

10/15/2026

CLERK OF THE COURT

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,
Appellee

SUPPLEMENT TO PETITION FOR
GRANT OF REVIEW

v.

Crim. App. Dkt. No. 20240542

Staff Sergeant (E-6)
MANUEL A. ERB,
United States Army,
Appellant

USCA Dkt. No. 26-0282/AR

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

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Issues Presented

I.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY DENYING APPELLANT'S MOTION FOR A MISTRIAL.

II.

WHETHER THE EVIDENCE IS LEGALLY SUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION FOR FALSE OFFICIAL STATEMENT.

III.

WHETHER DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE MATERIAL EVIDENCE THAT WOULD HAVE IMPEACHED THE ALLEGED VICTIM'S CREDIBILITY.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [CCA] had jurisdiction over this matter pursuant to Article 66(d), Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 866(d). This Honorable Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of false official statement, sexual assault of a child (two specifications), and sexual abuse of a child (two specifications), in violation

of Articles 107 and 120b, UCMJ, 10 U.S.C. §§ 907 and 920b (2019). The military judge sentenced Appellant to a dishonorable discharge, confinement for eleven years, and reduction to E-1.¹ (R. at 472; Statement of Trial Results [STR]). The military judge credited Appellant with five days of confinement credit toward the sentence to confinement. (R. at 479). The convening authority took no action on the findings or sentence and disapproved the request for waiver of automatic forfeitures. (Action).

Appellant assigned three errors for the CCA's consideration: (1) the military judge abused his discretion in denying Appellant's motion for a mistrial; (2) the evidence is legally and factually sufficient to sustain the findings of guilty for false official statement, sexual assault of a child; and sexual abuse of a child; and (3) the defense counsel's failure to investigate denied Appellant the effective assistance of counsel. Additionally, Appellant requested that the CCA consider matters raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).²

¹ The military judge sentenced Appellant to confinement for five years for Specification 1 of Charge I; confinement for two years for Specification 2 of Charge I; confinement for six years for Specification 3 of Charge I; and confinement for five years for Specification 4 of Charge I. The military judge did not adjudge a sentence to confinement for The Specification of Charge II. The military judge ordered that the sentences to confinement for Specifications 1-3 of Charge I shall be served concurrently with each other but consecutively with the sentence to confinement for Specification 4 of Charge I. (R. at 472).

² Appellant respectfully requests that this Honorable Court consider the matters raised pursuant to *Grostefon* in Appendix B.

The CCA addressed only the third assigned error and affirmed the findings and sentence. *United States v. Erb*, ARMY 20240542, 2026 CCA LEXIS 323 (Army Ct. Crim. App. Jul. 7, 2026) (summ. disp.). (Appendix A).

Pursuant to Rule 19 of this Court's Rules of Practice and Procedure, undersigned counsel filed a Petition for Grant of Review on September 4, 2026. This Court granted an enlargement of time to file a Supplement until September 30, 2026.

Reasons to Grant Review

Under Rule 21(b)(5) of this Court's Rules, the CCA's decision departed from the accepted course of military justice proceedings. The military judge recognized that a panel instruction could not cure the ineradicable impact of the Government's improper opening statement, yet that was the military judge's remedy when presented with the definitive example of when a mistrial is appropriate. The CCA's summary affirmance of this issue departed from the rule governing mistrials and the caselaw interpreting that rule. The CCA's summary affirmance of the conviction for false official statement where the Government failed to present sufficient evidence for two elements of the offense departed from the caselaw governing the offense and the defense of mistake of fact for a specific intent offense. Finally, the defense counsel failed to obtain and investigate digital media that they determined was relevant to Appellant's defense. The CCA's

findings that it could not determine whether the evidence was relevant, that Appellant did not sufficiently describe the material, and that the defense counsel's performance was not deficient departed from the caselaw in the Supreme Court and in this Court.

Statement of the Facts

A. Background

Appellant and Ms. SG met in March 2007. (R. at 237). SG was fourteen years old and Appellant was twenty years old when they met at her sister's sixteenth birthday party. (R. at 237-38, 248). Appellant and SG had two daughters, Ms. AE and Ms. JE, and they later married. (R. at 239, 240). JE was born on September 13, 2009. (R. at 241, 282; Pros. Ex. 9).

For financial reasons, SG sent her daughters to Oklahoma to live with Appellant and his new wife, Ms. KE. (R. at 241, 266, 275, 296). AE and JE had a difficult relationship with their stepmother. (R. at 275, 314). They wished that their dad would get involved and take their side instead of KE's side during fights. (R. at 276, 315, 316). JE bristled at KE's controlling demeanor over all aspects of life at home and she retaliated by intentionally upsetting KE. (R. at 316-17).

B. The Bedroom Allegation

JE testified that Appellant entered her bedroom on one night in September 2022, rubbed her breasts and “woman area” and then digitally penetrated her “woman part.” (R. at 282-85, 286, 294; Pros. Ex. 17).

C. The Couch Allegation

On some other occasion when JE was twelve years old, JE, AE, KE, and Appellant watched a movie on the couch in the family room. (R. at 287, 320). After AE and KE fell asleep, Appellant took JE’s hand, placed it under his shorts, and caused her to “stroke his man part.” (R. at 287-88, 320).

D. Appellant’s Statement and Subsequent Testimony

Special Agent [SA] PL of the Criminal Investigation Command [CID] interviewed Appellant in April 2023. (R. at 249; Pros. Exs. 5, 23). SA PL asked Appellant how old SG was when he met her. (Pros. Ex. 23). Appellant stated that he met SG when she was sixteen years old. (Pros. Ex. 23). Special Agent PL asked, “Soon after you met [SG] was when you had a kid together?” and Appellant answered, “yes.” (Pros. Ex. 23).

Appellant testified that SA PL asked him about SG’s age approximately an hour into the interview. (R. at 368). The question, which seemed unrelated to the rest of the interview, surprised him. (R. at 369). He tried to think about how old SG was when he met her by comparing her age to his daughters’ ages and gave his

best estimate about SG's age. (R. at 369). Sometime after the interview, he realized that he gave an incorrect answer to CID and he recalled that SG was fourteen years old and he was twenty-one years old when they met. (R. at 369, 372).

