

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

**UNITED STATES**

Appellee

v.

**Jonathon V. TYSON**

Senior Airman (E-4)  
United States Air Force

Appellant

**SUPPLEMENT TO PETITION  
FOR GRANT OF REVIEW**

Crim. App. Dkt. No. ACM 40617

Misc. Dkt. No. 2026-02

USCA Dkt. No. 26-0213/AF

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

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## ISSUES PRESENTED

- I. Whether Appellant’s convictions under Specifications 5, 8, and 9 of the Charge are legally sufficient where the Government’s charging scheme required proof beyond a reasonable doubt of multiple acts occurring in one instance on more than one occasion, but there was no such evidence.**
- II. Whether the lower court conducted its factual sufficiency review of Specifications 5, 8, and 9 of the Charge correctly where the Government’s charging scheme required proof beyond a reasonable doubt of multiple acts occurring in one instance on more than one occasion, but there was no such evidence.**
- III. Whether the lower court abused its discretion in denying Appellant’s petition for a new trial where the newly discovered evidence demonstrated the complaining witness’s knowledge and willingness to fabricate domestic violence by staging injuries and then making a false report to law enforcement.**

## STATEMENT OF STATUTORY JURISDICTION

Senior Airman (SrA) Jonathon V. Tyson’s approved sentence includes a bad-conduct discharge. Accordingly, the Air Force Court of Criminal Appeals (AFCCA) had jurisdiction pursuant to Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3).<sup>1</sup>

The AFCCA also had jurisdiction to review SrA Tyson’s timely petition for new trial under Article 73, UCMJ, 10 U.S.C. § 873, submitted on the grounds of newly discovered evidence when SrA Tyson’s case was pending before the

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<sup>1</sup> All references to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* [hereinafter *MCM*] (2019 ed.) except for those otherwise indicated or any reference to R.C.M. 1210, which is to the version in the 2024 *MCM*.

AFCCA. SrA Tyson now invokes this Court’s Article 67, UCMJ, 10 U.S.C. § 867, jurisdiction to review both decisions below.

### STATEMENT OF THE CASE

On December 15, 2023, a general court-martial consisting of officer and enlisted members found SrA Tyson, contrary to his pleas, guilty of one charge and six specifications of domestic violence in violation of Article 128b, UCMJ, 10 U.S.C. § 928b. R. at 117, 120, 1157–58. The panel acquitted SrA Tyson of three other specifications of domestic violence. R. at 117, 1157. The members sentenced SrA Tyson to a reduction to the grade of E-1, confinement for one year, and a bad-conduct discharge. R. at 1241–42. He received 246 days of pre-trial confinement credit. R. at 1244. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action.

SrA Tyson filed his assignments of error brief with the AFCCA on August 29, 2025. He later submitted a petition for new trial on January 23, 2026, on the grounds of newly discovered evidence. On April 13, 2026, the AFCCA affirmed the findings and sentence and denied the petition for new trial. Appendix at 1, 26.

SrA Tyson timely petitioned this Court for review on June 5, 2026, and moved to file the supplement to the petition subsequently. This Court granted the motion to file subsequently, setting the filing deadline for this supplement as June 29, 2026.

## STATEMENT OF FACTS

- A. Before MR met SrA Tyson, she accused her former husband of domestic violence and learned that whoever presents with a visible injury will be labeled a victim.**

In 2021, SrA Tyson met MR on Tinder, an online dating app. R. at 517. A month and a half later, MR moved in with SrA Tyson on Minot Air Force Base. R. at 631. At the time, MR was married to an active-duty member also stationed at Minot, Technical Sergeant (TSgt) AC.<sup>2</sup> R. at 632.

TSgt AC married MR “roughly around” 2015. R. at 629. But in 2014, MR and TSgt AC got into a physical altercation when they were living together on Holloman Air Force Base. R. at 736–37. MR told Security Forces that TSgt AC “took a key and scratched his face to make it look like she had dug her nail into his face worse than before.” Post-Trial Submission of Matters, Atch. 1 at 6; *see* R. at 741 (explaining MR stated TSgt AC “had taken the key to his own face”). When asked if TSgt AC ever hit, pushed, or restrained her before, she accused him of “always push[ing] [her] against walls, scream[ing] at [her] face, and throw[ing] things at [her].” Post-Trial Submission, Atch. 1 at 6. But in a post-trial interview with TSgt AC, he denied all of MR’s allegations, including those of self-harm. Petition for New Trial, Appendix D.

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<sup>2</sup> At trial, AC was a Staff Sergeant. But when the petition for new trial was submitted, AC was a TSgt.

During trial, the defense attempted to cross-examine MR about this incident. R. at 722. The defense asserted that MR had a motive to fabricate the allegations against SrA Tyson because she was previously exposed to a domestic violence incident where she learned that whoever presents with an injury will be labeled the victim. R. at 746. The theory of relevance focused on self-harm. *See* R. at 747 (“[T]his is her explaining away the cut on his face with self-harm — she’s not responsible.”). This evidence was excluded. R. at 756–57.

**B. MR accused SrA Tyson of numerous domestic violence offenses, for which she was the only source of evidence.**

At trial, MR testified that her relationship with SrA Tyson was physically abusive from late April 2022 to April 2023. R. at 535–50. By that time, in May 2022, MR had divorced TSgt AC. R. at 632.

During this timeframe, MR broadly asserted that SrA Tyson would grab her, threaten her, point his gun at her, and destroy her things. *See, e.g.*, 536, 570, 600. She said he would kick and punch her. R. at 536. Every time they argued, which she claimed was every day for one year, he punched her in the left arm. R. at 536, 570; *see* Charge Sheet at 1 (showing Specification 5 alleges “punching her arms”). She provided photos of bruises from May 2022, July 2022, and February 2023 (Pros. Exs. 8–11, 19), stating the bruises were from SrA Tyson doing something to her. R. at 538–49, 814–15. But no photo was corroborated by an independent source.

In October, SrA Tyson and MR got engaged, but the engagement was short-lived for SrA Tyson. R. at 527; *see* Pros. Ex. 17 (calling her his “ex” by February 2023). By early January 2023, SrA Tyson told MR that she had four months to get out of his house. Pros. Ex. 16 at 7. He called her his “desperate ex” in late February. Pros. Ex. 17. But MR stayed in SrA Tyson’s house. *See* Pros. Ex. 16; R. at 527.

From late 2022 to April 2023, the relationship further devolved. Pros. Ex. 16. SrA Tyson wanted the engagement ring back. R. at 613; Pros. Ex. 16 at 34. He expressed how much he disliked MR. R. at 584–85; Pros Ex. 12. And SrA Tyson was seeing other women. Pros. Ex. 16 at 3, 10, 12, 24–25; Pros. Ex. 17. In videos MR took of SrA Tyson damaging property in the house, SrA Tyson demanded that MR leave his house and verbally berated her. Pros. Ex. 12; R. at 584–85. He “want[ed] [MR] out.” Pros. Ex. 16 at 11. She told no one about the alleged everyday physical abuse. And she did not leave the house. R. at 527.

At the end of the four-month period MR was given to leave SrA Tyson’s house, MR made numerous allegations, including her “stuff” and phone being destroyed. R. at 321, 585–86. Then, the relationship exploded on April 14, 2023. On that day, MR called her supervisor and said SrA Tyson was destroying her stuff, but she also said she was “safe.” R. at 296. Nevertheless, members of her work and members of SrA Tyson’s unit showed up at SrA Tyson’s house. R. at 300. When

they rang the doorbell, MR testified that SrA Tyson was strangling her and that she was literally saved by the bell. R. at 602.

But no domestic violence claims were relayed to the members of the unit when they arrived, and MR took some time answering the door. R. at 302–03, 337–38. When she did, they could see she had bruises on her legs and she appeared upset and disheveled. R. at 302. They told her to go get SrA Tyson. R. at 303. She was gone for a few minutes. R. at 338. When she returned, she said he did not want to come and speak to them. R. at 385–86. They sent her back upstairs to him. R. at 338. She was gone for several minutes again. R. at 338. This time, when she came back, she had a fresh cut on her leg.<sup>3</sup> R. at 339. At some point, the members noticed the cut and pulled her out of the house. R. at 339, 387–88. At that point, MR said she did not want to get anyone in trouble and “just wanted him to stop destroying her stuff.” R. at 305.

Law enforcement arrived, and SrA Tyson was arrested and put into pretrial confinement. R. at 401–03; Department of Defense (DD) Form 2707, *Confinement Order* (Apr. 14, 2023). DNA evidence was collected but it did not corroborate any allegation of domestic violence. *See, e.g.*, R. at 876 (showing MR’s DNA was not on SrA Tyson’s hands).

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<sup>3</sup> MR claimed this cut came from SrA Tyson slicing her with scissors when she went to tell him to come downstairs. R. at 604, 711–19. SrA Tyson was acquitted of this allegation. *Compare* Charge Sheet at 1, *with* R. at 1157.

Photos of MR were taken over the next few days to document bruise progression. Pros. Exs. 2–4. There were marks on her neck, which experts said were likely not self-caused. R. at 995–96. But there was also a photo provided by MR showing a red mark on her neck, which she claimed came from SrA Tyson when he pinched her in February 2023. R. at 814–15; Pros. Ex. 19 at 1. An expert noted the similarities between the pinch marks in the February 2023 photo and the strangulation marks from April 2023. R. 1003–05. The experts could not age the bruises, explain where they came from, or explain what caused them. R. at 943, 997–1003, 1011. All the pictures that MR provided or that law enforcement took on or near April 14, 2023, required MR to explain the source. There were no outcry witnesses or eyewitnesses to any physical violence.

**C. Evidence at trial revealed that MR was not a truthful person or credible witness.**

No one testified that MR was a truthful person. Instead, an Air Force officer from the medical group testified that MR did not have a character for truthfulness. R. at 968. It was undisputed that MR lied about her age repeatedly. *E.g.*, R. at 637–43, 798–800, 807–08, 845–47, 918–20. She also lied about being enrolled in Family Advocacy. R. at 577. While she told her co-workers that SrA Tyson destroyed her stuff and they were having “marital issues,” she never told anyone that any physical

violence occurred, despite taking pictures of bruises ostensibly caused by SrA Tyson since May 2022. R. at 307, 321, 538.

MR also appeared to lie about her marital status. She told people she was married to SrA Tyson. R. at 558, 660. But in February 2023, she had called SrA Tyson her fiancé, not husband, in text messages. Pros. Ex. 17.

The defense impeached MR on these numerous topics: “lying about her age, accessing [SrA Tyson’s] social media and email accounts after his arrest, mistakenly believing she and [SrA Tyson] were married, inconsistencies in her testimony and statements she made to investigators or prior testimony, and improbabilities of her recitation of the charged offenses.” U.S. Resp. to Assignments of Error at 23. MR also had many motives to fabricate: “anger at breaking up, alleged infidelities, embarrassment, revenge, and MR previously slapping [SrA Tyson] or ‘snapping’ emotionally during arguments.” *Id.* at 23–24.

There were also Facebook messages between MR and SrA Tyson in the days leading up to April 14, 2023. Pros. Ex. 16. There, MR initially asserted that SrA Tyson had been “silently” terrorizing her for three months. Pros. Ex. 16 at 6. MR accused SrA Tyson of infidelity and using her for sex. *Id.* at 3-8, 10. But then, she accused him of hitting her and doing something to her rib within the past day. Pros. Ex. 16 at 8. She invited him to “go round [two].” *Id.* at 26. A video of SrA Tyson and MR from April 13, 2023, the same timeframe as these texts, only included an

accusation of him breaking her phone—no physical abuse. R. at 699–701; *see* R. at 823 (discussing the phone in the video).

When MR continued to bring up over Facebook messages her allegation of SrA Tyson recently hurting her, SrA Tyson said, “Take me to court.” Pros. Ex. 16 at 17. She continued asserting he abused her, and his response was: “Take me to court bitch,” followed by, “You’re wasting your time.” *Id.* at 25. Less than ten seconds later, MR wrote, “All of the pictures and video I have will never be dismissed,” followed with, “You have no marks on you but everything is on me.” *Id.* She asserted that she would “deal with him” the next morning. *Id.* at 39. The next morning, SrA Tyson was arrested for domestic violence. DD Form 2707, *Confinement Order*.

**D. After SrA Tyson was convicted, MR manipulated, threatened, and fabricated domestic violence allegations against another boyfriend.**

After SrA Tyson was arrested in April 2023, MR began dating AF. Petition for New Trial, Appendix C. AF attempted to break up with MR in 2024. *Id.* Thereafter, in various recordings made by AF, MR says the following:

“I’m actually going to set it up so that way it’s going to look like you hit me and I’m going to call the cops and it’s going to get really ugly really quick because that’s what you deserve for fucking with me bro.”

- Petition for New Trial, Appendix A, Clip 1 at 3:02–3:15.<sup>4</sup>

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<sup>4</sup> Any reference to a “clip” is to Appendix A.

