IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee,

v.

JAMES T. CUNNINGHAM
Senior Airman (E-4),
United States Air Force,
Appellant.

USCA Dkt. No. 23-0027/AF

Crim. App. Dkt. No. ACM 40093

BRIEF ON BEHALF OF APPELLANT

SPENCER R. NELSON, Maj, USAF
Appellate Defense Attorney
U.S.C.A.A.F. Bar No. 37606
Appellate Defense Division
1500 West Perimeter Road, Ste 1100
Joint Base Andrews, MD 20762
Phone: (240) 612-4770
Email: spencer.nelson.1@us.af.mil

Counsel for Appellant

INDEX

TABLE OF AUTHORITIES

STATUTES

SUPREME COURT CASES

COURT OF APPEALS FOR THE ARMED FORCES AND COURT OF MILITARY APPEALS CASES

SERVICE COURTS OF CRIMINAL APPEALS CASES

FEDERAL COURT CASES

STATE COURT CASES

RULES AND OTHER AUTHORITIES

ISSUES PRESENTED

I.

WHETHER THE AIR FORCE COURT PROPERLY APPLIED *UNITED STATES V. EDWARDS*, 82 M.J. 239 (C.A.A.F. 2022) IN FINDING ERROR—BUT NO PREJUDICE—FOR A VICTIM IMPACT STATEMENT THAT INCLUDED VIDEOS, PERSONAL PICTURES, STOCK IMAGES OF FUTURE EVENTS, AND LYRICAL MUSIC THAT TOUCHED ON THEMES OF DYING, SAYING FAREWELL, AND BECOMING AN ANGEL IN HEAVEN.

II.

WHETHER TRIAL COUNSEL'S SENTENCING ARGUMENT WAS IMPROPER UNDER *UNITED STATES V. WARREN*, 13 M.J. 278 (C.M.A. 1982) AND *UNITED STATES V. NORWOOD*, 81 M.J. 12 (C.A.A.F. 2021), RESPECTIVELY, WHEN SHE 1) ARGUED THAT SRA CUNNINGHAM'S UNCHARGED, FALSE STATEMENTS WERE AGGRAVATING EVIDENCE AFTER SHE HAD PREVIOUSLY CITED CASE LAW TO THE MILITARY JUDGE THAT SAID FALSE STATEMENTS WERE NOT ADMISSIBLE AS EVIDENCE IN AGGRAVATION; AND 2) TOLD THE MILITARY JUDGE THAT HE HAD SEEN THE MEDIA AND THE WORLD WAS WATCHING, TO JUSTIFY HER SENTENCE RECOMMENDATION.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (Air Force Court) reviewed this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d). This Honorable Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

On February 18, 2021, at a general court-martial, contrary to his plea, a panel of officer and enlisted members convicted Senior Airman (SrA) James Cunningham of one charge and one specification of murder, in violation of Article 118, UCMJ, 10 U.S.C. § 918. Joint Appendix (JA) at 002. The Military Judge sentenced SrA Cunningham to a dishonorable discharge, confinement for 18 years, forfeiture of all pay and allowances, and reduction to the grade of E-1. *Id*. The Convening Authority took no action on the findings or sentence. *Id*. On September 9, 2022, the Air Force Court affirmed the findings and sentence. JA at 001.

STATEMENT OF FACTS

Facts pertaining to each issue are included in the argument section below.

SUMMARY OF THE ARGUMENT

The Military Judge, Trial Counsel, and the Air Force Court compromised SrA Cunningham's substantial right to be sentenced on the evidence alone and to a sentencing proceeding that was based on fairness and integrity. *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005). The Military Judge compromised the proceedings by erroneously allowing the victim representative to submit a PowerPoint production that included 13 videos, 52 photos, and lyrical music that was "emotionally moving." *United States v. Edwards*, 82 M.J. 239, 248 (C.A.A.F. 2022). The Trial Counsel compromised SrA Cunningham's sentencing proceedings

by arguing uncharged, false statements as matters in aggravation during her sentencing argument *and* threatening the Military Judge that he had "seen the media" and that "the world is watching." JA at 180.

The Air Force Court subsequently erred when it held the erroneous PowerPoint production did not prejudice SrA Cunningham. This is despite the factual similarities between SrA Cunningham's case and *Edwards*. Both cases involved murder, Article 6b representatives, and impermissible unsworn statements. The Air Force Court failed to consider this Court's recent declaration that it is "harder for the Government to meet its burden of showing that a sentencing error did not have a substantial influence on a sentence than it is to show that an error did not have a substantial influence on the findings" *Edwards*, 82 M.J. at 247. It also did not fully consider that there were many impermissible items in the PowerPoint production that were not admitted at findings and that the PowerPoint as a whole, including its component parts, were meant to "evoke a strong emotional response." *Id.* Finally, the PowerPoint production in this case was quantitatively and qualitatively more egregious than the one in *Edwards*.

In regard to Trial Counsel's improper arguments during sentencing, the Supreme Court, this Court, the Air Force Court, and other jurisdictions have a long history of condemning similar—if not the same—misconduct, making it plain and obvious error. For example, in *United States v. Warren*, this Court said, "all that the

Supreme Court blessed—and all that we approve here—is an appropriate consideration of this factor [alleged lies under oath] as an indication of an accused's *rehabilitative potential* in arriving at an appropriate sentence for offenses of which he has just been convicted." 13 M.J. 278, 285 (C.M.A. 1982) (emphasis added). This Court affirmed that holding 18 years later, stating, "The court members 'may *not* mete out additional punishment for the false testimony itself.'" *United States v. Jenkins*, 54 M.J. 12, 20 (C.A.A.F. 2000) (quoting *Warren*, 13 M.J. at 285-86) (emphasis in original). Despite this case law, and its own which is more directly on point, the Air Force Court expressed a newfound approval for Trial Counsel to argue uncharged, false statements as matters in aggravation.

The most unsettling issue about Trial Counsel's arguments is trying to grasp *why* she made the comments. In regard to both her use of uncharged, false statements and threats to the media, the Record of Trial shows that she had actual knowledge that such remarks were improper. She quoted case law to the Military Judge which condemned the use of uncharged, false statements as a matter in aggravation. JA at 092. Likewise, she questioned potential panel members about the danger of media influence to ensure they would not be affected by it. JA at 054-57. Despite her acumen in navigating these issues in the preliminary proceedings and the trial, she threw caution to the wind during sentencing proceedings.

This Court in *Edwards* and *Norwood* found both error and prejudice when there was just one error, respectively. *Edwards*, 82 M.J. at 248; *United States v. Norwood*, 81 M.J. 12, 21 (C.A.A.F. 2021). This Court remanded both cases and authorized sentence rehearings. *Id*. This Court should do the same in SrA Cunningham's case since his case has both errors. In addition, this Court should find prejudice with respect to the errors individually, but also because of the "cumulative errors found in the record of trial." *United States v. Banks*, 36 M.J. 150, 171 (C.A.A.F. 1992). The sheer "number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of" the sentence in this case. *Id*.

ARGUMENT

I.

IN FINDING ERROR—BUT NO PREJUDICE—THE AIR FORCE COURT FAILED TO PROPERLY APPLY *UNITED STATES V. EDWARDS*, 82 M.J. 239 (C.A.A.F. 2022) FOR A VICTIM IMPACT STATEMENT THAT INCLUDED VIDEOS, PERSONAL PICTURES, STOCK IMAGES OF FUTURE EVENTS, AND LYRICAL MUSIC THAT TOUCHED ON THEMES OF DYING, SAYING FAREWELL, AND BECOMING AN ANGEL IN HEAVEN.

Facts

During the sentencing proceedings, the victim's representative, C.M., delivered a victim impact statement through a PowerPoint presentation. This

presentation included various visual images and graphics, and was accompanied by the following lyrical music:

I didn't know today would be our last
Or that I'd have to say goodbye to you so fast
I'm so numb, I can't feel anymore
Prayin' you'd just walk back through that door

And tell me that I was only dreamin'
You're not really gone as long as I believe

There will be another angel
Around the throne tonight
Your love lives on inside of me
And I will hold on tight

It's not my place to question
Only God knows why
I'm just jealous of the angels
Around the throne tonight

You always made my troubles feel so small
And you were always there to catch me when I'd fall
In a world where heroes come and go
Well God just took the only one I know

So I'll hold you as close as I can
Longing for the day, when I see your face again
But until then

God must need another angel
Around the throne tonight
Your love lives on inside of me
And I will hold on tight

It's not my place to question
Only God knows why
I'm just jealous of the angels
Around the throne tonight

Singin' hallelujah
Hallelujah
Hallelujah

I'm just jealous of the angels
Around the throne tonight

JA at 229 (Court Exhibit (Ct. Ex.) A). The impact statement also consisted of the following:

- Eleven slides, all including PowerPoint animations. These animations included transitions, appearing/disappearing text, and slides crumpling like paper that is being thrown away.

- Fifty-two total still images.[1]

- Ten still images with text superimposed onto the image.

- Four still images which were stock images of future events.

- An embedded presentation on Slide Two that auto played:

    - Eleven videos with audio, 39 total still images, and nine still images with text, lasting four minutes and nine seconds.

    - The lyrical music played for the entirety of this first embedded presentation.