E. Motions to Exclude Evidence Under Military Rules of Evidence 404(b) and 414

The Government notified the defense of its intent to introduce certain evidence under Military Rules of Evidence [Mil. R. Evid.] 404(b) and 414, including that appellant and SG had sexual intercourse when she was fourteen and fifteen years old and that she became pregnant with AE when she was fifteen years old. (App. Exs. V, VI). Under Mil. R. Evid. 404(b), the Government sought to admit the evidence to prove Appellant's intent, lack of mistake, and motive and to argue that "sexual desires towards teenage minors" is "a common motive for both the uncharged misconduct and the charged offense." (Apps. Ex. VI-A, IX). Under Mil. R. Evid. 414, the Government contended that the evidence was relevant to prove Appellant's propensity to commit sexual acts with teenagers under the age of sixteen and to demonstrate Appellant's sexual attraction to teenagers "below the age of 16" and his willingness "to act upon that sexual attraction." (App. Ex. VIII).

The defense moved to exclude the evidence. (App. Exs. V, VI). The Government opposed both motions. (App. Exs. VIII, IX).

The military judge concluded that the evidence was inadmissible under Mil. R. Evid. 404(b) because the Government failed to establish a non-propensity purpose for the evidence and that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice to the trial process. (App. Ex. XI). The military judge determined that the probative value was “extremely limited” with respect to motive. (App. Ex. XI).

The military judge also concluded that the evidence was inadmissible under Mil. R. Evid. 414. (App. Ex. XII). Regarding evidence that Appellant had sexual intercourse with SG when she was fourteen years old, the military judge concluded, *inter alia*, that the evidence was logically relevant but that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. (App. Ex. XI). Regarding evidence that Appellant had sexual intercourse with SG when she was fifteen years old, the military judge concluded that these acts did not violate Colorado law, such that the evidence did not constitute another offense of child molestation under Mil. R. Evid. 414. (App. Ex. XI).

F. The Government’s Opening Statement

The trial counsel [TC] informed the members that they would meet JE, who was now fifteen years old and who was twelve years old at the time of the alleged incidents; AE, who was born in October 2008 and had recently turned

sixteen years old; and SG, who was born in August 1992. (R. at 146-47). The TC claimed that birthdays were “important in this case” because Appellant met SG when she was fourteen years old, not sixteen years old, and that Appellant

was already in [SG’s] life, when she celebrated her 15th birthday. He was already in her life when she celebrated her 16th birthday. And [AE], the oldest daughter of [SG] and Staff Sergeant Erb, was born just a couple of months after [SG] turned 16.

(R. at 147).

Following the defense counsel’s [DC]’s opening statement, the military judge, in an Article 39(a), UCMJ, session, alerted the parties to his concern about the TC’s reference to AE’s birth “a couple of months after [SG] turned 16.” (R. at 156). He stated, “So, that clearly makes a connection between sexual intercourse, since that’s the cause of birth and her age, which is different from, just that they met when she was 16.” (R. at 156).

Following a recess, the defense moved for a mistrial pursuant to Rule for Courts-Martial [R.C.M.] 915 based on the TC’s emphasis on the age at which SG allegedly engaged in sexual intercourse with Appellant. (R. at 157). The defense argued that the Government had drawn a “correlation” between SG and JE by telling the panel to pay attention to birthdates and that the comparison of Appellant’s prior relationship with SG with the charged acts had caused the panel to view Appellant’s conduct through an improper lens and cast a substantial doubt

upon the fairness of the trial. (R. at 157-58). The defense contended that a limiting instruction would be more harmful than helpful and would not cure the taint of the Government's opening statement. (R. at 158).

The Government conceded that the panel could infer that Appellant and SG had sex when she was fifteen years old but maintained that it "did not allude to when intercourse began, only to when the two met." (R. at 159). The Government argued that age was important to each charged offense and AE's birth certificate was direct evidence to prove that Appellant made a false official statement about how old SG was when they met. (R. at 160). The military judge expressed disfavor with the Government's failure to notify the court of its intent to introduce AE's birth certificate and noted that the court would address the "significant [Mil. R. Evid.] 403 balancing" if there was a motion to admit AE's birth certificate. (R. at 163).

Citing the correct law and standards for a mistrial, the military judge concluded that a mistrial was not warranted. (R. at 163-64, 166, 168). The military judge reasoned that SG's age when she met Appellant was relevant for the Specification of Charge II but that the nature of their meeting and relationship was relevant as *res gestae* and also "to derive inferences about the *mens rea*, required in a false official statement" regarding Appellant's knowledge and intent to deceive. (R. at 164). The military judge determined that the "circumstantial evidence

behind those specific intents, the knowledge[,] and the specific intent to deceive” should be permissible and would survive a Mil. R. Evid. 403 balancing test. (R. at 164-65).

The military judge indicated that the court was concerned only with evidence of prior sexual acts, chiefly the Government’s “obvious inference[] that prior sexual acts occurred” and noted “that is the kind of thing that should have been brought up to the court” because the court determined that this “very same[] factual scenario” was inadmissible under Mil. R. Evid. 404(b) and 414. (R. at 165). He acknowledged that the members may have “made that inference anyway, and is very difficult to pull back from that.” (R. at 166).

The military judge prohibited the Government from eliciting any testimony regarding SG’s age when she and Appellant had intercourse before she was sixteen years old and from introducing AE’s birth certificate without seeking a ruling from the court. (R. at 168). He cautioned the Government that letting any prohibited evidence “slip in again would definitely be a weighty consideration.” (R. at 168).

G. The Military Judge Cautioned the Government

Before SG testified, the military judge presided over an Article 39(a), UCMJ, session in which he reiterated his ruling from the previous day. (R. at 223-24). He questioned why the Government continued to assert that SG and

Appellant were close when she was fifteen and sixteen years old and cautioned that the Government risked a spillover issue. (R. at 225). The Government promised not to elicit such testimony from SG. (R. at 225).

The defense maintained that any questions about SG giving birth to AE and JE when she was fifteen and sixteen years old had the same prejudicial impact as any questions about the closeness of SG and Appellant's relationship at those ages and invited the panel to draw an impermissible inference about Appellant's character for an attraction to minors. (R. at 227). The defense reiterated its objection to any evidence about the date of AE's birth. (R. at 228).

The military judge sustained the defense objection to SG's age when AE was conceived and born and to the introduction of AE's birth certificate. (R. at 230-32). The military judge again cautioned the Government to avoid "any other comments, correlations, [and] inferences in argument" that connect SG's age at the time she met and had sex with appellant and JE's age at the time of the alleged incidents. (R. at 234-35).

Additional facts are contained in the arguments below.

Issues Presented

I.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY DENYING APPELLANT'S MOTION FOR A MISTRIAL.

