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UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

No. ACM 40093

UNITED STATES
Appellee

v.

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

Appeal from the United States Air Force Trial Judiciary

Decided 9 September 2022

Military Judge: Sterling C. Pendleton.

Sentence: Sentence adjudged on 18 February 2021 by GCM convened at Ellsworth Air Force Base, South Dakota. Sentence entered by military judge on 8 March 2021: Dishonorable discharge, confinement for 18 years, forfeiture of all pay and allowances, and reduction to E-1.

For Appellant: Major Matthew L. Blyth, USAF; Major Spencer R. Nelson, USAF.

For Appellee: Lieutenant Colonel Matthew J. Neil, USAF; Major Abbigayle C. Hunter, USAF; Major John P. Patera, USAF; Mary Ellen Payne, Esquire.

Before KEY, ANNEXSTAD, and GRUEN, *Appellate Military Judges*.

Judge ANNEXSTAD delivered the opinion of the court, in which Senior Judge KEY and Judge GRUEN joined.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

ANNEXSTAD, Judge:

At a general court-martial, a panel of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of murder, in violation of Article 118, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 918.[1] Appellant elected to be sentenced by the military judge. The military judge sentenced Appellant to a dishonorable discharge, confinement for 18 years, forfeiture of all pay and allowances, and

[1] All references to the UCMJ and the Rules for Courts-Martial (R.C.M) are to the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM).*

reduction to the grade of E-1.[2] The convening authority took no action on the findings or sentence.

Appellant raises seven assignments of error which we have reordered and reworded: (1) whether Appellant's conviction was legally and factually sufficient; (2) whether the military judge abused his discretion in denying a defense request for an expert witness; (3) whether the military judge abused his discretion by allowing the victim's representative to present a victim impact statement that included videos, personal pictures, stock images of future events, and lyrical music that touched on themes of dying, saying farewell, and becoming an angel in heaven; (4) whether trial counsel committed prosecutorial misconduct during her sentencing argument; (5) whether the military judge abused his discretion by failing to suppress Appellant's statements to law enforcement personnel; (6) whether Appellant's due process rights were violated because Article 118(3), UCMJ, 10 U.S.C. § 918(3), does not list manslaughter as a lesser included offense, thereby foreclosing his ability to reduce his criminal exposure by pleading not guilty to an offense charged, but guilty to a named lesser included offense; and (7) whether the Government can prove beyond a reasonable doubt that the military judge's failure to instruct the panel that a guilty verdict must be unanimous was harmless.[3]

With respect to issues (5), (6), and (7), we have carefully considered Appellant's contentions and find

[2] Appellant was awarded 118 days of pretrial confinement credit.

[3] Issues (1), (5), and (6) were personally raised by Appellant pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982).

they do not require further discussion or warrant relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

Finding no error that materially prejudiced a substantial right of Appellant, we affirm the findings and sentence.

I. BACKGROUND

Appellant joined the Air Force in January 2013. At the time of his trial, he was 27 years old, and worked as an aircraft maintainer at Ellsworth Air Force Base, South Dakota. In September 2018, Appellant began dating CM, and the two moved in together in July 2019. In September 2019, their first child, ZC, was born. Later that year, in December 2019, Appellant and CM became engaged and were living in a house in Rapid City, South Dakota. Their two roommates, BS and BS's husband, lived in the lower level of the house.

On the morning of 3 March 2020, CM woke up, fed and changed ZC, and placed him in his car seat so that Appellant could drop him off at daycare on his way to work. Appellant left with ZC around 0645 and dropped ZC off around 0700. CM was scheduled to work that day from 0800 until 2130 hours. CM testified that ZC's daycare provider sent her multiple pictures and messages throughout the morning indicating that ZC was happy and acting normally. Around noon, Appellant was released from work early to prepare for an upcoming exercise. Appellant picked up ZC from

daycare on his way home and arrived home at approximately 1300.

BS testified that she saw Appellant arrive home and take ZC upstairs with him. She went upstairs to get food between 1400 and 1500, at which point she saw ZC in his jumper seat near Appellant who was playing video games. BS stated that ZC seemed normal and happy, and she returned to her bedroom on the lower level of the house. BS stated that at times that afternoon she could hear that ZC was "unusually" fussy. BS testified that at some point after returning to her room she heard footsteps upstairs and then a loud noise. At 1730 she texted her husband concerning ZC; one of those messages read as follows:

> Idk what [Appellant] is doing but [ZC] has been super fussy and every time he starts screaming it sounds like [Appellant] throws something or jumps around like he's pissed off that he has to stop playing his game then he'll stomp to their room and leave [ZC] in there and I can hear him screaming and [Appellant] walking around. Idk if he's getting annoyed or what but it irritates me every time. It doesn't sound like he tries to calm him or anything he just lets him scream[.]

Right after sending the message, BS testified that she heard Appellant calling her name and rushing to her bedroom door. She stated Appellant was holding ZC and saying that he didn't know what was wrong with him. BS testified that ZC was limp, not holding his head up, and did not appear normal. She remembered

Appellant telling her that he gave ZC a bottle and then heard ZC making a gurgling noise.

BS called 911 at 1732 and testified that she was the one who spent the majority of the time speaking with the emergency operator. BS told the operator that ZC was not breathing. While waiting for the ambulance, Appellant and BS gave ZC mouth-to-mouth resuscitation. BS testified Appellant appeared to be in shock and said things like, "Oh god. His eyes are fogging, his eyes are fogging;" "Come on Bubba, come on Bubba;" and "Come on, come on little man." Shortly thereafter, paramedics and police officers arrived.

Officer SB, from the Rapid City Police Department (RCPD), was one of the officers who responded to Appellant's house. Officer SB testified that he spoke with Appellant while paramedics attended to ZC, and Appellant told him that ZC was sleeping, woke up fussy, and that he started making gurgling noises when Appellant attempted to feed him a bottle. Officer SB then stated Appellant told him that after ZC started making the gurgling noises, that ZC's eyes were closed, his body was limp, and he wasn't responding to his name.

An ambulance took ZC to the emergency room at Monument Hospital in Rapid City, South Dakota. Shortly thereafter CM joined Appellant at the hospital. Dr. AN, a board-certified emergency physician was working that evening and provided medical treatment to ZC. Dr. AN testified at trial as an expert witness in the field of emergency medicine. Dr. AN stated that when ZC arrived at the emergency room, his breathing was slow and shallow, his color was pale, and his body was limp. Dr. AN also noted that ZC's forehead was discolored and swollen. Dr. AN

testified that medical providers performed chest compressions, secured ZC's airway, began intravenous medications, and performed a computed tomography (CT) scan of ZC's head.[4] According to Dr. AN, the CT scan revealed that ZC had bleeding in the brain, and ZC's condition was caused by "non-accidental trauma, subdural hematoma, and metabolic acidosis."

Shortly after he arrived at the hospital on March 3, 2020, Officer SB was informed by the medical staff treating ZC that ZC had a "brain bleed." He relayed that news to Appellant and CM, and told them that ZC was going to be airlifted to Sanford Children's Hospital in Sioux Falls, South Dakota. Appellant started crying and stated "I'm an idiot. [Crying] I feel so bad. He hit his head, I thought it was nothing. [Inaudible] It was under my watch; I feel so bad." Officer SB asked Appellant and CM if they were willing to go to the police department to speak with investigators, and both agreed. Of note, Officer SB's body camera captured Appellant's responses described above. The video footage was admitted as a prosecution exhibit and played for the members during trial.

RCPD Detectives SW and DH spoke with Appellant after he arrived at the police department. CM was separately interviewed. Detective SB testified they "still didn't really know what was going on" at that point, so they conducted a "non-custodial interview" of Appellant. Detective SW stated he informed Appellant in the opening minutes of the interview that he was not required to speak with them and that he was free

[4] A computed tomography scan is a medical imaging technique used to obtain detailed internal images of the body.

to leave at any time. Also, he informed Appellant that no matter what was discussed, "he wouldn't be placed under arrest that day and he would be free to get up and leave." Detective SW stated Appellant acknowledged that he did not have to speak with investigators. During his testimony, Detective SW confirmed that the interview was recorded and the substantive portion of the interview lasted approximately two hours. The recorded interview was admitted as a prosecution exhibit and was played during trial for the members.

After Appellant agreed to speak with them, Detective SW asked Appellant to "walk [them] through" what had happened. Appellant then went on to describe the entire morning and his picking ZC up from daycare early. Appellant told investigators that he put ZC in his baby activity jumper seat to play a short time after arriving home. According to Appellant, when he went to let his dog outside, he heard a loud bang and looked over at ZC in his jumper. Appellant stated that ZC just smiled at him and continued to play as normal. Appellant then stated that he fed ZC and laid him down for a nap. Appellant explained that when ZC woke up from his nap, he was fussy and inconsolably crying. Appellant then stated that he gave ZC another bottle and laid him down around 1730 hours, but soon thereafter heard ZC making noises. When Appellant went to check on ZC, Appellant explained to investigators that he found ZC limp and unresponsive.

Detective SW confirmed with Appellant that ZC did not have any medical conditions, physical ailments, or reported issues at daycare, and that he had been acting normal up until Appellant found him unresponsive. Appellant then mentioned that after ZC woke up from the nap, "he just wasn't that happy baby

anymore. He was that fussy. He was just fussy." Detective SW asked Appellant about the details of the incident he described in the jumper to include: what the bang sounded like; how often ZC used the jumper; and if ZC had ever been injured in the jumper before. Detective SW also asked Appellant how CM was with ZC. Appellant answered that CM adored ZC and that he had never "seen somebody love something like that."

Later in the interview, Detective SW asked Appellant if there was anything else he could think of that might have injured ZC. Appellant answered in the negative. The investigators told Appellant that if ZC had bumped his head while in the jumper, he would not have experienced such a serious injury. Detective SW stated, "We know that [ZC] did not get this injury from the jumper." He then asked, "Is this a one-time thing where something happened or what - I mean, what happened, man?" Appellant responded he had dropped ZC, but had withheld that information because he was scared people would think he abused ZC. Detective DH replied, "Just like [SW] said a minute ago, neither he nor I, doubt one tiny bit that you love your son. That's obvious. I don't doubt that. Not at all. Just so we can understand, and also it may help doctors help your son, walk us through what happened."

Appellant then told investigators he dropped ZC while seated on the couch trying to feed him, and ZC fell face first onto the carpeted floor in the living room. Detective SW questioned Appellant's story with skepticism:

> The same people that I deal with on a weekly, if not daily, basis, the same people that have talked to me about

> children injuries and stuff like that, that have given me the training to know that this injury didn't happen by him being in a bouncer. This injury ain't going to happen from a 5[-]month-old just dropping 2 or 3 feet on carpeted ground, okay. I know that for a fact, to the point of -- I have several kids myself, one of which is the same age as your kid, has fallen off a bed from higher than that and nothing happens. It doesn't happen, okay. It's time to start giving the truth. We can't keep lying about this stuff. I mean, were you frustrated; couldn't get the kid to stop crying? What was going on?

Appellant responded to Detective SW's questions by claiming that he sat ZC on the kitchen counter and when Appellant turned to get his bottle, ZC leaned forward and fell off the counter onto the hardwood floor in the kitchen. Appellant stated, "I should have known better because he's only 5 months, so he's not going to keep himself up." Detective SW then asked, "[h]ow many times are we going to dance around this?" Appellant replied that he "didn't do anything to [his] child." The exchange then progressed as follows:

> [Detective SW]: I know it's hard, man. You don't get to sleep. You don't get to do anything anymore. It's hard and it's frustrating. Temperatures -- and temp -- I mean, tempers rise. It happens to you. It happens to all of us, okay. You're not a bad guy, but something happened. We can't change what happened in the past.

> All we can do is face ourselves in the future and, you know, decide what kind of man we want to be from this point because what happened, happened. Now it's about trying to make it right. Like my partner here said, it's not just us asking. Anything you can tell us about how this really happened can help those doctors fix him up too. We need -- we need to know the truth.
>
> [Detective DH]: If they don't know the mechanism of injury, they can't treat the injury as effectively. Does that make sense?
>
> [Appellant]: Yeah.
>
> [Detective DH]: I mean your son's injury is very serious, so any assistance that we can have to treat him is very important.

The exchange continued by Detective DH asking Appellant to help them "help the doctors." To which he responded:

> [Appellant]: Did I really hit my kid? Did I really get so mad at him that I just hit him? How could I not remember something like that? I'm a horrible father, you know. Why would I hit my own kid?
>
> [Detective DH]: That level of frustration can lead us to do things that we just don't expect in ourselves. Like you don't know what to do. You just feel yourself backed into a corner.

[Appellant]: But to hit my own kid like out of frustration and just -- Why? I didn't mean -- I didn't mean to do it. Oh God. I put my kid in the hospital.

[Detective SW]: Was it like with an object or just your hand or what?

[Appellant]: I didn't -- I don't remember having any objects, so probably just my hand. I might have just punched him. But why would I do it?

[Detective SW]: Is that what happened?

[Appellant]: I think so.

[Detective SW]: What do you mean, you think so?

[Appellant]: I just remember I was getting upset. I was -- I was just getting frustrated because he just wouldn't stop crying. I just -- next thing I know, he's eating and he's fine and then –[.]
[Detective SW]: Come on, [Appellant].

[Detective DH]: Help us understand what happened, so we can help your son as best we can.

[Detective SW]: You know what happened in there, enough to come up with these other stories that we all know aren't true. Did you hit him? Was it just one hit or multiple or -- what happened?

[Appellant]: It was just once, but it was hard.

[Detective SW]: Was it with your left or right hand?

[Appellant]: My dominant hand [holding right hand up].

[Detective SW]: Right hand. Was it just with your fist or -- [?]

[Appellant]: [Affirmative response.]

[Detective DH]: Were you holding him?

[Appellant]: No. He was laying down.

[Detective DH]: On the floor?

[Appellant]: In his little taco thing.

[Detective SW]: When did that happen?

[Appellant]: About around 4:30. He just wouldn't stop crying.

[Detective SW]: Mmm-hmm.

[Appellant]: I didn't know what to do. I just -- I was afraid you guys were going to take my kid from me. Yes, 4:30. He just wouldn't stop. I thought maybe he was hungry. I tried to give him his bottle. He just wasn't having it. I didn't know what to do. I got frustrated. I put him in his taco, walked off, tried to cool down. He just kept screaming and screaming and screaming. I was like, I don't know what to do. I really don't know what to do. Instead of going downstairs and asking my roommate to help, I just let that -- the frustration, the anger, just build up inside me. Instead of taking it out on something else like normal people would do, I took it out on my own son. It's not his fault. He's only 5 months. It's not

> his fault. He can't help it. He can't tell me what's wrong. He can't -- [.]
>
> [Detective SW]: Where did you hit him at?
>
> [Appellant]: I hit him in the forehead.
>
> [Detective SW]: Just the one time?
>
> [Appellant]: [Affirmative response.]
>
> [Detective SW]: What happened after that?
>
> [Appellant]: He started crying some more. I mean, I wasn't expecting him to be quiet after that. I just socked my kid.
>
> [Detective SW]: Mmm-hmm.
>
> [Appellant]: And he just -- he cried for a little bit. He stopped. I picked him up. He stopped. Then it was about 5 o'clock-ish and I tried to give him his bottle again. He ate it, but there was just -- the way he was eating, he could -- it didn't seem normal.

Appellant later stated that he "was more surprised than anything. Like, I literally just hit my kid and my kid just looked at me with a smile -- not a smile, but he looked like -- he looked at me like you're my guardian. I didn't feel like it." He went on to explain:

> I just felt like I let him down. When he did that, my heart just sank because I knew it was my fault. When he stopped, when he didn't respond, and then when I picked him up and he was limp, the worst of worst feelings came to mind. Sorry.

While Appellant was speaking to investigators, ZC was airlifted to the pediatric specialty center. At trial, Dr. KS, a forensic pathologist at Sanford Children's Hospital, testified as an expert witness for the Government in the field of forensic pathology. Dr. KS confirmed a number of additional medical tests were conducted upon ZC's arrival. For example, an eye exam revealed that ZC had extensive bilateral retinal hemorrhages, which is indicative of an abusive or non-accidental head injury. Dr. KS also testified a second CT scan was performed on ZC's head. He stated that this scan showed bilateral subdural hemorrhages and severe hypoxic-ischemic injury—meaning injury to the brain caused by a lack of oxygen and blood flow. Dr. KS also stated that a skeletal survey was completed with no fractured bones noted. Dr. KS. testified ZC died on 12 March 2020, nine days after arriving at the hospital, "[d]espite medical therapy."

Dr. KS also performed ZC's autopsy which revealed that ZC had a bruise on the right side of his forehead, a second lighter smaller bruise in the middle of his forehead, and a bruise on the outside of his left ear. ZC's internal organs showed no signs of disease or injury. Dr. KS also noted the post-mortem physical examination of ZC's brain reflected the hemorrhages previously seen on the CT scans. He also explained that ZC's brain was swollen, and the injuries to ZC's brain were indicative of significant trauma to the outside of the head. Dr. KS also noted the autopsy revealed hemorrhaging around the spinal cord in ZC's neck area, which he attributed to rapid acceleration and deceleration of the head. He further opined that a combination of shaking and punching would explain all of ZC's injuries. Finally, Dr. KS testified that the manner of death was homicide, and specifically stated

ZC "died as a result of a traumatic brain injury due to an assault that ha[d] components of blunt force injury and a rapid acceleration, deceleration injury."

The panel of officer and enlisted members found Appellant guilty of one specification of murder.

II. Discussion

A. Legal and Factual Sufficiency

Appellant contends his conviction of murder is both legally and factually insufficient. Specifically, Appellant argues the injuries ZC "sustained do not align with [his] confession," and a single punch could not have caused all of ZC's injuries. Additionally, Appellant contends the character evidence presented at trial that Appellant was generally a gentle, peaceful, and patient person contrasts with the violent murder of which he was convicted and calls into question whether the Government met its burden of proof. We disagree with Appellant's contentions and find no relief is warranted.

1. Additional Background

During their case-in chief, the Defense called two expert witnesses. The first was Dr. AZ, a pediatric radiologist. Dr. AZ testified the first CT scan did not show any swelling of ZC's brain. Dr. AZ had reviewed the x-rays and testified he did not see any classical metaphyseal lesions which are fractures that can occur when shaking an infant and are highly associated with child abuse. He also stated no rib fractures were present. Consistent with the Government's experts, Dr. AZ agreed the first CT scan did show subdural hemorrhaging, and the second CT scan showed swelling of ZC's brain. On cross-

examination, Dr. AZ also confirmed he had seen cases of abusive head trauma without any bone fractures.

The second witness was Dr. DF, who was recognized as an expert witness in the fields of forensic pathology and biomechanics. Dr. DF testified ZC's subdural hemorrhages, brain swelling, retinal hemorrhages, neck injuries, and multiple bruises to his forehead could all be the result of falling from the kitchen counter. During cross-examination, Dr. DF agreed that all of ZC's injuries were also consistent with an infant who had been punched and shaken. Furthermore, Dr. DF testified that he could not exclude shaking as the cause of death because ZC exhibited the "classic triad" of injuries associated with shaking: subdural hemorrhages, profuse retinal hemorrhages, and brain swelling.

During its rebuttal case, the Government called Colonel (Col) SM, a pediatrician, who was recognized as an expert in the fields of general and child- abuse pediatrics. Col SM testified she had reviewed many cases of infant shaking that did not show additional injuries beyond bleeding within the skull, brain injuries, and retinal hemorrhages—in other words, no bone fractures or retinoschisis. Col SM stated ZC's injuries were not consistent with hitting his head on a jumper, falling to a carpeted floor from his father's lap, or falling from the kitchen counter. Finally, Col SM opined ZC's injuries were consistent with a punch or punches to the head, combined with shaking.

2. Law

Issues of legal and factual sufficiency are reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "Our assessment of legal and factual sufficiency is limited to evidence produced at trial."

United States v. Rodela, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citing *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993)), *rev. denied*, No. 22-0111, 2022 CAAF LEXIS 278 (C.A.A.F. 12 Apr. 2022).

"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) (citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018). "[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." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (alteration in original) (citation omitted), *cert. denied*, __ U.S. __, 139 S. Ct. 1641 (2019). 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)).

"The test for factual sufficiency is 'whether, after weighing the evidence in the record of trial and making allowances for not having personally observed

the witnesses,' [this] court is 'convinced of the [appellant]'s guilt beyond a reasonable doubt.'" *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). "In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *Wheeler*, 76 M.J. at 568 (alteration in original) (quoting *Washington*, 57 M.J. at 399). This court's review of the factual sufficiency of evidence for findings is limited to the evidence admitted at trial. *See* Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007) (citations omitted).

Appellant was convicted of murder while engaging in an act inherently dangerous to another in violation of Article 118, UCMJ, which required the Government to prove five elements beyond a reasonable doubt: (1) that ZC is dead; (2) that ZC's death resulted from the intentional acts of Appellant, specifically striking ZC in the head and shaking ZC on 3 March 2020 at or near Rapid City, South Dakota; (3) Appellant's act was inherently dangerous to another and showed a wanton disregard for human life; (4) Appellant knew that death or great bodily harm was a probable consequence of the act; and (5) the killing was unlawful. *See Manual for Courts-Martial, United States* (2019 ed.), pt. IV, ¶ 56.b.(3).