“I’m going to have my brother pinch the fuck out of me. As soon as I touch down in Minot, Imma call the cops and be like this man literally just fucking hit me and threw me around his fucking apartment -- er his house.”

- Clip 1 at 3:24–3:34.

“I’ll deal with you Tuesday.”

- Clip 3 at 00:26–00:30.

“Just writing down ideas for what I’m going to do on Tuesday . . . I’m not telling you. . . I’m just tired, you know, tired of being treated like shit by men. So, I’m, I’m literally taking you down, each one of you down, one by one so.”

- Clip 3 at 3:05–3:43.

“I hope you know you’re gonna get in a lot of trouble. . . . I hope you know for the time you fucking hit me! Yeah! Yeah! You wanna go there! Yes you did, yes you did! I have pictures! I have pictures. . . . You wanna do what the fuck I say or do you want me to get you in trouble?”

- Clip 4 at 00:16–00:33.

MR repeatedly states that AF will “pay,” either money for “wasting a year” of her life or in “another” way. *See generally* Clips 1–10. She also accuses him of being the reason she must start a new life and for her not having a home or a job. *Id.*

AF repeatedly denies all allegations of abuse. *See generally* Clips 1–12; Petition for New Trial, Appendix C. At one point, when AF confronts MR about threatening him and “trying to falsely . . . accuse [him] of a crime,” MR responds, “[T]hat’s crazy cause that’s exactly what [SrA] Jonathon [Tyson] was saying, only for him to be found guilty of the crime.” Clip 8 at 2:14–2:35.

After filing his assignments of error brief, SrA Tyson filed a petition for new trial based on the newly discovered evidence of MR threatening AF with false domestic violence allegations. SrA Tyson asserted that the newly discovered evidence went to the heart of the case, MR's credibility, because every allegation relied on MR being credible and her allegations being true, which the newly discovered evidence casted doubt on.

**E. The Air Force Court summarily affirmed the convictions and denied the petition for a new trial.**

The Government charged three specifications that required proof of very specific conduct occurring on more than one occasion. First, the Government alleged that SrA Tyson, from May 1, 2022, to April 14, 2023, on divers occasions, “punch[ed] [MR's] arms and torso with his fists.” Charge Sheet at 1. Second, the Government alleged that SrA Tyson from between on or about December 1, 2022, to on or about April 14, 2023, on divers occasions, “destroy[ed] clothing, shoes, hair appliances, toiletries, bags, a cooler, makeup items, eye-glasses, and other household items . . . the property of [MR].” *Id.* at 3. Finally, the Government charged that SrA Tyson from between on or about December 1, 2022, to on or about April 14, 2023, on divers occasions, “communicat[ed] a threat by telling [MR], ‘I’m going to have to kill you,’ and ‘I’m going to blow your brains out’ or words to that effect.” *Id.*

For each specification, SrA Tyson challenged the legal and factual sufficiency of the convictions, asserting that the Government failed to prove the specific conduct

it charged based on the unit of prosecution. The AFCCA did not address these arguments when it found all the convictions legally or factually sufficient. Appendix at 15–17.

The AFCCA addressed the petition for new trial in the same opinion. Appendix at 23–25. The AFCCA agreed that the newly discovered evidence was discovered after trial and that it could not have been discoverable by SrA Tyson before trial. *Id.* at 25. But the AFCCA ultimately concluded that SrA Tyson “failed to meet his burden to demonstrate a new trial is necessary to avoid manifest injustice.” *Id.* The AFCCA determined that “numerous reasons” led to this conclusion but only discussed “the most significant three.” *Id.* Those three reasons seemed to be that the evidence was not relevant because MR did not admit to perjury, the evidence did not pass the M.R.E. 403 balancing test, and that MR’s credibility was already litigated at trial. *Id.* The AFCCA denied the petition for new trial and affirmed the findings and the sentence. *Id.* at 26.

#### ARGUMENT

SrA Tyson’s case provides this Court the opportunity to define the unit of prosecution for three domestic violence offenses, while also interpreting the impact of “on divers occasions” on this kind of charging scheme. These questions have not been answered by this Court, but they should. C.A.A.F. R. 21(b)(5)(A); *see* Oral Argument at 13:00–13:26, *United States v. Askins*, USCA Dkt. Nos. 26-

0002/AR, 26-0014/AR, <https://www.armfor.uscourts.gov/newcaaf/CourtAudio13/20260519A.mp3> (asking whether “from the Government’s own charging scheme,” the two domestic violence offenses charged under subsection (1) and (5) of 128b, UCMJ, are from the “same course of conduct” when analyzing multiplicity); *id.* at 43:50–44:46 (querying why there is a distinction in Article 128b, UCMJ, between “violent offense” under (1), and “strangulation” under (5), if not to suggest that these are different offenses that cannot be multiplicitous). SrA Tyson’s case presents a different question from *Askins*, focusing on legal sufficiency rather than multiplicity, but it would similarly require this Court to explain how subsections (1), (2)(A), and (2)(B) under Article 128b, UCMJ, should be analyzed. C.A.A.F. R. 21(b)(5)(A).

Separately, this case gives this Court an opportunity to clarify its petition for new trial precedent, which is being erroneously applied. The petition for new trial standard, codified under Article 73, UCMJ, and provided by the President in R.C.M. 1210(f)(2), does not require proof of “manifest injustice.” The AFCCA relied on that outdated requirement to heighten SrA Tyson’s burden beyond that required by R.C.M. 1210. *See United States v. Bacon*, 12 M.J. 489, 491 (C.M.A. 1982) (citing *MCM*, ¶ 109.d (1969 rev. ed.)) (requiring a petitioner to show “*an injustice* has resulted from the findings or the sentence *and* that a new trial would probably produce a substantially more favorable result” (emphasis added)).

Additionally, the AFCCA applied other incorrect legal principles that also conflict with R.C.M. 1210. *Compare* Appendix at 25 (concluding “MR’s credibility was attacked thoroughly at trial,” where she denied fabricating the allegations), *with* U.S. Opposition to Petition for New Trial at 8 (citing *Bacon*, 12 M.J. at 492) (asserting petitions for new trial are not designed to “relitigate” already presented matters decided adversely to the petitioner).

Both these errors come from this Court’s old precedent that predate what the President has prescribed for R.C.M. 1210. While this Court has never repudiated those standards, it should do so now because they conflict with the plain text of the statute. C.A.A.F. 21(b)(5)(B)(i). Even if the AFCCA applied the correct law, though, that application was clearly unreasonable in this case and in conflict with similar cases that this Court has decided. *Id.* Thus, this Court should grant on the petition for new trial issue to address these issues.

**I. SrA Tyson’s convictions under Specifications 5, 8, and 9 of the Charge are legally insufficient because there was no evidence that the charged conduct occurred during the same instance on multiple occasions.**

This Court should grant review to clarify the impact of “on divers occasions” in specifications charging multiple acts in one offense. In doing so, this Court can establish the unit of prosecution for three domestic violence offenses. While *Askins* may establish the unit of prosecution for Specification 5, the legal sufficiency for all three specifications remains unresolved and further dependent

on the application of “on divers occasions.” Thus, there is good cause to grant this petition where these three convictions are legally insufficient as charged, either by the failure to prove the conduct occurred in the same instance or on more than one occasion. *See United States v. English*, 79 M.J. 116, 120 (C.A.A.F. 2019) (permitting narrowing the scope of an offense on appeal); *United States v. Rodriguez*, 66 M.J. 201, 203 (C.A.A.F. 2008) (upholding striking “on divers occasions” to affirm only one instance of the offense).

**A. Standard of review.**

This Court reviews legal sufficiency de novo. *United States v. Moore*, 86 M.J. 308, 311–12 (C.A.A.F. 2026) (citing *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019)). “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.” *Id.* (quoting *United States v. Gutierrez*, 73 M.J. 172, 175 (C.A.A.F. 2014)).

**B. The units of prosecution for assault and destruction of property show the convictions are legally insufficient.**

The three domestic violence specifications at issue each incorporated another offense into the charging scheme: assault, Article 128, UCMJ; destruction of property, Article 109, UCMJ; and communication of a threat, Article 115, UCMJ, respectively. Charge Sheet at 1, 3 (pictured on next page with highlights). For each specification, the Government’s charging scheme alleged “a violent

offense” or “an act” as a course of conduct, i.e., multiple blows, multiple items destroyed, and multiple threats. *Id.*; see R. at 1059, 1064, 1066 (explaining in the instructions that the panel had to find SrA Tyson “committed a violent offense” or “an act in violation of the [UCMJ]” (emphasis added)). All offenses alleged “on divers occasions.” Charge Sheet at 1, 3.

<p>Specification 5: In that SENIOR AIRMAN JONATHON TYSON, United States Air Force, 5th Maintenance Group, Minot Air Force Base, North Dakota, did, at or near Minot Air Force Base, North Dakota, between on or about 1 May 2022 and on or about 14 April 2023, on <u>divers occasions</u>, commit a violent offense against MR [REDACTED], the intimate partner of the accused, to wit, by punching her arms and torso with his fists.</p>	<p>1 JUNE 23 TCB</p>
<p>Specification 8: In that SENIOR AIRMAN JONATHON TYSON, United States Air Force, 5th Maintenance Group, Minot Air Force Base, North Dakota, did, at or near Minot Air Force Base, North Dakota, between on or about 1 December 2022 and on or about 14 April 2023, on <u>divers occasions</u>, with the intent to threaten and intimidate the intimate partner of the accused, commit an offense in violation of the UCMJ against any property, to wit, willfully and wrongfully destroy clothing, shoes, hair appliances, toiletries, bags, a cooler, makeup items, eye-glasses, and other household items of a value of about \$3,000.00, the property of MR [REDACTED]</p>	<p>1 JUNE 23 TCB</p>
<p>Specification 9: In that SENIOR AIRMAN JONATHON TYSON, United States Air Force, 5th Maintenance Group, Minot Air Force Base, North Dakota, did, at or near Minot Air Force Base, North Dakota, between on or about 1 December 2022 and on or about 14 April 2023, on <u>divers occasions</u>, with the intent to threaten and intimidate the intimate partner of the accused, commit an offense in violation of the UCMJ against MR [REDACTED], to wit, wrongfully communicate to MR [REDACTED] a threat to kill her.</p>	<p>1 JUNE 23 TCB</p>

To determine whether SrA Tyson committed the conduct in each specification, it is necessary to understand how “on divers occasions” impacts the incorporated offense. This can only be gleaned from the unit of prosecution. Based on this Court’s precedent on units of prosecution, the Government’s charging scheme charged a singular, uninterrupted act in each specification.

This Court has provided the unit of prosecution for assault, under Article 128, UCMJ, and property damage under Article 109, UCMJ. *United States v. Flynn*, 28 M.J. 218, 221 (C.M.A. 1989) (first citing *United States v. Morris*, 18

M.J. 450 (C.M.A. 1984); and then citing *United States v. Rushing*, 11 M.J. 95 (C.M.A. 1981)) (“Congress intended assault . . . to be a continuous course-of-conduct-type offense and that each blow in a single altercation should not be the basis of a separate finding of guilty.”); *United States v. Collins*, 36 C.M.R. 323, 325 (C.M.A. 1966) (“[W]hen several articles of property are damaged, in violation of Article 109, under circumstances indicating only a single incident or transaction, the damage must be alleged as part of one offense.”). The principles in these cases apply to communication of a threat as well. *See Collins*, 36 C.M.R. at 326 (assessing how when the Government alleges multiple things in a specification, the question becomes “whether the [conduct all occurred] in a single incident, as alleged in the specification, and as to which the Government has the burden of proof”).

Article 128b, UCMJ, incorporates these offenses in its subsections. 10 U.S.C. §§ 928b(1), (2)(A)–(B); *MCM* (2024 ed.), pt. IV, ¶¶ 78a.b(1), (2)(a)–(b). Therefore, the incorporated offenses’ units of prosecution should govern when Article 128b, UCMJ, textually asserts “a violent offense” or “an offense” under the UCMJ.

The instructions support this determination. The panel had to find that SrA Tyson committed *a singular* “violent offense” or “act.” R. at 1059, 1064, 1066. These instructions show the parties’ interpretation of the specification: there was a

singular event, i.e., *an* assault, *an* instance of property destruction, and *an* instance of communicating a threat, where each event was described with specificity, i.e., the manner and harm, the property affected, and the words spoken. Since this is a reasonable interpretation of the specification, this version controls. *United States v. George*, 86 M.J. 38, 42–43 (C.A.A.F. 2025). Therefore, as charged, each specification alleged a *singular set of conduct*—not individual offenses occurring over a period. This is also supported by the Government’s charging scheme in other specifications where it charged assaults and property damage as distinct acts, even when occurring in or around the same time. *See* Charge Sheet (charging kicking separate from punching and destruction of MR’s phone separate from destruction of her various other items).