- An embedded presentation on Slide Ten that auto played:

[1] Pros. Ex. 36 is one photograph of a collage of very small photos, some of which may have been on the unsworn slideshow, including what may be a blurry picture of the victim in SrA Cunningham's uniform. However, before the unsworn statement starts, C.M. says, "So, during the trial you have all seen pictures of [Z.C., the Victim,] both good and bad. But none of them portray the love that I have for him and what was truly taken from me." JA at 122.

- Two videos with audio, 14 total still images, and one still image with text, lasting one minute and three seconds.

- The same lyrical music also played during this presentation.

JA at 229 (Ct. Ex. A). When the embedded videos on Slides Two and Ten played, the accompanying music would lower in volume so the contents of the video could be heard. *Id.*

Other notable items in the PowerPoint production included stock images of future events that include one image per slide with the following text, respectively: "First Day of School;" "First Tee Ball Game;" "Graduation Day;" and "Marriage." JA at 229 (Ct. Ex. A), Slides Six through Nine. After each slide is completed, the auto transition is the slide being crumpled up like used paper and being thrown away. *Id.* Slide Eleven is a professional picture of Z.C. laying inside of SrA Cunningham's uniform sleeping with a smile. *Id.*

Military Judge Response to Defense Counsel Objection: "To me, That's Proper Victim Impact"

The Defense objected to the PowerPoint production in its entirety, arguing that it was "not a proper means to bring a victim impact statement before the court." JA at 117. The Defense Counsel reasoned that the rule limited victim impact statements to those that were "oral, written, or both," and that "[b]y definition, what is on this CD is not oral, or written." *Id.* He further contended that had the rule intended to cover "photographic evidence, slideshows, or things of that nature . . . it

would have said so." *Id*. The Defense Counsel concluded by stating that even if the PowerPoint presentation qualified as a statement under R.C.M. 1001, it would fail the Mil. R. Evid. 403 balancing test. *Id.*

The Military Judge overruled the objection. He opined that the balancing test was unwarranted since the PowerPoint presentation was not evidence; thus, he believed he only had to ensure "the plain language of the rule [1001(c)] [was] being followed." JA at 120.

The Defense Counsel then specifically objected to the stock images. *Id*. The Military Judge overruled this objection as well, but said he would give it the weight it deserved. JA at 121. The Military Judge then reconsidered his position on the balancing test "[o]ut of an abundance of caution," and found the probative value of the PowerPoint presentation was not substantially outweighed by the Mil. R. Evid. 403 factors. *Id.* He stated that he had viewed the presentation and said, "To me, that's proper victim impact including psychological, social impact directly relating to or arising from the offense to which the accused has been found guilty." *Id*.

C.M. later testified as a witness during sentencing. JA at 100. She also provided an oral unsworn statement. JA at 122. She began with a brief introduction and then played the first portion of her PowerPoint production, which included Slides One through Two and the first embedded video which lasted four minutes and nine seconds. JA at 123, 229 (Ct. Ex. A). C.M. then clicked through animated Slides

Three through Nine while speaking to the content on each slide. *Id*. Slide Ten contained the second video which lasted one minute and three seconds. *Id.* After this slide, she advanced to the last slide and gave her closing remarks. *Id*.

The Air Force Court Opinion

The Air Force Court found that the Military Judge erred in admitting the statement, but that SrA Cunningham was not prejudiced. JA at 018. Since it found error, the Air Force Court focused its analysis on the factors outlined in *United States v. Barker*, 77 M.J. 377, 384 (C.A.A.F. 2018). JA at 019. The Air Force Court found all four *Barker* factors weighed in favor of the Government. *Id.* The Air Force made several observations in its analysis. First, that the information contained in "the PowerPoint presentation was cumulative" to testimony properly received into evidence. *Id.* Second, that "trial counsel did not play or use any portion of the victim's unsworn statement in her sentencing argument." *Id.* Third, that this case differed from *Edwards* because Trial Counsel did not create the PowerPoint production. JA at 020. The Air Force Court further noted that "trial counsel did not present or play the presentation." *Id.*

In *Edwards*, this Court assessed that in sentencing the prejudice test "is considerably more difficult to apply to sentencing…there is a broad spectrum of lawful punishments that a panel might adjudge…Complicating matters further, it is

much more difficult to compare the 'strengths' of the competing sentencing arguments than it is to weigh evidence of guilt." 82 M.J. at 247.

Although the Air Force Court cited *Edwards* for other propositions, it failed to mention this Court's recent standard on prejudice in either its law section or its analysis. Rather, the Air Force Court cited to *United States v. Cano*—a case that is 17 years old—for the proposition that "An error is more likely to be harmless when the evidence was not critical on a pivotal issue in the case." JA at 018 (citing 61 M.J. 74, 77-78 (C.A.A.F. 2005) (internal quotation marks and citation omitted)).

Standard of Review

This Court reviews a military judge's interpretation of R.C.M. 1001(c) *de novo*. *Edwards*, 82 M.J. at 243. This Court reviews whether a military judge erroneously admitted an unsworn victim statement for an abuse of discretion. *Id*. A military judge abuses his discretion when his legal findings are erroneous. *Id*. (quoting *Barker*, 77 M.J. at 383).

When this Court finds error in the admission of sentencing evidence (or sentencing matters), the test for prejudice is whether the error substantially influenced the adjudged sentence. *Id.* at 246 (citations and quotations omitted). The Government bears the burden of demonstrating that the admission of erroneous evidence was harmless. *Id*.

This Court considers four factors when deciding whether an error substantially influenced an appellant's sentence: (1) the strength of the Government's case; (2) the strength of the defense's case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question. *Id*. This Court considers these factors *de novo*. *Id*. (citations and quotations omitted). The Government bears the burden of demonstrating that the admission of erroneous evidence is harmless. *Id*.

Law and Analysis

Even though this case and *Edwards* both involved murder, Article 6b representatives, and impermissible unsworn statements, the Air Force Court's analysis on prejudice diverged from several principles this Court elucidated in *Edwards*. First and foremost was this Court's insight that the *Barker* factors are "considerably more difficult to apply to sentencing." *Id*. at 247. As such, "[p]roof of guilt can be overwhelming," but it is still "harder for the Government to meet its burden of showing that a sentencing error did not have a substantial influence on a sentence than it is to show that an error did not have a substantial influence on the findings." *Id*. The Air Force Court's failure to analyze this recent prejudice principle casts doubt on its entire analysis. Other principles that the Air Force Court should have considered, or did not consider fully, are: 1) that there were many impermissible items in the PowerPoint production that were not admitted at findings;

2) the PowerPoint as a whole, and its component parts, were meant to "evoke a strong emotional response," *id.*; 3) Trial Counsel referenced the PowerPoint in its sentencing argument; and 4) in terms of quantity and quality, the PowerPoint production in this case was worse than the one in *Edwards*.

A. The Materiality and Quality of the Impermissible Unsworn Statement Weigh in Favor of This Court Finding It Substantially Influenced SrA Cunningham's Sentence

The Government has the burden to prove that the admission of the PowerPoint production was harmless; it cannot satisfy its burden given the materiality and quality of the PowerPoint production. Material evidence is "evidence, fact, statement, or information that, if believed, would *tend to influence or affect* the issue under determination." BOUVIER LAW DICTIONARY, *Material Evidence* (2012) (internal citations omitted) (emphasis added); *see also* BALLANTINE'S LAW DICTIONARY, *Material Evidence*, 3rd Edition (2010) ("Evidence which goes to the substantial matters in dispute or has a legitimate and effective influence or bearing on the decision of the case.") (citations omitted). Three considerations under the *Barker* materiality and quality factors show that the impermissible unsworn statement "tend[ed] to influence or affect" SrA Cunningham's sentence. The unsworn contents were also very high quality and, in some instances, professionally produced.

a. Materiality and Quality: The Sheer Number of Impermissible Items in the PowerPoint Production Vis-à-Vis the Properly Admitted Evidence Weighs in Favor of Finding Prejudice

This Court has "reasoned that an error is more likely to have prejudiced an appellant if the information conveyed as a result of the error was not already obvious from what was presented at trial." *Edwards*, 82 M.J. at 247. Stated in the negative, if the evidence "would not have provided any new ammunition," an error is likely to be harmless. *United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007) (internal citations omitted). In *Edwards*, this Court recognized and analyzed the contents of the victim impact and *specifically* how it compared to evidence that was previously admitted. This Court said that the video had "a slideshow of pictures accompanied by background music, including pictures of the victim as a child, throughout his life, and finally, of his gravestone. *All but one of these pictures had not been admitted into evidence*." 82 M.J. at 247 (emphasis added.)

In his dissent, Chief Judge Ohlson also analyzed the victim impact statement vis-à-vis the evidence that was admitted at trial: "I believe that any prejudice to Appellant caused by the video was almost entirely negated by the fact that it was *cumulative* of the properly admitted victim impact evidence." 82 M.J. at 249 (emphasis added). He then went on to detail that five witnesses testified under oath in sentencing, including the victim's parents, two aunts, and the commander. *Id*. SrA Cunningham's case is similar in that the victim's mother and grandmother

testified in sentencing. JA at 095, 100. The Government's case in *Edwards*, however, was much stronger than SrA Cunningham's case because at least four additional people testified in that case: the paternal aunt, maternal aunt, a friend, and the victim's commander. 82 M.J. at 249-50 (Ohlson, C.J., dissenting). Thus, the risk of evidence becoming cumulative of the unsworn statement, and therefore immaterial, was much greater in *Edwards* than SrA Cunningham's case.

