the panel that Appellant had served for nineteen years and four months, that he had eight overseas tours, and that he earned numerous awards and decorations throughout his career. Pros. Ex. 31.

Appellant's EPRs portrayed a superior noncommissioned officer [NCO] who routinely exceeded expectations and exemplified military standards and conduct. Pros. Ex. 32. Appellant was recognized as an exceptionally effective leader and one of the most consistent performers with noteworthy technical skills. Pros. Ex. 32. Described as a "[d]ynamic [w]ingman" with exceptional dispatcher/leadership skills, Appellant delivered "unparalleled" service in every environment. Pros. Ex. 32. Appellant continued to exceed expectations throughout the investigation, preferral and referral of charges, withdrawal of charges, and re-preferral and re-referral of charges. Pros. Ex. 32. Indeed, he was recommended for promotion in his last EPR, dated 4 December 2020. Pros. Ex. 32.

The Government argued that an appropriate sentence consisted of ten years confinement, reduction to E-1, and a mandatory dishonorable discharge. (R. at 1263, 1265, 1268, 1269). The Government beseeched the panel to "protect not only the boys and victims in this case, but society," from Appellant. R. at 1268.

The Defense Sentencing Case

The defense sentencing case consisted of (1) testimony from Senior Master Sergeant [SMSgt] (Ret.) PB, who testified about Appellant's duty performance after the alleged incident; (2) a video of Appellant describing his duties for certain pandemic-related measures; (3) Appellant's written unsworn statement; (4) Appellant's verbal unsworn statement, and (5) Appellant's awards, certificates, achievements, EPRs, and photos, as well as character statements from colleagues and friends. R. at 1233, 1236; App. Exs. C-AM.

SMSgt (Ret.) PB, Appellant's first sergeant, testified that Appellant performed his duties exceptionally after he was released from BAMC in early 2018. R. at 1235-36. He knew of Appellant's arrest and that Appellant had violated the military protective order but not the civilian protective order. R. at 1235-1236.

The Defense played Def. Ex. AK, a video of Appellant describing his duties. R. at 1236; Def. Ex. AK. This video had previously been distributed to the whole Air Base Wing to demonstrate certain protocols and protections implemented in response to COVID-19. R. at 1272.

In his written unsworn statement, Appellant discussed the physical and mental illnesses he sustained while deployed:

> On 10 December 2010, I was on a logistics patrol headed northbound from forward operating base Kalsu to LSA (Logistics Staging Area) Anaconda, Balad Air Base Iraq. At FOB Kalsu, we were in black out light discipline because we didn't want anyone observing a convoy preparing to leave the camp. I noticed a strong burnt rubber odor coming from a distant location. As soon as we departed for Balad, the nervousness started growing on me to an unhealthy level. In western Baghdad on the Tampa Sword junction, an improvised explosive device exploded to the right side of me going about 50 miles an hour. I have a very a strong memory [sic] of most things in my life . . . but I don't remember exactly what I was doing and how I reacted during enemy contact. I later on read

about myself and saw the messages I had sent, how I took control of the convoy and, instead of doing a stopped damage assessment, I had another truck drive beside me to see if my truck was still operable.

Later that night, I was lead vehicle in the convoy on route Milton headed into Balad Air Base. I started signing the paperwork at the search pit while another convoy was exiting the base. They didn't make it less than a mile outside the perimeter before they were hit by an IED on the route I was just on.

What makes me sad about that day, is that one of my subordinates, [CG], watched my truck get hit at the time he was afraid that I died. Although I survived the hit, it still scarred him for the rest of his life and led to him leaving the military. Seeing one of my troops that I cared about and considered a friend suffer this way really hurt me. He passed away on 16 December 2020, age 31. When I heard that he passed away I regretted that I hadn't kept in contact with him after he left the military.

When I returned to Japan, the migraines kept on going and it felt incredibly hard to do the simplest things. We got hit by a 9.1 earthquake and I was immediately summoned to work. For the next 3 months, I worked 12-16 hour days every day. I was part of the humanitarian relief efforts, Operation Tomodachi. I did a lot during those 3 months i.e [sic] transporting humanitarian supplies to the affected areas, transporting department of energy teams around the Fukushima power plant areas tracking the spread of the radiation, helping load aircraft with supplies to be dropped in remote locations etc. I helped take care of a lot of people but I was not able to take care of myself.

I didn't realize it at the time until later on, but I had a tumor forming in my face & it could have turned cancerous if left alone. In September 2011, I had my parotid gland/major saliva gland tumor removed from my face because they were scared it might eventually turn into cancer and lead to my demise. I still have problems with that side of my face to this day. I feel a constant dull pain and I will have to live like this for the rest of my life.

. . .

One morning at RAF Lakenheath in July 2014, we had a helicopter crash off base and I was part of the recovery operation. I started to feel a deep sadness in my heart, and didn't know what was wrong with me. I started noticing things were spiraling out of control for

> me. I was having nightmares, I was feeling exhausted, I would sleep a couple hours a week. I remember going into work with tears in my eyes, but no one approached me or checked on me. I remember crying in front of someone, but instead of receiving compassion they told me that a man shouldn't be crying. This was especially hurtful because I always did my best to reach out and be there for others, but it seemed like no one was willing to be there for me. Feeling isolated and hopeless, I sunk to a new low and attempted suicide via hanging. After my attempt, I walked around and even went to work with bruises on my throat, yet no one, not even my wife at the time, asked about the bruises or offered to help.

Def. Ex. AM. (ellipsis in original).

Appellant explained that he relied on running and fishing for dealing with his struggles and trying to forget about nightmares, headaches, and difficult memories from his deployments. Def. Ex. AM. He remained committed to getting the help he needed because he recognized that "the things that I have seen have taken a toll on me and that I need help. . . ." Def. Ex. AM.

Appellant recounted witnessing a horrific collision between a motorcyclist and his passenger with a five-ton "rollback wrecker." Def. Ex. AM. He rendered first aid and spoke compassionately to the female passenger, whom he saw only as "a hurt mother." Def. Ex. AM. Appellant called 911 and described the casualties, route, and location to the dispatcher. Def. Ex. AM. He cleaned up debris from the wrecked motorcycles and used his logistics expertise to assist the first responders. Def. Ex. AM. Some people asked who he was and hugged him. Def. Ex. AM. Afterwards, Appellant sat on the grass shoulder of the road and did some deep breathing exercises to settle himself down. Def. Ex. AM

The final paragraphs of Appellant's written unsworn statement acknowledged his misconduct and included heartfelt apologies to his children, GP, and AC. Def. Ex. AM. He expressed his concern that "the real possibility that the sentence of this court-martial will prevent me from getting the help I know I need from the Department of Veterans Affairs." Def. Ex. AM.

He concluded, "I struggle to make sense of what happened on that day with the father I believed that I was and the father that I want to be. I don't have the words that can make things right for my children, but I can truly and honestly say that I am committed to becoming a better man and father." Def. Ex. AM.

Appellant made an unsworn statement, in which he explained that he joined the Air Force to continue a legacy of service to his country. R. at 1238. He apologized to AC and GP because his actions shocked and hurt them. R. at 1238. He spoke of his love for his children, whose births changed his life. R. at 1238. He felt saddened that his military service had caused him to miss many milestones. R. at 1239. Appellant described his joy at seeing his children at trial because he had not been allowed to see them for so long. R. at 1239. Appellant "soaked up" their voices and how much they had grown. R. at 1239. He wished he could have talked with his children, hugged them, and laughed with them because he loved them so much. R. at 1239. Appellant hated that his children had to testify and he hoped to mend his relationship with them. R. at 1239-40. He felt "most sorry" for the suffering his boys experienced at his hands. R. at 1240. Appellant expressed his concern that the conviction and requirement to register as a sex offender "will prevent me from getting the help that I need, especially from the VA.[30] I'm already out of your lives so much. I struggle to make sense of what happened on that day, with the father that I believed that I was before that day, and the father that I want to be." R. at 1240.

The character statements portrayed a knowledgeable ground transporter, a decorated and motivated airman, and an exceptional asset to the Air Force. Def. Ex. E. Technical Sergeant [TSgt] DP described Appellant's "incredible work ethic, drive and contagious positive attitude" and commitment to putting in extra time to fix something if needed. Def. Ex. F. He believed

[30] Department of Veterans Affairs.

that Appellant could be "completely rehabilitated and positively impact society" because Appellant is "an incredible asset to the Air Force . . . committed to excellence when accomplishing his military duties and is unwavering in his loyalty to his country." Def. Ex. F. TSgt JT observed Appellant is "persistent to exceed standards and mentor our airmen with a positive attitude, while dealing with personal challenges [he] would have struggled to overcome had [he] been in his shoes." Def. Ex. G. He described the charges as "far out of character" for Appellant. Def. Ex. G. VR, who previously served with Appellant, wrote that she was "a better Airman having served beside TSgt Lopez." Def. Ex. J. She continued, "I do not call TSgt Lopez a friend; I call him my brother. . . ." Def. Ex. J.

The Defense urged the panel to see Appellant as the whole man and not just who he was on one horrible day. R. at 1270. The Defense argued for a sentence of confinement for three years, reduction to E-1, and forfeiture of all pay and allowances. R. at 1273. The Defense pressed the panel to consider confinement for three years because Appellant was committed to doing the work "to get the help that he needs to deal with the things he's seen on deployments and the struggles that he's had." R. at 1271.

Standard of Review

This court reviews sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006).

Law

The Courts of Criminal Appeals [CCAs] have the power to determine whether a sentence is appropriate as a matter of fact. *United States v. Kelly*, 77 M.J. 404, 406 (C.A.A.F. 2018); *United States v. Campbell*, 71 M.J. 19, 26 (C.A.A.F. 2012). Article 66(d), UCMJ, provides that this Honorable Court "may affirm only such findings of guilty, and the sentence or such part or

amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." This sentence appropriateness provision is "a sweeping Congressional mandate to ensure 'a fair and just punishment for every accused.'" *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (citations omitted). Indeed, this power over sentence appropriateness "'has no direct parallel in the federal civilian sector,'" and no other federal appellate court, including the Court of Appeals for the Armed Forces [CAAF], possesses this power. *Kelly*, 77 M.J. at 407 (quoting *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999).

"A Court of Criminal Appeals must determine whether it finds the sentence to be appropriate. It may not affirm a sentence that the court finds inappropriate, but not 'so disproportionate as to cry out' for reduction." *Baier*, 60 M.J. at 384. "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). Sentence appropriateness requires individualized consideration of the particular appellant, the nature and seriousness of the offense, appellant's record of service, and all matters contained in the ROT, including matters submitted in clemency. *Id.* at 395-96; *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Sentence appropriateness is distinguishable from clemency, which is the practice of "bestowing mercy – treating an accused with less rigor than he deserves." *Id.* at 395.

The CCAs have the power to, "in the interests of justice, substantially lessen the rigor of a legal sentence." *United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002) (quoting *United States v. Lanford*, 6 C.M.A. 371 (C.M.A. 1955)). "The charter of Courts of Criminal Appeals on sentence review is to 'do justice.'" *Id.* at 223 (quoting *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991)).

Argument

The sentence of confinement for nine years and six months is unduly harsh and inappropriately severe when considering this particular appellant, the nature and seriousness of the offenses, his service record, and all matters contained in the ROT.

The panel convicted appellant of sexual assault, assault consummated by a battery, child endangerment, and kidnapping. There is no question that the allegations of misconduct are serious and somber. After AC filed for divorce, she was briefly a single parent before remarrying and she worried about her children and the impact of the alleged incident on them, especially as GL grew rude and rebellious. AC, GP, and the boys struggled to understand the incident and to place it into context with what they knew about Appellant. Appellant does not question the validity of these feelings, but, as stated in Assignment of Error II, *supra*, the government failed to prove beyond a reasonable doubt that Appellant committed the charged acts because of Appellant's PTSD and because of AC's enormous credibility issues.

AC's professed fear of Appellant following the alleged incident, namely that it felt awkward when he drove by the house, is belied by AC's conduct following her return to Texas. She wanted Appellant to be part of the family and she committed herself to her husband emotionally and sexually. She knew of the protective orders and enthusiastically violated them on the very day she returned to Texas and then multiple times a week for months. Moreover, if AC feared that Appellant would hurt her children again, then it defies logic that she reunited with him as soon as she returned to Texas and created as much of a family life with Appellant as she could. In 2019, AC violated the civilian court order granting Appellant visitation with his sons and denied his multiple requests to see his children. She violated the order out of spite and not

because Appellant was a risk to their children. By all accounts, Appellant was a loving and devoted father, so much so that GL had asked if he could live with his father in July 2018.

Appellant was a superior NCO whose chain of command regularly commended him for his leadership and technical skills. He continued to excel and perform at a high level throughout the investigation and both iterations of the court-martial. He earned the respect of his first sergeant at a time when many, if not most, leaders would not entrust an accused with the responsibility of establishing and maintaining pandemic protocols. Appellant performed so well that he was recommended for promotion in his last EPR before trial.

The Government's argument that the panel must "protect not only the boys and victims in this case, but society" from Appellant was wholly unsupported by the evidence for the case-in-chief and the presentencing case. The Government implicitly argued that Appellant was likely a repeat offender. This argument was utterly inappropriate given that the Government offered no evidence, either testimonial or documentary, which demonstrated any risk of recidivism. Given that the Government asked for a sentence including confinement for ten years and the panel adjudged a sentence of confinement for nine years and six months, it is likely that the Government's argument persuaded the panel.

The adjudged sentence to confinement is unduly harsh and inappropriate. Appellant suffered from a PTSD episode but AC had exhausted her patience for her husband's PTSD and talk of Iraq. 1 January 2018 represented a tragically anomalous day in an otherwise distinguished career and a decade of devoted fatherhood. Because of the adjudged sentence, Appellant is ineligible for the mental and physical treatment at the VA that he so desperately needs.

When considering Appellant's character; the nature and seriousness of the offenses; the military judge's error in denying the motion to dismiss Specification 1 of Charge III for failing to state an offense; the legal and factual insufficiency of the evidence for Specifications 1-4 of Charge I and The Specification of Charge II and Charge II; Appellant's outstanding service record, including a recommendation for promotion; and all matters contained in the record of trial, the approved sentence to confinement is unduly harsh and inappropriately severe. This Court has the power to correct the injustice of the approved sentence.

Conclusion

WHEREFORE, because of errors prejudicial to the substantial rights of appellant, he respectfully requests that this Honorable Court set aside and reassess the sentence.

V.

THE DEFENSE COUNSELS' FAILURES AND ERRORS DENIED APPELLANT THE EFFECTIVE ASSISTANCE OF COUNSEL.

Additional Facts

Appellant's PTSD

On 20 April 2021, a Dr. RW, a forensic psychiatrist, convened an RCM 706 sanity board to inquire into the capacity, mental responsibility, and psychiatric diagnosis of Appellant, pursuant to a request by the Defense.[31] App. Exs. XXXIII, XXXIV. Dr. RW opined that Appellant did not have a severe mental disease or defect at the time of the alleged criminal conduct, he understood the nature and quality of the wrongfulness of his alleged conduct at the time it allegedly occurred, and he did not suffer from a severe mental disease or defect at the

[31] The short-form RCM 706 Sanity Board Evaluation states that the convening authority requested the inquiry, but the military judge's 1 March 2021 scheduling order states that the Defense requested the sanity board. App. Exs. XXXIII, XXXIV.

time of the sanity board, such that he was able to understand the nature of the proceedings against him and could conduct and cooperate intelligently in his defense. App. Ex. XXXIV. Nonetheless, Dr. RW concluded that "[t]he Accused's clinical psychiatric diagnosis is Posttraumatic Stress Disorder." App. Ex. XXXIV.

Expert Consultants and/or Witnesses

The 23 January 2019 Preliminary Hearing Officer's Report [PHO Report] states:

> DC "did not believe at the time of the hearing there were grounds to believe the accused was not mentally responsible at the time of the alleged offense. However, an expert has not been appointed to them to assist in the evaluation of TSgt Lopez's mental health during the charged time frame. There is evidence in the record that TSgt Lopez has been diagnosed with Post-Traumatic Stress Disorder (PTSD). (PHO Ex. 5, 9, 14). There is evidence in the record that TSgt Lopez attempted suicide by taking 15 muscle relaxers or other pills during the charged time frame. At this time, there is not enough evidence to suggest that TSgt Lopez was not mentally responsible for the offenses or not competent to participate in his defense. However, I would recommend an expert in the appropriate field review the evidence and/or an inquiry into the mental capacity or mental responsibility of TSgt Lopez during the charged time frame be conducted IAW RCM 706.

App. Ex. XIV.

The PHO Report noted that (1) "Vic also previously engaged TSgt Lopez's first sergeant and providers concerning TSgt Lopez's mental health and behavior (PHO Ex. 14)" and (2) in October 2017, "Vic was more concerned with getting TSgt Lopez treatment for his PTSD." App. Ex. XIV.

On 23 April 2021, the Defense moved for a unanimous verdict. App. Ex. VI. Attachment 3 to that motion contains email correspondence between the parties and the then-military judge on several issues from the first iteration of the court-martial, including motions the

Defense planned to file. App. Ex. VI. On 14 August 2019, Maj HS, Appellant's then-DC, wrote, in pertinent part:

> The Defense at this time plans on filing two motions (MRE 412 and Motion to Suppress). Due to the nature of the offenses and our client's state of mind during the allegations (attempted suicide and took medication in excess) and at the time when the police responded we anticipate needing both our Forensic Psychologist and Toxicologist for motions hearing. Currently, our experts are not approved to travel for a bifurcated hearing.

App. Ex. VI.

Attachment 8 to the unanimous verdict motion contains an undated joint status update from the parties. App. Ex. VI. Regarding expert witnesses/issues, the "DC requested a forensic psychologist as a confidential expert consultant. The government anticipates approval and it is currently with the NAF for action." App. Ex. VI.

On 23 April 2021, the Defense moved to dismiss the charges and specifications for speedy trial issues. App. Ex. XIV. In that motion, the Defense states that "[i]nterviews related to earlier motions proceedings in this case by a forensic psychologist of TSgt Lopez's two minor sons . . . showed they had been directed to not be forthright with TSgt Lopez concerning AC's relationship with [her current husband]." App. Ex. XIV. Attachments 39 and 40 to the speedy trial motion contain reports by the Defense forensic psychologist who examined GL and NL. App. Ex. XIV.

Attachment 5 to the PHO Report, the Air Force Office of Special Investigations Report of Investigations [ROT], contains multiple interviews with Appellant's colleagues in which they detail Appellant's discussion of his PTSD issues as late as November 2017. App. Ex. XIV.

Attachments 39 and 40 of the speedy trial motion contain 27 May 2020 reports by the Defense forensic psychologist who examined and evaluated GL and NL for the purpose of

assessing the potential psychological or emotional impact of testifying in court in Appellant's presence. App. Ex. XIV.

The chronology in the Government response to the speedy trial motion contains several notations about "4 Defense expert request packages" and a notation that the "Defense sends formal request for Court Expert[32] in forensic psychology."[33] App. Ex. XV.

The Defense called Maj HS, Appellant's former DC, as a witness regarding the issue of whether AC coached her sons' testimony. R. at 1029-30. She testified that she interviewed NL in January 2021 at the Fort Sam Houston Defense Counsel's Office and that "all of our defense experts were present" during the interview. R. at 1030. On cross-examination, Maj HS clarified that the experts were Dr. KG, a forensic psychologist; Mr. K, a DNA examiner; Dr. JN, a forensic toxicologist; J, the digital forensics examiner; and an unnamed sexual assault nurse examiner consultant. R. at 1031-31.

Defense Voir Dire Questions

Before voir dire of the members, the military judge overruled the Government's objection to Defense questions about deployment difficulties, struggling to cope with re-deployment, reintegration after deployment, and how deployments affect relationships. R. at 160. The CTC posited that "PTSD is not a defense" and the Defense did not notify the Government of mental responsibility special or affirmative defenses. R. at 160.

[32] The ROT contains no explanation of who the "Court Expert" was, what the purpose of such an expert was, and whom the expert was intended to assist. If a Court Expert was appointed and either the parties or the military judge, or both, relied on this expert, Appellant asserts that evidence of this expert and his or her appointment should be included in the ROT and that the failure to include such evidence presumptively prejudiced Appellant. *See* Assignment of Error III, *supra*.

[33] The chronology also notes that on 8 March 2021 the TC notified the Defense of its intent to request a forensic toxicologist and that "Defense determines the [sic] they do not need one for their case." App. Ex. XV.

The Defense asked questions in voir dire about struggles to cope with deployment and difficulties in intimate or martial relationships following deployment. R. at 197, 215-17, 247-48, 268-69, 282-84, 344-45.

AC's Waiver of the Attorney-Client Privilege

AC testified that prior to November 2018, she told her SVC that Appellant made admissions to her regarding the charged conduct. R. at 612-13. The TC objected. R. at 614. Appellant's CDC recognized the possibility of waiver and stated:

> I'm not going into privileged communication, Your Honor. There's not a waiver. I'm not going into waiver, so I'm not quite capturing 510 objection. I agree that there's an attorney/client privilege. The witness has brought up SVC. I don't want to presume that the members know what an SVC is, but it's important for purposes of the witness's statement, that she's told her SVC, that the members understand that the SVC is not prosecuting the case, and, in fact, has to keep her communications in confidence.

R. at 614.

CDC Waiver of Partial Lack of Mental Responsibility Instruction

During an 8 June 2021 Article 39(a), UCMJ, session before the Government's re-direct examination of AC, the military judge asked the CDC to confirm that the defense had not notified the Government or the court-martial of "either lack of mental responsibility or partial lack of mental responsibility, or self-defense." R. at 630. The CDC answered in the affirmative. R. at 630. The military judge asked whether any of the defenses had been raised and the CDC answered, in relevant part:

> With regard to mental responsibility, we did not give notice of mental responsibility. And the government's questions brought out – introduced, explicitly, PTSD into this case, because came out in a response from [AC] to a question from trial counsel. I think based on that and some of the other things that she talked about, I could see potentially how, at least partial mental responsibility could be raised, which is not an affirmative defense, at least raised by the

> evidence, not something that we were intending to argue or go down, but I can see it as being raised by the evidence where you've got evidence he's got PTSD, there's issues going on that night that could – that she's articulated could trigger his PTSD. And so, I could see that coming up based on the presentation of the evidence as it came out, both based on trial counsel and then our follow up, based on their initial examination of the witness.
>
> And looking back at the Benchbook, I looked at it, I think yesterday at some point, it would probably apply more potentially to the child endangerment offense, if I recall correctly, but I may be misremembering that, I'd have to look again at the notes that accompany that instruction. So it's probably a little too late for me to start pretending like I remember it.

R. at 630-31.

The military judge stated that he was "flagging the issue seeing where parties are" because the defense had asked AC whether fireworks were a PTSD trigger for Appellant and because of the "discussion of being a possum kind of stuff." R. at 631. The CDC responded:

> But the possum and I think the alcohol piece came out of trial counsel's examination, and the explicit reference to PTSD came out of trial counsel's examination. So to the extent that there might be a concern from the defense, I don't think we're there. I mean, that came out of the government's case-in-chief and their own presentation of evidence.

R. at 631.

The CDC pointed out that the questions regarding Appellant's PTSD triggers – alcohol and fireworks – and Appellant's PTSD came from the Government's direct examination of AC. R. at 631.

The CDC conceded that "our take on the evidence would be, as it's come out, that it has been raised by the evidence" and acknowledged that the court could find that the evidence raised the issue of partial mental responsibility, such that the relevant instruction would be necessary based on the presentation of the evidence. R. at 631.

The Government noted that the Defense never provided notice of any "partial, full, special, or affirmative defense," but that several Defense voir dire questions concerned PTSD. R. at 632. Regarding AC's testimony about Appellant's PTSD, the Government asserted that she "gratuitously mentioned some things as it related just to that evening and arguments that they've had." R. at 632. The Government asserted "as a proffer to the court" that:

> The senior counsel on this case had a conversation about what is the scope of PTSD, the government told the defense that we anticipated raising an oral motion in *limine* regarding PTSD for this exact reason, because there had been no notice, whatsoever in this case, which is required under the rules, and the scheduling order. In conversations with the defense, we were able to hash out the limited capacity in which we thought that this evidence would come out, talking about the charged events, and just the arguments leading up. After that, Defense went way past that, and then started talking about triggers and insinuating to the members that this is actually a mental responsibility case. The government's position is that it's not raised by the evidence, any notice of that is untimely and it should have been given.
>
> And additionally, the accused was – went through two separate 706 sanity inquiries. So if it does end up getting raised by the evidence, and that the defense is arguing that, the government will be seeking to rely upon those reports. We would have to coordinate with other – the sanity board providers, since there were two different ones that conducted this, we would be prepared to articulate our position and requesting the long form, as well as the short forms that we have. And in addition to that, we'll be requesting a special instruction and will be prepared to address that at the appropriate time, related to limited use evidence that the members, how they may consider that, otherwise we run a very serious risk of jury nullification in this case. These are issues that should've been properly articulated by the defense and raised to the government's attention prior to 7 p.m. on the second day of trial, Your Honor.

R. at 632-33.

The CDC argued that the Defense voir dire questions regarding AC's experiences with Appellant's PTSD were meant to explore how Appellant's PTSD affected AC's behavior, motive, and anger at Appellant on the night in question and that the Defense should not be

faulted for failure to give notice "of something the defense didn't intend to get into." R. at 633. He continued:

> [T]here was no plan on my end to get into PTSD or talk explicitly about PTSD or reference the diagnosis. That came out explicitly during trial counsel's examination. There's no notice requirement. I mean, once trial counsel kicks open the door, whether gratuitous on the witness's part or not, that's a result potentially on the scope of their questions. I'm not going to say that they did a bad job scoping their questions, I don't think they did. I mean, sometimes witnesses just don't say the exact thing that we want them to say. And in this instance [AC] seems to have done that.
>
> And when we're talking about just the straight up evidentiary issue of does – has by virtue of that, gone down the avenue of partial mental responsibility that may, in fact, be raised by the evidence. I don't think – it didn't sound like from the colloquy that we've had that the court has reached a determination as to that, but has brought us a lot closer to that by virtue of the government's presentation of the case, and while we basically have a motive bias line of questioning related to that in her questioning, and in part explaining [AC's] actions, her actions on the night in question, I would agree, there's potential for a particular instruction in that regard, and that is what we talked about with trial counsel. That was before during – before trial counsel's examination that explicitly brought out PTSD. I mean, that's just not on the fence at this point.

R. at 633-34.

During an Article 39(a) session to discuss instructions, the CDC waived the instructions for lack of mental responsibility and partial lack of mental responsibility. R. at 1052. In this same discussion, the CTC requested a special instruction regarding PTSD:

> But we are requesting a special instruction, something along the lines of, you have received evidence that [AC] believed the accused had . . . Post-Traumatic Stress Disorder, PTSD. This evidence was not offered to demonstrate or refute whether the accused is mentally responsible for his conduct. Lack of mental responsibility, that is an insanity defense, is not an issue in this case. You may, however, consider evidence of PTSD as relevant facts and circumstances of the charged events on or about 1 January 2018, as well as the general nature of the relationship between the accused and [AC], plus anything else the defense would like included on that, you may give

> it such weight you believe it is fairly entitled to receive. The government believes that through the direct and cross-examination of [AC] specific instance related to PTSD were raised, and that the cross-examination going into fireworks as a trigger especially, may leave a misimpression in the minds of the fact finder, and may, even though there's no actual defense of mental responsibility, it may cause them to question whether or not – it may lead – it may lead down a road of jury nullification or them to question how they're supposed to evaluate that particular evidence. So I think it's appropriate and raised by the evidence, Your Honor.

R. at 1062.

Appellant's CDC consented to the Government's proposed instruction. R. at 1063. Neither party objected to the military judge's draft instruction on this issue. R. at 1071.

The military judge instructed the panel:

> You may have received evidence related to whether [Appellant] had Post-Traumatic Stress Disorder ("PTSD"). The mental responsibility of the accused, to include whether he had PTSD, is not raised as a defense to any of the charges or specifications. Evidence of whether [Appellant] had PTSD may be considered in understanding [AC's] interpretation of the facts and circumstances that occurred on or about 1 January 2018, actions taken by [AC] related to the events on or about 1 January 2018, statements made by [AC] and [Appellant] related to the events on or about 1 January 2018, actions taken by representatives of law enforcement on or about 1 January 2018, and in understanding the relationship between [Appellant] and [AC]. You may give the evidence such weight that you believe it is fairly entitled to receive.

R. at 1084.

Closing Arguments

During closing argument, the Government raised the issue of Appellant's PTSD, but called it a "red herring[]" and "unreasonable and distracting." R. at 1100-1101.

The CDC obliquely referenced Appellant's PTSD at the beginning of his closing argument:

> One of the contradictions, like how does Sergeant Lopez go from playing possum and being a possum, saying things like, "Don't hit me," hiding on the couch upstairs in their loft. Which he goes to immediately when she comes in, according to her statement. How does he go from that to the monstrous conduct in what is described, and then by the end of the day, here we are; same old Sergeant Lopez again. [AC] saying, "Hey, George, you should go outside." "Okay, I should go outside." Out he goes. "Hello, officers, yes, I did it. I would like to be extremely compliant with you right now." How does the pendulum wing that much? The pendulum swings that much because there is more to this case than just the surface statements that you got from [AC].

R. at 1103.

The CDC also argued:

- There is no escaping the fact that there is something weird that happened that day, something bizarre; something unusual. There is no dispute from the defense about that. R. at 1104.

- But Sergeant Lopez tells his brother, here is what I am going to do. And it's not, I'm going to go take control. I'm going to go get back at [AC]. I'm going to go show her. I'm going to do what [AC] claims Sergeant Lopez's dad told him to do a couple days prior. He's going to go to sleep. He's trying to avoid having a fight. He does not want to engage with [AC], with his wife . . . . that's not someone who is intending at that moment to go back and start some daylong kidnapping, because now he's got the impetus to take control. So then as you move forward into that morning, and we've got the evidence from [AC] that she says that Sergeant Lopez comes in right around when [GP] leaves and goes up to the loft. And what's he doing? He's not coming after her? He's not trying to do anything with her. He's trying to hide from her. So how do we get from the possum, him thinking he is a possum, him with his back to her, him saying, "Don't hit me." To all of a sudden the control. There is something missing. There is something missing in this story. Because that narrative just doesn't make sense. R. at 1106.

- [AC] talked about, when you walk through the beginning of her testimony, just how she felt about Sergeant Lopez. And whatever condition, you know, what she identified as PTSD. While she talked about after this event, how she was so focused on Sergeant Lopez getting treatment . . . . Either way, at some point there is a point where [AC] gets so frustrated she chucks her rings at him and out she goes. She doesn't want to deal with

> it. She doesn't want to deal with him. She doesn't know how to deal with him because he has been drinking, it's New Year's, here we go again with another argument and it's going to go nowhere because he is going to be acting weird, I just know it. She bails on that. And then she comes home. And what is the sort of language that she uses about what happens after that? "I had to go out to get." "I was annoyed that I had to go out to get him." And she is done with this relationship. R. at 1126-27.

The Defense Sentencing Case

The military judge and the parties discussed the presentencing phase of trial in an Article 39(a) session. R. at 1185. The Government confirmed that Appellant had served for nineteen years and four months. R. at 1186.

The Defense sentencing case consisted of (1) testimony from Appellant's first sergeant, SMSgt (Ret.) PB, who testified about Appellant's duty performance after the alleged incident; (2) a video of Appellant describing his duties for certain pandemic-related measures; (3) Appellant's written unsworn statement; (4) Appellant's verbal unsworn statement; and (5) Appellant's awards, certificates, achievements, EPRs, and photos, as well as character statements from colleagues and friends. R. at 1233, 1236; Def. Exs. C-AM.

In his written unsworn statement, Appellant explained that the deaths of two Airmen by an explosive force penetrator in Iraq in January 2006 haunted him. Def. Ex. AM. He wrote, "This occurred on the Sword Vernon Junction not far from where I was hit but I had the unpleasant feeling of having to traverse that site often & it made me incredibly sad." Def. Ex. AM. He recalled not being present for the births of his sons because he was deployed. Def. Ex. AM. As he watched NL's birth via FaceTime, Appellant recalled, "I was suffering. I had daily migraines and felt a wobbly stature when walking." Def. Ex. AM. Appellant also discussed the physical and mental illnesses he sustained while deployed. Def. Ex. AM. *See* Assignment of Error IV, *supra*.

In his verbal unsworn statement, Appellant stated, "I'm worried that receiving [a] federal conviction and having to register as a sex offender will prevent me from getting the help that I need, especially from the VA." R. at 1239.

Following the presentation of sentencing evidence, the military judge noted that there was no "evidence presented related to loss of retirement." R. at 1243. Appellant's CDC confirmed that "[t]here's not any affirmative evidence introduced specific to retirement. . . ." R. at 1243. Appellant's CDC noted that Appellant's enlistment had expired and that the Defense elected not to raise the issue based on a Benchbook instruction and the cases cited therein. R. at 1243. Appellant's CDC advised the military judge that the Defense made a strategic decision not to present evidence of Appellant's retirement, in part because Appellant's retirement date "would be pretty obvious to the members." R. at 1243.

The military judge instructed the members:

> In determining the sentence, you should consider all the facts and circumstances of the offenses of which the accused has been found guilty, and all matters concerning the accused, whether presented before or after findings. Thus, you should consider the accused's background, his character, his service record, all matters in extenuation and mitigation, and any other evidence he presented. You should also consider any matters in aggravation.
>
> During the findings portion of the case, I instructed you about the limited purposes for which you could consider the evidence of whether the accused has Post-Traumatic Stress Disorder. At this stage, in selecting a sentence, you should consider all matters in extenuation, mitigation, and aggravation, regardless of whether it was introduced before or after findings. In other words, all the evidence you have heard in this case is relevant on the subject of sentencing.

R. at 1257-58.

The military judge instructed the panel that the mandatory minimum sentence of a dishonorable discharge may deprive Appellant of "substantially all benefits administered by the Department of Veterans Affairs and the military establishment." R. at 1257.

In the sentencing argument, Appellant's DC urged the panel to consider "the context surrounding that day; how he got there, how everyone got there." R. at 1270. The DC asserted that Appellant's conduct on 1 January 2018 did not represent the whole of him and that his conduct was so aberrant that GP "struggled to recognize him." R. at 1271. Indeed, "the person that was there on 1 January 2018, it's not who Sergeant Lopez is as a whole. It's not who he typically was. It was that one horrible day. That day he deeply regrets." R. at 1271.

Appellant's DC Admits Possible "Deficient and Prejudicial" Strategic Decisions

On 23 June 2021, Captain [Capt] TO, Appellant's DC, submitted a memorandum for the convening authority with allegations of legal error. R. at Clemency Submission. Among other things, Appellant's DC noted that Appellant "worked to address his own mental health and ability to parent through treatment after the charged conduct. . . ." R. at Clemency Submission. Additionally, the DC noted that "trials such as this one are also ripe for reflection on the performance by defense counsel. Questions may be fairly raised about the performance of counsel and may intersect with prejudicial errors by the military judge that, in the absence of defense objection, will be tested for plain error on appeal." R. at Clemency Submission. The DC posited that certain Defense strategic decisions and trial tactics may have been "deficient and prejudicial." R. at Clemency Submission. These included, *inter alia*, (1) the Defense's "strategic choice to not introduce evidence related to military retirement and reliance on the military judge's instruction" in lieu of a focus on Appellant's "actions and relationships as a means to illustrate his rehabilitative potential and need for help (vice mere funds)"; (2) the

Defense request for a tailored instruction "concerning consideration of Post-Traumatic Stress Disorder . . . where the defense failed to request an instruction and the military judge failed to given [sic] and instruction limiting the consideration of testimony by [AC] that outside agencies, specifically mental health and law enforcement, made a determination that [Appellant's] Post-Traumatic Stress Disorder did not factor into the actions on 1 January 2018 of which [Appellant] was convicted"[34]; and (3) the Defense request for an instruction that only the members would determine the credibility of the witnesses and what the facts of the case are in lieu of a "more specific limiting instruction during findings related to testimony by [AC] that outside agencies, specifically mental health and law enforcement, made a determination that [Appellant's] Post-Traumatic Stress Disorder did not factor into the actions on 1 January 2018 of which [Appellant] was convicted." R. at Clemency Submission.[35]

Standard of Review

Assertions of ineffective assistance of counsel are reviewed de novo. *United States v. Carter*, 79 M.J. 478, 480 (C.A.A.F. 2020) (citations omitted).

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[34] AC did not testify that "outside agencies, specifically mental health and law enforcement, made a determination that [Appellant's] Post-Traumatic Stress Disorder did not factor into the actions on 1 January 2018 of which [Appellant] was convicted," as alleged by Capt TC. If there was a determination by outside agencies, specifically mental health and law enforcement, that Appellant's PTSD did not factor in his actions on 1 January 2018, that determination constitutes evidence not included in Appellant's ROT but upon which the parties relied and Appellant was presumptively prejudiced by its absence. *See* Assignment of Error III, *supra*.

[35] Appellant's DC also suggested that the Defense performance regarding the Motion to Dismiss for violation of Appellant's right to speedy trial may have been deficient and prejudicial based on the Defense "struggle[] to identify case law that would support our position under the Fifth Amendment. That may point to a flaw in our research, or perhaps a dearth of case law in this particular area." R. at Clemency Submission. Appellant's DC then set forth a series of facts and assertions not included in the ROT. Because these facts and assertions were not developed during trial, Appellant does not rely on them on appeal, but Appellant urges this Court to order declarations or affidavits from counsel on this issue and/or to find that additional proceedings are necessary to address this issue. *See* Article 66(f)(3), UCMJ; *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

Law

The Sixth Amendment and the UCMJ guarantee an accused the right to effective assistance of counsel. *United States v. Hammer*, 60 M.J. 810, 818 (A.F. Ct. Crim. App. 2004), *aff'd*, 62 M.J. 390 (C.A.A.F. 2005) (citing U.S. Const. amend. VI; Article 27(b), UCMJ).

"To prevail on an ineffective assistance claim, the appellant bears the burden of proving that the performance of defense counsel was deficient and that the appellant was prejudiced by the error." *United States v. Captain*, 75 M.J. 99, 103 (C.A.A.F. 2016) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Accordingly, appellant bears the burden with respect to three questions:

> 1. Are the allegations made by appellant true; and if they are, is there a reasonable explanation for counsel's actions in the defense of the case?
>
> 2. If they are true, did the level of advocacy fall measurably below the performance ordinarily expected of fallible attorneys?
>
> 3. If ineffective assistance of counsel is found to exist, is there a reasonable probability that, absent the errors, the factfinder would have had reasonable doubt respecting guilt?

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

"[A] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. This test "finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution." *Id*. In *United States v. Webb*, the CAAF held that when evaluating whether there was a "reasonable probability" that the proceeding would have been different but for the error, "the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial." 66 M.J. 89, 92 (C.A.A.F. 2008) (emphasis added)

(citation omitted); *see Hammer*, 60 M.J. at 818 ("Our focus . . . is on the reliability and fairness of the adversarial process.").