The addition of “on divers occasions” to the specifications thus alleges that the charged *set* of conduct had to happen on more than one occasion. *Rodriguez*, 66 M.J. at 203. This would mean “punching MR in the arms *and* torso” at least twice, destroying the *whole list of items* at least twice, and threatening MR with *both* phrases at least twice. But the Government did not prove this.

In analyzing legal sufficiency for *all* offenses, the AFCCA made no mention of the specific words in the charging scheme. Appendix at 15–16. The AFCCA simply recited the legal sufficiency standard and then held that multiple specifications were legally sufficient. *Id.* But the Government failed to prove that

the conduct alleged in three specifications happened as charged, to include occurring on more than one occasion. *English*, 79 M.J. at 120; *Rodriguez*, 66 M.J. at 203.

Thus, this Court should grant review to assess how “on divers occasions” affects the legal sufficiency analysis of these three domestic violence specifications where the unit of prosecution is a singular act.

**II. The AFCCA did not conduct its factual sufficiency review of Specifications 5, 8, and 9 of the Charge correctly because there was no evidence that the charged conduct occurred during the same instance on multiple occasions.**

The AFCCA’s legal sufficiency analysis in this case either ignored the law or was influenced by an erroneous view of the law about what the Government had to prove, as discussed *supra*. If that is true, then the AFCCA’s factual sufficiency analysis was similarly tainted. Where the AFCCA fails to “consider all applicable legal principles,” the case should be remanded for a new factual sufficiency review. *Moore*, 86 M.J. at 310.

**A. Standard of review.**

This Court may review whether the AFCCA applied “correct legal principles” in performing its factual sufficiency review. *Moore*, 86 M.J. at 312 (quoting *United States v. Harvey*, 85 M.J. 127, 129 (C.A.A.F. 2024)).

**B. The AFCCA’s factual sufficiency analysis ignored the specifics of the charging scheme, showing an erroneous view of the law.**

The AFCCA’s factual sufficiency review was stunted and did not address SrA Tyson’s specific deficiency in proof: the Government failed to prove the specific conduct charged. Appendix at 15–17. Rather, it only focused on how the convictions were factually sufficient because it found MR to be a credible witness. *Id.* But the AFCCA’s determination about MR’s credibility cannot make up for the Government’s failure to elicit the correct evidence for the conviction to be legally *or* factually sufficient. *English*, 79 M.J. at 120; *Rodriguez*, 66 M.J. at 203.

For each challenged conviction, the AFCCA lumped its analysis of multiple specifications together. *See, e.g.*, Appendix at 15 (blending the analysis for Specifications 4 and 5 together: “MR testified that on multiple occasions, between May 2022 and April 2023, Appellant kicked her legs with his feet and punched her arms and body with his fists.”). The blending of multiple allegations together shows that the AFCCA failed to appreciate the significance of the charging schemes. Instead of parsing the conduct and instances alleged, the AFCCA treated the charged acts as a continuous course of conduct that can be affirmed because it found MR credible. But there was no *Hyppolite*-esque<sup>5</sup> instruction in this case that

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<sup>5</sup> *United States v. Hyppolite*, 79 M.J. 161 (C.A.A.F. 2019).

would have allowed for such an interpretation. *See* R. at 1041–46 (denying such instruction).

Because the AFCCA failed to consider all applicable legal principles, this Court should grant review of this factual sufficiency review issue, especially if it grants on the legal sufficiency challenge above (Issue I).

### **III. The AFCCA abused its discretion in denying SrA Tyson’s petition for a new trial when newly discovered evidence revealed MR was willing and able to fabricate domestic violence allegations.**

The AFCCA abused its discretion two ways. First, incorrect legal principles were used. The AFCCA applied the “manifest injustice” standard, holding SrA Tyson “failed to meet his burden to demonstrate a new trial is necessary to avoid a manifest injustice.” Appendix at 25. This standard was changed by R.C.M. 1210 in 1984. *Compare MCM*, ¶ 109.d (1969 rev. ed.), with Executive Order No. 12473, 49 Fed. Reg. 17152, 17249 (Apr. 23, 1984). Despite this change in the text, this Court has kept the old standard alive. *See, e.g., United States v. Hull*, 70 M.J. 145, 152 (C.A.A.F. 2011) (quoting *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993)) (requiring a “manifest injustice”).

Additionally, the AFCCA appears to have applied a fraud on the court standard to SrA Tyson’s case. Appendix at 25 (determining the newly discovered evidence did not reveal MR admitting to perjury). SrA Tyson did not raise fraud on the court. Coupled with misunderstanding the grounds for the petition for new trial,

the AFCCA appears to have adopted an argument by the Government about SrA Tyson not being able to “relitigate” MR’s credibility, despite this standard also being untethered from R.C.M. 1210. U.S. Opposition to Petition for New Trial at 8 (citing *Bacon*, 12 M.J. at 492) (arguing that SrA Tyson could not “relitigate general matters which were presented below and decided adversely to him”). The AFCCA’s conclusion that “MR’s credibility was attacked thoroughly at trial” suggests that the AFCCA determined the new evidence would only “relitigate” this issue. Appendix at 25. But this is not the correct standard. R.C.M. 1210.

Second, the AFCCA’s application of R.C.M. 1210 to the facts of SrA Tyson’s case was clearly unreasonable. The AFCCA’s brief three paragraph analysis shows it misapplied the law and misunderstood SrA Tyson’s petition to the point of being a clearly unreasonable application of the law to the facts of this case.

This Court should grant review to confirm that R.C.M. 1210 abrogated the law that the AFCCA applied in this case and clarify what law should be used when analyzing a petition for new trial raised under R.C.M. 1210(f)(2) versus R.C.M. 1210(f)(3). *See United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017) (“[I]f possible, every word and every provision is to be given effect and . . . no word should be ignored or needlessly be given an interpretation that causes it to duplicate another provision. . . .”).

**A. Standard of review.**

The AFCCA’s denial of a petition for new trial is reviewed under an abuse of discretion standard. *United States v. Gray*, 51 M.J. 1, 12 (C.A.AF. 1999). “Legal error (*i.e.*, an abuse of discretion) occurs if the findings of fact upon which [the lower court] predicates [its] ruling are not supported by evidence of record; if incorrect legal principles were used . . . ; or if [the lower court’s] application of the correct legal principles to the facts of a particular case is clearly unreasonable.” *Id.*

**B. The AFCCA applied incorrect legal principles to SrA Tyson’s case. If it applied any correct legal principles, the AFCCA did so in a clearly unreasonable manner.**

**1. The “manifest injustice” standard has been abrogated.**

Following a recitation of R.C.M. 1210, the AFCCA cited this Court’s precedent that petitions for a new trial are “granted only if a manifest injustice would result absent a new trial.” Appendix at 24 (citing *Hull*, 70 M.J. at 152). The AFCCA then concluded that SrA Tyson “failed to meet his burden to demonstrate a new trial is necessary to avoid a manifest injustice.” *Id.* at 25. Even after seemingly applying R.C.M. 1210, the AFCCA finished its analysis with the manifest injustice standard again. *Id.* But this standard has been abrogated.

The President has prescribed the governing standard for a petition for new trial on the grounds of newly discovered: “The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would

probably produce a substantially more favorable result for the accused.” R.C.M. 1210(f)(2)(C). This standard was established in 1984 by President Reagan in Executive Order No. 12473. 49 Fed. Reg. at 17152, 17249. President Reagan issued R.C.M. 1210(f)(2)(3) in the exercise of both his own constitutional authority, *id.* at 17152, and Congress’s delegated constitutional authority from 10 U.S.C. § 836(a) (1982). Every President since has left it intact. *Compare* 49 Fed. Reg. at 17249, *with* R.C.M. 1210(f)(2)(C).

“[W]hen the statutory language is plain,” a court “must enforce it according to its terms.” *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). R.C.M. 1210(f)(2)(C)’s standard for granting a petition for new trial is plain. It is the courts’ duty to apply that presidentially prescribed language in accordance with its plain terms. No “manifest injustice” requirement exists—any more.

The AFCCA did not apply R.C.M. 1210’s standard. Rather it applied a “manifest injustice” standard that predates the rule. The AFCCA’s citation to this Court’s decision in *Hull* demonstrates so. Appendix at 24 (citing *Hull*, 70 M.J. at 152). *Hull* uses the “manifest injustice” language, citing *Williams*. 70 M.J. at 152. *Williams*, in turn, cites: (1) *Bacon*; (2) two other pre-1984 *MCM* cases; and (3) *United States v. Giambra*, 33 M.J. 331, 335 (C.M.A. 1991). *Williams*, 37 M.J. at 356. *Giambra*—the only R.C.M. 1210-era case that *Williams* cites in support of the manifest injustice standard—never refers to such a standard; neither the word

“manifest” nor “injustice” even appears in that opinion. Rather, *Williams*’ invocation of the manifest injustice standard is predicated exclusively on pre-1984 *MCM* case law: *Bacon*.

*Bacon* expressly notes that the “manifest injustice” standard came from “paragraph 109*d*, [*MCM*, 1969 (Revised edition)].” 12 M.J. at 490. That paragraph provided, in part, that “[s]ufficient grounds for granting a new will be deemed to exist only if . . . all the facts and information . . . affirmatively establish that *an injustice* has resulted from the findings or the sentence *and* that a new trial would probably produce a substantially more favorable result for the accused.” *MCM*, ¶ 109.*d* (1969 rev. ed.) (emphasis added). No “establish[ing] . . . an injustice” standard appears in today’s R.C.M. 1210. Only the latter requirement remains. Thus, this Court’s use of the “manifest injustice” language, cited multiple times by the AFCCA, does not constitute a plain interpretation of R.C.M. 1210. It was error for the AFCCA to apply this abrogated, non-textualist standard.

The AFCCA abused its discretion by relying on this abrogated standard. This case is an ideal vehicle for this Court to clarify the correct standard for petition for new trial and that the manifest injustice standard no longer applies.

**2. MR's lack of credibility at trial should have bolstered the petition for a new trial, not cut against it, which indicates another use of incorrect legal principles by the AFCCA.**

Part of the AFCCA's short analysis on the petition for new trial concludes that MR's credibility was sufficiently attacked at trial. Appendix at 25. While the AFCCA cited no law for this, it appears to have relied on the Government's erroneous view of the law. The Government argued that a petition for a new trial cannot be used to "relitigate" an issue that was litigated at the original trial. U.S. Opposition to Petition for New Trial at 8 (citing *Bacon*, 12 M.J. at 492). This is the same point articulated by the AFCCA: MR's credibility was attacked at trial and thus, the new evidence only relitigates this issue. Appendix at 25. But this is not the standard for a new trial under R.C.M. 1210 nor is it supported by precedent.

**a. Impeachment can be the basis for a new trial.**

"Impeachment can be defined as an attack on the credibility or believability of a witness. In general, it is a process of explaining away a witness' testimony as to the existence of a fact at issue in a trial." *United States v. Banker*, 15 M.J. 207, 210 (C.M.A. 1983) (cleaned up). The AFCCA has recognized that "[i]mpeachment evidence may constitute 'newly discovered' evidence sufficient to support a request for a new trial" if it goes to "the substance of the defense," and not to a "separate matter not otherwise relevant to the proceeding." *United States v. Johnson*, No. ACM 34889, 2004 CCA LEXIS 133, at \*24–25 (A.F. Ct. Crim. App.

May 21, 2004) (first citing *Williams*, 37 M.J. at 355; and then citing *United States v. Niles*, 45 M.J. 455, 459 (C.A.A.F. 1996)). R.C.M. 1210(f)(2)(C) does not limit or exclude impeachment either.

And yet, the AFCCA cast aside the value of impeachment here, suggesting that MR had already been sufficiently impeached on other matters and that further impeachment evidence—that corroborated the defense theory—had little additional value. But this was an erroneous analysis. The pertinent inquiry was “whether a different court-martial might have reached a result more favorable to the accused in light of arguments defense counsel might have brought to bear with knowledge of [the new evidence] as well as the differences in the testimony of the [witnesses].” *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005). An example of such evidence is “noncumulative, uncontradicted impeachment evidence which [is] relevant not only to a material issue in this case but the dispositive issue in this case – the victim’s credibility.” *Williams*, 37 M.J. at 357 (citations omitted). The newly discovered evidence had this effect and impact.

The newly discovered evidence went to the heart of the case: MR’s credibility. At trial, the senior defense counsel said it best: “Members, make no mistake. This case is about false allegations.” R. at 1106. Every allegation relied on MR being credible and her allegations being true. The new evidence would have attacked MR’s denials that she fabricated her allegations against SrA Tyson and

that her injuries were self-induced, accidental, or came from other sources. It provided the foundation to show MR *would* inflict self-harm or ask someone else to do so. The defense did not have evidence that MR would do this at the time, but it was their theory. If the defense could have confronted MR with her willingness to fabricate a domestic violence allegation against an intimate partner under similar facts, that would have significantly weakened MR's credibility. The AFCCA failed to analyze how the newly discovered evidence *further* discredited MR in the way that it mattered, casting it as seemingly cumulative—when it was not—or based on a misunderstanding of the law that impeachment was not grounds for a new trial.