3. Analysis

During Appellant's court-martial, the Government introduced convincing evidence of his guilt. Most significantly, the evidence demonstrated that on the

morning of 3 March 2020, ZC was a healthy and happy baby and remained that way until approximately 1500 that afternoon. The evidence also established that sometime between 1500 and 1730, ZC suffered major injuries to his head and brain while in the sole custody of Appellant, and those injuries resulted in his death. This evidence was established by the testimony of ZC's mother, ZC's daycare provider, and Appellant's roommate, BS. BS also confirmed ZC was "super fussy" after 1500 on the afternoon of 3 March 2020, and that Appellant sounded like he was angry and he either threw something or "stomped" on the floor. She explained she was so concerned that she sent a text message to her husband regarding what she heard. BS testified Appellant called her name and came rushing to her room asking for help moments after she sent the text. She testified that ZC was "limp" and not acting "normal." The Government also presented testimony from three medical experts who all stated ZC's multiple injuries to his head and brain were consistent with being punched and shaken. Finally, the Government presented Appellant's own statements to Detectives SW and DH, where he admitted to punching ZC in the forehead out of frustration.

We are not persuaded that Appellant only admitting to punching ZC in the head one time somehow weakens the Government's case. In fact, even without Appellant's admission, the evidence admitted into the record at trial provides a factually and legally sufficient basis for Appellant's conviction. Nor are we persuaded that the character evidence related to Appellant's general nature for peacefulness overcomes evidence of guilt. We conclude that viewing the evidence in the light most favorable to the Prosecution demonstrates a rational trier of fact could have found

the essential elements of murder while engaging in an act inherently dangerous to another beyond a reasonable doubt. *See Robinson*, 77 M.J. at 297–98. Furthermore, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are ourselves convinced of Appellant's guilt beyond a reasonable doubt. *See Reed*, 54 M.J. at 41 (citation omitted).

B. Expert Witness Request

Appellant argues the military judge abused his discretion in denying a defense request for an expert witness. Specifically, Appellant contends that he was entitled to the production of a forensic psychologist with expertise in false confessions, because "the false confession was the heart of Appellant's defense." Appellant asks us to set aside his conviction and sentence. We find that the military judge did not abuse his discretion and conclude that no relief is warranted.

1. Additional Background

Defense counsel requested the appointment of Dr. SR as an expert consultant on 13 December 2020. Dr. SR is a forensic psychologist who specializes and teaches in the field of false confessions. On 22 January 2021, the convening authority denied Appellant's request.[5] On 27 January 2021, Defense moved the court to compel the production of Dr. SR as an expert

[5] Four months earlier, on 6 August 2020, the convening authority had appointed Dr. KG as a confidential expert consultant for the Defense in the field of forensic psychology. The court further notes that the convening authority also provided additional expert consultants in the fields of forensic pathology, pediatric radiology, and child abuse pediatrics.

consultant. The Government filed a response in opposition on 28 January 2021. Neither side requested an Article 39(a), UCMJ, 10 U.S.C. § 839(a), hearing on the issue and none was held. In support of their motion, the Defense did not offer any statement from Appellant claiming that any part of his statement to law enforcement was false or any statement from Dr. SR on how the science behind false confessions applied to Appellant's case. On 3 February 2021, after considering the filings of the parties, the military judge issued his written ruling denying the motion to compel.

In his written ruling, the military judge indicated he had considered the defense arguments and he addressed Appellant's failure to establish (1) that an expert would be of assistance to the Defense, and (2) that denial of the expert assistance would result in a fundamentally unfair trial. As to the first prong, the military judge concluded the Defense failed to establish why the expert was needed. Specifically, the military judge stated that the Defense "provided little evidence, if any to support the contention the [Appellant] made [a] false [ ] statement[ ]." The military judge also explained that "the [D]efense proffered no information, academic or otherwise, that connect[ed] the facts of this case with a false confession." The military judge concluded no evidence was presented that indicated "the evidence at issue [was] beyond the ability of the [Appellant's] accomplished defense counsel." As to the second prong, the military judge found the Defense failed to demonstrate how the denial of expert assistance would result in a fundamentally unfair trial. The military judge again explained that "the [D]efense has the tools necessary to appropriately defend the

[Appellant] during the merits portion of [the] trial and present evidence in extenuation and mitigation, should th[e] case reach the sentencing phase of [the] trial."

2. Law

We review a military judge's ruling on a motion to compel expert assistance for an abuse of discretion. *United States v. Anderson*, 68 M.J. 378, 383 (C.A.A.F. 2010) (citation omitted). "An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous or if the court's decision is influenced by an erroneous view of the law." *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (quoting *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008)).

This "standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (internal quotation marks and citations omitted). "[T]he abuse of discretion standard of review recognizes that a judge has a range of choices and [a military judge's decision] will not be reversed so long as the decision remains within that range." *United States v. Gore,* 60 M.J. 178, 187 (C.A.A.F. 2004) (citation omitted). "When judicial action is taken in a discretionary matter, such action can not be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of the relevant factors." *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010) (quoting *United States v. Sanchez*, 65 M.J. 145, 148 (C.A.A.F. 2007)).

Our superior court has also explained that:

> [S]ervicemembers are entitled to . . . expert assistance when necessary for an adequate defense. The mere possibility of assistance is not sufficient to prevail on the request. Instead, the accused has the burden of establishing that a reasonable probability exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial. To establish the first prong, the accused must show (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why the defense counsel were unable to gather and present the evidence that the expert assistance would be able to develop.

Freeman, 65 M.J. at 458 (first alteration in original) (internal quotation marks and citations omitted).

3. Analysis

Neither party contends that the military judge's findings of fact were clearly erroneous. We agree that there is sufficient evidence in the record to support the military judge's findings of fact. Therefore, we turn our attention to the military judge's application of the law. We note at the outset that Appellant does not allege the military judge applied incorrect principles of law. In fact, Appellant cites much of the same authority the military judge relied upon in his ruling. Instead, Appellant argues that the military judge reached the wrong conclusion. Therefore, we review

whether the military judge's decision was clearly unreasonable—and conclude that it was not.

We find that the military judge's application of the law to the facts was not clearly unreasonable because the Defense did not establish the necessity of the requested expert assistance. At best, the Defense showed that an expert in false confessions offered the mere possibility of assistance. In its motion to compel, the Defense stated an expert was needed to examine "issues surrounding susceptibility to suggestion, the methods [law enforcement officers] used, and how those factors *potentially* caused [Appellant] to provide a false explanation for his son's injuries." (Emphasis added). We note the Defense never actually provided any evidence that the confession Appellant made to law enforcement officers was false. Additionally, we find that Appellant presented no evidence that he suffered from any abnormal mental or emotional problems that made him susceptible to making false incriminatory statements in response to criminal accusations. *See United States v. Bresnahan,* 62 M.J. 137, 143 (C.A.A.F. 2005) (denial of a defense request for expert assistance was not an abuse of discretion where defense failed to provide evidence that the confession was actually false).

Furthermore, we do not find that the military judge abused his discretion in concluding that an expert was not necessary to present or understand evidence relating to what Appellant told law enforcement officials. We agree with the military judge's conclusion that this evidence was not overly complicated, and that Appellant's defense counsel were more than capable, and in fact did challenge and explain the substance of Appellant's interview with the RCPD detectives. Here, the military judge clearly articulated

his findings of fact and conclusions of law, and his decision was not based on an incorrect view of the law. Therefore, we find that the military judge did not abuse his discretion when he denied the defense motion to compel expert assistance in the field of forensic psychology with expertise in false confessions.

C. Format of Victim Impact Unsworn Statement

Appellant contends the military judge abused his discretion by allowing the victim's representative to present a victim impact statement that included a PowerPoint presentation containing videos, personal pictures, stock images of future events, and lyrical music that touched on themes of dying, saying farewell, and becoming an angel in heaven. While we agree with Appellant that the military judged erred, we do not find that Appellant suffered any prejudice as a result of the error, and thus find no relief is warranted.

1. Additional Background

During the Government's sentencing case, both CM and CM's mother testified under oath and without objection. CM's mother primarily testified about the impact of ZC's death on her and CM. More specifically, CM's mother testified about receiving a "hysterical" phone call from CM on 3 March 2020 regarding ZC's medical emergency. She described how she immediately flew to her daughter's side and was present with her at the hospital for ZC's last days of life. She told the military judge that seeing ZC in the hospital was "horrific" and "the worst thing [she] ever had to witness in [her] entire life." She described the days leading up to his death as "[e]xactly what [she]

imagined [her] hell would be." CM's mother also explained she was deeply impacted by ZC's death, telling the military judge that his death and watching her daughter grapple with it "changed [her] entire life" and there were days when she could not get out of bed or function normally. She also described how, shortly before trial, she requested medication to help her cope with her grief and there were days where she considered taking her own life. CM's mother also described the negative impact ZC's death had on her daughter, stating that "[a]lmost every night I get [S]napchats of my child crying, talking about how she misses her child, [and how] she misses being a mommy."

During CM's testimony, she described how excited she was to become a mother, how horrifying it was when she received the phone call that ZC was being rushed to the hospital, and the difficult days she spent in the hospital with ZC hoping that he would recover. She also described, in great detail, the process of deciding to withdraw life support, the moment ZC died in her arms, and her suffering after his death. In terms of the impact of ZC's death, CM described that she "lost nearly everything" including her ability to trust others, her child, her relationship with Appellant, and "the future [she] thought [she] had." CM said she still thinks about ZC "[e]very minute of every day." As part of her testimony, CM referenced three pages of pictures which were later admitted as a prosecution exhibit. The first page was a photo of the wall in ZC's hospital room that was covered in photos she had hung and a "#[ZC]strong" sign. The second page was a photo of CM looking at ZC in the hospital, and the

third page was a photo of CM cuddling ZC in his hospital bed.

Following the conclusion of the Government's sentencing case, CM, who had been appointed as the Article 6b, UCMJ, 10 U.S.C. § 806b, representative for ZC, made an unsworn statement. The unsworn statement consisted of CM orally addressing the military judge while using a PowerPoint slide show that consisted of pictures, videos, music with lyrics, and stock images of important life events. Prior to the unsworn statement, the Defense objected to the slideshow. In particular, the Defense argued the slideshow was not an oral or written statement within the meaning of Rule for Courts-Martial (R.C.M.) 1001(c), and that it was designed to appeal to emotion. The military judge overruled the objections.

2. Law

We review a military judge's interpretation of R.C.M. 1001[6] de novo, but review a decision regarding the presentation of victim impact statements in presentencing for an abuse of discretion. *See United States v. Hamilton*, 78 M.J. 335, 340 (C.A.A.F. 2019); *United States v. Barker*, 77 M.J. 377, 382–83 (C.A.A.F. 2018). A military judge abuses his or her discretion when he or she makes a ruling based on an erroneous view of the law. *See Barker*, 77 M.J. at 383.

[6] Rules addressing a victim's right to be reasonably heard were contained in R.C.M. 1001A, *Manual for Courts-Martial, United States* (2016 ed.). However, those rules are now contained in R.C.M. 1001(c). *See* 2019 *MCM*, App. 15, at A15-18 ("R.C.M. 1001(c) is new and incorporates R.C.M. 1001A of the MCM (2016 edition)."). Our analysis cites to these versions as applicable.

Article 6b, UCMJ, details several rights belonging to crime victims. Among them are "[t]he right to be reasonably heard at . . . [a] sentencing hearing relating to the offense," and "[t]he reasonable right to confer with the counsel representing the Government" at a court-martial proceeding relating to the offense. Articles 6b(a)(4)(B) and 6b(a)(5), UCMJ, 10 U.S.C. § 806b(a)(4)(B), 806b(a)(5); *see also* R.C.M. 1001(c)(1) ("[A] crime victim of an offense of which the accused has been found guilty has the right to be reasonably heard at the presentencing proceeding relating to that offense.").

"The crime victim may make an unsworn statement and . . . [t]he unsworn statement may be oral, written, or both." R.C.M. 1001(c)(5)(A). "[T]he right to make an unsworn victim statement belongs solely to the victim or the victim's designee and not to trial counsel." *United States v. Edwards*, ___ M.J. ___, No. 21-0245, 2022 CAAF LEXIS 283, at *16 (C.A.A.F. 14 Apr. 2022) (first citing *Barker*, 77 M.J. at 378; and then citing *Hamilton*, 78 M.J. at 342). This "right 'is separate and distinct from the [*G*]*overnment's* right to offer victim impact statements in *aggravation*, under R.C.M. 1001(b)(4).'" *Id.* (quoting *Barker*, 77 M.J. at 378).

Notwithstanding a victim's right to be reasonably heard, a military judge has the responsibility to "[e]nsure that the dignity and decorum of the proceedings are maintained," and shall "exercise reasonable control over the proceedings." R.C.M. 801(a)(2)–(3); *see also LRM v. Kastenberg*, 72 M.J. 364, 372 (C.A.A.F. 2013) (holding a victim's "right to a reasonable opportunity to be heard on factual and legal grounds" is "subject to reasonable limitations

and the military judge retains appropriate discretion under R.C.M. 801").

When testing for prejudice in the context of sentencing, we determine whether the error substantially influenced the adjudged sentence by considering "the following four factors: '(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question.'" *Hamilton*, 78 M.J. at 343 (quoting *United States v. Bowen*, 76 M.J. 83, 89 (C.A.A.F. 2017)). "An error is more likely to be prejudicial if the fact was not already obvious from the other evidence presented at trial and would have provided new ammunition against an appellant." *Barker*, 77 M.J. at 384 (citation omitted). An error is more likely to be harmless when the evidence was not "critical on a pivotal issue in the case." *United States v. Cano*, 61 M.J. 74, 77–78 (C.A.A.F. 2005) (internal quotation marks and citation omitted).

3. Analysis

In light of our superior court's recent decision in *Edwards,* we find that the military judge erred by allowing the victim's Article 6b representative to use a PowerPoint presentation that included videos, personal pictures, stock images of future events, and lyrical music, because the contents of the pictures, music and videos were neither a written nor oral statement within the scope of R.C.M. 1001(c). 2022 CAAF LEXIS 283, at *16.

In *Edwards*, the Court of Appeals for the Armed Forces (CAAF), determined the military judge abused his discretion when he allowed the deceased victim's

father to present an unsworn impact statement that included a video produced by trial counsel. *Id.* at *1–2. The video featured trial counsel interviewing the victim's family and a slide show of photographs set to acoustic background music. *Id*. The court concluded the military judge had erred for two reasons: (1) a video including acoustic music and pictures is neither a written nor oral statement as required by the Rules for Courts-Martial, and (2) because trial counsel produced the video, the statement was—in part—trial counsel's rather than that of the victim, while the right to make a statement solely belongs to victim or the victim's designee. *Id.* at *2. The majority in *Edwards* determined that a remedy was warranted because the Government had not met its burden to show that the video did not substantially influence the sentence. *Id*. at *2–3.

As in *Edwards*, the presentation here exceeded the scope of a written or oral statement; therefore, we conclude the military judge erred, and we turn our attention to the question of prejudice. We find the Government has demonstrated that the use of the PowerPoint presentation did not substantially influence Appellant's sentence and therefore conclude that no remedy is warranted.

Specifically, we find that the four factors articulated in *Barker* all weigh in the Government's favor. 77 M.J. at 384. First, the Government's case was exceptionally strong. The evidence in aggravation showed that Appellant killed his 5-month-old son after he became frustrated with his child's crying. The testimony of CM and the child's grandmother described in great detail how excited CM was to become a mother, what it was like for them to get the phone call that ZC was being rushed to the hospital, the painful days in the

hospital with ZC hoping he would recover, the process of deciding to withdraw ZC's life support, the moment ZC died in CM's arms, and the long-lasting impacts they both continued to suffer.

With respect to the second factor, we find Appellant's sentencing case was weak relative to the Government's case. The Defense called a number of witnesses to speak to Appellant's rehabilitative potential, some of whom had already testified in findings. Most of the admitted witness testimony was in the form of pre-recorded video statements. Appellant also gave a verbal unsworn statement in a question-and-answer format. The unsworn statement was focused on Appellant's own pain, the fact that he was not able to support CM emotionally following ZC's death, and that he did not get to say good-bye to ZC or attend the funeral because he was in pretrial confinement. We find this factor also weighs in the Government's favor.

The third factor—the materiality of the evidence—also weighs in favor of the Government. As our superior court noted in *Edwards*, prejudice is more likely when "the information conveyed as a result of the error was not already obvious from what was presented at trial." 2022 CAAF LEXIS 283, at *21 (citation omitted). Overall, we find the information contained in the PowerPoint presentation was cumulative to the information that had already been properly received during both the trial and sentencing proceedings. In fact, both CM and her mother had already testified during the sentencing proceedings and conveyed the profound pain and devastating impact that Appellant's crime had on them. Additionally, unlike *Edwards*, trial counsel did not play or use any portion of the victim's unsworn

statement in her sentencing argument. This supports our conclusion that the PowerPoint was not material at trial and pushes the third factor in favor of the Government.

The fourth *Barker* factor, the quality of the evidence, also weighs in favor of the Government. We highlight an important difference between this case and the circumstances that occurred in *Edwards*. In *Edwards,* the CAAF found that the statement was improper, and that remedy was appropriate, in part, because it deemed the video was actually a statement from the trial counsel and not a statement of the victim. Here, ZC's Article 6b, UCMJ, representative, CM, created the PowerPoint presentation herself. CM chose the pictures, and she picked the videos and music. Neither party suggests on appeal that trial counsel had any involvement whatsoever. Moreover, it is also worth noting that in this case, trial counsel did not present or play the presentation. Instead, CM spoke in person, directly to the military judge, and used the slide presentation as a demonstrative aid to help illustrate her words. Unprompted and without questions from trial counsel, CM spoke directly to the military judge, in a military judge alone sentencing proceeding, for almost three pages of the transcript. We find CM's spoken words comply with the requirements for a proper victim's statement under R.C.M. 1001(c) and thus would have conveyed the same basic message even without the use of the PowerPoint presentation. Finally, as noted above, trial counsel did not play or reference any part of the unsworn statement during argument, and the unsworn statement contributed little to the Government's case that was not already evident through properly admitted evidence. For these reasons, we find the fourth factor also favors the

Government and leads to our conclusion the Government has shown that the PowerPoint presentation did not substantially influence Appellant's sentence.

D. Trial Counsel's Sentencing Argument

Appellant claims that trial counsel committed prosecutorial misconduct during her sentencing argument. Specifically Appellant argues that trial counsel improperly (1) argued that Appellant struck ZC as a result of his built-up frustration and anger with ZC's crying; (2) referenced the media attention and members present in the courtroom to improperly pressure the military judge; and (3) argued that Appellant's false statements were matters in aggravation. The Defense did not object at any point during argument. We conclude that trial counsel's argument was not plainly improper.[7]

1. Additional Background

Appellant elected to be tried by a panel of officer and enlisted members. Once he was convicted, Appellant elected to be sentenced by military judge alone. During the findings portion of the trial, the Government introduced multiple statements Appellant made to his roommate (BS), first responders, and law enforcement investigators about the cause of ZC's injuries. Because the statements contradicted each other, the military judge instructed

[7] Appellant also requests that even if we determine that issues 3 and 4 warrant no relief individually, that we consider and issue a ruling on the cumulative effect of the alleged sentencing errors. Since we only find error with regard to issue 3, we find the doctrine of cumulative error inapplicable to Appellant's case. *See United States v. Banks,* 36 M.J. 150, 170–71 (C.M.A. 1992).

the members before findings on the use of false exculpatory statements. Specifically, he advised:

> If you believe there has been evidence that, after the offense allegedly committed, the accused may have given false explanations about the alleged offense or surrounding facts and circumstances, consider this:
>
> Conduct of an accused, including statements made and acts done upon being informed that a crime may have been committed or upon being confronted with a criminal charge, may be considered by you in light of other evidence in the case in determining the guilt or innocence of the accused.
>
> If an accused voluntarily offers an explanation or makes some statement tending to establish his innocence, and such explanation or statement is later shown to be false, you may consider whether this circumstantial evidence points to consciousness of guilt. You may infer that an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish his innocence. The drawing of this inference is not required.
>
> Whether the statement made, was voluntary, or was false is for you to decide. You may also properly consider the circumstances under which the

> statements were given, such as the environment, under which they were given.
>
> Whether evidence as to an accused's voluntary explanation or statement points to a consciousness of guilt, and the significance, if any, to be attached to any such evidence, are matters for determination by you, the court members.

Later during an Article 39(a), UCMJ, session, after findings had been announced but before the sentencing phase began, the parties argued the admissibility of additional false exculpatory statements Appellant made to various family members or friends who were on the defense witness list for sentencing. The evidence discussed during this session concerned Appellant's statements that he was forced by police to confess and that he did not remember confessing. Trial counsel eventually withdrew their request to admit these statements.

The Defense called a number of live witnesses during its sentencing case. During cross-examination of the character witnesses, trial counsel asked a series of questions about whether the witnesses were aware of the false statements Appellant had made about lack of memory of his confession, lack of memory about what happened to ZC, and being forced to confess by police. Trial defense counsel objected to these questions, but the objections were overruled. The military judge ruled the questions were permissible under R.C.M. 1001(b)(5)(e) since evidence of Appellant's rehabilitative potential was elicited from the witnesses by trial defense counsel.

Trial counsel organized the Government's sentencing argument into three sections: aggravation, mitigation, and victim impact. During the aggravation portion of the argument, trial counsel began by discussing the nonviolent choices Appellant had when ZC was inconsolable on the day of the crime**.** Trial counsel then played a video clip of Appellant's law enforcement interview where Appellant acknowledged, "[I]nstead of going downstairs and asking my roommate for help, I just let the frustration, the anger, just build up inside me." Immediately following the video clip, trial counsel stated "this is aggravating" and went on to argue that despite having multiple viable nonviolent avenues for ZC's care, Appellant let his anger and frustration get the best of him and chose to resort to violence.