Counsel are presumed competent, and the strategic or tactical decisions made at trial are not generally second-guessed by appellate courts. *United States v. Morgan*, 37 M.J. 407 (C.M.A. 1993). While there is a presumption of competence, an appellant can overcome the presumption if he shows specific defects in counsel's performance that were unreasonable under prevailing professional norms. *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006) (quotation marks and citations omitted); *Carter*, 79 M.J. at 480-81. Strategic choices made by counsel must be objectively reasonable. *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015). They must also be made after a thorough and appropriate investigation. *Hammer*, 60 M.J. at 820 ("Defense counsel, of course, have an ethical obligation to properly investigate the charges against their client in formulating trial strategy. This duty extends to interviewing witnesses or making reasonable tactical decisions rendering some interviews unnecessary.") (citations omitted).

"'Strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.'" *Wiggins v. Smith*, 539 U.S. 510, 533 (2003) (citing *Strickland*, 466 U.S. at 690–91). "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (citation omitted). The Supreme Court has "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (citing *Hill v. Lockhart*, 474 U.S. 52, 57 (1985)). "At the sentencing phase, ineffective assistance may occur if trial defense counsel either 'fails to investigate adequately the possibility of evidence that would be of

value to the accused in presenting a case in extenuation and mitigation or, having discovered such evidence, neglects to introduce that evidence before the court-martial.'" *United States v. Scott*, 81 M.J. 79, 84 (citing *United States v. Boone*, 49 M.J. 187, 196 (C.A.A.F. 1998)).

Lack of mental responsibility is a complete defense:

> It 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 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.

RCM 916(k)(1).

The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence. RCM 916(b)(2).

Partial lack of mental responsibility, or "[a] mental condition not amounting to a lack of mental responsibility under paragraph (k)(1)" is not an affirmative defense. RCM 916(k)(2). The Discussion to RCM 916(k)(2) states:

> Evidence of a mental condition not amounting to a lack of mental responsibility may be admissible as to whether the accused entertained a state of mind necessary to be prove as an element of the offense. The defense must notify the trial counsel before the beginning of trial on the merits if the defense intends to introduce expert testimony as to the accused's mental condition.

RCM 701(b)(2) requires the defense to notify the trial counsel in writing before the beginning of trial on the merits of its intent to offer the defense of lack of mental responsibility or its intent to introduce expert testimony as to the accused's mental condition.

The attorney-client privilege is codified in Mil. R. Evid. 502. The Rule provides the following:

> (a) General Rule. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential

> communications made for the purpose of facilitating the rendition of professional legal services to the client:
>
> > (1) between the client or the client's representative and the lawyer or the lawyer's representative;
> >
> > (2) between the lawyer and the lawyer's representative;
> >
> > (3) by the client or the client's lawyer to a lawyer representing another in a matter of common interest;
> >
> > (4) between representatives of the client or between the client and a representative of the client; or
> >
> > (5) between lawyers representing the client.

A privilege may be waived under certain circumstances, pursuant to Mil. R. Evid. 510(a), which provides:

> A person upon whom these rules confer a privilege against disclosure of a confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege. This rule does not apply if the disclosure is itself a privileged communication.

Argument

This is not a case in which an accused was diagnosed with PTSD following the charged acts or after the court-martial was closed,[36] nor is this is a case where the defense counsel elected to introduce evidence of the accused's PTSD and traumatic brain injury [TBI] in the sentencing case via the accused's unsworn statement and documentary evidence,[37] nor is this a case where

[36] *See, e.g., United States v. Colvano*, ACM 37121, 2009 CCA LEXIS 95 (A.F. Ct. Crim. App. 17 Mar. 2009) (unpub. op.); *United States v. McKinney*, NMCM 88 00524, 1995 CCA LEXIS 423 (N-M. Ct. Crim. App. 2 Jun. 1995) (unpub. op.).
[37] *See United States v. Jacks*, No. 202000098, 2021 CCA LEXIS 476 (N-M. Ct. Crim. App. 20 Sep. 2021) (unpub. op.).

the accused's claims of PTSD and TBI were disputed, either by documentary evidence or expert testimony.[38]

This is a case in which Appellant was diagnosed with PTSD years before the charged conduct; he was treated for PTSD for years and specifically in the months leading up to 1 January 2018; the adult alleged victims believed he was in the throes of a PTSD incident during the alleged incident; he mentioned "murder-suicide" and attempted suicide on 1 January 2018; he was involuntarily hospitalized in the SAMMC mental health department for weeks following 1 January 2018; and the RCM 706 short form stated that Appellant was diagnosed with PTSD. Despite this mountain of evidence, despite asking voir dire questions about struggles to cope with deployment and difficulties in intimate or marriage relationships following deployment, and despite AC opening the door to evidence about Appellant's PTSD, the Defense failed to introduce evidence, whether testimonial or documentary and whether by expert witnesses or other witnesses, of Appellant's PTSD either during trial on the merits or during the sentencing phase of trial.

This is also a case in which the Defense failed to investigate and pursue AC's waiver of the attorney-client privilege during a critical part of her testimony and failed to investigate whether AC did inform her SVC of Appellant's purported admissions that he intended to hurt her on 1 January 2018. This blockbuster testimony undercut the Defense case and the CDC inexplicably came to AC's aid and advocated for her privilege rather than investigate the veracity the AC's testimony.

[38] *See United States v. Tankersley*, No. 20140074, 2016 CCA LEXIS 504 (A. Ct. Crim. App. 15 Aug. 2016) (unpub. op.).

Counsels' deficient performance falls into four categories: (1) the failure to retain an expert consultant in PTSD, to move for an expert witness in PTSD, or to introduce any evidence of Appellant's PTSD either on the merits or during the sentencing phase of trial; (2) waiving the instruction for partial lack of mental responsibility after earlier arguing that the evidence raised the issue; (3) the failures to investigate the veracity of AC's testimony that she told her SVC about Appellant's purported admissions after AC waived the attorney-client privilege and to litigate the waiver of the attorney-client privilege; and (4) the failure to present evidence related to Appellant's loss of retirement during the Defense sentencing case. Finally, Appellant's own DC suggested that certain Defense strategic choices constituted deficient performance which prejudiced Appellant. The specific deficiencies discussed below individually and cumulatively prejudiced Appellant by depriving him of a fair trial.

1. The defense counsels' failure to retain an expert consultant in PTSD, to move for an expert witness in PTSD, or to introduce any evidence of Appellant's PTSD either on the merits or during the sentencing phase of trial was deficient and prejudiced Appellant.

It is indisputable that Appellant suffered from combat-related PTSD.[39] The triggering event occurred in Iraq[40] and worsened over time, including after Appellant redeployed from

[39] PTSD is a trauma and stressor-related disorder. There are eight diagnostic criteria for diagnosis: (1) the person was exposed to death, threatened death, actual or threatened serious injury, or actual or threatened sexual violence; (2) the traumatic event is persistently re-experienced; (3) avoidance of trauma-related stimuli after the trauma; (4) negative thoughts of feelings that began or worsened after the trauma; (5) trauma-related arousal and reactivity that began or worsened after the trauma; (6) symptoms last for more than one month; (7) symptoms create distress or functional impairment (e.g., social, occupational); and (8) symptoms are not due to medication, substance use, or other illness. American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) [DSM-V].

[40] AC did not testify about when Appellant was in Iraq, but the context of her testimony makes clear that Appellant's deployment to Iraq, with its PTSD-inducing traumatic event(s), preceded his 2017 re-deployment from Turkey. Additionally, Appellant's Personal Data Sheet states that Appellant deployed to Iraq from November 2005-June 2006, April-October 2009, August 2010-March 2011. Pros. Ex. 31. He served in Turkey from February 2006-May 2017. Pros. Ex. 31.

Turkey in May 2017, so much so that AC demanded he sign a medical release for her to access his medical records. She believed that Appellant was lying about attending "PTSD sessions while he was in Turkey." R. at 507-508. Between May 2017 and 1 January 2018, Appellant obsessed about Iraq so frequently that she was ready to end their marriage because she was tired of dealing with Appellant's PTSD. On 1 January 2018, AC believed that Appellant "revert[ed] back to times in Iraq" when she found him curled up in a fetal position in the loft, shouting at something only he could see, and proclaiming that he was a possum. AC believed that this PTSD episode was triggered by Appellant's consumption of alcohol and the New Year's Eve fireworks. The subsequent charged acts occurred either in the throes of or in the immediate aftermath of a PTSD episode and yet, despite overwhelming evidence, the Defense failed to retain an expert consultant or to move for an expert witness in PTSD.

a. The Defense did not retain an expert consultant or move for an expert witness for this court-martial.

The Defense did not retain either an expert consultant or move for an expert witness in PTSD for **this** court-martial. While the Defense had "experts" – a forensic psychologist and forensic toxicologist – in anticipation of filing a Mil. R. Evid. 412 motion and a motion to suppress Appellant's statements "[d]ue to the nature of the offenses and our client's state of mind during the allegations," those experts were for the charges and specifications which were withdrawn in February 2021. The charges and specifications in the first iteration of trial – one specification of rape and one specification of assault consummated by a battery – did not require the Government to prove Appellant's state of mind beyond a reasonable doubt. Thus, even if the Defense retained an expert consultant for the first iteration of trial and relied on that assistance

for the second iteration of trial, that reliance was defective because the second iteration of trial included more offenses than the first iteration of trial, including child endangerment for which the Government was required to prove Appellant's state of mind – that he acted by design or with culpable negligence[41] – beyond a reasonable doubt. If Appellant's state of mind was not an element in any offense from the first iteration of the court-martial, then it is unlikely that the expert consultant, if there was one, evaluated Appellant and assisted the Defense with preparation for trial on a matter that was not in dispute then but was in dispute at the second court-martial.

The failure to retain an expert consultant or to move for an expert witness in PTSD for the second iteration of the court-martial was unreasonable and deficient. Had the Defense retained an expert consultant or moved for an expert witness for the second iteration of the court-martial, the Defense could have (1) rebutted the RCM 706 sanity board findings and conclusions and introduced evidence that Appellant's PTSD amounted to a severe mental disease or defect and that he was unable to appreciate the nature and quality or the wrongfulness of his acts, such that the Defense could have claimed the affirmative defense of lack of mental responsibility; (2) rebutted evidence that Appellant had the specific intent necessary for the child endangerment specification, such that the Defense could have asserted that Appellant had a partial lack of mental responsibility; (3) introduced evidence, either documentary or testimonial, during trial on the merits or during the sentencing phase of the impact of Appellant's PTSD of his conduct, the nexus between PTSD and criminal conduct, and to supplement Appellant's unsworn statement in which he discussed the traumatic events from his Iraq deployments. Everyone in the courtroom knew that Appellant had PTSD, that it had worsened over time, including the months

[41] *See* Assignment of Error I, *supra*.

immediately preceding 1 January 2018, that AC believed that Appellant was in the throes of a PTSD episode on that day, that Appellant attempted suicide, and that he was involuntarily hospitalized in the mental health department of SAMMC for weeks following the alleged incident and yet the Defense failed to retain an expert or move for an expert witness to investigate, discuss, and/or testify about the proverbial elephant in the room. Appellant was convicted of all specifications except for wrongfully communicating a threat and was sentenced to nine years and six months of confinement, just six months less than the Government argued for. It is clear that Appellant was prejudiced by his Defense counsels' deficient performance.

b. If there was an expert consultant in forensic psychology, the expert was a child forensic psychologist and not an expert consultant regarding PTSD.

Even if the Defense retained an expert consultant – a forensic psychologist, per the undated joint status update in Attachment 8 to the unanimous verdict motion – it appears that the consultant was a child forensic psychologist and not a forensic psychologist with expertise in PTSD. App. Ex. VI. After the undated joint status update, all subsequent references to a forensic psychologist are to a child forensic psychologist. The speedy trial motion discusses "[i]nterviews related to earlier motions proceedings in this case by a *forensic psychologist of TSgt Lopez's two minor sons*. . . ." App. Ex. XIV. (emphasis added). Attachments 39 and 40 to that motion contain reports by the Defense *forensic psychologist who examined GL and NL*. App. Ex. XIV. (emphasis added). There were five "defense experts . . . present" at the January 2021 interview of NL at the Fort Sam Houston Defense Counsel's Office, including Dr. KG, whom Maj HS identified as a forensic psychologist. Because the purpose of the interview was to determine whether AC coached NL's testimony, it is implausible that the forensic psychologist was an expert in PTSD.

While the Government's chronology in the response to the speedy trial motion noted that there were "4 Defense expert request packages," there is nothing in the record indicating that any of these experts were forensic psychologists or forensic psychiatrists assisting the Defense with evaluating the nature and severity of Appellant's PTSD, the nexus between PTSD and criminal conduct, the impact of PTSD on Appellant's ability to form the specific intent required for child endangerment, or addressing PTSD for matters in extenuation and mitigation during the sentencing phase of trial. The Defense failure to retain an expert consultant regarding Appellant's PTSD was unreasonable and deficient and prejudiced Appellant for the reasons stated in section 1a, *supra*.

c. The Defense failed to introduce evidence on the merits of Appellant's PTSD to rebut evidence that Appellant had the specific intent necessary for the child endangerment specification and failed to introduce any PTSD evidence as matters in extenuation during the sentencing phase of trial.

The Defense did not introduce any evidence about Appellant's PTSD on the merits, presumably because Appellant's attorneys anticipated that the Government would seek to rebut any PTSD evidence with information adduced from two RCM 706 long form reports, including testimony from the "sanity board providers." R. at 632-33. This strategic choice was deficient because the Defense accepted the conclusions of the RCM 706 sanity board[42] without seeking an expert – either an expert consultant or an expert witness – to investigate the history of Appellant's PTSD, the presentation of his symptoms, who treated Appellant, what treatment he received, which medications he was prescribed, how Appellant's PTSD manifested itself in the

[42] The Government averred that Appellant "went through two separate 706 sanity inquiries." R. at 632. There is no evidence of the first RCM 706 inquiry in Appellant's ROT. If such an inquiry exists and if the board made findings and conclusions, that report should be in the ROT. Given that the parties relied on this first RCM 706 inquiry, Appellant was presumptively prejudiced by its absence from the ROT. *See* Assignment of Error III, *supra*.

months leading up to 1 January 2018, and what treatment and/or medications he received while hospitalized at SAMMC after 1 January 2018. In other words, the Defense accepted the Government's conclusion that Appellant did not suffer from a severe mental disease or defect and that he was able to appreciate the wrongfulness of his acts without conducting its own investigation of Appellant's past and current PTSD treatment or challenging the RCM 706 boards' findings and conclusions.

The Defense failed to zealously advocate on Appellant's behalf regarding his PTSD; instead, when the Government informed the Defense that it "anticipated raising an oral motion in *limine* regarding PTSD," the Defense cooperated with the Government to "hash out the limited capacity" in which the Government "thought this evidence would come out, talking about the charged events, and just the arguments leading up." R. at 632-33. The Government was worried about "jury nullification." Rather than advocate for the admission of evidence of Appellant's PTSD either for the affirmative defense of lack of mental responsibility or for the limited purpose of rebutting evidence of Appellant's specific intent necessary for the child endangerment specification, the Defense retreated at the mere possibility of a motion in *limine*. Ultimately, the Government did not move in *limine* to preclude evidence of Appellant's PTSD and there is no documentation of this purported off-the-record agreement in the ROT.

Assuming *arguendo* that the Defense elected not to introduce evidence of Appellant's PTSD on the merits because the Government would introduce rebuttal evidence, the Defense's strategic decision was nonetheless deficient. The Defense failed to present any evidence of Appellant's PTSD as mitigating or extenuating evidence during the sentencing phase of trial. This failure defies logic, especially after both the Government and the Defense discussed Appellant's PTSD during their respective closing arguments on the merits. The Government

argued that Appellant's PTSD was "a red herring" and "unreasonable and distracting." R. at 1100-1101. These statements opened the door for the Defense to discuss Appellant's PTSD; instead, the Defense limited itself to pointing out the incongruity of Appellant believing he was a possum with his "monstrous conduct" later that day and his return to the "same old Sergeant Lopez again." R. at 1103. These statements occurred in a vacuum without the benefit of an expert in PTSD to explain triggers and the nexus between PTSD and criminal conduct or any other evidence regarding other PTSD episodes that Appellant had experienced. Indeed, the CDC argued that "there is more to this case than just the surface statements that you got from [AC]" and yet the Defense failed to introduce evidence of Appellant's PTSD or expert testimony about PTSD during the sentencing phase. If there was "more to this case," then why did the Defense not introduce it once the Government opened the door? This failure was unreasonable and deficient.

Assuming *arguendo* that the Defense made a strategic choice not to present expert testimony about PTSD during the sentencing phase of trial, the failure to present any evidence of Appellant's PTSD was unreasonable and deficient. The Defense could have presented Appellant's medical records detailing his course of treatment and prescribed medications or testimony from his health care providers regarding his diagnosis and course of treatment. The Defense could have presented witnesses to testify about Appellant's PTSD, including but not limited to, Appellant's first sergeant whom AC "engaged . . . concerning TSgt Lopez's mental health and behavior" shortly before 1 January 2018.

In his unsworn statement, Appellant expressed his worry that he would not receive the treatment he needed from the VA if he received a punitive discharge. This was clearly a reference to mental health treatment. The Defense could have asked Appellant questions about

his past and current mental health treatment to help the panel understand the nature and severity of his PTSD. Because Appellant elected to make an unsworn statement, the Government could not question him. The Government could have offered testimony to rebut aspects of Appellant's unsworn statement regarding his PTSD, but the Defense could have narrowed the parameters of the issue by addressing his treatment without opening the door to other rebuttal evidence. Furthermore, the Government introduced Appellant's Personal Data Sheet, which listed the dates of Appellant's deployments and service in Turkey, as evidence. Pros. Ex. 31. The Defense could have supplemented this evidence with evidence of the January 2006 attack on the Sword Vernon Junction that killed two Airmen, evidence of Appellant's migraines and "wobbly stature when walking," evidence of the 2010 explosion in Iraq that nearly killed Appellant, evidence of the July 2014 helicopter crash outside RAF Lakenheath, or evidence of the crash between a motorcycle and the wrecker truck.[43] The Defense failed to introduce any evidence about these traumatic and extenuating events and their impact on Appellant and his conduct. The failure to introduce any evidence, whether testimonial or documentary, of Appellant's PTSD, in even a narrow presentation, during the sentencing phase of trial was unreasonable and deficient.

Appellant was prejudiced by this failure because the panel rejected the CDC's suggestion of confinement for three years and sentenced Appellant to confinement for nine years and six months, just six months short of the ten-year sentence to confinement that the Government sought. Had the Defense presented evidence of Appellant's PTSD during the sentencing phase,

[43] *See United States v. Lowe*, ACM S32707, 2022 CCA LEXIS 91 (A.F. Ct. Crim. App. 11 Feb. 2022) (unpub. op.) (finding that the defense counsel did not deprive the accused of the effective assistance of counsel where the accused was diagnosed with PTSD prior to trial but after the alleged offenses and the defense counsel supplemented the Government's evidence of the accused's combat service with a citation from a deployment and testimony from witnesses, including the accused's mother, about the impact on the accused of his younger brother's death).

there is a reasonable possibility that the panel would have returned a shorter sentence to confinement.

Appellant suffered from PTSD. This fact was incontrovertible at trial, yet the Defense (1) failed to retain an expert consultant to assist the Defense team with evaluating Appellant and rebutting the RCM 706 sanity board's conclusions that Appellant did not have a severe mental disease or defect and that he appreciated the wrongfulness of his actions; (2) failed to move for an expert witness in PTSD who could have testified, either on the merits or during the sentencing phase, about Appellant's PTSD and the nexus between PTSD and criminal conduct; and (3) failed to introduce any evidence of Appellant's PTSD, whether testimonial or documentary, either during the trial on the merits to prove lack of mental responsibility or partial lack of mental responsibility or during the sentencing phase as mitigating evidence. Every person in the courtroom knew that Appellant suffered from debilitating PTSD and yet the Defense failed to introduce any evidence of it for the panel to actually consider. This failure was objectively unreasonable and prejudiced Appellant.

2. The Defense waived the instruction for partial lack of mental responsibility after earlier arguing that the evidence raised the issue. This amounted to deficient performance which prejudiced Appellant.

In response to the military judge's question about whether lack of mental responsibility and partial lack of mental responsibility were raised by the evidence, the CDC stated that the Defense "did not give notice of [lack of] mental responsibility" but recognized that partial mental responsibility was "at least raised by the evidence" of Appellant's PTSD triggers specifically for the child endangerment specification. R. at 630-31. The CDC also acknowledged that AC's testimony about Appellant drinking alcohol, acting like a possum, and being triggered by fireworks raised the issue of partial lack of mental responsibility. Later, the CDC argued that the

court could find that the evidence raised the issue of partial lack of mental responsibility and that the relevant instruction would be necessary even if the Defense did not intend to raise the issue because the "trial counsel kick[ed] open the door" to the issue of Appellant's PTSD and his mental responsibility for the child endangerment offense. R. at 633. The CDC continued to press the military judge to find that the evidence had raised the issue of partial lack of mental responsibility because of "the virtue of the government's presentation of the case," and the Government's "motive bias line of questioning" of AC. R. at 633-34.

After arguing that the evidence raised the issue of partial lack of mental responsibility for the child endangerment specification, the CDC later waived the instructions for lack of mental responsibility for all offenses and partial lack of mental responsibility for the child endangerment offense.

Even if the Defense made a strategic decision not to assert lack of mental responsibility as a complete defense, and it appears there was some off-the-record agreement between the parties about the affirmative defense, *see* section 1c, *supra*, there was no reasonable explanation for the Defense to waive the instruction for partial lack of mental responsibility after repeatedly arguing that the evidence raised the issue. It defies logic that the Defense waived an issue it had earlier advanced. All the Defense had to do was request the instruction. Even if the Government had opposed it, the Defense would have preserved the issue for appeal. Accordingly, the Defense tactic prejudiced Appellant.

3. The Defense failed to investigate the veracity of AC's testimony that she told her SVC about Appellant's purported admissions after AC waived the attorney-client privilege.

Upon AC's testimony that she told her SVC about Appellant's purported admissions that he intended to hurt her on 1 January 2018, Appellant's CDC recognized the import of the

testimony – that AC had voluntarily disclosed a privileged communication and that she may have waived the attorney-client privilege regarding that communication. Rather than investigate whether AC actually told her SVC about the alleged admissions and move to litigate the waiver of the attorney-client privilege, the CDC pointed out to the members that AC's communication with her SVC was confidential. By highlighting the possibility that AC was truthful about informing her SVC of the admissions prior to November 2019, the CDC bolstered AC's credibility, which was a hotly contested issue at trial. The CDC's bolstering of AC's credibility amounted to a continuation of the CDC's pattern of introducing aggravating evidence through cross-examination than had been volunteered by or elicited from AC on direct examination. For example, the CDC asked AC, "You told your sons that people looked in Sergeant Lopez's brain and said – and saw that Sergeant Lopez had been planning the events on 1 January, for a month?" R. at 622. Appellant's alleged admissions were made more aggravating and AC's credibility was bolstered by the CDC's questions.

Additionally, AC had several motives in this case, including financial gain, as evidenced by her GoFundMe plea (and subsequent purchase of a purse worth nearly half of what she raised online) and the rent money from the state of Texas if she agreed to participate in the prosecution of Appellant. More importantly, AC was motivated by her interest in her sons viewing her as a victim and that they did not "resent" or "blame" her in the future. App. Ex. XLVIII). Given AC's desire to ensure that her sons did not resent her in the future, it is difficult to understand how or why AC did not reveal Appellant's alleged admissions that he had a plan and was sober for the charged incidents earlier than she did, especially considering that she later divorced Appellant and they stopped communicating. This was a critical point for Appellant's defense, essential for attacking AC's credibility and the veracity of her testimony, but the Defense utterly

failed to investigate the truth of AC's testimony that she told her SVC of Appellant's admissions. While the CDC recognized the import of AC's testimony and that it may have constituted a waiver of the attorney-client privilege, he failed to pursue the issue. Had the CDC adequately investigated and litigated the waiver, it is likely that the military judge would have concluded that AC waived the privilege and that the SVC was compelled to testify. Regardless of how the SVC would have testified, the failure to litigate the waiver meant that Appellant could not challenge AC's waiver of the privilege on appeal. The CDC's failure to preserve the issue for appeal was unreasonable and deficient. It was equally unreasonable and deficient to bolster AC's testimony by highlighting to the members that AC's communication with her SVC was confidential, implying that AC's communication to her SVC was truthful. By informing the members that "it's important for purposes of the witness's statement, that she's told her SVC, that the members understand that the SVC is not prosecuting the case, and, in fact, has to keep her communications in confidence," the CDC shielded AC's credibility rather than attack it.

The failures to investigate AC's testimony that she told her SVC about Appellant's admissions before she told any law enforcement official or prosecutor and litigate the waiver of the attorney-client privilege were unreasonable and deficient. These failures prejudiced Appellant because the TC explicitly referenced Appellant's alleged admissions as evidence of Appellant's guilt during closing argument and as aggravating evidence during the sentencing argument. R. at 1099-1101, 1261, 1263-65, 1267. The CDC could have argued that AC's testimony was false and that she lied to the panel under oath. Such an approach could have been the "straw that broke the camel's back" when it came to AC's credibility. *See United States v. Brickey*, 16 M.J. 258, 265-66 (C.M.A. 1983) ("The fact that court-martial members believe a witness despite circumstances A and B, which tend to impair his credibility, does not mean they

will continue to believe him if impeaching circumstance E is added."). AC's credibility was a critical issue in this case. *See* Assignment of Error II, *supra*. Indeed, during closing argument, the CDC argued that "a lot of what the government is asking you to find Sergeant Lopez guilty of is based exclusively on the description of events provided by [AC]" and "there's some real problems from the defenses [sic] perspective with her credibility" and "motives." R. at 1102-1103, 1106-1107. Yet, the CDC failed to develop the record on these issues. Had the Defense done so, the worst that could have happened was that the SVC corroborated AC's testimony. At best, pursuing the issue would have demonstrated that AC lied to the members about this supposed report to her SVC and was willing to lie to them about it, thereby diminishing her credibility to such a degree that the members would have had reasonable doubt about whether the Government proved Appellant's guilt beyond a reasonable doubt. Assuming *arguendo* that the panel would still convict Appellant even if the Defense pursued these issues, Appellant was nonetheless prejudiced during sentencing when the Government argued that the purported admissions were aggravating evidence. R. at 1261, 1263-65, 1267. Had the Defense pursued and litigated the waiver of the attorney-client privilege to determine the veracity of AC's testimony, the weight given to this aggravation evidence and argument would have been reduced. Because of the Defense's unreasonable and deficient performance, Appellant did not receive a fair trial.

4. The Defense failure to present evidence related to Appellant's loss of retirement during the sentencing phase was deficient and prejudiced Appellant.

The conviction for sexual assault had a mandatory minimum sentence of dishonorable discharge. 2016 MCM, Appendix 22. The Defense elected not to introduce any evidence of the loss of Appellant's retirement benefits because Appellant's retirement date "would be pretty obvious to the members." R. at 1243.

The Defense sentencing case focused on Appellant's duty performance during the course of the investigation and the two courts-martial, his EPRs, and his written and verbal unsworn statements, but the Defense failed to introduce any evidence regarding the medical benefits Appellant stood to lose as a result of his conviction and the mandatory minimum sentence. In his verbal unsworn statement, Appellant worried that the conviction "will prevent me from getting the help that I need, especially from the VA." R. at 1239. During the sentencing argument, the CDC asked the panel to consider "the context surrounding that day; how he got here, how everyone got there" and that 1 January 2018 was not "who Sergeant Lopez is as a whole." R. at 1271. These veiled references to Appellant's long-standing and debilitating PTSD, especially after Appellant expressed his fear that he would not receive the mental health treatment he needed, required the Defense to introduce evidence of the loss of Appellant's retirement benefits. In Appellant's case, this meant a loss of medical benefits, especially by the VA, and not a loss of anticipated funds. The Defense could have introduced evidence of the various types of mental health treatment Appellant had already received and the types of treatment offered by the VA in order to impress upon the panel the severity of Appellant's PTSD and what the loss of mental health treatment benefits would mean for Appellant's chronic PTSD. Instead of advocating for the panel to recognize what the impact of the loss of medical benefits upon retirement would be, the Defense relied on the military judge's instruction. In no way did this instruction convey what the loss of mental health treatment – the help Appellant needed most – would mean for Appellant.

Appellant recognizes that a dishonorable discharge was a mandatory punishment and that the panel could not have returned a lesser punitive punishment, but the Defense decision not to introduce evidence of the particular benefits crucial for Appellant's mental health, especially

after Appellant expressed his fear that he would not get the help he needed, was unreasonable and deficient. The Defense did not even mention the loss of these benefits during sentencing argument. As throughout the rest of trial, Appellant's PTSD was the proverbial elephant in the room and the Defense did not address it. The panel rejected the Defense argument for a sentence of confinement for three years and returned a sentence of confinement for nine years and six months, just six months fewer than the Government sought. Had the Defense introduced any evidence of Appellant's PTSD, the history of his illness, including all treatment at VA facilities, and the mental health treatment offered by the VA, it is reasonably likely that the panel would have returned a lesser sentence to confinement.

5. Appellant's DC suggested that certain strategic choices constituted deficient performance which prejudiced Appellant.

Appellant's DC provided a list of tactical decisions by the Defense that may be considered deficient and prejudicial. R. at Clemency Submission. These decisions included, inter alia, (1) the strategic decision not to introduce evidence related to the loss of Appellant's military retirement benefits, including the loss of mental health benefits in light of Appellant's fear that he would not get the help he needed; (2) the strategic decision to request a sentencing instruction that the panel may consider Appellant's PTSD as evidence of "all matters in extenuation, mitigation, and aggravation, regardless of whether it was introduced before or after findings" in lieu of an instruction limiting the consideration of AC's testimony that "outside agencies, specifically mental health and law enforcement, made a determination that TSgt Lopez's [PTSD] did not factor into" his actions on 1 January 2018; and (3) the strategic decision to request an instruction that only the members would determine the credibility of witnesses in lieu of a limiting findings instruction regarding AC's testimony that "outside agencies,

specifically mental health and law enforcement, made a determination that TSgt Lopez's [PTSD] did not factor into" his actions on 1 January 2018. R. at Clemency Submission.

The DC's suggestion that the Defense performance was deficient and prejudicial to Appellant practically begs this Court to conclude that various strategic decisions lacked a reasonable explanation, that the level of advocacy on Appellant's behalf fell measurably below the performance ordinarily expected of fallible attorneys, and that there is a reasonable probability that, but for the errors, the panel would have reasonable doubt regarding Appellant's guilt because of a lack of mental responsibility for all specifications of which he was convicted, reasonable doubt regarding Appellant's guilt because of a partial lack of mental responsibility for the child endangerment specification, and the panel may have adjudged a lesser sentence for Appellant.

6. The cumulative errors warrant relief.

This Court may "consider whether trial defense counsels' conduct, examined in its totality, constituted ineffective assistance of counsel even if individual oversights or missteps did not independently rise to that level." *Akbar*, 74 M.J. at 392 (citations omitted). The volume and severity of the errors discussed above, as well as additional instances of deficient and prejudicial performance identified by Appellant's DC, warrant relief independently and when assessing the cumulative effect of them.

Conclusion

For the foregoing reasons, Appellant respectfully requests that this Honorable Court set aside and dismiss the findings and sentence and restore all rights, property, and privileges to appellant. Alternatively, appellant respectfully requests that this Court order a factfinding hearing pursuant to *United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967).

VI.

THE MILITARY JUDGE ABUSED HIS DISCRETION BY NOT INSTRUCTING THE PANEL ABOUT PARTIAL LACK OF MENTAL RESPONSIBILITY FOR THE CHILD ENDANGERMENT SPECIFICATION.

Standard of Review

Whether a military judge correctly instructed the members is a question of law reviewed de novo. *United States v. Payne*, 73 M.J. 19, 22 (C.A.A.F. 2014) (citation omitted); *United States v. Solomon*, ACM 39972, 2022 CCA LEXIS 492, *44 (A.F. Ct. Crim. App. 19 Aug. 2022) (unpub. op.)

Law

Military judges are required to "determine and deliver appropriate instructions." *United States v. Barnett*, 71 M.J. 248, 249 (C.A.A.F. 2012) (quoting *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008)). Required instructions include, *inter alia*, a "description of the elements of each offense charged," any applicable special defenses, and "[s]uch other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, sua sponte, should be given." R.C.M. 920(e).

The Courts of Criminal Appeals [CCAs] "have the unique authority to address errors raised for the first time on appeal despite waiver of those errors at trial." *Solomon*, 2022 CCA LEXIS at *45 (citing *United States v. Hardy*, 77 M.J. 438, 442-43 (C.A.A.F. 2018); Article 66(d)(1), (charging the CCAs to affirm only so much of the findings and sentence that they find is correct and "should be approved"). The CCAs assess the entire record and determine "whether to leave an accused's waiver intact, or to correct the error." *United States v. Chin*, 75 M.J. 220, 223 (C.A.A.F. 2016).

Argument

This Court should find that the military judge abused his discretion in not instructing the panel on partial lack of mental responsibility regardless of the Defense waiver of the instruction. The Defense waived the instruction despite repeatedly arguing that partial lack of mental responsibility had been raised by the evidence, specifically AC's testimony about Appellant's PTSD, Appellant acting like a possum in the loft, and Appellant's known triggers of alcohol and fireworks. Given that these pieces of evidence raised the issue of whether Appellant lacked partial mental responsibility for the child endangerment specification, which required the Government to prove that Appellant acted either by design or by culpable negligence, *see* Assignment of Error I, *supra*, the military judge should have provided the instruction.

The failure to provide the instruction materially prejudiced Appellant's substantial rights. See Article 59(a), UCMJ. Had the members been properly instructed, it is likely that the panel would have found Appellant not guilty of child endangerment because he lacked the requisite intent.

Conclusion

WHEREFORE, because of error prejudicial to the substantial rights of Appellant, he respectfully requests that this Honorable Court set aside and dismiss the findings of guilty for child endangerment in Specification 1 of Charge III and reassess the sentence.

VII.

APPELLANT WAS DEPRIVED OF HIS RIGHT TO A UNANIMOUS VERDICT AS GUARANTEED BY THE SIXTH AMENDMENT, THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE, AND THE FIFTH AMENDMENT'S RIGHT TO EQUAL PROTECTION.[44]

[44] This issue is presently before the CAAF. *United States v. Anderson*, 2022 CAAF LEXIS 529 (C.A.A.F. 25 July 2022) (order granting review).

Additional Facts

Motion for a Unanimous Verdict

On 23 April 2021, Appellant's CDC moved for the court to instruct the panel that a finding of guilty for any specification required a unanimous verdict, pursuant to the Fifth and Sixth Amendments, RCM 906, 920, and 921, and applicable case law in light of the Supreme Court's decision in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020). App. Ex. VI. The Government opposed the motion. App. Ex. VII.

The Military Judge's Ruling

The military judge denied the motion in a 29 April 2021 written ruling. App. Ex. VIII. Regarding the Sixth Amendment, the military judge concluded that "Sixth Amendment jury protections do not apply in courts-martial, so any right to a unanimous verdict based on the Sixth Amendment does not apply to this court-martial." App. Ex. VIII. The military judge noted that "SCOTUS did not address the issue in *Ramos*, and this Court does not have the authority to determine decades of binding precedent on this issue were overturned by *Ramos* by implication." App. Ex. VIII.

Regarding the Fifth Amendment Due Process Clause, the military judge averred that "[p]anels are not juries," such that "the use of different nouns ("panel" vice "jury") seems to justify different inferences, including that Congress intended to differentiate juries and their protections from panels." App. Ex. VIII.

Regarding the Fifth Amendment Equal Protection Clause, the military judge concluded that "[t]reating a military accused differently than a civilian defendant, as explained by CAAF in *Akbar*,[45] does not violate equal protection" and that the Defense "failed to demonstrate that the

[45] *Akbar*, 74 M.J. 364.

right to a unanimous verdict from a panel in a court-martial is a fundamental right." App. Ex. VIII. The military judge dismissed the Defense's argument that the Government cannot show a compelling interest in non-unanimous verdicts when capitally referred cases require unanimous verdicts. App. Ex. VIII. The military judge asserted that "life itself" is the compelling interest in unanimous verdicts for capitally referred cases and noted that "[a]n interest may be compelling but still fall short of the interest in life or not depriving a citizen of life in the absence of extremely trustworthy processes, depending on whose perspective one takes in assessing the interest." App. Ex. VIII. The military judge concluded that rational basis was the appropriate scrutiny and that "[a]s explained by ACCA in *Mayo*,[46] providing protection against unlawful command influence provides a rational basis for Congress' determination that unanimous verdicts should not be required in courts-martial." App. Ex. VIII. Next, the military judge focused on "[a]voiding hung juries" to justify non-unanimous verdicts:

> It is also worth noting that requiring unanimous verdicts is not an unalloyed boon to military accuseds. In the current system, a 4-4 split results in an acquittal, and the accused cannot be tried for the same offense. If unanimous verdicts were required, the requirement would presumably apply to acquittals as well as convictions, meaning a 4-4 split (or a vote of 1 of conviction and 7 for acquittal) would result in a hung jury and could, depending on the rules adopted, permit a retrial in which the accused would again face the possibility of conviction. The current system prevents such retrials, saving the government time and money and saving the accused from facing the possibility of conviction multiple times. Avoiding hung juries thus benefits the government and an accused and can serve as an independent justification for Congress' decision not to require unanimous verdicts.

App. Ex. VIII.

[46] *United States v. Mayo,* ARMY 20140901, 2017 CCA LEXIS 239 (A. Ct. Crim. App. Apr. 7, 2017) (unpub. op.)

Finally, the military judge noted that the Defense discussed *Solorio v. United States*[47] and *Ortiz v. United States*,[48] but noted that *Ortiz* did not overturn or modify *Solorio*'s overruling of *O'Callahan v. Parker*'s[49] military nexus requirement. App. Ex. VIII.

Appellant's Forum Rights, Election of Forum, and Plea

The military judge advised Appellant that he had the right to be tried by a court consisting of eight members and that, if he elected trial by members, three-fourths of the members must vote to convict him. R. at 138. Appellant pled not guilty to the Charges and their Specifications and elected to be tried by a panel of officer and enlisted members. R. at 138, 158. The panel consisted of eight members – five officers and three enlisted members. R. at 376.

The Military Judge's Instructions

During voir dire, the military judge instructed the panel that the Government bore the burden of proving Appellant's guilt beyond a reasonable doubt. R. at 173.

After the parties' closing arguments, the military judge provided procedural instructions to the members, including that "the influence of superiority in rank will not be employed in any manner in an attempt to control the independence of the members in the exercise of their own personal judgment" and "[t]he concurrence of at least three-fourths of the members present when the vote is taken is required for any finding of guilty. Since we have eight members, that means six members must concur in any finding of guilty." R. at 1137, 1138.