**b. The AFCCA seemingly relied on *Bacon* to dismiss the impact of the impeachment evidence.**

The AFCCA's analysis is sparse but appears to echo the Government's argument. *Compare* U.S. Opposition to Petition for New Trial at 8, 10, 13 (discussing *Bacon* and MR's credibility being attacked at trial), *with* Appendix at 25 (discussing how "MR's credibility was attacked thoroughly at trial"). But *Bacon*'s statement about "not relitigating" an issue is taken out of context. The statement comes from *United States v. Bouchier*, which provided in 1954 that "a party shall not lightly be permitted to relitigate issues once decided." 17 C.M.R. 15, 25 (C.M.A. 1954). This is not the Presidentially prescribed standard today, which *Bacon* and *Bouchier* pre-date. Moreover, this standard conflicts with cases like *Williams*, and *United States v. Sztuka*, 43 M.J. 261 (C.A.A.F. 1995), both of

which focused on how the defense could “relitigate” the credibility determination of a prosecution witness.

*Sztuka* is particularly applicable here. Both here and in *Sztuka*, the defense presented a theory of framing and false allegations but were unsuccessful. 43 M.J. at 264; *see R.* at 1106 (asserting the theory of “false allegations”). In both cases, there was corroborating evidence for the spurred partner’s account. *See* 43 M.J. at 263–64 (highlighting a sworn statement, supported by a positive urinalysis, countered any defense theory that the husband framed his wife); *see, e.g.*, Pros. Exs. 2, 5 (showing bruises on MR). Both MR and the husband in *Sztuka* testified similarly: they “frequently claimed that [they] could not remember at convenient points in the questioning; often evaded answering difficult questions and ultimately did so, if at all, only when doggedly pursued by defense . . . ; and on occasion, after repeated and focused questioning by defense counsel, ultimately acknowledged what earlier [they] had denied.” *Sztuka*, 43 M.J. at 265; *see R.* at 1117 (summarizing that MR testified to “I don’t know,” “I don’t remember,” or “it was such a blur” over eighty-seven times, eighty-two of which were during cross-examination). As with *Sztuka*, SrA Tyson’s “trial that came down to a single question: Who did the members believe.” *Sztuka*, 43 M.J. at 269 (quoting *United States v. Singleton*, 41 M.J. 200, 204–05 (C.A.A.F. 1994)). The new evidence relitigated that issue, both here and in *Sztuka*, and it was appropriate for the

AFCCA to consider that under R.C.M. 1210. The only reason the AFCCA would have dismissed the issue of credibility is by misunderstanding the correct legal principles.

**c. The AFCCA’s analysis erroneously analyzed fraud on the court.**

It seems the AFCCA was ultimately analyzing the petition for new trial on the grounds of fraud on the court under R.C.M. 1210(f)(3), which SrA Tyson did not raise. None of the recordings explicitly show MR admitted to perjury. But newly discovered evidence does not require SrA Tyson to prove MR lied or perjured herself. He only had to show that “[t]he newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result.” R.C.M. 1210(f)(2)(C).

But the AFCCA focused on whether there was an admission of perjury, which mirrors the Government’s argument as well. *Compare* U.S. Opposition to Petition for New Trial at 13 (asserting there are no admissions of perjury), *with* Appendix at 25 (finding that there is no information MR “falsely testified or otherwise fabricated evidence against” SrA Tyson). In two of the three paragraphs of analysis, the AFCCA focuses only on how MR did not admit to lying and was “thoroughly” impeached at trial. Appendix at 25. Both analyses focus on suspected perjury arguments, rather than considering how the new evidence, in light of all pertinent evidence, would probably produce a better result for SrA Tyson.

Had the members heard MR calmly relay to AF how she was “going to set it up so . . . it’s going to look like [AF] hit [her]” and how she was going “have [her] brother pinch the fuck out of [her]. . . ., call the cops and be like [AF] literally just fucking hit [her] and threw [her] around his fucking apartment,” the members would have looked at MR’s testimony about what happened with SrA Tyson and evaluated her already weak credibility in a different light. This was the law and the analysis the AFCCA should have performed, but it failed to do so, seemingly from misunderstanding what law to apply.

**3. At minimum, if the AFCCA did apply the correct legal principles, it abused its discretion through a clearly unreasonable application of the law to the facts.**

Whatever law the AFCCA applied, it reviewed the new evidence through a pinhole, rather than with “all other pertinent evidence” in this case. Every allegation against SrA Tyson relied on MR’s narrative of events. There were no eyewitnesses, no medical evidence, no forensic evidence, nothing independent of MR to corroborate her version of events. This includes the “substantial evidence” the AFCCA believed “corroborated” MR. Appendix at 25. All of it boiled down to MR’s explanation, to include the experts’ opinions and what the photos and videos depicted. But after the newly discovered evidence, the photos and videos MR provided are suspect, along with her testimony that the experts relief on.

Regarding the photographic evidence she collected, MR acted similarly with both AF and SrA Tyson. To AF she yelled at AF that he would get in “a lot of trouble . . . for the time [he] fucking hit [her],” screaming that he did hit her and that she had pictures. Clip 4 at 00:16–00:33. She concluded with, “You wanna do what the fuck I say or do you want me to get you in trouble?” *Id.* She texted SrA Tyson similar comments: “Like if you get a domestic violence charge on you that’s heavy”; “And I’m keeping you from that so fucking respect me”; “All of the pictures and video I have will never be dismissed”; “You have no marks on you but everything is on me[.]” Pros. Ex. 16 at 12, 25. Going all the way back to TSgt AC—MR’s ex-husband—MR made broad domestic violence allegations against him too. Post-Trial Submission of Matters, Atch. 1 at 6.

But that is not the only similarity. MR threatened AF that she would “deal with him on Tuesday,” and was “writing down ideas for what [she was] going to do on Tuesday” when she sees him again. Clip 3 at 00:26–00:30, 3:05–3:43. The last text message she sent to SrA Tyson before he was arrested similarly said “I’ll deal with you in the morning.” Pros. Ex. 16 at 39. These are the same words, the same threats.

As for the experts, no expert could date any bruise or attribute it to any source. But the experts foreclosed self-harm. R. at 995–96. Now, though, with MR’s knowledge and willingness to fabricate domestic violence allegations, self-

harm is not the only explanation. She could have gotten a bruise from anywhere or anyone and then blamed it on SrA Tyson. For example, MR testified that one photo she took showed a mark left by SrA Tyson pinching her neck. R. at 814–15. One of the experts at trial agreed that the so-called “pinch mark” was similar to the marks in the photos supposedly supporting that SrA Tyson strangled MR. R. at 1003–05. Considering MR explained to AF that she would just have her brother “pinch the fuck out of [her]” to create bruises to match a domestic violence allegation, nothing MR testified to at SrA Tyson’s trial is credible anymore—if it ever was. Clip 1 at 3:24–3:34.

Additionally, the forensic psychologist that testified relied entirely on MR’s narrative of events. R. at 898–903 (showing the source of the expert’s testimony relied on MR’s testimony and the videos MR captured). But that narrative is now dubious where MR openly admitted to being willing and able to plan a domestic violence allegation. *See Williams*, 37 M.J. at 357–58 (discussing how expert testimony relied on the named victim’s narrative and the named victim withheld critical pieces of information).

MR’s statements to AF also implicated SrA Tyson on their face. She told AF that she was tired of being treated like “shit” by men so she was “taking them down one by one.” Clip 3 at 3:07–3:43. MR made clear in a different recording that calling her a liar was not going to work because she got away with this before.

Specifically, when AF confronted MR about threatening him and “trying to falsely . . . accuse [him] of a crime,” MR responded, “[T]hat’s crazy cause that’s exactly what [SrA] Jonathon [Tyson] was saying, only for him to be found guilty of the crime.” Clip 8 at 2:14–2:35.

The AFCCA identified these facts but failed to analyze them. Instead, it concluded, “MR did not indicate she testified falsely or otherwise fabricated evidence against” SrA Tyson. Appendix at 25. This is an unreasonable application of the facts. There is direct evidence that MR is fabricating or would fabricate allegations against AF: “I’m going to have my brother pinch the fuck out of me. . . . Imma call the cops and be like this man literally just fucking hit me and threw me around his fucking apartment.” Clip 1 at 3:24–3:34. Thus, MR’s statement that *both* men are lying about her falsely accusing them is an indication that she fabricated her narrative with *both* men.

The AFCCA correctly characterized the discussion between MR and AF as “emotional,” but failed to appreciate what that meant considering all the evidence in SrA Tyson’s case. Appendix at 25. What MR did to AF mirrored what she did to SrA Tyson: she used domestic violence allegations to get what she wanted, a relationship that took care of her and that she controlled. At SrA Tyson’s trial, MR lied about key aspects of her life that would have triggered a loss in benefits or of stability, for example, her age (which was why SrA Tyson broke up with her) and

her marital status. R. at 637–43, 798–800, 807–08, 845–47, 918–20 (lying about age); R. at 643–47 (lying about marital status—or at least exhibiting an incredible amount of ignorance). By lying about being SrA Tyson’s wife, and thus a “military spouse,” she received hiring preferences (R. at 648), on-base housing (R. at 630–31, 661), and monetary benefits (Pros. Ex. 16 at 3 (showing SrA Tyson pays the bills)). But with the new evidence, these are not mere credibility problems; they reveal a motive to fabricate domestic violence allegations to control an intimate partner. She wanted to maintain these relationships because they suited her. But the moment the breakups occurred and MR was obligated to leave, the domestic violence allegations began—with both men.

The AFCCA failed to analyze this evidence during its relevancy determination and instead erroneously focused on whether there was fraud on the court. *See* R.C.M. 1210(f)(3), *Discussion* (explaining examples of fraud on the court include “confessed or proved perjury”). But the petition for new trial was about impeaching MR and showing her habit, plan, scheme, or modus operandi to cast reasonable doubt *at a new trial* that she was lying. R.C.M. 1210(f)(2)(C) (requiring the new evidence, if considered by a court-martial, in light of all other pertinent evidence, produce a substantially more favorable result). These are different legal concepts that the AFCCA blended together in a clearly unreasonable application of the law to the facts.

In failing to find relevance, the AFCCA’s one sentence Mil. R. Evid. 403 determination is as meaningless as it is erroneous. This Court should give it little to no deference and examine the record itself. *United States v. Maebane*, 86 M.J. 173, 183 (C.A.A.F. 2025). In doing so, this Court would find denying the petition based on Mil. R. Evid. 403, a rule of *inclusion*, is clearly unreasonable.

The last paragraph of the AFCCA’s analysis is a restatement of the first. *See* Appendix at 25 (saying “as discussed *supra*”). The AFCCA failed to review the evidence in light of all other pertinent evidence, to include how the “corroborat[ing]” evidence—presumably the photos, videos, and expert testimony, though the AFCCA does not say—all flows from MR’s testimony and version of events. *Id.* If she is fabricating domestic violence allegations against her intimate partners through saving pictures of bruises or getting someone to cause bruises on her, MR’s credibility is non-existent under similar circumstances. Clip 1 at 3:02–3:15, 3:24–3:34; Clip 4 at 00:16–00:33. Her statements to AF are relevant to her credibility and denials that she fabricated evidence in SrA Tyson’s case because her plot to frame AF occurred under similar, “emotional” circumstances. Appendix at 25. The AFCCA applied the law to the facts of this case in a clearly unreasonable manner, brushing over the evidence that made all the difference in this case.

Whether the AFCCA applied correct legal principles or not, it abused its discretion in applying the law to the facts of this case in a clearly unreasonable

manner. This Court should grant to explain how that application is unreasonable, as it has done before. *Niles*, 45 M.J. at 457; *Sztuka*, 43 M.J. at 262.

### CONCLUSION

SrA Tyson's case is the perfect vehicle to define units of prosecution, explain the application of "on divers occasions" to a set of charged conduct, and clarify the standards for petitions for new trial. SrA Tyson requests that this Court grant review of his case.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "S. Castanien", with a long horizontal flourish extending to the right.

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## CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that: (1) this supplement complies with the type-volume limitation of Rule 21 because it contains 8,998 words; and (2) this supplement complies with the style requirements of Rule 37.



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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was electronically filed with the Court and electronically served on the Air Force Government Trial and Appellate Operations Division at [af.jajg.afloa.filng.workflow@us.af.mil](mailto:af.jajg.afloa.filng.workflow@us.af.mil) on June 25, 2026.



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# APPENDIX

**UNITED STATES AIR FORCE  
COURT OF CRIMINAL APPEALS**

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**No. ACM 40617**

**Misc. Dkt. No. 2026-02**

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**UNITED STATES**

*Appellee*

**v.**

**Jonathon V. TYSON**

Senior Airman (E-4), U.S. Air Force, *Appellant*

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Appeal from the United States Air Force Trial Judiciary

Decided 13 April 2026

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*Military Judge:* David M. Cisek (arraignment and motions); Dayle P. Percle (trial).