Trial counsel then discussed the false statements Appellant made about the cause of ZC's injuries which had been admitted during the Government's case-in-chief. More specifically, trial counsel argued that Appellant's false statements about the source of his son's injuries were aggravating because they showed a lack of remorse and compromised his son's treatment:

> But what he does not do, he doesn't tell the truth about what just happened? In that split second [Appellant] goes from beating his son into self-preservation mode. He is more interested in protecting himself, keeping himself out of trouble then [sic] getting his son the help that he so desperately needs. He tells [his roommate], I don't know what happened. A couple of minutes later, the

> first responders show up, he has a little bit more time, and he tells them well, I'm not sure what happened, [ZC] was feeding and ma[de] some choking noise. But I just don't know what happened.
>
> He gets to the hospital, and the doctors say, your kid has a bruise on his head. So, then [Appellant] says, oh well it was the taco -- or the bouncy thing, the jumper. And then when he goes to law enforcement, while his son is fighting for his life, [Appellant] tells lie, after lie, after lie, after lie, until we finally get a piece of truth. [Appellant] finally admits, yes, I punched my son.
>
> . . . .
>
> [Appellant's] repeated lies were designed to keep him out of trouble and were in complete disregard to the well-being and safety of his baby. These are aggravating circumstances surrounding the [Appellant]'s crime.

During the rehabilitation section of her argument, trial counsel mentioned the false statements Appellant made regarding memory loss of his confession and being forced by law enforcement to confess. Trial counsel then went on to highlight the impact of Appellant's crime on ZC, CM, and members of their family.

Trial counsel concluded her argument by urging the military judge to consider general deterrence in assessing the sentence:

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

Trial defense counsel did not object at any point during trial counsel's sentencing argument. At the conclusion of trial defense counsel's sentencing argument, the military judge offered both parties another opportunity to object to opposing counsel's argument. Both parties answered in the negative.

2. Law

Whether an accused has waived or merely forfeited an issue is a question of law we review de novo. *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017) (citing *United States v. Rosenthal*, 62 M.J. 261, 262 (C.A.A.F. 2005)).

"Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional

relinquishment or abandonment of a known right." *Id.* (quoting *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)). Issues that are waived leave no error for this court to correct on appeal. *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009) (citing *United States v. Pappas*, 409 F.3d 828, 830 (7th Cir. 2005)). An affirmative statement that an Accused at trial has "no objection" generally "constitutes an affirmative waiver of the right or admission at issue." *United States v. Swift*, 76 M.J. 210, 217 (C.A.A.F. 2017) (citations omitted).

The issue of "[i]mproper argument is a question of law that we review de novo." *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011) (citation omitted). However, if the defense does not object to a sentencing argument by trial counsel, we review the issue for plain error. *Id.* (citing *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007)). To establish plain error, an appellant "must prove the existence of error, that the error was plain or obvious, and that the error resulted in material prejudice to a substantial right." *Id.* at 106 (citing *Erickson*, 65 M.J. at 223). Again, because "all three prongs must be satisfied in order to find plain error, the failure to establish any one of the prongs is fatal to a plain error claim." *United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006).

During sentencing argument, "[t]rial counsel may . . . refer to the sentencing considerations set forth in R.C.M. 1002(f)." R.C.M. 1001(h). These considerations include "the nature and circumstances of the offense and the history and characteristics of the accused." R.C.M. 1002(f)(1). They also include the "impact of the offense on" the "social, psychological, or medical well-being of any victim of the offense," R.C.M.

1002(f)(2)(A), and on "the mission, discipline, or efficiency of the command of the accused and any victim of the offense." R.C.M. 1002(f)(2)(B). In addition to these considerations, trial counsel may refer to the need for the sentence to: "(A) reflect the seriousness of the offense; (B) promote respect for the law; (C) provide just punishment for the offense; (D) promote adequate deterrence of misconduct; (E) protect others from further crimes by the accused; [and,] (F) rehabilitate the accused . . . ." R.C.M. 1001(h); R.C.M. 1002(f)(3).

"Trial counsel is entitled to argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." *Frey*, 73 M.J. at 248 (internal quotation marks and citation omitted). "[E]ither party may comment on properly admitted unsworn victim statements" during presentencing argument. *United States v. Tyler*, 81 M.J. 108, 113 (C.A.A.F. 2021).

"During sentencing argument, the trial counsel is at liberty to strike hard, but not foul, blows." *United States v. Halpin*, 71 M.J. 477, 479 (C.A.A.F. 2013) (internal quotation marks and citation omitted). "[T]he argument by a trial counsel must be viewed within the context of the entire court-martial." *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000). "The focus of our inquiry should not be on words in isolation, but on the argument as viewed in context." *Id*. (internal quotation marks and citations omitted).

"The legal test for improper argument is whether the argument was erroneous and whether it materially

prejudiced the substantial rights of the accused." *United States v. Frey*, 73 M.J. 245, 248 (C.A.A.F. 2014) (quoting *Baer*, 53 M.J. at 237). Three factors "guide our determination of the prejudicial effect of improper argument: '(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction[s].'" *United States v. Sewell,* 76 M.J. 14, 18 (C.A.A.F. 2017) (alteration in original) (quoting *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005)). "In applying the *Fletcher* factors in the context of an allegedly improper sentencing argument, we consider whether trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the appellant was sentenced on the basis of the evidence alone." *Halpin*, 71 M.J. at 480 (alteration, internal quotation marks, and citation 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 military judge alone case we would normally presume that the military judge would disregard any improper comments by counsel during argument and such comments would have no effect on determining an appropriate sentence." *United States v. Waldrup*, 30 M.J. 1126, 1132 (N.M.C.M.R. 1989).

3. Analysis

The Government argues that trial defense counsel waived any objection to trial counsel's argument by virtue of announcing they had no objections at the end of the argument and that we should not address any

of the issues raised by Appellant on appeal regarding trial counsel's argument. We decline the Government's request, instead consider the issues forfeited, and review for plain error.

Appellant first contends trial counsel improperly argued that Appellant struck ZC out of his built-up anger and frustration with ZC's crying. Appellant reasons that this evidence constituted the actus reus of the offense, and therefore was not proper evidence of aggravation. We disagree. The actus reus of Appellant's crime was striking ZC in the head and shaking ZC. Here, trial counsel commented on properly admitted evidence and argued it was an aggravating factor that Appellant's motive was anger and frustration when he had multiple other nonviolent options for ZC's care. These matters related directly to the offense of which Appellant was convicted. We find no error, plain or otherwise, with this argument.

Next, Appellant contends that trial counsel's reference to the media and spectator attention on the case was improper because it improperly pressured the military judge to comply with trial counsel's sentence recommendation. We disagree and find trial counsel's argument was a permissible method to argue for general deterrence and justice.

For support, Appellant relies on *United States v. Norwood*, 81 M.J. 12 (C.A.A.F. 2021). In that case, the trial counsel asked the members, without objection, to think about what would happen "when you all return to your normal duties . . . . [A]nd someone asks you . . . . 'Wow, what did [Appellant] get for that?' Do you really want your answer to be 'nothing at all'?" *Id.* at 19 (alterations in original). Under a plain error

standard of review, the CAAF set aside the sentence, finding the trial counsel had improperly "pressured the members to consider how their fellow service-members would judge them and the sentence they adjudged instead of the evidence at hand." *Id.* at 21. The CAAF reasoned, "Arguing an inflammatory hypothetical scenario with no basis in evidence amounts to improper argument that we have repeatedly, and quite recently, condemned." *Id.* (citing *United States v. Voorhees*, 79 M.J. 5, 14–15 (C.A.A.F. 2019)). The CAAF reminded practitioners that "[t]rial counsel may properly ask for a severe sentence, but [they] cannot threaten the court members with the specter of contempt or ostracism if they reject [their] request." *Id.* (alterations in original) (quoting *United States v. Wood*, 40 C.M.R. 3, 9 (C.M.A. 1969)).

However, in our view, unlike *Norwood*, the remarks here cannot be understood to pressure or threaten the military judge with contempt or ostracism from others if he reached a sentence that was less than trial counsel's recommended sentence. At no point did trial counsel suggest that others would judge him unfavorably if he imposed, or did not impose, a certain sentence. Trial counsel frequently referenced the evidence in the case, explaining the aggravating circumstances of Appellant's crime, and argued that the sentence should promote general deterrence, respect for the law, and justice. As our court has recently stated, "We decline to extend *Norwood* to remarks aimed at specific or general deterrence that are founded in the record and devoid of pressure or threats." *United States v. Jackson*, No. ACM 39955, 2022 CCA LEXIS 300, at *95 (A.F. Ct. Crim. App. 23

May 2022) (unpub. op.). We therefore conclude that Appellant has not demonstrated trial counsel's argument, in context, was clear or obvious error. *See Erickson*, 65 M.J. at 223.

Finally, Appellant claims that trial counsel's reference to false statements was not proper evidence in aggravation. Appellant bases his argument, in part, on the premise that trial counsel acknowledged Appellant's statements regarding being forced by police to confess and not remembering his confession were not proper matters of aggravation. However, we see no evidence that trial counsel used these statements at all during argument. The only false statements trial counsel argued as evidence in aggravation were statements Appellant made to his roommate, first responders, and law enforcement about the cause of ZC's injuries. This was permissible because the evidence showed, and trial counsel argued, that having an accurate history of how the injuries occurred would have assisted in providing ZC medical care. In fact, this argument was supported by multiple medical providers who testified about the importance of having an accurate history of a patient's injury when providing treatment.

Additionally, during the interview with Appellant, Detective SW informed him that an accurate history would help medical providers care for ZC. Using this evidence, trial counsel argued that Appellant's false statements were aggravating because Appellant was "more interested in protecting himself, keeping himself out of trouble" than getting ZC "the help he so desperately need[ed]" and Appellant's "lies were designed to keep him out of trouble and were in complete disregard to the well-being and safety of his baby." We do not find that trial counsel engaged in the

improper argument of saying merely lying about the offense alone constituted aggravating evidence. Rather, we find that trial counsel properly connected the false statements to the negative impact on ZC's medical care, which he was only receiving as a direct result of Appellant's crime. Therefore, we conclude Appellant has failed to show that trial counsel's argument constituted plain or obvious error.

Even if we were to assume error, plain or obvious, the sentencing authority in this case was a military judge, sitting alone. Military judges are presumed to know the law and to follow it absent clear evidence to the contrary. *Erickson*, 65 M.J. at 225 (citing *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997)). Here, there is no evidence to rebut that presumption. Finally, after weighing the *Fletcher* factors together and considering trial counsel's arguments in context, we are confident that the military judge properly sentenced Appellant on the basis of the evidence alone. *Erickson*, 65 M.J. at 224.

III. CONCLUSION

The findings and sentence as entered are correct 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

This opinion is subject to revision before publication.

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES
Appellee

v.

James T. CUNNINGHAM, Senior Airman
United States Air Force, *Appellant*

No. 23-0027
Crim. App. No. 40093

Argued March 29, 2023—Decided July 21, 2023

Military Judge: Sterling C. Pendleton

For Appellant: *Major Spencer R. Nelson* (argued); *Major David L. Bosner*.

For Appellee: *Major Morgan R. Christie* (argued); *Colonel Naomi P. Dennis* and *Mary Ellen Payne*, Esq. (on brief).

Judge SPARKS delivered the opinion of the Court, in which Chief Judge OHLSON and Judge JOHNSON joined. Judge MAGGS filed a

separate opinion concurring in part and dissenting in part, in which Judge HARDY joined.

Judge SPARKS delivered the opinion of the Court.

In 2021, a general court-martial consisting of officer and enlisted members convicted Senior Airman (SrA) James T. Cunningham (Appellant), contrary to his pleas, of murder in violation of Article 118, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 918 (2018). A military judge sentenced Appellant to a dishonorable discharge, confinement for eighteen years, forfeiture of all pay and allowances, and reduction to E-1. After the convening authority took no action on the case, the lower court affirmed the findings and the sentence. *United States v. Cunningham*, No. ACM 40093, 2022 CCA LEXIS 527, at *2, 2022 WL 4115134, at *1 (A.F. Ct. Crim. App. Sept. 9, 2022) (unpublished).

This Court then granted review of the following issues:

> I. Whether the Air Force Court properly applied *United States v. Edwards*, 82 M.J. 239 (C.A.A.F. 2022) in finding error—but no prejudice—for a victim impact statement that included videos, personal pictures, stock images of future events, and lyrical music that touched on themes of dying, saying farewell, and becoming an angel in heaven.
>
> II. Whether trial counsel's sentencing argument was improper under *United States v. Warren*, 13 M.J. 278 (C.M.A. 1982) and *United States v. Norwood*, 81 M.J. 12 (C.A.A.F. 2021), respectively, when she: (1)

> argued that Appellant's uncharged, false statements were aggravating evidence after she had previously cited case law to the military judge that said false statements were not admissible as evidence in aggravation; and (2) told the military judge that he had seen the media and the world was watching, to justify her sentence recommendation.
>
> III. Whether Appellant was deprived of the right to a unanimous verdict under *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), after the military judge denied his motion for unanimity, denied his request to poll the panel on whether its verdict was unanimous, and the Air Force Court dismissed the issue with no discussion.[1]

United States v. Cunningham, 83 M.J. 139 (C.A.A.F. 2022) (order granting review). We answer the first granted issue in the affirmative and hold that the second granted issue is expressly waived.

I. Background

At the time of the offense, Appellant was approximately twenty-six years old and had been dating CM before the couple had a child, ZC. The three lived together with two housemates: BS and BS's husband. On the day of the offense ZC was almost six months old. ZC's day-care provider texted CM letting her know that he was happy and acting normally while at day care. 2022 CCA LEXIS 527, at *4, 2022

[1] Issue III was not argued or briefed, as it was held as a trailer to *United States v. Anderson*, __ M.J. __ (C.A.A.F. 2023). Based upon the decision in *Anderson*, we hold that Appellant was not deprived of the right to a unanimous verdict.

WL 4115134, at *2. Appellant brought ZC home from day care while CM was still at work. After doing so, Appellant took ZC upstairs and began playing video games. *Id.*, 2022 WL 4115134, at *2. BS noted that ZC was " 'unusually' fussy," and texted her husband that it sounded like Appellant was throwing something or jumping around as if he were annoyed that he had to stop playing video games because of ZC. *Id.*, 2022 WL 4115134, at *2. After BS sent this text, Appellant called for BS, saying that something "was wrong" with ZC and he did not know why. BS testified that ZC did not appear normal, he was limp and could not hold his head up. BS then called 911.

Throughout the ordeal Appellant gave various stories to several parties—his housemate, first responders, and local authorities—about what happened to ZC. For instance, he told first responders that ZC woke up "fussy" and started making gurgling noises when he tried to feed ZC. Upon being told that medical personnel discovered a brain bleed in ZC, Appellant then changed his story several times: ZC hit his head while in his baby "jumper" seat, Appellant dropped ZC onto a carpeted floor, and ZC fell onto a hardwood floor. Appellant ultimately admitted that he hit ZC in the face out of frustration because ZC would not stop crying. He told investigators that he was " 'afraid [authorities] were going to take [his] kid from [him]. . . . [he] got frustrated. . . . [ZC] just kept screaming . . . . [he] just let that— frustration, the anger, just build up.' " 2022 CCA LEXIS 527, at *14, 2022 WL 4115134, at *5. As a result of the injuries, ZC died nine days later in the hospital.

A. Sentencing Testimony and the Victim Impact Statement

CM and CM's mother testified under oath during the Government's sentencing case without objection. CM's mother testified about the impact ZC's death had upon her and CM. CM's mother explained that, upon hearing about ZC's injuries, she immediately flew to be with her daughter and was at the hospital for ZC's last days. She testified that seeing ZC in the hospital was "horrific," and that it was the "worst thing" she had witnessed in her life. Observing her daughter's struggle with ZC's death, and ZC's death itself, "changed [CM's mother's] entire life." CM's mother requested medications to help cope and considered suicide. Every night CM's mother would receive multimedia messages via Snapchat of her daughter crying, "talking about how she misses her child, [and how] she misses being a mommy."

CM testified in detail about the process of deciding to withdraw life support, the moment ZC died in her arms, her suffering after his death, and the toll it took on her. CM described that she lost not only her child, but also her relationship with Appellant, the ability to trust others, and "the future [she] thought [she] had." During her testimony, CM referenced three pages of pictures which were later admitted as a prosecution exhibit, consisting of photos of ZC's hospital room, CM looking at ZC in the hospital, and CM cuddling ZC in the hospital bed.

CM was appointed as ZC's representative pursuant to Article 6b, UCMJ, 10 U.S.C. § 806b (2018), and in this role made an unsworn victim impact statement following the Government's sentencing case. CM's victim impact statement consisted of her orally addressing the military judge while using a

PowerPoint slideshow that consisted of pictures, videos, and somber music. The PowerPoint presentation contained eleven slides, including animations which included transitions, appearing and disappearing text, and slides crumpling like paper that is being thrown away. It also included over fifty still images; four still images which were stock images of future life events which ZC would not experience (such as a first day at school, marriage, and graduation); and embedded presentations that automatically played video with accompanying audio. CM then finished her victim impact statement orally. CM stated that "all the slides [she] presented . . . videos, pictures, words . . . all come from [her]."

II. Standard of Review

Interpreting Rule for Courts-Martial (R.C.M.) 1001A (2016 ed.) is a question of law this Court reviews de novo. *United States v. Edwards*, 82 M.J. 239, 243 (C.A.A.F. 2022).[2] However, we review a military judge's decision to accept a victim impact statement offered pursuant to R.C.M. 1001A for an abuse of discretion *Id.* "When the Court finds error in the admission of sentencing evidence (or sentencing matters), the test for prejudice is 'whether the error substantially influenced the adjudged sentence.' " *Id.* at 246 (quoting *United States v. Barker*, 77 M.J. 377, 384 (C.A.A.F. 2018)).

[2] We note that in the 2019 edition of the *Manual for Courts Martial*, R.C.M. 1001A (2016 ed.) has been incorporated into R.C.M. 1001 as R.C.M. 1001(c) (with subsection header "Crime victim's right to be reasonably heard").

III. Analysis

A. The Victim Impact Statement

Under the plain text of R.C.M. 1001A(e) (2016 ed.), unsworn statements may be "oral, written, or both." In *Edwards*, we concluded that the military judge abused his discretion by admitting a victim impact statement that consisted of a video presentation containing photographs and music because R.C.M. 1001A(e) (2016 ed.) only authorized a victim impact statement that was "oral, written, or both." In this case, even though R.C.M. 1001A(e) (2016 ed.) has been moved to R.C.M. 1001(c) (2019 ed.), the rule still only authorizes a victim impact statement which is "oral, written, or both." R.C.M. 1001(c)(5)(A). Accordingly, the admission of the victim impact statement in the instant case is error as it similarly contained elements which were neither "oral" nor "written," namely, the music and photographs. *Edwards*, 82 M.J. at 244. As such, the analysis turns to prejudice.[3]

Prejudice

The Government "bears the burden of demonstrating that the admission of erroneous evidence was harmless." *Id.* at 246. We consider "four factors when deciding whether an error substantially influenced an appellant's sentence: '(1) the strength of the

[3] As in *Edwards*, 82 M.J. at 243, we need not—and do not—decide whether the rules would ever permit a victim to offer an unsworn statement via prerecorded video because the victim impact statement at issue in this case was deficient for the reasons explained above. Additionally, although part of CM's victim impact statement consisted of her making an oral statement, we make no ruling as to whether what she said is severable from the victim impact statement as a whole.

Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question."[4] *Id.* at 247 (quoting *Barker*, 77 M.J. at 384). We conduct this analysis de novo. *United States v. Thompson*, 63 M.J. 228, 231 (C.A.A.F. 2006)). "[I]t is highly relevant when analyzing the effect of error on the sentence that the case was tried before a military judge, who is presumed to know the law." *Barker*, 77 M.J. at 384 (citing *United States v. Bridges*, 66 M.J. 246, 248 (C.A.A.F. 2008)).

As for the first factor, the Government's sentencing case is strong and weighs heavily in its favor. Appellant was convicted of a serious crime which exposed him to a potentially long sentence. Namely, Appellant struck his six month-old child in the head out of frustration, causing ZC's death; he lied multiple times to multiple people, including first responders responsible for ZC's care; and CM and CM's mother's collective sworn testimonies highlighted their collective suffering which directly resulted from the crime, which was the murder of an infant. Furthermore, Appellant concedes that this "first *Barker* factor weighs in favor of the Government as its sentencing case was strong in the sense that the victim's grandmother and mother testified under oath about the devastating impact [ZC's] death had on them."

[4] As we have done in the past, the Court acknowledges that applying these factors to sentencing, as opposed to errors occurring during the findings phase of the court-martial, is difficult. *See Edwards*, 82 M.J. at 247. Nonetheless, it is the test with which we conduct sentencing errors given our precedent, and as such we are obligated to use it.

As for the second factor, unlike in *Edwards*, 82 M.J. at 247, Appellant did introduce matters in extenuation and mitigation. Multiple parties spoke on Appellant's behalf. Although there was a significant number of people doing so, thirteen in total, the majority came as unsworn recorded statements. However, Appellant's own unsworn testimony focused almost entirely on himself—how he could not attend ZC's funeral, or how he could not be there to support CM—and he expressed little remorse for his actions. Nonetheless, we conclude that this factor weighs slightly in favor of Appellant.

The third factor, materiality, weighs in the Government's favor. Although matters are material if they have "some logical connection with the facts of the case or the legal issues presented,"[5] "an error is more likely to have prejudiced an appellant if the information conveyed as a result of the error was not already obvious from what was presented at trial." *Edwards*, 82 M.J. at 241; *see also United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007) (noting that an error is likely to be harmless when a fact was already obvious from prior testimony and the evidence in question " 'would not have provided any new ammunition' " (quoting *United States v. Cano*, 61 M.J. 75, 77-78 (C.A.A.F. 2005))). The information contained in the PowerPoint presentation was drawn from the evidence that had already been admitted during both the trial on the merits and sentencing proceedings. CM and her mother both testified during the sentencing and communicated the "profound pain and devastating impact that Appellant's crime had on them." 2022 CCA LEXIS 527, at *38, 2022 WL

[5] *Black's Law Dictionary* 701 (11th ed. 2019).