While it is true that the Air Force Court found "the PowerPoint presentation was cumulative" to the evidence admitted at trial and sentencing, it did not *recognize*, *analyze*, or even *compare* what was in the PowerPoint production versus what was admitted into evidence. JA at 019. So, while this Court in *Edwards* found that "All but one of these pictures had not been admitted into evidence," the Air Force Court made no such comparison or finding. 82 M.J. at 247. The Air Force Court's declaration of cumulativeness was wrong because it failed to recognize or explain how the following items in the PowerPoint were "cumulative" as they were *not* admitted into evidence:

- The emotional music that accompanied the PowerPoint production;
- The professional lyrics that accompanied the PowerPoint production;
- The 52 images in the PowerPoint production. At the start of her unsworn statement, the victim representative even noted, "So, during the trial you have all seen pictures of [Z.C.] both good and bad. *But none of them* portray the love that I have for him and what was truly taken from me." JA at 122

(emphasis added). She then went on to show 52 pictures that better portrayed the love she had for her son and "what was truly taken from [her]."[2] *Id*;

- Four stock images of future, fictional events;
- Ten total still images with text superimposed onto the image; and
- Thirteen videos.

The Air Force Court ignored these facts. Instead, it unduly focused on the sworn testimony of the victim's mother and grandmother to the exclusion of completing a balancing test of *if* and *how* the testimony was "cumulative" to the items listed above.

A proper analysis of the unsworn statement in this case reveals that the PowerPoint production had more impermissible items and was longer than the one in *Edwards*. In terms of quantity, C.M.'s unsworn statement had 52 photos, while the one in *Edwards* only had 30. JA at 229 (Ct. Ex. A). The *Edwards'* unsworn statement was seven minutes long, while just the two embedded videos in C.M.'s spanned over five minutes. *Id*. C.M.'s total PowerPoint production is approximately ten minutes, exceeding the time in *Edwards*. JA at 229 (Victim Impact Statement at 1:31:57). When analyzed vis-à-vis the properly admitted evidence, the error of

[2] Even if this Court were to find that Prosecution Exhibit 36 contained some duplicates of what was contained in the PowerPoint (although it is hard to tell), the images in Prosecution Exhibit 36 were only thumbnail photos. JA at 210. Thus, the medium of how the information was conveyed is vastly different from the PowerPoint production. As such, the effect of the PowerPoint is exceedingly more impactful.

allowing the PowerPoint production was "more likely to have prejudiced" SrA Cunningham since "the information conveyed as a result of the error was not already obvious from what was presented at trial." *Edwards*, 82 M.J. at 247. In other words, it provided "new ammunition" that the Trial Counsel referenced and the Military Judge heard. *Harrow*, 65 M.J. at 200.

b. Materiality and Quality: The PowerPoint Presentation Was Intended to Invoke a "Strong Emotional Response"

When assessing materiality, this Court in *Edwards* acknowledged that "the pictures, coupled with the background music" were "intended to evoke a strong emotional response." 82 M.J. at 247. This Court then gave a "heart-wrenching" example: "Seeing the victim's father cry into the uniform of his deceased son…." *Id*. at 247-48.

When the Air Force Court discussed materiality here, it did not mention—let alone acknowledge—that the PowerPoint production also had the "type of content that had the *potential* to influence the sentencing decision…." *Id*. (emphasis added).

The very last slide in the PowerPoint production, which shows the victim wrapped in SrA Cunningham's uniform, is comparable to the father in *Edwards* crying into his son's uniform:

This image is similarly "heart-wrenching," and it is hard to imagine how anyone could not be moved by seeing it. *Id*. at 248. Undoubtedly, this picture of the victim was meant to evoke strong emotion by tying the death of this child to military service—the same way the father crying into a uniform did. But it was not just the image; rather, it was the image combined with C.M.'s declaration that she and the victim "both deserve justice." JA at 124.[3] And this image is but *one* of many from

[3] As mentioned in Footnote One, *supra*, this picture may have been included in the Pros. Ex. 36 which is a collage of small photos, but the image in question is too small and blurry to confirm. JA at 210. Regardless, this image was not admitted into

the mélange that were not admitted at trial which would "evoke a strong emotional response." *Edwards*, 82 M.J. at 247.

Another significant item was the professional music. This music played during the majority of the PowerPoint. Both its lyrics and melody created a somber, forlorn ambience more fitting of a funeral than sentencing proceedings. The music alone, with its lyrics "God must need another angel around the throne tonight," is enough to create prejudice. JA at 229 (Victim Impact Statement at 1:31:57). The music is akin to the "emotional displays" that this Court's predecessor warned against because "though understandable," they can "quickly exceed the limits of propriety and equate to the bloody shirt being waved." *United States v. Pearson*, 17 M.J. 149, 153 (C.M.A. 1984). The music—which was unrelated to the evidence—was so supernal that like *Pearson* it violated the "fundamental *sanctity* of the court-martial," but in an ironical way since the music was geared to invoke the *sacred*. *Id*. (emphasis added).

Finally, in discussing the quality of the evidence, this Court in *Edwards* noted that trial counsel selected photographs, music, and interviews, and then "edited all of those elements together" in what was likely a "time-intensive process that resulted in an emotionally moving video…." 82 M.J. at 248. There is no evidence in this case

---

evidence in the same form or medium as Pros. Ex. 36, thereby bolstering its materiality and quality.

that Trial Counsel helped produce the PowerPoint. However, portions of the PowerPoint were professionally produced. This created a similar effect as if Trial Counsel would have been involved in its production: A high-quality PowerPoint that was composed of inadmissible items and therefore, *a fortiori*, created an inadmissible effect.

First, a professional artist created the song playing in the background and its lyrics were provoking. JA at 229 (Victim Impact Statement starting at 1:31:57). Second, C.M. artfully synchronized the song to automatically play during the video she created (using photos that were not authorized under the R.C.M.) *Id.* The music automatically lowered in volume when someone was speaking on the video and then automatically increased in volume when the speaker stopped. *Id.* Third, C.M. also used professional, stock images to evoke emotion and then animated those images as if they were being crumpled up and thrown away, arguably to demonstrate that SrA Cunningham had thrown those opportunities away for her. JA at 229 (Ct. Ex. A at Slides Six through Nine). Finally, as mentioned above, C.M. used a professional photo of Z.C. wrapped in Appellant's uniform as the closing image. These artistic expressions were unauthorized and dramatically increased the quality of the unsworn. *Id.* at Slide Eleven.

c. Materiality and Quality: Trial Counsel Referenced the Unsworn Statement in Her Sentencing Argument

In assessing materiality and quality, this Court said the "materiality and quality of the video are bolstered by the way the Government used the video during sentencing." 82 M.J. at 248. The Air Force Court's recognition here that the "trial counsel did not *play or reference* any part of the unsworn statement during argument" is only partially true. JA at 020 (emphasis added). The Air Force Court correctly stated that Trial Counsel did not "play" the production again; however, it incorrectly stated that Trial Counsel did not "reference any part" of the PowerPoint production. *Id.*

Trial Counsel first stated, "[C.M.] never did get to take those six month photos of [Z.C.]. She is never going to get to watch him graduate. She is never going to hear him utter the words mama to her. Every single moment in his life, from the major to the mundane were destroyed, erased, wiped away with the accused [*sic*] murder." JA at 180. This is a clear "reference" to the portion of the unsworn where Z.C.'s life's moments were captured in stock images and then a graphic was used to show them being crumpled up like trash and thrown away.

Second, as way to color C.M.'s grief and loss, Trial Counsel asked, "What do you call a mother who's lost her child? There is no word for it in the human language. Because no word could possibly capture the anguish, the grief, the loss of such a thing." *Id*. Although this is not an explicit reference to the PowerPoint production,

it aligns with the emotion the PowerPoint production was intended to evoke. Although Trial Counsel's references to the unsworn might not be as prominent as the use in *Edwards*, they are still probative of the PowerPoint's materiality and quality.

B. Contrary to the Air Force Court's Determination, the Strength of SrA Cunningham's Defense Case Was not "Weak"

Admittedly, the first *Barker* factor weighs in favor of the Government as its sentencing case was strong in the sense that the victim's grandmother and mother testified under oath about the impact Z.C.'s death had on them. However, SrA Cunningham's sentencing case was also strong. He had three witnesses testify under oath about his potential to be rehabilitated. JA at 125-34. Nine individuals recorded statements that spoke about SrA Cunningham's character, values, how he had helped them in the past, how they would miss him, and that they wanted him in their life. JA at 142-66. SrA Cunningham gave an unsworn statement in which he talked about how not having his father in his life was challenging and how he could not grieve the loss of his son because he had to "keep [his] mouth quiet." JA at 170, 172.

C. Conclusion: There is no Significant Reason This Court Should Depart from its Finding of Prejudice in Edwards *Given the Factual Similarities Between the Cases*

There is no significant reason to depart from *Edwards* by not finding prejudice in this case. Notably, both *Edwards* and SrA Cunningham's case are factually

similar—murder cases with Article 6b victim representatives offering impact statements in contravention of the plain language of R.C.M. 1001. As such, the Air Force Court's opinion should have tracked very closely with *Edwards*' analysis. However, the Air Force Court chose to selectively focus on key points in *Edwards*—such as Trial Counsel's involvement in making and using the impact statement—while ignoring or discounting other valid considerations such as the quantity, materiality, and emotional effect of the inadmissible items. This is especially true since there were professional elements—music and photographs—that created the same prejudicial effect as Trial Counsel's involvement in *Edwards*. Most notably, the materiality and quality of the PowerPoint were higher than the victim impact statement in *Edwards*.