*Sentence:* Sentence adjudged 16 December 2023 by GCM convened at Minot Air Force Base, North Dakota. Sentence entered by military judge on 2 February 2024: Bad-conduct discharge, confinement for 1 year, and reduction to E-1.

*For Appellant:* Major Samantha M. Castanien, USAF.

*For Appellee:* Colonel G. Matt Osborn, USAF; Lieutenant Colonel J. Peter Ferrell, USAF; Lieutenant Colonel Jenny A. Liabenow, USAF; Major Vanessa Bairos, USAF; Major Kate E. Lee, USAF; Major Jocelyn Q. Wright, USAF; Major Catherine D. Mumford, USAF; Captain Donnell D. Wright, USAF; Mary Ellen Payne, Esquire.

Before JOHNSON, DOUGLAS, and MCCALL, *Appellate Military Judges.*

Senior Judge DOUGLAS delivered the opinion of the court, in which Chief Judge JOHNSON and Judge MCCALL joined.

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**This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.**

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DOUGLAS, Senior Judge:

Contrary to his pleas, a general court-martial composed of officer and enlisted members found Appellant guilty of six specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928b.<sup>1,2</sup> Appellant's intimate partner, MR, is the named victim in all specifications. The members sentenced Appellant to a bad-conduct discharge, confinement for one year, and reduction to the grade of E-1.<sup>3</sup> The convening authority took no action on the findings or the sentence. Appellant requested suspension, commutation, or reduction of the adjudged reduction in pay grade, which was denied due to the severity of the crimes. Appellant requested waiver of automatic forfeitures, which was also denied.

Appellant raises 13 issues on appeal, which we have rephrased, whether: (1) he was denied meaningful cross-examination of MR in violation of his Sixth Amendment<sup>4</sup> right to confrontation when the trial judge excluded evidence offered under Mil. R. Evid. 608(c); (2) his conviction for strangling MR is factually sufficient; (3) his conviction for kicking MR in the legs on divers occasions is legally and factually sufficient; (4) his conviction for punching MR in the arms and torso on divers occasions is legally and factually sufficient; (5) his conviction for destroying MR's cellphone is legally and factually sufficient; (6) his conviction for destroying a variety of MR's belongings is legally and factually sufficient; (7) his conviction for threatening MR on divers occasions is legally and factually sufficient; (8) trial counsel committed prosecutorial misconduct during the findings argument; (9) omission of 14 files in Preliminary Hearing Exhibit 16 is a substantial omission that requires remand; (10) the 172-day delay from sentencing to docketing warrants relief; (11) he was deprived of his constitutional right to a unanimous verdict; (12) he was subject to vindictive prosecution; and (13) barring him from multiple Air Force installations while

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<sup>1</sup> All references in this opinion to the UCMJ, the Rules for Courts-Martial (R.C.M), and the Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

<sup>2</sup> Consistent with his pleas, the same general court-martial found Appellant not guilty of three specifications of domestic violence in violation of Article 128b, UCMJ.

<sup>3</sup> Appellant was credited with 246 days of pretrial confinement.

<sup>4</sup> U.S. CONST. amend. VI.

on appellate leave constitutes unlawful punishment or otherwise violates the law.<sup>5</sup> We also considered one additional issue not raised by Appellant, but identified during this court's Article 66(d), UCMJ, 10 U.S.C. § 866(d), review: whether (14) Appellant is entitled to relief for facially unreasonable appellate delay in accordance with *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006), or Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2).

On 23 January 2026, Appellant petitioned for a new trial pursuant to Article 73, UCMJ, 10 U.S.C. § 873. The court docketed Appellant's petition the same day. The Government filed its timely response on 23 February 2026, and Appellant filed a reply to the Government's response on 9 March 2026. Therefore, we consider Appellant's petition for a new trial with his other assertions of error.

We have combined our review and analysis of Appellant's issues (2) through (7) because they relate to the legal and/or factual sufficiency of Appellant's convictions. Similarly, we have combined our review and analysis of issues (10) and (14) because they both relate to post-trial processing delay.

Four issues are resolved with brief explanation. With respect to issue (9), we find the omission of 14 audio and visual files provided to the preliminary hearing officer (PHO) as Preliminary Hearing Exhibit 16 is not substantial. *United States v. Davenport*, 73 M.J. 373, 377 (C.A.A.F. 2014). On 5 November 2025, the court granted a government motion to attach documents. We now consider those attachments, including a declaration submitted by one of the legal office paralegals, Technical Sergeant (TSgt) VP, as well as four additional files not otherwise found in the record of trial.<sup>6</sup> The 14 audio and visual files provided as Preliminary Hearing Exhibit 16 were corrupted upon assembly of Appellant's record of trial. However, they are each described in detail in TSgt VP's declaration, and either exist elsewhere in the record of trial, the report of investigation by the Air Force Office of Special Investigations (OSI), or are now attached. Appellant does not allege prejudice. The PHO report is properly attached to the record of trial, and the report briefly summarizes Exhibit 16 as 14 audio and visual files. Their omission as Preliminary Hearing Exhibit 16 does not affect our ability to complete appellate review of Appellant's convictions and sentence.

As to issue (11), Appellant is not entitled to relief. *See United States v. Anderson*, 83 M.J. 291, 302 (C.A.A.F. 2023) (holding that a military accused does

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<sup>5</sup> Appellant personally raises issues (12) and (13) pursuant to *United States v. Grostefon*, 12 M.J. 431, 436 (C.M.A. 1982).

<sup>6</sup> *See United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020).

not have a right to a unanimous verdict under the Sixth Amendment, the Fifth Amendment’s due process clause, or the Fifth Amendment’s component of equal protection<sup>7</sup>), *cert. denied*, 144 S. Ct. 1003 (2024).

As to issue (12), we have carefully considered Appellant’s personally raised concern that the OSI conducted a biased investigation, leading to a discriminatory or vindictive prosecution. This concern is raised for the first time on appeal. On 8 September 2025, the court granted Appellant’s motion to attach a declaration by Appellant, dated 27 August 2025. We now consider this declaration.<sup>8</sup> In his declaration, Appellant asserts OSI did not sufficiently investigate whether the named victim, MR, was being truthful with various aspects of her statements.

“By advancing [a] selective prosecution argument, [A]ppellant asserts a defect in the preferral and referral of the charges.” *United States v. El-Amin*, 38 M.J. 563, 564 (A.F.C.M.R. 1993) (citations omitted). At trial, Appellant was required to raise any objections to defects in the preferral and referral of his charges prior to entering his pleas. Rule for Courts-Martial (R.C.M.) 905(b)(1). Failure to do so constitutes forfeiture. R.C.M. 905(e)(1). If not forfeiture, Appellant’s concern of discriminatory or vindictive prosecution fails because even after considering Appellant’s declaration, the record is devoid of evidence of discriminatory or vindictive prosecution.

To support a claim of selective or vindictive prosecution, an accused has a “heavy burden” of showing that “others similarly situated” have not been charged, that “he has been singled out for prosecution,” and that his “selection . . . for prosecution” was “invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.”

*United States v. Argo*, 46 M.J. 454, 463 (C.A.A.F. 1997) (quoting *United States v. Garwood*, 20 M.J. 148, 154 (C.M.A. 1985)). We find no error materially prejudicial to Appellant’s substantial rights as to this concern. Articles 59(a), UCMJ, 10 U.S.C. § 859(a).

With respect to issue (13), we have carefully considered Appellant’s personally raised perspective that post-trial barments from military installations are errors in post-trial processing for which we can order appropriate relief under Article 66(d)(2), UCMJ. However, we find the matter is collateral and beyond

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<sup>7</sup> U.S. CONST. amend. V.

<sup>8</sup> See *Jessie*, 79 M.J. at 444.

this court’s statutory authority to review. A Court of Criminal Appeals (CCA) “may act only with respect to the findings and sentence as entered into the record under [Article 60c, UCMJ, 10 U.S.C. § 860c].” 10 U.S.C. § 866(d)(1). Consequently, Appellant’s post-trial barments from one or more military installations do not require further discussion or warrant relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

As to the remaining issues, we find no error materially prejudicial to Appellant’s substantial rights, and we affirm.<sup>9</sup> Further, we deny Appellant’s petition for a new trial.

### I. BACKGROUND

Appellant met MR, an adult female civilian, while he was assigned to Minot Air Force Base, North Dakota. Shortly after meeting her, she moved into his house on base, and they began a two-year romantic relationship. That relationship ended on 14 April 2023.

On that day, MR, who worked as a base medical appointment clerk, called her military supervisor to explain that she would not be coming into work again, for the third day in a row. Captain (Capt) AR, MR’s military supervisor, became concerned, because MR sounded like she was crying and he could hear another person walking around in the background. The call dropped. Capt AR could not reach MR again. So Capt AR, the first sergeant, and two members of Appellant’s unit conducted a welfare check at Appellant’s house.

Upon arrival, MR answered the door, disheveled and with a noticeable bruise on her exposed, right thigh. Appellant’s unit members requested Appellant come to the door; when he refused, law enforcement was called and responded. Appellant was detained, and MR was medically evaluated. Photographs taken at the hospital revealed extensive bruising on MR’s body, including her neck. Photographs taken at the house revealed damage to numerous personal items. These photographs were admitted as evidence in Appellant’s court-martial.

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<sup>9</sup> The panel was properly assembled; however, the trial judge neglected to announce the proper assembly as required by R.C.M. 911. Appellant does not allege prejudicial error, and we find none.

## II. DISCUSSION

### A. Excluded Evidence, Mil. R. Evid. 608(c)

#### 1. Additional Background

During cross-examination of MR, trial defense counsel attempted to establish MR had a motive to fabricate the source of her injury as alleged in Specification 3 of the Charge, by cutting her own leg with scissors. Trial defense counsel advocated the source of this cut on MR's leg was MR's own self-inflicted harm with scissors. The basis for this theory was a ten-year-old event, between MR and her ex-husband, the facts of which were deemed by the trial judge as failing to meet a direct nexus to Appellant's case, citing *United States v. Sullivan*, 70 M.J. 110, 115 (C.A.A.F. 2011). Despite Appellant's acquittal of this specification, Appellant maintains on appeal that the trial judge abused her discretion by excluding evidence offered under Mil. R. Evid. 608(c), *Evidence of Bias*, because it demonstrates MR fabricated all the allegations by creating and manipulating evidence.

#### 2. Law

We review a trial judge's decision to exclude evidence for abuse of discretion. *United States v. St. Jean*, 83 M.J. 109, 112 (C.A.A.F. 2023) (citing *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019)). "This abuse of discretion standard is a strict one, calling for more than a mere difference of opinion—[t]he challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *Id.* (alteration in original) (quoting *United States v. Hendrix*, 76 M.J. 283, 288 (C.A.A.F. 2017)).

The confrontation clause of the Sixth Amendment preserves the right of an accused "to be confronted with the witnesses against him." U.S. CONST. amend. VI.

"Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise ad-duced." Mil. R. Evid. 608(c).

An accused does not have a right to cross-examine a witness on any subject solely because he describes it as one of credibility, truthfulness, or bias. There must be a direct nexus to the case that is rooted in the record. That is, the evidence must be logically relevant as required by [Mil. R. Evid.] 401, and it must also be legally relevant in accordance with the [Mil. R. Evid.] 403 balancing test. In short, the right to cross-examine is the right to question where the proffer establishes a real and direct nexus to a fact or issue at hand.

*Sullivan*, 70 M.J. at 115.

### **3. Analysis**

The trial judge did not abuse her discretion when she determined the facts, as presented, did not establish a nexus in Appellant’s case. Outside the presence of members, the trial judge allowed the trial defense counsel to explore their theory of MR’s motive to fabricate, specifically their proffered facts, through specific cross-examination of MR regarding the details of the ten-year-old event, which resulted in a security forces report. Further, the trial judge allowed the trial defense counsel to call and directly examine one of the security forces members responding to MR’s residence at the time of the report of domestic violence between her and her ex-husband. The contradictory and unconfirmed evidence gathered in this hearing outside the presence of the members was well characterized by the trial judge as failing to have a direct nexus to Appellant’s case. *See Sullivan*, 70 M.J. at 115. The trial judge did not abuse her discretion. Given all the evidence presented to her, her ruling was reasonable. *See St. Jean*, 83 M.J. at 112.

## **B. Sufficiency of Convictions**

### **1. Additional Background**

The members convicted Appellant of six specifications of domestic violence against MR, his intimate partner: by unlawfully strangling her with his hands on 14 April 2023; by kicking her legs on divers occasions between 1 May 2022 and 14 April 2023; by punching her arms and torso on divers occasions between 1 May 2022 and 14 April 2023; by destroying a cellular device on 12 April 2023; by destroying MR’s non-military personal property including clothing, shoes, hair appliances, toiletries, bags, a cooler, makeup items, eyeglasses, and other household items, on divers occasions, between 1 December 2022 and 14 April 2023; and by communicating a threat to MR on divers occasions between 1 December 2022 and 14 April 2023, to wit: “I’m going to have to kill you” and “I’m going to blow your brains out.”