Standard of Review

A military judge's decision on whether to grant a mistrial will not be reversed absent clear evidence of an abuse of discretion. *United States v. Rudometkin*, 82 M.J. 396, 400 (C.A.A.F. 2022).

Law

R.C.M. 915 permits the military judge, as a matter of discretion, to declare a mistrial “when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings.” *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003). The Discussion to R.C.M. 915 provides that “[t]he power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons.” *Manual for Courts-Martial, United States* (2019 ed.) [MCM], pt. II-128. A mistrial may be appropriate when, for example, “inadmissible matters so prejudicial that a curative instruction would be inadequate are brought to the attention of the members. . . .” *Id.*

For both the trial court and the appellate court, the challenge is to determine the prejudicial impact of the error. *Id.* at 91. As this Court has stated:

Assessment of the probable impact of inadmissible evidence upon the court members is always difficult. Sometimes an instruction to disregard the inadmissible evidence is sufficient assurance that it will not be weighed against the accused; other times the nature of the evidence is such that it is not likely to be erased from the minds of the court members. Each situation must be judged on its own facts.

Diaz, 59 M.J. at 91 (quoting *United States v. Pastor*, 8 M.J. 280, 284 (C.M.A. 1980)). That judgment “is rooted in a simple ‘tolerable’ risk assessment that the members would be able to put aside the inadmissible evidence.” *Id.*

Argument

1. The Government’s improper opening statement amounted to the definitive example of when a mistrial may be appropriate.

Moments into its opening statement, the Government stomped its proverbial foot on the floor to highlight that birthdays were “important” and emphasize the fact that JE “recently turned 15 years-old [sic]” and that SG gave birth to AE “just a couple of months after [SG] turned 16,” leading the panel to conclude that Appellant impregnated SG when she was the same age as JE was at trial. (R. at 146-47).

The military judge stated that the Government’s “obvious inference[] that prior sexual acts occurred” between SG and Appellant was the “very same[]

factual scenario” outlawed by the two rulings. (R. at 165). Under Mil. R. Evid. 404(b), the military judge denied the admission of the proffered evidence to prove that Appellant had “sexual desires towards teenage minors” because the “obvious propensity inference” caused the probative value of the evidence to be substantially outweighed by the danger of unfair prejudice. (App. Ex. XI)). Under Mil. R. Evid. 414, the military judge denied the admission of the same evidence to prove Appellant’s propensity to engage in sexual acts with teenage girls under sixteen years old and his willingness to act upon his sexual attraction to teenage girls. (App. Ex. XI). The military judge reasoned that the probative weight of the evidence that SG was fourteen when she had sex with Appellant was substantially outweighed by the danger of unfair prejudice and that it was not illegal for Appellant and SG to have sex when she was fifteen. (App. Ex. XI).

Before the CCA, the Government conceded that the improper opening statement implying that Appellant impregnated SG when she was the same age as JE was at trial—fifteen years old—was a “transgression.” (Appellee Br. at 10). Indeed, the Government’s improper opening statement amounted to the definitive example of when a mistrial may be appropriate: “when inadmissible matters so prejudicial that a curative instruction would be inadequate are brought to the attention of the members. . . .” R.C.M. 915(a) Discussion, MCM, pt. II-128. Nothing in R.C.M. 915 or its Discussion constrains the power to grant a mistrial

only to the admission of evidence or closing arguments, contrary to the military judge's attempted minimization of the improper comments as "not evidence or arguments." (R. at 166). Indeed, R.C.M. 915(a) contemplates that a mistrial may be appropriate "because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." The Discussion to R.C.M. 915(a) provides that "urgent circumstances" may necessitate a mistrial. As discussed below, urgent circumstances warranted a mistrial because the Government flouted the Mil. R. Evid. 404(b) and 414 rulings by emphasizing inadmissible matters that the military judge had deemed unduly prejudicial to Appellant.

2. The military judge's remedy was insufficient to cure the prejudice.

The military judge offered the defense the opportunity to mention any failure of proof in its closing argument or to request a curative instruction at any time during trial. (R. at 166-67). The defense declined the military judge's offer to provide a curative instruction because an instruction would be more harmful than helpful and would be insufficient to correct the prejudicial impact of the Government's opening statement. (R. at 158-59). Ultimately, the military judge's remedy consisted of a one-sentence addition to the standard spillover instruction. (R. at 395).

The remedy was insufficient to separate the propensity inference from the charged acts, as the military judge had anticipated. In the Mil. R. Evid.

404(b) ruling, the military judge concluded:

It would be exceedingly difficult for a factfinder to isolate motive from propensity. While a panel instruction can generally help mitigate such a danger, “Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might.” *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016) (citing *Boyde v. California*, 494 U.S. 370, 380 (1990)). Where the argument for motive over propensity is so attenuated, it is unreasonable to think a factfinder will not be distracted or confused.

(App. Ex. XI).

The prejudicial impact of the Government’s improper comments was so great that the military judge found it necessary to reiterate his rulings, (R. at 223-24), caution the Government that it risked a spillover issue, (R. at 225), and warn the Government to avoid “any other comments, correlations, [and] inferences in argument” that connect SG’s age at the time she met and had sex with Appellant and JE’s age at the time of the alleged incidents. (R. at 234-35). The implication was that the Government’s “comments, correlations, [and] inferences” cast substantial doubt upon the fairness of the proceedings. *See* R.C.M. 915(a). Given that the military judge had determined that it was “very difficult” for the members to compartmentalize a proper use of evidence from an improper use of evidence so much so that they would be distracted or confused, (R. at 166; App. Ex. XI), the

military judge believed that the taint of the panel’s exposure to the impermissible inference was ineradicable. *See Diaz*, 59 M.J. at 90-91 (citation omitted). After spilling much ink and expressing much consternation over the Government’s improper argument at multiple junctures during the trial, the additional sentence was insufficient to cure the prejudice of the Government’s transgression. In denying the motion for a mistrial, the military judge permitted the panel to make the very inference that he had warned against. This decision cast substantial doubt upon the fairness of the proceedings. Accordingly, the decision not to grant a mistrial constituted a clear abuse of discretion.

II.

WHETHER THE EVIDENCE IS LEGALLY SUFFICIENT TO SUSTAIN APPELLANT’S CONVICTION FOR FALSE OFFICIAL STATEMENT.

Standard of Review

Issues of legal sufficiency are reviewed de novo. *United States v. Harrington*, 83 M.J. 408, 414 (C.A.A.F. 2023) (citation omitted).

Law

“The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (citation omitted). “[I]n resolving

questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution.” *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted).