WHEREFORE, SrA Cunningham respectfully requests this Court overturn the Air Force Court's decision by finding prejudice under *Edwards*, remand the case back to the Air Force Court, and direct that the Air Force Court order a new sentencing rehearing without the erroneous victim impact statement.

II.

TRIAL COUNSEL'S SENTENCING ARGUMENT WAS IMPROPER UNDER *UNITED STATES V. WARREN*, 13 M.J. 278 (C.M.A. 1982) AND *UNITED STATES V. NORWOOD*, 81 M.J. 12 (C.A.A.F. 2021), RESPECTIVELY, WHEN SHE 1) ARGUED THAT SRA CUNNINGHAM'S UNCHARGED, FALSE STATEMENTS WERE AGGRAVATING EVIDENCE AFTER SHE HAD PREVIOUSLY CITED CASE LAW TO THE MILITARY JUDGE THAT SAID FALSE STATEMENTS WERE NOT ADMISSIBLE AS EVIDENCE IN AGGRAVATION; AND 2) TOLD THE MILITARY JUDGE THAT HE HAD SEEN THE MEDIA AND THE WORLD WAS WATCHING, TO JUSTIFY HER SENTENCE RECOMMENDATION.

Facts

A. Prong 1): Uncharged, False Statements as Aggravating Evidence

a. Trial Counsel's Acknowledgement That Uncharged, False Statements "Are Not Admissible as Evidence in Aggravation"

After the conclusion of the findings argument, Trial Counsel sent the Defense Mil. R. Evid. 304(d) notices that contained statements SrA Cunningham purportedly made to several witnesses. JA at 088. Trial Counsel proffered that SrA Cunningham stated he was forced to confess, that he did not remember confessing, and that he told different stories to different people. JA at 089, 091. The Defense objected to the admission of these statements as, *inter alia*, improper evidence in aggravation. JA at 088-89. Trial Counsel countered that the statements went to SrA Cunningham's lack of remorse. JA at 089.

When asked for case law to support the Government's position, the Trial Counsel cited to *United States v. Obregon*, No. ACM 39005, 2017 CCA LEXIS 609 (A.F. Ct. Crim. App. Sep. 6, 2017) (unpub. op.) and said:

> And this sites [*sic*] another case. It sites [*sic*] another unpublished opinion, saying that false statements about an accused -- or about an offense made sometime after the offense *are not admissible as evidence in aggravation*. And so, we are making the distinction here, we are not bringing in evidence about the accused false statements about his son falling off the kitchen counter. Which several of these witnesses would also be able to testify to. What we are offering is evidence about his explanation for confessing to the crime.

JA at 092 (emphasis added). After further discussion with the Military Judge and the Defense Counsel, the Trial Counsel withdrew "their intent to offer this type of evidence." JA at 093.

b. Government Counsel Distinguished Rehabilitation Potential and Aggravation Evidence Before Its Sentencing Argument

Later, when cross-examining a Defense witness who had testified to SrA Cunningham's rehabilitative potential, the Circuit Trial Counsel asked whether the witness knew about the statements. JA at 134. The Defense objected. *Id*. Citing to *United States v. Cameron*, the Government responded that SrA Cunningham had opened the door by placing his rehabilitative potential into evidence and quoted from the case "[w]e conclude from the evidence offered by the defense on sentencing that the appellant placed his character and *rehabilitation potential* into evidence. Therefore, his false denial of his use of marijuana would have been admissible in

rebuttal." *Id.* (citing 54 M.J. 618, 620 (A.F. Ct. Crim. App. 2000) (emphasis added). The Government concluded its argument saying that the statements were a "specific instance of conduct going to that character for *re-rehabilitative potential* [*sic*]." *Id*. (citing 54 M.J. 618, 620 (A.F. Ct. Crim. App. 2000) (emphasis added). The Military Judge overruled the Defense's objection and did not conduct a Mil. R. Evid. 403 balancing test. JA at 135.

c. Trial Counsel Used Uncharged, False Statements in Her Sentencing Argument

During sentencing argument, Trial Counsel began by telling the Military Judge that he needed to look at the "totality of the circumstances" which included "aggravation, what makes this crime so bad; mitigation, what makes this criminal not so bad; and victim impact." JA at 173. She addressed each item in turn. *Id*. After explaining how SrA Cunningham committed the crime and then sought help from his roommate, Trial Counsel stressed, "But what does he not do, he doesn't tell the truth about what just happened? [*sic*]" JA at 176. Trial Counsel then detailed every alleged mistruth SrA Cunningham may have made, capping it with her opinion that he "tells lie, after lie, after lie, after lie, until we finally get a piece of the truth." *Id*.

After playing a video clip of SrA Cunningham saying that he wanted to visit his son in Sioux Falls, Trial Counsel asserted, "The accused [*sic*] repeated lies were designed to keep him out of trouble and were in complete disregard to the well-being and safety of his baby. *These are the aggravating circumstances surrounding the*

accused's crime. *These deserve* at least 20-25 years confinement." JA at 177 (emphasis added). Trial Counsel then transitioned to her rehabilitation section and only mentioned SrA Cunningham's alleged "lies" once when speaking about his rehabilitative potential. JA at 177-78.

d. The Air Force Court Opinion

The Air Force Court recognized that Trial Counsel used false, uncharged statements as matters in aggravation: "The only false statements trial counsel argued as evidence in aggravation were statements Appellant made to his roommate, first responders, and law enforcement about the cause of ZC's injuries." JA at 026. But the lower court believed the statements were permissible because "having an accurate history of how the injuries occurred would have assisted in providing ZC medical care." *Id*. The Air Force Court also stated that, even if the statements were error, there was no evidence to rebut the presumption that the Military Judge knew the law. JA at 027.

B. Prong 2): Seeing the Media and the World is Watching

During motions practice on a pretrial punishment issue, SrA Cunningham's leadership testified about the media, saying the "media had been all over this case," that "word travels fast," that SrA Cunningham was "all over the news," and it was "true" that the commander had concerns "given the media attention." JA at 035, 037, 039. The media attention was so great that command was concerned for SrA

Cunningham's safety. JA at 042. His squadron commander rhetorically asked, "you know, who's to say someone wouldn't recognize him from you know, the media? You never know what's coming, so, [to] ensure his safety and accountability." *Id*. The Government likewise acknowledged the heightened media attention, with Assistant Trial Counsel stating "both the unit and the public were aware. The public through media and news information…." JA at 043. In the Assistant Trial Counsel's opinion, the media attention was so high that the commander believed "there was a clear concern for the safety of his member." *Id.* Moreover, there was "a clear concern for potential misconduct, in the way of witness tampering or otherwise harming, or causing similar violence, toward the witnesses…" *Id.*

Counsel and the Military Judge also discussed potential media attention during two R.C.M. 802 conferences. JA at 044-45. The Military Judge issued instructions to panel member five times not to read or listen to outside media. JA at 046-53. Trial Counsel raised media influence at least two times during voir dire. JA at 054-57. A potential panel member disclosed that he had a read an article about the case so Trial Counsel asked him "are you confident that you will only consider the evidence that is presented in court?" *Id*.

The Military Judge held a partially closed session during the trial when one panel member disclosed that a friend had texted him a news link to the case. JA at 082-85. The Military Judge requested that the member delete the link to the news

article and excused him to the deliberation room to do so. JA at 083-84. The Military Judge addressed this issue alone with counsel. JA at 084. The Military Judge called the member back into the partially closed session to confirm whether he had deleted the news link. JA at 084-85.

No witnesses mentioned "media" or "news" during the findings and only C.M. mentioned a social media campaign during her sentencing testimony. JA at 108.

During sentencing argument, Trial Counsel closed with the following:

> *You have seen the media*, and you see the people in the courtroom, and you have heard witness testimony talking about the media interest in this case, *the world is watching*. *The world wants to know what price tag you're going to put on this accused for murdering his son*. Send a message that promotes respect for the law. Send a message to deter others from ever thinking of doing what the accused did. And send a message to promote justice in this case, Your Honor. And that must include at least 20 to 25 years confinement, a dishonorable discharge, and reduction in rank to E-1, and total forfeitures.

JA at 180 (emphasis added). The Military Judge never issued a disclaimer that he knew the law and would disregard any inappropriate arguments. JA at 180-85.

On Trial Counsel's statements that the Military Judge had "seen the media," the "world is watching," and "the world wants to know what price tag you're going to put on this accused," the Air Force Court opined: The statements "cannot be understood to pressure or threaten the military judge with contempt or ostracism from others…." JA at 026. Since the statements could not be understood as threats, the Air Force Court distinguished this case from *Norwood*. *Id.* Ultimately, the Air

Force Court found the statements were a "permissible method to argue for general deterrence and justice." JA at 025.

Standard of Review

This Court reviews claims of prosecutorial misconduct and improper argument *de novo*; when no objection is made at trial, the error is forfeited and this Court reviews for plain error. *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019) (citation omitted). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *Id*. (quoting *Fletcher*, 62 M.J. at 179).