[47] 483 U.S. 435 (1987).
[48] 138 S. Ct. 2165 (2018).
[49] 395 U.S. 258 (1969) (overruled on other grounds).

Findings of the Court-Martial

The panel convicted Appellant of all offenses but for Specification 4 of Charge III. R. at 1183. It is unclear how many members concurred in the findings as the members' vote was not disclosed. R. at 1183.

Standard of Review

A military judge's instructions are reviewed de novo. *United States v. MacDonald*, 73 M.J. 426, 434 (C.A.A.F. 2014). The constitutionality of a statute is a question of law reviewed de novo. *United States v. Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000).

Law and Argument

Article I, Section 8 of the Constitution provides, "The Congress shall have Power . . . To make Rules for the Government and Regulation of the Land and naval Forces." The courts will generally defer to Congress when it legislates on military affairs. *See, e.g.*, *Solorio*, 483 U.S. 435 (1987). In *Solorio*, the Supreme Court stated, "The rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress." *Id*. at 440 (1987) (citation omitted). The Court further noted:

> Congress has primary responsibility for the delicate task of balancing the rights of [servicemembers] against the needs of the military. As we recently reiterated, "judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."

Id. at 447 (omission in original)

The Sixth Amendment guarantees an impartial jury in all criminal prosecutions. U.S. Const. amend. VI. Section 1 of the Fourteenth Amendment prohibits states from depriving any

person of life, liberty, or property without due process of law and from denying any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV.

The Fifth Amendment guarantees the due process of law to anyone subject to the deprivation of life, liberty, or property in a criminal proceeding. U.S. Const. amend. V. The Due Process Clause also prohibits the federal government from discriminating if the discrimination is so unjustifiable that it violates due process of law. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

Article 52(a)(3), UCMJ, 10 U.S.C. § 852(a)(3), provides for non-unanimous guilty verdicts in trials by courts-martial with members.[50] It requires only "the concurrence of at least three-fourths of the members present when the vote is taken." A trial by court-martial requires eight members in a general court-martial and four members in a special court-martial. Article 16(b)(1), (c)(1), UCMJ, 10 U.S.C. § 816(b)(1), (c)(1). However, "[a]fter impanelment, as a result of excusals, [a general-court martial panel] could be reduced to no fewer than six members." Benchbook, para. 2-1-3. Therefore, as few as six members, needing only a three-fourths concurrence for a finding of guilty, may determine a servicemember's fate.

In *Ramos*, decided in April 2020 before Appellant's trial on the merits, the Supreme Court "repudiated [its] 1972 decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), which had allowed non-unanimous juries in state criminal trials." *Edwards*, 141 S. Ct. at1551. In delivering the Court's opinion, Justice Gorsuch explained:

> The text and structure of the Constitution clearly suggest that the term "trial by an impartial jury" carried with it some meaning about the content and requirements of a jury trial.

[50] In capital cases, however, the UCMJ requires a unanimous verdict to convict and for a sentence of death. *See* Article 52(b)(2), UCMJ, 10 U.S.C. § 852(b)(2).

> One of these requirements was unanimity. Wherever we might look to determine what the term "trial by an impartial jury" meant at the time of the Sixth Amendment's adoption – whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward – the answer is unmistakable. A jury must reach a unanimous verdict to convict.

Ramos, 140 S. Ct. at 1395. Furthermore, "the Sixth Amendment right to a jury trial is 'fundamental to the American scheme of justice,' such that "[t]here can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally." *Id*. Justice Thomas reiterated the fundamental nature of the right to a unanimous guilty verdict, declaring, "It is within the realm of permissible interpretations to say that 'trial . . . by . . . jury' [in the Sixth Amendment] includes a protection against nonunanimous felony guilty verdicts." *Id*. at 1423 (Thomas, J., concurring).[51]

Ramos held that, by way of the Fourteenth Amendment's Due Process Clause, the Sixth Amendment's jury-unanimity rule is "no less" applicable to state convictions for criminal offenses as it is to federal convictions. 140 S. Ct. at 1397. While the "jury-unanimity requirement announced in *Ramos* was not dictated by precedent or apparent to all reasonable jurists" prior to *Ramos*, that decision unequivocally broke "momentous and consequential" new ground. *Edwards*, 141 S. Ct. at 1555-56, 1559. Lest there be anyone who failed to appreciate the "momentous and consequential new ground" broken in *Ramos*, *Edwards* made clear that *Ramos* belongs to the canon of "landmark" criminal procedure cases which includes "*Mapp*,

[51] Justice Thomas agreed with the majority that Ramos' non-unanimous felony conviction was unconstitutional but would have applied the right to a unanimous guilty verdict through the Privileges or Immunities Clause of the Fourteenth Amendment. *Ramos*, 140 S. Ct. at 1420-21 (Thomas, J., concurring).

Miranda, *Duncan*, *Batson*, [and] *Crawford*. . . ." *Id*. at 1559.[52] These cases "fundamentally reshaped criminal procedure throughout the United States and significantly expanded the constitutional rights of criminal defendants." *Id*.

In dissenting from the *Edwards'* holding which declined to retroactively apply *Ramos*, Justice Kagan elaborated on the "vital," "essential," "indispensable," and "fundamental" right to a unanimous jury verdict:

> Allowing conviction by a non-unanimous jury impairs the purpose and functioning of the jury, undermining the Sixth Amendment's very essence. It raises serious doubts about the fairness of a trial. And it fails to assure the reliability of a guilty verdict. So when a jury has divided, as when it has failed to apply the reasonable-doubt standard, there has been no jury verdict within the meaning of the Sixth Amendment.

Id. at 1573-74, 1577 (Kagan, J., dissenting) (alterations, internal quotation marks, and citations omitted).

"[T]he [*Ramos*] Court took the unusual step of overruling precedent for the most fundamental of reasons: the need to ensure, in keeping with the Nation's oldest traditions, fair and dependable adjudications of guilt." *Id*. at 1575 (Kagan, J., dissenting). Non-unanimous guilty verdicts deprive servicemembers not only of a fundamental right, but also of an essential procedural safeguard ensuring a fair and dependable adjudication. Through Article 52(a)(3), UCMJ, Congress denies servicemembers this foundational, fundamental tenet of American justice for no articulated reason, let alone a legitimate or compelling Government interest.

Convictions by non-unanimous guilty verdicts "raise[] serious doubts about the fairness of [a] trial" and they fail to "assure the reliability of [a guilty] verdict." *Brown v. Louisiana*, 447

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[52] *Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Crawford v. Washington*, 541 U.S. 36 (2004).

U.S. 323, 334, n. 13 (1979). Thus, servicemembers, such as Appellant, who exercise their statutory right to be tried by a panel have a constitutional right for that factfinder to convict him unanimously – whether under the Sixth Amendment, the Due Process Clause of the Fifth Amendment, or the Equal Protection Clause of the Fifth Amendment.

"Although an accused tried by a court-martial has no Sixth Amendment right [to a jury trial], he does possess a due process right to a fair and impartial factfinder. Statutes and rules of procedure must be interpreted in the light of – and, if necessary, must yield to – this guarantee." *United States v. Carter*, 25 M.J. 471, 473 (C.M.A. 1988) (citations omitted). Since 1964, this Court and its predecessor have consistently concluded that, where servicemembers elect to be tried by a panel, they have a constitutional right to a panel that is impartial. *United States v. Crawford*, 35 C.M.R. 3, 6 (C.M.A. 1964); *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005); *see also, e.g., United States v. Deain*, 17 C.M.R. 44, 49 (C.M.A. 1954) ("Fairness and impartiality on the part of the triers of fact constitute a cornerstone of American justice.").

Here, in dismissing Appellant's assertion of the right to a unanimous verdict under *Ramos*, the military judge characterized *Ramos* as an opinion of a "fractured Court" which "does not mention courts-martial, the military or the armed forces, nor does it mention, let alone purport to overrule, any of the precedents [cited by the military judge]." App. Ex. VIII.

The military judge is correct that *Ramos* does not refer to courts-martial, but the question of whether trials by courts-martial require a unanimous verdict to convict was not the question before the Supreme Court. The question before the Supreme Court was whether the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous jury verdict to convict. *Ramos*, 140 S. Ct. 1394. Had the Supreme Court "refer[red] to courts-martial" in a case

about the application of the Sixth Amendment to state criminal convictions, it would have amounted to an advisory opinion, *i.e.*, "an opinion issued by a court on a matter that does not involve a justiciable case or controversy between adverse parties." *United States v. Wall*, 79 M.J. 456, 461 (C.A.A.F. 2020); *United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003)). Article III courts are precluded from issuing advisory opinions and the Courts of Criminal Appeals [CCAs] and the CAAF "generally adhere to the prohibition on advisory opinions as a prudential matter." *Id.* (citing U.S. Const., Art. III, § 2; Laurence H. Tribe, *American Constitutional Law* § 3-9, at 328-30 (3d ed. 2000)). Accordingly, the Supreme Court's decision not to opine on a case or controversy not before that court is not dispositive, contrary to the military judge's reasoning.

Until 2020, it was presumed that the Sixth Amendment guarantee of a unanimous verdict did not apply to criminal convictions in state courts. The presumption was so embedded that the jury unanimity requirement announced in *Ramos* "was not dictated by precedent or apparent to all reasonable jurists" prior to *Ramos*. *Edwards*, 141 S. Ct. at 1555-56. Here, the presumption that the Sixth Amendment jury-unanimity right does not apply to courts-martial is similarly embedded. *See, e.g., United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012) (in discussing when jeopardy attaches in the military context, this Court has stated, "In addition, there is no Sixth Amendment right to trial by jury in courts-martial.")[53] (citations omitted); *United States v. Pritchard*, __M.J. __, ARMY MISC. 20220001, 2022 CCA LEXIS 349 (A. Ct. Crim. App. Jun. 9, 2022) (*en banc*); *United States v. Causey*, 82 M.J. 574 (N-M. Ct. Crim. App. 2022), *rev. granted*, 2022 CAAF LEXIS 557 (C.A.A.F. Aug. 3, 2022); *United States v. Westcott*, No. ACM

[53] Given that the constitutional question in *Easton* concerned when jeopardy attaches in the military context under Article 44, UCMJ, this Court's statement that "there is no Sixth Amendment right to trial by jury in courts-martial" is dicta and not the holding of *Easton*.

39936, 2022 CCA LEXIS 156, *6 (A.F. Ct. Crim. App. Mar. 17, 2022) (unpub. op.), *rev. denied*, 2022 CAAF LEXIS 522 (C.A.A.F. Jul. 21, 2022).

Much of the CAAF's jurisprudence on the right to a Sixth Amendment "jury trial" focuses on the lack of a right to a "representative cross-section" of the accused's community. *See, e.g., United States v. Riesbeck*, 77 M.J. 154, 162 (C.A.A.F. 2018) (citation omitted); *Easton*, 71 M.J. at 175-76; *United States v. Tulloch*, 47 M.J. 283, 285 (C.A.A.F. 1997); *United States v. Smith*, 27 M.J. 242, 248 (C.M.A. 1988). In other words, a military accused is not entitled to a jury of his or her peers by virtue of Article 25, UCMJ, which provides, *inter alia*, that panel members must be superior in rank to the accused and that the convening authority shall detail members who are "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."

While a jury-unanimity requirement was not dictated by precedent or apparent to all reasonable jurists of this Court, the sister CCAs, and CAAF pre-*Ramos*, the "fundamental right" announced in *Ramos* now applies to courts-martial. This is because *Ramos* turns the presumption that the Constitution does not require unanimous verdicts for non-capital courts-martial on its head by making clear that (1) it is the Sixth Amendment's right to an *impartial* jury that requires unanimity; and (2) this unanimity is inextricably linked to the *fundamental fairness* of a verdict. In two pre-*Ramos* decisions, the CAAF recognized that "[a]s a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001); *see also Richardson*, 61 M.J. at 118. Thus, whether under the Sixth Amendment or the Fifth Amendment, Congress' choice to provide a statutory right to trial by a panel necessarily triggered constitutional

requirements of fairness and impartiality. Following *Ramos*, these requirements are not satisfied by non-unanimous convictions.

The military judge's failure to require a unanimous verdict following *Ramos* violated Appellant's rights under the Sixth and Fifth Amendments. Because the error was of constitutional dimension, the Government bears the burden of proving that the error was harmless beyond a reasonable doubt. *United States v. Tovarchavez*, 78 M.J. 458 (C.A.A.F. 2019). Because it cannot do so, Appellant is entitled to relief.

1. Under *Ramos*, unanimous verdicts are central to an accused's Sixth Amendment right to a jury trial *and* to an impartial jury.

In *Ramos*, Justice Gorsuch explained that the Founders understood that unanimity was central to the right to a petit, or trial, jury in a criminal case and to the right to an impartial jury, which, unlike unanimity, the text of the Sixth Amendment expressly requires. *See Ramos*, 140 S. Ct. at 1395-97. "Wherever we might look to determine what the term 'trial by an *impartial* jury' meant at the time of the Sixth Amendment's adoption – whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward – the answer is unmistakable. A jury must reach a unanimous verdict in order to convict." *Id*. at 1395 (emphasis added). This requirement is necessary because "a jurisdiction adopting a nonunanimous jury rule, even for benign reasons, would still violate the Sixth Amendment." *Id*. at 1401, n.44.

Ramos did not just overrule *Apodaca* and incorporate the unanimous verdict requirement against the states; it also reinforced that unanimous juries are essential to the Constitution's separate guarantees of impartial juries and fair verdicts. In overruling *Apodaca*, "[t]he Court took the unusual step of overruling precedent for the most fundamental of reasons: the need to ensure, in keeping with the Nation's oldest traditions, fair and dependable adjudications of a

defendant's guilt." *Edwards*, 141 S. Ct. at 1575 (Kagan, J., dissenting). This Court has also recognized:

> [t]he right to a trial by an *impartial panel* lies at the *very heart of due process*. Our common-law heritage, our Constitution, and our experience in applying that Constitution have committed us irrevocably to the position that the criminal trial has one well-defined purpose – to provide a *fair and reliable* determination of guilt.

United States v. Commisso, 76 M.J. 315, 321 (C.A.A.F. 2017) (citation omitted) (emphasis added). Thus, even if Appellant did not have a constitutional right to a trial by petit jury, the Constitution nonetheless required that, once he was tried by the factfinder that Congress chose to provide him, any conviction must be unanimous in order to guarantee a fair and impartial trial. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (explaining why, even if a criminal defendant has only a statutory, as opposed to constitutional, right to appeal, "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution"); *accord United States v. Rodriguez-Amy*, 19 M.J. 177, 178 (C.M.A. 1985) (explaining that a military criminal appeal is a statutory right that, once granted, must comport with safeguards of constitutional due process). When synthesizing Appellant's statutory right to be tried by a panel with the requirement that such statutory right must comport with the Constitution, *Ramos* establishes that Appellant's constitutional right to a fair and impartial panel requires that guilty verdicts be unanimous.

2. The CAAF has recognized that the UCMJ and the Rules for Courts-Martial create statutory and constitutional rights for an accused who elects to be tried by members.

"'[A] court-martial is now the only place in America where a criminal defendant can be convicted without consensus among the jury.'" *Westcott*, 2022 CCA LEXIS 156, at *117 (Meginley, J., dissenting) (quoting Capt. Nino Monea, Reforming Military Juries in the Wake of

Ramos v. Louisiana, 66 Naval L. Rev. 67, 72 (2020)). Virtually all the other provisions of the Sixth Amendment, aside from the Vicinage Clause, have already been incorporated into the military justice system. In *Lambert*, the CAAF was presented with the question of whether, after the accused learned that a member introduced a fiction book called "Guilty As Sin" into the deliberation room, the military judge erred in failing to adequately voir dire the members and in prohibiting the defense from conducting voir dire of the members. 55 M.J. at 294. After stating that an accused has no Sixth Amendment right to a jury trial, this Court focused on an accused's right to an impartial jury: "*[T]he Sixth Amendment* requirement that the jury be impartial applies to court-martial members and covers not only the selection of individual jurors, but also their conduct during the trial proceedings and *the subsequent deliberations*." *Id*. (emphases added). Thus, for 21 years, the CAAF has explicitly recognized that an accused is entitled to an impartial factfinder, including when the factfinder is a panel composed of members. Despite *Lambert's* clear application of the Sixth Amendment's guarantee of impartiality to a court-martial panel, the military judge failed to even mention *Lambert* when conducting the analysis of Appellant's right to a unanimous verdict. Instead, the military judge insisted that the trial court had no authority to "determine decades of binding precedent on this issue were overturned by *Ramos* by implication." App. Ex. VIII.

Following *Ramos*, an impartial court-martial panel is a logical fallacy, unless that panel, acting as the factfinder, returns a unanimous verdict to convict.

Lambert is but one case in which the CAAF has extended Sixth Amendment protections to courts-martial:

a. Right to Speedy Trial: "In the military justice system, an accused's right to speedy trial flows from various sources, including the Sixth Amendment, Article 10 of the [UCMJ], and

RCM 707 of the Manual for Courts-Martial." *United States v. Cooper*, 58 M.J 54, 57 (C.A.A.F. 2003).

b. Right to Public Trial: "Without question, the [S]ixth [A]mendment right to a public trial is applicable to courts-martial." *United States v. Hershey*, 20 M.J. 433, 435 (C.M.A. 1985) (citation omitted).

c. Right to Confront: "We hold that where testimonial hearsay is admitted, the Confrontation Clause is satisfied only if the declarant of that hearsay is either (1) subject to cross-examination at trial, or (2) unavailable and subject to previous cross-examination." *United States v. Blazier*, 69 M.J. 218, 222 (C.A.A.F. 2010).

d. Right to Notice:

> The rights at issue in this case are constitutional in nature. The Fifth Amendment provides that no person shall be deprived of life, liberty, or property, without due process of law," U.S. Const. amend. V. The Sixth Amendment provides that an accused shall "be informed of the nature and cause of the accusation," U.S. Const. amend. VI. Both amendments ensure the right of an accused to receive fair notice of what he is being charged with.

United States v. Girouard, 70 M.J. 5, 10 (C.A.A.F. 2011) (citations omitted).

e. Right to Compel: "The right to present a defense has many aspects. Under the Compulsory Process Clause, a defendant has a 'right to call witnesses whose testimony is material and favorable to his defense.'" *United States v. Bess*, 75 M.J. 70, 75 (C.A.A.F. 2016) (citation omitted).

f. Right to Counsel: "The first question we address is when did appellant's right to counsel under the [S]ixth [A]mendment attach. . . . In the military, this [S]ixth [A]mendment right to counsel does not attach until preferral of charges." *United States v. Wattenbarger*, 21 M.J. 41, 43 (C.M.A. 1985) (citations omitted).

g. Right to the Effective Assistance of Counsel: "The Sixth Amendment guarantees a criminal accused, including military service members, the right to effective assistance of counsel." *Gooch*, 69 M.J. at 361 (citation omitted).

The above sample of cases makes clear that, notwithstanding the deference afforded to Congress to legislate on military matters, courts – including this Court, the sister CCAs, and the CAAF – have applied certain constitutional protections to courts-martial. These constitutional protections include jury-specific constitutional rights. *See Lambert*, 55 M.J. at 295 (regarding the Sixth Amendment right to an impartial panel); *Wiesen*, 56 M.J. at 174 (regarding the Fifth Amendment due process right to a fair and impartial panel); *Richardson*, 61 M.J. at 118 ("As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel.").

3. The Fifth Amendment Due Process Clause requires unanimous verdicts for serious offenses.

The Fifth Amendment also guarantees Appellant the right to a unanimous guilty verdict. In *Ramos*, five justices expressly held that the due process principle of incorporation is what required Louisiana to afford the right of a unanimous verdict to defendants in state court. In *McDonald v. City of Chicago*, the Supreme Court explained that, in order for a Bill of Rights guarantee to be incorporated at all, the hallmark question is whether such a right is fundamental to the American scheme of ordered liberty or is deeply rooted in our Nation's history and tradition. 561 U.S. at 767.[54]

In *Ramos*, the Court announced that there "can be no question the Sixth Amendment's unanimity requirement applies to state and federal trials equally," that the Sixth Amendment's

[54] In *McDonald*, the Court held that the Second Amendment right to bear arms was incorporated against the states. 561 U.S. at 748.

guarantee to a jury trial "is fundamental to the American scheme of justice," and is "incorporated against the States." 140 S. Ct. at 1397. The Court also labeled this right an "ancient guarantee," and explained that "the right to trial by jury *included* a right to a unanimous verdict," at the time of the Sixth Amendment's adoption. *Id.* at 1402 (emphasis in original). With these pronouncements, the Court implicitly recognized that due process of law as applied to the states by the Fourteenth Amendment guarantees the right to a unanimous verdict. This is how the Sixth Amendment right to a unanimous verdict is protected by due process.[55] Accordingly, because "Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs and that Clause provides some measure of protection to defendants in military proceedings,"[56] the non-unanimous verdict system established by Article 52, UCMJ, fails to pass constitutional muster.

In *United States v. Santiago-Davila*, the CAAF's predecessor held that if a right applies because of due process, "it applies to courts-martial, just as it does to civilian juries." 26 M.J. 380, 390 (C.M.A. 1988). In *Santiago-Davila*, that meant applying *Batson*[57] to courts-martial. Furthermore, a unanimous verdict is part and parcel of the Fifth Amendment right to have one's guilt proved beyond a reasonable doubt, a right which military courts have explicitly required in courts-martial. *See United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016). Just as *Batson*, *Miranda*, *Crawford*, *Duncan*, and *Mapp* apply to courts-martial and not just civilian criminal defendants, so, too, does *Ramos*. To suggest that servicemembers do not enjoy a right to a

[55] Because courts-martial are federal creatures, the Fourteenth Amendment's Equal Protection Clause applies through reverse incorporation. *See Bolling*, 347 U.S. at 499-500; *United States v. Meakin*, 78 M.J. 396, 401 n.4 (C.A.A.F. 2019) (explaining the applicability of the Fourteenth Amendment to the military through the Fifth Amendment).
[56] *Weiss v. United States*, 510 U.S. 163, 176 (1994).
[57] 476 U.S. 79.

unanimous guilty verdict but enjoy other, equally fundamental Fourth, Fifth, and Sixth Amendment rights leads to a fundamentally unfair result. In *Hibdon v. United States*, the Sixth Circuit reiterated:

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

204 F.2d 834, 838 (6th Cir. 1953).

Appellant's case presents an even more glaring deprivation of due process than that which Louisiana or Oregon sanctioned prior to *Ramos*. The schemes in those states utilized a twelve-member jury and required a minimum of ten votes to convict. The pool from which the defense could obtain a not-guilty verdict was larger than Appellant's in two ways: (1) the jurors were drawn from a cross-section of the community, as opposed to the members selected by the convening authority pursuant to Article 25, UCMJ; and (2) twelve members served on the jury, as opposed to the eight-member panel in Appellant's trial. From a statistical perspective, the civilian defendants enjoyed a greater benefit than an accused facing trial by court-martial; in Louisiana and Oregon, a prosecutor would need to convince approximately 83% of the jury to convict, but in the military justice system, a prosecutor need only convince 75% of the panel to convict an accused.

An accused at a court-martial is due the same right as civilian defendants to have the Government prove its case beyond a reasonable doubt. *See United States v. Gay*, 16 M.J. 475, 477 (C.M.A. 1983) ("Due process requires proof beyond a reasonable doubt for conviction of a crime.") (citation omitted). Federal civilian courts have long recognized the nexus between this right and the requirement of jury unanimity as to guilt. *See Billeci v. United States*, 184 F.2d 394

(D.C. Cir. 1950) ("An accused is presumed to be innocent. Guilt must be established beyond a reasonable doubt. All twelve jurors must be convinced beyond that doubt; if only one of them fixedly has a reasonable doubt, a verdict of guilty cannot be returned."); *Hibdon*, 204 F.2d at 838.

Unanimity is central to an accused's due process right to have the Government prove its case beyond a reasonable doubt. *See Gay*, 16 M.J. at 477. As noted by two concurring justices in *Ramos*, allowing a non-unanimous guilty verdict "sanctions the conviction" of some defendants,[58] who would otherwise defeat the State's efforts "to [meet] its burden" of proving guilt. *Id.* at 1410-12 (Sotomayor, J., concurring).

Whereas in the unconstitutional systems previously employed in Louisiana and Oregon, a prosecutor needed to obtain ten votes to convict, in the military an accused facing a non-capitally referred court-martial is not even entitled to ten votes. Therefore, the need for unanimity is especially important in the military justice system because from a pure mathematics perspective, the military's smaller panels make it easier for the prosecution to obtain the requisite number of votes (*i.e.*, establish proof beyond a reasonable doubt) with an eight-member panel. Additionally, servicemembers are denied a panel of their peers; instead, they are entitled to a panel of "the best qualified for the duty" according to the convening authority pursuant to Article 25(d)(2), UCMJ, 10 U.S.C. § 825(d)(2). A Department of Defense report observed that the "best qualified" criteria under Article 25(d)(2)

> ensures the highest caliber personnel [are] available to serve as court-martial members. This represents a significant protection for the accused. Moreover, the "best qualified" court-martial members presumably reach fair and accurate verdicts more efficiently.

[58] 140 S. Ct. at 1417 (Kavanaugh, J., concurring).

United States v. Benedict, 55 M.J. 451, 458 (C.A.A.F. 2001) (Effron, J., dissenting) (citing Department of Defense, Joint Service Committee on Military Justice, Report on the Method of Selection of Members of the Armed Forces to Serve on Courts-Martial (1999)).

The Government's burden of proof is unconstitutionally lowered when the Government can secure a conviction even if twenty-five percent of those who are the "best qualified" hold a reasonable doubt regarding the accused's guilt. This situation "does violence to language and logic to say that the government has proved the defendant's guilt beyond a reasonable doubt." *Johnson v. Louisiana*, 406 U.S. 356, 401 (1972) (Marshall, J., dissenting). For Justice Marshall, "[t]he doubts of a single juror are in my view evidence that the government has failed to carry its burden of proving guilt beyond a reasonable doubt." *Id*. The UCMJ exacerbates that concern because one-quarter of a "best qualified" panel could be convinced of the accused's innocence, and yet this servicemember would still be found guilty.

When it comes to an accused's procedural rights in a court-martial, the relevant question under the Due Process Clause is "whether the factors militating in favor of [the right] are so extraordinarily weighty as to overcome the balance struck by Congress." *Weiss*, 510 U.S. at 177-78 (quotation and citation omitted). In *Weiss*, the petitioners challenged whether they had a right to have their courts-martial presided over by military judges with fixed terms in office. The Supreme Court held that the Due Process Clause did not require fixed terms. The Court expressly tied its analysis to the lack of a connection between fixed terms and impartiality and rejected the petitioners' claim that "a military judge who does not have a fixed term of office lacks the independence necessary to ensure impartiality." *Id*. at 178. Additionally, the Court noted that the Due Process Clause did not require fixed terms for military judges because "it has never been a part of the military justice tradition." *Id*. at 179. However, the Court cautioned that

"[w]e do not mean to say that any practice in military courts which might have been accepted at some time in history automatically satisfies due process of law today." *Id*. This statement calls to mind Justice Kagan's statement in *Edwards* that what was not apparent pre-*Ramos* – unanimous verdicts – is required today. *See* 141 S. Ct. at 1555-56 (Kagan, J., dissenting). Thus, while military courts today do not require unanimous verdicts, it is apparent post-*Ramos* that servicemembers are also entitled to unanimous verdicts.

Here, the military judge failed to consider any factors which are so extraordinarily weighty as to overcome the balance struck by Congress in not requiring unanimous guilty verdicts for serious offenses in trials by court-martial. Indeed, that part of the Due Process analysis is nonexistent.

Here, the factors militating in favor of unanimous verdicts, in addition to those already addressed, *supra*, are so extraordinarily weighty as to overcome the balance struck by Congress for the following reasons.

First, at the time the current military panel system was devised, neither *Ramos* nor *Edwards* had yet been decided and Congress would have been under the impression that non-unanimous verdicts were constitutional in other systems. Since then, the Supreme Court has roundly rejected such systems. The fact that the Supreme Court has so recently recognized the imperative nature of a unanimous verdict for the civilian population is an extraordinarily weighty factor that overcomes the balance struck by Congress. A system of non-unanimous verdicts "sanctions the conviction at trial or by guilty plea of some defendants who might not be convicted under the proper constitutional rule." *Ramos*, 140 S. Ct. at 1417 (Kavanaugh, J., concurring).

Second, Congress has already recognized the importance of unanimous verdicts in capitally referred cases and the military justice system only allows for the possibility of the death penalty when a panel of twelve members unanimously agree upon the findings. *See* RCM 1004(a)(2)(A). Thus, the military justice system already acknowledges that unanimity has a place and unanimous verdicts are required in capital cases. In other words, the military justice system is not a stranger to the concept of unanimous verdicts. The military judge's apparent concern about the prevention of unlawful command influence and securing finality of verdicts is not a concern in capital cases. There is no plausible argument for why these considerations are tolerable in non-capital cases but not in capital cases. An accused referred to a non-capital court-martial – who may face a sentence of life in prison[59] – is entitled to the same requirement of proof beyond a reasonable doubt by a unanimous factfinder as an accused referred to a capital court-martial. The military judge's discussion of *Akbar* in relation to Equal Protection focused on "life itself" as the compelling interest and not unanimity. The military judge failed to articulate why unanimity is required in capital cases but not in non-capital cases. It is unknown what "extremely trustworthy processes" the military judge referred to, but Appellant avers, in light of *Ramos* and *Edwards*, that a system which requires unanimous verdicts of one subset of accuseds while denying that right to the overwhelming majority of accuseds is not an extremely trustworthy process.

[59] In *United States v. Daniels*, No. ACM 39407 (rem), 2022 CCA LEXIS 472, at *1 (A.F. Ct. Crim, App. Aug. 9, 2022) (unpub. op.), the appellant was charged with negligent dereliction of duty, rape, and conduct unbecoming an officer and gentleman in violation of Articles 92, 120, and 133, UCMJ. His case was prosecuted in 2017. *Id*. at *1. Pursuant to Article 52, UCMJ (2016), only two-thirds of the members needed to concur in any finding of guilty. Notably, appellant, a black man, was accused of raping a white woman. *Id*. at *60. As a result of his conviction for rape, he faced a maximum confinement term of life in prison. *Id*. at *65.

Third, the unanimity requirement is even more important in jurisdictions, like courts-martial, that utilize panels with fewer than twelve members. *See Ballew v. Georgia*, 435 U.S. 223, 234 (1978) (noting that "the risk of convicting an innocent person [] rises as the size of the jury diminishes."). In his concurring opinion in *Ramos*, Justice Kavanaugh highlighted the "racist origins of the non-unanimous jury":

> [I]t is no surprise that non-unanimous juries can make a difference in practice, especially in cases involving back defendants, victims, or jurors. . . . Then and now, non-unanimous juries can silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors. The [other] jurors "can simply ignore the views of their fellow panel members of a different race or class."

Ramos, 140 S. Ct. at 1417-18 (Kavanaugh, J., concurring) (citation omitted).

In his concurring opinion in *Causey*, Senior Judge Gaston posited:

> Justice Kavanaugh's concerns that the use of non-unanimous verdicts can increase the possibility of unfair or unjust verdicts and the fencing out of view of minority jurors – which ultimately could be by race, ethnicity, or gender – appear no less applicable to the military justice system than to state criminal justice systems.

82 M.J. at 591 (Gaston, S.J., concurring).

Notably, when an accused elects trial by members, the default is an officer panel. When the accused is an officer, he or she is informed he will be tried by "commissioned (and/or warrant) officers." Benchbook at para. 2-1-3. If the military accused is enlisted, he or she is informed that he or she "may request the members of the court be comprised entirely of officers, that is commissioned and/or warrant officers, or at least one-third enlisted members." *Id*. If a servicemember does not request enlisted members, his or her court "shall be compromised of [officer] members in accordance with the convening order." *Id*.

According to a Department of Defense [DoD] report published in December 2020:

> Overall, the active component officer population is *less diverse* than the eligible civilian population. Blacks/African Americans, Hispanics, and Asians are *all underrepresented* compared with the eligible population. . . . Notably, the officer corps is *significantly less racially and ethnically diverse* than the enlisted population, for both the active and Reserve Components. Similarly, the civilian population eligible for commissioning as an officer is *much less racially and ethnically diverse* than the population eligible for serving as an enlisted member.[60]

In the military justice system, the views of 25% of the members can be ignored by their fellow members. This reality and its attendant perception of unfairness and racial bias undermines confidence in and respect for the military justice system.[61] Given the fundamental nature of the right espoused in *Ramos*, and the concerns that minority opinions will be discounted on non-unanimous court-martial panels – especially when the population of eligible panel members is already less racially and ethnically diverse than the eligible civilian population – this Court should find that unanimous verdicts are constitutionally required in the military in order to ensure equal protection under the law.

Fourth, the military's evolution does not require a non-unanimous verdict. Courts-martial are not conducted adjacent to battlefields, and military necessity today does not require such tribunals be held near foxholes. Modern technology and logistics can overcome the hurdles that once caused unnecessary delays in courts-martial. There can hardly be any suggestion that

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[60] Department of Defense Board on Diversity and Inclusion Report: Recommendations to Improve Racial and Ethnic Diversity and Inclusion in the U.S. Military, Executive Summary at viii, available at https://media.defense.gov/2020/Dec/18/2002554852/-1/-1/0/DOD-DIVERSITY-AND-INCLUSION-FINAL-BOARD-REPORT.PDF (last accessed on Aug. 11, 2022) (emphasis added).

[61] Additionally, equal protection concerns may arise due to a convening authority's selection of a servicemember's panel members at the outset of court-martial. The CAAF recently granted review of an equal protection claim where an appellant asserted that the convening authority used a non-neutral member selection process, resulting in an all-white panel for the appellant, a minority accused, facing serious charges. *United States v. Jeter*, 81 M.J. 791 (N-M. Ct. Crim. App. 2021), *rev. granted*, 2022 CAAF LEXIS 327 (3 May 2022).

non-unanimous verdicts are critical to military exigency, at least not in the normal circumstances attendant to modern courts-martial. Indeed, it is inconvenient for courts-martial to be delayed based upon witness availability and these delays have tangential impacts on the efficiency and efficacy of our mission. But to not require in-person cross-examination of adverse witnesses in courts-martial on the grounds of "the military is different" would violate the Sixth Amendment Confrontation Clause.

Finally, as the Oregon Supreme Court recently recognized, "*Ramos* does not imply that the Sixth Amendment prohibits acquittals based on non-unanimous verdicts or that any other constitutional provision bars Oregon from accepting such acquittals." *State v. Ross*, 367 Ore. 560, 573 (2021). Therefore, to the extent that the Government argues that a parade of horribles will plague the military justice system by virtue of requiring unanimity (*e.g.*, unlawful influence in the deliberation room, panel member anonymity, inefficiency due to hung juries, a threat to the finality of verdicts, etc.), this is a parade of strawmen. The military justice system already has discounted the legitimacy of some of these fears in capital courts-martial which require unanimity. Consistent with *Ross*, the military justice system can legitimately proceed with its present system allowing for non-unanimous acquittals so long as it requires a unanimous conviction.

In *Pritchard*, the Army CCA dismissed an equal protection argument because of concerns that "unanimous verdicts would unduly impede the efficiency of military operations. That is to say, deliberations towards unanimous verdicts are likely to take longer to achieve, thereby keeping participants from the military duties for greater periods of time." 2022 CCA LEXIS 349, at *10 (citation omitted). In relying on a 1916 statement made thirty-four years before the UCMJ was enacted in 1950, the Army CCA deliberately chose a World War I lens

from which to view military efficiency in courts-martial rather than a modern view of courts-martial. The Army CCA was concerned about "hung jury results," in which "the command is faced with the prospect of either engineering a retrial or returning a service member with unresolved charges to its ranks." *Id*. at *13. The Army CCA presumed that "[v]erdicts with a three-fourths majority" would be reached more quickly and provide finality. *Id*.

Here, the military judge averred that requiring unanimous guilty verdicts may lead to scores of hung juries and retrials. The military judge suffered from the same fundamental misunderstanding of the issue as the Army CCA did in *Pritchard*: the issue is whether a *conviction* requires a unanimous verdict. Appellant does not assert that an acquittal in the military justice system requires a unanimous vote. A vote to acquit because the Government failed to prove an accused's guilt beyond a reasonable doubt will result in an acquittal and not a hung jury. Next, in *Pritchard*, the Army CCA dropped a footnote in which it declared that "we are unaware of any other court in the country where a single vote for acquittal results in an acquittal." *Id*. at *13, n. 9. Even if the Army CCA is correct, as Justice Gorsuch so aptly stated, "it is something else entirely to perpetuate something we all know is wrong only because we fear the consequences of being right." *Ramos*, 140 S. Ct. at 1390. Regardless of whether a court-martial panel's verdict results in a hung jury or an acquittal, Appellant asserts that the issue before this Court is that there is no other court in the country where a non-unanimous verdict results in a conviction.

Appellant does not contend that he is entitled to every constitutional guarantee enshrined within the jury trial right. It would be untenable for the military to require a cross-section of the population from the state and district where the crime occurred to sit as panel members. Congress has reached an appropriate balance in this regard given the impracticability of such a

requirement in the military context where individuals retain their domiciles and travel throughout the nation or overseas on a regular basis. Unlike the right to a unanimous verdict, the right to a fair cross-section of individuals from a particular state/district is not "inextricably interwoven" with the burden of proof required by the Fifth Amendment.

Ramos makes clear that unanimity is central to the underlying impartiality, or fairness, of a criminal proceeding in any forum in the United States, whether state, federal, or military. If unanimity is central to impartiality and fairness, then Appellant had a due process right to a unanimous guilty verdict.

4. Appellant was entitled to a unanimous verdict because this right is a fundamental constitutional right under the Fifth Amendment Equal Protection Clause.

Under the Fifth Amendment, an equal protection violation is "discrimination that is so unjustifiable as to violate due process." *Akbar,* 74 M.J. at 406 (citation and quotation marks omitted). In *Santiago-Davila*, this Court's predecessor wrote, in the context of a *Batson* challenge, that "the right to equal protection is a part of due process under the Fifth Amendment . . . and so it applies to courts-martial, just as it does to civilian juries." 26 M.J. at 389.

The Equal Protection Clause protects against arbitrary government distinctions based on suspect classifications or the encroachment or denial of fundamental rights. *United States v. Means*, 10 M.J. 162, 165 (C.M.A. 1981). "The Equal Protection Clause is generally designed to ensure that the Government treats 'similar persons in a similar manner.'" *United States v. Gray*, 51 M.J. 1, 22 (C.A.A.F. 1999). Civilians and servicemembers are similarly situated when they are "in all relevant respects alike." *United States v. Begani*, 81 M.J. 273, 280 (C.A.A.F. 2021) (citation omitted). Other definitions of similarly situated utilized by the various Federal Courts of Appeal include the following: "'identical or directly comparable in all material aspects' or

'prima facie identical' or even a more 'colloquial' phrasing of 'apples to apples.'" *United States v. Begani*, 79 M.J. 767, 777 (N-M. Ct. Crim. App. 2020), *aff'd*, 81 M.J. 273 (C.A.A.F. 2021).