4115134, at *12. Properly admitted photos and the content of CM's testimony from presentencing proceedings illustrate her devastation resulting from Appellant's acts. For example, CM testified that she wanted to be a "mother more than anything" when she grew up; she thought ZC was a perfect baby; receiving the call that ZC was going to the hospital was the worst phone call she had ever received; when she was told by the neurosurgeon that ZC would not survive, it felt as if "somebody took a knife and jabbed it into [her] heart, and pulled it back out, and stomped on it"; "it was hell" when she was woken up and was told ZC was brain dead after spending eight days in the hospital with him; after deciding to take ZC off of life support she held him in her arms as he died; she likely will have trust issues if she were to attempt to have children in the future; and everything felt as if it were taken from her. Also admitted into evidence were photos of ZC hooked up to lifesaving equipment, and CM in bed cuddled next to ZC. Additionally, while the Government's sentencing argument referenced "victim impact," and mentioned that CM spoke on her own behalf and that of ZC, as his authorized representative, it did not *explicitly* reference the content of the PowerPoint presentation or CM's oral victim impact statement.[6] The cumulative nature of

[6] Appellant states that although the PowerPoint presentation was not used during trial counsel's argument, it was still "clearly referenced" by the Government, and thus, it was material. The "reference" is insignificant at most, especially when compared to the use of the actual video by counsel during sentencing argument in *Edwards*. In the instant case, trial counsel said that:

> [CM] never did get to take those six-month photos of [ZC]. She is never going to watch him graduate. She is never going to hear him utter

the videos and photographs—despite their materiality to the case—provides no additional information than what was presented during sentencing testimony, and as such supports our holding that Appellant suffered no prejudice. *See also United States v. Hursey*, 55 M.J. 34, 36 (C.A.A.F. 2001) (concluding that an error to admit evidence was harmless in part because the record contained a significant amount of admissible evidence that was similar). Lastly, although the admitted music was not necessarily cumulative, we nonetheless do not expect it to sway a military judge.

As for the quality of the evidence, the fourth *Barker* factor, it also weighs against Appellant. The quality of the evidence may be assessed by its tendency, if any, to influence the trier of fact, or in this case, the sentencing authority. The victim impact statement in this case was clearly intended by the victim advocates to evoke emotion. Nonetheless, military judges are "presumed to know the law" and follow it absent clear evidence to the contrary. *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007); *Barker*, 77 M.J. at 384.

> the words mama to her. Every single moment in his life, from the major to the mundane were destroyed, erased, wiped away with the accused [*sic*] murder.

Brief for Appellant at 21, *United States v. Cunningham*, No. 230027 (C.A.A.F. Jan. 12, 2023) (alterations in original) (internal quotation marks omitted). The only overlap between the victim impact statement and trial counsel's words was one slide in the PowerPoint presentation, which had a stock graduation photo, and CM stating orally that she would never be able to "applaud as he walks across the stage on graduation day." This is not an explicit reference to the victim impact statement.

We note that the military judge in the instant case, in reference to the victim impact statement, stated that he would "give it the weight that it deserves, and [he] will consider it under the rule as [he] mentioned." However, we do not conclude that this necessarily indicates that the military judge gave the victim impact statement any weight, let alone was substantially influenced by it, and thus is not "clear evidence to the contrary." *Erickson*, 65 M.J. at 225. A military judge understands that emotions cannot enter the final determination of the sentence, and a military judge is far less likely to be influenced by the emotional aspects of a victim impact statement even if it were designed to explicitly invoke emotion. *See, e.g., United States v. Manns*, 54 M.J. 164, 167 (C.A.A.F. 2000) (noting that in bench trials the risk of unfair prejudice is substantially less than it would be with members). There is no indication in this record that the military judge allowed the emotional aspects of the presentation to affect him to a point that he departed from his duty to determine an appropriate sentence in a fair, objective, and unbiased manner. Ultimately, the military judge imposed a sentence of eighteen years in opposition to the Government's request of at least twenty to twenty-five years of confinement. Yes, the military judge erred in allowing the victim impact statement based on its *format*, as pictures and music are not permissible. *See Edwards*, 82 M.J. at 243-44. Yet, even with this error, again, there is nothing in the record to support that the military judge was *substantially influenced* by the victim impact statement as it was presented. *See, e.g., Barker*, 77 M.J. at 384 (holding that in a bench trial, despite the military judge erring in admitting victim impact statements given their inappropriate format, it was the "particularly horrific" "manner in which [the

victimized children] were sexually assaulted" that influenced the adjudged sentence, not the wrongly admitted statements). After assessing the above factors, we hold that the Government has met its burden to demonstrate that the error did not substantially influence Appellant's sentence.

B. Improper Sentencing Argument

At the conclusion of their sentencing arguments, the military judge asked if either party had any objections. Government trial counsel and trial defense counsel answered in the negative. "Whether an appellant has waived an issue is a legal question that this Court reviews de novo." *United States v. Davis*, 79 M.J. 329, 332 (C.A.A.F. 2020) (citing *United States v. Haynes*, 79 M.J. 17, 19 (C.A.A.F. 2019)). In this case, trial defense counsel "did not just fail to object," but "affirmatively declined to object" when answering "no" to the military judge's question. *Davis*, 79 M.J. at 331-32. We hold that this response constitutes an express waiver, obviating the need to address the issue of improper sentencing argument.

IV. Conclusion

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Judge MAGGS, with whom Judge HARDY joins, concurring in part and dissenting in part.

In this appeal, Appellant challenges a sentencing argument and a victim impact statement. I fully agree with the Court's conclusion that Appellant expressly waived his objections to the sentencing argument. But I only partially agree with the Court's analysis of the victim impact statement. Specifically, I agree with the Court that the military judge abused his discretion by allowing the victim's representative to present a PowerPoint slideshow that included pictures, videos, and music with lyrics during the sentencing phase of the trial. I further agree with the Court that precedent requires us to consider the factors discussed in *United States v. Barker*, 77 M.J. 377, 384 (C.A.A.F. 2018), in determining whether this error was harmless. But I do not agree with the Court's holding that the Government has proved that the error did not substantially prejudice Appellant.

In my view, this case is indistinguishable from *United States v. Edwards*, 82 M.J. 239, 248 (C.A.A.F. 2022). In *Edwards*, this Court held that the government failed to prove that a nearly identical error did not substantially prejudice the accused. *Id.* I would reach the same conclusion here. Accordingly, while I concur in the Court's judgment insofar as it affirms the finding that Appellant is guilty of unpremeditated murder, I respectfully dissent from the judgment insofar as it affirms the sentence.

I write separately for two reasons. The first is to explain why I believe this case is indistinguishable from *Edwards*. The second is to question whether the four *Barker* factors are generally suited to the task of deciding

whether an error has substantially affected a sentence. This case and *Edwards* suggest that they are not.

I. The *Edwards* Precedent

In *Edwards*, a court-martial found the appellant guilty of one specification of unpremeditated murder and sentenced him to thirty-five years in prison, a dishonorable discharge, reduction to the grade of E-1, and forfeiture of all pay and allowances. 82 M.J. at 241-42. On appeal to this Court, the appellant argued that the military judge had abused his discretion by allowing the victim's representative to present a sophisticated video during the presentencing phase of the trial. *Id.* at 240-41. The video included an interview with the victim's parents and a slideshow of photographs set to background music. *Id.* at 240. It turned out that trial counsel had produced the video on behalf of the victim's family. *Id.* at 241.

In addressing the appellant's argument, this Court observed that Rule for Courts-Martial (R.C.M.) 1001A(e) (2016 ed.), authorized "a victim or the victim's designee" to make an unsworn impact statement that is " 'oral, written, or both.' " *Edwards*, 82 M.J. at 241. The Court then ruled that the military judge had abused his discretion in allowing the video to serve as a victim impact statement on two separate grounds. *Id.* First, the Court reasoned that a video that includes music and pictures is not an oral or written statement within the meaning of R.C.M. 1001A(e). *Id.* Second, the Court reasoned that the right to make an unsworn statement belongs to the victim or the victim's designee and cannot be transferred to trial counsel. *Id.*

Having determined that an error occurred, the Court turned to prejudice. The Court held that the government had conceded that it had the burden of proving that the error did not substantially influence the adjudged sentence. *Id.* at 246 (citing *Barker*, 77 M.J. at 384). The Court further held that it would assess prejudice by considering four factors identified in *Barker*: "(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question." *Id.* at 247 (internal quotation marks omitted) (quoting *Barker*, 77 M.J. at 384). In addition to the *Barker* factors, the Court cited *United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007), for the principle that an error is more likely to have prejudiced the accused "if the information conveyed as a result of the error was not already obvious from what was presented at trial." 82 M.J. at 247.

The Court in *Edwards* decided that the first two factors did not support a conclusion that prejudice had occurred because the government's case was strong, and the defense's case was not. *Id.* But the Court decided that the materiality and quality factors supported a conclusion that prejudice had occurred. *Id.* The Court reasoned that the video was material because it included content "that had the potential to influence the sentencing decision of the panel." *Id.* at 248. The Court further reasoned that the quality of the video weighed in favor of finding prejudice because the video was "emotionally moving." *Id.* Balancing all the factors, the Court held that the government failed to meet its burden of establishing that the video did not substantially influence the appellant's sentence. *Id.*

In my view, this case is indistinguishable from *Edwards*. In both cases, the court-martial found the

accused guilty of murder. In both cases, the military judge allowed the victim's representative to present music, video, and photographs as a victim impact statement. In both cases, the court-martial imposed a lengthy prison sentence. In *Edwards*, this Court held that the military judge abused his discretion because R.C.M. 1001A(e) (2016 ed.) only authorized a victim impact statement that was "oral, written, or both." In this case, even though R.C.M. 1001A(e) (2016 ed.) has been moved to R.C.M. 1001(c) (2019 ed.), the rule still only authorizes a victim impact statement which is "oral, written, or both." R.C.M. 1001(c)(5)(A). The military judge in this case therefore abused his discretion for the same reason as the military judge in *Edwards*.

In deciding whether the error was harmless, my analysis of the *Barker* factors is essentially the same as the Court's analysis of these factors in *Edwards*. Applying the first two *Barker* factors, I would conclude, as the Court did in *Edwards*, that the Government's case was strong, and that the defense's case was not. Accordingly, I agree that these factors do not support a conclusion that prejudice occurred.

The third *Barker* factor is the materiality of what was wrongly considered at sentencing. Evidence or other matters considered in a trial are "material" if they have "some logical connection with the facts of the case or the legal issues presented." *Black's Law Dictionary* 701 (11th ed. 2019). In this case, the PowerPoint presentation was material for the same reason that the improper video was material in *Edwards*: it presented information about the impact of the offense that "had the potential to influence the sentencing decision of the panel." *Edwards*, 82 M.J. at 248. The photographs and videos conveyed the profound effects

of the murder on the victim's mother and the loss of life that the infant victim himself suffered.

The final *Barker* consideration is the "quality" of what was wrongly considered at sentencing. When appellate courts assess the quality of evidence or other information presented at trial (as opposed to, say, the *quantity* of such evidence or other information), their task is one of estimation. They must appraise the evidence or other information and determine how likely it was to have convinced or influenced the court-martial in the circumstances of the case. *See, e.g.*, *United States v. Thompson*, 63 M.J. 228, 232 (C.A.A.F. 2006) (concluding that the "actual worth of the statements about preservice drug use was minimal" because they were scarcely cited by counsel and subject to a limiting instruction by the military judge); *United States v. Kerr*, 51 M.J. 401, 406 (C.A.A.F. 1999) (concluding that the "quality" of some wrongly admitted evidence was "of questionable credibility"). As in *Edwards*, I would conclude that the photos, video, and music had a tendency to influence the sentence. Indeed, the military judge expressly confirmed the quality of the PowerPoint presentation when he said: "To me, that's proper victim impact including psychological, social impact directly relating to or arising from the offense to which the accused has been found guilty." For these reasons, I would conclude that, like the quality of the video in *Edwards*, the quality of the PowerPoint presentation supports a conclusion that prejudice occurred. Balancing all four factors, I would hold that the Government failed to prove that the error did not substantially affect the sentence.

The Court reaches a different conclusion in part because of its assessment of the materiality factor.

The Court acknowledges that the PowerPoint presentation was material but decides that the materiality factor should not weigh heavily in the prejudice analysis because the content of the PowerPoint presentation was largely cumulative of other evidence. I agree that the PowerPoint presentation might have been more prejudicial if it had presented more new information. But that does not make the PowerPoint presentation any less material or *negate* its tendency to influence the sentencing decision. This factor, accordingly, still favors Appellant and weighs against the Government.

The Court also concludes that the "quality" of the presentation favors the Government because nothing in the record shows that the emotional aspects of the presentation actually affected the military judge's judgment. I agree that it is difficult to point to anything in the record of this case that demonstrates the extent to which the PowerPoint presentation actually influenced the military judge. But absent a highly unusual express statement by a sentencing authority about sentencing deliberations, the record of a case almost never will reveal the actual extent to which improper evidence or unsworn statement influenced the sentence. Accordingly, under *Edwards* and *Barker*, the quality factor is not and cannot be assessed by the lack of an express indication of the actual effect of the PowerPoint presentation on the sentencing authority. Instead, as the Court itself explains, the quality of the PowerPoint presentation must be evaluated by its "*tendency* . . . to influence the . . . sentencing authority." (Emphasis added.) Just like the video in *Edwards*, the "emotionally moving" PowerPoint presentation in this case had a tendency to influence the military judge, and therefore

Appellant's sentence, by "evok[ing] an emotional response." 82 M.J. at 248. This factor therefore also favors Appellant and weighs against the Government.

Finally, the Court presumes that the military judge understood the law and therefore did not give much consideration to the music and photographs in the video. While we always start with a presumption that military judges know the law, *see United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007), the presumption must give way when there are persuasive contrary indications. In this case, when the military judge overruled trial defense counsel's objection to the video, the military judge erred under R.C.M. 1001(c)(5)(A). He further demonstrated that the PowerPoint presentation would affect his judgment when he characterized the PowerPoint presentation as containing "proper victim impact." In these circumstances, the presumption does not change my view.

For the reasons discussed above, I would affirm the decision of the United States Air Force Court of Criminal Appeals with respect to the finding of guilty but reverse with respect to the sentence and return the record to the Judge Advocate General of the Air Force for remand to the Court of Criminal Appeals either to reassess the sentence based on the affirmed finding of guilty or to order a sentence rehearing.

II. Using the *Barker* Factors to Determine Whether Errors in Sentencing Were Harmless

In *United States v. Weeks*, this Court first adopted a four-factor test for determining whether erroneous evidentiary rulings substantially affected the *findings* of a court martial. 20 M.J. 22, 25 (C.M.A. 1985). These

factors were refined in *Kerr*, 51 M.J. at 405, and later became known as the *Kerr* factors. *See United States v. Bowen*, 76 M.J. 83, 89 (C.A.A.F. 2017). In *Barker*, without much discussion, this Court applied the same four factors used in *Kerr* to determine whether an error at sentencing substantially affected the *sentence*. 77 M.J. at 384. This Court followed *Barker* in *United States v. Hamilton*, 78 M.J. 335, 343 (C.A.A.F. 2019), and *Edwards*, 82 M.J. at 247.

However suitable the four factors might be for determining prejudice with respect to the findings, I have significant doubts about whether they are apt for deciding whether an error affected the sentence. In *Edwards* and in the present highly similar case, this Court has applied the *Barker* factors but arrived at different results. At least part of the reason for our disagreement may be that the *Barker* factors are simply too crude a tool for determining whether an error at sentencing substantially affected a sentence.

Deciding whether an error influenced the sentence is more difficult than deciding whether an error influenced the findings. Findings generally involve a binary choice of whether the accused is guilty or not guilty of a charged offense. In contrast, sentencing involves considerable discretion. In this case, the military judge sentenced Appellant to confinement for eighteen years. A wide variety of considerations must have gone into that decision. Even if the PowerPoint presentation only added several months to his confinement, that would still be material prejudice to Appellant. I am skeptical that we can rule out that possibility using just the *Barker* factors. And by limiting analysis of prejudice to these four factors, we unnecessarily focus more on their definitions than on the total effects of an error.

Article 59(a), UCMJ, provides that a "sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." 10 U.S.C. § 859(a) (2018). This Court has reduced the "material prejudice" standard to just the four factors listed in *Barker*. These factors are important to consider but I think it was a mistake in *Barker* to *limit* our consideration to these factors given the difficulty of deciding whether errors during the sentencing phase of the trial affected the sentence.

OPINION OF THE
UNITED STATES COURT OF APPEALS FOR
THE ARMED FORCES

FILED JUNE 29, 2023

No. 22-0193
Crim. App. No. 39969

UNITED STATES,
Appellee,
v.
Anthony A. ANDERSON, Master Sergeant,
United States Air Force,
Appellant.

Argued October 25, 2022—Decided June 29, 2023

Military Judge: Willie J. Babor

Judge HARDY delivered the opinion of the Court, in which Chief Judge OHLSON, Judge SPARKS, Judge MAGGS, and Senior Judge EFFRON joined.

Judge HARDY delivered the opinion of the Court.

This case asks us to decide whether courts-martial defendants have a right to a unanimous guilty verdict under the Sixth Amendment, the Fifth Amendment Due Process Clause, or the Fifth Amendment component of equal protection. We hold that they do

not. Accordingly, we affirm the judgment of the United States Air Force Court of Criminal Appeals (AFCCA).

I. Background

The Government charged Appellant with two specifications of attempted sexual abuse of a child in connection with Appellant's online communications with fictitious thirteen-year-old "Sara." Before Appellant's trial, defense counsel filed a motion requesting that the court: (1) require a unanimous verdict for any finding of guilty; or (2) instruct the members that the president of the panel must announce whether any finding of guilty was the result of a unanimous vote. The military judge denied the motion in a written ruling supplemented after the court-martial adjourned. A panel composed of officers and enlisted members convicted Appellant, contrary to his pleas, of both specifications in violation of Article 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880 (2018). Appellant elected to be sentenced by the military judge, who sentenced Appellant to twelve months of confinement for each offense, to run concurrently, reduction to E-1, and a dishonorable discharge. The convening authority took no action on the findings or sentence. The AFCCA affirmed. *United States v. Anderson*, No. ACM 39969, 2022 CCA LEXIS 181, at *61, 2022 WL 884314, at *21 (A.F. Ct. Crim. App. Mar. 25, 2022) (unpublished). We granted review of the following issue:

> Whether Appellant was deprived of his right to a unanimous verdict as guaranteed by the Sixth Amendment, the Fifth Amendment's due process clause, and the Fifth Amendment's right to equal protection.

United States v. Anderson, 82 M.J. 440, 440-41 (C.A.A.F. 2022) (order granting review).

II. Discussion

Nonunanimous verdicts have been a feature of American courts-martial since the founding of our nation's military justice system. *See* William Winthrop, *Military Law and Precedents* 377 (2d ed., Government Printing Office 1920) (1895); Article XXXVII of the American Articles of War of 1775, *reprinted in* Winthrop, *supra*, at 956 [hereinafter 1775 Articles of War]; Section XIV, Article 10 of the American Articles of War of 1776, *reprinted in* Winthrop, *supra*, at 968 [hereinafter 1776 Articles of War]. Congress chose to maintain nonunanimous verdicts when it enacted the UCMJ in 1950, Act of May 5, 1950, ch. 169, Pub. L. No. 81-506, 64 Stat. 107, 125, and has continued to do so through the most recent updates to court-martial voting requirements in the Military Justice Act of 2016. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5234, 130 Stat. 2000, 2916 (2016).

Consistent with this long tradition, the UCMJ expressly authorizes a court-martial to convict a servicemember subject to a general or special courtmartial of a criminal offense "by the concurrence of at least three-fourths of the members present when the vote is taken." Article 52(a)(3), UCMJ, 10 U.S.C. § 852(a)

(3) (2018). Appellant's conviction comports with this requirement. Appellant nonetheless contends that he is entitled to relief on the grounds that Article 52(a)(3), UCMJ, contravenes his right to a unanimous verdict

under the Fifth and Sixth Amendments. Because we disagree, we affirm the judgment of the AFCCA.

A. The Sixth Amendment

As relevant here, the Sixth Amendment demands that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI. As noted in its recent decision in *Ramos v. Louisiana*, the Supreme Court "has, repeatedly and over many years, recognized that the Sixth Amendment requires unanimity." 140 S. Ct. 1390, 1396 (2020); *see also id.* at 1397-99 (collecting cases). In *Ramos*, the Supreme Court observed that "the Sixth Amendment affords a right to 'a trial by jury as understood and applied at the common law, . . . includ[ing] all the essential elements as they were recognized in this country and England when the Constitution was adopted.' " *Id.* at 1397 (alterations in original) (quoting *Patton v. United States*, 281 U.S. 276, 288 (1930), *abrogated on other grounds by Williams v. Florida*, 399 U.S. 78, 90 (1970)). One of those essential elements of a trial by jury was "that the verdict should be unanimous." *Id.* (quoting *Patton*, 281 U.S. at 288) (citing *Andres v. United States*, 333 U.S. 740, 748 (1948)).