The elements of false official statement, in violation of Article 107, UCMJ, are that the accused made a certain official statement; that that statement was false in certain particulars; that the accused knew it to be false at the time of making it; and that the false statement was made with the intent to deceive. MCM, pt. IV, ¶ 41.b.(1).

The offense requires the false representation to be made with the intent to deceive regardless of the materiality of the false statement to the issue inquiry. *Id.* at ¶ 41.c.(1)(d). The military judge instructed the panel that “intent to deceive” means “to purposely mislead, to cheat, to trick another, or to cause another to believe as true that which is false.” (R. at 390).

Because making a false official statement is a specific intent offense, honest ignorance or mistake of fact is a defense to the offense. R.C.M. 916(j). *See also United States v. Oglivie*, 29 M.J. 1069, 1070-71 (A.C.M.R. 1990) (citation omitted). The ignorance or mistake need only have existed in the mind of the accused no matter how unreasonable the ignorance or mistake might have been. R.C.M. 916(j).

Argument

The evidence is legally insufficient because the Government failed to prove beyond a reasonable doubt that Appellant knew his statement was false at the time he made it and that he made the statement with the intent to deceive.

When asked by SA PL how old SG was when Appellant first met her, Appellant thought about it, appeared unsure, and then answered that he thought SG was sixteen years old, or words to that effect. (Pros. Ex. 23). The only other evidence for this offense consisted of SG's testimony that she was fourteen years old when she met Appellant at her sister's sixteenth birthday party. (R. at 237-38). While SG insisted that the day she met Appellant was "important" because it was her sister's sixteenth birthday, the Government introduced no evidence that the day carried the same significance for Appellant, such that he knowingly made a false statement with the intent to deceive. (R. at 237). In other words, SG knew that she was fourteen years old when she met Appellant because she related her age to her sister's age, as siblings often do, but the Government offered no evidence, whether testimonial or documentary, that Appellant thought of SG's age in relation to her sister's age or birthday. While SG may have ascribed some significance or nostalgia to the date and age at which she met Appellant, there was no evidence that Appellant felt that way. Indeed, it is not unusual for a partner in a romantic relationship to not recall dates or anniversaries as well as the other partner. This is

especially true for relationships, such as Appellant and SG's, that end acrimoniously and where one partner remarries.

Next, SA PL did not ask Appellant any follow-up questions, such as how he knew SG was sixteen years old when they met. The evidence of Appellant's statement alone was insufficient to sustain the conviction without any evidence that Appellant knew the statement was false when he made it and that he made the statement to purposely mislead, cheat, or trick SA PL or to cause SA PL to believe as true that which was false, which was SG's age at the time they met. The Government offered zero evidence for the third and fourth elements of the offense. Indeed, the Government did not ask Appellant a single question on cross-examination regarding the knowledge or intent necessary for this offense. (R. at 371-73).

Finally, the Government failed to disprove beyond a reasonable doubt Appellant's honest mistake of fact regarding SG's age when they met. The Government relied on SG's testimony that she was fourteen years old when she met Appellant when arguing that it was "unreasonable" for Appellant to not know the age of his "then-wife" and "dependent" when he told SA PL that he thought SG was sixteen when they met. (R. at 401). Because false official statement is a specific intent offense, the reasonableness or unreasonableness of his honest ignorance or mistake of fact was not an issue. *See* R.C.M. 916(j). The

Government bore the burden to disprove the defense of ignorance or mistake of fact. *See* R.C.M. 916(b). By focusing solely on the fact that Appellant made the statement to SA PL and introducing zero evidence that Appellant did not have an honest mistake of fact regarding SG's age, the Government failed to disprove the defense beyond a reasonable doubt.

Appellant made the statement in April 2023, more than sixteen years after the March 2007 party where he and SG met. He testified that he felt surprised when SA PL asked the question about SG because "[i]t was so long ago." (R. at 369). Indeed, the passage of time was so great that "[i]t was rough trying to remember," so Appellant "tr[ie]d to compare my kid's [sic] ages and when we actually met compared to that." (R. at 369).

SG testified that she met Appellant at her sister's *sixteenth* birthday party. (R. at 237) (emphasis added). While Appellant struggled to remember how old SG was by comparing his daughters' ages to SG's age at a party sixteen years earlier, it is also likely that he also confused SG's age with her sister's age at her sixteenth birthday party. Appellant had an honest mistake of fact because of (1) the sixteen-year passage of time between the party and when Appellant made the statement to SA PL, (2) his attempt to remember SG's age by thinking of his daughters' ages, and (3) how he muddled SG's age and her sister's age. Accordingly, even when drawing every reasonable inference from the evidence of

record in favor of the prosecution, the evidence is legally insufficient. *See Barner*, 56 M.J. at 134.

III.

WHETHER DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE MATERIAL EVIDENCE THAT WOULD HAVE IMPEACHED THE ALLEGED VICTIM'S CREDIBILITY.

Additional Facts

A. Defense Counsel Failed to Investigate Digital Media

During pretrial preparation with his defense counsel, either Appellant or KE advised both counsel that KE possessed certain digital media indicating that JE had knowledge of sexual matters that predated the acts alleged in Specifications 1 to 4 of Charge I. (Def. App. Exs. A, B).³

KE was the account holder for JE's cell phone plan. (Def. App. Exs. A, B). As such, KE had access to the cloud service or cloud storage system where JE's photos, videos, text messages, and other digital media were saved. (Def. App. Exs. A, B). Prior to trial, KE searched the cloud account for a certain photo and discovered a May 8, 2022, FaceTime video of JE and her friend, R, watching a pornography video together. (Def. App. Exs. A, B).

³ The CCA granted Appellant's motion to attach Defense Appellate Exhibits A and B, which are affidavits by Appellant and KE, respectively. (Def. App. Exs. A, B).

In a June 26, 2024 meeting with defense counsel, KE informed them that she was in possession of videos and text messages between JE and her friends which contained inappropriate material. (Def. App. Exs. A, B). KE showed defense counsel some of the aforementioned videos and text messages. (Def. App. Exs. A, B). Appellant and KE considered the videos and text messages to be essential for demonstrating that JE had knowledge beyond her age of sexual matters, that this knowledge predated the acts alleged in Specifications 1 to 4 of Charge I, and that JE's knowledge of sexual matters could not be attributed to Appellant. (Def. App. Exs. A, B).

Appellant's defense counsel did not want KE to send the videos and text messages to their government email addresses because of the nature of the material, so they set up a digital dropbox for KE to upload the material to a non-government site from which they could view and potentially use the digital media at trial. (Def. App. Exs. A, B).