Government action that treats individuals differently with respect to a fundamental right triggers strict scrutiny review. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Strict scrutiny analysis requires the Government to prove that the challenged statute is narrowly tailored to achieve a compelling government interest. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Where there is no suspect classification or the implication of a fundamental right, the Government's action need survive only rational basis review which requires a rational basis for the distinction between similarly situated individuals. *United States v. Hennis*, 77 M.J. 7, 10 (C.A.A.F. 2017).

Ramos and *Edwards* established that a unanimous verdict is a fundamental right. The Supreme Court overruled existing precedent with a momentous and consequential decision that guaranteed defendants in state criminal proceedings the same right to unanimous verdicts as guaranteed to defendants in federal criminal proceedings. The six-justice majority in *Edwards* twice described *Ramos* as a "landmark" decision. 141 S. Ct. at 1559, 1561. In dissenting from the majority's decision in *Edwards*, which failed to apply *Ramos* retroactively, Justice Kagan stressed that six-justice majority was in complete accord with the dissenting justices' view of how *Ramos* fundamentally altered the criminal justice landscape. She called *Ramos* a "fundamental change in the rules thought necessary to ensure fair criminal process" and reiterated that the majority extolled the ancient foundations of the jury rule, the bedrock role of the unanimous jury in American criminal courts, how unanimity ensures fairness in criminal trials and protects against wrongful verdicts, and how unanimity safeguards the jury system from racial prejudice. 141 S. Ct. at 1574, 1578 (Kagan, J., dissenting).

If unanimous guilty verdicts are necessary in the civilian criminal justice system "to ensure impartiality," per *Ramos*, then it follows that they are equally necessary to achieve the same result in a court-martial. Following *Ramos* and *Edwards*, there is no doubt that the landmark right to a unanimous verdict is a fundamental right. Because unanimity is central to the underlying fairness of a criminal proceeding in all state and federal courts, it is likewise central to the underlying fairness of a court-martial.

The military judge only addressed Equal Protection in terms of whether the right to a unanimous guilty verdict is a fundamental right; the military judge did not address whether a civilian defendant and a military accused are similarly situated. App. Ex. VIII.

In discussing the law relating to equal protection, the military judge cited to CAAF's holding in *Akbar*. App. Ex. VIII. In *Akbar*, the CAAF "[did] not find any unjustifiable discrimination because Appellant, as an accused servicemember, was not similarly situated to a civilian defendant." 74 M.J. at 406 (citing *Parker v. Levy*, 417 U.S. 733, 743 (1974)).[62] However, because Akbar's case was referred capitally and his panel adjudged the death penalty, his panel was required to return findings by a unanimous verdict. RCM 1004; *Akbar*, 74 M.J. at 371. Therefore, by virtue of his offenses, Akbar was granted the right to a unanimous verdict, a right that all other military members charged with non-capital crimes are denied.

Furthermore, *Akbar* was decided in 2015, three years prior to the Supreme Court's holding in *Ortiz*, 138 S. Ct. 2165. Conspicuously absent from the military judge's ruling is any mention of *Ortiz*. App. Ex. VIII. Notably, a judge from this Court came to the opposite

[62] The Supreme Court's holding in *Parker* is unsurprising, given the nature of the offenses at issue. The appellant in that case was charged with three military specific offenses: willfully disobeying a superior commissioned officer, conduct unbecoming of an officer and a gentleman, and disorders and neglects to the prejudice of good order and discipline in the armed forces, in violation of Articles 90, 133, and 134, UCMJ. 417 U.S. at 737-38.

conclusion as the military judge concerning the nature of the right at issue in *Ramos*. *See Westcott*, 2022 CCA LEXIS 156, at *126 (Meginley, J., dissenting). "[T]he right to a unanimous verdict is a fundamental constitutional right, as articulated in *Ramos*." *Id*. at *126 (Meginley, J., dissenting). Unlike the military judge here, Judge Meginley reached his conclusion via *Ortiz*.

"The procedural protections afforded to a service member are 'virtually the same' as those given in a civilian criminal proceeding, whether state or federal." *Ortiz*, 138 S. Ct. at 2174. "[T]rial-level courts-martial hear cases involving a wide range of offenses, including crimes unconnected with military service; as a result, the jurisdiction of those tribunals overlaps substantially with that of state and federal courts." *Id*. at 2170 (citations omitted). Indeed, military courts now "closely resemble[] civilian structures of justice," so much so that the military justice system is judicial in nature, and not merely, or even primarily, a tool to ensure good order and discipline. *Id*. at 2174. "Each level of military court decides criminal 'cases' as that term is generally understood, and does so in strict accordance with a body of federal law (of course including the Constitution)." *Id*. A court-martial panel "decide[s] questions of the most momentous description, even life itself." *Id*. at 2175. If the Supreme Court finds that the procedural protections between military and civilian accused are "virtually the same," and the role of a panel or jury as the trier of fact is the same, all in accordance with the Constitution, then certainly a military accused and a civilian defendant are similarly situated – all the more so when they can be tried for the same offenses and especially so when the same accused could be tried in either civilian or military court.

While there are some vocabulary and minor procedural differences between a court-martial and a civilian criminal trial, the fundamental role of a "panel" and a "jury" is precisely

the same: to be the trier of fact. Both the military justice and civilian justice systems depend on a group of persons who serve as the final arbiter of fact and the truth-seekers in a criminal proceeding. Both panel members and jurors are tasked with weighing the credibility of witnesses and determining the facts. Furthermore, if the procedural protections provided to an accused are virtually identical to a civilian defendant and the punishments adjudged by a court-martial are similar to those adjudged in civilian criminal trials, servicemembers are similarly situated to civilian defendants. This is especially notable because courts-martial "can try service members for a vast swath of offenses, including *garden-variety crimes unrelated to military service*," such that servicemembers and civilian defendants are "identical or directly comparable in all material respects." *Ortiz*, 138 S. Ct. at 2174 (emphasis added); *Begani*, 79 M.J. at 777.

As *Ortiz* explained, and Judge Meginley highlighted, servicemembers may be tried for offenses that no longer have a military connection. 138 S. Ct. at 2174; 2022 CCA LEXIS 146, at *132 (Meginley, J., dissenting). Here, the Government alleged that Appellant committed six specifications of assault consummated by a battery, one specification of sexual assault, one specification of child endangerment, two specifications of kidnapping, and one specification of wrongfully communicating a threat. Unlike the military specific offenses in *Parker*, these offenses are not one unique to military law, nor are these offenses related to Appellant's military service.

From an equal protection standpoint, perhaps most significant is the situation presented in *United States v. Martinez*, No. ACM 39973, 2022 CCA LEXIS 212 (A.F. Ct. Crim. App. Apr. 6, 2022) (unpub. op.), *rev. granted*, 2022 CAAF LEXIS 562 (C.A.A.F. Aug. 3, 2022).[63] There, the accused was convicted of wrongful use of marijuana, communicating a threat, wire fraud, and

[63] JA at 155.

attempted wire fraud in violation of Articles 112a, 115, and 134, UCMJ. *Id*. at *1-2. The accused's alleged wrongful use of marijuana is not unique to military law, nor was it related to his military service. The same is true of the allegation that he communicated a threat to injure the reputation of one of his alleged victims. *Id*. at *12-13. This type of conduct, which occurred at Hurlburt Field, Florida, is criminalized through state statutes. *See* FLA. STAT. ANN. § 836.05 (2020).

The wire fraud allegation was charged pursuant to Article 134, clause 3, as a violation of federal law under 18 U.S.C. §1343. *Id*. at *16. The attempted wire fraud allegation was charged pursuant to Article 80, UCMJ, with the intended offense identified as wire fraud, in violation of 18 U.S.C. §1343. *Id*. at *18-19.

The elements of Article 134, clause 3, are: (1) that the accused did or failed to do certain acts that satisfy each element of the federal statute (including, in the case of prosecution under 18 U.S.C. §13, each element of the assimilated State, Territory, Possession, or District law); and (2) that the offense charged was an offense not capital. 2019 MCM, pt. IV, ¶91.b.(3). Clause 3 offenses involve noncapital crimes or offenses which violate federal civilian law, including law made applicable through the Federal Assimilative Crimes Act. If any conduct of this nature is specifically made punishable by another article of the UCMJ, it must be charged as a violation of that article. *Id*. at ¶91.c.(1). Thus, there are limitations on Article 134. "The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132." *Id*. at ¶91.c.(5)(a).

The Government is prohibited from charging an accused with a federal civilian offense under Article 134, clause 3, when the conduct at issue is "specifically made punishable by another article of the UCMJ." 2019 MCM, pt. IV, ¶91.c.(1). Given this prohibition, the

Government's decision to charge Airman [Amn] Martinez with the offense of wire fraud (and attempted wire fraud) in violation of 18 U.S.C. §1343 demonstrated that it believed his conduct was not "punishable by another article of the UCMJ." *See id*. Instead, the Government alleged, and obtained convictions, for mail fraud and attempted mail fraud. 2022 CCA LEXIS 212, at *1-2.

To find Amn Martinez guilty of mail fraud and attempted mail fraud, the military judge instructed his eight-member panel that a conviction required a three-fourths concurrence, or six of eight votes to convict. 2022 CCA LEXIS 212, at *3; Article 52(a)(3), UCMJ. If Amn Martinez had been tried in federal district court on the same allegations, he could not have been convicted unless his twelve-person jury was unanimous. Under any definition of similarly situated, Amn Martinez – a servicemember tried at a court-martial – was similarly situated to a civilian defendant. Based on the nature of his charges – mail fraud under 18 U.S.C. §1343 – Amn Martinez was "in all relevant respects alike"[64] or "identical or directly comparable in all material respects," to a civilian defendant facing the same charges in federal district court. *Begani*, 79 M.J. at 777. His charges were "prima facie identical" to a civilian defendant's wire fraud charges as they would both be facing charges alleging a violation of the same federal civilian statute. *Id*. Finally, in comparing Amn Martinez's wire fraud charges to that of a civilian defendant's wire fraud charges brought in federal district court, this Court is comparing "apples to apples." *Id*.

While Amn Martinez was charged with wire fraud in violation of 18 U.S.C §1343, other servicemembers may be court-martialed for "a vast swath of offenses, including garden-variety crimes unrelated to military service." *Ortiz*, 138 S. Ct. at 2174. That is exactly what happened

[64] *Begani*, 81 M.J. at 280 (citation omitted).

to Appellant. When servicemembers are not charged with military specific offenses, but are instead charged with "garden-variety" offenses, they may be tried in state court upon state charges. This is especially true when a servicemember's alleged offense(s) occur off-base, as was the case here, where Appellant's offenses occurred in Texas and officials of that state ceded jurisdiction to military authorities. Had Appellant been tried in a Texas court, he was entitled to a unanimous verdict. In other words, he had at least one less fundamental right in the military than had he been tried in Texas.

Under strict scrutiny review, the fundamental right to a unanimous verdict must be narrowly tailored to serve a compelling Government interest. There is no compelling interest in denying the fundamental right of a fair and impartial panel to servicemembers merely based on their service to the United States. In *Mayo*, the Army CCA pontificated about potential compelling Government interests in a non-unanimous panel verdict:

> [C]urrent practice helps reduce the possibility of impermissible influences on panel members both inside and outside the panel deliberation room. These pernicious concerns of improper influence will be mostly acutely felt when the case involves high stakes, when the case involves infamous acts, or when the personalities involved are less likely to yield to prophylactic instructions. That is, concerns of improper influence are most likely to be a problem in the most problematic of circumstances.

ARMY 20140901, 2017 CCA LEXIS 239 at *22 (A. Ct. Crim. App. Apr. 7, 2017) (unpub. op.).

This pre-*Ramos* decision, which the military judge cited favorably, reflects a concern about unlawful command influence. *See* App. Ex. VIII. "Perhaps the Government thus has an interest in nonunanimous panels, but the law concerning unlawful command influence is – supposedly – in place to protect an accused. . . . . [T]he *Mayo* rationale as justification to deny servicemembers the right to a unanimous jury should give anyone pause about the fairness of the military justice system." *Westcott*, 2022 CCA LEXIS 156, at *129 (Meginley, J., dissenting).

This is especially true because Article 37, UCMJ, 10 U.S.C. § 837(a)(1), prohibits unlawful command influence by the convening authority, any commanding officer, any panel member, and the military judge. To ensure these concerns are alleviated from the start – during voir dire and before the members are empaneled to serve on a servicemember's court-martial – the military judge asks the following question: "Is any member of the court in the rating chain, supervisory chain, or chain of command, or any other member?" Benchbook at para. 2-6-2. If this question is answered affirmatively, the military judge asks additional questions to ensure that any affected members feel they will be free to express their opinion and disagree with any other member of the panel, including those who are superior or subordinate to another panel member. *Id*. Moreover, the military judge instructs the members that "the influence of superiority in rank will not be employed in any manner in an attempt to control the independence of the members in the exercise of their own personal judgment." Benchbook at para. 2-5-14.

If, pursuant to Article 25, the convening authority selects the "best qualified" members for the duty, Article 37(a)(1) prohibits unlawful command influence, and the military judge instructs the members not to influence other members by virtue of superior rank, then there should be no concern about unlawful command influence in the deliberation room. This concern, touted as a reason for non-unanimous verdicts, is, or should be, nonexistent in the deliberation room. Thus, the military courts' general concern about unlawful command influence in the deliberation room and the military judge's concern here is a fallacy. Indeed, the CAAF has already addressed this matter: "Where the vote is unanimous, [the] concerns about command influence would appear to be unfounded." *United States v. Loving*, 41 M.J. 213, 296 (C.A.A.F. 1994).

Justice Kavanaugh's concurring opinion in *Ramos* notes:

> Then and now, non-unanimous juries can silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors. The 10 jurors "can simply ignore the views of their fellow panel members of a different race or class."

Ramos, 140 S. Ct. at 1418 (Kavanaugh, J., concurring in part) (citation omitted).

In his *Westcott* dissent, Judge Meginley refuted many of the other potential reasons to preserve non-unanimous verdicts. Regarding the finality of a verdict preventing hung juries, Judge Meginley noted that this is only an issue if either the Constitution or congressional legislation requires a unanimous vote to acquit. 2022 CCA LEXIS 156, at *131 (Meginley, J., dissenting) (citation omitted). Regarding expedience, Judge Meginley observed:

> cases generally take much longer to get to trial than they did in 1950, especially when scientific testing of evidence is involved; it is not uncommon for a case to proceed to trial a year after the offense was committed. Regarding the procurement of members, this may have been a significant issue in 1950, but is not so in 2022, as it is not uncommon to travel servicemembers to sit on panels at other installations. . . . Having considered these possible reasons, none warrant denial of equal protection regarding a unanimous verdict when viewed in context of the consequences of such a verdict.

Id.

Federal courts are in "wide agreement that convictions by general courts-martial receive the weight of equivalent convictions in the civilian system." *Gourzang v. AG United States*, 826 F.3d 132, 137 (3d Cir. 2016); *see also United States v. Grant*, 753 F.3d 480, 484-85 (4th Cir. 2014) (holding that a conviction by general court-martial can qualify as a predicate offense under the Armed Career Criminal Act); U.S.S.G. § 4A1.2(g): Definitions and Instructions for Computing Criminal History ("Sentences resulting from military offenses are counted if imposed by a general or special court-martial."). Servicemembers sentenced to confinement by a court-martial may be confined at a civilian institution so long as they are "subject to the same

discipline and treatment" as civilians in that institution. Article 58, UCMJ, 10 U.S.C. § 858. In *United States v. McPherson*, the CAAF reiterated the plain meaning of Article 58, UCMJ, when it wrote, "[m]ilitary confinees can – and must – receive treatment equal to civilians confined in the same institution." 73 M.J. 393, 396 (C.A.A.F. 2014)

Servicemembers convicted at courts-martial may be subject to various post-trial proceedings and requirements, including DNA processing required under 10 U.S.C. § 1565 and Department of Defense Instruction [DoDI] 5505.04, firearms prohibitions under 18 U.S.C. § 922, domestic violence ramifications under 18 U.S.C. § 922(g)(9), and sex offender notification requirements, under DoDI 1325.07. *Westcott*, 2022 CCA LEXIS 156, at *135 (Meginley, J., dissenting). The firearms prohibition is particularly problematic for servicemembers whose Second Amendment right to keep and bear arms can be stripped because of convictions for a multitude of offenses and whose military duties may require him or her to bear arms.

Appellant is subject to all of the aforementioned requirements. Entry of Judgment. Because of his conviction, Appellant is required to register as a sex offender in the state where he lives pursuant to the Sex Offender Registration and Notification Act, [SORNA], 34 U.S.C. § 20901 et seq. Judge Meginley noted that "SORNA considers a military conviction equal to a federal or state conviction. If a servicemember is denied a unanimous panel, it is not equal." *Wescott,* 2022 CCA LEXIS 156, at *136.

Had Appellant been prosecuted for the same offense of sexual assault in state or federal court with the right to a unanimous verdict, then he and a civilian prosecuted for the same offense would be similarly situated because both would be subject to the same SORNA requirements. If, however, Appellant was convicted at a court-martial, as he was, and the hypothetical civilian was convicted in a civilian court for the same offense, the civilian defendant

would have the fundamental right to a unanimous verdict. Appellant, denied this right, could have been convicted by as few as six members. R. at 9, 138, 1138, 1145; Article 52(a)(3), UCMJ. Had Appellant been tried at a special court-martial, he could have been convicted by as few as three people. Article 16(c)(1), UCMJ; Article 52(a)(3), UCMJ. Both Appellant and the hypothetical civilian would be subject to the same SORNA requirements. This is not the equal protection of the laws. Judge Meginley opined, "I am convinced that servicemembers and civilians are similarly situated for purposes of equal protection analysis when it comes to evaluating nonunanimous verdicts and their consequences under SORNA." 2022 CCA LEXIS 156, at *137.

Even under a rational basis test, the non-unanimous convictions authorized by Article 52(a)(3) cannot stand. A rational basis suffices for treating similarly situated people differently. *See, e.g., Rostker v. Goldberg*, 453 U.S. 57, 80 (1981) (asking whether the disparate treatment is "not only sufficiently but closely related" to Congress' purpose in legislating); *Akbar*, 74 M.J. at 406 ("equal protection is not denied when there is a reasonable basis for a difference in treatment") (internal citation omitted). In *Ramos*, the Supreme Court explained that "a jurisdiction adopting a nonunanimous jury rule even for benign reasons would still violate the Sixth Amendment." 140 S. Ct. at 1440, n. 44. No benign purpose exists here.

Finally, this Court need not wait for Congress or the Supreme Court to apply *Ramos* to courts-martial. After the Supreme Court's ruling in *Batson*, the CAAF's predecessor held that *Batson* extended to courts-martial by virtue of equal protection as guaranteed by the Fifth Amendment Due Process Clause. *Santiago-Davila*, 26 M.J. 380. Likewise, in *United States v. Tempia*, 16 C.M.A. 629, 631 (C.M.A. 1967), the Court of Military Appeals held that the

principles established in *Miranda*,[65] applied to military interrogations of criminal suspects. As with *Ramos*, *Miranda* involved a state court defendant, not a military accused. *See Tempia*, 16 C.M.A. at 635. In finding that *Miranda's* Fifth Amendment privilege against self-incrimination was applicable to military interrogations, the CAAF's predecessor noted that "the subsequent case of *Johnson v. New Jersey*[66] . . . repeatedly referred to the new [*Miranda*] standards as 'constitutional rules of criminal procedure,' the 'prime purpose' of which 'is to guarantee full effectuation of the privilege against self-incrimination, the mainstay of our adversary system of justice.'" 16 C.M.A. at 635. After all, "the views of 'the Supreme Court of the United States on constitutional issues' are binding on [this Court]." *Id*.

Here, Article 52(a)(3) was enacted before *Ramos*, when *Apodaca* was still in effect. Just as in *Santiago-Davila* and *Tempia*, this Court should apply *Ramos* to courts-martial to guarantee every military accused the same fundamental right afforded to every other defendant in the United States: the right to a unanimous guilty verdict because unanimity is central to the fairness of a trial and the reliability of a guilty verdict.

Conclusion

WHEREFORE, because of error prejudicial to the substantial rights of Appellant, he respectfully requests that this Honorable Court set aside the findings and sentence and restore all rights, property, and privileges to Appellant.

[65] *Miranda*, 384 U.S. 436.
[66] 384 U.S. 719 (1966).

PRAYER FOR RELIEF

WHEREFORE, appellant respectfully requests that this Honorable Court grant the requested relief.

[redacted]
WILLIAM E. CASSARA, Esq.
Appellate Defense Counsel
PO Box 2688
Evans, GA 30809
706-860-5769
bill@courtmartial.com

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, NAF, MD 20762-6604
240-612-4777
samantha.golseth@us.af.mil

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 28 November 2022.

[redacted]
WILLIAM E. CASSARA, Esq.
Appellate Defense Counsel
[redacted]

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

APPENDIX

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

VIII.

THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUPPORT THE FINDINGS OF GUILTY FOR SPECIFICATION 1 OF CHARGE III BECAUSE NO EVIDENCE WAS INTRODUCED THAT THE DOOR WAS LOCKED WITH A LOCK.

Additional Facts

Specification 1 of Charge III alleges an offense in violation of Article 134, UCMJ:

> In that TECHNICAL SERGEANT GEORGE E. LOPEZ, United States Air Force, 502d Logistics Readiness Squadron, Joint Base San Antonio-Lackland, Texas, at or near San Antonio, Texas, on or about 1 January 2018, was responsible for the care of his two sons, [GL] and [NL], children under the age of 16 years, and did endanger their welfare *by locking them in a room* while he assaulted their mother, [AC], in their presence, and that such conduct was of a nature to bring discredit upon the armed forces.

Charge Sheet (emphasis added).

Standard of Review

Questions of legal and factual sufficiency are reviewed de novo. *United States v. Bright*, 66 M.J. 359, 363 (C.A.A.F. 2008); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

Article 66(d), UCMJ, mandates that this Court review the legal and factual sufficiency of the evidence and affirm only those findings of guilty which this Court finds correct in law and in fact. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). Such a review involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency. *Washington*, 57 M.J. at 399. The term "reasonable doubt" does not mean that the

evidence must be free from conflict. *United States v. Wheeler*, 76 M.J. 565, 568 (A.F. Ct. Crim. App. 2017) (citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)). It does, however, mean "a conscientious doubt, based upon reason and common sense, and arising from the state of the evidence" and "proof that leaves you firmly convinced of the accused's guilt." Dept. of the Army Pam. 27-9, Military Judges' Benchbook (Benchbook), para. 2-5 (29 Feb. 2020).

The test for legal sufficiency is "whether, considering the evidence in a light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003); *United States v. Pabon*, 42 M.J. 404, 405 (C.A.A.F. 1995) (*quoting Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The test for factual sufficiency is, "whether after weighing the evidence in the record of trial, and making allowances for not having personally observed the witnesses, [this Court is] convinced of [appellant's] guilt beyond a reasonable doubt." *Walters*, 58 M.J. at 396 (*citing Turner*, 25 M.J. at 325)). This Court must be convinced of appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325.

Elements of Specification 1 of Charge III

To find Appellant guilty of Specification 1 of Charge III, the Government is required to prove by legal and competent evidence beyond a reasonable doubt (1) That at or near San Antonio, Texas, on or about 1 January 2018, Appellant had a duty for the care of his two sons, GL and NL; (2) That GL and NL were then under the age of 16 years; (3)That at or near San Antonio, Texas, on or about 1 January 2018, Appellant endangered their welfare (through either design or culpable negligence)[67] *by locking them in a room* while he assaulted their mother, AC, in their presence;

[67] *See* Issue I *supra.*

and that, under the circumstances, the conduct of the Appellant was of a nature to bring discredit upon the armed forces.

Argument

In Specification 1 of Charge III, the Government charged Appellant with endangering his children, in violation of Article 134, UCMJ, by *locking them in a room* while he assaulted their mother, AC. AC and GL both testified that Appellant locked Appellant, AC, GL, and NL in the bedroom together, and AC testified Appellant "locked the door." R. at 448, 665, 667, 669. However, none of the witnesses testified whether the bedroom or closet door was locked with a lock.

Conversely, the evidence demonstrates AC, GL, and NL each left the room at various points on the date of the alleged offense. GL explained he and NL left the room to eat chicken in the kitchen. R. at 669. When asked do you remember how you got out of the room, GL stated "I remember saying like I was hungry, that's pretty much it." R. at 671. GL did not testify that the room was locked with a lock or that he could not open the door to leave the room. GL further testified that after eating, GL went into his parent's closet, but not because anyone had told him to. *Id*. GL went into the closet by himself and was "just relaxing." *Id*. While GL went into the closet, with the closet door left open, NL stayed in the bedroom with AC. R. at 680.

Moreover, while NL testified that he did not see anything happen to AC, he recalled he left their house and knocked on their neighbors' doors. R. at 692. NL explained he went to three neighbors' houses before returning home, and when he returned home, Appellant put both NL and GL into the closet. R. at 694. Even setting aside the stark contrast in GL and NL's memories for argument's sake, the Government did not provide any evidence that the closet doors were ever locked.

Conclusion

The Government was required to prove beyond a reasonable doubt that the Appellant locked his children in a room while he assaulted AC and they failed to do so.

WHEREFORE, because of error prejudicial to the substantial rights of Appellant, he respectfully requests that this Honorable Court set aside the findings of guilty for Specification 1 of Charge III and reassess the sentence.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**UNITED STATES' MOTION TO COMPEL DECLARATIONS OR AFFIDAVITS**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **GEORGE E. LOPEZ**, United States Air Force *Appellant*	)	No. ACM 40161 9 December 2022

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

Pursuant to Rule 23.3(e) of this Honorable Court's Rules of Practice and Procedure, the United States hereby requests this Court compel Appellant's trial defense counsel, Maj Allen Abrams and Capt Toni Otokunrin, to provide an affidavit or declaration in response to Appellant's allegations of ineffective assistance of counsel (IAC). In his assignments of error, Appellant claims he received ineffective assistance in findings and sentencing in four ways. (App. Br. at 81.)

First, Appellant contends that his counsel failed by insufficiently investigating, presenting, and arguing Appellant's Post-Traumatic Stress Disorder (PTSD). (Id.) Second, Appellant contends that his counsel failed to request a partial mental responsibility instruction. (Id.) Third, Appellant contends that his counsel failed to investigate whether the victim waived her attorney-client privilege when she testified to admissions Appellant made to her. (Id.) And fourth, Appellant contends that his counsel failed to present evidence related to Appellant's loss of retirement during sentencing. (Id.)

On 9 December 2022, Appellant's trial defense counsel responded to undersigned counsel stating they would only provide an affidavit or declaration by an order by this Court.

To prepare an answer under the test set out in United States v. Polk[1], 32 M.J. 150, 153 (C.M.A. 1991), the United States requests that this Court compel the two trial defense counsel to provide a declaration or affidavit. Statements from Appellant's counsel are necessary because the record is insufficient to answer Appellant's IAC allegations, since it provides no information about trial defense counsel's strategic decisions as they relate to Appellant's specific assertions of ineffectiveness. Thus, the United States requires statements from trial defense counsel to adequately respond to Appellant's brief. *See* United States v. Rose, 68 M.J. 236, 236 (C.A.A.F. 2009); United States v. Melson, 66 M.J. 346, 347 (C.A.A.F. 2008). In fact, this Court cannot grant Appellant's ineffective assistance of counsel claim without first obtaining statements from trial defense counsel. *See* Rose, 68 M.J. at 237; Melson, 66 M.J. at 347.

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

[redacted]
MORGAN R. CHRISTIE, Maj, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Appellate Defense Division on 9 December 2022.

[redacted]USAF
Appellate Government Counsel, 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*	)	**UNITED STATES' MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **GEORGE E. LOPEZ**, United States Air Force *Appellant*	)	No. ACM 40161 9 December 2022

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

Pursuant to Rule 23.3(m)(5), the United States respectfully requests that it be given 14 days after this Court's receipt of a declaration or affidavit from trial defense counsel to submit its answer so that it may incorporate statements provided by Appellant's trial defense counsel in response to the specified ineffective assistance of counsel issue.[1] This case was docketed with the Court on 1 September 2021. Since docketing, Appellant has been granted twelve (12) enlargements of time. Appellant filed his brief with this Court on 28 November 2022. This is the United States' first request for an enlargement of time. As of the date of this request, 464 days have elapsed.

There is good cause for the enlargement of time in this case. Appellant has raised, *inter alia*, four areas in which he claims his trial defense counsel was ineffective. The United States cannot prepare its answer to the allegations of ineffective assistance of counsel without a statement from trial defense counsel. An enlargement of time is necessary to ensure trial defense counsel have time to review the allegations before they draft and submit their statements to the

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

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

Additionally, between now and the anticipated due date for this answer, undersigned counsel is tasked with the following:

- United States v. Knodel – Bifurcated motions for DuBay hearing at MCAS Miramar, California (TDY 12-15 December 2022)
- United States v. Knodel – Litigating DuBay hearing at MCAS Miramar, California (TDY 8-13 January 2023)

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

[redacted]
MORGAN R. CHRISTIE, Maj, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

[redacted]
MARY ELLEN PAYNE
Associate Chief, 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 the Appellate Defense Division on 9 December 2022.

[redacted]

MORGAN R. CHRISTIE, Maj, USAF
Appellate Government Counsel, 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 40161**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
George E. LOPEZ	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 28 November 2022, Appellant, through counsel, submitted an assignments of error brief. In the brief, Appellant alleges that trial defense counsel were ineffective in four ways:

> (1) the failure to retain an expert consultant in PTSD, to move for an expert witness in PTSD, or to introduce any evidence of Appellant's PTSD either on the merits or during the sentencing phase of trial; (2) waiving the instruction for partial lack of mental responsibility after earlier arguing that the evidence raised the issue; (3) the failures to investigate the veracity of AC's testimony that she told her SVC about Appellant's purported admissions after AC waived the attorney-client privilege and to litigate the waiver of the attorney-client privilege; and (4) the failure to present evidence related to Appellant's loss of retirement during the Defense sentencing case.

On 9 December 2022, the Government filed a Motion to Compel Declarations or Affidavits and contemporaneously filed a Motion for Enlargement of Time. The Government requests this court compel Appellant's trial defense counsel, Major Allen Abrams and Captain Toni Otokunrin, to provide affidavits or declarations in response to the claimed ineffective assistance of counsel. According to the Government, Appellant's trial defense counsel indicated they would only provide an affidavit or declaration upon order by this court. In the motion for enlargement of time, the Government requests 14 days after the court's receipt of declarations or affidavits to submit its answer. Appellant did not file a response to the motions.

The court has examined the claimed deficiencies and finds good cause to compel a response. The court cannot fully resolve Appellant's claims without piercing the privileged communications between Appellant and trial defense

counsel. Moreover, in light of the court's order, it finds the Government's requested enlargement of time is appropriate.

Accordingly, after considering the Government's motions and the deficiencies alleged by Appellant, it is by the court on this 21st day of December, 2022,

ORDERED:

The Government's Motion to Compel Declarations or Affidavits is **GRANTED**. Major Allen Abrams and Captain Toni Otokunrin are each ordered to provide an affidavit or declaration to the court that is a specific and factual response to Appellant's claims that they were ineffective as described above.

A responsive affidavit or declaration by each counsel will be provided to the court not later than **20 January 2023.** The Government shall deliver a copy of the responsive affidavits or declarations to Appellant's counsel.

It is further ordered:

The Government's Motion for Enlargement of Time is **GRANTED**. The Government's answer to Appellant's assignments of error brief will be filed not later than **3 February 2023**.

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**UNITED STATES' MOTION TO ATTACH DOCUMENTS**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **GEORGE E. LOPEZ**, United States Air Force *Appellant*	)	No. ACM 40161 19 January 2023

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

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

A. **Appendix A – Declaration of Maj Allen Abrams, dated 18 January 2023 (30 pages)**

B. **Appendix B – Declaration of Ms. Toni Otokunrin, dated 18 January 2023 (2 pages)**

The attached declarations are responsive and relevant to Appellant's claims that his trial defense counsel were ineffective. Appellant submitted this claim as his fifth assignment of error. (App. Br. at 62.) On 21 December 2022, this Court compelled declarations from the two trial defense counsel. These declarations are responsive to the Court's order.

Under United States v. Jessie, this Court may consider matters from outside the record of trial, if they relate to "issues raised by materials in the record but not fully resolvable by those materials." 79 MJ 437, 445 (C.A.A.F. 2020). Appellant avers that his trial defense counsel were ineffe[illegible]ur ways: (1) by failing to retain an expert consultant in PTSD, to move for an exp[illegible]PTSD, or to introduce any evidence of Appellant's PTSD either on the merits or dur[illegible]entencing phase of trial; (2) by waiving the instruction for partial lack of mental

U.S. AIR FORCE COURT OF CRIMINAL APPEALS

GRANTED

30 JAN 2023

responsibility after earlier arguing that the evidence raised the issue; (3) by failing to investigate the veracity of the victim's testimony that she told her SVC about Appellant's purported admissions after the victim waived the attorney-client privilege and to litigate the waiver of the attorney-client privilege; and (4) by failing to present evidence related to Appellant's loss of retirement during the Defense sentencing case. (App. Br. at 81.) The steps trial defense counsel took to investigate, prepare, and advocate on Appellant's behalf, and the strategic and tactical decisions that followed, are therefore "raised by materials in the record but not fully resolvable by those materials." Id.

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

[redacted]
MORGAN R. CHRISTIE, Maj, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

[redacted]
MARY ELLEN PAYNE
Associate Chief, 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 the Appellate Defense Division on 19 January 2023.

MORGAN R. CHRISTIE, Maj, USAF
Appellate Government Counsel, 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,	)	**UNITED STATES ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	
	)	Before Panel No. 1
Technical Sergeant (E-6) **GEORGE E. LOPEZ**, USAF Appellant.	)	No. ACM 40161
	)	3 February 2023

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

MORGAN R. CHRISTIE, Maj, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
United States Air Force
[redacted]

MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Counsel Division
United States Air Force
[redacted]

ALLISON R. GISH, Maj, USAF
Appellate Government Counsel
Government Trial and
Appellate Counsel Division
United States Air Force
[redacted]

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UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) **GEORGE E. LOPEZ**, USAF, *Appellant.*	)))))))))	UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR Before Panel No. 1 No. ACM 40161

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

ISSUES PRESENTED

I.

[WHETHER] THE SPECIFICATION OF CHARGE III FAILS TO STATE AN OFFENSE BECAUSE IT FAILED TO ALLEGE WHETHER THE CHILD ENDANGERMENT WAS BY DESIGN OR BY CULPABLE NEGLIGENCE?

II.

[WHETHER] THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUPPORT THE FINDINGS OF GUILTY FOR ASSAULT CONSUMMATED BY A BATTERY IN SPECIFICATIONS 1-4 OF CHARGE I AND FOR SEXUAL ASSAULT IN THE SPECIFICATION OF CHARGE II?

III.

[WHETHER] APPELLANT WAS PRESUMPTIVELY PREJUDICED BY THE ABSENCE FROM THE RECORD OF TRIAL OF MOTIONS, EVIDENCE, AND RULINGS FROM THE FIRST ITERATION OF THE COURT-MARTIAL UPON WHICH THE MILITARY JUDGE AND THE PARTIES RELIED FOR THIS COURT-MARTIAL?

IV.

[WHETHER] THE SENTENCE TO CONFINEMENT OF NINE YEARS AND SIX MONTHS IS INAPPROPRIATELY SEVERE?

V.

[WHETHER] THE DEFENSE COUNSELS' FAILURES AND ERRORS DENIED APPELLANT THE EFFECTIVE ASSISTANCE OF COUNSEL?

VI.

[WHETHER] THE MILITARY JUDGE ABUSED HIS DISCRETION BY NOT INSTRUCTING THE PANEL ABOUT PARTIAL LACK OF MENTAL RESPONSIBILITY FOR THE CHILD ENDANGERMENT SPECIFICATION?

VII.

[WHETHER] APPELLANT WAS DEPRIVED OF HIS RIGHT TO A UNANIMOUS VERDICT AS GUARANTEED BY THE SIXTH AMENDMENT, THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE, AND THE FIFTH AMENDMENT'S RIGHT TO EQUAL PROTECTION?

VIII.[1]

[WHETHER] THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUPPORT THE FINDINGS OF GUILTY FOR SPECIFICATION 1 OF CHARGE III BECAUSE NO EVIDENCE WAS INTRODUCED THAT THE DOOR WAS LOCKED WITH A LOCK?

STATEMENT OF THE CASE

Appellant's statement of the case is correct.

[1] The assignment of error is raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

STATEMENT OF FACTS

Summary

All the convicted offenses occurred during a 12-hour time frame between 0455-1835 hours on New Year's Day, 1 January 2018, at Appellant's home in San Antonio, Texas. (R. at 852-53.) Appellant lived in this home with his wife of nine years, AC, their two young sons, GL and NL, and AC's adult sister, GP. (R. at 434.) At the time, GL was 8 years old, and NL was 6 years old. (R. at 437.)

Background

Leading up to News Year's Eve, Appellant and his wife were discussing divorce over various marital issues, including Appellant's drinking. (R. at 435-436.) On New Year's Eve, Appellant went to a neighbor's house for a party and drank alcohol. (R. at 435.) He took their eldest son, GL, with him. (R. at 437.) AC stayed home with their younger son, NL, who was sick. (R. at 435-436.) Appellant returned home with GL around 0000 hours. (R. at 437.) GL went to bed in his room upstairs. (Id.) AC could tell Appellant had been drinking. (Id.) She confronted him about drinking while on call for work, at which point, Appellant admitted he lied to her about being on call. (Id.) AC threw her wedding rings at Appellant and said she was "done" with the marriage. (R. at 437-438.) In response, Appellant left the house. (R. at 438.) He returned home around 0200 on 1 January 2018. (Id.) When Appellant returned home, he seemed "normal." (R. at 439.) He and AC continued to verbally fight about their marriage. (R. at 440, 511.) This time, AC left the home to cool down. (Id.) When she returned home, Appellant was gone. (R. at 440.)

Appellant eventually came home shortly after 0600 hours. (R. at 442.) By this point, GP had left for work. (R. at 400.) Appellant and AC continued to talk and verbally argue. (Id.) At

some point during the argument AC said, "I'm done. I'm going to bed," and she retreated to her bedroom. (R. at 444). AC was "tired" as she "had been up all night." (Id.) NL was sleeping in AC's master bedroom that night on the floor beside her, as he was sick. (R. at 465.) After AC said she was going to bed, Appellant followed her into the bedroom and grabbed her phone. (R. at 500.) Appellant got "upset" when AC would not provide her passcode. (R. at 444.) When AC would not tell Appellant her phone password, "he started yelling like a drill sergeant and demanding that [she] give him the pass code [and] to look at him." (R. at 445.)