If the Sixth Amendment right to a jury trial applied in the military justice system, Appellant would have a strong argument that he had a constitutional right to a unanimous verdict at his court-martial. *See Andres*, 333 U.S. at 748 ("Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply."). The trouble for Appellant, however, is that the Supreme Court has repeatedly stated that the Sixth Amendment right to a

jury trial does not apply to courts-martial. In *Ex parte Milligan*, the Supreme Court explained "the right of trial by jury . . . is preserved to every one accused of [a] crime who is not attached to the army, or navy, or militia in actual service." 71 U.S. 2, 123 (1866).[1] Later, in *Ex parte Quirin*, the Supreme Court reiterated that " 'cases arising in the land or naval forces' are . . . . deemed excepted by implication from the Sixth [Amendment]." 317 U.S. 1, 40 (1942); *see also Whelchel v. McDonald*, 340 U.S. 122, 127 (1950) ("The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions."). Following the Supreme Court's lead, this Court has long held the same. *See, e.g.*, *United States v. Begani*, 81 M.J. 273, 280 n.2 (C.A.A.F. 2021) (explaining that members of the land and naval forces do not have a Sixth Amendment right to a jury trial); *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012) ("[T]here is no Sixth Amendment right to trial by jury in courts-martial."); *United States v. Kemp*, 22 C.M.A. 152, 154, 46 C.M.R. 152, 154 (1973) (explaining the same in the context of panel member appointment).

1. The Supreme Court's decisions exempting the military justice system from the Sixth

[1] The Supreme Court acknowledged that although the Fifth Amendment expressly exempts cases arising in the land or naval forces from its grand jury requirement, the Sixth Amendment contains no such exception. *Ex parte Milligan*, 71 U.S. at 123 (comparing the text of the Fifth and Sixth Amendments). Nevertheless, after noting this disparity, the Supreme Court concluded that "the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth." *Id.*

Amendment right to a jury trial cannot be dismissed as dicta

Appellant argues that all the Supreme Court cases stating that there is no Sixth Amendment right to a jury trial in the military justice system can be dismissed as dicta. We disagree. Even if we were inclined to accept Appellant's premise—that the Supreme Court has never been presented with or squarely answered the question whether the Sixth Amendment jury right applies to courts-martial—we cannot ignore the fact that the lack of such a right has been a central component of a series of landmark Supreme Court military justice cases. For example, in *United States ex rel. Toth v. Quarles*, the Supreme Court held that the Constitution forbids Congress from subjecting a former servicemember to trial by court-martial after the servicemember had severed all relationships to the military. 350 U.S. 11, 23 (1955). Key to the Supreme Court's reasoning was the fact that the former servicemember would be denied his Sixth Amendment right to a jury trial in a court-martial. *Id.* at 17-18 (explaining the "great difference between trial by jury and trial by selected members of the military forces").

Two years later in *Reid v. Covert*, the Supreme Court once again considered the constitutional limits of the military justice system, holding that Congress could not subject the accompanying civilian dependents of overseas servicemembers to courts-martial. 354 U.S. 1, 5 (1957). Justice Black's plurality opinion noted that "[e]very extension of military jurisdiction . . . acts as a deprivation of the right to jury trial and of other treasured constitutional protections." *Id.* at 21. The opinion further observed that courts-martial do not

give an accused the same protections that exist in the civilian courts, and that "[l]ooming far above all other deficiencies of the military trial, of course, is the *absence of trial by jury* before an independent judge after an indictment by a grand jury." *Id.* at 37 (emphasis added); *see also id.* at 37 n.68 ("The exception in the Fifth Amendment, of course, provides that grand jury indictment is not required in cases subject to military trial and this exception has been read over into the Sixth Amendment so that the requirements of jury trial are inapplicable.").[2]

The same concern led the Supreme Court a decade later in *O'Callahan v. Parker* to hold that servicemembers could only be tried by court-martial for crimes that were connected to their military service. 395 U.S. 258, 272 (1969), *overruled by Solorio v. United States*, 483 U.S. 435 (1987). Once again, the Supreme Court's decision was based on its view that there were fundamental differences between military and civilian trials, including the absence of a Sixth Amendment right to a jury trial in the military. *Id.* at 261- 62 ("If the case does not arise 'in the land or naval

[2] *Reid* specifically addressed civilian dependents who had been charged with a capital offense. 354 U.S. at 4. Three years later, in a series of companion cases, the Supreme Court further held that Congress could not subject the civilian dependents of overseas servicemembers to courts-martial when charged with a noncapital offense, *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 249 (1960), nor civilian military employees stationed overseas, whether charged with a capital, *Grisham v. Hagan*, 361 U.S. 278, 280 (1960), or noncapital offense, *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 282, 284 (1960). In each of these cases the Supreme Court again emphasized the nonapplicability of the Sixth Amendment right to a jury trial at a court-martial. *Singleton*, 361 U.S. at 249; *Grisham*, 361 U.S. at 280; *Guagliardo*, 361 U.S. at 284.

forces,' then the accused gets first, the benefit of an indictment by a grand jury and second, a trial by jury before a civilian court as guaranteed by the Sixth Amendment . . . ."). Although the Supreme Court overruled *O'Callahan* eighteen years later, *Solorio*, 483 U.S. at 450-51, nothing in that opinion undermined the long-standing principle that the Sixth Amendment right to a jury trial does not apply in the military justice system. Rather, *Solorio* rested its holding on *O'Callahan*'s dubious treatment of historical practice and the plain language of the constitutional grant of power to Congress "to make rules for the 'Government and Regulation of the land and naval Forces.' " *Solorio*, 483 U.S. at 441-42 (quoting U.S. Const. art. I, § 8, cl. 14).

Even if the Supreme Court's statements exempting the military justice system from the Sixth Amendment's right to a jury trial in *Ex parte Milligan*, *Ex parte Quirin*, and *Whelchel* technically qualify as nonbinding dicta, the Supreme Court has never treated them as such. To the contrary, the Supreme Court has repeatedly relied on the principle that courts-martial are fundamentally different from civilian trials because of that exemption. It would be disingenuous for this Court to ignore over a century of consistent guidance from the Supreme Court about the applicability of the Sixth Amendment to military trials.

2. The right to an impartial court-martial panel does not guarantee a unanimous verdict

Although the Sixth Amendment right to a jury trial has never applied in the military justice system, an accused servicemember's right to be tried by impartial

panel members has long been a "cornerstone of the military justice system." *United Stated v. Hilow*, 32 M.J. 439, 442 (C.M.A. 1991); *see* Article XXXV, 1775 Articles of War, *supra*, at 956 ("All the members of a court-martial, are to behave with calmness, decency, and impartiality . . . ."); Article 69 of the American Articles of War of 1806, *reprinted in* Winthrop, *supra*, at 982 (requiring members to swear to " 'administer justice . . . without partiality, favor, or affection' "); *United States v. Modesto*, 43 M.J. 315, 318 (C.A.A.F. 1995) ("Impartial court-members are a *sine qua non* for a fair court-martial."). While Congress has long guaranteed this right via statute, this Court has also recognized that "[a]s a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001) (first citing *United States v. Mack*, 41 M.J. 51, 54 (C.M.A. 1994); and then citing Rule for Courts-Martial 912(f)(1)(N), *Manual for Courts-Martial, United States* (2000 ed.)). Appellant argues that in *Ramos*, "the Supreme Court explicitly equated the term impartial with the term unanimity." Brief for Appellant at 14, *United States v. Anderson*, No. 22-0193 (C.A.A.F. Aug. 24, 2022). As a result, Appellant contends, he has a right to a unanimous verdict as part of his right to an impartial panel.[3]

[3] Appellant does not contend that a court-martial panel is a "jury" within the meaning of the Sixth Amendment, nor that he was entitled to a jury trial—and all that that would require under the Sixth Amendment—as opposed to a trial by a court-martial panel. Appellant explicitly acknowledges that "[t]he issue is not whether Appellant has a constitutional right to a jury trial; rather, the issue is whether Article 52(a)(3), UCMJ . . . is unconstitutional under the Sixth Amendment following *Ramos*, or under the Due Process and/ or Equal Protection Clauses of the

Ramos held that the Sixth Amendment right to a jury trial, as incorporated to the states under the Fourteenth Amendment, requires unanimous verdicts to convict defendants of serious offenses. 140 S. Ct. at 1397. The Supreme Court did not explicitly equate impartiality with unanimity, nor hold that the Sixth Amendment's impartiality requirement commands unanimity. In the Supreme Court's own words, "[T]he Sixth Amendment's *right to a jury trial* requires a unanimous verdict to support a conviction in federal court, it requires no less in state court." *Id.* (emphasis added).

Appellant points to the following language in *Ramos* to support his argument: "Wherever we might look to determine what the term 'trial by an impartial jury' meant at the time of the Sixth Amendment's adoption . . . the answer is unmistakable. A jury must reach a unanimous verdict in order to convict." *Id.* at 1395. However, each time the majority opinion uses the phrase "trial by an impartial jury," the phrase is in quotation marks, indicating it is meant to be a quotation from the Sixth Amendment, rather than a deliberate emphasis on the word "impartial." *See id.* at 1395-96, 1400. Furthermore, at several points in the opinion, the majority refers only to the right to a jury trial as requiring a unanimous verdict, without reference to impartiality at all. *See, e.g.*, *id.* at 1394, 1397. At no point in the opinion does the Supreme Court consider what the word "impartial" means or what is required for a jury to be "impartial." In the absence of any analysis or discussion of any kind about

Fifth Amendment." Reply Brief for Appellant at 11, *United States v. Anderson*, No. 22-0193 (C.A.A.F. Sept. 30, 2022).

what the Sixth Amendment's guarantee of an "impartial" jury requires, we are not persuaded by Appellant's argument that the Supreme Court held—sub silentio— that only a unanimous jury can be impartial.

Nor do we view "impartial" as synonymous with "unanimous." The Government persuasively argues that impartiality and unanimity are distinct concepts that address different characteristics of a fair jury. In support of its argument, the Government points first to Justice Kavanaugh's *Ramos* concurrence, where he recognized that impartiality and unanimity are complementary concepts. *See id.* at 1418 (Kavanaugh, J., concurring in part) ("After all, the requirements of unanimity and impartial selection thus complement each other in ensuring the fair performance of the vital functions of a criminal court jury." (internal quotation marks omitted) (citation omitted)). The Government also references multiple Founding Era dictionaries to illustrate that the drafters of the Sixth Amendment would not have understood "impartial" and "unanimous" to have the same meaning.[4]

[4] The dictionaries cited by the Government universally define "impartial" as meaning just and unbiased and "unanimous" as being of one mind. *See*, *e.g.*, James Barclay, *A Complete and Universal English Dictionary* (1792) (defining impartial as "just; without any bias or undue influence" and unanimous as "of one mind; agreeing in opinion"); Samuel Johnson, *A Dictionary of the English Language* (10th ed. 1792) (defining impartial as "[e]quitable; free from regard or party; indifferent; disinterested; equal in distribution of justice; just" and unanimous as "[b]eing of one mind; agreeing in design or opinion"); 1 John Ash, *The New And Complete Dictionary of the English Language* (1775) (defining impartial as "[f]ree from any undue regard to party, equitable, just, disinterested"); 2 John Ash, *The New And Complete Dictionary of the English Language* (1775) (defining unanimous as "[h]aving one mind, agreeing in opinion, agreeing

Appellant offered no rebuttal to these specific arguments other than to point out once again that the majority opinion in *Ramos* repeatedly used the quoted phrase "trial by an impartial jury."

We also note that the concept of impartiality in courts martial dates to the earliest American Articles of War that predate the Sixth Amendment. *See* Article XXXV, 1775 Articles of War, *supra*, at 956 ("All the members of a court-martial, are to behave with calmness, decency, and impartiality . . . ."); Section XIV, Article 3, 1776 Articles of War, *supra*, at 968 (requiring members to swear to " 'administer justice . . . without partiality, favor, or affection' "). The simultaneous presence of an impartiality requirement and nonunanimous verdicts in the original Articles of War illustrates that at no time during the entire history of the American military justice system has impartiality been understood to require unanimous verdicts.

We agree with Appellant that *Ramos* held that unanimity is an essential element of a Sixth Amendment jury trial, but we disagree that it further held that it is also an essential element of an impartial factfinder. In the absence of a Sixth Amendment right to a jury trial in the military justice system, Appellant had no Sixth Amendment right to a unanimous verdict in his court-martial.

B. Fifth Amendment Due Process

Even if the Sixth Amendment right to a jury trial does not apply to the military justice system, Appellant

in a design"). These definitions comport with our own understanding of these terms.

argues that he is still guaranteed the right to a unanimous verdict by the Due Process Clause of the Fifth Amendment. *See* U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."). Appellant asserts that the guarantee of a unanimous verdict is a vital and essential constitutional right that is fundamental to the American scheme of justice.

To succeed in a due process challenge to a statutory court-martial procedure, an appellant must demonstrate that " 'the factors militating in favor of [a different procedure] are so extraordinarily weighty as to overcome the balance struck by Congress.' " *Weiss v. United States*, 510 U.S. 163, 177-78, 181 (1994) (quoting *Middendorf v. Henry*, 425 U.S. 25, 44 (1976)). When Congress acts pursuant to its power "to make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. art. I, § 8, cl. 14, "judicial deference . . . is at its apogee." *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981).

Here, the factors militating in favor of the right to a unanimous verdict are not so weighty as to overcome the balance struck by Congress in Article 52, UCMJ. The Supreme Court's analysis in *Weiss* is instructive. In that case, petitioners raised a due process challenge to the lack of a fixed term for military judges in Article 26, UCMJ, 10 U.S.C. § 826 (1988). *Weiss*, 510 U.S. at 176. The Court held that the factors supporting a fixed term for military judges did not overcome the balance struck by Congress based on two primary considerations: "[t]he absence of tenure as a historical matter in the system of military justice, and the number of safeguards in place to ensure impartiality." *Id.* at 181. Looking to those same considerations in

this context, both support the conclusion that the factors militating in favor of unanimous verdicts do not outweigh the balance struck by Congress in Article 52, UCMJ.

First, historical evidence establishes that for more than two centuries, courts-martial verdicts have not been subject to a unanimity requirement. Both the 1775 and 1776 American Articles of War expressly provided for majority convictions in regimental courts-martial.[5] *See* Article XXXVII, 1775 Articles of War, *supra*, at 956; Section XIV, Article 10, 1776 Articles of War, *supra*, at 968. Although the early Articles of War did not specify the required votes to convict in a general court-martial, Winthrop notes that "the result—in all cases, whether grave or slight, and whether capital or other—is determined by a majority of the votes." Winthrop, *supra*, at 377. In 1920, Congress formally codified the required number of votes for conviction as two-thirds,[6] which the UCMJ similarly required upon its enactment in 1950. Act of June 4, 1920, Pub. L. No. 66-242, 41 Stat. 754, 795-96; Act of May 5, 1950, 64 Stat. at 125.[7] Most recently, in the Military Justice Act of 2016, Congress updated

[5] Regimental courts-martials were "instituted for the trial and punishment of 'small offences.' " Winthrop, *supra*, at 485 n.23 (quoting Article XXXVII, 1775 Articles of War, *supra*, at 956, and Section XIV, Article 10, 1776 Articles of War, *supra*, at 968).

[6] The two-thirds requirement in the 1920 Articles of War did not apply to the Navy. *See* Act of June 4, 1920, 41 Stat. at 787. Until the enactment of the UCMJ, "the Navy was still governed by a code passed in 1862 and that was based upon 17th century British naval law." Walter B. Huffman & Richard D. Rosen, *Military Law: Criminal Justice and Administrative Process* § 1:25 (2022-2023 ed.).

Article 52, UCMJ, to require at least a three-fourths majority vote for conviction. § 5234, 130 Stat. at 2916.[8] While historical practice is not dispositive, it "is a factor that must be weighed," and "historical maintenance . . . 'suggests the absence of a fundamental fairness problem.' " *Weiss*, 510 U.S. at 179 (quoting *United States v. Graf*, 35 M.J. 450, 462 (C.M.A. 1992)). More than two centuries of nonunanimous verdicts in courts-martial weigh against Appellant's due process challenge.

Second, several unique safeguards in the military justice system address Appellant's concerns about the impartiality and fairness of courts-martial without unanimous verdicts. For example, Article 51(a), UCMJ, requires voting by secret ballots, which protects junior panel members from the influence of more senior members. 10 U.S.C. § 851(a) (2018). Appellants in the military justice system are also entitled to factual sufficiency review on appeal, ensuring panel verdicts are subject to oversight.

[8] [7] Both the 1920 and 1950 enactments required unanimous votes for conviction of an offense for which the death penalty was mandatory. Act of June 4, 1920, 41 Stat. at 795-96; Act of May 5, 1950, 64 Stat. at 125.

[8] Under the updated Article 52, UCMJ, "[a] sentence of death requires (A) a unanimous finding of guilty of an offense [under the UCMJ] expressly made punishable by death and (B) a unanimous determination by the members that the sentence for that offense shall include death." Article 52(b)(2), UCMJ. These provisions demonstrate that Congress continues to give specific attention to the proper voting requirements for courts-martial and is making deliberate decisions about when to require unanimous verdicts.

Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2018).[6] While these safeguards are not identical to those present in the civilian system, they need not be. As the Supreme Court has recognized, " 'the tests and limitations [of due process] may differ because of the military context.' " *Weiss*, 510 U.S. at 177 (alteration in original) (quoting *Rostker*, 453 U.S. at 67). Preserving impartiality and fairness does not require identical safeguards in the military and civilian justice systems.

"Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." *Solorio*, 483 U.S. at 447. In light of this deferential standard, two centuries of historical maintenance, and the other safeguards that Congress has, in its sound discretion, put in place to preserve impartiality, we hold that the factors militating in favor of unanimous verdicts are not so extraordinarily weighty as to overcome the balance struck by Congress in Article 52, UCMJ.

Appellant makes two additional due process arguments that we find unpersuasive. First, Appellant argues that by incorporating the Sixth Amendment right to a unanimous jury verdict to the states in *Ramos*, "the Court implicitly recognized that due process of law . . . guarantees the right to a unanimous verdict." According to Appellant, a prerequisite for incorporation is finding that a right is

[9] We acknowledge that Congress amended the language of Article 66(d)(1), UCMJ, in the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542, 134 Stat. 3388, 3611-12. The amendment does not change our analysis of this issue.

required as a matter of Fourteenth Amendment due process, and because Fourteenth and Fifth Amendment due process are coextensive, Fifth Amendment due process requires unanimous guilty verdicts. However, Appellant misconceives incorporation doctrine and its effect on Fifth Amendment due process. As the United States Court of Appeals for the District of Columbia Circuit has explained, under incorporation, a right " 'is *made applicable* to the States by the Fourteenth Amendment.' The right . . . is not, however, converted into a procedural due process right by incorporation." *Sanford v. United States* 586 F. 3d 28, 35 (D.C. Cir. 2009) (quoting *Ballew v. Georgia*, 435 U.S. 223, 224 n.1 (1978)) (holding that incorporation of the Sixth Amendment right to a jury trial under the Fourteenth Amendment does not create a due process right to a jury trial that would apply directly to courts-martial). The Supreme Court's incorporation of the right to a unanimous verdict to the states in *Ramos* made that right applicable to the states; it did not convert unanimous verdicts into a procedural due process right.

Second, Appellant argues that "a unanimous verdict is part and parcel of the Fifth Amendment right to have one's guilt proved beyond a reasonable doubt," and that nonunanimous verdicts unconstitutionally lower the Government's burden of proof. Brief for Appellant at 33, *United States v. Anderson*. Appellant conflates unanimous verdicts and the beyond-a-reasonable-doubt standard by misconceiving juries as reaching their verdicts as an entity, rather than as a group of individuals. To the contrary, the reasonable doubt standard refers to reasonable doubt in the mind of the individual juror. *See Johnson v. Louisiana*, 406 U.S.

356, 362-63 (1972), *overruled by Ramos*, 140 S. Ct. 1390;[7] *Tibbs v. Florida,* 457 U.S. 31, 42 n.17 (1982) ("Our decisions also make clear that disagreements among jurors or judges do not themselves create a reasonable doubt of guilt."). This must be the case, because if reasonable doubt were evaluated based on the group of jurors, there could be no hung juries in the civilian system—one juror with reasonable doubt would require an acquittal, not a hung jury. *Johnson*, 406 U.S. at 363. Consequently, nonunanimous verdicts do not run afoul of the Due Process Clause's requirement that the government prove the defendant's guilt beyond a reasonable doubt.

C. Fifth Amendment Equal Protection

Finally, Appellant argues that his nonunanimous panel verdict violated his Fifth Amendment right to equal protection because he is being denied a fundamental right—the Sixth Amendment right to a unanimous jury verdict—that is guaranteed to civilians. Arguing that servicemembers facing courts-martial and civilians facing criminal trials in state and federal courts are similarly situated, Appellant asserts that Congress's authorization of nonunanimous verdicts in Article 52, UCMJ, cannot withstand strict scrutiny. Even if he is not being

[7] Although *Ramos* overturned *Johnson*'s holding that the Fourteenth Amendment does not require unanimous jury verdicts, *Ramos* was decided based on incorporation of the Sixth Amendment via the Fourteenth Amendment. *Ramos*, 140 S. Ct. at 1397. The case did not challenge *Johnson*'s holding that the Fourteenth Amendment standing alone does not require unanimous verdicts, nor disturb the rationale that a nonunanimous verdict "is not in itself equivalent to a failure of proof by the State, nor does it indicate infidelity to the reasonable-doubt standard." *Johnson*, 406 U.S. at 362.

denied a fundamental right, Appellant argues that Congress has no rational basis for denying servicemembers the right to a unanimous verdict. We disagree.

The Equal Protection Clause of the Fourteenth Amendment prohibits denying to "any person . . . the equal protection of the laws." U.S. Const. amend. XIV, § 1. The " 'right to equal protection is part of due process under the Fifth Amendment, and so it applies to courtsmartial, just as it does to civilian juries.' " *United States v. Witham*, 47 M.J. 297, 301 (C.A.A.F. 1997) (citations omitted) (quoting *United States v. Santiago-Davila*, 26 M.J. 380, 389-90 (C.M.A. 1988)). Equal protection does not prohibit all classifications, indeed "most laws differentiate in some fashion between classes of persons." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

The threshold question in equal protection analysis is whether the groups treated differently by the law are similarly situated. *Begani*, 81 M.J. at 280. Distinctions between similarly situated groups must satisfy the rational basis test unless the distinction implicates either a suspect class or a fundamental right, in which case strict scrutiny applies. *Nordlinger*, 505 U.S. at 10 (first citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-441 (1985); and then citing *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)).