Law and Analysis

The law requires Trial Counsel to ask the sentencing authority "to fashion their sentence" on "cool, calm consideration of the evidence and commonly accepted principles of sentencing." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000) (internal citations omitted). As such, "arguments aimed at inflaming the passions or prejudices of the court members are clearly improper." *Id.* (internal citations omitted). In this case, Trial Counsel made two improper arguments, asking the Military Judge to fashion his sentence on considerations that were not based on the evidence or commonly accepted sentencing principles: 1) uncharged, false statements which Trial Counsel described as the "*aggravating circumstances* surrounding the accused's crime" which "*these deserve* at least 20-25 years

confinement." JA at 177 (emphasis added); and 2) references that the Military Judge had "seen the media," "heard witness testimony talking about the media interest in this case," and that that "the world [was] watching" him. JA at 180.

A. Case Law, Trial Counsel's Actual Knowledge, and Strong Judicial Rationale Show that Trial Counsel's Use of Uncharged, False Statements was Plain Error

This case is unique because Trial Counsel had actual knowledge of the case law that prohibited her from arguing SrA Cunningham's uncharged, false statements as a matter in aggravation—indeed, she quoted the law to the Military Judge. Nevertheless, she made her improper arguments anyway. In addition to applicable case law from the Air Force Court, the Supreme Court and this Court's predecessor have decided a nearly identical question of law. This case law is buttressed by sentencing fundamentals and the principle that it is "axiomatic that a court-martial must render its verdict solely on the basis of the evidence presented at trial." *United States v. Clifton*, 15 M.J. 26, 29 (C.M.A. 1983).

a. The Supreme Court Decided a Nearly Identical Question and the Court of Military Appeals Quickly Followed, Stating That It Did Not "Underestimate the Mischief to Which our Ruling Today Might be Put."

It is well-settled that if a defendant testifies under oath, a judge can consider what he or she believes to be "willful and material falsehoods" for the accused's "prospects for *rehabilitation and restoration to a useful place in society*." *United States v. Grayson*, 438 U.S. 41, 55 (1978) (emphasis added). In other words, "A defendant's truthfulness or mendacity while testifying on his own behalf, almost

without exception, has been deemed probative of his attitudes toward society and *prospects for rehabilitation* and hence relevant to sentencing." *Id*. at 50 (emphasis added). The Supreme Court did not mention that such material falsehoods could be used as aggravating evidence. In fact, it cautioned that "Nothing we say today requires a sentencing judge to enhance, in some wooden or reflex fashion, the sentences of all defendants whose testimony is deemed false." *Id*. at 55. The dissent used stronger language that a trial judge does not make a "determination that [an accused's] testimony was false;" despite not making this factual determination on the veracity of the statement, the judge can still "mete out additional punishment to the defendant simply because of his personal belief that the defendant did not testify truthfully at the trial." *Id*. at 55, 58 (Stewart, J., dissenting).

Against this backdrop, the Court of Military Appeals adopted the Supreme Court's rationale, clearly stating a limiting principle:

> It must be remembered that the Supreme Court in *Grayson* did not approve a *per se* increase in an accused's sentence because of his false testimony. Instead, all that the Supreme Court blessed—and all that we approve here—is an appropriate consideration of this factor as *an indication* of an accused's *rehabilitative potential* in arriving at an appropriate sentence for offenses of which he has just been convicted.

Warren, 13 M.J. at 285 (emphasis in original). This Court's predecessor also carved out a special warning on improper argument: "[A]ny over-emphasis by trial counsel which amounts to an invitation to the court 'to rely on' this factor 'to the exclusion of' others 'borders on inflammatory argument.' *Id*. (internal citation omitted).

If this Court treats uncharged, false statements in the same way the Supreme Court and the Court of Military Appeals treated false testimony under oath, then Trial Counsel's argument is plain and obvious error because she tied SrA Cunningham's alleged lies to aggravation evidence. She did so by first asking the Military Judge, "Aggravation, what is it about this murder that makes it worse than every other murder?" JA at 173. After summarizing the victim's death, she then tied the crime to SrA Cunningham's truthfulness: "But what does he not do, he doesn't tell the truth about what just happened? [*sic*]." JA at 176. Trial Counsel then detailed every alleged mistruth SrA Cunningham may have made, up to and including his interrogation, and then she summarized that he "tells lie, after lie, after lie, until we finally get a piece of the truth." JA at 176.

At this point, if there was any doubt that Trial Counsel was using SrA Cunningham's uncharged, false statements to have the Military Judge "mete out additional punishment," she then made her motive abundantly clear. *Grayson*, 438 U.S. at 58 (Stewart, J., dissenting); *see also Jenkins*, 54 M.J. at 20 ("The court members 'may *not* mete out additional punishment for the false testimony itself.'") (quoting *Warren*, 13 M.J. at 285-86) (all emphasis in original). She argued, "The accused [*sic*] repeated lies were designed to keep him out of trouble and were in complete disregard to the well-being and safety of his baby. *These are the aggravating circumstances surrounding the accused's crime*. *These deserve* at least

20-25 years confinement." JA at 177 (emphasis added). Trial Counsel specifically stated that SrA Cunningham's statements were "the aggravating circumstances." *Id*. She then specifically used those lies to justify her confinement recommendation: "These deserve at least 20-25 years confinement." *Id*. Her statements not only "border[ed] on inflammatory argument;" they were inflammatory since they were explicitly tied SrA Cunningham's statements to aggravation evidence. *Warren*, 13 M.J. at 285.

This was the *exact* kind of "mischief" that this Court's predecessor in *Warren* foresaw that its "ruling…might be put." *Id*. Indeed, Trial Counsel's behavior became the very dreaded "pet" that the Court welcomed into its "judicial household [that] will not easily be housebroken." *Id*.

b. Assuming, Arguendo*, This Court Does Not Find the Supreme Court's and the Court of Military Appeal's Precedent Applies, Air Force Court Precedent Is Directly on Point*

The Air Force Court's published and unpublished decisions show that Trial Counsel's use of uncharged, false statements as aggravation was plain error:

- Despite the government's argument at trial, however, evidence that the accused lied when questioned about the theft tended to prove nothing regarding the impact of the crime. On the contrary, it was evidence of conduct wholly separate from the charged offense. Its most obvious effect was to show that the sentence should be more severe *because the accused had lied and had failed to assist the investigators by incriminating himself*…It was, therefore, not relevant to the issue of aggravation…Accordingly, we find that the military judge erred when he admitted such evidence as aggravation.

United States v. Caro, 20 M.J. 770, 771-72 (A.F.C.M.R. 1985) (emphasis added)

- The trial defense counsel did object to the testimony of Sergeant McQuade regarding the car chase by the town patrol and the *statement* by the appellant to the town patrol that he was not a military member. The defense argued that this testimony was not a proper aggravating factor within R.C.M. 1001(b)(4) because it did not involve circumstances directly relating to or resulting from the offense and it did not have any impact on the victim, on mission discipline, or the efficiency of Clabon's unit. The military judge overruled the defense objection on the basis that the information objected to constituted "res gestae" and was directly related to the assault offense. We disagree.

  United States v. Clabon, 33 M.J. 904, 905 (A.F.C.M.R. 1991) (emphasis in original)

- [W]e conclude that uncharged false statements about charged offenses, as a general rule, are not proper evidence in aggravation. R.C.M. 1001(b)(4). Consideration of sentencing fundamentals reveals the rationale for this conclusion.

  Cameron, 54 M.J. at 620.

- During his sentencing argument, assistant trial counsel made four separate references averring the appellant lied to various individuals….Consistent with our prior decisions in *Clabon* and *Caro*, we agree with the appellant that the military judge's basis for allowing the argument was in error.

  United States v. Lafollette, No. ACM 38174, 2014 CCA LEXIS 10, at *13 (A.F. Ct. Crim. App. Jan. 14, 2014) (allowing the statements into evidence because the court found that the defendant opened the door to the statements).

See also United States v. Obregon, No. ACM 39005, 2017 CCA LEXIS 609 at *11 (A.F. Ct. Crim. App. Sep. 6, 2017) (unpub. op.). The Air Force Court failed to

engage with these cases. These opinions show Trial Counsel should not have turned SrA Cunningham's uncharged, false statements into aggravating evidence.

c. Trial Counsel Had Actual Knowledge That Her Argument Was Improper

Prosecutorial misconduct is "action or inaction by a prosecutor in violation of some legal norm or standard…." *United States v. Pabelona*, 76 M.J. 9, 11 (C.A.A.F. 2017). It is behavior that "overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *Id*. (internal quotation and citation omitted).

In this case, Trial Counsel violated legal standards that she previously quoted to the Military Judge, namely that "false statements about an accused—or about an offense made sometime after the offense *are not admissible as evidence in aggravation*." JA at 092 (emphasis added). Then, before her sentencing argument, during a cross-examination, her co-counsel cited case law to the Military Judge, distinguishing between aggravation and rehabilitation evidence as it related to uncharged, false statements. JA at 134. During her sentencing argument, she referenced this distinction. JA at 177-78. Thus, she knew the difference between aggravation evidence and rehabilitation evidence. This Court's consideration of the Government's comments before the sentencing argument is not only permissible, but crucial because "the argument by a trial counsel must be viewed within the context of the entire court-martial." *Baer*, 53 M.J. at 238.

Thus, this case is unique—and disconcerting—because Trial Counsel was not an inexperienced, junior officer. Rather, she was a seasoned Major who *knew* that arguing false statements as matters in aggravation ran contrary to Air Force Court case law. JA at 034. Despite this knowledge, she made improper sentencing arguments anyway. As such, her conduct falls within this Court's apprehension that "trial counsel's performance in this case was not one we would expect from any lawyer, let alone a 'senior' trial counsel." *Voorhees*, 79 M.J. at 14. The fact that Trial Counsel knowingly made the arguments also invites this Court's question on whether this type of argument is still receiving explicit, or tacit, approval: "This case aside, the consistent flow of improper argument appeals to our Court suggests that those in supervisory positions overseeing junior judge advocates are, whether intentionally or not, condoning this type of conduct." *Id*. at 15.