Strangling, Striking and Body Slamming AC

After "yelling really loud," Appellant got on top of AC, telling her to "look at him" and asking her, "do you love me" while strangling her with his forearm. (Id.) Appellant's legs were wrapped around AC's body as he was on top of her, "squeezing on [her] ribs." (R. at 445-446.) AC struggled to breathe. (R. at 445.) AC thought she was going to die when Appellant strangled her. (R. at 959.) As AC struggled to breathed while being strangled, their younger son, NL, woke up crying. (R. at 445.) After approximately 15 seconds of strangling AC, Appellant stopped. (R. at 446.) AC gasped for air. (Id.) AC recognized the maneuver Appellant performed when he strangled her as an "arm choke" used in jujitsu, a martial art Appellant practiced. (Id.)

Appellant told NL that Appellant was "just playing with mommy" and instructed NL to go back to sleep. (R. at 447.) Meanwhile, Appellant instructed AC to "stay on the bed." (Id.) Then, Appellant told AC she was going to "feel and learn the pain [she] caused him over the years." (Id.) Appellant began barking commands at AC to move to certain places in the room and do certain things. (Id.) If she did not comply, Appellant would "come charging at [AC] grabbing and just body slam [her] towards the floor." (Id.)

Locking AC and the Boys in the Room

At some point during the encounter, AC's eldest son, GL, woke up and came into the bedroom. (R. at 448.) After GL entered the room, Appellant locked the master bedroom door. (R. at 448, 667.) While inside the room, AC asked Appellant what his plan was. (R. at 448.) He responded, "I'm not really sure, but how does murder/suicide sound to you." (Id.) AC's two sons were standing there "really confused" when Appellant said this. (Id.) AC went into "survival mode." (Id.) She asked Appellant, "what about the boys? Don't you care about them? They're going to grow up without both parents" to which Appellant retorted, "it doesn't matter. They're little. They won't remember this anyway." (Id.) Appellant told AC that "he knew that he was going to go to jail." (R. at 449.)

Confiscating Electronics

Once Appellant locked AC and their boys in the bedroom, he collected and confiscated all their electronics, including AC's cell phone, AC's Apple Watch, her iPad, and GL's iPad so they could not access them. (R. at 452, 524, 640.) AC later noticed that someone had "pulled on the [WiFi] wire pretty hard and messed up the whole connection thing." (R. at 639.) The Wi-Fi plug looked like "somebody had tampered with the wiring." (R. at 453.)

The Second Strangulation

AC continued pleading with Appellant to not commit a murder-suicide. (R. at 450.) She invoked their children, she implored him to think of his military career and retirement, and she beseeched him to just leave and she "wouldn't call the cops." (R. 448, 450.) As AC pleaded for her life, Appellant grabbed her, pushed her towards the bed, and strangled her a second time. (R. at 450.) As GL witnessed his mother being strangled, he told his father to "stop." (Id.) Appellant ultimately did stop. (Id.) When he did, AC asked Appellant if she could go to the

bathroom. (R. at 451.) Appellant responded, "No" and instructed AC to urinate on herself or on the bed because "it didn't matter because we weren't going to make it out that day." (R. at 451.) GL sat on the bed next to AC. (R. at 452.) "He was scared." (Id.) AC instructed GL, "Listen to your dad and don't get him mad. I don't want him to start hurting you." (Id.)

The Children Escape the Locked Room

At some point during the ordeal, NL managed to leave the bedroom. (R. at 451.) Appellant chased after NL and brought him back to the room. (R. at 452.) Appellant told NL that the "next time he does that he was going to start getting physical with him." (Id.) Appellant continued to order AC around and continued to body slam her in front of the two kids. (Id.) When the boys would ask, "What are you doing to mom?" Appellant would respond, "I'm just playing. I'm playing with mom." (Id.) AC instructed her children, "No, he's not playing with me. He's hurting mommy. Leave." (Id.) She instructed her children to try to leave the room. (Id.) This time they both left. (Id.) Both children managed to leave the room. (Id.) Appellant chased after them. (Id.)

Slamming AC into the Backyard Fence

When her children left the room, AC also escaped in her pajamas and ran towards the backyard barefoot "screaming for help." (R. at 452, 454.) Appellant caught up to AC in the backyard by grabbing her hair and shoving her towards the fence in the backyard. (R. at 454.) AC hit the side of her face against the fence and fell. (Id.) Appellant grabbed AC and brought her back inside the house into the living room. (R. at 454-455.) Once inside, Appellant punched AC twice in the face. (Id.) After punching her, Appellant brought AC back into the master bedroom. (R. at 455.) Appellant managed to corral the two boys and put them back in the master bedroom as well. (Id.) GL was "shaking and crying." (Id.) Appellant instructed AC

"not to tell the boys to leave the room and to tell the boys to listen to him" otherwise he would "keep doing that he was going to start getting physical with them." (Id.)

"Curiously Aroused"

Next, Appellant told AC that "he found himself suddenly curiously aroused." (R. at 456.) He instructed the boys to go into the master bedroom closet. (Id.) The boys complied. (R. at 457.) After Appellant put his children in the closet, he climbed on top of AC demanding that she kiss him. (R. at 457-458.) AC refused. (R. at 458.) In response, Appellant started "slapping [AC] around," trying to kiss her and telling her to remove her pants. (Id.) AC tried to get Appellant off her, told him, "No," told him, "You don't have my permission like I don't want to do this" and tried to push him off. (Id.) Appellant pinned AC down to the bed and said if she kept "fighting him off, he was going to start throwing punches again." (Id.) Appellant told AC, "We're not going to have sex how we typically have sex." (Id.) Appellant pulled AC's pajama pants and underwear off and attempted to have anal sex with her, something they had never done before. (Id.) AC was "moving around" so much that Appellant could not insert his penis into her anus. (Id.) Instead, he penetrated her vagina with his penis. (Id.) Appellant ejaculated inside AC's vagina. (Id.) He then instructed her to put her underwear and pants back on. (Id.)

The Third Strangulation

In the wake of Appellant penetrating her vagina, AC was "shocked" and "confused." (R. at 460.) She felt Appellant "really was going to kill himself and [her.]" (Id.) A while after Appellant penetrated AC's vagina with his penis, the boys started knocking on the closet door, and Appellant eventually let them out. (R. at 461.) Once let out of the closet, the boys "started asking a lot of questions." (Id.) Appellant repeatedly told the boys that Appellant was in charge. (Id.) Undeterred, AC continued to tell her boys to "leave, but they wouldn't leave." (R. at 462.)

At this point, Appellant told AC, "You need a reminder again of who's in charge." (Id.) He then grabbed her, threw her on the bed, and strangled her a third time. (Id.)

Body Slamming GP

Appellant then took AC and the boys into the kitchen after GL complained about not eating all day and being hungry. (R. at 466.) At this point, AC's sister, GP, came home from work. (Id.) GP returned home around 1515-1530 hours. (R. at 401.) Appellant instructed AC that if she "told [her] sister or hinted to [her] sister to run or anything, that he was going to hurt her." (R. at 466.) When GP came home, Appellant immediately demanded her phone. (Id.) GP looked at AC and asked, "What's wrong?" (R. at 466) because AC appeared "scared" and "distressed." (R. at 402.) Sensing something was wrong, GP moved towards the door, but Appellant chased after GP, grabbed her, and "body slammed" her to the floor using a "trained" jujitsu move. (R. at 466, 402-403.) GP was "screaming." (R. at 467.) She was "in shock…really emotional and scared." (R. at 405.) Appellant instructed AC and GP to sit down on barstools in the kitchen as he took chicken out of the refrigerator to eat. (R. at 467.) Appellant grabbed a kitchen knife and began "swaying the knife around" while "taunting" AC and GP with the knife while laughing and chopping chicken. (Id.) GP "literally thought like [she] was going to die or he was going to hurt [them] bad." (R. at 405.)

The Call to 911

After a while, Appellant allowed the boys and GP to go upstairs. (R. at 469.) While AC remained downstairs, Appellant called his mother and told her that "he had done some really bad things to [AC], and that he was probably going to go to jail." (R. at 469.) Appellant also called his brother and told him he was "going to jail for 20 years." (R. at 735.) Appellant then found a bottle of muscle relaxer pills and downed the bottle. (R. at 469.) After Appellant took the pills,

he gave AC back her phone for the first time in almost twelve hours. (Id.) AC immediately called 911 at 1835 hours. (R. at 469; Pros. Ex. 25.) During the recorded 911 call, AC told the dispatcher that Appellant hurt her, and she did not "want to provoke him." (R. at 472.)

Documented Injuries

When the police arrived, they photographed AC's injuries. (R. at 754.) She had a busted lip from where Appellant shoved her into the fence. (R. at 475.) Her lip and eyes were slightly swollen. (R. at 476.) She had a scratch on the top of her foot from running outside shoeless in the backyard calling for help. (R. at 476, 754.) She also had some redness to her left wrist. (R. at 754.) By the time the police arrived, AC was "crying" and "terrified." (R. at 744.) Responding officers observed AC "very distraught, very emotional" (R. at 910) and GP appearing to be in obvious discomfort from an injury to her leg. (R. at 915.)

"I Did Some Cruel and Unusual Things"

When police responded to the home after the 911 call, the first words out of Appellant's mouth were, "I did it," and "I did some cruel and unusual things." (R. at 709, 743.) When the responding officer asked, "if he assaulted his wife," Appellant stated, "yes." (R. at 710.) When the responding officer asked if "he sexually assaulted his wife," Appellant stated, "yes." (Id.)

The Aftermath

After the police came and processed the scene, GP went to the Emergency Department at a local hospital to be treated for her injuries. (Pros. Ex. 16.) GP presented with lower extremity pain on her ride side, right hip pain, and right-sided back pain when Appellant "slammed her on the floor." (Pros. Ex. 16, page 1.) GP had multiple bruises on the right side of her body and puncture wounds. (Pros. Ex. 16, page 5.)

AC also participated in an "invasive" Sexual Assault Forensic Exam (SAFE) (R. at 948, Pros. Ex. 15.) The nurse documented bruises on both AC's left forearm and also above her right elbow, consistent with her narrative of Appellant grabbing her. (R. at 963-964.) DNA swabs were taken from both AC and Appellant and tested at a local lab. (Pros. Ex. 17, Pros Ex. 19.) Appellant's DNA was found in AC's vaginal and rectal swab tips (R. at 838) and her DNA was found on Appellant's penile swab tips and swabs from AC's underwear. (R. at 818). Semen was also present on both the vaginal and rectal swabs taken from AC. (R. at 795, Pros. Ex. 17.)

Three days after the incident, AC met with a Family Advocacy Program (FAP) provider on base for an intake assessment. (R. at 770.) AC appeared to be "in pain" and was "very stiff." (Id.) AC had a visibly "swollen lip." (R. at 772.) Along with appearing to be in physical pain, AC reported pain in her "lower back and her upper shoulder" that started after the charged events on 1 January 2018. (R. at 775.) AC reported during her intake that Appellant both sexually and physically assaulted her on 1 January 2018. (R. at 776, 785.)

In the aftermath of the incident, AC had to leave her job for 90 days of emergency leave. (R. at 478-79.) Despite the trauma, AC sought to continue being a family unit with Appellant and ensure he got the help he needed. (R. at 480.) All the while, AC questioned if she was doing the right thing. (R. at 481.) Appellant ultimately confessed to AC that he "did all of those things on New Years Day" because he "wanted [AC] to feel all the pain and all of the humiliation [she] put him through over the years and that he did it in front of the boys because he knew it would hurt [her] more." (R. at 481.) After learning of the intentionality of the attacks, AC filed for divorce. (R. at 481-82.)

"Dad Was Going to Kill My Mom"

Child Protective Services (CPS) interviewed GL and NL at their elementary school days after the New Year's incident. (R. at 897, Pros. Ex. 29, Pros Ex. 30.) GL told CPS he saw Appellant "hitting, punching; cussing [his] mom out" and "[b]ody slamming her." (R. at 668.) GL saw Appellant on top of AC, "Choking her." (Id.) GL was "scared." (Id.) He thought Appellant "would hurt [him.]" (R. at 681.) GL felt like he was locked in that room "all day." (R. at 669.) GL saw AC try to escape into the backyard and Appellant "chasing her" and "doing something to [his] mom." (Id.) GL remembered his aunt, GP, coming home and Appellant demanding her to see her phone. (R. at 672.) After that, GL saw Appellant grab GP, and GP "fell on her butt." (Id.) GL remembered the police coming to this house that day, and he saw his dad in handcuffs outside. (R. at 673.)

NL told CPS Appellant locked NL, GL, and AC up in a room. (R. at 1003.) NL remembered running out of the house to the neighbors to try to get help so "dad could stop doing all that what he was doing." (R. at 692.) When Appellant told GL and NL to get in the closet, NL was "scared" of his "mom being hurt." (R. at 694.) NL saw GL cry in the closet until the police arrived. (R. at 695.) NL told CPS the police came to his house because Appellant "was almost going to kill my mom. Because dad was going to kill my mom." (R. at 1003.)

ARGUMENT

I.

THE SPECIFICATION OF CHARGE III PROPERLY STATED AN OFFENSE.

Additional Facts

Charge III and its specification charged Appellant with child endangerment, in violation of Article 134, UCMJ:

> In that TECHNICAL SERGEANT GEORGE E. LOPEZ, United States Air Force, 502d Logistics Readiness Squadron, Joint Base San Antonio-Lackland, Texas, at or near San Antonio, Texas, on or about 1 January 2018, was responsible for the care of his two sons, [GL] and [NL], children under the age of 16 years, and did endanger their welfare by locking them in a room while he assaulted their mother, [AC], in their presence, and that such conduct was of a nature to bring discredit upon the armed forces.

(*Charge Sheet*, dated 23 January 2021, ROT, Vol. 1.)

On 14 January 2021, the same day charges were preferred, trial defense counsel filed a request for a Bill of Particulars which asked, in relevant part, "When is the alleged child endangerment in relation to the alleged sexual assault?" (App. Ex. XVI, Attachment 17.) Trial defense counsel never requested the Government clarify whether he was charged with child endangerment under a culpable negligence theory or by design. (Id.) In its response to the Bill of Particulars, the Government responded with the following clarification:

> The child endangerment begins when TSgt Lopez puts the children in the bedroom and keeps them there against their will. This is evidenced by [G.L.]'s fear and desire to call 911 and [N.L.]'s action of running outside to the neighbors to get help. The child endangerment continued through to when TSgt Lopez put the boys in the closet while he sexually assaulted AC. It continued during Charge I, Spec 6, when TSgt Lopez grabbed and pushed [G.P.] to the ground in front of the boys.

(Id.)

The military judge set 23 April 2021 as the deadline for filing motions. (App. Ex. XVI ¶ 6.) Trial defense counsel did not move to dismiss for failure to state an offense for the child endangerment specification. The parties conducted arraignment and a motions hearing on 25 May 2021. (Id.) Trial defense counsel did not raise a motion to dismiss for failure to state an offense for the child endangerment specification at the motions hearing. (Id.)

On 31 May 2021, the Government sent trial defense counsel proposed instructions in anticipation of trial. (App. Ex. XVI ¶ 8.) These instructions included culpable negligence as an element for the child endangerment specification. (Id.) On the same day, and for the first time, the defense indicated it objected "to a culpable negligence instruction where the prosecution failed to provide notice of a *mens rea* in the charged offense." (Id.)

On 7 June 2021, after arraignment, but prior to entry of pleas, trial defense counsel asked to "flag" for the Court an "objection" to trial counsel's draft instructions regarding the child endangerment specification as charged. (R. at 141.) Trial defense counsel conceded he "did not file a motion for failure to state an offense" but maintained an objection "that's going to lead us into a motion-like discussion" he wanted to flag prior to entry of pleas. (Id.) Trial defense counsel then argued that the specification, as drafted, "does not put [Appellant] on notice as to the *mens rea* alleged, and so it failed to provide proper notice of what he should be defending against. So it would be failure to state an offense." (R. at 142.) Trial defense counsel's main concern was that the specification seemed to suggest it was a "strict liability offense, which really isn't the standard." (R. at 142-143.) The military judge queried if trial defense counsel was moving to dismiss the specification before it went to the members, as group voir dire was set to begin in 30 minutes. (R. at 143.) Trial defense counsel was non-committal:

> I'd be perfectly happy to take it up that way. I mean, we flag it as an objection, I mean, I recognize kind of the procedural way that we strategically elected to bring that up, and most certainly, if the court required us to make the objection at this time, we'd be happy to do so, but we understand that otherwise it could be a question that we're getting to later when we're talking about obstructions [sic]. It seems like the most efficient way to take it up now, but we also recognize kind of the strategic places that we made and had, we would like to flag this issue for the court.

(Id.)

In response, Circuit Trial Counsel highlighted the defense's strategic concession to miss the Court's motions deadline:

> First of all, strategically the defense has strategically chosen to violate the court's scheduling order. If the defense is raising a motion to dismiss for failure to state an offense; that is a motion that should've been properly filed according to the military judge's scheduling order no later than 23 April 2021. Now that should've been addressed last week at our motions hearing where we had a robust motions hearing. The defense has been on notice on exactly how this has been charged for many months now, and, in fact, much of the litigation that was involved last week was that this case, and the exact facts, and exact charges had been out there for years now. So the defense is not saying *mea culpa*, we failed to identify this issue. They are saying, Your Honor, strategically, we chose to wait to raise this as a motion right before entry of pleas, 30 minutes before the members are called.

(R. at 144.)

In a long exchange with the military judge, Circuit Trial Counsel argued the Government's theory of the case was one of child endangerment by "culpable negligence" and the general intent of culpable negligence was necessarily implied by the Government's charging scheme. (R. at 148.)

Trial defense counsel acknowledged his defiance of the Court's Scheduling Order and waiting until the first day of trial to implicate notice:

> I mean I have to be candid to the court, we deliberately did not file a motion on it…that's just how it is. And I'm certainly willing to take any critique that the court has as to how the defense elected to go about that. I mean, there are procedural rules, and considerations that certainly go into that decision, and if the court believes that it was inappropriate, happy to hear any sort of critique that the court has.

(R. at 151-152.)

Then, trial defense counsel seemingly conceded that Appellant would not face any double jeopardy concerns based on the Government's charging scheme:

> CDC: And then depending on the -- basically the choice of potent -- or any absence of the requisite *mens rea*, then there, potentially depending on – I mean, it sounds like from the government, it would -- in all – we're probably not in a protection against double jeopardy space at this point, although I think if -- I think I can see the argument that there is, because if, for example, you know, [Appellant] were to face a conviction for culpable negligence, that would seemingly not preclude the government from proceeding at a later time on the by design.
>
> MJ: Well I think that the LIO -- I mean, I have go back in the case law on double jeopardy, but I think that it is broader, as far as the protection that you have, it's not just specifically the -- that you were either tried for by like – it's a little bit broader than that ----
>
> CDC: Yeah, it captures basically the gravamen of what it would --
>
> MJ: Right.
>
> CDC: Yeah, I think that may be right and I may just be remembering that that particular -- just remembering that particular double jeopardy piece. If there was some discussion about the procedural nature of it? I mean, yes…
>
> (R. at 151.)

After agreeing with the military judge that the Government's charging scheme likely protected Appellant against double jeopardy, trial defense counsel then conceded that general intent need not be alleged in a specification. (R. at 151, 153-154.)

On 10 June 2021, on the fifth day of trial, the military judge issued a written ruling on the defense "objection" and styled the pleading as a Ruling on the Defense Motion to Dismiss: Failure to State an Offense. (App. Ex. LXVI.) In denying the defense motion, the military judge found that culpable negligence, on its own, was not an essential element of the offense that must be expressly charged. (Id. ¶ 20.) "Even if culpable negligence is, on its own, an essential element of the offense," the military judge found that the specification "necessarily implies

culpable negligence" and put Appellant on notice that he endangered his sons' welfare by locking them in a room while he assaulted their mother in their presence. (Id. ¶ 21.)

The military judge read the following instruction to the members on the elements of the Specification of Charge III:

> In Specification 1 of Charge III, the accused is charged with the offense of child endangerment, in violation of Article 134 of the Uniform Code of Military Justice. To find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt: (1) That at or near San Antonio, Texas, on or about 1 January 2018, the accused had a duty for the care of his two sons, [G.L.]. and [N.L.]; (2) That [G.L.] and [N.L.] were then under the age of 16 years; (3) That at or near San Antonio, Texas, on or about 1 January 2018, the accused endangered their welfare *through culpable negligence* by locking them in a room while he assaulted their mother, [A.L.], in their presence; and (4) That, under the circumstances, the conduct of the accused was of a nature to bring discredit upon the armed forces.

(R. at. 1077-1078) (emphasis added.)

The military judge defined "culpable negligence" as:

> …a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. In the context of this offense, culpable negligence may include acts that, when viewed in the light of human experience, might foreseeably result in harm to a child, even though such harm would not necessarily be the natural and probable consequences of such acts. In this regard, the age and maturity of the child, the conditions surrounding the neglectful conduct, the proximity of assistance available, the nature of the environment in which the child may have been left, the provisions made for care of the child, and the location of the parent or adult responsible for the child relative to the location of the child, among others, may be considered in determining whether the conduct constituted culpable negligence. While this offense may be committed against any child under 16, the age of the victim is a factor in the culpable negligence determination. Leaving a teenager alone for an evening may not be culpable or even simple negligence; leaving an infant or toddler for the same period might constitute culpable negligence. On the other hand, leaving a teenager without supervision for an extended period while the

> accused was on temporary duty outside commuting distance might constitute culpable negligence.

(R. at 1078.)

Finally, the military judge instructed that "Endanger" means "to subject one to a reasonable probability of harm." (Id.)

Standard of Review

Whether a specification states an offense is a question of law, which this Court reviews de novo. United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006).

If a specification fails to state an offense, the appropriate remedy is dismissal of that specification unless the Government can show the error was harmless beyond a reasonable doubt. United States v. Humphries, 71 M.J. 209, 213 n.5 (C.A.A.F. 2012).

Law

The test to determine whether a specification states an offense is whether it contains 1) "the essential elements of the offense, 2) notice of the charge, and 3) protection against double jeopardy." United States v. Dear, 40 M.J. 196, 197 (C.M.A. 1994). Additionally, "A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication; however, specifications under Article 134 must expressly allege the terminal element." R.C.M. 307(c)(3).

The elements of child endangerment are: "1) That the accused had a duty for the care of a certain child; 2) That the child was under the age of 16 years; and 3) That the accused endangered the child's mental or physical health, safety, or welfare through design or culpable negligence." Manual for Courts-Martial, United States, pt. IV, ¶ 68b (2016 ed.) (MCM).

"Child endangerment, like other offenses by culpable negligence, is a general-intent offense reviewed under an objective test." United States v. Koth, No. ARMY 20150179, 2017 CCA LEXIS 145, at *4 (A. Ct. Crim. App. 16 March 2017) (unpub. op.); *See* United States v. Gibson, 43 M.J. 343, 346 (C.A.A.F. 1995) (applying the objective "reasonable person" test to culpable negligence); United States v. Redding, 34 C.M.R. 22, 25 (C.M.A. 1963).

Child endangerment by culpable negligence is a lesser-included offense of child endangerment by design. MCM, pt. IV, ¶ 68b (2016 ed.).

In United States v. Bryant, the Court found that "general intent ordinarily need not be separately alleged." 39 C.M.R. 380, 382 (A.B.R. 1968). The Court reasoned:

> The reason for this is that an allegation of wrongfulness and/or unlawfulness, either in those words or through the use of a term of art such as 'assault,' is deemed sufficient to place the accused on notice that he is being charged with an offense involving a 'general' intent or its equivalent, e.g.: culpable negligence.
>
> Id.

A bill of particulars serves to accomplish three purposes:

> Inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial, to avoid or minimize the danger of surprise at the time of trial, and to enable the accused to plead the acquittal or conviction in bar of another prosecution for the same offense when the specification itself is too vague and indefinite for such purposes.
>
> R.C.M. 906(b)(6), Discussion.

That said, "[a] bill of particulars cannot be used to repair a specification which is otherwise not legally sufficient." Id.

"A defective specification is necessarily addressed differently in the guilty plea context than in the contested trial context." United States v. Ballan, 71 M.J. 28, 36 (C.A.A.F. 2012). In the context of a contested trial, "a defective specification can be addressed at the outset through a

bill of particulars, or before the close of evidence by motion…The key is that the accused must have the opportunity to prepare his defense and argue his case in a manner responsive to the Government's case-in-chief." Id. at 37.

To determine double jeopardy protections, the court "may turn to the entire record of trial." Dear, 40 M.J. at 197(citing United States v. Williams, 21 M.J. 330, 332 (C.M.A. 1986)).

"The military is a notice pleading jurisdiction." United States v. Fosler, 70 M.J. 225, 229 (C.A.A.F. 2011) (citing United States v. Sell, 3 C.M.A. 202 (C.M.A. 1953)).

Analysis

Appellant argues that "Specification 1 of Charge III fails to state an offense because it failed to allege, either expressly or by necessary implication, the essential element of whether the conduct endangering GL and NL was by design or culpable negligence." (App. Br. at 31.) As a result, Appellant believes he "was not on notice whether he needed to defend himself against child endangerment by design or by culpable negligence." (Id.) This Court should reject this contention for two reasons. First, the Government charged endangerment by culpable negligence through necessarily implication. And second, Appellant cannot show prejudice.

1. Appellant was properly charged with child endangerment by culpable negligence for endangering his sons' welfare.

Ultimately, Appellant argues that the three prongs of the Dear test – the essential elements of the offense, notice of the charge, and protection against double jeopardy – were not met. The Government disagrees for the reasons stated below.

a. The first element of the Dear test was met because child endangerment by culpable negligence was charged "by necessary implication" under R.C.M. 307(c)(3).

Appellant first argues that the Government failed to allege the third element of child endangerment either expressly or by necessary implication. (App. Br. at 32.) He argues that culpable negligence cannot be included by necessary implication because the third element in the

Manual for Courts-Martial provides two mutually exclusive options for the intent element. (Id.) According to Appellant, "although each sample specification provides the Government with options for charging Appellant with conduct that endangered the children's welfare by design or through culpable negligence, the Government failed to do so." (Id.)

The Government acknowledges it did not charge Appellant with child endangerment by culpable negligence expressly. But because culpable negligence goes to general intent, it can be part of the specification by necessary implication.

At the outset, the measure of culpable negligence is an objective one – whether a reasonable person would realize the risk. United States v. Brown, 22 M.J. 448, 450 (C.M.A. 1986). In Koth, the Army Court of Criminal Appeals found that child endangerment by culpable negligence is a general intent crime that could be proved by circumstantial evidence. 2017 CCA LEXIS 145, at *1.

In United States v. Lafontaine, this Court upheld the appellant's guilty plea to two specifications of child endangerment. No. ACM 39004, 2017 CCA LEXIS 523, at *12 (A.F. Ct. Crim. App. 2 August 2017) (unpub. op.), *pet. denied*, 7 M.J. 111 (C.A.A.F. 2017). According to the Lafontaine opinion, the elements of the first specification were:

> (1) That Appellant had a duty for the care of MH; (2) That MH was then under the age of 16 years; (3) That Appellant endangered MH, his physical health, safety, and welfare by exposing him to a living environment laden with animal excrement, soiled diapers, and food waste; and (4) Appellant's conduct under the circumstances was of a nature to bring discredit upon the Armed Forces.

Id. at *5-6.

For the second specification this Court characterized the third element as alleging that the appellant "endangered MH's physical health, safety, and welfare by leaving him strapped in an infant seat outside, exposed to rain." Id. Significantly, when reciting the elements of child

endangerment, this Court did not include either the term "culpable negligence" or "by design." Id. The military judge in Lafontaine read the definition of culpable negligence to the appellant, who stated she understood both the elements and definitions the military judge provided her and indicated she did not have any questions about them. Id. at *7. On appeal, the appellant challenged the third element, stating that it did not rise to the level of culpable negligence beyond a reasonable doubt. Id. But this Court found that the military judge did not abuse his discretion in accepting the appellant's plea. Id. at *12.

In this case, as the military judge noted in his ruling, this Court's omission of culpable negligence in its recitation of the elements of child endangerment in Lafontaine likely reflects the fact that general intent does not ordinarily need to be alleged separately and is necessarily implied by the other parts of the elements. (App. Ex. LXVI ¶ 20.) Indeed, general intent only requires "knowledge with respect to the *actus reus* of the crime." United States v. Carter, 530 U.S. 255, 268 (2000). Here, the charging instrument expressly put Appellant on notice that the *actus reus* of the charged endangerment of GL and NL was "locking them in a room while he assaulted their mother, [AC], in their presence." (*Charge Sheet*, ROT, Vol. 1.)

In Appellant's case, the specification as written necessarily implied that Appellant committed child endangerment through culpable negligence. The military judge specifically defined culpable negligence as "a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission." (R. at 1078.) "[C]ulpable negligence may include acts that, when viewed in the light of human experience, might foreseeably result in harm to a child, even though such harm would not necessarily be the natural and probable consequences of such acts." (Id.) Locking the children in a room while Appellant

assaulted their mother in their presence is exactly the type of act that might foreseeably harm a child when viewed in light of the human experience.

In the content of maltreatment, another general intent crime, CAAF concluded "that there is no scenario where a superior who engages in the type of conduct prohibited under Article 93, UCMJ, can be said to have engaged in innocent conduct." United States v. Caldwell, 75 M.J. 276, 281 (C.A.A.F. 2016). Similarly, there is no scenario in which a parent locks a child in a room while he repeatedly assaults their mother in the child's presence and not at least act with culpable disregard for the foreseeable consequences to their child's welfare. By its very definition, an assault cannot be "innocent conduct." Id. An "assault" is an attempt or offer with unlawful force of violence to do bodily harm to another. MCM, pt. IV, ¶ 54c.(1)(a). Thus, the first element of the Dear test is met, and Appellant's argument fails.

Appellant next argues that the military judge's ruling at trial "acknowledged the ambiguity, or lack of notice, in the specification when he stated that Appellant acted 'by *at least* culpable negligence.'" (App. Br. at 34) (emphasis added.) However, in the very next sentence of his ruling, the military judge clearly stated, "As such, the specification necessarily implies that the endangerment was accomplished by culpable negligence." (Id.) The words "at least" were a small part of a much larger ruling in which the military judge unequivocally stated more than once that this case dealt with culpable negligence. The military judge did not leave open the possibility that the specification was charged "by design," like Appellant claims.

For that reason, Appellant culpable negligence was properly included through necessary implication and the first element of the Dear test is met.

b. The second element of the Dear test was met because the Government's response to trial defense counsel's Bill of Particulars, other language in the charge sheet, and trial defense counsel's own expressed understanding, established notice of child endangerment by culpable negligence.

Second, Appellant argues that the Government's response to the defense's bill of particulars was not sufficient to put him on notice of "whether the endangering conduct was by design or through culpable negligence." (App. Br. at 33.) Yet in looking at both the charge sheet and the Government's response to the bill of particulars together, that is not the case.

The Government's theory was that Appellant endangered the children by locking them in a room while he assaulted their mother *in their presence*. The mother's assaults were separately charged in other specifications, so Appellant was on notice of the underlining assaults that gave rise to the child endangerment specification. Furthermore, to the extent that Appellant was not on notice regarding the Government's theory, he certainly was on notice as early as 31 May 2021 when trial counsel sent the defense proposed instructions that did not mention "by design," but *did* include "culpable negligence." (App. Ex. LXVI ¶ 8.) And the military judge found as fact that trial defense counsel was on notice at least before the motions deadline of 23 April 2021 because they recognized the potential deficiency and intentionally did not raise it to disadvantage the Government:

> 6. The defense recognized the specification did not expressly allege either culpable negligence or design but made a tactical decision not to raise a motion to dismiss the specification prior to the motions deadline of 23 April 2021. The apparent reason for this decision was to avoid bringing the issue to the government's attention until it was potentially too late for the government to cure the potential defect and still try the specification with the other charged misconduct.

(App. Ex. LXVI.)

Appellant next argues that the bill of particulars does not overcome a deficient specification. However, as the military judge noted in his written ruling, "the bill of particulars

and other information…are relevant regarding notice, fairness, and how narrowly or broadly the language in the specification should be read." (App. Ex. LXVI ¶ 5) (emphasis added.) As CAAF said in Ballan, "The key is that the accused must have the opportunity to prepare his defense and argue his case in a manner responsive to the Government's case-in-chief." 71 M.J. at 37. Here, Appellant was on notice to the underlining conduct giving rise to the specification as early as charges were preferred in his first court-martial on 12 December 2018. While Appellant was not charged with child endangerment in his first court-martial, Appellant, and Maj AA, his Circuit Defense Counsel, were "aware of the nature of the underlining target or predicate offense." United States v. Norwood, 71 M.J. 204, 207 (C.A.A.F. 2012).

Additionally, the bill of particulars gave Appellant sufficient notice to prepare his defense and argue his case. It narrowed the basis for the charge by pointing to specific incidents beginning with when Appellant put the children in the bedroom and going through Specification 6 of Charge I, when Appellant pushed GP to the ground. (App. Ex. XVI.) This clarification sufficiently narrowed the issue for Appellant's trial defense counsel to properly address it during the trial. While Appellant contends, for the first time on appeal, he did not know whether to prepare to defend against endangerment by design or culpable negligence, either way, he would have to prepare a defense against culpable negligence since it is a lesser-included offense to endangerment by design. MCM, Appendix 12A, Art. 134 (2016 ed.).

It is also important to note that trial defense counsel first raised the issue a trial during a discussion with the military judge and Government about giving members the culpable negligence instruction. (R. at 141.) This demonstrates that the defense was not only on notice that they would have to defend against the element of culpable negligence but had strategized how to address it during Appellant's trial. Trial defense counsel did not request a continuance or

delay to adequately prepare to meet the Government's culpably negligent charging theory nor assert that they had prepared only to defend against a design theory. Appellant thus points to nothing in his brief to indicate that the Government's response to the bill of particulars, its draft instructions, and the plain language of the charging instrument itself, were not enough for him to prepare his defense. As a result, his argument fails under the second Dear prong.

c. The third element of the Dear test was met because there was sufficient protection against double jeopardy in this case.

Finally, Appellant argues that "AC testified that Appellant had planned the alleged incident for a long time, meaning that the Government's witness had provided potential evidence of child endangerment by design, which exposed Appellant to a possible prosecution of the greater offense." (App. Br. at 35.) But Appellant's own defense counsel conceded Appellant was not at risk for double jeopardy as the "gravamen" of the child endangerment is already captured by Appellant's culpable negligence conviction. (R. at 151.) Also, the "Fifth Amendment protection against double jeopardy provides that an accused cannot be convicted of both an offense and a lesser-included offense." United States v. Hudson, 59 M.J. 357, 358 (C.A.A.F. 2004). Since child endangerment by culpable negligence is a lesser-included offense of child endangerment by design, Appellant cannot be tried again for the same conduct. Appellant is thus afforded full protection against double jeopardy.

In Williams, our superior Court found that "the language of the specification -- taken together with the evidence, the instructions, and the findings will afford Williams full protection against double prosecution." 21 M.J. at 332. The Army Court issued a similar ruling in United States v. Haugen, No. ARMY 20180375, 2019 CCA LEXIS 412 *9 (A. Ct. Crim. App. 25 October 2019) (unpub. op.). In that case, the Court found that "[t]he military judge's specific findings, coupled with the charge sheet, bill of particulars, and testimony of DS combine to

provide appellant sufficient protection against future prosecutions. As such, we are convinced appellant is adequately protected from double jeopardy in this case." Id. at *9. The same is true with Appellant's case.

For that reason, Appellant's argument fails under the third prong of the Dear test. And this Court should reject Appellant's argument that Specification 1 of Charge III failed to state an offense.

2. Even if this Court finds the child endangerment specification failed to state an offense, any error was harmless beyond a reasonable doubt.

Even under the stringent constitutional standard of harmlessness beyond a reasonable doubt, Appellant cannot show prejudice. A finding of error alone does not warrant dismissal. Ballan, 71 M.J. at 36. Whether a remedy is required depends on "whether the defective specification resulted in material prejudice to [the appellant]'s substantial right to notice." Humphries, 71 M.J. at 215. In a contested case, this Court tests prejudice by looking at the entire record "to determine whether notice of the missing element is somewhere extant in the trial record…or is essentially uncontroverted." Id. at 215-16.

Here, the defense filed many motions. In every motion the defense listed, *inter alia*, "Child endangerment of [Appellant]'s two sons, in violation of Article 134, UCMJ, 10 U.S.C. § 934" as a charge in Appellant's case. (App. Ex. LXVI ¶ 4.) When trial defense counsel filed a request for a bill of particulars, he did not seek any clarification on whether the government charged Appellant with endangerment by culpable negligence or by design. On the contrary, the only notice trial defense counsel required, with respect to the child endangerment allegation related to *timing*. (App. Ex. LXVI ¶ 2.) Importantly, trial defense counsel requested a bill of particulars on twelve topics and filed the request on the same day charges were preferred. (Id.) The timing, and breadth of the request, show that trial defense counsel was thinking through

notice issues early in the case. If the defense wanted to be put on notice regarding culpable negligence vs. design, they could have been far before trial. They strategically chose not to request that information. Instead, the defense deliberately chose to violate the Court's scheduling order for motions and raise the issue at the last possible moment prior to entry of pleas, offering up "that's just how it is" as the only justification for the late objection. (R. at 151.) In any event, there is no prejudice as Appellant was on notice he would have to defend against child endangerment by culpable negligence because, at the very least, it was a lesser-included offense of design of which the members would be instructed.

Trial defense counsel was expressly on notice as early as 31 May 2021, seven days before the start of trial, that the Government's theory of the child endangerment specification was by culpable negligence. (R. at 144-145.) The Government reiterated its position on the first day of trial, prior to entry of pleas, that it believed "this is a culpable negligence crime and not a crime by design." (R. at 145.) The Circuit Trial Counsel again confirmed: "The government views this and anticipates the facts will present themselves as a culpable negligent theory, and the government does not have any evidence that this was the great offense of by design." (R. at 148.) Trial defense counsel did not disagree with the Government's assertion that "the facts will present themselves as a culpable negligent theory." (Id.) Additionally, trial defense counsel did not request the military judge ruled on the issue prior to presentation of evidence. On the contrary, the military judge issued his ruling denying the defense's motion on fourth day of trial, after the Government rested its case. And after the military judge issued his ruling, trial defense counsel did not request reconsideration. Instead, he conceded, "I think culpable negligence would seem to be the appropriate *mens rea*." (R. at 1050.)

As early as opening statement, trial counsel linked the evidence of endangerment to Appellant's culpable disregard for his sons' welfare:

> The accused only stopped strangling his wife when their younger son woke up hungry for breakfast, but he didn't make them breakfast. He didn't let his wife leave. Instead, he kept the boys in the master bedroom with them and locked the door.
>
> Over the course of those 12 hours, [AC] and the boys made several attempts to escape, to try and find help, but the accused would not let them. Then he did something that he had not done before. He told the boys to get in the closet in the master bedroom, and he turned his physical aggression into sexual aggression. He opened her legs and thrust his penis into her vagina. As she lay there looking away crying, he ejaculated, all the while their boys were in the closet.