This Court has previously declined to find that servicemember and civilian defendants are similarly situated. In *United States v. Akbar*, this Court rejected the argument that the failure to apply civilian death penalty protocols in the military justice system violates equal protection. 74 M.J. 364, 405-06

(C.A.A.F. 2015). The Court held that the appellant, "as an accused servicemember, was not similarly situated to a civilian defendant." *Id.* at 406. The Supreme Court, moreover, has repeatedly emphasized the differences between the military and civilian societies and justice systems. *See, e.g.*, *Parker v. Levy*, 417 U.S. 733, 743-44 (1974); *Weiss*, 510 U.S. at 17475; *Toth*, 350 U.S. at 17-20. Appellant offers no persuasive reason to upset those conclusions here.

Citing the Supreme Court's recent decision in *Ortiz v. United States*, 138 S. Ct. 2165 (2018), Appellant argues that servicemember and civilian defendants are similarly situated based on the similarities between the military and civilian justice systems. It is true that in *Ortiz* the Supreme Court described the military justice system's essential character as "judicial," and noted that the procedural protections afforded to military defendants are " 'virtually the same' " as those provided to civilian criminal defendants. *Id.* at 2174 (quoting 1 David A. Schlueter, *Military Criminal Justice: Practice and Procedure* § 1-7, at 50 (9th ed. 2015)). But we are not persuaded that the Supreme Court intended to suggest that military and civilian defendants are similarly situated for equal protection purposes. Instead, we agree with the United States Army Court of Criminal Appeals that, "[t]o the extent there are similarities between the two systems, it is because Congress, in its discretion, struck a balance between the interests of justice and the distinct purposes of the military, not because accused service members and civilians are alike before the law." *United States v. Pritchard*, 82 M.J. 686, 692-93 (A. Ct. Crim. App. 2022) (first citing

Weiss, 510 U.S. at 177; and then citing *Middendorf*, 425 U.S. at 46).

Two groups are similarly situated if they are " 'in all relevant respects alike.' " *Begani*, 81 M.J. at 280 (quoting *Nordlinger*, 505 U.S. at 10). We acknowledge that Congress has—over time—amended the UCMJ to make the military justice system more like civilian courts. *See Weiss*, 510 U.S. at 174 ("By enacting the Uniform Code of Military Justice in 1950, and through subsequent statutory changes, Congress has gradually changed the system of military justice so that it has come to more closely resemble the civilian system."). But Congress's efforts to close the gap between the two systems does nothing to make us question our decision in *Akbar* that an accused servicemember is not similarly situated to a civilian defendant. *Akbar*, 74 M.J. at 406. As the Supreme Court recognized in *Parker*, "[t]he differences between the military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' " 417 U.S. at 743 (quoting *Toth*, 350 U.S. at 17). That primary business does not disappear when a servicemember is charged with a crime, and it prevents servicemember and civilian defendants from being " 'in all relevant respects alike.' " *Begani*, 81 M.J. at 280 (quoting *Nordlinger*, 505 U.S. at 10). Moreover, the three principal differences between the systems that so troubled the Supreme Court in cases like *Toth*, *Reid*, and *O'Callahan* still remain true today: servicemembers facing courts-martial still have no constitutional right to: (1) a trial by jury; (2) before an independent Article III judge; (3) after an indictment by a grand jury. The similarities in the two criminal systems do not render servicemember and civilian defendants similarly situated.

Even if Appellant were similarly situated to a civilian criminal defendant, he has no fundamental right to a unanimous verdict in the military justice system, and he does not argue that servicemembers are a protected class. Accordingly, Article 52, UCMJ, could only violate Appellant's equal protection rights if Congress's disparate treatment of servicemembers serves no legitimate government purpose. *Heller v. Doe*, 509 U.S. 312, 319-20 (1993) ("[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity."). Under rational basis review, we must presume that Article 52, UCMJ, is constitutional and the burden falls on Appellant to rebut " 'every conceivable basis which might support it.' " *Id.* at 320 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

The Government asserts that nonunanimous verdicts in the military are necessary to promote efficiency in the military justice system and to guard against unlawful command influence in the deliberation room. Appellant characterizes these arguments as strawmen and argues that the military could "legitimately proceed" with unanimous verdicts. Brief for Appellant at 44, *United States v. Anderson*. But especially considering the deference that Congress is owed with respect to national defense and military affairs, *Rostker*, 453 U.S. at 64, Appellant's responses do not rebut the presumption that Congress had a rational basis for enacting Article 52, UCMJ. The Government's justifications for nonunanimous verdicts in courts-martial are rationally related to legitimate state interests and do not violate Appellant's Fifth Amendment right to equal protection.

III. Conclusion

Appellant did not have a right to a unanimous verdict at his court-martial under the Sixth Amendment, Fifth Amendment due process, or Fifth Amendment equal protection. Accordingly, we affirm the judgment of the United States Air Force Court of Criminal Appeals.

DEPARTMENT OF THE AIR FORCE
UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES	)	MOTION FOR
	)	APPROPRIATE
	)	RELIEF UNANIMOUS
	)	VERDICT
	)	OR DISMISSAL
	)	
v.	)	
	)	
SrA JAMES T.	)	
CUNNINGHAM	)	
28th Aircraft MX Sq.	)	
Ellsworth AFB, SD	)	20 November 2020

MOTION

Pursuant to Rules for Courts-Martial (R.C.M.) 201 906(a), and 907(b)(l), SrA James T. Cunningham, by and through counsel, moves this Honorable Court to require that the members return a unanimous verdict and to modify the member instructions accordingly. Alternatively, if the Court believes it is without authority to require a unanimous verdict, the Defense moves to dismiss the Charges and their specifications because referral of the Charges to a court-martial that can return a guilty verdict upon just seventy-five percent of the members' vote of guilty, violates SrA Cunningham's right to a jury trial under the Due Process Clause of the Fifth Amendment to the United States Constitution and the Sixth Amendment to the United States Constitution.

SUMMARY

The Fifth Amendment provides that no person may be "deprived Of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. V, cl. 3. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." U.S. CONST. amend. VI. The Supreme Court of the United States "has, repeatedly and over many years, recognized that the Sixth Amendment requires unanimity" among jurors. *Ramos v. Louisiana*, No. 18-5924, slip op. at 6 (April 20, 2020). In this case, the convening authority has convened a general court-martial that will allow conviction upon the vote of just six of eight panel members, contrary to the constitutional requirement. To correct this wrong, and to ensure SrA Cunningham is afforded due process, the court-martial must be required to return a unanimous verdict. If the Court is without authority to impose such a requirement, the Charge must be dismissed for want of jurisdiction because the Court lacks the constitutional requirements necessary to resolve the Charge.

FACTS

Procedural History

1. On 26 May 2020, [redacted] B[redacted] C[redacted]. 28 AMXS/CC, preferred one charge of murder in violation of Article 118, Uniform Code of Military Justice (UCMJ). The specification alleged that SrA

Cunningham committed murder "by means of striking in the head." On 2 July 2020, the charge was referred to a General Court-Martial. It was subsequently served on AIC Cunningham on 9 July 2020. (Attachment I)[21] On 4 August 2020, (the new 28 AMXS/CC) preferred an additional charge of murder in violation of Article 1 1 8, UCMJ. This specification alleged that SrA Cunningham committed the same murder alleged in the original charge "by means of striking Z[redacted] C[redacted] in the head and shaking him on or about 3 March 2020." This charge was referred to the same General Court Martial as the original charge, and the original charge was withdrawn and dismissed by the convening authority on 28 October 2020. (Attachments 1-2)

Facts Relevant to the Motion

2. Should SrA Cunningham elect to be tried by a panel,[22] the panel will be composed of eight members. [23] However, it is possible for a general court-martial panel to be reduced to either seven or six members in this case.[24] Regardless, in order to convict SrA Cunningham of an offense, three-fourths of the panel

[21] Attachments 1-2 are not physically attached and submitted with this request due to their existence elsewhere in the record. The Defense respectfully request consideration of the attachment to establish the factual predicate for the motion.

[22] As of the date of this filing, SrA Cunningham has not yet entered his pleas or made his forum selection.

[23] S*ee* R.C.M. 501 (a)(1)(A)(i)

[24] *See* R.C.M. 501(a)(1)(A)(iv)

must vote to convict.[25] Under the standard eight-member panel, only six members (or 75% of the panel) are required to concur on a finding of guilt in order to obtain a conviction.

BURDEN

3. Generally, the burden of persuasion lies on the moving party and applies a preponderance of the evidence standard. R.C.M. 905(c). However, the "burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for the different rule[.]" *United States v. Easton*, 71 M.J. 168, 174 (C.A.A.F. 2012).

LAW

The Text of the Constitution

4. The Fifth Amendment to the United States Constitution states as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property

[25] *See generally*, 10 U.S.C. §§ 829(d)(2) and 852(a)(3); *see also* R.C.M. 921 (c)(2)-(3)

> be taken for public use, without just compensation.

U.S. CONST. amend. V.

5. The Sixth Amendment to the United States Constitution states as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST. amend. VI.

Ramos v. Louisiana

6. In reaching its conclusion in *Ramos, v. Louisiana* and held that "[t]here can be no question . . . that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally." 590 U.S. Slip op. No. 18-5924 at 6 (20 April 2020). In reaching this conclusion, the Court reasoned "[t]he text and structure of the Constitution clearly suggest that the term 'trial by an impartial jury' carried with it some meaning about the content and requirements of a jury trial." *Id.* at 4. After discussing the common law origins of the unanimous jury verdict, the Court then noted that it "has, repeatedly and over many years, recognized that the Sixth Amendment requires unanimity." *Id.* at 6. The Court surmised that it had "commented on the Sixth Amendment's unanimity requirement no fewer than 13 times over more than 120 years." *Id.* at I l .

7. Turning to its prior decisions in *Apodaca v. Oregon*, 406 U.S. 404 (1972), and *Johnson v. Louisiana*, 406 U.S. 356 (1972), the majority expressed frustration with these "badly fractured set of opinions" that departed from the Sixth Amendment's "seemingly straightforward principles." *Id.* at 8. Ultimately, a majority of the Court concluded that "at the time of the [Sixth] Amendment's adoption, the right to a jury trial meant a trial in which the jury renders a unanimous verdict"(emphasis in original). *Id.* at 12. Although the majority questioned the wisdom of the Apodaca plurality's suggestion that the decrease in hung juries is always necessarily a good thing, the Court went on to explain that its objection to *Apodaca* was not so much that its "cost-benefit analysis was too skimpy." *Id*. at 14. Rather, the *Ramos* majority took issue with "the deeper problem" posed by the fact that the Apodaca plurality "subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment in the first place." *Id*. at 14-15. Finally, the majority considered *stare decisis*, but concluded that it failed to justify adherence to override the erroneous nature of the *Apodaca* plurality. See id. at 16.

The Right to a Unanimous Jury under the Sixth Amendment

8. Under the Constitution, a person charged with a non-petty offense has right to trial by jury. "The protection of the United States Constitution and Federal laws apply to members of the armed forces except those protections which are expressly or by necessary implication inapplicable[,] includ[ingl the fundamental right to a fair trial[.]" *United States v. Strombaugh*, 40 M.J. 208, 21 1-212 (C.A.A.F. 1994). Moreover, "the men and women in the Amed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service,"

Weiss v. United States, 510 U.S. 163, 194 (Ginsberg, J. concurring), and "[a] member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity of a commander but as written in the Constitution[.]" *Winters v. United States*, 89 S. Ct. 57, 60 (1968).

9. The power of Congress to regulate military justice "is to be exercised in harmony with express guarantees of the Bill of Rights." *O'Callahan v. Parker*, 395 U.S. 258, 273. "[T]he change in status from civilian to soldier does not automatically vitiate those constitutional rights inherent in any citizen which military necessity does not constitutionally justify denying to him." *United States v. Ezell*, 6 M.J. 307, 327 (C.M.A. 1979) (Fletcher, J., concurring).

Cases in Which Military Courts Have Found the Sixth Amendment Applies to Courts-Martial

10. With respect to the Sixth Amendment, military courts have recognized that military members are entitled to the following rights which are specifically grounded in this amendment (as opposed to deriving through some other constitutional, statutory, or regulatory provision):

a. **Speedy Trial**: An accused servicemember is entitled to a speedy trial pursuant to the Sixth Amendment separate and apart from the protections afforded by Article 10, UCMJ. *see, e.g., United States v. Danylo*, 73 M.J. 183, 186 (C.A.A.F. 2014).

b. **Public Trial**: An accused servicemember is entitled to a public trial pursuant to the Sixth Amendment. *See United States v. Hershey*, 20 M.J. 433, 435 (C.M.A. 1985) ("Without

question, the sixth amendment right to a public trial is applicable to courts-martial.).

c. **Confrontation**: An accused servicemember is entitled to rely upon the guarantees of the Sixth Amendment's confrontation clause. *See, e.g., United States v. Blazier*, 69 M.J. 21 8 (C.A.A.F. 2010) (expressly and repeatedly citing to the Sixth Amendment's confrontation clause).

d. **Notice**: An accused servicemember is entitled to the right to be informed of the nature and cause of the accusation for which he faces a court-martial." *See United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 201 1) (applying the protections of the Fifth and Sixth Amendments to set aside convictions under Article 1 34, UCMJ).

e. **Compulsory Process**: An accused servicemember is entitled to the right of compulsory process under the Sixth Amendment. *See United States v. Bess*, 75 M.J. 70, 75 (C.A.A.F. 2016) ("Under the Compulsory Process Clause a defendant has a 'right to call witnesses whose testimony is material and favorable to his defense.'").

f. **Counsel/Effective Assistance of Counsel**: An accused servicemember is entitled to counsel under the Sixth Amendment. See *United States v. Watternbarger*, 21 M.J. 41, 43 (C.M.A. 1985) (discussing when the Sixth Amendment right to counsel attaches in the military). An accused servicemember is likewise entitled to the *effective assistance* of counsel under the Sixth Amendment. *See United States v. Gooch*, 69 M.J. 353, 361

(C.A.A.F. 201 1) ("The Sixth Amendment guarantees a criminal accused, including military service members, the right to effective assistance of counsel.").

Courts Have Previously Stated the Sixth Amendment Right to a Jury Trial Does Not Apply to Courts-Martial, but Servicemembers Are Constitutionally Entitled to an "Impartial Panel" under the Fifth Amendment 's Due Process Clause

11. Despite the plain language of the Sixth Amendment, the Supreme Court and superior military courts have repeatedly held that the Sixth Amendment right to a jury trial is inapplicable to trials by courts-martial. *See, e.g., Ex Parte Milligan*, 71 U.S. 2 (1866); *Ex parte Quirin*, 317 U.S. l , 39-41 (1942); *United States v. Wolf*, 5 M.J. 923, 924 (1978); *United States v. Smith*, 27 M.J. 242, 248 (C.M.A. 1988); *United States v. Curtis*, 32 M.J. 252, 267 (C.M.A. 1991); *United States v. Loving*, 41 M,J. 213, 285 (C.A.A.F. 1994); *United States v. Tulloch*, 47 M.J. 283, 285 (C.A.A.F. 1997); *United States v. New*, 55 M.J. 95, 103 (C.A.A.F. 2001); *United States v. Wiesen*, 57 M.J. 48, 50 (C.A.A.F. 2002); *United States v. Riesbeck*, 77 M.J. 154 (C.A.A.F. 2018).

12. In those cases where military appellate courts have held that the Sixth Amendment's guarantee of a jury trial does not apply to courts-martial, they have routinely grounded this determination by relying upon the Supreme Court's decision in *Ex parte Quirin*. In that case, which arose within the context of a military commission rather than a court-martial, the Supreme Court ultimately held that "the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trial by military commission." 71 U.S. at 40. The *Quirin* Court

explained that because the Fifth Amendment expressly excepts "cases arising in the land or naval forces" such cases "are deemed excepted by implication from the Sixth [Amendment]." *Id.* However, the Court clarified:

> The exception from the Amendments of "cases arising in the land or naval forces" was not aimed at trials by military tribunals, without a jury, of such offenses against the law of war. Its objective was quite different -- to authorize the trial by court martial of the members of our Armed Forces for all that class of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in the civil courts.

Id. at 43.

13. Since *Ex parte Quirin* was decided, the Supreme Court more recently recognized the evolving nature of the modern day court-martial and its newfound likeness to state and federal criminal courts in *Ortiz v. United States*, 128 S. Ct. 2165 (2018). In that case, it considered, inter alia, whether it maintained jurisdiction to review decisions by the Court of Appeals for the Armed Forces. In holding that it did, the Supreme Court reasoned that the military justice system's essential character is, in a word "judicial." Id. at 2174. The Court explained that "[t]he procedural protections afforded to a service member are 'virtually the same' as those given in a civilian criminal proceeding, whether state or federal." *Id.*

14. The highest military court has recognized "that the cornerstone of the military justice system is the right to members who are fair and impartial," *United States v. Leonard*, 63 M.J. 398, 399 (C.A.A.F. 2006),

which is wholly consistent with the high regard American jurisprudence places on juries. *See, e.g., Reid v. Covert*, 354 U.S. I (1957) ("Trial by jury in a court of law and in accordance with traditional modes of procedure . . . has served and remains one of our most vital barriers to governmental arbitrariness. These elemental procedural safeguards were embedded in our Constitution to secure their inviolateness and sanctity against the passing demands of expediency or convenience.").

15. Congress allows convictions at general or special courts-martial with only "the concurrence of at least three-fourths of the members present when the vote is taken." 10 U.S.C. 852(a)(3).

16. The United States Constitution, on the other hand, requires that the verdict be unanimous. U.S. CONST. amend. VI.; *Ramos*, No. 18-5924, slip op. at 6.

17. A death sentence may only be adjudged in a capital case tried before members if the "accused was convicted of such an offense by.. .the unanimous vote of all twelve members of the court-martial." R.C.M. 1004(a)(2)(A). Similarly, "[a] sentence may include death only if the members unanimously vote for the sentence to include death." R.C.M. 1006(d)(4)(A).

Equal Protection under the Due Process Clause of the Fifth Amendment

18. In *United States v. Santiago-Davilla*, the Court of Military Appeals considered an equal protection objection within the context of a Batson challenge. 26 M.J. 380 (C.M.A. 1988). The Court acknowledged that *Batson* "is not based on a right to a representative cross section on a jury" (i.e., a Sixth Amendment right); rather, *Batson* emanates from

"an equal-protection right to be tried by a jury from which no 'cognizable racial group' has been excluded." *Id.* at 389. The court went onto recognize: "[t]his right to equal protection is a part of due process under the Fifth Amendment . . . and so it applies to courts-martial, just as it does to civilian juries." *Id.* at 390.

19. The Court of Appeals for the Armed Forces (C.A.A.F.) recently applied the equal protection doctrine in *United States v. Akbar*, 74 M.J. 364 (C.A.A.F. 2015). In that case, the Court stated "[a]n 'equal protection violation' is discrimination that is so unjustifiable it violates due process." *Id.* at 406. "However, 'equal protection is not denied when there is a reasonable basis for a difference in treatment.'" *Id.* In *Akbar*, the Court concluded that there was no such violation on the grounds that "servicemembers who are death-penalty eligible are treated differently than their similarly situated counterparts because convening authorities do not have to comply with death penalty protocols." *Id.* The C.A.A.F. reached this conclusion for two reasons. First, citing to *Parker v. Levy* for the proposition that the military is a specialized society separate from civilian society. Therefore, the appellant "as an accused servicemember, was not similarly situated to a civilian defendant." *Id.* Second, it noted that the difference stemmed from an internal Justice Department policy which was "without the force of law and subject to change or suspension at any time." *Id.* Noting a prior case which held that the "United States Attorney's Manual on death penalty protocols did not confer substantive rights" C.A.A.F. determined there was no equal protection violation. *Id.*

20. "For the government to make distinctions does not violate equal protection[26] guarantees unless constitutionally suspect classification like race, religion, or national origin are utilized or *unless there is an encroachment on fundamental constitutional rights like freedom of speech or of peaceful assembly*. The only requirement is that reasonable grounds exist for the classification used." *United States v. Means*. 10 M.J. 162. 165 (C.M.A. 1981) (emphasis added).

21. "Absent a suspect classification or interference with a fundamental right, all that is needed for the statute to withstand constitutional scrutiny is a rational basis for the distinction between [similarly situated persons]." *United States v. Hennis*, 77 M.J. 7, 10 (C.A.A.F. 2017) (rejecting an appellant's objection to lack of "learned counsel under the Military Justice Act of 2016" on equal protection grounds). By contrast, in a case where the Supreme Court considered an equal protection claim touching upon a fundamental right, it explained that it "may withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial government interest." *See Dunn v. Blumstein*, 405 U.S. 330, 340-41 (1972). In other words, the test in a "fundamental rights case" would be strict scrutiny.

[26] Because courts-martial are federal creatures, technically speaking, the Fourteenth Amendment's equal protection clause does not strictly apply. Rather, pursuant to the doctrine of "reverse incorporation" as set forth in *Bolling v. Sharpe*, 347 U.S. 497 (1954), "the Fifth Amendment's Due Process Clause . . . picks up the equal protection guarantee of the Fourteenth Amendment." *United States v. McIntosh*, 414 F. App'x 840, 842 (6th Cir. 201 1).

ARGUMENT

22. In light of *Ramos*, SrA Cunningham has a right to trial by an impartial panel and to a unanimous verdict for three reasons. First, a unanimity concept has been read into the "impartial jury" guarantee of the Sixth Amendment. Second, a uniramous verdict is part and parcel with proving a case beyond a reasonable doubt under the Due Process Clause of the Fifth Amendment. Third, failure to afford servicemembers the fundamental right to a unanimous verdict violates equal protection under the Fifth Amendment's Due Process Clause.