Pursuant to the defense counsel's request, on July 23, 2024, KE uploaded the FaceTime video from her Gmail address to the dropbox link provided by the defense counsel on app.box.com. (Def. App. Exs. A, B). At least one defense counsel advised KE that either the upload did not work or that they could not open or access the material she sent. (Def. App. Exs. A, B).

KE attempted to re-send the FaceTime video approximately twenty times. (Def. App. Exs. A, B). At least one defense counsel informed KE that either the upload was unsuccessful or that they could not open or access the FaceTime video. (Def. App. Exs. A, B). KE offered to upload the digital media to an external device for the defense counsel, but they declined and did not make any other effort to view the digital media. (Def. App. Exs. A, B).

At trial, either one or both defense counsel told Appellant and KE that “we’ll be fine,” or words to that effect, without the introduction and/or admission of the FaceTime video as evidence during the court-martial. (Def. App. Exs. A, B).

B. No Affidavits from Defense Counsel

The Government did not seek affidavits from appellant’s defense counsel, nor did the CCA order affidavits from Appellant’s defense counsel. *Erb*, 2026 CCA LEXIS 323 at *8, n.4.

C. CCA Decision

The CCA concluded that Appellant failed to establish that defense counsel’s performance was deficient “[b]ecause appellate [sic] has neither produced the material for review nor demonstrated a viable pathway for its admission under Mil. R. Evid. 412” *Id.* at *8.

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. *United States v. Leipart*, 85 M.J. 35, 40 (C.A.A.F. 2024) (citing *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011) (citation omitted)).

Law

To establish that ineffective assistance of counsel occurred, the appellant must prove that the defense counsel's performance was deficient, and that the deficiency caused prejudice. *United States v. Captain*, 75 M.J. 99, 103 (C.A.A.F. 2016) (citing *Strickland v. Washington*, 466 U.S. 668, 698. (1984)). Accordingly, the 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 fact finder would have had reasonable doubt respecting guilt?

See Gooch, 69 M.J. at 362 (citation omitted).

“[A] reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 394. In *United States v. Webb*, this Court 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) (citation omitted).

Counsel are presumed competent, and the strategic or tactical decisions made at trial are not generally second-guessed by appellate courts. *United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000) (citation omitted). Where the appellant attacks the trial strategy or tactics of the defense counsel, the appellant must show specific defects in counsel's performance that were unreasonable under prevailing professional norms. *United States v. Scott*, 81 M.J. 79, 84 (C.A.A.F. 2021) (citation omitted). Strategic choices made by counsel must be objectively reasonable. *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015). “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) (quoting *Strickland*, 466 U.S. at 690-91) (internal quotation marks omitted)). “[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691.

Argument

Appellant's defense counsel were deficient by failing to investigate the digital media provided by KE to show that JE had knowledge of sexual matters beyond her age, that this knowledge predated the acts alleged in Specifications 1 to 4 of Charge I, and that JE's knowledge of sexual matters could not be attributed to Appellant. Their failure prejudiced Appellant.

1. Defense counsel failed to investigate a FaceTime video of JE and a friend watching a pornography video and there is no reasonable explanation for their failure to do so.

Appellant and KE informed defense counsel that KE was in possession of certain digital media, including a8 May 8, 2022, FaceTime video of JE and R watching pornography. They advised defense counsel that this evidence would demonstrate that JE had knowledge beyond her years of sexual matters, that this knowledge predated the acts that allegedly occurred around the time of JE's thirteenth birthday in September 2022, and that JE's knowledge of sexual matters could not be attributed to Appellant allegedly sexually assaulting and sexually abusing her in her bed and on the couch. (Def. App. Exs. A, B). Defense counsel recognized that the evidence was relevant because they set up a digital dropbox account on app.box.com, provided KE with a link to that account, and then instructed her to upload the material to the digital dropbox. (Def. App. Exs. A, B).

KE attempted to upload the material approximately twenty times, as can be seen from the screenshots attached to Def. App. Ex. B.

Defense counsel knew that the upload was unsuccessful but took no further action to obtain the relevant material. (Def. App. Exs. A, B). They could have set up another digital dropbox account with app.box.com or used a different cloud-based file-sharing service. They could have instructed KE to send the FaceTime video and other digital media via text message. They could have sent KE a link to upload the relevant material to them via the Department of Defense Secure Access File Exchange [DoD SAFE]. Defense counsel took none of these actions. This failure to investigate evidence relevant to JE's knowledge of sexual matters that predated the alleged bedroom and couch incidents constituted a specific defect in defense counsel's performance.

The CCA faulted Appellant for not providing that court with the digital media that Appellant sent to his defense counsel and stated that it was "left to rely solely on the abbreviated characterizations of the material described in the affidavits," such that it "cannot, and will not, assume the specific contents of the video or the texts to make a judgment call on whether this material was relevant to the underlying case."⁴ *Erb*, 2026 CCA LEXIS 323 at *5. Whether the CCA could

⁴ The CCA also apparently faulted Appellant for the size of the screenshots included in Def. App. Ex. B. *Erb*, 2026 CCA LEXIS 323 at *3 ("In support of this assignment of error, [A]ppellant and his wife submitted affidavits and a screenshot

or should “make a judgment call on whether this material was relevant to the underlying case” is immaterial; defense counsel found the material relevant, so much so that they set up a digital dropbox account to obtain the material and requested that KE transmit the digital media to that account. (Def. App. Exs. A, B). The CCA apparently wanted more specific details about the digital media. *See id.* Appellant maintains that the affidavits contain sufficient details regarding the nature of the digital media, but asserts that the CCA could have, and should have, ordered defense counsel to submit declarations regarding the nature of the material and their reasons for not acquiring it and investigating it for possible use in Appellant’s defense despite finding the material relevant. The CCA declared that Appellant did not produce or sufficiently describe the material and then stuck its proverbial head in the sand by not requiring the defense counsel to explain why they failed to pursue relevant material. *Erb*, 2026 CCA LEXIS 323 at *5-6, *8, n.4.

of a Dropbox account. The screenshot displayed indecipherably small thumbnails of text messages and images.”). The CCA may be referring to screenshots on the first, third, and fourth pages of Def. App. Ex. B, which contains eight pages of screenshots. (Def. App. Ex. B). Appellant avers that the screenshots on these pages could be enlarged by increasing the size of the computer screen upon which the CCA viewed them. Moreover, the remainder of the screenshots clearly show various thumbnails, the names of the file, the file type, the date of the attempted uploads to the dropbox account, KE’s name as the person who attempted to upload the files, and the sizes of the files. (Def. App. Ex. B).