(R. at 394-395.)

Again, in closing, trial counsel argued the same underlining facts of endangerment to Appellant's culpable disregard for his sons' welfare:

> He endangered their welfare through culpable negligence by locking them in a room and assaulting their mother within their presence. They told you about needing to get out and get help. They even told you about running to get help. They knew that this was not right. And she had to tell them, 'Mommy is hurting daddy [sic], he's not playing. Go get help. Run.' They ran out at separate times. This is child endangerment.
> …
>
> That's child endangerment. You heard from [GL] that he choked her, she was crying because he was on her in her room. He locked us in there. He was telling her what to do. He threw her on the floor and was saying bad words to her.
> …
>
> Now you also heard that when he was asked, 'Why were you scared?' 'Because I thought he would hurt me.' That was his testimony. That's child endangerment. You heard from [NL] about how he was scared. He went for help. That he, the accused, put [GL] in the closet with him, and [GL] was crying.
>
> …

That's child endangerment.

(R. at 1096-1097.)

Appellant does not allege in his brief that he would have done anything differently if the Government had charged him under with endangerment by design. He has not pointed to any alterations in trial strategy, different defenses he would have raised, or how trial defense counsel would have approached its case had they been on notice of culpable negligence at an earlier juncture. Appellant cannot point to any "fundamental change of tactics" necessitated by the Government's charging scheme. United States v. Brown, 16 C.M.R. 257, 262 (C.M.A. 1954). Nor was Appellant "compelled thereby to construct his defense anew." Id.

In this regard, Appellant's case is distinguishable from a case like United States v. Simmons, where the defense pinpointed specific things they would have taken differently based on the Government's charging scheme. 82 M.J. 134, 141 (C.A.A.F. 2002). "Specifically, the change in dates likely affected the investigation the defense team otherwise might have conducted, the type of evidence they otherwise might have introduced, and the nature of the cross-examination they otherwise might have conducted." Id.

Under these facts, there is no basis to conclude that if the Government had properly included the words "by culpable negligence" in Specification 1 of Charge III, that Appellant would have handled his defense at court-martial any differently.

II.

APPELLANT'S CONVICTIONS ARE FACTUALLY AND LEGALLY SUFFICIENT.

Standard of Review

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

Law

A. Legal Sufficiency

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

"In determining whether any rational trier of fact could have determined that the evidence at trial established guilt beyond a reasonable doubt, [this Court is] mindful that the term 'reasonable doubt' does not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable inferences from the evidence presented." Id. The standard for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic

facts to ultimate facts." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011). Our superior Court has long recognized that the Government can meet its burden of proof with circumstantial evidence. King, 78 M.J. at 221.

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

B. Factual Sufficiency

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

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

Analysis

At the outset, Appellant broadly challenges five specifications for both legal and factual sufficiency for six reasons: (1) AC had no credibility; (2) The physical evidence did not support the convictions; (3) AC gave wildly inconsistent accounts of the alleged incident; (4) AC agreed to testify only after learning she could get money from the state Government; (5) Deputy DP did not hear Appellant say, "I did cruel and unusual things"; and (6) The shoddy investigation failed to pursue relevant evidence. (App. Br. at 38.)

But Appellant does not articulate which element of which specification these six reasons go to, nor does he analyze each specification individually. Instead, Appellant generally argues these six areas render the evidence legally and factually insufficient to support the findings of guilt. It is unclear how. Additionally, while Appellant raises both legal and factual sufficiency for all convicted charges, it is unclear at times which standard he is arguing. At any rate, a rational factfinder could find the Appellant committed these offenses beyond a reasonable doubt, and this Court should be likewise convinced.

A. Specification 1, Charge I (Assault Consummated by a Battery: Strangling AC)

Appellant's conviction for this battery, in violation of Article 128, UCMJ, required the Government to prove three elements: (1) That at or near San Antonio, Texas, on divers occasions, on or about 1 January 2018, the accused did bodily harm to AC; (2) That the accused did so by strangling her on her neck with his forearm; and (3) That the bodily harm was done with unlawful force or violence. MCM, pt. IV, ¶ 54b.(2) (2016 ed.). An "assault" is an attempt

or offer with unlawful force or violence to do bodily harm to another. Military Judges' Benchbook, Dept. of the Army Pamphlet 3-54-2. An assault in which bodily harm is inflicted is called a battery. Id. A "battery" is an unlawful and intentional application of force or violence to another. Id. The act must be done without legal justification or excuse and without the lawful consent of the victim. Id. "Bodily harm" means any physical injury to or offensive touching of another person, however slight. Id.

Victim and Eyewitness Testimony

At trial, AC testified to three distinct times that Appellant strangled her with his forearm. (R. at 445, 450, 462.) AC recognized the maneuver Appellant performed when he strangled her as an "arm choke" used in jujitsu, a martial art Appellant practiced. (R. at 446.) AC also described the physiological effects of manual strangulation as she struggled to breathe (R. at 445) and gasped for air (R. at 446).

The victim's credible testimony alone that she did not consent to Appellant strangling her three times was sufficient to establish guilt beyond a reasonable doubt. But the factfinder did not just have AC's word. Her two sons were in the room when she was strangled. GL witnessed Appellant on top of his mom choking her. (R. at 668.) GL testified that AC was "trying to get out [of] the choke hold" and demonstrated for the members how AC was "moving around" when Appellant was strangling her. (Id.) GL remembers this moment years later because he "was scared." (Id.) GL told CPS that Appellant "almost choked [AC.]" (R. at 996.) NL told CPS that Appellant was arrested because "he was almost gonna kill my mom. Because dad was gonna kill my mom." (Pros. Ex. 30.) While NL did not describe strangulation, this statement was circumstantial evidence before the fact finder that a child witnessing his mother struggle to

breathe was Appellant trying to kill AC. The victim's sworn testimony alone could conclusively prove Appellant's guilt. Rodriguez-Rivera, 63 M.J. at 383.

Prior Consistent Statements

On top of GL's eyewitness testimony, the Government introduced multiple prior consistent statements AC made shortly after the New Year's Day incident. First, AC told 911 that Appellant hurt her. (R. at 472, Pros. Ex. 25.) Later that night, consistent with her trial testimony, AC told the SANE that she was strangled three times. (R. at 958-959.) Three days later, AC made another prior consistent statement to FAP that Appellant strangled her. (R. at 785.) Then, six days later, AC made yet another prior consistent statement in an 8-page typed statement to the Sheriff's Office about strangulation. (Pros. Ex. 28.) In that statement, she clearly described the first strangulation: "He then strangled me for about 15 seconds. It wasn't your usual strangulation. My husband is a blue belt in Jiu-Jitsu and I believe he was doing the arm chock [sic] where you wrap your legal around the person cutting circulation from both your stomach and neck." (Pros. Ex. 28, page 3.) Then, she vividly described the second strangulation: "He then body slammed me and told me that I must have forgotten who was in charge grabbed me put me on the bed and strangled me again." (Pros. Ex. 28, page 4.) Finally, she plainly described the third strangulation: "He then charged at me grabbed me put me back on the bed and strangled me again." (Pros. Ex. 28, page 5.)

Appellant's Admissions

Appellant's own statements are strong circumstantial evidence of his consciousness of guilt for strangling AC. While Appellant never used the words "strangle" or "choke," his repeated admissions of assaulting his wife bolster AC's credibility that she was strangled on divers occasions:

- "I did it." (R. at 743.)
- "I did some cruel and unusual things." (R. at 709.)
- "I asked him if he assaulted his wife and he stated yes." (R. at 810.)
- "I asked him if he said he sexually assaulted his wife and he stated, yes, he did." (R. at 710.)
- Right after the New Year's Day incident, Appellant told his brother he was going to jail for 20 years and then talked about suicide. (R. at 735.)
- Appellant begged AC, "Please don't testify." (R. at 481.)
- AC heard Appellant tell his Mom he had "done some really bad things to [AC]" and that he was probably going to jail. (R. at 469.)

The testimony of one, credible witness may be sufficient to establish guilt beyond a reasonable doubt. Rodriguez-Rivera, 63 M.J. at 383. AC's sworn testimony about strangulation was credible, corroborated by her sons who witnessed it and a nurse who treated her for strangulation, and bolstered by Appellant's own statements that he assaulted his wife and was going to jail if AC testified against him.

B. Specification 2, Charge I (Assault Consummated by a Battery: Grabbing and Pushing AC)

Appellant's conviction for this battery, in violation of Article 128, UCMJ, required the Government to prove three elements: (1) That at or near San Antonio, Texas, on or about 1 January 2018, the accused did bodily harm to AC; (2) That the accused did so by grabbing and pushing AC down to the ground with his hand; and (3) That the bodily harm was done with unlawful force or violence. MCM, pt. IV, ¶ 54b.(2) (2016 ed.). The same definitions referenced above for the strangulation assault apply.

At trial, AC testified to multiple incidents throughout the day where Appellant would "body slam" her to the ground. (R. at 452, 447-448.) Appellant would grab AC's body with his hands and "slam [her] towards the floor." (R. at 448.) GL testified he watched Appellant

"cussing my mom out and like punching her and pushing her." (R. at 667.) GL recalled Appellant "hitting, punching; cussing my mom out. Body slamming her." (R. at 668.)

Along with GL's eyewitness corroboration of the assaults, AC was treated for injuries at a local hospital consistent with her narrative of Appellant grabbing and pushing her. (R. at 963-964.) Police photographed redness to AC's left wrist. (R. at 754.) Three days after the incident, a provider at FAP noticed AC appeared to be "in pain" and was "very stiff." (R. at 770.) In addition to appearing to be in physical pain, AC reported pain in her "lower back and her upper shoulder" that started after the charged events on 1 January 2018. (R. at 775.) These ailments suggest being grabbed and pushed to the ground. This evidence, including Appellant's own admissions that he assaulted his wife, and AC's numerous prior consistent statements about the assaults, were compelling evidence before the trier of fact.

The testimony of one, credible witness may be sufficient to establish guilt beyond a reasonable doubt. Rodriguez-Rivera, 63 M.J. at 383. AC's sworn testimony regarding being body slammed was credible, corroborated by her sons who witnessed it and police who photographed her injuries, and bolstered by Appellant's own statements that he assaulted his wife and consciousness of guilt that he was going to jail if AC testified against him.

C. Specification 3, Charge I (Assault Consummated by a Battery: Pushing AC on the Head)

Appellant's conviction for this battery, in violation of Article 128, UCMJ, required the Government to prove three elements: (1) That at or near San Antonio, Texas, on or about 1 January 2018, the accused did bodily harm to AC; (2) That the accused did so by pushing AC on the head with his hand; and (3) That the bodily harm was done with unlawful force or violence. MCM, pt. IV, ¶ 54b.(2) (2016 ed.). The same definitions listed above for the strangulation assault apply.

At trial, AC testified she left her bedroom in pajamas and ran towards the backyard barefoot "screaming for help." (R. at 452, 454.) Appellant caught up to AC in the backyard by grabbing her hair and shoving her towards the fence in the backyard. (R. at 454, 528-529.) AC hit the side of her face against the fence and fell. (R. at 454.) When police arrived on scene, they photographed AC's busted lip from where Appellant shoved her into the fence. (R. at 475, Pros. Ex. 10.) They also photographed a scratch on the top of AC's right foot from where she ran barefoot into the backyard and Appellant pushed her into the fence. (Pros. Ex. 10.) The Government introduced AC's pajamas as physical evidence which showed a grass stain on her right knee and lower leg, consistent with falling in the backyard, just as she testified. (Pros. Ex. 3.) A FAP provider also testified that she observed AC's visibly "swollen lip" a few days after the assault, which corroborates the injury she sustained when Appellant pushed her into the fence. (R. at 772.) AC also told the FAP provider that Appellant pushed AC into a fence. (R. at 785.)

The testimony of one, credible witness may be sufficient to establish guilt beyond a reasonable doubt. Rodriguez-Rivera, 63 M.J. at 383. AC's sworn testimony related to being pushed into the fence was credible. Her testimony was corroborated by her sons who testified she was in the back yard then and police who photographed her injuries. And her testimony matched what she told FAP happened. Finally, her testimony was bolstered by Appellant's own statements that he assaulted his wife and consciousness of guilt that he was going to jail if AC testified against him.

D. Specification 4, Charge I (Assault Consummated by a Battery: Striking AC in the Face)

Appellant's conviction for this battery, in violation of Article 128, UCMJ, required the Government to prove three elements: (1) That at or near San Antonio, Texas, on divers

occasions, on or about 1 January 2018, the accused did bodily harm to AC; (2) That the accused did so by striking AC in the face with his hand; and (3) That the bodily harm was done with unlawful force or violence. MCM, pt. IV, ¶ 54b.(2) (2016 ed.). The same definitions referenced above for the strangulation assault apply.

AC testified to multiple instances through the day where Appellant both slapped and punched her in the face with his hand:

- "He grabbed me, and I was kind of hanging on his arm like this, and he punched my face twice." (R. at 454-455.)
- "He punched me when we were in the living room already inside the house. He was taking me to the bedroom. (R. at 531.)
- Appellant "just kind of starts slapping me around because I'm moving." (R. at 457-458.)
- "He proceeded to scoop me up and brought me back inside the house as he then punched me in the face twice and told me that was my punishment for disobeying him." (Pros. Ex. 28, page 4.)
- "He then looked at me and slapped me around and told me to 'shut the Fuck up.'" (Id.)
- "He then ordered me to take my pants off and I said no. In which he slapped me…." (Pros. Ex. 28, pages 4-5.)

The testimony of one, credible witness may be sufficient to establish guilt beyond a reasonable doubt. Rodriguez-Rivera, 63 M.J. at 383. AC's sworn testimony regarding being struck in the face multiple times was credible. Her testimony was corroborated by her sons who witnessed some strikes and police who photographed her injuries. And her testimony tracked what she told law enforcement and FAP happened. Finally, her testimony was bolstered by Appellant's own statements that he assaulted his wife and consciousness of guilt that he was going to jail if AC testified against him.

E. The Specification of Charge II (Sexual Assault)

Appellant's conviction for sexual assault, in violation of Article 120, UCMJ, required the Government to prove three elements: (1) That at or near San Antonio, Texas, on or about 1

January 2018, the accused committed a sexual act upon AC, by causing penetration, however slight, of her vulva by the accused's penis; (2) That the accused did so by causing bodily harm to AC, to wit: penetrating her vulva with his penis; and (3) That the accused did so without AC's consent. MCM, pt. IV, ¶ 45a.(b) (2016 ed.). "Consent" is defined as "a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. MCM, pt. IV, ¶ 45a.(g)(8) (2016 ed.). Lack of verbal or physical resistance does not constitute consent." Id. To determine whether a person consented to the conduct in question, "[a]ll of the surrounding circumstances are to be considered[.]" Id.

Although Appellant did not testify at trial, the thrust of the defense's argument was that AC and Appellant engaged in consensual sexual intercourse days *before* the News Year's Day incident, but not on New Year's Day itself. (*See* R. at 1110.) Now, on appeal, Appellant does not contest that he penetrated AC's vulva with his penis, so the first element is no longer in dispute. (App. Br. at 42.)

The evidence did not raise the defense of reasonable mistake of fact as to consent. (R. at 1052.) For that reason, the uncontradicted evidence before the fact finder was AC's testimony that she did not consent, and Appellant's admission to responding officers that he sexually assaulted his wife.

AC testified she directly told Appellant multiple times he did not have her consent. She told him, "No," she told him, "You don't have my permission like I don't want to do this," and she tried to physically push him off her body. (R. at 458.) AC "reminded him again that he did not have my consent" to which Appellant replied that he did have AC's consent because they were married. (Pros. Ex. 28, page 5.) AC told the police, "He then proceeded to penetrate my vagina as he watched and ejaculated inside of me. I was looking away crying and feared for my

life." (Pros. Ex. 28, page 5.) None of the victim's words—"no" and "you don't have my permission"—or actions—pushing him off and crying—created reasonable doubt that this was a nonconsensual encounter. When police arrived on scene, AC told them Appellant "sexually assaulted her without her consent." (R. at 719, 723.) Appellant also admitted to police that he "sexually assaulted" his wife. (R. at 710.) And Appellant's admission that he "did some cruel and unusual things" to his wife is strong evidence of his consciousness of guilt for sexually assaulting her. (R. 709.)

F. Appellant's Attacks on Sufficiency.

AC's Credibility

Appellant first argues that AC's overarching lack of credibility renders the above five specifications both legally and factually insufficient. (App. Br. at 38.) At the heart of Appellant's claim is that AC was not credible because of her counterintuitive victim behavior post-assault as she continued to talk to, and have sex with, her husband. (App. Br. at 39-41.) Because of this, Appellant claims AC must have fabricated the allegations. But this hypothetical attack on a potential motive to fabricate does not create reasonable doubt, especially when the second Appellant gave the victim her phone back, she immediately called 911 and reported being assaulted and then was "distraught, "very emotional," "crying," and "frantic" within minutes when police arrived. (R. at 910.) AC's post-assault behavior also does not explain Appellant's immediate admissions of guilt. If Appellant did not physically or sexually assault his wife, then he would have no reason to spontaneously admit to law enforcement that he did.

Appellant's argument is much like what the appellant in United States v. Leipart recently raised. Nos. ACM 39711, 2021-03, 2023 CCA LEXIS 39 (A.F. Ct. Crim. App. 26 January, 2023) (unpub. op.) The appellant in Leipart contended that his conviction for sexual assault was

factually insufficient because of the victim's "continuation of the relationship" post-assault. Id. at *22-23. According to the appellant, it was "not credible" that the victim would continue the relationship after Appellant sexually assaulted her. Id. at *22.

This Court concluded that "a rational factfinder—applying their common sense and knowledge of the ways of the world—could reasonably conclude [the victim]'s decision to continue her relationship with Appellant despite occasional instances of sexual abuse by her intimate partner/spouse was believable." Id. Specifically, the victim testified that in the "early stages of their relationship and marriage Appellant was not always abusive toward her, and that she preferred to act as though the sexual assaults had not occurred because she wanted to form a family with Appellant and [her child.]" Id. at *23. The victim also testified that her continuation of the relationship with Appellant occurred "amidst ongoing threats from Appellant" to "kill or injure her." Id. at *20, 23.

Like the victim in Leipert, the victim here testified that she continued a relationship with Appellant post-assault amid ongoing threats:

> He said that if he was going to go to jail that he was going to make sure he'd give me a hard time. That he would call CPS on me all the time in regards to the kids and that with the protective order, that the protective order says that he can't be within certain feet but it doesn't say that he can't be within the same area, so that he was going to just pretty much make sure that he gave me a hard time.
>
> (R. at 650.)

Like the victim in Leipert, the victim here also testified that in the nine years leading up to the New Year's Day incident, Appellant was never abusive to her, and she tried to reconcile with Appellant out of love and the family that they created together. (R. at 435, 561.)

The fact finder could reasonably conclude that the victim still talking to, and being intimate with, her husband post-incident did not materially undermine her testimony related to

the assaults. The panel could reasonably credit AC's explanation for her counterintuitive behavior which came after Appellant's assaults and amid ongoing threats from Appellant. This Court should do so as well.

Overall, Appellant argues that AC was the "linchpin of the Government's case" for the challenged specifications and so they legally and factually fail as result of her credibility. (App. Br. at 41-42.) But this was not a "he said; she said case." AC's testimony was corroborated by a wealth of other evidence. There were multiple eyewitnesses to several challenged specifications. The Government introduced photographic evidence of injuries. To rehabilitate AC's credibility, the Government introduced numerous prior consistent statements AC made to law enforcement, medical personnel, and FAP shortly after the charged events. Appellant made significant admissions to both physically and sexually assaulting his wife. He expressed consciousness of guilt telling his brother and mother that he was going to jail for a long time because of the bad things he did to her. AC's testimony was corroborated by other witnesses, statements, photographic evidence, physical evidence, law enforcement reports, medical records, and Appellant himself. Finally, the trier of fact was able to meaningfully assess her credibility over two days of testimony and rigorous cross-examination.

The Physical Evidence

Next, Appellant argues that the physical evidence "did not support the convictions." (App. Br. at 42.) Specifically, Appellant claims that given the intensity of the assaults AC described, "one would expect her injuries to be more severe." (Id.) But the SANE expert testified that it is "not that common" to see physical injuries or signs of strangulation on a victim. (R. at 962-963.) In fact, it is possible to strangle someone to death without leaving any marks at all. (R. at 962.) While AC did not have any outwards physical signs of strangulation, she did

report throat pain and coughing, which are consistent internal symptoms of strangulation. (Pros. Ex. 15.)

It is also commonsense that bruises and swelling, two of the injuries AC reported, develop over time. So while AC's injuries may not have been as readily apparent when police immediately photographed her as they would have been a few days later, when the FAP provider saw AC she was "very stiff" and "in pain." (R. at 770.)

Next, Appellant challenges AC's phone logs that the Government introduced in evidence to show a lack of activity for the 12-hour period AC was held hostage in her own home. (App. Br. at 42.) Appellant speculates there was more content on AC's phone that she deleted. (App. Br. at 43.) But legal sufficiency does not demand proof that excludes "every hypothesis or possibility of innocence, but every fair and rational hypothesis except for guilt." United States v. Loving, 41 M.J. 213, 281 (C.A.A.F. 1994). While Appellant points to "possibilities" there was more content on AC's phone that could have shown activity on her phone that day, there was simply no evidence presented on the merits to support that theory. A reasonable factfinder could have found that the digital evidence corroborated AC's claim that Appellant confiscated her electronics when he kidnapped her.

Appellant also argues that AC's refusal to provide her Apple watch or her sons' iPads to investigators "indicated her fear that evidence contradicting her testimony would be discovered." (App. Br. at 43.) This argument is speculative. There is nothing in the record, and Appellant points to nothing, to support the argument that exculpatory evidence existed on this Apple Watch or iPads. No witness testified at trial to using their Apple Watch or iPad to make a call or send a message on New Year's Day. On the contrary, AC testified that Appellant confiscated all their electronic devices. And a lack of activity during the 12 hours the victims were kidnapped within

the home was corroborated by the Government's digital forensics examiner's testimony and Prosecution Exhibit 23. (R. at 843, 850.) As a result, a rational factfinder could reasonably discount the lack of physical evidence and credit the other evidence establishing guilt.

AC's Different Accounts of the Incident

Next, Appellant takes aim at inconsistencies in AC's trial testimony versus what she told police and FAP. (App. Br. at 43-44.) Appellant also challenges the inconsistencies between AC's testimony and the testimony of her two sons, most notably her younger son, NL. (App. Br. at 44.) But all the inconstancies Appellant targets are minor.

a. *Fighting three times versus four.*

First, Appellant attacks whether AC and Appellant verbally fought three times that day or four. (App. Br. at 43-44.) Appellant contends that when confronted with this discrepancy at trial, AC responded, "So, well it depends basically." (App. Br. at 43.) But AC did not say this. The military judge did. During a confusing exchange on cross-examination, as the defense tried to impeach AC with a supposed prior inconsistent statement, AC asked the military judge directly, "Can I read my statement?" to which the military judge responded, "So, well it depends basically." (R. at 505.)

b. *Location of where Appellant demanded AC's phone.*

Second, Appellant attacks the fact that AC testified at trial that she was in her bedroom when Appellant demanded her phone, but she implied to law enforcement that Appellant demanded her phone just *before* going to her bedroom. (App. Br. at 43.) From that, Appellant claims AC, "when confronted with the discrepancy," admitted that her account to law enforcement was the true account. (Id.) This is not correct. Trial defense counsel impeached AC with her written statement to law enforcement, "I then told him that he could keep it and

walked back to my room and laid down." (R. at 519.) AC confirmed she wrote that, but never confirmed one version was "true" and the other was not. (R. at 519-520.) Additionally, the quote Appellant pulls from AC's written statement to law enforcement is taken out of context. AC was clear to law enforcement that Appellant "came to our room and asked for my cellphone." (Pros. Ex. 26, page 3.) That is consistent with her trial testimony: "Then he came to the room, and he asked for my phone." (R. at 444.) Later in her written statement AC told law enforcement that she told Appellant, "He could keep it and walked back to my room and laid down." (Pros. Ex. 26, page 3.) But this was *after* Appellant demanded the phone while AC was in the bedroom. There is thus no inconsistency between AC's trial testimony and her prior statement.

c. *Location of where Appellant stockpiled AC's electronic devices.*

Third, Appellant attacks AC's testimony at trial that Appellant put her electronic devices in the home office while she told FAP that Appellant put the electronics in the corner of the master bedroom. (App. Br. at 44.) Testifying from memory, the FAP provider testified, "I *believe* it was in the master bedroom in a corner all in a pile" and that she did not "recall" AC telling her about devices being moved to the office. (R. at 776) (emphasis added). A rational factfinder could have found that the FAP provider was mistaken as to the precise location of the electronics as she testified from memory about a singular encounter with AC that happened years before trial. After all, the reason AC came to see the FAP provider was for assaults—not the wrongful withholding of electronic devices. Thus, the panel may have easily rejected the FAP provider's recollection of this specific tidbit in favor of AC's testimony.

d. *Method of strangulation.*

Fourth, Appellant attacks AC's testimony that Appellant "strangled her the same way each time." (App. Br. at 44.) But AC's testimony was more nuanced than that. When asked about the "manner" of strangulation, AC responded, "They were the same." (R. at 462.) When asked to explain, AC responded with the similarities between the three strangulations: she was "laying on the bed" for all three and all three "felt the same" in terms of duration. (Id.) At no point did AC claim that Appellant "strangled her the same way each time by wrapping his arm around her neck as she lay face-up on the bed and that he squeezed her abdomen with his legs," which is what Appellant claims. (App. Br. at 44.) There is therefore no inconsistency.

e. *Differences in AC's Testimony Versus GL and NL.*

Fifth, Appellant attacks differences in AC's account of New Year's Day and her sons' account of the same day. But inconsistencies are also to be expected between an adult retelling a traumatic event and two children. This is especially the case when NL was only six years old at the time. And while NL did not recall many specifics during his trial testimony, the Government introduced a prior consistent statement NL made to CPS mere days after the charged events that was generally consistent with AC's trial testimony. (Pros. Ex. 30.) The military judge instructed the members that they could consider NL's prior consistent statements to CPS not only for the truth, but also "for their tendency to refute the charge of improper influences or motives." (R. at 1083.) Therefore, a rational factfinder could have discounted Appellant's claim that AC coached NL due to the introduction of a recorded prior consistent statement prior to any allegation of improper influence.

f. *Differences in AC's Testimony Versus FAP Provider.*

Finally, Appellant argues the sexual assault allegation is insufficient because the FAP provider testified AC told her Appellant sexually assaulted her in the closet with the doors closed while the boys were in the bedroom. (R. at 776.) But the military judge instructed the members that they could not use this prior inconsistent statement for the truth of the matter asserted. (R. at 1083.) Rather, the members could only use this inconsistency in deciding whether to believe AC's in-court testimony. (Id.) And they did believe her. A rational fact finder could have easily determined that the FAP Provider mixed up who was in the closet versus who was on the bed, but the gist of the statement was the same: Appellant sexually assaulted AC in her home. And Appellant admitted as much.

The military judge also instructed the members, "In weighing discrepancies between witnesses, you should consider whether they resulted from an innocent mistake or a deliberate lie." (R. at 1082.) A rational factfinder could have found that to the extent there were any discrepancies between AC's testimony and that of her sons, or AC's testimony and the FAP provider, those minor inconsistencies years after an event are to be expected. A rational factfinder could have also found that what AC was never inconsistent on was that Appellant sexually assaulted her, strangled her, kidnapped her, threatened her, hit her in the face, body slammed her, pushed her into a fence, and did so when their two minor children were locked in the room with her. On the charged events and key aspects of the case, AC's trial testimony was remarkably consistent with her 8-page written statement to police written six days after the incident. (*Compare* R. at 432-660 *with* Pros. Ex. 28.)

AC Received Victim Compensation from the State Government to Testify

Appellant next argues that AC agreed to testify at trial so that she could receive free money from the State of Texas if she remained an active participant in his prosecution. (App. Br. at 45.) But AC testified at trial the financial incentive was not the motivating factor behind her testifying against Appellant. (R. at 619.) Even if this were AC's motivation for testifying against Appellant years later, AC did not learn of this program until Fall of 2018. (R. at 619.) She made multiple consistent statements about the assaults months prior, in January 2018. So learning of this financial program occurred months *after* she made multiple prior consistent statements to law enforcement, the SANE who treated her, and a FAP provider cataloging the entire New Year's Day incident. Learning of a financial program to assist victims of crimes after the fact does not change AC's consistent narrative of Appellant's crimes. It also does not change Appellant's voluntary admissions that he "did it," "did cruel and unusual things," was "going to jail for a long time," and telling police he assaulted and sexually assaulted his wife.

One of the Police Officers Did Not Hear Appellant say, "I did cruel and unusual things."

When police responded to the 911 call at Appellant's house, two officers arrived at the same time, Deputy PM, and Deputy DP. One officer, Deputy PM, recalled Appellant saying, "I did some cruel and unusual things." (R. at 709.) The other officer, Deputy DP, recalled Appellant saying, "I did it." (R. at 743.) Regardless of the precise language used that night, the deputies' testimony was clear: Appellant was admitting guilt and expressing consciousness of guilt. Nor is there any evidence to suggest Deputy PM was lying or mistaken about his memory from that night. On the contrary, "I did some cruel and unusual things" is an oddly precise quote to invent out of thin air. It is possible Appellant made this admission when Deputy PM very first exited the car, before Deputy DP was within earshot as Deputy PM testified that Deputy DP

"was around me" but he could not say, "exactly where." (R. at 713.) It is just as likely that Deputy PM, who was a patrol officer for over 20 years, had a better memory of that night than Deputy DP, who was a trainee and on his first call. (*Compare* R. at 707 *with* R. at 708.) At bottom, such a minor discrepancy in wording for an uncharged event does not render five specifications factually and legally insufficient.

Shoddy Investigation

Finally, Appellant claims five specifications are legally and factually insufficient because of a few investigative activities that did not occur in this case. (App. Br. at 46.) It is unclear how failed investigative steps create legal insufficiency. For factual sufficiency, not all investigative steps are created equal. No one photographed the pill bottle Appellant took because suicide is not a crime in the State of Texas, and they were not investigating him for trying to take his own life. (R. at 936.) The bedsheet was the only item from the bedroom tested for biological substances because AC was lying on the bedsheet when Appellant ejaculated. (R. at 753.) Police did not photograph Appellant's upper body, despite AC's contention that she fought back, because Appellant was wearing a long-sleeved sweatshirt during the entire encounter. (R. at 460, Pros. Ex. 7, 11.) Police did not collect the knife Appellant brandished because it was a kitchen knife that was never used on anyone. (R. at 405.)

Police could have photographed Appellant's hands to see if he had defensive scratch wounds (App. Br. at 46.) They did not. But Appellant did not tell police that he assaulted his wife in self-defense or because she attacked him first. To the contrary, he told police that he did "some cruel and unusual things." And AC testified that she did not scratch Appellant with her nails that day. (R. at 640.) So there was no reason for police to photograph Appellant's hands to look for scratches.

Likewise, police could have tried to contact neighbors to see if they had security footage of GL running outside to get help, as he claimed. (R. at 692-693.) They did not. But it is speculative whether that investigative step would have yielded evidence sufficient to undermine the verdict. Even if police contacted the neighbors, it is possible they did not have a security system enabled that captured video. Given the testimony by four eyewitnesses, Appellant's admissions, medical records, DNA evidence, and photographic evidence, a rational factfinder could have reasonably concluded that the police did not need to perform that additional investigative step to rely on their investigation.

The Government introduced sufficient evidence for a rational factfinder to find Appellant guilty beyond a reasonable doubt, despite any investigative steps not performed. Trial defense counsel highlighted the issues he now raises on appeal in cross-examination of the various law enforcement officers that testified at trial. A rational trier of fact may have concluded that police need not follow every lead or perform every investigative task possible to have a reliable investigation.

Conclusion

A rational trier of fact, viewing the evidence in the light most favorable to the prosecution would find the evidence proved the essential elements beyond a reasonable doubt. The evidence presented at trial also proved Appellant's guilt beyond a reasonable doubt. This Court, after making allowances for not having personally observed the witnesses or assessed the victim's credibility, should be convinced of Appellant's guilt beyond a reasonable doubt. Appellant's requested relief is not justified.

III.

APPELLANT WAS NOT PRESUMPTIVELY PREJUDICED BY THE ABSENCE FROM THE RECORD OF TRIAL OF MOTIONS, EVIDENCE, AND RULINGS FROM THE FIRST ITERATION OF THE COURT-MARTIAL.

Additional Facts

On 12 December 2018, charges in Appellant's first court-martial were preferred. (App. Ex. VI, XIV.) Those charges were referred to trial on 27 March 2019. (Id.) On 12 January 2021, after arraignment, but before findings were announced, those original charges were withdrawn and dismissed without prejudice pursuant to R.C.M. 604(a). (Id.) On 14 January 2021, Government preferred charges anew. (Id.) They were referred to trial on 23 January 2021. (Id.) Appellant waived his Article 32 preliminary hearing. (App. Ex. VI.)

Appellant was represented by the same Circuit Defense Counsel, Maj AA, for almost two years, during both his first and second court-martial. (Maj Allen Abrams Affidavit, dated 17 January 2023) (Maj Abrams Affidavit). Maj AA represented Appellant from 21 August 2019 until 12 June 2021. (Id.)

Standard of Review

Whether a record of trial is complete is a question of law that is reviewed de novo. United States v. Davenport, 73 M.J. 373, 376 (C.A.A.F. 2014).

Law

A complete record of proceedings, including all exhibits and a verbatim transcript, must be prepared for any general or special court-martial that results in a punitive discharge or more than six months of confinement. Article 54(c)(2), UCMJ. Appellate courts understand that inevitably records will be imperfect, and therefore review for substantial omissions. *See* United States v. Lashley, 14 M.J. 7, 8 (C.M.A. 1982). A substantial omission renders a record

incomplete and raises a presumption of prejudice that the Government must rebut. United States v. Henry, 53 M.J. 108, 111 (C.A.A.F. 2000) (citing United States v. McCullah, 11 M.J. 234, 237 (C.M.A. 1981)). Insubstantial omissions do not raise a presumption of prejudice or affect the record's characterization as complete. Id. A substantial omission may not be prejudicial if the appellate courts can conduct an informed review. United States v. Simmons, 54 M.J. 883, 887 (N-M. Ct. Crim. App. 2001); *see also* United States v. Morrill, ARMY 20140197, 2016 CCA LEXIS 644, at *4-5 (A. Ct. Crim. App. 31 October 2016) (unpub. op.) (finding that the record "adequate to permit informed review by this court and any other reviewing authorities") (citation omitted).

In Henry, the Court of Appeals for the Armed Forces (CAAF) held that omission of "an accused's personnel record" was insubstantial. 53 M.J. at 111 (citing United States v. Harper, 25 M.J. 895 (A.C.M.R. 1988)). CAAF then considered the omission of four prosecution exhibits to be insubstantial, partially because the court could determine the contents of the exhibits from the record. Id.

"Each general or special court-martial shall keep a *separate* record of the proceedings in each case brought before it." Article 54(a), UCMJ (emphasis added.)

R.C.M. 1112(f) instructs that "[i]n accordance with regulations prescribed by the Secretary concerned, a court reporter shall attach" certain matters to the record before forwarding for appellate review. If the trial for which the record is being prepared "was a rehearing or new or other trial of the case," then one such matter to be attached to the record is "the record of any former hearings." R.C.M. 1112(f)(1)(C). Although R.C.M. 1112(f) does not define "rehearing," "new trial" or "other trial," these terms are defined elsewhere in the Rules for Courts-Martial. R.C.M. 810(e) defines "other trial" to mean "another trial in a case in which the original

proceedings were declared invalid because of lack of jurisdiction or failure of a charge to state an offense."

Further, R.C.M. 810(a)(1)(A), Discussion, states:

> [t]he term "rehearings," "new trials," "other trials" . . .generally have the following meanings: "rehearings" refers to a proceeding ordered by an appellate or reviewing authority on the findings and the sentence or on the sentence only; "new trial" refers to proceedings under Article 73 because of newly discovered evidence or fraud committed on the court; "other trials" refers to a proceeding ordered to consider new charges and specifications when the original proceedings are declared invalid because of a lack of jurisdiction or failure of a charge to state an offense.

Department of the Air Force Manual (DAFMAN) 51-203, *Records of Trial,* 21 April 2021, ¶ 7.1.2.3 allows for creation of an abbreviated record of trial when courts-martial are terminated by withdrawal before findings, which happened in Appellant's case. Practitioners are directed by DAFMAN 51-203 to follow the "*ROT and Attachment Assembly Checklist for Full Acquittals, Not Guilty by Reason of Lack of Mental Responsibility, Mistrials, Dismissal of All Charges, or Otherwise Terminated Without Findings Checklist*" on the Virtual Military Justice Deskbook.[2] Id. at. 7.1.2; 7.2. Nothing on this checklist requires that the proceedings from a court-martial where the charges are merely withdrawn must be attached to the ROT in any later proceedings on the same charges.

DAFMAN 51-203, para. 7.5. is entitled "Retrial on Dismissed Charges" and states:

> If charges are *dismissed* after arraignment, and a retrial is expected on the same or amended charge, an abbreviated ROT will be prepared; however, a verbatim transcript of the proceedings to the point of termination is required. Assemble the ROT in accordance with paragraph 7.2, to include the verbatim transcript. Certify this

[2] This checklist is available at: https://kmjas.jag.af.mil/moodle/pluginfile.php/39206/mod_folder/content/0/03_Courts_Martial_Checklists/ROT_GCM_SPCM_Assembly_Acquittals_Dismissals_%28oa_1Jan19%29_20200501_CHECKLIST.pdf?forcedownload=1

> ROT, and serve a copy on the accused and defense counsel. Forward this ROT to JAJM, and *attach a copy of it to the ROT created for the second proceeding.*

(emphasis added).

When charges are dismissed, a "[r]einstitution of charges requires the command to start over. The charges must be re-preferred, investigated, and referred in accordance with the Rules of Courts-Martial, as though there were no previous charges or proceedings." United States v. Britton, 26 M.J. 24, 26 (C.M.A. 1988).

R.C.M. 1112(d)(2) provides:

> If a record is incomplete or defective a court reporter or any party may raise the matter to the military judge for appropriate corrective action. A record of trial found to be incomplete or defective before or after certification may be corrected to make it accurate. A superior competent authority may return a record of trial to the military judge for correction under this rule.

Analysis

A. Appellant's Record Is Complete.

Appellant argues that unspecified "motions, evidence, and rulings" from his first court-martial, that resulted in withdrawn and dismissed charges, should have been included in the ROT for his second court-martial, that resulted in a guilty verdict. (App. Br. at 50.) But Article 54(a) requires "a separate record" for each general court-martial. Since Appellant was arraigned during his first court-martial, before charges were withdrawn and dismissed, a ROT was prepared to document that trial proceeding pursuant to Air Force regulations. *See* DAFMAN 51-203, ¶ 7.1.2.3. The "motions, evidence, and rulings" Appellant complains are missing are in that record. There is no requirement to duplicate records in Appellant's first ROT and include them in Appellant's second ROT. On the contrary, not only would duplicating records in two separate

ROTs be inefficient, but it would also run contrary to the plain language of Article 54(a) that requires "separate" records.