Sixth Amendment

23. To frame the issue, the Defense acknowledges the litany of cases holding that the Sixth Amendment right to trial by jury does not apply to the military. As such, since *Ramos* was decided on Sixth Amendment grounds only, its holding does not reach this case. The Defense also acknowledges this Court's obligation to apply binding precedent from the CAAF. Out of candor to the Court, those binding cases that directly cut against the Defense's argument are cited in this motion in ¶ 12. Nonetheless, the Defense argues that these cases finding the Sixth Amendment right to jury trial inapplicable to the military were wrongly decided. Separately, the Defense raises two argument on Fifth Amendment grounds that were not considered in Ramos.

24. The *Ramos* opinion grounds the right to unanimity in a historical understanding of the text of the Sixth Amendment's guarantee to an "impartial jury." The Defense understands that courts have previously held there is no Sixth Amendment right to trial by "jury" in courts-martial. However, the origins

of this rule stem from cases which were decided during Reconstruction after the Civil War and in the midst of World War II within the context of military commissions rather than courts-martial. Given the significant changes to our military justice system since that time. and the fact that every single other right under the Sixth Amendment has been found to apply at courts-martial, this rule should no longer apply.

25. The notion that the Sixth Amendment right to a jury trial does not extend to courts-martial was first announced in dicta in *Ex parte Milligan* (1866) and then accepted by *Ex parte Quirin* (1942). At the time those cases were decided. our present-day military justice system would be unrecognizable to the authors of those opinions. Even as late as 1976, when *Middendorf v. Henry*, 425 U.S. 25 (1976) was decided by the Supreme Court, Justice Rehnquist observed that the question of whether of "whether an accused in a court-martial has a constitutional right to counsel has been much debated and never squarely resolved." *Id.* at 33. Since then, not only has this Sixth Amendment right to counsel question been squarely resolved in favor of an accused servicemember, but so has every single other protection afforded by the Sixth Amendment except the right to a jury trial. *See* ¶ 11 *supra*.

26. The belief that a military service member does not enjoy the Sixth Amendment right to a jury trial is based, as stated, almost exclusively upon *Milligan*'s 154-year-old dicta—advanced without analysis, authority, or justification. *Milligan*'s dicta was uncritically parroted in the early days of the U.C.M.J., when the Supreme Court was openly disdainful of the military justice system. *See e.g., United States ex rel. Toth v Quarles*, 350 U.S. 11, 22 (1955) ("There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights

and Article III of our Constitution."). Moreover, the Court seemed resigned to accept that a court martial could never truly be a fair judicial proceeding. *See e.g., Reid v. Covert*, 354 U.S. l, 38 (1957) ("Military law is, in many respects, harsh law which is frequently cast in very sweeping and vague terms. It emphasizes the iron hand of discipline more than it does the even scales of justice."). As a result, courts failed to critically analyze the applicability of the Sixth Amendment right to a jury trial to military service members and tacitly accepted that the purpose of a court-martial was to achieve swift discipline, not justice.

27. More recently, however, the U.S. Supreme Court has recognized that our military justice system is "judicial" in nature. In contrast to its historical origins, in today's court-martial the "procedural protections afforded to a service member are 'virtually the same' as those given a civilian criminal proceeding, whether state or federal." *Ortiz*, 138 S.Ct. at 2174 (citation omitted). Today, the military justice system strives to operate as a true system of justice on par with its Article III counterparts. This is reflected in the reforms brought on by the 2016 Military Justice Act. As just one example, Appendix 17 of the 2019 Manual for Courts-Martial explains that the offense of aggravated assault through the use of a deadly weapon was amended to "align it more closely with federal civilian practice under 18 U.S.C. 1 13." In short, the expansion of courts-martial jurisdiction and development of the Uniform Code of Military Justice demand that courts-martial afford the military accused the full benefit of the Sixth Amendment right to an impartial jury.

28. As mentioned above, courts have long cited *Ex parte Milligan* for the proposition that military members do not have a Sixth Amendment right to a

jury trial. However, that case arose during the civil war and held, unremarkably, that civilians cannot ordinarily be tried by military tribunals. Mr. Milligan, a civilian, was accused of conspiring with the Confederate States of America. He was arrested, tried, convicted, and sentenced to be hanged by a military commission convened by the military governor of Indiana. *Id.* at 118. Among other things, the Supreme Court held Mr. Milligan was denied his right to jury trial afforded by the Sixth Amendment. *Id*. In coming to that conclusion, the Court contrasted Mr. Milligan's civilian status to that of a military service member. The Court stated a person serving in the military "surrenders his right to be tried by the civil courts[l" whereas "[a]ll other persons . . . are guaranteed the inestimable privilege of trial by jury." *Id*. at 123. The Court further stated, that "the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth." *Id*. The Court did not explain what makes this conclusion "doubtless" and this language was not relevant or necessary to the holding of the case. It was dicta with dangerous consequences — for this case is rarely cited for its actual holding, but is often cited for the proposition that military service members do not enjoy the right to a jury trial.

29. The case of *Ex parte Quirin* has also been cited for the proposition that a military accused has no Sixth Amendment right to a trial by jury. Like *Milligan*, however, that case did not involve an American serving in the armed forces. *Ex parte Quirin* was an appeal regarding a habeas corpus action brought on behalf of "citizens of the German Reich, with which the United States [was] at war." 317 U.S. at 20. Each of the petitioners had trained in Germany for a clandestine mission "to destroy war industries

and war facilities in the United States" and each had traveled to the United States in submarines with "a supply of explosives, fuses, and incendiary and timing devices." *Id*. at 21. After their arrest by the FBI, the President promptly "appointed a Military Commission and directed it to try petitioners for offenses against the law of war and the Articles of War[.]" *Id*. at 22. On 8 July, 1942, less than a month after they surreptitiously arrived in the United States, they were tried before the military commission.

30. At trial, the accused challenged the jurisdiction of the commission and argued that they had a constitutional right to a trial by jury in the civil courts. Significantly, the Court assumed, "that a trial prosecuted before a military commission . . . is not one 'arising in the land . . . forces,' when the accused is not a member of or associated with those forces." *Id*. at 41. Rather, the petitioners in *Ex parte Quirin* were "unlawful combatants punishable as such by military commission." *Id*. at 35. The Court held that "it was not the purpose or effect of 5 2 of Article III, read in light of the common law, to enlarge the then existing right to a jury trial." *Id*. at 39. Rather, the idea was to "preserve unimpaired" the existing right to trial by jury as it existed at the time. *Id*. In light of this holding, the Court concluded "that 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in civil courts." *Id*. at 40. Thus, whether a military accused has a Sixth Amendment right to an impartial jury at court-martial was not at issue and any statements regarding such rights were, once again, dicta.

31. At the time the Sixth Amendment was adopted, courts-martial verdicts were decided "by the majority

of voices" of the panel. AMERICAN ARTICLES OF WAR OF 1775, art. XXXVII. However, courts-martial at that time were used to prosecute uniquely military offenses and jurisdiction over common law offenses was extremely limited. For instance, while "strik[ing] his superior officer . . . or offer[ing] violence against him, being in the execution of his office" was an enumerated offense, AMERICAN ARTICLES OF WAR OF 1776, Il, art. 5, there was no prohibition against assaults generally. Indeed, if a military member was accused of committing a crime "punishable by the known laws of the land," the service member's commander was charged with delivering "such accused person or persons to the civil magistrate•• for trial where they would have enjoyed the protections of the Sixth Amendment's guarantee to a trial by an impartial jury, including its unanimity requirement. AMERICAN ARTICLES OF WAR OF 1 776, X, art. l. The opposite is true today as convening authorities are told to "foster relationships with local civilian authorities 'with a view toward maximizing Air Force jurisdiction" over such offenses. Air Force Instruction 51-201 , Administration of Military Justice, Il 4.17.1., 18 January 2019.

32. When courts-martial panels vote and six of eight members vote to find an accused guilty, the deliberations come to an end. Unless the panel elects to reconsider, no further discussion is required to determine why the two remaining members retain reasonable doubt as to guilt. As pointed out by the U.S. Supreme Court, requiring unanimity results in "more open minded and more thorough deliberations." *Ramos*, slip op. at 14. In this scenario, unanimity would require those in the majority to consider the concerns of the minority and continue discussing the evidence until the two become convinced that their doubt is not reasonable or until the six come to accede

to the view of the minority based on reasonable doubt as to guilt. This properly puts the government to their burden.

33. The Sixth Amendment affords SrA Cunningham the right to have this criminal case tried to an impartial panel and that right includes the requirement that the panel's verdict be unanimous. As discussed below, this right is so "extraordinarily weighty" that it outweighs any concern of Congress that would allow conviction upon a vote of only three-fourths of the panel. *See Middendorf*, 425 U.S. at 44.

Fifth Amendment

34. The U.S. Supreme Court has recognized that the Fifth Amendment can independently guarantee an even broader set of rights otherwise guaranteed by the text of a different provision of the Constitution. *See e.g., Miranda v. Arizona*, 384 U.S. 436 (1966) (recognizing an implicit Fifth Amendment right to counsel separate and distinct from the Sixth Amendment's explicit right to counsel). Perhaps the best example of this can be seen in the case of *Middendorf v. Henry*, wherein the Court recognized that even though there is no Sixth Amendment right to counsel in a summary court-martial, it nevertheless needed to consider whether the Fifth Amendment's Due Process Clause provided such guarantee given that servicemembers who are "subjected to loss of liberty or property . . . are entitled to the due process of law guaranteed by the Fifth Amendment." *See* 425 U.S. at 42-43.

35. The C.A.A.F. has repeatedly stated that an accused has a Fifth Amendment right, as a matter of

due process, to an "impartial panel. [27]" Therefore, the only constitutional right which has not been recognized to apply in courts-martial by C.A.A.F. or its predecessor court which is otherwise applicable to the civilian world is the right to a jury of the state and district wherein the crime allegedly occurred, as this is not a practical construct given the military's global reach.

Fifth Amendment Argument: A Unanimous Jury Verdict is "Inextricably Interwoven" with the Fifth Amendment's Requirement on the Burden of Proof

36. The Fifth Amendment requires that the government prove its case beyond a reasonable doubt as a matter of due process:

> There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value -- as a criminal defendant his liberty this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt.

In re Winship, 397 U.S. 358, 364 (1970) (quoting *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958).

[27] *See United Stales v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005) ("As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel.") (quoting *United Slates v. Wiesen*. 56 M.J. 172. 174 (C.A.A.F. 2001)).

37. In the landmark case of *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016), the C.A.A.F. expressly relied upon *Winship* for the following proposition:

> [a] foundational tenant of the Due Process Clause, U.S. CONST. amend. V, is that an accused is presumed innocent until proven guilty. An accused has an absolute right to the presumption of innocence until the government has proven every element of every offense 'beyond a reasonable doubt,' and members may only determine that the accused is guilty if the government has met that burden.

Id. at 356 (internal quotations and citations omitted).

38. As discussed *infra*, C.A.A.F. has repeatedly recognized that servicemembers are constitutionally entitled to an "impartial panel" as a matter of due process under the Fifth Amendment. This "impartial panel" language mirrors the Sixth Amendment's guarantee to an "impartial jury." The text of the Sixth Amendment says nothing about unanimity; rather, this requirement stems from an understanding of what it means to be tried by an "impartial jury." Because C.A.A.F. recognizes an analogous right to an "impartial panel" as a matter of due process, this Court should require a unanimous verdict under the Fifth Amendment.

39. As both the Court of Appeals for the D.C. Circuit and the Sixth Circuit Court of Appeals recognized well over half a century ago, the unanimity requirement is part and parcel with the government's requirement to prove guilt beyond a reasonable doubt. This burden of proof is unequivocally grounded in the Fifth Amendment's due process clause, which applies to courts martial as well as civilian criminal proceedings. As these federal appellate courts

observed, all members must be convinced beyond a reasonable doubt in order to sustain a conviction. The Sixth Circuit, in particular, explained:

> [the] unanimity of a verdict in a criminal case is inextricably interwoven with the required measure of proof. To sustain the validity of a verdict by less than all the jurors is to destroy this test of proof for there cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remain reasonably in doubt as to guilt. It would be a contradiction in terms."

Hibdon v. United States, 204 F.2d 834, 838 (6th Cir. 1953).

40. Accordingly, because the unanimous verdict requirement, "is inextricably interwoven with the required measure of proof" the Defense contends that our present court-martial system fails to afford due process of law under the Fifth Amendment to servicemembers. The unanimity requirement is even more important in jurisdictions, like courts-martial, that utilize panels with fewer than twelve members. *See Ballew v. Georgia*, 435 U.S. 223, 234 (1978) (noting that "the risk of convicting an innocent person [] rises as the size of the jury diminishes.").

Fifth Amendment Argument: The Lack of a Unanimous Verdict Encroaches upon a Fundamental Right and Triggers Strict Scrutiny under the Equal Protection Clause

41. Given the decision in *Ramos*, the military justice system is now the only system of criminal law within the United States that authorizes non-unanimous verdicts. Accordingly, SrA Cunningham, a subset of the less than 0.5% of the population who

are serving in the military, has been denied equal protection of a constitutional right guaranteed to the other 99.5% he has raised his right hand to defend.

42. In *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Supreme Court found that because "trial by jury in criminal cases is fundamental to the American scheme of justice, [due process] guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee. *Id*. at 149.

43. The right to a unanimous verdict amounts to a "fundamental right" within the sphere of equal protection jurisprudence. Accordingly, the Government may only overcome this claim if it can pass strict scrutiny (i.e., establish a compelling interest and demonstrate that this differentiation is necessary to achieve that interest). In the alternative, if this Court were not to find that a "fundamental right" has been implicated, the Government would need to pass rational basis scrutiny (i.e., it has a legitimate objective and this differentiation is rationally related to achieve said objective).

44. "Congress has plenary control over rights, duties, and responsibilities in the framework of the Military Establishment" and, therefore, [j]udicial deference . . . is at its apogee when reviewing congressional decision making in this area." *Weiss*, 510 U.S. at 177 (internal quotations and citations omitted). Although Congress is given deference, it "is subject to the requirements of the Due Process Clause when legislating in the area of military affairs[.]" *Id.* at 176. Thus, the test to determine whether the Due Process Clause (or the Sixth Amendment) provides for unanimous verdicts is "whether the factors militating in favor of [a right to a unanimous verdict] are so

extraordinarily weighty as to overcome the balance struck by Congress." *Id.* at 177-78.

45. Congress, of course, has a substantial interest in reducing the time and expense associated with the administration of the military justice system. However, authorizing convictions upon the concurrence of just three-fourths of the panel so fundamentally undermines the constitutional safeguards a jury is meant to provide, "that any countervailing interest of [Congress] should yield." *Burch v. Louisiana*, 441 U.S. 130, 139 (1979) ("conviction by a nonunanimous six member jury in a state criminal trial for a nonpetty offense deprives an accused of his constitutional right to trial by jury." *Id.* at 134.).

46. As stated in ¶ 3. the "burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for the different rule[.] *Easton*, 71 M.J. at 174. As such, the Government must clearly identify the state interest (compelling or legitimate) at issue. In other words, the Government must demonstrate how nonunanimous verdicts are tailored to that end.

47. When the Government makes a distinction which encroaches upon "fundamental constitutional rights," they are required to overcome strict scrutiny. In other words, the Government must not only show that it has a "compelling and substantial government interest" but that the distinction which it has drawn is "necessary" and narrowly tailored to achieve that end. Such is the case here because, post-*Ramos*, it is clear that the right to a unanimous verdict is a fundamental constitutional right. In *Ramos*, a five justice majority noted that "[t]his Court has long explained that the Sixth Amendment right to a jury trial is 'fundamental to the American scheme of

justice[.]'" Justice Sotomayor's concurrence in *Ramos* likewise emphasized that the constitutional protection to a unanimous verdict "ranks among the most essential[.]"

48. There does not exist a compelling reason why departing from the same burden of proof utilized within the civilian world would in any way be justified by military exigency. This is not like *Parker v. Levy* where the Court noted how conduct that is permissible within the civilian world may be criminalized in the military; rather, this is a matter of criminal procedure. There is hardly any rational relation between ensuring conformity with military standards and the necessary number of individuals required to convict an accused if brought before court-martial.

49. Even before *Ramos* announced the fundamental nature of unanimity, the Court had already expressed the underlying fundamental right to a jury as far back as 1968 in *Duncan v. Louisiana*. In that case, the Court plainly stated, "we believe that trial by jury in any criminal case is fundamental to the American scheme of justice[.]" 391 U.S. at 149 (emphasis added). Eleven years later, in *Burch v. Louisiana*, the U.S. Supreme Court clarified that not only is the right to trial by jury "fundamental to the American Scheme of Justice," but that it is, in fact "essential to due process of law." 441 U.S. at 134.

50. The significance of this verbiage in *Burch* is that it recognizes that those rights commensurate with a jury trial do not only apply by nature of the Sixth Amendment, but also by nature of the Fifth (or Fourteenth) Amendment's due process clause. In light of *Ramos*, there can, therefore, be no dispute that the right to a unanimous verdict is "fundamental" not just to our federal scheme of justice, or a particular state's

scheme of justice — but it is "fundamental to the American scheme of justice." *Ramos* clearly announced that the fundamental right to a unanimous verdict is part and parcel with the fundamental right to a jury.

51. With that said, it does not matter whether this fundamental right sounds in the Fifth of Sixth Amendment from an equal protection analysis (all that matters is whether there has been an encroachment upon a "fundamental right" of some sort). However, the Defense's position is further bolstered by the fact that *Burch* explicitly recognized that such fundamental rights are not only conferred by nature of the Sixth Amendment but are also "essential to due process of law," and, therefore, sound in the Fifth and Fourteenth Amendments as well. Given that the right to a unanimous verdict is essential to due process of law and this right is "fundamental," the present court-martial system reflects disparate treatment between persons which encroaches on a fundamental constitutional right. thereby triggering strict scrutiny.

52. Within the context of an equal protection analysis, in order for the Government to overcome strict scrutiny it bears the burden of demonstrating that it has a "compelling state interest" and the differentiation at issue is "narrowly tailored" to achieve said interest. *See generally, Johnson v. California*, 543 U.S. 499, 514 (2005). Put another way, the U.S. Supreme Court has explained that even if the Government can provide a "compelling state interest" it is "still constrained in how it may pursue that end: [T]he means chosen to accomplish the [govemment's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Grutter v. Bollinger*, 549 U.S. 306, 333 (2003) (internal citations omitted).

53. Accordingly, this differentiation between military members and the civilian population infringes upon a fundamental constitutional right, thereby triggering strict scrutiny which the government cannot withstand. Unlike matters which regulate criminal *conduct* (e.g., Article 86, UCMJ makes failing to show up for work a crime in the military community whereas it could not be punishable in the civilian world), this differentiation touches upon a matter of criminal procedure which does not justify disparate treatment between the two populations. Simply put, unlike *Parker v. Levy*, et. al., there is no legitimate interest served by this differentiation such that it causes military members to conform themselves to appropriate lifestyle standards. To hold otherwise would suggest that Congress is also free to lower the burden of proof required in courts-martial to a preponderance of the evidence. There is no distinction between the two in terms of how such a rule regulates the conduct of those in the military — only the procedure which will be employed to hold them accountable for their conduct.

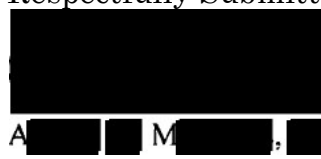
54. For the foregoing reasons, the Government has failed to meet — and cannot meet — its burden of overcoming this equal protection objection.

RELIEF REQUESTED

55. WHEREFORE, SrA Cunningham, by and through counsel, moves this Honorable Court to require the panel to reach its verdict by unanimous vote. If the Court is without authority to do so, the Defense moves for the dismissal of the Charges and their Specifications, pursuant to R.C.M. 907(b)(1).

56. The Defense does not request an Article 39(a), UCMJ, hearing.

Respectfully Submitted,



Defense Counsel

2 Attachments:

1. Original (Withdrawn) Charge Sheet (PHO Exhibit l, First Preliminary Hearing)
2. Additional Charge Sheet, dated 4 August 2020 (2 pages) (PHO Exhibit I, Second Preliminary Hearing)

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of this Defense Motion for Appropriate Relief: Unanimous Verdict on the Military Judge and Trial Counsel on 20 November 2020 via email and e-FiIing.

Defense Counsel

[The Article 39(a) session was called to order at 1300, 10 February 2021.]

MJ: This Article 39(a) session is called to order. The parties are once again present. The members are absent. Appellate Exhibit LXXV is the result of the random assignment of members to the remaining members. Does any party have an objection to the manner in which the members were assigned to the numbers -- or the numbers were assigned to the members?

TC: No, Your Honor.

CDC: No, Your Honor.

MJ: Trial Counsel, do you have a peremptory challenge?

TC: No, Your Honor.

MJ: Defense Counsel, do you have a peremptory challenge?

CDC: Yes, Your Honor. Captain Schantz.

MJ: All right. With the peremptory challenge, I have verified that we have the necessary eight members and we have the necessary enlisted quorum of three members. Do counsel agree, Trial Counsel?

TC: Yes, Your Honor.

CDC: Sorry. Yes, Your Honor, we agree.

MJ: Just to confirm, our members then will be Second Lieutenant Martin, Master

Sergeant Rast, Major Gullo, Lieutenant Colonel Grade, Lieutenant Colonel Tomlin, Senior Master Sergeant Pridemore, Major Rives, Master Sergeant

Degarmo. Those members excused then will be Lieutenant Colonel Carcamo, Lieutenant Colonel Abel, Major Greenman, Major NcNair, Lieutenant Goo, Tech Sergeant Jernigan, Tech Sergeant Schmitt, Staff Sergeant Hedlund, Lieutenant Beam and Captain Schantz. Are all of the members accounted for?