On appeal, Appellant challenges the factual sufficiency of the strangling conviction of MR on 14 April 2023. He challenges the remaining convictions due to lack of both legal and factual sufficiency. Appellant asserts MR is not “credible” for a variety of reasons, but primarily for being untruthful. All the reasons offered for MR’s lack of credibility on appeal were explored at trial.

In early May 2022, Appellant returned home from temporary duty, after approximately three months of absence. MR observed her relationship with Appellant deteriorate “to the bad side.” She described Appellant as getting “angrier over the littlest things.” He began to destroy her belongings, kicked her

on her legs and punched her on both arms, starting with her left arm. On 6 May 2022, MR asked Appellant to take her to the hospital for chest pains. While at the hospital, and later while at home, MR took photographs of herself. Five photographs were admitted at trial, demonstrating bruises to her arms, wrist, and leg. MR also took a 13-second video of her legs, which demonstrated a variety of bruises on both of her legs. This video was also admitted at trial.

On 6 May 2022, while MR was checking herself into the hospital, Appellant discovered MR had been lying to him about her age. At trial, MR admitted she had presented herself to Appellant as approximately six years younger than she was, in part because she was always told she looked younger than her age, and in part because she understood that Appellant was not interested in dating older women.

The physical abuse continued and during a verbal argument on 26 July 2022, Appellant grabbed MR's arm, leaving visible bruises. MR took photographs of her arm, which demonstrated several smaller bruises on the inside and outside of her arm. Two photographs were admitted at trial from this event.

In February 2023, MR's relationship with Appellant continued to deteriorate. They were discussing potential separation and MR moving out of Appellant's house. However, MR mistakenly thought she was married to Appellant. She wore a ring on her left hand and recalled a specific proposal. She also recalled signing a specific piece of paper that she had not read, but Appellant insisted could, and would, be mailed to a different state which would form the basis of a legal marriage.

On 11 and 26 February 2023, MR recorded short videos of verbal arguments with Appellant, wherein MR is asking Appellant not to damage her candle holder with his hands and an icemaker with a multi-tool knife. Both videos were admitted at trial.

During the spring of 2023, MR explained that Appellant threatened her by saying things such as "I'm going to have to kill you," and "I'm going to blow your brains out." MR described the arguments and threats as happening "every day" or "every other day." Sometime in March 2023, MR recorded another video of Appellant and her arguing over him damaging her personal belongings. In this video, Appellant can be seen using a handheld tool and breaking a "charger" to MR's cell phone along with other items from the kitchen counter. The video ends with Appellant physically pushing and grabbing or punching MR; this video was also admitted at trial.

At work, MR's supervisor suspected personal or relationship issues and asked her about them. MR explained to her supervisor that she and Appellant

were seeking assistance through the Family Advocacy Program (FAP) to dissuade her leadership from intervening. MR would miss work because of the fights, and Appellant and MR agreed to use FAP appointments to explain why she was not at work.

On 11 April 2023, MR again recorded a video of her and Appellant arguing in their home, which was admitted at trial. Appellant was telling MR to get out of the house, or he was going to go on a “rampage” and destroy her personal belongings. During the trial, MR explained that during that week, Appellant destroyed her property. He “[d]umped it. Cut it. Shredded it.” On 12 and 13 April 2023, MR said Appellant “bang[ed] [her cell phone] on the metal bed frame” until “it was completely shattered, in[side] and out[side].” On those same days, MR stayed home from work due to a rib injury she believed she suffered when Appellant was on top of her and they both heard a “snap.” She was in significant pain and did not believe she could work. Text messages admitted at trial corroborated MR’s concern about her rib and her request for Appellant to help her seek medical treatment.

MR described a series of violent events on 14 April 2023 throughout the house and garage. Appellant had “thrown [MR] around a little bit . . .” Appellant ripped one of MR’s sweaters he found in the laundry room. Appellant locked MR in the garage. Appellant had duct-taped the lock of one door and ratchet-strapped the second front door to the house to keep MR from getting back inside. Appellant grabbed her arm to throw her outside, after she managed to get inside the house. Appellant threatened to damage more of her personal belongings and went upstairs to the second floor of the house. MR followed him to try and prevent him from damaging her things, and Appellant threw MR on the floor. MR got up and Appellant threatened to kill MR. Appellant grabbed MR by the neck, using both his hands, and then he “puts a lot of force into it.” Appellant said, “I have to kill you, [MR]. It’s the only way.” MR thought to herself, “okay, maybe this is where it ends for me.” The doorbell rang. Appellant threw MR into the next room and told her to answer the door. That is when MR’s supervisor, first sergeant, and Appellant’s unit members had arrived to check on them.

Photographs taken at the hospital of MR’s body on 14 April 2023 were admitted at trial and demonstrated significant and extensive bruising all over her body, including her neck and chin. Additional photographs taken at the residence on 14 April 2023 were admitted in trial and demonstrated damage to MR’s cell phone and personal belongings.

A forensic pathologist testified for the Defense and said that she could not rule out self-harm or accidental injury as a source of MR’s injuries. An officer

in the medical group also testified for the Defense stating that in her opinion, MR is not a truthful person.

In its rebuttal case, the Government called a forensic pathologist to testify. Disagreeing with the Defense’s forensic pathologist, the Government’s expert testified the pictures of MR’s neck clearly showed evidence of strangulation and the injuries, in her opinion, were not self-inflicted.

## **2. Law**

### ***a. Standards of Review***

We review questions of legal sufficiency *de novo*. *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (citation omitted). We review questions of factual sufficiency when an appellant asserts an assignment of error and shows a specific deficiency in proof. *United States v. Harvey*, 85 M.J.127, 129 (C.A.A.F. 2024) (citing Article 66(d)(1)(B)(i), UCMJ, 10 U.S.C. § 866(d)(1)(B)(i)).

### ***b. Legal and Factual Sufficiency***

“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) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)). “The term reasonable doubt, however, does not mean that the evidence must be free from conflict.” *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017). “[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). As a result, “[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction.” *King*, 78 M.J. at 221 (alteration in original) (citation omitted). The test for legal sufficiency “gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1973)).

Article 66(d)(1), UCMJ, provides:

#### **(B) FACTUAL SUFFICIENCY REVIEW.**

- (i) In an appeal of a finding of guilty under subsection (b), the Court may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.

(ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—

(I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and

(II) appropriate deference to findings of fact entered into the record by the military judge.

(iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

10 U.S.C. § 866(d)(1), *Manual for Courts-Martial, United States* (2024 ed.) (2024 *MCM*). The factual sufficiency standard applies to courts-martial in which every finding of guilty in the entry of judgment is for an offense occurring on or after 1 January 2021. *See* The National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(e)(2), 134 Stat. 3388, 3612–13 (1 Jan. 2021).

The requirement of “appropriate deference” when a CCA weighs the evidence and determines controverted questions of fact “depend[s] on the nature of the evidence at issue.” *Harvey*, 85 M.J. at 130. This court has discretion to determine what level of deference is appropriate. *Id.* at 131. “[T]he quantum of proof necessary to sustain a finding of guilty during a factual sufficiency review is proof beyond a reasonable doubt, the same as the quantum of proof necessary to find an accused guilty at trial.” *Id.* (internal quotation marks omitted). In order for this court “to be clearly convinced that the finding of guilty was against the weight of the evidence, two requirements must be met.” *Id.* at 132. “First, [we] must decide that the evidence, as [we] weighed it, does not prove that the appellant is guilty beyond a reasonable doubt. Second, [we] must be clearly convinced of the correctness of this decision.” *Id.* (emphasis omitted). “[T]he factfinder at the trial level is always in the best position to determine the credibility of a witness.” *United States v. Peterson*, 48 M.J. 81, 83 (C.A.A.F. 1998).

### ***c. Offenses***

In order to convict Appellant of domestic violence by strangulation of MR as charged in Specification 1 of the Charge, the Government was required to prove that at or near Minot Air Force Base, North Dakota, on or about 14 April 2023: (1) Appellant assaulted MR, the intimate partner of Appellant; (2) Appellant did so by unlawfully strangling MR with his hands; and (3) that the

strangulation was done with unlawful force or violence. *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), App. 2, at A2-45–46; see also Exec. Order. No. 14,062, 87 Fed. Reg. 4763, 4778 (31 Jan. 2022).<sup>10</sup> The term “‘strangulation’ means intentionally, knowingly, or recklessly impeding the normal breathing or circulation of blood of a person by applying pressure to the throat or neck, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim.” 87 Fed. Reg. at 4772.

In order to convict Appellant of domestic violence by commission of a violent offense against MR as charged in Specification 4 of the Charge, the Government was required to prove that at or near Minot Air Force Base, North Dakota, between on or about 1 May 2022 and on or about 14 April 2023, on divers occasions: (1) Appellant committed a violent offense, to wit: assault consummated by battery by kicking MR’s legs with his feet; and (2) that the violent offense was committed against MR who was, at the time of the violent offense, an intimate partner of Appellant. *MCM*, App. 2, at A2-45–46; Exec. Order. No. 14,062, 87 Fed. Reg. at 4779. The term “violent offense” includes a violation of Article 128, UCMJ, 10 U.S.C. § 928, assault consummated by a battery. 87 Fed. Reg. at 4780.

In order to convict Appellant of domestic violence by commission of a violent offense against MR as charged in Specification 5 of the Charge, the Government was required to prove that at or near Minot Air Force Base, North Dakota, between on or about 1 May 2022 and on or about 14 April 2023, on divers occasions: (1) Appellant committed a violent offense, to wit: assault consummated by battery by punching MR’s arms and torso with his fists; and (2) that the violent offense was committed against MR who was, at the time of the violent offense, an intimate partner of Appellant. *MCM*, App. 2, at A2-45–46; 87 Fed. Reg. at 4778. The term “violent offense” includes a violation of Article 128, UCMJ, assault consummated by a battery. 87 Fed. Reg. at 4780.

To convict Appellant of domestic violence by commission of a violent offense against MR as charged in Specifications 4 and 5 of the Charge, the Government was also required to prove each underlying offense of assault consummated by a battery, in violation of Article 128, UCMJ. Specifically, taken together, the Government was required to prove that at or near Minot Air Force Base, North Dakota, between on or about 1 May 2022 and on or about 14 April 2023, on divers occasions: (1) Appellant did bodily harm to MR by kicking her legs with

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<sup>10</sup> This executive order established the elements and definitions for domestic violence, now found in the 2024 *MCM*, pt. IV, ¶ 78a.

his feet, and by punching her arms and torso with his fists; (2) that the bodily harm was done unlawfully; and (3) that the bodily harm was done with force or violence. *MCM*, pt. IV, ¶ 77.b.(2)(a)–(c).

In order to convict Appellant of domestic violence by commission of an offense against property with the intent to threaten or intimidate MR as charged in Specification 7 of the Charge, the Government was required to prove that at or near Minot Air Force Base, North Dakota, on or about 12 April 2023: (1) Appellant committed an act in violation of the UCMJ, to wit: destroying non-military property in violation of Article 109, UCMJ, 10 U.S.C. § 909; (2) that Appellant committed the act against a cellular device, the property of MR; and (3) that Appellant committed the act with the intent to threaten and intimidate the intimate partner, MR, of the Appellant. *MCM*, App. 2, at A2-45–46; 87 Fed. Reg. at 4778–79.

In order to convict Appellant of domestic violence by commission of an offense against property with the intent to threaten or intimidate MR as charged in Specification 8 of the Charge, the Government was required to prove that at or near Minot Air Force Base, North Dakota, between on or about 1 December 2022 and on or about 14 April 2023, on divers occasions: (1) Appellant committed an act in violation of the UCMJ, to wit: destroying non-military property in violation of Article 109, UCMJ; (2) that Appellant committed the act against clothing, shoes, hair appliances, toiletries, bags, a cooler, makeup items, eyeglasses, and other household items, the property of MR; and (3) that Appellant committed the act with the intent to threaten and intimidate the intimate partner, MR, of the Appellant. *MCM*, App. 2, at A2-45–46; 87 Fed. Reg. at 4778–79.

In order to convict Appellant of domestic violence by commission of an offense against property with the intent to threaten or intimidate MR as charged in Specifications 7 and 8 of the Charge, the Government was also required to prove the underlying offenses of destroying non-military property, in violation of Article 109, UCMJ. Specifically, taken together, the Government was required to prove that at or near Minot Air Force Base, North Dakota, on or about 12 April 2023, and between on or about 1 December 2022 and on or about 14 April 2023 on divers occasions: (1) Appellant willfully and wrongfully destroyed the certain non-military property as alleged; (2) that the property belonged to MR; and (3) that the property was of some value. *MCM*, pt. IV, ¶ 45.b.(3)(a)–(c).