Appellant's case was not a "rehearing or new or other trial of the case" under R.C.M. 1112(f). The charges in Appellant's original proceedings were withdrawn and dismissed, but not directly because of "lack of jurisdiction or failure of a charge to state an offense." R.C.M. 810(e). While the first military judge and the parties participated in several R.C.M. 802 conferences discussing potential errors in the convening orders, the parties never went on the record, the court-martial was never assembled, and the military judge never issued any ruling related to jurisdiction or any charge failing to state an offense. (App. Br. at 48, App. Ex. VI.) Thus, Appellant's second court-martial was thus not an "other trial."

Further, Appellant's court was not ordered by an appellate or reviewing authority and was not a proceeding under Article 73. It therefore did not meet the definition of a "rehearing" or "new trial" as used in the Rules for Courts-Martial. As a result, R.C.M. 1112(f)(1)(C) does not apply here, and the Government was not required under the Rules for Courts-Martial to attach the prior GCM proceeding to the ROT for Appellant's second GCM. Moreover, DAFMAN 51-203, paragraph 7.5 does cover the circumstances of Appellant's case. While Appellant's original charges were dismissed after arraignment, his second court-martial was not a "retrial…on the same or amended charge." While the underlining conduct between Appellant's two courts-martial were the same, the charges were not. Appellant's first court-martial consists of only one charge and one specification of rape, in violation of Article 120, UCMJ, and one charge and one specification of assault consummated by a battery, in violation of Article 128, UCMJ for strangling AC. (App. Ex. VI.) In contrast, Appellant's second court-martial consisted of nine new charges and specifications, as well as charging Appellant with

sexual assault, vice rape, on AC. The only specification that was the same between the two iteration of Appellant's courts-martial was the battery specification alleging strangling of AC. But even so, Appellant was originally charged with a singular act of strangling AC "on the neck with his hands" while his convicted charge was for divers occasions of strangling AC "on the neck with his forearm." (*Compare* App. Ex. VVI, Attachment 1 *with Charge Sheet*.) Appellant was thus not tried on "the same or amended charge" as Appellant's charges were drastically different between the two courts-martial. DAFMAN 51-203, ¶ 7.5. The Government has complied with all relevant rules and regulations. Appellant's ROT is complete.

B. Even if Appellant's Record Is Not Complete, He Is Not Prejudiced by the Omissions.

Appellant suffered no prejudice because he was represented by the same Circuit Defense Counsel across both iterations of his court-martial, and his trial defense counsel had access to all the filings for both courts. And, where relevant, that same trial defense counsel attached the previous filings from the first court-marital *to* filings in the second court-martial, to the tune of hundreds of pages.

Appellant broadly argues that the ROT "omits the motions, evidence, and rulings upon which the military judge and the parties relied during the second court-martial." (App. Br. at 50.) But Appellant does not explain what he means by "the parties relied" on these filings. Any prior motion rulings from the prior military judge in a separate court-martial would not affect this court-martial. And Appellant does not argue he needs those prior filings to intelligently raise issues now on appeal. Appellant argues that AC's testimony at a motions hearing in the first court-marital was mentioned during the second court-martial. (App. Br. at 48.) From that, Appellant argues AC's motions testimony in the first court-martial should have been included in the ROT for the second court-martial. But AC's motions hearing *was* in the ROT. Trial defense

counsel refreshed AC's recollection with her motions testimony. (R. at 552-53.) A 162-page document containing AC's entire prior motions testimony is in Appellant's ROT as Appellate Exhibit XLVIII. (R. at 553.)

Furthermore, many of the documents that Appellant complains are not included in his ROT were attached to motions filed by trial defense counsel, and all the motions that trial defense counsel filed were contained into the record as Appellate exhibits. So the ROT *does* include a copy of the previous motions, evidence, and rulings on which Appellant's counsel relied at his second court-martial.

For instance, as part of Appellant's second court-martial, on 23 April 2021, trial defense counsel filed a Motion for Appropriate Relief to Require a Unanimous Panel Verdict. (App. Ex. VI.) The motion contained 10 attachments. (Id. at page 29.) Of those 10 attachments, 8 attachments related to Appellant's first court-martial. (Id. at Attachments 1-8.)

Likewise, as part of Appellant's second court-martial, on 3 May 2021, trial defense counsel filed a Motion to Compel Production of a Witness. (App. Ex. IX.) That motion contained 17 attachments. (Id. at page 10.) Of those 17 attachments, 9 attachments related to the Appellant's first court-martial. (Id. at Attachments 1-9.)

On 26 April 2021, again as part of Appellant's second court-martial, trial defense counsel filed a Motion to Dismiss for Defective Preferral. (App. Ex. XII.) This 333-page motion outlined the entire procedural background of Appellant's first court-martial and included 22 attachments, all of which related to Appellant's first court-martial. (Id. at pages 8-9.)

Appellant points to nothing in the evidence to show that separately including these documents in the ROT would be substantial. Thus, the court should reject Appellant's argument that he was prejudiced by the exclusion of these documents.

C. This Court Does Not Need the Record of the Prior Proceedings to Conduct its Article 66(d) Review.

In any event, there is no need for this Court to review the prior proceedings in order to conduct its Article 66(d), UCMJ, review. Appellant did not raise improper withdrawal and re-referral of charges in his assignment of error on appeal. And a recent opinion from our superior Court further suggests that the prior proceedings are not relevant to this Court's appellate review of this case. *See* United States v. Badders, ___ M.J. ___, 2022 CAAF LEXIS 398 (C.A.A.F. 1 June 2022). Although Badders addressed the implications of a mistrial, its analysis is relevant here because withdrawal of charges from a court-martial – without dismissal – is like a mistrial. *See* R.C.M. 915(c)(1) ("A declaration of a mistrial shall have the effect of withdrawing the affected charges and specifications from the court-martial.") In Badders, our superior Court explained that a mistrial "ends a valid referral," and "a new referral . . . acts to convene a court-martial *separate from the first.*" 2022 CAAF LEXIS 398, at *12 (internal citations and quotations omitted) (emphasis in original). It follows that the convening authority's withdrawal and dismissal of charges from one court-martial and preferral and referral of different charges to a new court-martial under a new convening order likewise convenes a separate proceeding from the first. Since Appellant's second GCM was a separate court-martial from his initially referred GCM, there is no need for this Court to evaluate the prior proceedings as part of its Article 66(d), UCMJ, review. The existing rules and regulations governing when prior proceedings should be attached to records of trial do not affect Appellant's substantial rights in this case.

Finally, if this Court finds error, this Court should return the record of trial to The Judge Advocate General for remand to the convening authority for correction pursuant to R.C.M. 1112(d)(2) instead of "set aside" the findings of guilty and sentence, which is the drastic relief Appellant requests. (App. Br. at 51.)

IV.

APPELLANT'S SENTENCE IS NOT INAPPROPRIATELY SEVERE.

Standard of Review

This Court reviews sentence appropriateness de novo. United States v. Baier, 60 M.J. 382, 383-384 (C.A.A.F. 2005). The Court may only affirm the sentence if it finds the sentence to be "correct in law and fact and determines, on the basis of the entire record, [it] should be approved." Article 66(d)(1), UCMJ.

Law

Sentence appropriateness is assessed "by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial." United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009).

Although this Court has great discretion to determine whether a sentence is appropriate, the Court lacks the authority grant mercy. United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted). Unlike the act of bestowing mercy through clemency, which was delegated to other channels by Congress, CCAs are entrusted with the task of determining sentence appropriateness, thereby ensuring the accused gets the punishment he deserves. United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988).

Analysis

Appellant only challenges his term of confinement as being inappropriately severe. (App. Br. at 60.) The maximum confinement that could have been adjudged was confinement for life without eligibility for parole. (R. at 1254.) Appellant was ultimately sentenced to only a fraction of that maximum term of confinement allowed and was not sentenced to any forfeitures

of pay. (R. at 129-30.) The adjudged amount of confinement was also six months below the recommendation of the trial counsel, who argued for "at least ten years' confinement."[3]

Ultimately, the panel determined an appropriate sentence was reduction to E-1, confinement for nine years and six months, and to be dishonorably discharged. (R. at 1288.) The sentence was well within the maximum available punishment given Appellant's crimes. It was also an appropriate punishment given Appellant's crimes. Finally, Appellant did not receive any adjudged forfeitures, even though forfeiture of all pay and allowances was an authorized sentence. (R. at 1254.)

Appellant advances four reasons why he should receive leniency: (1) AC's minimal victim impact, (2) Trial counsel improperly argued Appellant was a repeat offender, (3) Appellant's PTSD, and (5) Appellant's stellar record of service. (App. Br. at 61-62.) But, importantly, Appellant ignores or significantly discounts the severity and aggravating factors of his crimes.

Victim Impact

First, Appellant focuses on Victim AC's counterintuitive behavior post-assault to undercut her victim impact. (App. Br. at 60-61.) But Appellant's reliance on AC's feelings towards Appellant "*following* the alleged incident" does not account for the impact she felt for 12 hours *during* the charged events. (App. Br. at 60.)

AC was yelled and cursed at, spat on, grabbed, slapped, pushed, punched, pinned down, body slammed, kidnapped, strangled, sexually assaulted, and taunted with a murder-suicide. For 12 hours she was not allowed freedom of movement, her phone was confiscated, she was

[3] "In light of that, an appropriate sentence in this case is at least ten years' confinement and a reduction to E-1." (R. at 1263.)

instructed to urinate on herself, she was vomited on, and she was forced to wear ejaculate-crusted underwear for hours without changing or bathing. And these things happened to her in front of her two young children. She thought she was going to die. And she thought Appellant was going to kill himself in the process, orphaning their two young sons. Any time that AC pled with Appellant, tried to bargain with him, or defied him, she was hit in the face, she was pushed to the ground, or she was strangled to the point that she could not breathe. Appellant's crimes left AC feeling "weak, powerless, humiliated, and defeated." (R. at 1230.)

Appellant likewise focuses on certain aspects of AC's post-assault behavior, like seeking to initially reconcile with Appellant, to the exclusion of others. AC provided an oral unsworn statement to the members during sentencing. (R. at 1229.) AC became emotional at multiple points while delivering her impact statement. (R. at 1229-1230.) Long after the physical injuries healed from the New Year's Day incident, AC was still dealing with the effects of Appellant gaslighting and "manipulating" her. (R. at 1230.) He made her feel like she "deserved what happened" and he made her "feel guilty." (Id.) Her "life was turned upside down" and she experienced so much stress and anxiety she developed ulcers. (Id.) The entire ordeal was "terrifying" to AC. (Id.)

While Appellant exclusively focuses on AC in his brief, she was not the only victim with significant impact. GP provided a written unsworn statement where she described still having flashbacks from that night. (Court Exhibit B.) GP broke down crying on the witness stand in findings reliving the incident. (R. at 401-402.) Not only was GP physically injured and treated at an emergency room after Appellant body slammed to the floor, but Appellant weaponized a personal family tragedy—an aunt's suicide—against her that night to secure compliance during the kidnapping. (R. at 449.) Appellant engaged in psychological warfare by taunting GP with a

knife while asking how her aunt committed suicide. (Id.) GP suffered very real, very sobering impacts from Appellant's crimes.

Finally, GL and NL were, and will continue to be, impacted by Appellant's crimes. Although they were perhaps too young to fully articulate that impact at trial, they were affected all the same. GL provided a victim impact statement where he asked his father "why" he did the things that he did that night. (Court Exhibit C.) As AC aptly recognized, the boys will continue to have questions about that night as they get older, and she will be the one shouldering the responsibility for Appellant's actions and explaining what happened for years to come. (Court Exhibit A.) After all, NL recalls that day as the day "dad was going to kill my mom." (R. at 1003.)

Improper Argument

Second, Appellant advances an argument that because trial counsel argued during sentencing that the members must "protect not only the boys and victims in this case, but society," he is somehow entitled to sentence leniency. (App. Br. at 61.) According to Appellant, trial counsel "implicitly argued that Appellant was a likely a repeat offender." (Id.) It is unclear how. The military judge instructed the members that "protection of society from the wrongdoer" was a commonly recognized sentencing principle. (R. at 1255.) That is precisely what trial counsel argued. And Appellant raise improper sentencing argument as part of his brief. Thus, it is unclear how this aspect of trial counsel's argument, arguing protection of society for someone who menaced four victims for 12 hours, shows his sentence is inappropriately severe.

Service Record

Third, Appellant emphasizes his service record as a "superior NCO" who "continued to excel and perform at a high level" even amid the investigation and subsequent court-martial.

(App. Br. at 61.) But trial counsel already factored in Appellant's service record when she did not argue for the maximum possible punishment, but only recommend ten years confinement:

> Well, we know exactly what the accused thinks his punishment should be: Twenty years. So you can give him exactly what he thinks his crimes deserve, 20 years, or you could show him some leniency because of his good duty performance, his deployments, because he was cooperative when law enforcement first arrived.
>
> (R. at 1263.)

Next, Appellant highlights the fact that he "performed so well that he was recommended for promotion in his last EPR before trial." (App. Br. at 61.) But Appellant did not receive a "promote now" recommendation or even a "must promote" recommendation. (Pros. Ex. 32, page 34.) A "promote" recommendation is only one step above marking Appellant as "not ready now" to promote. (Id.) Thus, the promotion box checked on his last EPR before trial does not signify superior performance.

PTSD

Fourth, Appellant argues his term of confinement is "unduly harsh and inappropriate" because he is now ineligible for treatment from the VA for his PTSD. (App. Br. at 61.) But there is no evidence before this Court that the VA has denied Appellant benefits, or he has been unable to receive treatment while in confinement for PTSD. If the VA has denied Appellant benefits, it stems from his Dishonorable Discharge, and not confinement. *See* R. at 1257 ("The law imposes a mandatory minimum sentence of a dishonorable discharge for the offenses. Such a discharge may deprive one of substantially all benefits administered by the Department of Veterans Affairs and the military establishment.") And Appellant does not challenge the severeness of his mandatory dishonorable discharge.

Appellant received "the punishment he deserves." Healy, 26 M.J. at 395-96. For twelve hours, he took his own family hostage, kidnapping them in their own home. They did not know

if they would live or die. They survived physical violence, sexual violence, and mental anguish. 1 January 2018 was a nightmare four people will never forget, including two young, impressionable children. Appellant told his wife he planned his attack because he wanted her to feel hurt. And he intentionally did it in front of her kids because he knew that would hurt her the most. Appellant's crimes were "cruel and unusual." (R. at 743.) Shortly after that dreadful day, Appellant told his brother he was going to jail for "20 years." (R. at 735.) But now he claims he does not deserve less than 10 years. Appellant is not entitled to relief. This Court should affirm the appropriate sentence returned by the military judge.

V.

TRIAL DEFENSE COUNSEL EFFECTIVELY REPRESENTED APPELLANT DURING FINDINGS AND SENTENCING.

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. United States v. Datavs, 71 M.J. 420, 424 (C.A.A.F. 2012) (citing United States v. Gutierrez, 66 M.J. 329, 330-31 (C.A.A.F. 2008)).

Law

A. Ineffective Assistance of Counsel

The Sixth Amendment guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; United States v. Gilley, 56 M.J. 113, 124 (C.A.A.F. 2001). In assessing the effectiveness of counsel, courts apply the standard from Strickland v. Washington, 466 U.S. 668, 687 (1984), and begin with the presumption of competence announced in United States v. Cronic, 466 U.S. 648, 658 (1984).

"In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency

resulted in prejudice." United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing Strickland, 466 U.S. at 698). The Strickland standard is "stringent." United States v. Rose, 71 M.J. 138, 144 (C.A.A.F. 2012).

The Court can decide an ineffective assistance claim on either of these two elements without consideration of the other. Strickland, 466 U.S. at 697. Thus, this Court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [appellant] as a result of the alleged deficiencies." Id.

Military courts apply the following three-part test in assessing whether the presumption of competence has been overcome: (1) are Appellant's allegations true, and if so, "is there a reasonable explanation for counsel's actions"; (2) if the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance…[ordinarily expected] of fallible lawyers"; and (3) if defense counsel were ineffective, is there a "reasonable probability that, absent the errors," there would have been a different result? United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (alteration and omission in original) (quoting United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)). The burden is on Appellant to show both deficient performance and prejudice. Datavs, 71 M.J. at 424.

To establish the element of deficiency, the appellant must first overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. In cases involving attacks on defense counsel's trial tactics, an appellant must show specific defects in counsel's performance that were "unreasonable under prevailing professional norms." United States v. Mazza, 67 M.J. 470, 475 (C.A.A.F. 2009)).

"Disaffected clients seeking to assign blame for their predicament often blame their lawyers for their predicament rather than themselves. For this reason the law presumes that counsel is effective, and places upon an appellant the burden of establishing ineffectiveness." United States v. Thompson, No. ACM 32630, 1998 CCA LEXIS 163, at *7 (A.F. Ct. Crim. App. 5 February 1998) (unpub. op.).

To show prejudice, Appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 698; Loving v. United States, 68 M.J. 1, 6-7 (C.A.A.F. 2008). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

An appellant who claims ineffective assistance of counsel "must surmount a very high hurdle." United States v. Alves, 53 M.J. 286, 289 (C.A.A.F. 2000) (citations and quotation marks omitted). Judicial scrutiny of a defense counsel's performance must be "highly deferential and should not be colored by the distorting effects of hindsight." Id. (citing Strickland, 466 U.S. at 689). Moreover, this Court does "not look at the success of a criminal defense attorney's trial theory, but rather whether counsel made an objectively reasonable choice in strategy from the alternatives available at the time." Thompson, unpub. op. at *7-8.

"If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice…that course should be followed." United States v. Wiley, 47 M.J. 158, 160 (C.A.A.F. 1997) (quoting Strickland, 466 U.S. at 697). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." United States v. Dewrell, 55 M.J. 131, 133 (C.A.A.F. 2001) (quoting Strickland, 466 U.S. at 690).

Analysis

Appellant argues his trial defense counsel was constitutionally ineffective in four areas: (1) Failing to retain an expert consultant in PTSD or introduce evidence of Appellant's PTSD in findings or sentencing; (2) Waiving an instruction on partial mental responsibility; (3) Failing to investigate and litigate whether AC waived her attorney-client privilege with her SVC; and (4) Failing to present evidence of Appellant's lost retirement at sentencing. (App. Br. at 81.)

A. PTSD.

First, Appellant alleges his trial defense counsel did not retain an expert consultant in PTSD for the second iteration of the court-martial. (App. Br. at 83.) This is not correct. On 14 January 2021, trial defense counsel requested the convening authority appoint Dr. KG, a board certified forensic psychologist who was previously appointed to assist the defense in the first court-martial. (Maj Abrams Affidavit at Attachment 1.) The request specifically identified Appellant's "severe PTSD and combat related mental health issues" as a basis for the expert request. (Id. ¶ 6.) Dr. KG "spoke fluently" on the topic of PTSD "and matters related to her field of expertise and extensive experience." (Maj Abrams Affidavit ¶ 14.) Thus, Dr. KG was qualified to assist the defense in the field of PTSD. So, Appellant's allegation that trial defense counsel failed to retain, or move for, an expert in the field of PTSD is not true and his claim on this basis must be rejected[4]. Polk, 32 M.J. at 153.

Next, Appellant argues his counsel were deficient for not introducing evidence of PTSD in findings "to rebut evidence that Appellant had the specific intent necessary for the child

[4] In his brief, Appellant conflates the Court-appointed child forensic psychologist, Dr. MC, with the defense's expert consultant, Dr. KG. (App. Br. at 84.) The court-appointed psychologist, Dr. MC, was present at Appellant's second court-martial, but she was not the defense's expert consultant. (R. at 383.)

endangerment specification." (App. Br. at 85.) But child endangerment by culpable negligence does not require specific intent. *See* Issue I, *supra*. So the defense of partial mental responsibility was unavailable as child endangerment by culpable negligence was only a general intent crime. *See* United States v. Handy, 48 M.J. 590, 593 (A.F. Ct. Crim. App. 1998) ("As for partial mental responsibility, appellant's absence offense was only a general intent crime. Consequently, the concept of partial mental responsibility was not a player for that offense.")

Consistent with the holding in Handy, evidence of Appellant's PTSD in findings would not have been a defense to child endangerment, or any other charge since he was charged exclusively with general intent crimes. *See* RCM 916(k)(2), Discussion. To that end, the military judge instructed the members: "You may have received evidence related to whether [Appellant] had Post-Traumatic Stress Disorder ("PTSD"). The mental responsibility of the accused, to include whether he had PTSD, is not raised as a defense to any of the charges or specifications." (R. at 1084.)

Even if it were, there are reasonable explanations for trial defense counsel's actions. Trial defense counsel was aware of Appellant's PTSD. (Maj Abrams Affidavit.) To that end, the Circuit Defense Counsel received, and reviewed, 1,664 pages of Appellant's mental health records. (Id. ¶ 11.) Trial defense counsel also had access to the "long form" of Appellant's sanity board report. (Id.) Between 12 March 2020 and 12 January 2021, trial defense counsel had multiple discussions with Dr. KG, the defense's appointed forensic psychologist, about introducing evidence relating to Appellant's PTSD. (Id. ¶ 13.) Dr. KG firmly advised to "avoid introducing evidence that would result in production of [Appellant]'s mental health records to the prosecution." (Id.) Dr. KG had "firm views based on her review of [Appellant]'s records and her interactions with [Appellant] during case preparation." (Id. ¶ 14.)

On 27 April 2021, a second sanity board was conducted on Appellant at trial defense counsel's request. (App. Ex. XXXIV.) On 16 May 2021, Circuit Defense Counsel emailed Dr. KG the sanity board result asking her three things: "(1) whether the report is put together well and done right, (2) any impacts on case strategy, such as client testimony or introducing anything related to [Appellant]'s mental health if the Government somehow doesn't bring it up, and (3) anything else that strikes you as important." (Maj Abrams Affidavit ¶ 15.) On 18 May 2021, Dr. KG responded with her consistent advice to avoid introducing evidence of Appellant's PTSD:

> I want to reiterate I do not recommend doing anything that would place his mental health records in the Government's hands. Aside from uncharged conduct and inconsistent statements in general; he provided some inconsistent statements upon which the PTSD diagnosis was based. Whether he has PTSD or not, his records diagnosis does not explain or mitigate sexual assault or the alleged violence.

(Id. ¶ 16.)

Trial defense counsel confirmed that Dr. KG's advice "informed [their] trial strategy." (Id.) The Circuit Defense Counsel responded to Dr. KG that he "agreed" with her advice and based on his review of M.R.E. 513 and the relevant case law, he believed any reference to a mental condition could open the door." (Id. ¶ 17.) Circuit Defense Counsel showed an understanding of the current state of the law at the time regarding opening the door to the prosecution obtaining Appellant's mental health records that they did not have. (Id. ¶ at 18.) Contemporaneous to trial, the Circuit Defense Counsel wrote a memorandum for record detailing his real-time trial strategy about not presenting evidence of Appellant's PTSD. (Id. ¶ 20.)

For her part, Appellant's second trial defense counsel, Capt TO, agreed with Maj AA's trial strategy in not introducing evidence of Appellant's PTSD. (Capt Toni Otokunrin Affidavit,

dated 18 January 2023) (Capt Otokunrin Affidavit). Capt TO "believed that the benefit of introducing PTSD evidence would be greatly outweighed by the rebuttal evidence that it would allow the Government to present." (Id. ¶ 2.) On top of concerns about the prosecution receiving Appellant's mental health records, Capt TO recognized that Appellant had been through two separate sanity boards, and two separate panels acknowledged that he had PTSD, but also that he was mentally responsible for his actions and aware at the time that his conduct was wrong. (Id. ¶ 3.) Part of Capt TO's calculus for not wanting to introduce PTSD was that she believed it would "weaken our case and cause us to lose credibility with the panel" if the Government could rebut evidence of PTSD with two separate sanity board findings. (Id.)

Evidence of "uncharged misconduct" and "prior inconsistent statements" in Appellant's mental health records might have reasonably given trial defense counsel pause. (Maj Abrams Affidavit ¶ 16.) Both trial defense counsel made a tactical decision to not introduce evidence of Appellant's PTSD after doing a risk-reward analysis and determining that any benefit was outweighed by the potential risk to the case.

Strategic or tactical decisions made by counsel will not be second-guessed on appeal unless the appellant shows specific defects in performance that were unreasonable under prevailing professional norms. Mazza, 67 M.J. at 475. To prevail, then, the appellant has the heavy burden of establishing that his trial defense counsels' tactical decisions to forgo introducing evidence of PTSD, especially when their expert counseled against it, was unreasonable. *See* Datavs, 71 M.J. at 424 (Trial defense counsel performance is not deficient "when [he] make[s] a strategic decision to accept a risk or forego a potential benefit, when it is objectively reasonable to do so") (citation omitted); *see also* United States v. Adams, 59 M.J.

367, 370, n.5 (C.A.A.F. 2004) ("An appellant's burden is heavy because counsel is presumed to have performed in a competent, professional manner").

Maj AA considered it "fortunate that the prosecution had opened the door to [Appellant]'s PTSD diagnosis during AC's testimony." (Maj Abrams Affidavit ¶ 20.) When this evidence came out at trial, Capt TO "worked to strategically make sure it could be used to our advantage." (Capt Otokunrin Affidavit ¶ 5.) Maj AA believed any new reference to PTSD, or substantive introduction of PTSD by Dr. KG's testimony or otherwise, "would lead the prosecution gaining access to [Appellant]'s mental health records via Military Rule of Evidence 513." (Maj Abrams Affidavit ¶ 21.) Under these circumstances, trial defense counsels' informed decision, validated by Dr. KG, to not pursue PTSD was reasonable.

Next, Appellant claims his counsel were deficient for failing to introduce evidence of his PTSD in sentencing. (App. Br. at 85.) But Appellant adequately addressed his PTSD through his unsworn statement. (Def. Ex. AM.) Appellant vividly detailed his time in Iraq, IED explosions, and his "traumatic experiences." (Id.) He relayed "deep sadness," "nightmares," crying, and detailed a suicide attempt where he tried to hang himself and his neck was covered in bruises. (Id.) He detailed at length his struggles to cope with stress and mental health from combat deployments. (Id.) In his oral unsworn statement, he emphasized how he will not be able to get the help he needs from the VA with his dishonorable discharge. (R. at 1240.) So, this powerful mitigating evidence was all properly before the sentencing authority.

The Navy Court has "consistently held that introducing evidence of an appellant's PTSD and TBI through lay witness testimony and unsworn statements, instead of through expert testimony or documents, is not deficient performance by trial defense counsel." United States v. Jacks, No. 202000098, 2021 CCA LEXIS 476, at *4-5 (N-M Ct. Crim. App. 20 September 2021)

(unpub. op.) On the contrary, the Navy CCA has repeatedly held that "the decision to introduce evidence of an appellant's PTSD or TBI in sentencing via testimony or unsworn statement is 'a reasonable tactical choice.'" Id.

Similarly, the declarations submitted by trial defense counsel show that their decision to not present evidence of Appellant's PTSD through expert testimony or mental health records was an objectively reasonable, strategic decision, as presenting such evidence would have enabled the Government to rebut the diagnosis with potentially damaging prior inconsistent statements about his PTSD besides opening up the door to uncharged misconduct. *See* United States v. Lowe, No. ACM S32707, 2022 CCA LEXIS 91, at *8-9 (A.F. Ct. Crim. App. 11 February 2022) (unpub. op.) (finding trial defense counsel's decision to forgo evidence of PTSD in sentencing "objectively reasonable" when Government could have rebutted the diagnosis with evidence that Appellant may have fabricated the experiences he claimed caused the PTSD).

Ultimately, the approach trial defense counsel took to introducing Appellant's PTSD through his unsworn statement, coupled with AC's sworn testimony in findings, is the same approach this Court endorsed recently in Lowe:

> We also note that Appellant's counsel still presented evidence during sentencing of both Appellant's combat service and the traumatic death of his younger brother. This approach leveraged the potential mitigation of Appellant's provable traumatic experiences and resulting mental health battles, while eliminating the potential for the Government to put on evidence that would have severely undermined Appellant's credibility, claims of PTSD, and remorse. Therefore, the record supports that Appellant's counsel made an informed, conscious, and reasonable decision to not present Appellant's PTSD diagnosis during sentencing and we will not second guess tactical decisions.

Id. at *9.

So too here. Appellant's vivid imagery of his combat service overseas and the death of his father "leveraged the potential mitigation" of Appellant's "traumatic experiences and resulting mental health battles" while minimizing the risk the Government could access his mental health records or rebut his PTSD diagnosis. Id.

Even if trial defense counsel were somehow ineffective (which they certainly were not), in failing to present PTSD evidence, Appellant's claim must be dismissed because he suffered no prejudice. To prevail on prejudice, Appellant "must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. Appellant has failed to meet "the stringent Strickland standard." Rose, 71 M.J. at 144. Even if trial defense counsel substantively admitted evidence of Appellant's PTSD in findings, the members were instructed on the limited way in which they could even consider that evidence:

> MJ: Evidence Related to PTSD: You may have received evidence related to whether [Appellant] had Post-Traumatic Stress Disorder ("PTSD"). The mental responsibility of the accused, to include whether he had PTSD, is not raised as a defense to any of the charges or specifications. Evidence of whether [Appellant] had PTSD may be considered in understanding [AC]'s interpretation of the facts and circumstances that occurred on or about 1 January 2018, actions taken by [AC] related to the events on or about 1 January 2018, statements made by [AC] and [Appellant] related to the events on or about 1 January 2018, actions taken by representatives of law enforcement on or about 1 January 2018, and in understanding the relationship between [Appellant] and AC. You may give the evidence such weight that you believe it is fairly entitled to receive.

(R. at 1084.)

For these reasons, since the members were instructed that PTSD was not a defense to any charge, the record does not demonstrate a reasonable probability that Appellant would not have been convicted but-for counsels' errors.

Likewise, Appellant cannot show a reasonable probability that but-for counsels' errors he would have received a lesser sentence. If trial defense counsel substantively admitted evidence of Appellant's PTSD in sentencing, it would have been cumulative of evidence already before the members, through AC's testimony and Appellant's unsworn statement. Moreover, introducing Appellant's PTSD in sentencing, through expert testimony or mental health records, would have likely allowed the Government to obtain Appellant's mental health records – the same records trial defense counsel said contained uncharged misconduct and inconsistent statements about the charged events. While the members could not have sentenced Appellant any more harshly for uncharged misconduct, it could have undermined evidence of his rehabilitative potential already before the members and trial defense counsels' argument that he was a stellar NCO who had never been in trouble before New Year's Day. Appellant has thus failed to meet "the stringent Strickland standard" as he cannot show prejudice. Rose, 71 M.J. at 144.

B. Waiving Partial Mental Responsibility Instruction.

Next, Appellant complains trial defense counsel was also deficient for waiving an instruction for partial mental responsibility. (App. Br. at 89.) But partial mental responsibility are only defenses to specific intent crimes—not general intent crimes. United States v. Corralez, 61 M.J. 737, 745 (A.F. Ct. Crim. App. 2005). Appellant was not charged with any specific intent crimes. Trial defense counsel's change of position on whether partial mental responsibility was raised by the evidence resulted from Circuit Trial Counsel citing controlling Air Force precedent to the Court. (R. at 1054.) Trial defense counsel sagely recognized that binding Air Force precedent controlled the issue and did not allow for a partial mental responsibility instruction. (R. at 1055.) After reviewing the case law, Circuit Defense Counsel did not believe he still had a "colorable legal argument for hits [sic] applicability." (Maj Abrams Affidavit ¶ 25.) While trial

defense counsel wanted the Court to "make its own determination" he also balanced his desire to "maintain candor with the Court." (Id.) And a defense counsel cannot be deficient when he does not pursue futile tactics, like advanced a position contrary to binding, published Air Force precedent:

> An attorney's decision to forego taking actions that likely would be futile is not deficient. Vieux v. Pepe, 184 F.3d 59, 64 (1st Cir. 1999) ("Obviously, counsel's performance was not deficient if he declined to pursue a futile tactic."); *see also* United States v. Wright, 573 F.2d 681, 684 (1st Cir. 1978) ("Counsel is not required to waste the court's time.").

United States v. Cueto, 82 M.J. 323, 329 (C.A.A.F. 2022).

Even if trial defense counsel requested the instruction, the military judge likely would not have given it. Because he did not, in fact, give it. Nor was he required to. Child endangerment by culpable negligence is a general intent offense to which the partial mental responsibility instruction is inapplicable. *See* Issue VII, *supra*. So it is unlikely the military judge would have given the members an inapplicable instruction not raised by the evidence, even if the defense requested it. The record does not demonstrate a reasonable probability that Appellant would not have been convicted of the child endangerment specification but for counsel's error in waiving the instruction. For these reasons, this Court can dispose of Appellant's ineffective assistance of counsel claim "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice…that course should be followed." Wiley, 47 M.J. at 160.

C. Failure to Investigate AC's Alleged Wavier of the Attorney-Client Privilege.

Appellant next argues that trial defense counsel was deficient by failing to litigate AC's purported waiver of the attorney-client privilege. (App. Br. at 90.) From a single question-and-answer exchange during AC's cross-examination, Appellant claims she waived her attorney-client privilege:

> Q. Okay. And when you got divorced, you hadn't shared those admissions by [Appellant] with any prosecutors or law enforcement representatives, is that correct?
>
> A. When I got divorced?
>
> Q. Yeah.
>
> A. I did.
>
> Q. Oh you did. Who?
>
> A. I believe it was my SVC.
>
> (R. at 613.)

But trial defense counsel had a strategic reason for not trying to pierce the victim's attorney-client privilege with her SVC: the SVC could have just as easily corroborated the victim's report. (Maj Abrams Affidavit ¶ 35.) If the victim *did* have this conversation with her SVC, that would be consistent with her trial testimony. As a result, the Government's case would be strengthened.

From AC's fleeting statement "I believe I told [my SVC]," Appellant speculates that "it is *likely* the military judge would have concluded that AC waived the privilege and that the SVC was compelled to testify." (App. Br. at 92) (emphasis added). Even if trial defense counsel litigated this issue, and even if the military judge found waiver *and* compelled an attorney to testify against his client, it is entirely possible the SVC would say he does not remember the victim telling him about Appellant's admissions. After all, the conversation happened more than two years before trial back in November 2018. (R. at 613.) It is also entirely plausible that any discrepancy between the victim and SVCs' recollection resulted from faulty memories rather from untruthfulness.

At bottom, even if the SVC were to state that he did not recall the victim telling him about Appellant's admissions, such a statement would not have the probative value that Appellant claims. Trial defense counsel's strategy in cross-examining AC on this topic was "to undermine the weight of the admissions by making them appear to be a fabrication tied to the motive to fabricate of moving on to another relationship." (Maj Abrams Affidavit ¶ 30.) As a strategic choice, the decision to forgo this line of effort is "virtually unchallengeable." Dewrell, 55 M.J. at 133. Thus, Appellant fails to establish that trial defense counsel's level of advocacy "falls measurably below the performance ordinarily expected of fallible lawyers." Strickland, 466 U.S. at 690; Polk, 32 M.J. at 153.

Now, on appeal, Appellant claims if the SVC said the victim did not tell him about Appellant's admission, then it would show that the victim was lying and question her credibility. It is speculative that the SVC would have contradicted AC. It is certainly *possible*. But that is not enough to meet his burden of showing a "reasonable *probability*" that the factfinder would have had a reasonable doubt respecting guilt if trial defense counsel litigated this issue, prevailed, and then called the SVC to testify. Polk, 32 M.J. at 153 (emphasis added.)

Furthermore, trial defense counsel already challenged AC's credibility. The fact finder found her credible. Adding one more cross-examination question on another inconsistency would not have changed the outcome. Appellant had other evidence from which to argue the victim's credibility. In closing argument, trial defense counsel argued there are "some real problems from the defenses perspective with [AC]'s credibility." (R. at 1107.) "There is far more to her motive and intentions." (R. at 1104.) But that was just the beginning. The bulk of trial defense counsel's closing argument focused on attacking AC's credibility. It was the central theme. Appellant has not shown that a reasonable probability that the panel would have rejected

AC's sworn testimony as not credible if her SVC contradicted her. This is especially so when AC's testimony was independently corroborated by varied sources, including Appellant himself.

D. Failure to Present Evidence of Retirement.

Next, Appellant claims his counsel was ineffective for failing to present evidence of Appellant's loss of retirement. (App. Br. at 93.) At the outset, Appellant was not retirement eligible and so did not have an approved retirement date. (Maj Abrams Affidavit ¶ 38.) Furthermore, Appellant's ETS had expired at the time of the court-martial. (R. at 1243, Pros. Ex. 31.) Thus, any evidence relating to Appellant's loss of retirement would have been projections based on future events yet to come. Maj AA described the tactical reason for focusing the sentencing case on Appellant's emotional growth instead of financial loss:

> One decision that was brought up on the record was the defense's decision to not introduce evidence related to retirement. The defense strategy for sentencing was to focus the trier of fact on (a) [Appellant]'s rehabilitative potential, as evinced by opinions and statements about his good deeds and duty performance, (b) his desire for a health[y] relationship with his children, and (c) his desire to get healthy. The latter was addressed, in part, by the reference to Department of Veterans Affairs in his unsworn statement. In my assessment, focusing the members on how little money and benefits [Appellant] would have in the event of his mandatory dishonorable discharge would orient the members on him being selfish, lacking perspective on the heinous acts of which he was convicted, and yield the moral high ground that we were otherwise endeavoring to keep compared to the patently selfish conduct for which we impeached his ex-wife throughout the trial.
>
> (Maj Abrams Affidavit ¶ 36.)

The reasons given by both of Appellant's defense counsel about his representation of Appellant were not "conclusory, self-serving [or] inadequate." Polk, 32 M.J. at 153. They were well reasoned and well-articulated. In fact, the defense's deliberate choice to forego evidence specific to retirement was articulated on the record: "It was certainly considered during the

course of our decision-making related to presenting evidence on behalf of [Appellant]." (R. at 1243.)

It was reasonable for trial defense counsel focus their sentencing efforts on reducing Appellant's confinement exposure instead of harping on the fallout from a punitive discharge. Introducing evidence of the financial impact due to loss of an attenuated possible retirement could have distracted from the defense's primary arguments that Appellant wanted to reunify with his children, and the charged events were a "horrible blip" in an otherwise stellar career and good life. (R. at 1271.) And as a strategic choice, the decision to forgo evidence of Appellant's lost retirement is "virtually unchallengeable." Dewrell, 55 M.J. at 133.