The Air Force Court reasoned that the Trial Counsel did not commit any error because her earlier acknowledgements to the Military Judge were about SrA Cunningham's statements on "being forced by police to confess and not remembering his confession." JA at 026. The Air Force Court found no error because it saw "no evidence that trial counsel used *these statements* at all during argument." *Id*. (emphasis added). However, the Air Force Court recognized that the Trial Counsel did—in fact—argue *other* false statements: "statements Appellant made to

his roommate, first responders, and law enforcement about the cause of ZC's injuries." *Id*.

The Air Force Court misapprehended the point: Trial Counsel had knowledge that she should not be arguing *any* uncharged, false statement as a matter in aggravation. The specific false statements she argued are irrelevant—what mattered is that she had prior knowledge that she should not be making such arguments.

d. Courts Have Found That a "Consideration of Sentencing Fundamentals Reveals the Rationale" for Prohibiting the Use of Uncharged, False Statements in Sentencing

There are two logical reasons to prohibit the use of uncharged, false statements as aggravation evidence. First, the Air Force Court has held that "false statements about [charged] offenses do not directly relate to those offenses." *Cameron*, 54 M.J. at 619. It postulated that "Logically, such a position may appear to be counter-intuitive." *Id*. However, "[c]onsideration of sentencing fundamentals reveals the rationale for this conclusion, to wit, proper punishment should be based on the nature, seriousness, and character of the offender." *Id*.

In *Cameron*, a case of marijuana use, the Air Force Court said:

> Applying this principle to the question of whether the appellant's false denial was directly related to or resulted from his use of marijuana, *how would that denial affect the nature and seriousness of his use of marijuana*? It would not, *because his false official statement (or false swearing) did not alter the characteristics of his previous illegal use of marijuana*. Therefore, his false statement did not directly relate to or result from his use of marijuana. Logic would also require the

> conclusion that such false statement was not a fact or circumstance of the marijuana use.

Cameron, 54 M.J. at 620 (emphasis added). The same logic applies in SrA Cunningham's case. The fact that he may or may not have uttered false statements after striking his child, did not change the nature or seriousness of that strike. The damage was done when the *actus reus* was completed. Stated in the language of the legal charge against him, the "act inherently dangerous to another" was already consummated. Thus, any statements made after the offense, would not "alter the characteristics" of the previous and illegal inherently dangerous act. *Id*.

The second logical reason to prohibit the use of uncharged, false statements as matters in aggravation is that the Government could have chosen to charge them *ab initio*. If SrA Cunningham's statements were so crucial to the Government, it could have charged them, which would have allowed them to argue the underlying conduct in both findings and sentencing. Furthermore, this would have placed SrA Cunningham in a position with more due process protections: He could have fully challenged whether or not those statements were actually false. Since the Government used the statements in the last moments of the trial, SrA Cunningham was unable to properly rebut the statements since they were not factually developed as aggravation—or a standalone offense—in findings or sentencing proceedings.

B. Jurisprudence, the Actions of the Military Judge (and Counsel) During Trial, Logic, and Trial Counsel's Failure to Mention General Deterrence All Show That Her References to the Media Were Plain and Obvious Error

There are four overarching reasons why this Court should find error in Trial Counsel's argument that the Military Judge had "seen the media," that he had "heard witness testimony talking about the media interest," that "the world is watching," and the "world wants to know what price tag" he was going to put on SrA Cunningham. First, historical and modern jurisprudence have rejected media influence generally, and some of the specific phrases Trial Counsel used. Second, Counsel and the Military Judge carefully guarded against media influence in SrA Cunningham's case, showing that Trial Counsel knew it was improper to cast the media's shadow upon the sentencing proceeding. Third, prohibitions against invoking the media are grounded on solid, logical bedrock. Fourth, an analysis of Trial Counsel's words individually, and collectively, lack indicia of a general deterrence argument.

a. The Judiciary has Always Guarded Against Media and Community Pressures that Could Improperly Influence both Juries and Judges

As far back as 1807, the press's relentless coverage of Aaron Burr's treason trial forced Chief Justice John Marshall to grapple with the former vice president's ability to get a fair trial. *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811, 1816 (1995). The Chief Justice analyzed English cases from nearly a hundred years earlier where the fact that the accused

persons were "objects of the law" was a "matter of universal notoriety." *United States v. Burr*, 25 F. Cas. 49 (C.C.D. Va. 1807) (No. 14,692g). Chief Justice Marshall set in motion the standard that still governs impartiality and external influence: "Strong and deep impressions which close the mind against the testimony…which will combat that testimony and resist its force" are objectionable. *Reynolds v. United States*, 98 U.S. 145, 155 (1878).

In 1907, Justice Holmes stated, "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and *not by any outside influence, whether of private talk or public print*." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (emphasis added). He declared that if any publication interferes with the administration of justice, a court "may punish it" as necessary. *Id*. at 463. This is because "preventing interference with the course of justice by premature statement, *argument* or intimidation hardly can be denied." *Id*. (emphasis added).

With technological advances in the 1960s, the Supreme Court made several statements about prosecutorial misconduct and the role of media both inside and outside of the judiciary. In one sentence, albeit long, Justice Frankfurter framed the problem:

> Not a Term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts—*too often, as in this case, with the prosecutor's collaboration*—exerting pressures upon potential jurors before trial and *even during the course of trial*, thereby making it extremely difficult, if not impossible, to secure a jury capable of taking in, free of prepossessions, evidence submitted in open court.

Irvin v. Dowd, 366 U.S. 717, 730 (1961) (Frankfurter, J., concurring) (emphasis added). The Supreme Court noted that the function of the judiciary was to "ascertain the truth," but "the use of television, however, cannot be said to contribute materially to this objective. Rather its use amounts to the injection of an irrelevant factor into court proceedings." *Estes v. Texas*, 381 U.S. 532, 544 (1965).

The Supreme Court was clear in the danger publicity posed to a jury and judges. For juries, "Where pretrial publicity of all kinds has created intense public feeling…the televised jurors cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them." *Id*. at 545. If that pretrial publicity is hostile to an accused, a juror "realizing that he must return to neighbors who saw the trial themselves, may well be led not to hold the balance nice, clear and true between the State, and the accused...." *Id*. (internal quotations omitted). For judges, the Supreme Court noted that they were "high-minded men and women," but "it is difficult to remain oblivious to the pressures that the news media can bring to bear on them both directly and through the shaping of public opinion." *Id*. at 548-49.

By the mid-1960s, the Supreme Court reaffirmed the courts' duty to guard against external media influence: "The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences." *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966). It specifically said that collaboration between counsel and the press on issues that affect the fairness of a criminal trial are "not only subject to regulation, but [] highly censurable and worthy of disciplinary measures." *Id*. at 363. *See also* Model Rules of Professional Conduct, *Fairness to Opposing Party and Counsel*, para. 3.4(e) (2018) ("A lawyer shall not…in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue….").

b. Modern Case Law From This Court and Other Jurisdictions Address Historical Concerns, Showing That Trial Counsel's Invocation of the Media Was Plain and Obvious Error

In *Edwards v. Sears, Roebuck & Co.*, counsel told the jury, *inter alia*, that they would decide "the dollar value of the loss of a husband and a father" because the victim's son would not know "what price he might want to put on a daddy." 512 F.2d 276, 285 n.10 (5th Cir. 1975). These comments are similar to the comments Trial Counsel made in this case that "The world wants to know what *price tag* you're going to put on this accused for murdering his son." JA at 180 (emphasis added). Although the Fifth Circuit did not decide whether the "price" comments were

individually impermissible, it held that collectively the counsel's comments created "inherent unfairness." *Id*. Arguably, Trial Counsel's arguments in this care are worse than that of *Edwards v. Sears, Roebuck & Co.*, because she invoked the specter of media attention—"the world wants to know"—to argue that the accused deserved a "price tag" on his head, like an animal or terrorist.

Iowa appellate courts have recently held that arguments referencing the "world" and the societal consequences were improper argument. In *Conn v. Alfstad*, counsel argued to the jury that the "people around the state and around the world were watching them." No. 10-1171, 2011 Iowa App. LEXIS 1090, at *16 (Ct. App. Apr. 27, 2011). This comment is nearly analogous to Trial Counsel's comment that the Military Judge had "seen the media…the world is watching. The world wants to know…." JA at 180. The Iowa Court of Appeals held the argument to be improper because counsel is not permitted to "advance arguments that could reasonably intimidate jurors into thinking that their verdict will subject them to public disapproval." *Alfstad*, No. 10-1171 at *16. In *Kipp v. Stanford*, counsel referenced the community and the social consequences of the jury's decision. 949 N.W.2d 249, *20 (Iowa Ct. App. 2020). Specifically, counsel "tied aspects of the case back to the community and the jury's place in it, including framing the jury's decision as something about which they will be asked by members of the community after the case ends." *Id*. In this case, through her comments, Trial Counsel similarly asked the

Military Judge to think about how the community would receive his sentence, not what the admitted evidence actually merited. Although Trial Counsel did not explicitly say the community would ask the Military Judge about his decision, the upshot was clear: The world was watching him and the world would judge him for his sentence. In this regard, SrA Cunningham's case is distinguishable from a case like *United States v. Koon* because Trial Counsel's arguments objectively put the Military Judge in a place where he had a "direct stake in the outcome of the case." *United States v. Koon*, 34 F.3d 1416, 1444 (9th Cir. 1994), *remanded*, 518 U.S. 81, 85 (1996).