Counsel have a “duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary . . . [A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgements.” *United States v. Scott*, 24 M.J. 186, 189 (C.M.A. 1987) (quoting *Strickland*, 499 U.S. at 691) (alteration in original). Defense counsel did not explain to him and/or KE why they failed to pursue the FaceTime video and other digital media after setting up a digital dropbox to transmit the material and then failed to pursue other means to obtain and investigate the material after learning that KE’s repeated efforts were unsuccessful. Defense counsel failed to make a reasonable investigation and failed to justify the choice not to pursue the relevant material. There is no explanation, much less a reasonable one, for the failure to investigate. Finally, because the Government did not seek affidavits from defense counsel, the CCA could not determine whether defense counsel made a strategic decision and any rumination from the Government or the CCA is purely speculative.

2. Defense counsel’s advocacy fell measurably below the performance ordinarily expected of fallible attorneys.

Given that there was no explanation, much less a reasonable one, for defense counsel’s failure to investigate the evidence, their advocacy fell measurably below the performance ordinarily expected of fallible attorneys. Defense counsel

believed that the FaceTime video and other digital media was relevant, so they created a non-government digital dropbox for the upload. Once they learned that KE's attempts to upload the media were unsuccessful, defense counsel did nothing. It is reasonable to conclude that fallible attorneys would have taken steps to obtain the evidence, such as setting up another digital dropbox account with app.box.com, utilizing a different cloud-based file-sharing service, asking KE to send the FaceTime video and other digital media via text message, or sending KE a link to upload the relevant material to them via DoD SAFE. Defense counsel were capable of taking one or more of these steps but they did not. Because neither the Government nor the CCA sought affidavits from defense counsel, there is no evidence that defense counsel considered any approaches to the evidence and its possible use, nor is there any evidence that defense counsel exercised any judgment or made strategic decisions. Doing nothing was not a strategic decision.

The CCA concluded that Appellant's defense counsel were not deficient because Appellant "has not demonstrated this material would have been admissible" under Mil. R. Evid. 412. *Erb*, 2026 CCA LEXIS 323 at *7-8. The court assumed that the evidence was legally inadmissible. *Id.* at *8. Its admissibility is not the issue, however. Given that defense counsel found the evidence relevant, they could have, and should have, used the digital media for the theory of the case that JE had knowledge of sexual matters beyond her age, that

this knowledge predated the acts alleged in Specifications 1 to 4 of Charge I, and that JE's knowledge of sexual matters could not be attributed to Appellant.

3. There is a reasonable probability that, absent the failure to investigate, the factfinder would have had reasonable doubt respecting Appellant's guilt.

In Specifications 1 to 4 of Charge I, the Government accused Appellant of sexually assaulting and sexually abusing JE, a child who had not attained the age of sixteen years. (Charge Sheet). As such, her age was a relevant fact for all four specifications.

In its closing argument, the Government asserted that JE was "just a 12-year-old girl" at the time of the alleged couch incident. (R. at 398). Throughout the closing argument and the rebuttal argument, the Government referenced JE's age multiple times. (R. at 398, 399, 401, 402, 403, 413, 414). During the rebuttal argument, the Government referred to JE and her friends as "kids" and argued that JE was credible because a "child" would not choose a court-martial as the setting to weave a grand conspiracy and lie. (R. at 414).

The implication of the Government's closing argument and rebuttal argument was that JE was a young child who knew nothing about sex and who used her own words for vulva and penis because she was unfamiliar with the correct terms for genitalia and ejaculation due to her age. (R. at 398).

Had defense counsel obtained and investigated the FaceTime video and other digital media, they could have impeached JE's testimony and argued to the factfinder that JE had knowledge about sexual matters, that this knowledge predated her testimony that Appellant assaulted and abused her around September 2022, and that her knowledge of sexual matters, including the words for genitalia and ejaculation, could not be attributed to Appellant. They did not. Instead of doing their due diligence in accordance with their ethical obligations as attorneys, they dismissively told Appellant and KE that "we'll be fine," or words to that effect. (Def. App. Exs. A, B). Appellant was not fine, however, as the panel convicted him of Specifications 1 to 4 of Charge I. Accordingly, defense counsel's failure to obtain and investigate the FaceTime video and other digital media prejudiced Appellant.

Prayer for Relief

WHEREFORE, Appellant respectfully requests that this Honorable Court grant his Petition for Grant of Review.

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Certificate of Compliance with Rules 21(b) and 37

1. This brief complies with the type-volume limitation of Rule 21(b) because it contains approximately 7,493 words.
2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.



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Appendix A: Army Court Decision

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
COOPER, WILLIAMS and SCHLACK
Appellate Military Judges

UNITED STATES, Appellee
v.
Staff Sergeant MANUEL A. ERB
United States Army, Appellant

ARMY 20240542

Headquarters, U.S. Army Fires Center of Excellence and Fort Sill
Jacqueline L. Emanuel and Kenton E. Spiegler, Military Judges
Colonel Robert C. Stelle, Special Trial Counsel

For Appellant: Captain Jessica A. Adler, JA; William E. Cassara, Esquire (on brief and reply brief).

For Appellee: Colonel Richard E. Gorini, JA; Major Elizabeth G. Van Dyck, JA; Captain Melissa D. Zigrang (on brief).

7 July 2026

SUMMARY DISPOSITION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

COOPER, Senior Judge:

Appellant raises three assignments of error to this court.¹ None warrant relief. However, we address appellant's claim that his defense counsel were ineffective.

An enlisted panel convicted appellant, contrary to his pleas, of one specification of false official statement, two specifications of sexual abuse of a child, and two specifications of sexual assault of a child, in violation of Articles 107, and 120b, Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 920b. The

¹ We have given full and fair consideration to the other matters raised by appellant, including those submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and determine they merit neither discussion nor relief.

military judge sentenced appellant to a dishonorable discharge, confinement for 11 years, and reduction to the grade of E-1.

BACKGROUND

Appellant and his ex-wife had two daughters together, Ms. AE and the victim. After the divorce, the daughters lived with appellant and his new wife on Fort Sill, Oklahoma.

Shortly before the victim's thirteenth birthday in September 2022, appellant entered her room late at night and lay down next to her in her bed. Appellant "unclipped [her] bra and started to rub [her] breasts." After a while, appellant put his hands down the front of her pants, inside her underwear, and "started to rub on [her] woman area." The victim heard appellant moaning and stroking "his man part." Appellant then inserted his fingers inside the victim's "woman part" and "started moving his fingers kind of fast." The victim jumped up off the bed and backed away from him. Appellant told her it was ok, and to lie back down in the bed. The victim went back to her bed, eventually fell asleep, and appellant left.