In order to convict Appellant of domestic violence by commission of an offense with the intent to threaten or intimidate MR as charged in Specification 9 of the Charge, the Government was required to prove that at or near Minot

Air Force Base, North Dakota, between on or about 1 December 2022 and on or about 14 April 2023, on divers occasions: (1) Appellant committed an act in violation of the UCMJ, to wit: communicating a threat in violation of Article 115, UCMJ, 10 U.S.C. § 915; (2) that Appellant committed the act against MR; and (3) that Appellant committed the act with the intent to threaten and intimidate the intimate partner, MR, of the Appellant. *MCM*, App. 2, at A2-45–46; 87 Fed. Reg. at 4778.

To convict Appellant of domestic violence by commission of an offense with intent to threaten or intimidate MR as charged in Specification 9 of the Charge, the Government was also required to prove the underlying offense of communicating a threat in violation of Article 115, UCMJ. Specifically, that at or near Minot Air Force Base, North Dakota, between on or about 1 December 2022 and on or about 14 April 2023, on divers occasions: (1) Appellant communicated certain language, to wit: “I’m going to have to kill you” and “I’m going to blow your brains out,” or words to that effect, expressing a present determination or intent to injure MR, presently or in the future; (2) that the communication was made known to MR; and (3) the communication was wrongful. *MCM*, pt. IV, ¶ 53.b.(1)(a)–(c). A communication is “wrongful” if Appellant transmitted it “for the purpose of issuing a threat or with the knowledge that the communication would be viewed as a threat.” *MCM*, pt. IV, ¶ 53.c.(2).

### **3. Analysis**

#### ***a. Strangulation***

Regarding the factual sufficiency of domestic violence by strangulation, Appellant has made a request for a factual sufficiency review and has asserted a showing of a deficiency of proof in that MR is not credible, primarily that she is untruthful. This is the same deficiency Appellant alleges for every conviction. We have considered whether Appellant’s claims are specific enough to trigger further analysis. We decide Appellant’s claims of deficiency is sufficiently specific for our analysis of this offense, as well as the other offenses.

We find Appellant’s conviction for domestic violence by strangulation committed against MR, his intimate partner, factually sufficient. MR testified that on 14 February 2023, Appellant used his two hands, grabbed her neck, and used force on her neck. Photographs taken on 14 February 2023 demonstrate bruises and other marks along both sides of her neck. Appellant submits the marks could have been self-inflicted. While this argument is supported by a defense expert at trial offering that she could not rule out self-inflicted harm, the testimony was opposed by a government expert who opined the injuries on MR’s neck were not self-inflicted. The weight of the evidence is that Appellant committed domestic violence by strangulation.

After weighing all the evidence and having given appropriate deference to the fact that the panel members saw and heard the witnesses, this court does not conclude that the findings of guilty were against the weight of the evidence as to Specification 1 of the Charge. Thus, those findings of guilty are factually sufficient. *See* Article 66(d)(1)(B)(i)–(ii), UCMJ (2024 *MCM*).

***b. Kicking Legs and Punching Arms and Torso***

Viewing the evidence in the light most favorable to the Government, the panel members rationally found Appellant guilty of domestic violence by commission of violent offenses, including the underlying offenses of assault consummated by a battery of MR, his intimate partner, beyond a reasonable doubt. Therefore, the findings of guilty as to Specifications 4 and 5 of the Charge, and to the Charge are legally sufficient. *See Robinson*, 77 M.J. at 297–98.

We find Appellant’s convictions for domestic violence by commission of violent offenses, including the underlying assaults consummated by batteries of MR are factually sufficient. MR testified that on multiple occasions, between May 2022 and April 2023, Appellant kicked her legs with his feet and punched her arms and body with his fists. She recorded her injuries with photographs and videos, which were admitted at trial. On 14 April 2023, numerous photographs were taken of her body which clearly demonstrate extensive bruising, in various stages of healing, on her arms, torso, and legs. According to the testimony of both the defense and government experts, neither believed these extensive injuries were caused by self-harm.

After weighing all the evidence and having given appropriate deference to the fact that the panel members saw and heard the witnesses, this court does not conclude that the findings of guilty were against the weight of the evidence as to Specifications 4 and 5 of the Charge, and to the Charge. Thus, those findings of guilty are factually sufficient. *See* Article 66(d)(1)(B)(i)–(ii), UCMJ (2024 *MCM*).

***c. Destroying Non-Military Property***

Viewing the evidence in the light most favorable to the Government, the panel members rationally found Appellant guilty of domestic violence by commission of an offense against property, including the underlying offenses of damaging MR’s non-military property, beyond a reasonable doubt. Therefore, the findings of guilty as to Specifications 7 and 8 of the Charge, and to the Charge are legally sufficient. *See Robinson*, 77 M.J. at 297–98.

We find Appellant’s convictions for domestic violence by commission of an offense against MR’s non-military property, as charged in Specifications 7

(cellular device) and 8 (clothing, shoes, hair appliances, toiletries, bags, a cooler, makeup items, eyeglasses, and other household items) are factually sufficient. MR testified that on 12 April 2023, Appellant banged MR's cellular device against the metal frame of their bed multiple times, until it was no longer functional. A photograph admitted at trial corroborates the damage to the cellular device. Appellant complains that MR is not credible, and not truthful, and therefore cannot be believed. We find MR credible. She explained how and why Appellant destroyed her cellular device. As for every nontruth, MR provided a plausible explanation as to why she may have intentionally lied, or whether she was confused. Similarly, we find MR was not incentivized to destroy her own personal belongings on divers occasions between 1 December 2022 and 14 April 2023. In addition to MR's testimony that Appellant damaged her personal belongings, she recorded him in the act. Appellant specifically stated he was destroying her property, and would continue to do so, while being recorded damaging her personal belongings. On 14 April 2023, numerous photographs were taken by law enforcement of their shared residence, and damage can be seen to the items charged.

After weighing all the evidence and having given appropriate deference to the fact that the panel members saw and heard the witnesses, this court does not conclude that the findings of guilty were against the weight of the evidence as to Specifications 7 and 8 of the Charge, and to the Charge. Thus, those findings of guilty are factually sufficient. *See* Article 66(d)(1)(B)(i)–(ii), UCMJ (2024 MCM).

***d. Communicating a Threat***

Viewing the evidence in the light most favorable to the Government, the panel members rationally found Appellant guilty of domestic violence by communicating a threat against MR, his intimate partner, with intent to threaten and intimidate MR beyond a reasonable doubt. Therefore, the findings of guilty as to Specification 9, and to the Charge are legally sufficient. *See Robinson*, 77 M.J. at 297–98.

We find Appellant's conviction for domestic violence by communication of a threat is factually sufficient. MR testified that on numerous occasions, including 14 April 2023, Appellant threatened to kill her by using the words, "I'm going to have to kill you," and "I'm going to blow your brains out," or words to that effect. MR testified that these words, combined with Appellant's hands on her neck, applying force, on 14 April 2023, brought her to believe she was not going to survive the day. We find MR credible. These words combined with his actions indicate Appellant's intent to threaten and intimidate MR and convey his intent to injure her.

After weighing all the evidence and having given appropriate deference to the fact that the panel members saw and heard the witnesses, this court does not conclude that the findings of guilty were against the weight of the evidence to Specification 9 of the Charge, and to the Charge. Thus, those findings of guilty are factually sufficient. *See* Article 66(d)(1)(B)(i)–(ii), UCMJ (2024 *MCM*).

We therefore conclude that Specifications 1, 4–5, and 7–9 of the Charge and the Charge are factually and legally sufficient.

### **C. Prosecutorial Misconduct: Argument**

Appellant complains for the first time that trial counsel made several improper arguments at trial. His brief raises three categories of alleged improper argument, including: expressing personal beliefs and opinions, to include vouching; disparaging opposing counsel; and commenting on Appellant’s right to not testify. Appellant further advocates that the cumulative impact of all three categories of error result in prejudicing Appellant’s substantial rights.

#### **1. Law**

“Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, *e.g.*, a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon.” *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996) (citations omitted). A prosecutor’s interest “in a criminal prosecution is not that [the Government] shall win a case, but that justice shall be done.” *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

We review prosecutorial misconduct and improper argument *de novo*. *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019) (citation omitted). When no objection is made at trial, we review for plain error. *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018) (footnote and 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.* at 401 (quoting *Fletcher*, 62 M.J. at 179).

“[A]rgument by a trial counsel must be viewed within the context of the entire court-martial. The focus of [the] inquiry should not be on words in isolation, but on the argument as ‘viewed in context.’” *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000) (quoting *United States v. Young*, 470 U.S. 1, 16 (1985)) (additional citations omitted). In performing our review, “it is improper to ‘surgically carve’ out a portion of the argument with no regard to its context.” *Id.*

Appellate judges must exercise care in determining whether a trial counsel's statement is improper or has improper connotations. The [United States] Supreme Court has emphasized that "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations."

*United States v. Palacios Cueto*, 82 M.J. 323, 333 (C.A.A.F. 2022) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974)). Thus, "[a] statement that might appear improper if viewed in isolation may not be improper when viewed in context." *Id.* (citing *Donnelly*, 416 U.S. at 645).

If we find a prosecutor's argument "amounted to clear, obvious error," we then determine "whether there was a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Voorhees*, 79 M.J. at 9 (internal quotation marks and citations omitted). "For constitutional errors, rather than the probability that the outcome would have been different, courts must be confident that there was *no reasonable probability* that the error *might have contributed* to the conviction." *United States v. Tovarchavez*, 78 M.J. 458, 462 n.5 (C.A.A.F. 2019) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). That is, "where a forfeited constitutional error was clear or obvious, 'material prejudice' is assessed using the 'harmless beyond a reasonable doubt' standard set out in [*Chapman*]." *Id.* at 460 (quoting *United States v. Jones*, 78 M.J. 37, 45 (C.A.A.F. 2018)). In analyzing prejudice from a prosecutor's improper argument, we consider: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Andrews*, 77 M.J. at 402 (quoting *Fletcher*, 62 M.J. at 184).

"Absent evidence to the contrary, [we] may presume that members follow a military judge's instructions." *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000) (citations omitted).

"[T]he lack of a defense objection is 'some measure of the minimal impact of a prosecutor's improper comment.'" *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001) (quoting *United States v. Carpenter*, 51 M.J. 393, 397 (C.A.A.F. 1999)).

In a plain error analysis, the most straightforward way of resolving an allegation of prosecutorial misconduct may be to do so based on prejudice or lack thereof. *Palacios Cueto*, 82 M.J. at 335.

## 2. Analysis

Appellant offers three categories of alleged trial counsel improper argument, claiming one of the categories includes comments upon Appellant's lawful exercise of his constitutional right not to testify. All three categories of alleged improper argument stem from examples of those made in *Fletcher*. See 62 M.J. 175. We do not see the correlation to *Fletcher*. We also do not see any trial counsel comment or argument that could be remotely considered as implicating Appellant's constitutional rights.

We review for plain error and find no clear or obvious error. *Andrews*, 77 M.J. at 398. But if any comment or argument rises to a level of plain error, we do not find prejudice. Specifically, we find there is no reasonable probability that, but for the error, the outcome of the proceeding would have been different. *Voorhees*, 79 M.J. at 9. And if any error is deemed constitutional error, we are confident that there is no reasonable probability that the error might have contributed to the conviction. *Tovarchavez*, 78 M.J. at 462 n.5.

First, Appellant submits trial counsel vouched for MR by his frequent use of the words "we" and "we know." Taken in context, these words were not used by trial counsel to demonstrate "personal assurances" about MR, or any other witness, or evidence. *Fletcher*, 62 M.J. at 180. Instead, trial counsel was often referring to the collective understanding of the witness testimony and evidence properly admitted in trial, from the perspective of the government counsel. Appellant provides additional examples of what he characterizes as personal commentary on the evidence; however, in context no additional analysis is warranted here.

Second, Appellant submits that trial counsel infringed upon Appellant's right not to testify, when trial counsel pointed out to the members that the Defense had proffered evidence of MR committing self-harm would be admitted at trial, when it was not. We do not view trial counsel's comments regarding the evidence trial defense counsel asserted would be admitted, as nearing the infringement of Appellant's constitutional right to not testify in his own defense. Appellant creates the nexus to a constitutional infringement by assertion, suggesting that only Appellant could be the source of evidence of MR's self-harm to complete this argument of prosecutorial misconduct. However, Appellant's trial defense counsel confronted MR, as well as the experts, on the viability of self-harm as a source of various injuries. "It is well established that the [G]overnment may comment on the failure of a defendant to refute government evidence or to support his own claims." *United States v. Webb*, 38 M.J. 62, 66 (C.M.A. 1993) (quoting *United States v. Coven*, 662 F.2d 162, 171 (1981)).