Multiple other jurisdictions, including this Court, have disapproved of comments similar to Trial Counsel's, showing that her comments were plain and obvious error:

- The prosecutor was implying, by his statement that the verdict would be 'a public and permanent record' *that the community was watching the jury*, and if the jurors did not convict the defendant, it will be unhappy with them.…To attempt to intimidate the jury by arguing, in some form, that the citizens of a community will have a record of the jury's verdict and that the evidence is such that consequences could result to the jury members if they do not convict the defendant is improper.

  State v. Delaney, 973 S.W.2d 152, 157 (Mo. Ct. App. 1998) (emphasis added).

- This case has attracted observers, commentators, reporters, and readers from across the globe…[Jurors] will also understand what that means — *that the world is watching them*.

United States v. Guzman Loera, No. 09-cr-0466 (BMC), 2018 U.S. Dist. LEXIS 185689, at *6 (E.D.N.Y. Oct. 30, 2018)) (placing restraints on media and public viewing of the voir dire process) (emphasis added).

- [R]eference to the jury's societal obligation is inappropriate when it suggests that the jury base its decision on the impact of the verdict on society and the criminal justice system rather than the facts of the case.

  State v. Campos, 309 P.3d 1160, 1174 (Utah 2013) (internal quotations and citations omitted).

- [I]t is improper to divert a jury from the evidence in the case by predicting the consequences of the jury's verdict….Moreover, it was improper to prey upon the personal interests of the court members as members of the military community and their concerns about the impact this defense may have on them in that role.

  United States v. Causey, 37 M.J. 308, 311 (C.A.A.F. 1993) (internal quotations and citations omitted).

- This Court has consistently cautioned counsel to limit arguments on findings or sentencing to evidence in the record and to such fair inferences as may be drawn therefrom.

  United States v. White, 36 M.J. 306, 308 (C.A.A.F. 1993) (internal quotations and citations omitted).

- Trial counsel may properly ask for a severe sentence, but he cannot threaten the court members *with the specter of contempt or ostracism* if they reject his request.

  United States v. Wood, 40 C.M.R. 3 (C.M.A. 1969) (emphasis added).

All of the above cited cases—both historical and modern—build up to *Norwood* and provide vital context for its holding. In *Norwood*, this Court described Trial Counsel's sentencing argument as one that "pressured the members to consider how their fellow service-members would judge them and the sentence they adjudged

instead of the evidence at hand." 81 M.J. at 21. This Court then said that it has "*repeatedly* held that a court-martial must reach a decision based only on the facts in evidence." *Id*. (internal quotations and citations omitted) (emphasis added).

Read in historical and modern context, *Norwood* reflects the principle that arguments that invite the sentencing authority to consider external, communal pressure—instead of the evidence admitted at trial—are improper. *A vivid hypothetical is not required*. Trial Counsel's statements to the Military Judge of "You have seen the media, and you see the people in the courtroom…the world is watching. The world wants to know what price tag you're going to put on this accused…" were enough to invite the Military Judge to consider what the world was expecting, not what was admitted into evidence. The statements were enough of an implicit threat to make clear to the Military Judge that he would be accountable to the world and fellow service members for his sentence. Simply put, he better get it right. And while the words Trial Counsel argued were different than those of *Norwood*, the effect was the same: Putting external media and social pressure into the Military Judge's mind to coerce a tough sentence.

A final factor is that Trial Counsel made these arguments only six days before this Court decided *Norwood*.[4] Since an "appellant gets the benefit of changes to the

[4] *Norwood* was decided on 24 February 2021, six days after SrA Cunningham was sentenced on 18 February 2021.

law between the time of trial and the time of his appeal," this Court should "apply the clear law at the time of the appeal"—*Norwood*—to find the error was forfeited and not waived. *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019).[5]

c. The Way Counsel and the Military Judge Guarded Against Media Pressure During Preliminary Proceedings and the Trial Itself Shows Trial Counsel's Overture to the Media was Plain and Obvious Error

The Military Judge and Counsel guarded against media influence at least 15 times during the trial proceedings. Trial Counsel heard or participated in all of these interactions, demonstrating that she had actual knowledge of the dangers that media and community pressure could exert on the factfinders. Trial Counsel herself even questioned two panel members about their knowledge of the media for the case. JA at 054-57. She questioned one, "are you confident that you will only consider the evidence that is presented in court?" and the other, "how confident are you that you can basically brain dump anything that you have learned…." JA at 055, 057. These questions demonstrate: 1) Trial Counsel was concerned about improper media influence; and 2) she had actual knowledge that the accused should only be convicted on "the evidence that is presented in court." JA at 055. Ironically, Trial Counsel was concerned about negative media influence for the factfinders, but not for the sentencing authority during her sentencing argument. Similarly, the Government as

[5] The Military Judge asked the parties if they had objections to the opposing party's argument. Both parties said "no." JA at 1359.

a whole was concerned about how improper media influence could help them win a pre-trial motion. JA at 043. It did not share the same concern, however, about how the media could improperly increase SrA Cunningham's sentence.

These references also demonstrate that Trial Counsel's declaration that the Military Judge had "seen the media…and *[he had] heard witness testimony* talking about the media interest in this case, the world is watching" was factually true, but legally irrelevant. JA at 180 (emphasis added). Meaning, the Military Judge only heard witness testimony during the motions hearing and voir dire, which is not proper testimony for sentencing proceedings. Thus, Trial Counsel was not only referencing improper, external influences, but referring to portions of the trial that were irrelevant for sentencing considerations. Given the court-martial's due diligence throughout the proceedings to guard against media influence, Trial Counsel's ill-timed media threats were quite a spectacular—if not tragic—defenestration of everything the court-martial fought so hard to avoid.

d. Cases Prohibiting References to the Media and Community Pressures that are Meant to Inflame Have Strong Logical Underpinnings

Finding error—and subsequently prejudice—in allowing the Government to argue external media and community pressures is logically sound for the following reasons:

- It ensures an individual is only convicted or sentenced on the admitted evidence. *Irvin,* 366 U.S. at 730 (Frankfurter, J., concurring) ("One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure.").

- It ensures external influences are left at the courtroom door. *Estes* 381 U.S. at 592 (Harlan, J., concurring) ("The entire thrust of rules of evidence and the other protections attendant upon the modern trial is to keep extraneous influences out of the courtroom.").

- It protects an individual's right to confront the witnesses against him. *White* 36 M.J. at 308 ("The danger of such arguments clearly impacts an accused's right of confrontation….").

- It protects an individual's ability to impeach or rebut adverse statements. *Id.* ("The danger of such arguments clearly impacts…the opportunity to impeach the source of the adverse comment.").

- It avoids the danger of creating a mini-trial within the trial itself which would slow the judicial process. *See generally White v. United States*, 148 F.3d 787, 792 (7th Cir. 1998); *United States v. Kaley*, 677 F.3d 1316, 1327 (11th Cir. 2012).

- It prevents the sentencing authority from having a "personal stake in the outcome of the case." *United States v. Kopituk*, 690 F.2d 1289, 1342 (11th Cir. 1982).

e. Trial Counsel's Argument Was Not a Proper Way to Argue for General Deterrence

Contrary to the Air Force Court's reasoning, this Court should not be persuaded that Trial Counsel was *properly* arguing for general deterrence. A general deterrence argument should *originate inside* of the courtroom—based on the evidence and facts of the case—to *be sent outside* of the courtroom. Trial Counsel's

fatal flaw was that she tried to argue for general deterrence by doing the exact opposite: Bringing in irrelevant concerns—media coverage—that *originated outside* of the courtroom and using those irrelevant concerns to pressure the Military Judge to "*send* a message" by increasing the sentence. JA at 180 (emphasis added).

The Supreme Court of North Carolina explained this principle well by saying it is permissible for a prosecutor to ask the jury to "send a message to the community." *State v. Barden*, 356 N.C. 316, 367 (2002) (internal quotations and citations omitted). However, a prosecutor cannot "encourage the jury to lend an ear to the community." *Id* (internal quotations and citations omitted). Stated differently, "the jury may speak for the community, but *the community cannot speak to the jury*." *Id*. (emphasis added); *cf. United States v. Ohrt*, 28 M.J. 301, 305 (C.M.A. 1989) (explaining that a court-martial panel necessarily sends a message to "those who know of [Appellant]'s crime and [Appellant's] sentence from committing the same or similar offenses.").

Although not explicitly required, Trial Counsel did not do any of the following which would indicate she was arguing for general deterrence. First, she never introduced the sentencing principles generally, or general deterrence specifically. Second, she never explained what constituted general deterrence. *Rebalancing Military Sentencing: An Argument to Restore Utilitarian Principles within the Courtroom*, 225 MIL. L. REV. 1, 18 (2017) ("General deterrence is less concerned

with the individual criminal, and instead hopes to dissuade others from the commission of future crime through the punishment imposed in the current case."). Third, she never applied the nature and circumstances of SrA Cunningham's case to the principle of general deterrence. Thus, she never answered the question of "why" general deterrence was appropriate for this case.