On another occasion, while the family watched a movie on the couch, appellant compelled the victim to touch his penis. After appellant's wife and Ms. AE fell asleep, appellant took the victim's hand, put it down his shorts and made her "stroke his man part" until "liquid came out of his man part." Appellant told the victim not to tell anyone. Appellant was found guilty of all these charged offenses.

Appellant now alleges his defense counsel were deficient by failing to investigate digital media his wife showed them prior to trial. He avers the digital media would have demonstrated the victim had knowledge of sexual matters beyond her age, this knowledge predated the charged offenses and supported the defense theory that the victim fabricated her allegations.

In support of this assignment of error, appellant and his wife submitted affidavits and a screenshot of a Dropbox account. The screenshot displayed indecipherably small thumbnails of text messages and images. According to the affidavits, appellant's wife showed defense counsel a video depicting the victim in a FaceTime call, watching a pornographic movie with a friend. Appellant's wife also claims she showed defense counsel "inappropriate" text messages between the victim and a friend. Neither appellant nor his wife provided the video or the text messages.

The affidavits further explain that defense counsel set up the Dropbox for appellant's wife to send the video and text messages. Appellant and his wife assert

the upload failed and defense counsel made no further attempt to obtain the digital material thereafter.²

LAW

We review allegations of ineffective assistance of counsel de novo. *United States v. Furth*, 81 M.J. 114, 117 (C.A.A.F. 2021) (citing *United States v. Carter*, 79 M.J. 478, 480 (C.A.A.F. 2020)). “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, 698 (1984)).

“With respect to *Strickland*’s first prong, courts ‘must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’” *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (quoting *Strickland*, 466 U.S. at 689). This presumption may be rebutted “by showing specific errors that were unreasonable under prevailing professional norms.” *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001) (citation omitted).

To overcome the presumption of competence appellant must prove counsel’s advocacy fell “measurably below the performance ordinarily expected of fallible lawyers.” *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011) (citation omitted) (cleaned up). “When a claim of ineffective assistance of counsel is premised on counsel’s failure to make a motion . . . an appellant must show that there is a reasonable probability that such a motion would have been meritorious.” *McConnell*, 55 M.J. at 482 (citation omitted).

Turning to *Strickland*’s second prong, appellant must show “a reasonable probability that, but for counsel’s deficient performance the result of the proceeding would have been different.” *Captain*, 75 M.J. at 103 (quoting *Datavs*, 71 M.J. at 424) (cleaned up). Moreover, “[t]he likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (citation omitted).

² To support this assertion, appellant’s wife included screenshots from the box.com site where she allegedly submitted the material to defense counsel. A thorough review of these screenshots does not show any evidence that the materials failed to upload. The screenshots show that she uploaded multiple materials, mostly .png images, on 23 July 2024 and that it took up a minimal amount of space (37.9 MB) out of a possible 10 GB of storage within the Dropbox.

DISCUSSION

First, as a threshold matter, appellant failed to provide this Court with the video or the “inappropriate” text messages. It is axiomatic that an appellate court cannot sufficiently evaluate the relevance, probative value, or potential prejudicial impact of material it has not seen.

Without the inclusion of the video and the text messages in the appellate record, this Court is left to rely solely on the abbreviated characterizations of the material described in affidavits. We cannot, and will not, assume the specific contents of the video or the texts to make a judgment call on whether this material was relevant to the underlying case. The burden rests squarely on the appellant to provide sufficient support for his appeal; failing to produce—or at a minimum sufficiently describe—the material central to an ineffective assistance of counsel claim is deleterious to an argument that trial defense counsel were deficient in handling it. *See United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (holding an appellant “must establish a factual foundation for a claim of ineffectiveness; second-guessing, sweeping generalizations, and hindsight will not suffice”); *see also United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007) (ruling an IAC claim fails where appellant did not meet his initial burden of establishing a factual appellate record to document the basis of the claim).

Second, appellant misconstrues the duty to investigate. Even if this Court were to assume, *arguendo*, that the video in question was, in fact, pornographic in nature—as described in the affidavits—appellant's claim still fails. Appellant argues defense counsel's failure to *acquire a copy* of the digital material equates to a failure to investigate. We decline to adopt such an expansive interpretation of what it means to “investigate.” Appellant and his wife concede defense counsel viewed the digital material provided by appellant's wife. (Defense Appellate Exhibits A & B). Simply stated, counsel did not fail their obligation to investigate because, according to appellant and his wife, defense counsel reviewed all the material at issue. Consequently, counsel's investigation was not deficient because under *Strickland*, the constitutional inquiry focuses on whether counsel's investigation was reasonable, not whether counsel amassed a physical archive of potential evidence. *See Wiggins v. Smith*, 539 U.S. 510, 527 (2003) (“In assessing the reasonableness of an attorney's investigation, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.”).

Appellant's actual complaint is that defense counsel did not *use* the material his wife provided to impeach the victim at trial. (Reply Brief, page 12 “the factfinder was never given the opportunity to consider the evidence.”). However, he has not demonstrated this material would have been admissible. Assuming the material was evidence of sexual behavior or a sexual predisposition of the victim,

Military Rule of Evidence [Mil. R. Evid.] 412 would apply. Mil. R. Evid. 412 is an exclusionary rule designed to shield victims from the introduction of evidence concerning their sexual behavior or sexual predisposition. *United States v. Banker*, 60 M.J. 216, 222 (C.A.A.F. 2004). When evidence falls under this rule, it is presumed inadmissible unless the proponent demonstrates that a specific exception applies. *See id.* (noting that because Mil. R. Evid. 412 is a rule of exclusion, the burden shifts to the proponent to demonstrate admissibility).

On appeal, the burden remains on appellant to articulate which exception under Mil. R. Evid. 412(b) would have permitted the introduction of this material. *See United States v. Smith*, 68 M.J. 445, 448 (C.A.A.F. 2010), (holding appellant has the burden under Mil. R. Evid. 412 of establishing entitlement to an exception to Mil. R. Evid. 412's general prohibition). Appellant did not even mention Mil. R. Evid. 412, let alone articulate an applicable exception and its viability at trial. Thus, as described, Mil. R. Evid. 412 applies to the proffered material, rendering the video and related text messages inadmissible as a matter of law.³

Trial defense counsel's performance cannot be deemed deficient for failing to offer evidence that is legally inadmissible. *Cf. McConnell*, 55 M.J. at 482 (when a claim of ineffective assistance of counsel is based on a failure to make a motion, an appellant must demonstrate "a reasonable probability that such a motion would have been meritorious."). Because appellate has neither produced the material for review nor demonstrated a viable pathway for its admission under Mil. R. Evid. 412, the appellant has failed to establish the first prong of *Strickland*.