Third, Appellant contends trial counsel improperly disparaged trial defense counsel and the Defense more generally. For example, Appellant cites portions

of the rebuttal argument where trial counsel described the trial defense counsel's arguments as "silly," described them as offering a "spin" that "ignores almost all of the evidence in this case," suggested they were "gaslight[ing]" MR, and asked the panel members to "not let [the Defense] continue to do what [Appellant] has done to [MR] for 2 years." In *Voorhees*, the United States Court of Appeals for the Armed Forces (CAAF) held that the trial counsel clearly and obviously erred when he "maligned" the trial defense counsel and "made the defense theory of the case seem fantastical." 79 M.J. at 10 (citation omitted). Assuming for purposes of analysis that trial counsel's characterization of the defense argument was clear error, we nevertheless find no reasonable probability that it affected the outcome. *See id.* at 9. First, the severity of any error was low; the comments were relatively limited and were part of a larger argument that primarily focused on the evidence. *Cf. Gilley*, 56 M.J. at 123 (explaining the absence of objection is some indication of minimal impact). Second, the trial judge *sua sponte* provided significant additional limiting instruction following trial counsel's rebuttal, to the effect that they should disregard counsel's personal opinions.<sup>11</sup> Third, the evidence supporting the convictions was moderately strong. Accordingly, we are confident that the members convicted Appellant on the basis of the evidence alone. *See Andrews*, 77 M.J. at 403 (quoting *Fletcher*, 62 M.J. at 184); *see also United States v. Matti*, \_\_ M.J. \_\_, No. 25-0148, 2026 CAAF LEXIS 189, at \*22 (C.A.A.F. 17 Feb. 2026) (holding that the trial counsel's improper statements during closing arguments "did not cause material prejudice and therefore were not plain error").

We find no error amounting to prosecutorial misconduct through argument. But if there is error, we find no prejudice because the severity of misconduct is low and the strength of the evidence is high. *Palacios Cueto*, 82 M.J. at 335.

## **D. Docketing and Appellate Review Delay**

### **1. Additional Background**

The court members sentenced Appellant on 16 December 2023, and the trial judge entered the judgment on 2 February 2024. Before docketing, the Air

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<sup>11</sup> The trial judge instructed the panel members as follows:

If you believe that you heard either counsel express their personal opinion about a witness's character or the strength of the evidence, you may not consider it for that purpose. Counsel are not permitted to offer personal opinions; that was merely argument. Neither counsel's personal opinions, personal qualifications, or personal conduct in court are matters relevant for your consideration in resolving the matters before you. You, and you alone, determine the credibility of the witnesses and whether the [G]overnment has proven the elements of an offense beyond a reasonable doubt.

Force Appellate Records Branch returned the record of trial on 25 April 2024 for correction by the trial judge to Appellate Exhibit XXXI. The correction was made and certified by the trial judge on 16 May 2024. The record of trial was docketed with this court on 5 June 2024. Thereafter, Appellant requested and was granted 12 enlargements of time before filing his assignments of error on 8 September 2025. The Government filed its answer brief on 28 October 2025, after obtaining one enlargement of time; Appellant filed a reply to the Government's answer on 9 November 2025.

## 2. Law

“[C]onvicted servicemembers have a due process right to timely review and appeal of courts-martial convictions.” *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citations omitted). In *Moreno*, the CAAF established a presumption of facially unreasonable delay “where the action of the convening authority is not taken within 120 days of the completion of trial,” “where the record of trial is not docketed by the [CCA] within thirty days of the convening authority’s action,” or “where appellate review is not completed and a decision is not rendered within eighteen months of docketing the case before the [CCA].” 63 M.J. at 142. In *United States v. Livak*, this court adapted the *Moreno* standard for cases referred to trial on or after 1 January 2019 and established an aggregated 150-day standard for facially unreasonable delay from sentencing to docketing with the CCA. 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020).

Where there is a facially unreasonable delay, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): “(1) the length of the delay; (2) the reasons for the delay; (3) the appellant’s assertion of the right to timely review and appeal; and (4) prejudice [to the appellant].” *Moreno*, 63 M.J. at 135 (citations omitted). The CAAF identified three types of cognizable prejudice for purposes of the right to timely post-trial review: (1) oppressive incarceration; (2) “particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision;” and (3) impairment of the appellant’s grounds for appeal or ability to present a defense at a rehearing. *Id.* at 138–40 (citations omitted). Where there is no qualifying prejudice from the delay, there is no due process violation unless the delay is so egregious as to “adversely affect the public’s perception of the fairness and integrity of the military justice system.” *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006).

We review de novo an appellant’s entitlement to relief for post-trial delay. *Livak*, 80 M.J. at 633 (citing *Moreno*, 63 M.J. at 135).

### 3. Analysis

#### *a. Docketing Delay*

The record of trial was docketed with this court 172 days after sentencing, exceeding the 150-day *Livak* standard for facially unreasonable delay. Accordingly, we have considered the *Barker* factors, and under the circumstances of this case, we find no violation of Appellant’s due process rights.

We note the record of trial in this case is voluminous, including 111 total exhibits and over 1,200 pages of transcript. According to the court reporter chronology and the base paralegal’s declaration, the Government displayed diligence when creating the record of trial. Further, the Government displayed responsiveness once an error was identified with Appellate Exhibit XXXI. From the date the record was returned for correction to that Appellate Exhibit (25 April 2024), through the date the trial judge signed the certificate of correction (16 May 2024), 21 days elapsed. The length of delay and the reasons for the delay are reasonable and favor the Government.

Appellant requested “speedy post-trial processing” in his post-trial submission of matters to the convening authority on 26 December 2023. Requesting speedy post-trial processing at the time of submitting matters to a convening authority is reasonable; this factor weighs slightly in Appellant’s favor. Finally, Appellant has not suffered prejudice. Appellant proclaims that if his case was docketed more promptly, his case would have been reviewed more quickly. However, this is not cognizable prejudice from the delay in docketing with this court.

Absent prejudice, we find the post-trial delay involved in Appellant’s case has not been so egregious as to adversely affect the perception of the military justice system. *See Toohey*, 63 M.J. at 362. Furthermore, recognizing our authority under Article 66(d)(2), UCMJ, we have also considered whether relief for excessive post-trial delay is appropriate in this case even in the absence of a due process violation. *See United States v. Valentin-Andino*, 85 M.J. 361, 366 n.4 (C.A.A.F. 2025). We conclude such relief is not warranted.

#### *b. Appellate Review Delay*

Over 18 months have elapsed since Appellant’s record of trial was originally docketed with the court. Therefore, under *Moreno* there is a facially unreasonable delay; we note the 18-month threshold has been exceeded by just over 120 days. Accordingly, we have again considered the *Barker* factors and find no due process violation. Appellant has not specifically alleged cognizable prejudice from appellate delay. For the reasons stated above with respect to the docketing delay, we find no cognizable prejudice. Absent prejudice, we

similarly find the post-docketing delay involved in Appellant’s case has not been so egregious as to adversely affect the perception of the military justice system. Most of the delay was the result of defense requests for 12 enlargements of time in which to file the assignments of error. In addition, we have considered the large size of the record and the number and complexity of the issues Appellant raised. Accordingly, we find no egregious delay and no violation of Appellant’s due process rights, *see Toohey*, 63 M.J. at 362; nor do we find any relief warranted in the absence of a due process violation under Article 66(d)(2), UCMJ.

## **E. Petition for a New Trial**

### **1. Additional Background**

After Petitioner<sup>12</sup> and MR ended their romantic relationship, MR entered a new romantic relationship with a civilian, AF. As MR and AF’s relationship eroded, AF recorded certain statements MR made and provided them to his mother, who provided them to Petitioner.<sup>13</sup> Through his appellate defense counsel, and through his Petition for a New Trial, Petitioner offers 12 edited recordings to assert newly discovered evidence, which he says challenges MR’s credibility at Petitioner’s trial.

Notably, MR’s statements in the recordings demonstrate she may be contemplating making false allegations of domestic violence against AF. For example, in one recording MR tells AF she “is going to set it up so that way it’s going to look like you hit me and I’m going to call the cops and it’s going to get really ugly really quick because that’s what you deserve for f[\*\*]king with me bro.” In another recording, MR explains that she will have her brother “pinch the f[\*\*]k out of” her, and then she will call the police and accuse AF of hitting her. In an additional recording, she briefly compares AF to Petitioner,

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<sup>12</sup> We refer to Appellant as Petitioner for this issue because he filed a Petition for a New Trial separately on 23 January 2026 from his brief for our Article 66, UCMJ, review; and the court docketed it this same date under Misc. Dkt. No. 2026-02.

<sup>13</sup> In addition to the recordings, Appellant provides three declarations. The first declaration is from AF’s mother, who explains how she came to possess the recordings, and how she was able to contact Petitioner’s appellate defense counsel. The second declaration is from AF. AF explains he began to record his conversations with MR because of her false allegations. He states the recordings began in May 2024 and continued through 2025, without specifying a timeframe within 2025. The third declaration is from an Air Force defense paralegal who assisted in an interview with MR’s first husband.

suggesting both men accused her of creating false accusations of crimes. She quips that Petitioner was actually convicted of domestic violence.<sup>14</sup>

## 2. Law

A petitioner may petition for a new trial “on the grounds of newly discovered evidence or fraud on the court.” Article 73, UCMJ, 10 U.S.C. § 873. A new trial shall not be granted on the grounds of newly discovered evidence unless the petition shows that:

- (A) The evidence was discovered after the trial;
- (B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and
- (C) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

R.C.M. 1210(f)(2) (2024 *MCM*); see *United States v. Luke*, 69 M.J. 309, 314 (C.A.A.F. 2011); *United States v. Johnson*, 61 M.J. 195, 198 (C.A.A.F. 2005). “[R]equests for a new trial . . . are generally disfavored,” and are “granted only if a manifest injustice would result absent a new trial . . . based on proffered newly discovered evidence.” *United States v. Hull*, 70 M.J. 145, 152 (C.A.A.F. 2011) (quoting *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993)).

## 3. Analysis

Petitioner asserts the 12 recordings constitute newly discovered evidence that warrants a new trial pursuant to Article 73, UCMJ. Petitioner suggests this new evidence demonstrates MR’s capability to fabricate false claims of domestic violence. Petitioner further argues that this evidence, coupled with the excluded evidence under Mil. R. Evid. 608(c), clearly shows that MR has a “habit, common plan or scheme, and modus operandi of lying about and fabricating domestic violence allegations as seen before, during, and after [Petitioner’s] court-martial.” Petitioner asserts that “if considered by the court-martial in the light of all other pertinent evidence, [the new evidence] would probably produce a substantially more favorable result for [Petitioner].” We find

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<sup>14</sup> Specifically, AF confronts MR about threatening him through alleging false crimes against MR. AF states, “[you are] trying to falsely . . . accuse me of a crime.” MR responds, “That’s what—that’s crazy cause [sic] that’s exactly what [Petitioner] was saying, only for him to be found guilty of the crime.”

Petitioner has failed to meet his burden to demonstrate a new trial is necessary to avoid a manifest injustice.

We accept that the newly discovered evidence was discovered after trial. We further accept that the evidence is not such that it would have been discovered by the Petitioner at the time of trial in the exercise of due diligence. This, of course, is because the recordings were created after Petitioner's 16 December 2023 trial.

However, we conclude Petitioner has failed to demonstrate the recordings of MR, "if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result" for Petitioner. We reach this conclusion for numerous reasons, and we highlight the most significant three below.

First, MR's recorded statements are made in emotional arguments with AF. AF is the target of her threats to fabricate allegations of domestic violence. Neither the recordings, nor the declarations, provide information that MR actually fabricated evidence, alleging any crime, against AF. Furthermore, MR does not indicate she testified falsely or otherwise fabricated evidence against Petitioner before or during Petitioner's court-martial.

Second, even if determined relevant, any probative value of these recordings "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." Mil. R. Evid. 403.

Third, as discussed *supra*, MR's credibility was attacked thoroughly at trial. MR denied suggestions that she fabricated the allegations against Petitioner and that her injuries were self-induced, accidental, or came from other sources. A witness testified that MR was an untruthful person. MR admitted that she had lied about her age. Nonetheless, substantial evidence was presented at trial which corroborated MR's allegations. Indeed, MR did not intend to initiate a complaint against Petitioner for domestic violence. Instead, she was encouraged to be medically evaluated upon the responders witnessing significant bruising on MR's legs.

Petitioner invites us to evaluate various theories of admissibility for the newly discovered evidence including Mil. R. Evid. 404(b), Mil. R. Evid. 406, and Mil. R. Evid. 608(c), but we need not as we do not believe the recordings survive the Mil. R. Evid. 403 balancing tests. Therefore, Petitioner has failed to demonstrate that the newly discovered evidence requires a new trial to avoid manifest injustice.

### III. CONCLUSION

Appellant's Petition for a New Trial, dated 23 January 2026, is **DENIED**.

As entered, the findings are correct in law and fact. Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2024 *MCM*). In addition, the sentence as entered is corrected in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and the sentence are **AFFIRMED**.



FOR THE COURT

*Carol K. Joyce*

CAROL K. JOYCE  
Clerk of the Court