While no words are talismanic, the above actions would provide strong indicia that Trial Counsel was making a general deterrence argument. Finally—and most notably—in 1,362 pages of trial transcript, "general deterrence" is never mentioned once, let alone in Trial Counsel's sentencing argument.

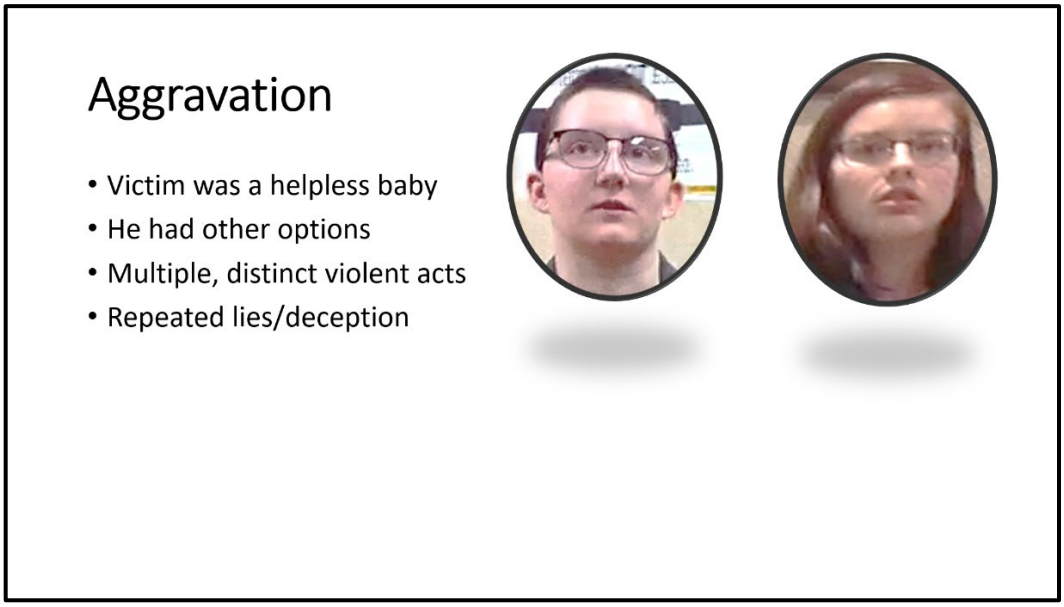
C. Prejudice: Trial Counsel's Two Improper Arguments "Resulted in a Reasonable Probability That the Sentence Adjudged Was Greater Than It Would Have Been Otherwise"

Under plain error review, SrA Cunningham must demonstrate that prosecutorial errors "materially prejudiced a substantial right." *Norwood*, 81 M.J. at 19. The "substantial right" at issue is that the Military Judge did not sentence SrA Cunningham on the "evidence alone." *Fletcher*, 62 M.J. at 184. Stated another way, the test is whether a "reasonable probability that the sentence adjudged was greater than it would have been otherwise." *Id*. at 21. There are several facts this Court should consider that indicate there is a "reasonable probability" that SrA Cunningham received more confinement time than he otherwise would have, but for the improper arguments. *Id*.

First, this Court cannot "presume" the Military Judge knew the law because there is "clear evidence to the contrary." *See Rapert*, 75 M.J. at 170. When Trial Counsel first raised the issue of false statements as matters in aggravation, the Military Judge asked Trial Counsel, "Do you have a case?" JA at 092. The Military Judge then said, "I mean, I am familiar with a line of cases that talk about an accused's attitude as it goes to remorselessness in admitting such evidence." *Id.* The gist from the Military Judge was clear: He was familiar with a *different line* of cases (remorse), but not with the cases for the current issue (false statements as aggravation). When Defense Counsel stated that they were not able pull up the case, the Military Judge responded, "I haven't either." JA at 093. Trial Counsel then withdrew its intent to offer said evidence. *Id.* As such, this Court cannot presume that the Military Judge knew it was improper to consider false statements as aggravating factors.

Second, the severity of the misconduct weighs in favor of finding prejudice. This was not just one off-hand remark; rather, these were two separate and distinct arguments that Trial Counsel made. Just the false statements as aggravating evidence compose at least one full page of Trial Counsel's eight-page argument or 12.5% of her entire argument. JA. at 176-77. Worse, however, is the fact that Trial Counsel structured her argument around false statements as matters in aggravation. She did this by introducing the structure of her argument as the "[T]otality of the

circumstances. That includes, but is not limited to, things like aggravation, what makes this crime so bad…And so, I'd like to talk about each of those in turn." JA at 173. She then spent one entire page of her aggravation section detailing how SrA Cunningham told "lie, after lie, after lie, after lie, until we finally get a piece of the truth." JA at 176. Her PowerPoint presentation that accompanied her argument prominently listed "repeated lies/deception" under "Aggravation":



Trial Counsel showed an iteration of this slide with the "Repeated lies/deception" at least three times during argument. JA at 229 (Appellate Exhibit XCIV). Notably, she closed her aggravation section by using the false statements as the justification for her confinement recommendation:

> The accused repeated lies were designed to keep him out of trouble and were in complete disregard to the well-being and safety of his baby. *These are the aggravating circumstances* surrounding the accused's crime. *These deserve at least 20 to 25 years confinement*.

JA at 177 (emphasis added). Trial Counsel's argument on false statements was a structural component of her sentencing argument, which makes the misconduct—and the argument as a whole—more severe.

Her "egregious attempt" to threaten the Military Judge with the media was also severe *ipso facto*. *See Norwood*, 81 M.J. at 21. Moreover, she strategically referenced the media using the principles of primacy and recency; this indicates severity since the "specter of contempt or ostracism" was the last thing she told the Military Judge and she used it to justify her sentence recommendation. *Wood*, 40 C.M.R. at 297; *see The Primacy and Recency Effects: The Secret Weapons of Opening Statements*, 33 TAQ 26 (2014) ("Specifically, the primacy effect plays a very powerful role early in an opening statement presentation, whereas the recency effect plays an important role at the conclusion of the opening statement."). Like *Edwards*, Trial Counsel made this remark at the "crescendo of [her] sentencing argument." 82 M.J. at 248.

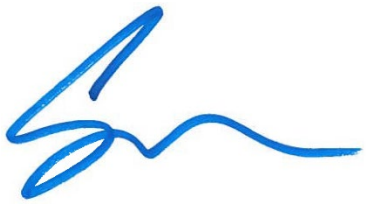
Third, the Military Judge did not acknowledge that Trial Counsel made any improper arguments nor did he take any curative measures. JA at 180-85. R. at 1354-59.

Fourth, the sentences requested by Counsel also indicate prejudice. Trial Counsel asked for 20-25 years of confinement. JA at 181. Defense Counsel recommended 5-10 years of confinement. *Id*. The Military Judge sentenced SrA

Cunningham to 18 years of confinement—nearly the amount that Trial Counsel recommended. JA at 030, 180. The adjudged confinement is much closer to what Trial Counsel asked for, which indicates prejudice.

Fifth, and finally, this Court should consider that Trial Counsel not only made two improper sentencing arguments, but also that there was an erroneous victim impact statement. As such, this Court should find prejudice because of the "cumulative errors found in the record of trial." *Banks*, 36 M.J. at 171.

WHEREFORE, SrA Cunningham respectfully requests this Court overturn the Air Force Court's decision by finding prejudice for the Government's improper argument, remand the case back to the Air Force Court, and direct that the Air Force Court order a new sentencing rehearing.

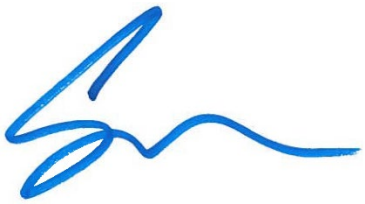


SPENCER R. NELSON, Maj, USAF
Appellate Defense Attorney
U.S.C.A.A.F. Bar No. 37606
Appellate Defense Division
1500 West Perimeter Road, Ste 1100
Joint Base Andrews, MD 20762
Phone: (240) 612-4770
Email: spencer.nelson.1@us.af.mil

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on January 12, 2023, pursuant to this Court's order dated December 13, 2022, and that a copy was also electronically served on the Government Trial and Appellate Division on the same date.



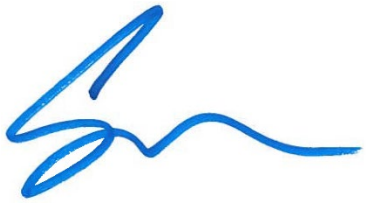
SPENCER R. NELSON, Maj, USAF
U.S.C.A.A.F. Bar No. 37606
Appellate Defense Division
1500 Perimeter Road, Ste 1100
Joint Base Andrews, MD 20762
Phone: (240) 612-4770
Email: spencer.nelson.1@us.af.mil

Counsel for Appellant

CERTIFICATE OF COMPLIANCE WITH RULES 24(b) & 37

This supplement complies with the type-volume limitation of Rule 24(b) of no more than 14,000 words because it contains 13,264 words.

This brief complies with the typeface and type-style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word Version 2016 with Times New Roman 14-point typeface.



SPENCER R. NELSON, Maj, USAF
U.S.C.A.A.F. Bar No. 37606
Appellate Defense Division
1500 Perimeter Road, Ste 1100
Joint Base Andrews, MD 20762
Phone: (240) 612-4770
Email: spencer.nelson.1@us.af.mil

Counsel for Appellant