CONCLUSION

After a complete review of appellant's initial brief, reply brief, Defense Appellate Exhibits A and B, the response brief submitted by appellee and the trial record, we find defense counsel's performance was not deficient.⁴

The findings of guilty and the sentence are AFFIRMED.

³ The evidence would also be subject to Mil. R. Evid 403, where a military judge can "exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." *United States v. St. Jean*, 83 M.J. 109, 113 (C.A.A.F. 2023). Appellant has failed to demonstrate how this material would overcome this hurdle.

⁴ After careful consideration of our superior court's guidance in *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997), we have determined neither affidavits from defense counsel nor a post-trial evidentiary hearing is necessary to resolve this issue as the first two principles under *Ginn* warrant rejection of appellant's IAC claim.

ERB- ARMY 20240542

Judge WILLIAMS and Judge SCHLACK concur.

FOR THE COURT:


JAMES W. HERRING, JR.
Clerk of Court

Appendix B: Matter Submitted Pursuant to *United States v. Grostefon*

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

WHETHER DEFENSE COUNSELS' INDIVIDUAL AND CUMULATIVE ERRORS DEPRIVED APPELLANT OF EFFECTIVE ASSISTANCE.

I. Defense counsel was ineffective for failing to confront JE with prior sexual-abuse evidence.

In its closing and rebuttal arguments, the Government indicated that JE would not have invented the allegations because she knew nothing about sex before the charged offenses. (R. at 398-99, 401-03, 413-14). This was one of the Government's central themes. However, Criminal Investigation Command [CID] reports documented that JE had been sexually abused by her biological mother's ex-boyfriend prior to the alleged offenses with Appellant. (CID Investigation Report, December 11, 2022). This evidence directly contradicted the Government's factual assertion and was highly relevant to rebut the inference that JE lacked the knowledge or experience necessary to invent detailed sexual allegations.

Moreover, that evidence is admissible under Mil. R. Evid. 412(b)(3), which permits evidence of an alleged victim's sexual behavior or predisposition when its exclusion would violate the accused's constitutional rights—here, the

Sixth Amendment rights to confrontation, to present a complete defense, and to due process. *See* Mil. R. Evid. 412(b)(3); *Olden v. Kentucky*, 488 U.S. 227, 230-233 (1988); *United States v. Williams*, 37 M.J. 352, 359-60 (C.M.A. 1993).

Defense counsel's failure to confront JE with this prior sexual abuse was objectively unreasonable. Having JE admit on cross-examination that she had previously been sexually abused by another man would have directly and powerfully undermined the Government's core credibility argument.

II. Defense counsel was ineffective for soliciting "human lie detector" testimony.

During direct examination, Special Agent (SA) PL testified that he had interviewed Appellant for this case. (R. at 249). During cross-examination, defense counsel and SA PL engaged in the following colloquy:

Q. Did [Appellant] think about his answers, at times?

A. He did.

Q. And when you thought about his answer, was he – what was his demeanor?

A. Your typical body language, when somebody is thinking about an answer. For example, looking up and away, would be one example.

(R. at 256). These were the last comments the panel members heard from SA PL.

(R. at 256-57).

A witness may not opine as to whether another person was truthful, called “human lie detector” testimony, which “usurp[s] the exclusive function of the jury to weigh the evidence and determine credibility.” *United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007) (internal quotation marks omitted); *see also United States v. Martin*, 75 M.J. 321, 325 (C.A.A.F. 2016) (“Human lie detector evidence is inadmissible at a court-martial . . . because it is a fundamental premise of our criminal trial system that the panel is the lie detector[.]” (alterations and internal quotation marks omitted)). Testimony need not be express; it may be the functional equivalent of human lie detector testimony when its substance leads members to infer that the witness believes someone is untruthful. *Martin*, 75 M.J. at 324 (C.A.A.F. 2016).

By deliberately eliciting SA PL’s description of Appellant’s behavior as “typical body language” of looking up and away while formulating answers, defense counsel invited the members to conclude that an experienced CID agent viewed Appellant’s demeanor as indicative of deception or evasion. That inference is precisely the prohibited human-lie-detector effect condemned in *Brooks* and *Martin*. Because these improper comments were the final words the panel heard from the interviewing agent, they carried heightened prejudicial force, leaving the members with a lasting, expert-sounding suggestion that Appellant had been untruthful. No tactical benefit justified the inquiry; the testimony did not

advance any defense theory and instead handed the Government an expert-sounding comment on Appellant's credibility from its own investigator as the last impression from that key witness.

III. Defense counsel's cumulative errors deprived appellant of effective assistance of counsel.

Even if defense counsels' two deficiencies were viewed in isolation, their combined effect deprived Appellant of effective assistance guaranteed by the Sixth Amendment. These errors compounded one another. Defense counsels' failure to impeach JE left her testimony largely unchallenged on the critical issue of sexual knowledge and motive to fabricate. Simultaneously, defense counsels' solicitation of SA PL's demeanor testimony injected an expert-sounding suggestion that Appellant was untruthful. In a case that turned almost entirely on which of two accounts the panel members believed, defense counsel (1) failed to undercut the complainant's credibility with available, admissible evidence, and (2) actively bolstered the Government's case against the accused's credibility. No coherent trial strategy explains either choice, let alone both.

As a result, the panel members were left with a distorted evidentiary picture: an unimpeached complainant portrayed as sexually naïve, and an investigator's suggestion that Appellant was lying. But for defense counsels' errors, there is a reasonable probability of a different result. *See Strickland*, 466 U.S. at 698; *Captain*, 75 M.J. at 103; *United States v. Pope*, 69 M.J. 328,

335 (C.A.A.F. 2011) (stating that, under the cumulative error doctrine, this Court must evaluate the collective prejudicial effect of all of defense counsel's errors to determine if their combined impact denied the appellant fair proceedings).

Certificate of Filing and Service

I certify that a copy of the foregoing in the case of *United States v. Erb*,
Crim. App. Dkt. No. 20240542, USCA Dkt. No. 26-0282/AR, was electronically
filed with this Court and the Government Appellate Division on October 15, 2026.



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