TC: Yes, Your Honor. We have another -- I'm sorry to be delayed in our response, but we have an issue we would like to raise with the defense's peremptory challenge.

MJ: Okay.

MJ: During the trial some of you took notes. You may take your notes with you into the deliberation room. However, your notes may not be read or shown to other court members.

As I previously instructed, you are not to consider information from outside sources. To the extent you have received any information about the outcomes or trial proceedings of other cases, you may not consider those cases in deciding findings in this case. Each case stands on its own. Your findings decision is to be your own independent decision based only on the evidence and matters properly before this court, and applying the instructions on the law that I give you. What may have happened in other cases, what you may have heard outside this courtroom, or any current policy in the Air Force are not matters for your consideration in this case.

No one in a position of authority over you expects you to return any particular finding in this case. No one is permitted to discover what occurred during your deliberations, what was said by any court member, or how any member voted. As the findings do not require a unanimous agreement, no one will ever know how you voted in this case or whether you concurred with the findings ultimately announced. The findings announced by the panel, regardless of what that is, will have neither a positive nor negative effect on your career. You are simply required to be fair to both sides, determine the facts based on the evidence provided, apply the law that I provide to those facts, and not be influenced by outside factors.

I will advise you of the elements of the offense alleged.

SPECIFICATION, CHARGE: MURDER WHILE ENGAGING IN AN ACT INHERENTLY DANGEROUS TO ANOTHER

In the specification of the Charge, the accused is charged with the offense of murder while engaging in an act inherently dangerous to another. To find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:

MJ: The order in which -- you vote on the specification under the charge before you vote on the charge. If you find the accused guilty of the specification under the charge, the finding as to the charge must be guilty.

The junior member will collect and count the votes. The count will then be checked by the president who will immediately announce the result of the ballot to the members.

The concurrence of at least three-fourths of the members present when the vote is taken is required for any finding of guilty. Since we have 8 members that means 6 members must concur in any finding of guilty.

If you have at least 6 votes of guilty of any offense then that will result in a finding of guilty for the offense. If fewer than 6 members vote for a finding of guilty, then your ballot resulted in a finding of not guilty.

You may reconsider any finding prior to its being announced in open court. However, after you vote, if any member expresses a desire to reconsider any finding, open the court and the president should announce only that reconsideration of a finding has been proposed. Do not state:

(1) Whether the finding proposed to be reconsidered is a finding of guilty or not guilty. I will then give you specific further instructions on the procedure for reconsideration.

As soon as the court has reached its findings, and I have examined the Findings Worksheet, the findings will be announced by the president in the presence of all parties. As an aid in putting your findings in proper form and making a proper announcement of the findings, the President may use,

the Findings Worksheet which the Bailiff may now hand to the president.

> [Bailiff handed the Findings Worksheet to the president.]

As indicated on the Findings Worksheet, the first portion will be used if the accused is completely acquitted of the charge and specification or if the accused is convicted of

MJ: Okay.

DC: Your Honor, I haven't been able to pull the case yet.

MJ: I haven't either.

DC: But from what I just heard trial counsel say, was that the statements were not admissible as evidence in aggravation?

MJ: I think she said false -- false statements.

DC: So, false statements were not admissible as evidence in aggravation?

MJ: I think that's what she said, yes.

TC: False statements about an offense, yes.

DC: Which would, I guess, lead me to ask how does that case then indicate to the court that they are admissible if that court excluded statements as evidence in aggravation? But I can't answer the court, I would have to read the case first so, that is where I'm going next.

MJ: Okay.

[Defense pulling up case cited and reading the case.]

TC: Your Honor, as we are looking through case law, the government will withdraw our intent to offer this type of evidence.

MJ: Okay. So, you don't plan on doing that now, is that right?

TC: That is correct?

MJ: Okay. Because I had not made a ruling, as you know. Okay, so that issue is behind us. What do we need to take up before -- what else do we need to take up? I think, defense you may have something else?

DC: Yes, Your Honor. Just on the Pretrial Motion for Appropriate Relief for a Unanimous Verdict. Given the fact that there is no mechanism to know by which if the verdict was unanimous or not. We would request this court at this time pole the members to assess whether or not there indeed was a unanimous verdict. We have preserved the issue in a pretrial motion and we do believe that it is a constitutional issue pursuant to the Supreme Court's ruling in *Ramos v. Louisiana*. Given that we don't believe that military courts have opined on this issue yet, we find it important to know if there was actual -- that if there could be actual prejudice in this case. If indeed it was a six of eight or a seven of eight. If that is the case, then we would be able to show to the Appellate Court that there is also not just a constitutional or structural error, but also that there was actual prejudice in this particular case.

DC: Again, candor to the court, we have not found a procedural mechanism or any affirmative authority that allows the military judge to exercise, to poll the members in this case, but we do believe that it is essential to Airman Cunningham's constitutional rights and we do believe that it is appropriate given the Supreme Court's jurisprudence prior to this and given the stakes in this case.

MJ: Okay. Trial counsel, I will allow you to be heard.

TC: Your Honor, just like defense said, there is no authority, you don't have the authority to ask this invasive question of the panel members. So, we would oppose their motion.

MJ: Okay. Defense, your motion is denied. I do, and I will recognize for the record and I think you have preserved the issue through your Motion to the Court for Unanimous Verdict, obviously the court denied that motion. But you have also preserved it here within the specifics of this case through your Motion in Limine there, but as both sides note, I don't know of any authority that would even allow me to do that. In fact, quite the opposite, our system has historically and still is predicated on the notion that a unanimous verdict is not required and part of that reason is to ensure, at least my understanding of it, to ensure that the general public does not know how each member voted. Of course, not the only reason, but certainly part of it to maintain good order and discipline and cohesiveness in the Armed Forces is part of the reason. So, with that though, your motion is denied. Anything else to take up before we call the members?

MJ: I have.

TC: We can, I guess, take the time now to set up the courtroom.

MJ: Okay. Do we need to take a recess? Go ahead, defense counsel.

DC: Before we do that, Your Honor, I think it is prudent to note that the defense does object to this slideshow. Obviously, Ms. Merhoff, has been appropriately designated as an Article 6(b) victim in this case. But this is not a proper means to bring a victim impact statement before the court. The rule provides that under RCM 1001(d)(5)(A) that a statement may be oral, or written, or both. Had the rule intended for photographic evidence, slideshows, or things of that nature, we preview that it would have said so in the rule. By the definition what is on this CD is not oral, or written. We don't object to Ms. Merhoff testifying and giving, or excuse me, giving a victim impact statement in this regard, but what this is is effectively -- this would also fail a 403 balancing test if you look at the case of *Pearson*, 17 MJ 149. What this is is tantam of waiving the bloody shirt, which obviously has been a phrase across various cases. But improper stoking emotions, rather than bringing a factual statement oral or written before the court.

MJ: Okay

DC: So, it's a two prong objection. It's not proper -- it's not a statement within the definition of RCM 1001(d)(5)(A), and even if this court does find that it is a statement, it fails a

403 balancing test as well.

MJ: Okay. Trial counsel?

TC: Yes, Your Honor.

MJ: Why don't you address the first part of the objection first and that is that it is not an oral or written statement.

TC: I find that an interesting position, Your Honor, because the defense intends to offer exhibits in their case in chief with video recordings that I'm not sure make the -- they are not either written or oral, or both under the defense's definitions of those terms. What we have here is a slideshow. So, there are writings on the slides, and then there are sounds made with a song, so it's oral. There is no requirement that it be done through her specifically, it doesn't have to be her voice making the --

MJ: It can even be done through counsel as I understand it.

TC: Yes, Your Honor. So, I'm not sure what authority the defense has with that objection.

DC: To respond, the rules with respect to defense sentencing evidence are different. The defense is not governed by RCM 1001(d)(5)(A). That is a victim impact statement so the trial counsel applying that rule to defense evidence would not be logical. So, I'm not sure how else to explain that. A quote from the *Pearson* case, Your Honor, emotional displays by grieving family members, though understandable, can quickly exceed the limits of propriety and equate to the bloody shirt being waived. That is the concern that

the defense has in this case. The defense can choose to ask that the rules of hearsay, foundation, and authentication be relaxed in their case in chief, so comparing apples to oranges is how we would respond to trial counsel's query.

MJ: Okay. I'm going to take a minute or two here.

[Military judge reviewing information.]

DC: Your Honor, if you are looking at *Pearson*, the pin site is 153.

MJ: All right, I hadn't gotten there yet. I was checking some other…

[Military Judge continues review.]

MJ: Trial counsel, I have had a chance to review it. I understand defense counsel's analogy, I think of his language waiving the bloody shirt, but as I recall there is nothing -- there is no gruesome pictures, or anything like that. I know that may not be exactly your point, defense counsel, I get that. But just clearing that up with trial counsel.

TC: Yes, Your Honor. It -- the slideshow contains a video that has pictures and short videos of the victim. Which even the *Pearson* case that defense counsel cited said that, I am quoting at pin site 152, "we agree that courts-martial can only make intelligent decisions about sentences when they are aware of the full measure of loss suffered by all of the victims including the family and close community. This in turn, cannot be fully assessed unless the court-martial knows what has been taken." And so, it appears that Caitlynn Merhoff his attempting to show you the life

of [Z.C.], to show you more about the life that has been taken. This isn't, you know, an emotional outburst, there is no incendiary language in this exhibit. I see it fall far short of waiving the bloody shirt.

MJ: Okay. Let me take the first objection first and then I'll move on. So, with regard to the fact that it is not oral or written, that objection is overruled. I base that on *United States v. Hamilton*, 77 MJ 579, in that case it dealt with a victim impact statement in which Air Force Court of Criminal Appeals held that the military judge did not abuse his discretion in that case leading in a video of a child that spoke at the conference. So, just with the technology that is available today, it's just another way -- it is another way of presenting information to the court.

So, that part of the objection is overruled.

With that, I wanted to check the -- I know I cited the AFCCA on *Hamilton*, I want a minute to check the CAAF case on *Hamilton* just to make sure that that part was not -- I don't - to my knowledge it wasn't overruled on those grounds. It had to do with something else that the victim in those cases were not present.

So, the information presented, trial counsel, it is that, in your estimation, it includes any financial, social, psychological, or medical impact on the victim directly relating to and arising from the offense to which the accused has been found guilty?

TC: That is our interpretation, yes.

MJ: All right. Yes, I think *US v. Hamilton*, did take up the notion of whether a video unsworn was

permitted. It was permitted, the issue in that case had to do with whether, as you may be aware, had to do with whether the victim was there to make her desires known. In that case, the victim was not there, it was a child pornography case in which the victim had been revictimized over the years and they wanted to put in evidence of that victimization while the victim was not present. So, the ruling in that was basically that the alleged victim had to have some part in it. And here that is clearly not the case that we have. So, I am going to allow the video portion of it. So, we've gotten to that and then I will say that I will consider it under 1001(c). And based on trial counsel's proffer and what I have seen, I find it to be in proper scope of RCM 1001(c). I will note for you trial counsel there are some -- because unsworn statements are not evidence, there are some, I guess, disagreement perhaps may be a strong word of-- or as to whether the rules of evidence even apply. So, your 403 argument, while appreciated, I think it is more incumbent upon me just to make sure the plain language of the rule is being followed. In the rule, I mean 1001(c).

DC: Understand, Your Honor, that -- understand how you would site the *Hamilton* case and distinguish it given that the Article 6(b) rep is here.

MJ: Yes.

DC: I do -- while you were doing that research, I just wanted to raise to you that I was able to play the slideshow. At least four the pictures aren't even of [Z.C.] or Ms. Merhoff. Four of the pictures are stock photos taken from the internet and the animation is a crumpled-up piece of paper presumably to signal that [Z.C.] will never have the opportunity to have those

experiences. It is just extremely inflammatory. So, if you are inclined to say that video and picture are an authorized means under the rule and pursuant to that case law, I would at least ask that you exclude slides 6, 7, 8, and 9. I will also note that slide 3 does have graphic picture of the burble, but understand that that is a picture of [Z.C.]. So, I would at least ask that 6, 7, 8 --

MJ: So, the 6, 7, and 8 are where the video kind of goes into the screen that looks like it is crumpling?

DC: Yes, Your Honor. And so, 6 is the first day of school and then when you use the animation on the PowerPoint it's seeming to indicate that -- and granted I don't know how it's going to be presented, but that was the implication that struck me when I played this after being given the government's evidence, or the governments CD there.

MJ: Yes, I understand your argument defense counsel. I guess I -- to me, and I've watched it. To me, that's proper victim impact including psychological, social impact directly relating to or arising from the offense to which the accused has been found guilty. I mean, those things won't happen. That is victim impact. So, your objection is overruled.

DC: Yes, sir.

MJ: I will give it the weight -- as military judge alone, I'll give it the weight that it deserves, and I will consider it under the rule as I mentioned, 1001(c).

DC: Thank you, Your Honor.

MJ: Out of an abundance of caution, I'm going to put -- although I'm not convinced that

MRE 403 even applies, I will put my thought process on the record. That is, I've seen the video, I find it highly probative of what's allowable under 1001(c)(2). Again, as I've stated before, victim impact from a victim who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of the offense of which the accused was found guilty. So, for those reasons I find the video to be quite probative of that and I don't -- you know, the crumpling of the screen of the events that are not going to happen. I find that the probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues with that regard. So, in fact it is fairly benign in that regard. So, the objection is overruled. I just wanted to put that on the record.

MJ: Trial -- would the -- so, with that then, is there a crime victim present who desires to be heard? You may --

TC: May we have just a moment to set up, judge?

MJ: Okay.

[Trial team setting up the courtroom for Caitlynn Merhoff to give her victim impact statement.]

CTC: Your Honor?

MJ: Yes.

CTC: Understanding the court's ruling on the defense's objections, is the court then admitting this as Court Exhibit 1?

MJ: As a court exhibit, yes.

CTC: Yes, sir.

MJ: Yes.

CTC: Just wanted to make sure.

MJ: Thank you. Okay, you may proceed. Thank you for that, trial counsel.

CTC: Yes, sir.

BEGINNING OF VICTIM IMPACT STATEMENT

BY CAITLYNN MERHOFF:

First of all, I would like to say I am not a public speaker, so I apologize if this is very awkward. But everyone here, I'm sure, knows who I am. Just for the record, I am Caitlynn Merhoff. I am and will always will be Z.C. mom.

So, during the trial you have all seen pictures of Z.C. both good and bad. But none of them portray the love that I have for him and what was truly taken from me. With that being said, I would like to go ahead and play this video first.

[Video playing with slideshow of Z.C. and Ms. Merhoff.]

So, Z.C. came into this world fighting on [redacted], as everyone knows.

He stole the hearts of everyone in his path, any staff that ever met him, any person to come visit immediately from the time he was born. He was the epitome of perfection and, like I said, I'm not just saying that because I'm his mother, everyone would attest to that.

When I finally got to see my sweet baby boy at Sanford Hospital without all staff around, and finally got to see him and look him over, I didn't recognize him. The sweet, healthy, smiling, baby boy was gone.

They say having children is like watching your heart walk around on the outside of your body. I wake up every day wondering how I'm supposed to go on living without my heart. Z.C. was my heart, my sole, my everything.

I was forced to sit on the sidelines watching my sweet, innocent baby fight his life. For nine days he laid in the hospital bed dying at the hands of his own father. There wasn't just a crime committed on March 3, my life as I knew it was taken from me.

When I had baby fever, which was as testified to, was for years. I didn't just talk about I wanted this cute, little, tiny baby in my arms. All I could think about was how my friends had little kids that would come spend a day with me and we would go shopping, and they would walk around holding my hands. I, more than anything, I just dreamed of watching him grow up. And that is something I'll never get to do. Such as I'll never get to take him to his first day of school, I'll never be able to teach him all about sports, and my love for sports, and watch him play his first ball game. And if he hates sports, watch him go to his first dance lesson.

I'll never be able to celebrate his achievements, no matter how big or small. Or applaud as he walks across the stage on graduation day. I'll never be able to give them away as he finds the love of his life, or any other future endeavors that he may encounter as he was taken far too soon.

[Video playing with slideshow of Z.C. and Ms. Merhoff.]

So, all of the slides that I presented here today, videos, pictures, words I've said, words

I've written on this presentation they all come from me, they all come from heart. Please understand that going through this trial was probably the second most difficult thing I've ever been through in my life. First being going through this in the first place. But having to relive all of this over, and over each day of the trial has been a nightmare in itself. So, with that being said I am glad this is finally coming to an end and I know Z.C. will be looking down on us very proud of

me, especially, for getting up here and speaking in the first place. As I mentioned, I'm not a public speaker. But with that being said, Z.C. and I both deserve justice. Thank you.

END OF VICTIM IMPACT STATEMENT

MJ: Thank you. Counsel, this is probably a good time to take a 10 minute recess and then we will come back and defense you can begin your case. This court is in recess. [The court-martial recessed at 1629, 18 February 2021.]

[END OF PAGE]

DC: Yes, Your Honor. I did.

MJ: Okay. Senior Airmen Cunningham, did your defense counsel explain these posttrial and appellate rights to you?

ACC: Yes, Your Honor.

MJ: Did your defense counsel explain to you that the convening authority is going to review the findings and sentence in your case and has the discretion to take action that may be favorable to you?

ACC: Yes, Your Honor.

MJ: Do you understand that it is your responsibility to keep in contact with your defense counsel, and let both of them know your desires in that regard?

ACC: Yes, Your Honor.

MJ: Do you understand that if your defense counsel cannot locate you it will be difficult for them to know to submit to the convening authority?

ACC: Yes, Your Honor.

MJ: Do you have any questions about your posttrial and appellate rights?

ACC: No, Your Honor.

MJ: Which counsel will be responsible for posttrial actions in this case?

ADC: I will, Your Honor.

MJ: Okay. Captain Gum, do you anticipate any upcoming reassignments, leave, deployments, or other scheduling concerns that might interfere with your posttrial representation of the accused?

ADC: No, Your Honor.

MJ: All right. This court is closed for deliberations.

[The court-martial closed for deliberations on Findings at 2049, 18 February 2021.]

[END OF PAGE]

[The court-martial reopened and called to order at 2255, 18 February 2021. The parties were present.]

MJ: Court is called to order. All parties present when the court closed, are again present.

Accused and defense counsel please rise.

[Accused and defense counsel did as directed.]

SENTENCE

MJ: Senior Airmen James T. Cunningham, this court-martial sentences you:

To be reduced to the grade of E-1;
To forfeit all pay and allowances;
To be confined for 18 years;
To be dishonorably discharged from the service.

Please be seated.

[Accused and defense counsel did as directed.]

MJ: The accused will be credited with 118 days of pretrial confinement against the accused's term of confinement.

Are there any other matters to take up before this court adjourns?

TC: No, Your Honor.

CDC: No, Your Honor.

MJ: This court is adjourned.

[The court-martial adjourned at 2256, 18 February 2021.]

[The draft instructions to the members on findings with email from the military judge was marked as Appellate Exhibit XCVII and inserted into the record.]

[END OF TRANSCRIPT]

ENTRY OF JUDGMENT IN THE CASE OF *United States v. SrA James T. Cunningham*

1st Ind., Entry of Judgment, SrA James T. Cunningham, dated 8 March 2021.

FROM: 28 BW/SJA 8 March 2021

MEMORANDUM FOR: ALL REVIEWING AUTHORITIES

The following criminal indexing is required, following Entry of Judgment, according to the references listed:

DNA Processing Required Under 10 U.S.C. 1565 and DODI 5505.14: Yes
Firearm Prohibition Triggered Under 18 U.S.C. 922: Yes

Domestic Violence Conviction Under 18 U.S.C. 922(g)(9): Yes
Sex Offender Notification in accordance with DODI 1325.07: No

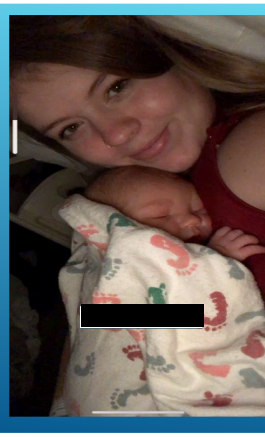
Fingerprint Card and Final Disposition in accordance with DODI 5505.11: Yes

USAF Staff Judge Advocate

Distribution:

Z [redacted]

Until we meet again may God hold you in the palm of your hand.



Z [redacted]

AND

MOM

[redacted]

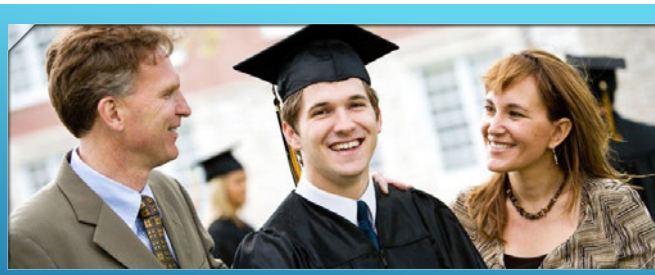
HE CAME IN TO THIS WORLD A FIGHTER.

THE LOSS IS IMMEASURABLE, BUT SO IS THE LOVE LEFT BEHIND. THE HARDEST PART WAS LEARNING TO LIVE WITHOUT YOU.

Z[redacted] LEFT THIS WORLD FIGHTING.

FIRST DAY OF SCHOOL

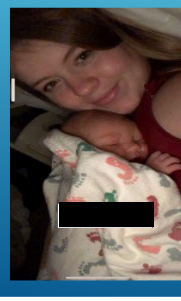
FIRST
TEE BALL
GAME



GRADUATION DAY

MARRIAGE

I WILL HOLD YOU IN MY HEART UNTIL I HOLD YOU IN HEAVEN...



~LOVE MOM