Even if trial defense counsel were somehow ineffective (which they were not) in not introducing evidence of retirement, Appellant's claim must be dismissed because he suffered no prejudice. To prevail on the prejudice issue, Appellant "must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. Appellant has failed to meet "the stringent Strickland standard." Rose, 71 M.J. at 144. Even if trial defense counsel introduced the dollar amount Appellant would lose if a future retirement was approved, the dishonorable discharge was mandatory, given his conviction for sexual assault. Thus, the panel would not have been able to spare his retirement, even if they wanted. Appellant has simply not met his burden under the stringent Strickland test to show a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. Loving, 68 M.J. at 6-7. Thus, he has not established prejudice. Id.

E. Cumulative Error.

Finally, Appellant advances a cumulative error argument by broadly citing a few tactical decisions Capt TO alluded to in her clemency submission on Appellant's behalf. (App. Br. at 95.) At the outset, Capt TO's own opinion of the trial defense team's actions does not resolve an ineffectiveness claim. Appellant couches Capt TO's clemency submission as a "suggestion" that trial defense counsel were "deficient and prejudicial to Appellant and practically begs this Court to conclude" that counsel were deficient. (App. Br. at 96.) But the clemency submission was more introspective than Appellant suggests: "Trials such as this one are also ripe for reflection on the performance by defense counsel. Questions *may* be fairly raised about the performance of counsel and *may* intersect with prejudicial errors by the military judge that, in the absence of defense objection, will be tested for plain error on appeal." (*Clemency Submission*, dated 23 June 2021 ¶ 8) (emphasis added). Capt TO never conceded deficient performance of counsel nor did she suggest that trial defense counsel were, in fact, deficient. Instead, the clemency submission appears to highlight certain areas for the convening authority's consideration in deciding whether to grant Appellant any relief.

Conclusion

At each step, Appellant seeks to "assign blame" for his predicament by blaming his lawyers rather than himself. This is the reason the law presumes counsel is effective. Thompson, 1998 CCA LEXIS at *7. Trial defense counsel had a sound trial strategy that this Court should not second-guess. This is not a case of dueling affidavits. Appellant did not submit an affidavit and Maj AA and Capt TO's affidavits are generally consistent with one another on key points. Trial defense counsels' affidavits rebut Appellant's claims of ineffectiveness. And Appellant has

failed to show a reasonable probability that, absent trial defense counsels' alleged errors, there would have been a different result.

VI.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN NOT INSTRUCTING THE MEMBERS ON PARTIAL MENTAL RESPONSIBILITY FOR THE CHILD ENDANGERMENT SPECIFICATION.

Standard of Review

"Whether a panel was properly instructed is a question of law reviewed *de novo*." United States v. Medina, 69 M.J. 462, 465 (C.A.A.F. 2011) (internal citation and quotation omitted). If an accused fails to make an adequate request for an instruction or object to a proposed instruction, this Court reviewed for plain error. United States v. Payne, 73 M.J. 19, 22 (C.A.A.F. 2014) (citations omitted). To establish plain error, the appellant must show: (1) that there was "error"; (2) that such error was "plain, clear, or obvious"; and (3) that the effort "affected" appellant's "substantial rights." United States v. Czekala, 42 M.J. 168, 170 (C.A.A.F. 1995) (citing United States v. Olano, 507 U.S. 725, 737 (1993)).

Law

A. Waiver

R.C.M. 920(f) states: "Failure to object to an instruction or to omission of an instruction before the members close to deliberate forfeits the objection."

"Whether an appellant has waived an issue is a legal question that this Court reviews *de novo*. Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." United States v. Davis, 79 M.J. 329, 331 (C.A.A.F. 2020) (citation and internal quotation marks omitted).

"Waiver must be established by *affirmative* action of the accused's counsel, and not by a mere failure to object to erroneous instructions or to request proper instructions." United States v. Smith, 50 M.J. 451, 455-56 (C.A.A.F. 1999) (emphasis in original) (citations and internal quotation marks omitted). An affirmative statement than an accused at trial has "no objection" generally "constitutes an affirmative waiver of the right or admission at issue." United States v. Swift, 76 M.J. 210, 217 (C.A.A.F. 2017) (citation omitted).

"While there are no 'magic words' dictating when a party has sufficiently raised an error to preserve it for appeal, of critical importance is the specificity with which counsel makes the basis for his position known to the military judge." United States v. Killion, 75 M.J. 209, 214 (C.A.A.F. 2016) (citation omitted) (quoting Smith, 50 M.J. at 456).

Required findings instructions can be waived. *See* Davis, 79 M.J. at 331 (holding that Appellant waived whether the mens rea of "knowingly" applies to the consent element of Article 120c(a)(2); United States v. Gutierrez, 64 M.J. 374, 376 (C.A.A.F. 2007) ("[E]ven if an affirmative defense is reasonably raised by the evidence, it can be affirmatively waived by the defense."). In Davis, the military judge had a preliminary discussion with the parties over the findings instructions he intended to give. Id. at 330. He asked whether there were any objections or requests for additional instructions, to which the trial defense counsel responded, "No changes, sir." Id. After granting a finding of not guilty to one of the specifications and marking the instructions as an appellate exhibit, the military judge again asked if there were any objections to the findings instructions, to which the trial defense counsel responded, "No, Your Honor." Id.

On appeal, the appellant in Davis argued "that it was plan error for the military judge to instruct the members that a required element of Article 120c(a)(2) is lack of consent, without

also specifying that the accused must have subjectively known that the alleged victim did not consent." Id. But the Court found that the appellant "waived this claim." Id. The Court reasoned that the appellant "affirmatively declined to object to the military judge's instructions and offered no additional instructions." Id. at 331. By "expressly and unequivocally acquiescing" to the military judge's instructions, the appellant waived all objections to the instructions. Id. "Having directly bypassed an offered opportunity to challenge and perhaps modify the instructions, appellant waived any right to object to them on appeal." Id. (quoting United States v. Walls, 349 F.3d 18, 24 (1st Cir. 2003).

B. Instructions

R.C.M. 920(e) listed "Required instructions" which the military judge "shall" give, including "a description of the elements of each offense charged." In this regard, "the military judge must bear the primary responsibility for assuring that the jury properly is instructed on the elements of the offense raised by the evidence as well as potential defenses and other questions of law." United States v. Prather, 69 M.J. 338, 344, n.8 (C.A.A.F. 2011) (quoting United States v. Graves, 1 M.J. 50, 53) (C.M.A. 1975)).

R.C.M. 920(c) states:

> At the close of the evidence or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. The military judge may require the requested instruction to be written. Each party shall be given the opportunity to be heard on any proposed instruction on findings before it is given. The military judge shall inform the parties of the proposed action on such requests before their closing arguments.

While the military judge must instruct the court members on findings, he "has substantial discretion in selecting which instructions to give." United States v. Sanchez, 50 M.J. 506, 509 (A.F. Ct. Crim. App. 1999) (citing United States v. Damatta-Olivera, 37 M.J. 474, 478 (C.M.A.

1993). On appeal, this Court reviews the instructions "in their entirety rather than piecemeal." Id. (citation omitted).

The Discussion section to R.C.M. 920(a) states: "Instructions consist of a statement of the issues in the case and an explanation of the legal standards and procedural requirements by which the members will determine findings. Instructions should be tailored to fit the circumstances of the case, and should fairly and adequately cover the issues presented."

"Appropriate instructions" under R.C.M. 920(a) are "those instructions necessary for the members to arrive at an intelligent decision concerning appellant's guilt." United States v. Baker, 57 M.J. 330, 333 (C.A.A.F. 2002) (citations omitted). To arrive at such an intelligent decision, the members must consider the charged offense's elements, evidence pertaining to those elements, and pertinent legal principles necessary to decide the case. Id. (citations omitted).

When evidence is introduced at trial which "reasonably raises" an affirmative defense or a lesser-included offense, the judge must instruct on that affirmative defense or lesser-included offense. United States v. Davis, 53 M.J. 202, 205 (C.A.A.F. 2000). "The test whether an affirmative defense is reasonably raised is whether the record contains some evidence to which the court members may attached credit if they so desire." Id.

Analysis

A. Appellant Waived His Objection to the Military Judge's Instructions.

At the outset, Appellant's assertion of instructional error is waived. Through repeated affirmative declinations to object to the military judge's findings instructions, Appellant "expressly and unequivocally acquiesce[d] to the military judge's instructions." Davis, 79 M.J. at 331. Appellant was directly asked if he objected to the Court's instructions, and he

affirmatively stated that he did not. (R. at 1140.) Thus, he "waived all objections to the instructions" with respect to mental responsibility on appeal. Id. at 332.

While the military judge ultimately remains responsible for providing correct instructions, trial defense counsel had ample opportunity to challenge the military judge's instructions. Here, like United States v. Rich, "it is evident that Appellant pondered the possibility of requesting a [partial mental responsibility] instruction, but ultimately made no such request." 79 M.J. 472, 477 (C.A.A.F. 2020). "These facts support the conclusion that Appellant made a 'deliberate decision' to abandon the [partial mental responsibility] instruction, and thus affirmatively waived the [] instructional issue[] on appeal before this Court." Id. Although "there are no 'magic words'" required to preserve an issue for appeal, this Court should not conclude on these facts that Appellant adequately made "his position known to the military judge" when he was asked several times if he objected to the Court's instructions and all seven times said he did not. Killion, 75 M.J. at 214.

If required findings instructions can be waived (*see* Davis, 79 M.J. at 331) and affirmative defenses can be waived (*See* Gutierrez, 64 M.J. at 376), then certainly a partial defense can likewise be waived[5]. Since Appellant waived this issue, there is no error for this Court to correct on appeal.

[5] The Government recognizes this Court has the authority under Article 66, UCMJ, to pierce waiver to correct a legal error. *See generally* United States v. Hardy, 77 M.J. 438, 442-43 (C.A.A.F. 2018) (citation omitted). That said, Appellant has pointed to nothing in the record to even suggest that the military judge might have plainly erred in his instructions. Without such a showing, this Court's theoretical ability to pierce waiver does not render the instructional omission substantial under the circumstances. Thus, this Court should apply waiver, and there is nothing left for this Court to correct on appeal.

B. The Military Judge Gave the Members Appropriate Instructions on Findings Pursuant to R.C.M. 920(a).

The military judge provided the members with all the "required instructions" listed in R.C.M. 920(e). He provided "a description of the elements of each offense charged." R.C.M. 920(e)(1). The military judge did not have to instruct the members on partial mental responsibility because child endangerment by culpable negligence "is a general-intent offense reviewed under an objective test." Koth, at *4. "The defense of partial mental responsibility rebuts a specific intent *mens rea* element, such as purposeful, knowing, or premeditated," which child endangerment lacks. United States v. Axelson, 65 M.J. 501, 503 (A. Ct. Crim. App. 2007). Child endangerment by culpable negligence does not have any "specific intent or knowledge element" that the Government must prove beyond a reasonable doubt. Handy, 48 M.J. at 592; *See also* Article 51, UCMJ. "Evidence of a mental condition not amounting to a lack of mental responsibility may be admissible as to whether the accused entertained a state of mind necessary to be proven as an element of the offense." R.C.M. 916(k)(2), Discussion. But here, Appellant's state of mind is not implicated for a child endangerment by culpable negligence charge. So the military judge was not required to instruct the members on partial mental responsibility when it did not implicate any of Appellant's convicted charges.

The military judge gave the members the "instructions necessary for the members to arrive at an intelligent decision concerning appellant's guilt." Baker, 57 M.J. at 333. He provided instructions to the members which were legally correct. And his instructions were based on statutory language. The military judge did not commit plain instructional error. The military judge's instructions fairly covered the issues presented. Appellant has demonstrated no manner in which the military judge's instructions conflicted with the law. Nor does Appellant identify any prejudice under a plain-error standard of review.

Appellant waived any objection to the military judge's instructions. Even if this Court pierces waiver, the military judge did not plainly err in issuing the instructions in this case, the United States asks this Court to deny Appellant's requested relief.

VII.

THE UNITED STATES DID NOT VIOLATE APPELLANT'S SIXTH OR FIFTH AMENDMENT RIGHTS IN NOT REQUIRING A UNANIMOUS VERDICT AT APPELLANT'S MILITARY COURTS-MARTIAL.

Standard of Review

The constitutionality of a statute is a question of law that is reviewed de novo. United States v. Wright, 53 M.J. 476, 478 (C.A.A.F. 2000) (*citing* United States v. Brown, 25 F.3d 307, 308 (6th Cir. 1994)).

Law and Analysis

At the time of Appellant's court-martial, Article 52, UCMJ, required the concurrence of three-fourths of the panel members for a conviction. At trial, the military judge instructed the members as such. (R. at 1138.) Appellant now argues, given the Supreme Court's decision in Ramos v. Louisiana, 140 S. Ct. 1390 (2020), the Sixth Amendment and the Fifth Amendment rights to due process and equal protection required a unanimous verdict by the court-martial panel. (App. Br. at 102.)

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

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

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

Further, in Anderson this Court found that non-unanimous verdicts did not constitute an equal protection violation under the Fifth Amendment. Id. at *56. *See also* United States v. Monge, No. ACM 39781, 2022 CCA LEXIS 396, at *30-31 (A.F. Ct. Crim. App. 5 July 2022) (unpub. op.) (holding that Appellant's unanimous verdict claim did not warrant discussion or relief). This Court should adopt its reasoning from Anderson and deny Appellant's requested relief.

VIII[6].

APPELLANT'S CONVICTION FOR CHILD ENDANGERMENT WAS LEGALLY AND FACTUALLY SUFFICIENT.

Law and Analysis

The standard of review and law for legal and factual sufficiency is included in Issue II, *supra*.

[6] This issue is pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

Appellant challenges only the language in the third element of child endangerment that Appellant endangered his two minor children by "locking them in a room" while he assaulted their mother. (App. Br. at 140.) Appellant concedes that there was testimony by two witnesses that Appellant "locked the door," but argues because his wife and two minor children were allowed to leave the bedroom at various points, the door must not have been locked. According to Appellant, the specification fails because the Government did not prove whether it was the bedroom door or closet door that was locked during the charged event. (App. Br. at 141.)

Appellant's eldest son, GL, testified at trial that he was "locked in" his parents' bedroom. (R. at 667.) While he was locked in the bedroom, he testified Appellant assaulted AC by "punching her and pushing her." (Id.) While locked in the room, Appellant was "hitting, punching" and "body slamming" AC. (R. at 667-68.) GL testified that his younger brother, NL, was also "locked in the room" with Appellant and AC. (R. at 668.) While locked in the bedroom, GL saw Appellant "choke" AC. (Id.) GL told CPS that Appellant "locked us in" a bedroom while Appellant assaulted AC. (R. at 996-997.) Similarly, NL told CPS that Appellant "made us lock up in a room" while Appellant assaulted AC. (R. at 1003.) AC testified that Appellant "locks the door" after GL walked into the master bedroom. (R. at 448.) AC also told responding police officer that Appellant "locked her and her children in the bedroom." (R. at 715.)

Drawing every reasonable inference in favor of the prosecution, a rational trier of fact could have found that the master bedroom door was locked as all three witnesses testified it was locked at some point. Pritchett, 31 M.J. at 216. The Government did not have to prove anything more than "a room" was locked. The master bedroom is a "room." The members were presented with a photograph of the bedroom door, and trial counsel argued in closing argument

that the door had a "normal locking mechanism in any family home in a master bedroom." (R. at 1135.) Three witnesses testified they were locked in the bedroom.

A rational trier of fact, viewing the evidence in the light most favorable to the prosecution would find the evidence proved the essential elements of child endangerment beyond a reasonable doubt. The evidence presented at trial also proved Appellant's guilt for kidnapping beyond a reasonable doubt. This Court, after making allowances for not having personally observed the witnesses or assessed the victim's credibility, should be convinced of Appellant's guilt beyond a reasonable doubt. Appellant's relief is not justified.

CONCLUSION

WHEREFORE, the United States respectfully asks this Court to deny Appellant's claims and affirm the findings and sentence.

[redacted]
USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
United States Air Force
[redacted]

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Counsel Division
United States Air Force
[redacted]

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 3 February 2023.

[redacted]

MORGAN R. CHRISTIE, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**UNITED STATES' MOTION TO FILE ANSWER BRIEF IN EXCESS OF PAGE LIMIT**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **GEORGE E. LOPEZ** United States Air Force *Appellant*	)	No. ACM 40161 3 February 2023

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

Pursuant to Rules 17.3 and 23.3(q) of this Honorable Court's Rules of Practice and Procedure, the United States respectfully moves to file its answer brief in excess of the page limit prescribed by this Court. The United States' answer is 91 pages not including the table of contents or index.

There is good cause to grant this motion. Appellant raised eight assignments of error, with many distinct subparts, spanning 142 pages. The transcript in this case is 1,291 pages long and the record consists of 18 volumes. In order to properly address Appellant's arguments, and identify the relevant facts and law necessary for resolution of the issues raised, the United States is required to exceed this Court's page limit in its brief.

WHEREFORE, the United States respectfully requests this Honorable Court grant its Motion to File Answer Brief in Excess of Page Limit.

GRANTED
8 FEB 2023

[redacted]
MORGAN R. CHRISTIE, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

[redacted]
MARY ELLEN PAYNE
Associate Chief
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 the Air Force Appellate Defense Division on 3 February 2023.

MORGAN R. CHRISTIE, Maj, USAF
Appellate Government Counsel
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*	)	**MOTION FOR ENLARGEMENT OF TIME TO FILE REPLY BRIEF**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **GEORGE E. LOPEZ** United States Air Force *Appellant*	)	No. ACM 40161 8 February 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 a reply to the Government's Answer. Appellant's reply brief is currently due on 15 February 2023. Appellant requests an enlargement for a period of seven days, which will end on **22 February 2023**. The record of trial was docketed with this Court on 1 September 2021. From the date of docketing to the present date, 525 days have elapsed. On the date requested, 539 days will have elapsed. Appellant remains in confinement; has been advised of his right to a timely appeal, and consents to this request for an enlargement of time.

On 25 May 2021 and 7-12 June 2021, Appellant was tried by a panel of officer and enlisted members at a general court-martial at Joint Base San Antonio-Fort Sam Houston, Texas. Record of Trial (ROT) at Vol. 1 – Entry of Judgment (EOJ), dated 25 August 2021. Contrary to his pleas, Appellant was convicted of one charge and five specifications alleging violations of Article 128, UCMJ; one charge and specification of sexual assault in violation of Art[illegible] UCMJ; and one charge and three specifications alleging violations of Article 134, [illegible] 12 June 2021, the panel sentenced him to confinement for nine years and six mon[illegible]duction to the grade of E-1, and a dishonorable discharge. *Id.* The convening

GRANTED
10 Feb 2023

authority took no action on the findings and no action on the sentence in the case. ROT at Vol. 1 – Convening Authority Decision on Action, dated 24 August 2021. There were 11 written motions filed. The transcript is 1291 pages. There are 35 prosecution exhibits, 39 defense exhibits, 79 appellate exhibits, and 3 court exhibits.

Civilian appellate defense counsel has an active docket of 51 cases with 20 cases pending before the Army Court of Criminal Appeals; 3 cases pending before the Air Force Court of Criminal Appeals; 3 cases pending before the Navy-Marine Corps Court of Criminal Appeals; 6 cases pending before the Court of Appeals for the Armed Forces, to include oral argument in *United States v. Warda*, USCA Dkt. No. 22-0282/AR, on 21 February 2023; 7 cases before the Federal Court of Claims; 9 cases before clemency and parole boards; and 3 pending writs of habeas corpus.

Military appellate counsel is currently assigned 17 cases; 12 cases are pending initial Assignments of Error before this court. No case currently takes priority over this case. Additionally, before the United States Court of Appeals for the Armed Forces, undersigned counsel has one case pending supplement to the petition for grant of review, *United States v. Brown*, USCA Dkt. No. 23-0101/AF, which is due no later than 23 February 2023.

An enlargement of time of seven days is necessary to allow undersigned counsel to review the Government's 105-page answer, coordinate with Appellant and civilian appellate defense counsel, and file a thorough reply. Thus, there is good cause to justify granting this seven-day enlargement of time.

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

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Capt, 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 8 February 2023.

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

9 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) GEORGE E. LOPEZ, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME TO FILE REPLY BRIEF ACM 40161 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States does not oppose Appellant's Motion for Enlargement of Time to file a Reply to the United States' Answer to Assignments of Error.

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 9 February 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* v. Technical Sergeant (E-6) **GEORGE E. LOPEZ**, United States Air Force *Appellant*	)))))))))	**REPLY BRIEF ON BEHALF OF APPELLANT** Before Panel No. 1 No. ACM 40161 21 February 2023

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

WILLIAM E. CASSARA, Esq.
Appellate Defense Counsel
[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

Pursuant to Rules 18(d) and 18.3 of the United States Air Force Court of Criminal Appeals Rules of Practice and Procedure, dated 23 December 2020, Appellant hereby replies to the United States Answer to Assignments of Error filed on 3 February 2023.

I.

THE SPECIFICATION OF CHARGE III FAILS TO STATE AN OFFENSE BECAUSE IT FAILED TO ALLEGE WHETHER THE CHILD ENDANGERMENT WAS BY DESIGN OR BY CULPABLE NEGLIGENCE.

The Government correctly lists the elements of child endangerment, including that "the accused endangered the child's mental or physical health, safety, or welfare through design or culpable negligence." (Answer at 17). It concedes that it failed to expressly allege the essential element of whether the conduct endangering GL and NL was by design or by culpable negligence. (Answer at 20). It asserts that it "charged endangerment by culpable negligence through necessarily [sic] implication." (Answer at 19). The Government fails to acknowledge, however, that the interpretation of a specification in such a manner as to find that an element was alleged by necessary implication is disfavored. (*United States v. Ballan*, 71 M.J. 28, 33 (2012)). Similarly, the Government fails to acknowledge that when a specification is first challenged at trial, as it was here, the Court of Appeals for the Armed Forces [CAAF] will "read the wording . . . narrowly and will only adopt interpretations that hew closely to the plain text." (*United States v. Turner*, 79 M.J. 401, 403 (quoting *United States v. Fosler*, 70 M.J. 225, 230 (C.A.A.F. 2011))).

The Government ignores the fact that it failed to use the sample specifications and elect one of the options for whether Appellant committed the charged acts through design or culpable negligence. (*See Manual for Courts-Martial, United States* (2016 ed.) [2016 MCM], pt. IV, ¶ 68a.(f)). The sample specifications list options which are mutually exclusive: either Appellant

endangered his children's welfare "on purpose, intentionally, or according to plan [with a specific intent to endanger" the children or he did so with "a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission." (*Id*. at ¶ 68a.(c)(1)-(2)). Appellant avers that an essential element cannot be alleged by necessary implication when there are explicit options for how to charge an accused. The Government's error calls to mind the CAAF's warning in *Turner* that "[t]his case underscores the peril that lies in wait for any government attorney who, when drafting charges, fails to meticulously follow the language contained in the UCMJ sample specifications." (79 M.J. at 404).

In its effort to salvage Appellant's conviction from the wreckage of failing to meticulously follow the language in the UCMJ sample specifications, the Government asserts that "[c]hild endangerment, like other offenses by culpable negligence, is a general-intent offense reviewed under an objective test." (Answer at 18 (quoting *United States v. Koth*, No. ARMY 20150179, 2017 CCA LEXIS at *4 (A. Ct. Crim. App. 16 March 2017) (unpub. op.)). First, this contention assumes that the Government charged Appellant with child endangerment by culpable negligence, but, as articulated by Appellant in the Opening Brief, the Government failed to allege the third element expressly or by necessary implication, Appellant was not on notice of what he was required to defend against, and the failure exposed Appellant to double jeopardy. (Opening Br. at 31-35).

Next, the Government's premise – that child endangerment by culpable negligence is a general intent offense – deliberately misconstrues the framing of the issue. As discussed in the Opening Brief, the issue is that the specification failed to state an offense:

> At trial, the Defense initially characterized the issue as an objection to the Government's proposed instructions, but both the parties and

> the military judge ultimately recognized the issue as a motion to dismiss for failure to state an offense. The Defense also initially characterized the issue as a failure to allege a mens rea and argument on the motion centered on whether child endangerment is a general intent offense or a specific intent offense.
>
> On appeal, however, Appellant avers that the issue was imprecisely framed and analyzed at trial. The issue is not whether child endangerment by culpable negligence is a general intent crime or whether this offense is a [lesser included offense] of child endangerment by design, as the military judge concluded; instead, the issue is that the specification failed to state an offense because it failed to allege an essential element expressly or by necessary implication, the failure did not put Appellant on notice what he needed to defend himself against, and the failure exposed Appellant to double jeopardy. In other words, the issue is not whether the endangering conduct can be criminalized under Article 134, UCMJ, but whether the wording of the specification satisfies constitutional requirements. *See Fosler*, 70 M.J. at 230.

(Opening Br. at 31).

The issue is that the specification failed to state an offense because it failed to allege the essential third element of the offense. Nonetheless, Appellant will address the Government's contention that child endangerment by culpable negligence is a general intent offense because the Government relies on this contention to conclude that Appellant's defense counsel were not deficient and that the military judge gave the members appropriate instructions on findings. (Answer at 67-68, 74, 75, 86).

The Government relies on *Koth* for the proposition that child endangerment by culpable negligence is a general intent offense. (Answer at 18, 20). *Koth*, however, is an unpublished summary disposition by the Army Court of Criminal Appeals [CCA]. (*Koth*, slip. op. at *1). The CAAF has recognized that unpublished opinions have precedential value, but that such opinions have less precedential value than published opinions. (*See United States v. Clifton*, 35 M.J. 79, 85 (C.A.A.F. 1992)). This Court, however, does not consider unpublished decisions to

be precedent. (*See* Rule 30.4a of this Court's Rules of Practice and Procedure). Moreover, *Koth* is not a case about failure to state an offense; instead, it is a case about whether the evidence is legally and factually sufficient to support the conviction of child endangerment by culpable design where the Government failed to present any evidence that the accused should have known of her son's injuries or that there was a reasonable probability of harm. (*Koth*, slip op. at *2). The Government alleged culpable negligence as an essential element, unlike in the present case. (*Id*. at *3). The Army CCA concluded, without citation to any statute or caselaw, that child endangerment by culpable negligence is a general intent offense. (*Id.)* Importantly, no other court has relied on *Koth* for this or any other reasoning or holding in that decision. Thus, contrary to the Government's contention, it is not settled that child endangerment by culpable negligence is a general intent offense. Consequently, the Government's next premise – that "because culpable negligence goes to general intent, it can be part of the specification by necessary implication" – fails. (Answer at 20).

Finally, culpable negligence is "a negligent act or omission" *and* "a culpable disregard for the foreseeable consequences to others of that act or omission." (MCM, pt. IV, ¶ 68a.(c)(1)-(2) (emphasis added)). General intent "merely requires that an accused commit an act with knowledge of certain facts." (*United States v. Haverty*, 76 M.J. 199, 204 (C.A.A.F. 2017) (citing *United States v. Caldwell*, 75 M.J. 276, 281 C.A.A.F. 2016)). "General intent involves the intent to perform an act even though the actor does not desire the consequences that result." (*Id*. (citation and internal quotation marks omitted)). Because culpable negligence requires an act or omission *and* a culpable disregard for the foreseeable consequences to others of that act or omission, by definition it involves more than the mere intent to perform an act as required in

general intent offenses. Therefore, child endangerment by culpable negligence is not a general intent offense.[1]

II.

THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUPPORT THE FINDINGS OF GUILTY FOR ASSAULT CONSUMMATED BY A BATTERY IN SPECIFICATIONS 1-4 OF CHARGE I AND FOR SEXUAL ASSAULT IN THE SPECIFICATION OF CHARGE II.

The evidence is legally insufficient to support the findings of guilty for assault consummated by a battery in Specifications 1-4 of Charge I because a reasonable factfinder could not have found the essential elements that Appellant did bodily harm and that the bodily harm was done with unlawful force or violence. The evidence is legally insufficient to support the finding of guilty for sexual assault in the Specification of Charge II because a reasonable factfinder could not have found the essential elements that Appellant committed a sexual act without consent.

Regarding factual insufficiency, the Government sticks its proverbial head in the sand about Appellant's PTSD episode, AC's belief that Appellant suffered a PTSD episode, AC's scheme to smuggle Appellant into their home, their "better than ever" marriage and sex life, and her attempts to visit Appellant in the mental health unit despite the existence of two protective orders. The Government urges this Court to engage in the same refusal to acknowledge AC's utter lack of credibility and find that her "counterintuitive behavior" "did not materially undermine her testimony related to the assaults." (Answer at 41-42). What materially undermined AC's testimony related to the assaults was her months-long deception to every

[1] In the Opening Brief, Appellant incorrectly cited RCM 907(b)(1)(B) regarding dismissal of a specification that fails to state an offense. (Opening Br. at 28). The correct citation is RCM 907(b)(2)(E).

investigator and prosecutor about the nature of her relationship with Appellant until she was impeached at a November 2019 pretrial motions hearing. Moreover, even after Appellant allegedly told AC that he planned the attack, she remained in the marriage, welcomed VR and her children into her home, and told VR about a new sexual activity with Appellant. Even after Appellant allegedly told AC that he plotted the attack, she continued to send flirty texts and sexually provocative photos to him, fantasized about a certain sexual act, and demanded that he get his "ass" over to their house so that they could have sex. (R. at 600; App. Ex. LIII).

Regarding the location of where Appellant allegedly demanded AC's phone, the Government acknowledges that AC gave inconsistent accounts to the Bexar County Sheriff's Office and at trial. (Answer at 44-45). In an effort to rehabilitate AC's inconsistent statements, the Government argues, "AC confirmed she wrote that, but never confirmed one version was 'true' and the other was not." (Answer at 45). This amounts to confirmation that AC lacked credibility because she lied either to the Sheriff's Office or to the court-martial.

Next, when confronted with Deputy DP's testimony that he never heard Appellant say, "I did cruel and unusual things," the Government tries to minimize the import of that testimony by insisting that, "[r]egardless of the precise testimony used that night, the deputies; testimony was clear: Appellant was admitting guilty and expressing consciousness of guilt." (Answer at 48). The problem with this argument is that the Government used this alleged statement as the theme for its opening statement and closing argument. (R. at 393, 395; App Ex. LXIX). As Appellant highlighted in the Opening Brief, of the twenty-seven times that the word "cruel" was used at Appellant's court-martial, the Government uttered it 17 times during the merits phase and twice during the presentencing phase. (Opening Br. at 45). This is not a question of the precision of the testimony; it's a question of whether Appellant actually said those words. One of the two

deputies standing in front of Appellant did not hear him make this statement. The Government then speculates, without any citation to the record, that Appellant made the statement when Deputy PM first exited the car before Deputy DP was within earshot of Appellant or that Deputy PM had a better memory because he was a veteran officer and Deputy DP was a trainee. (Answer at 48-49). The irreconcilable testimony undermined the Government's theory of the case.

III.

APPELLANT WAS PRESUMPTIVELY PREJUDICED BY THE ABSENCE FROM THE RECORD OF TRIAL OF MOTIONS, EVIDENCE, AND RULINGS FROM THE FIRST ITERATION OF THE COURT-MARTIAL UPON WHICH THE MILITARY JUDGE AND THE PARTIES RELIED FOR THIS COURT-MARTIAL.

Appellant relies on the facts, law, and argument contained in the Brief on Behalf of Appellant for this assignment of error.

IV.

THE SENTENCE TO CONFINEMENT OF NINE YEARS AND SIX MONTHS IS INAPPROPRIATELY SEVERE.

Appellant relies on the facts, law, and argument contained in the Brief on Behalf of Appellant for this assignment of error.

V.

THE DEFENSE COUNSELS' FAILURES AND ERRORS DENIED APPELLANT THE EFFECTIVE ASSISTANCE OF COUNSEL.

Based on the affidavits submitted by Appellant's CDC, Maj AA, and his DC, Capt TO, the Defense retained Dr. KG as an expert consultant in PTSD for the second iteration of the court-martial. (Answer at 67; Appellee Appendix A at ¶ 14). The record, however, does not

contain any documentation of the request for and approval of the appointment of Dr. KG. (*See* Assignment of Error III.)

The Government asserts that "child endangerment by culpable negligence does not require specific intent," such that "the defense of partial mental responsibility was unavailable as child endangerment by culpable negligence was only a general intent crime." (Answer at 68). The Government also contends that Appellant's defense counsel were not deficient in waiving the instruction for partial lack of mental responsibility because this defense is available only for specific intent crimes and not general intent crimes. (Answer at 74). For the reasons articulated in the reply to Assignment of Error I, *supra*, child endangerment by culpable negligence is not a general intent crime, such that the defense of partial mental responsibility was available and Appellant's CDC was deficient in waiving the instruction after earlier arguing that the evidence raised the issue. Maj AA admitted that even if he believed that there was authority for not giving the instruction, he still could have requested it and that doing so would have preserved the issue for appeal and he understood this because he had served as an appellate defense counsel for two years. (Appellee Appendix B at ¶ 26). He averred that "[t]he decision to not do that falls squarely on me and no one else." (*Id.*)

Next, AC waived her attorney-client privilege regarding—whether she told her SVC about the alleged admission by Appellant when she got divorced from him. The Government attempts to gloss over AC's disclosure of her attorney-client communication as a "fleeting statement" during a "single question and answer exchange."[2] (Answer at 75-76). However,

[2] The Government does not attempt to point to any rule or case which would deem this voluntary disclosure insufficient to find waiver. Moreover, to find otherwise, would permit alleged victims to use their SVC as a sword, by which they could lie about their previous statements to their SVC, and then also use their SVC as a shield, so that the truth of their testimony can never be determined.

fleeting or not, Appellant's CDC recognized that AC had volunteered her communication with her SVC to him. (R. at 614.)

The Government asserts that "trial defense counsel had a strategic reason for not trying to pierce [AC's] attorney-client privilege with her SVC: the SVC could have just as easily corroborated the [AC's] report." (Answer at 76). However, the CDC did *not* assert that he had a strategic reason, only that in looking back at the transcript now, he believes it appears it was a deliberate choice:

> I do not specifically recall my actual in-the-moment analysis as to why I did not request an Article 39(a) proceeding or make an oral motion under Military Rule of Evidence 510. As I read the transcript, it *appears* to be a deliberate choice.

(Appellee Appendix A ¶35) (emphasis added).

But as stated, he has no recollection from which to base this assertion. Moreover, the CDC recognizes he could have asked for an Article 39(a), UCMJ, proceeding to respond or made an oral motion to pierce the privilege, and he did neither. (*Id*. at 33). This failure is especially troubling given part of the CDC's explanation:

> I anticipate I was skeptical that an alleged admission like what Ms. AC claimed would be disclosed to the [SVC] but yet somehow not be conveyed to the prosecution until the following year, particularly in light of who her [SVC] was back in 2018.

(*Id*.)

The CDC and Government's hypothetical that the SVC could have corroborated AC is lacking because, at worst, this was information the members had already heard from AC and hearing it from the SVC would not serve as evidence that Appellant actually did make this alleged statement–just that AL said he did. Moreover, investigating this communication to the SVC, even if corroborated, still allowed the defense to continue with the same case strategy that

AC fabricated the admission to preserve her own reputation. It did not change that AC wanted and obtained custody of their children. (R. at 626.) Nor that AC was motivated by her interest in her sons viewing her as a victim so that they did not "resent" or "blame [her] for whatever does happen to their father." (App. Ex. XLVIII at 90.) Her children were asking when they were "going to see their dad again," but AC had been considering divorce even prior to the charged conduct. (App. Ex. XLVIII at 33, 86.) AC had reinitiated a relationship with OC, a man she had met in high school and reconnected with in October 2017, before the charged conduct. (App. Ex. XLVIII at 185-86.) Moreover, the alleged admission overlaps with when she started to communicate more with OC. (R. at 612.) AC's marriage to OC would only compound this motivation to preserve her image by vilifying Appellant through the fabrication of this "admission." (R. at 626.)

The Government further argues if AC's SVC testified that she did not remember if AC told her about Appellant's alleged admission prior to their divorce, that this could have resulted from faulty memories rather than untruthfulness. However, Appellant's defense counsel would have been able to draw out in questioning and argue that it would be strange for the SVC, a trained lawyer who understands the likely admissibility of an accused's admission, not to remember something as significant as this being shared with her, implicating AC's credibility.

Finally, the Government avers the "trial defense counsel already challenged AC's credibility. The fact finder found her credible." (Answer at 77). However, the members' findings do not clearly demonstrate this; the members acquitted Appellant of Specification 4 of Charge III, which alleged that he wrongfully communicated a threat to AC. This offense rested entirely on AC's testimony and credibility, like this alleged admission, and the acquittal on Specification 4 of Charge III signals how investigation of this alleged admission could have been

the straw that broke the camel's back as to AC's credibility–especially considering the extremely inflammatory nature of the alleged admission at issue. (*See United States v. Brickey*, 16 M.J. 258, 265-66 (C.M.A. 1983)).

Finally, the Government attempts to minimize the explosive nature of Capt TO's Clemency Submission in which she enumerated the tactical decisions she considered to be possibly deficient and prejudicial. (ROT, Vol. 15, Submission of Matters dated 23 June 2021.) Contrary to the Government's insistence that Capt TO's submission was merely "introspective" (Answer at 80), her point-by-point breakdown of the possible errors by the defense team amounts to an invitation to this Court to conclude that the defense team deprived Appellant of the effective assistance of counsel.

VI.

THE MILITARY JUDGE ABUSED HIS DISCRETION BY NOT INSTRUCTING THE PANEL ABOUT PARTIAL LACK OF MENTAL RESPONSIBILITY FOR THE CHILD ENDANGERMENT SPECIFICATION.

As discussed in the Reply to Assignment of Error I, *supra*, child endangerment by culpable negligence is not a general intent offense, such that the military judge erred by failing to instruct the panel on the defense of partial lack of mental responsibility for Specification 1 of Charge III.

VII.

APPELLANT WAS DEPRIVED OF HIS RIGHT TO A UNANIMOUS VERDICT AS GUARANTEED BY THE SIXTH AMENDMENT, THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE, AND THE FIFTH AMENDMENT'S RIGHT TO EQUAL PROTECTION.

Appellant relies on the facts, law, and argument contained in the Brief on Behalf of Appellant for this assignment of error.

VIII.[3]

THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUPPORT THE FINDINGS OF GUILTY FOR SPECIFICATION 1 OF CHARGE III BECAUSE NO EVIDENCE WAS INTRODUCED THAT THE DOOR WAS LOCKED WITH A LOCK.

Appellant relies on the facts, law, and argument contained in the Brief on Behalf of Appellant for this assignment of error.

[3] Appellant, through Appellate Defense Counsel, raised this issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). (Opening Br. at 139-42).

PRAYER FOR RELIEF

WHEREFORE, appellant respectfully requests that this Honorable Court grant the requested relief.

[redacted]
WILLIAM E. CASSARA, Esq.
Appellate Defense Counsel
[redacted]

[redacted]
SAMANTHA P. GOLSETH, Capt, 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 was sent via email to the Court and served on the Appellate Defense Division and the Appellate Government Division on 21 February 2023.

[redacted]
WILLIAM E. CASSARA, Esq.
Appellate Defense Counsel
[redacted]

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]