IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**BRIEF ON BEHALF OF APPELLANT**
v.	Docket No. ARMY 20230419
Sergeant First Class (E-7) **JOSEPH A. SANTIAGO,** United States Army, Appellant	Tried at Fort Campbell, Kentucky, on 14 July and 26 October 2022, 25-28 January, 13-14 July, 17-21 July, and 23 July–2 August 2023, before a general court-martial appointed by the Commander, Headquarters, Fort Campbell, Colonels Travis Rogers and J. Harper Cook, military judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignments of Error[1]

I. WHETHER THE CASE IS FACTUALLY AND LEGALLY SUFFICIENT TO AFFIRM A CONVICTION FOR MURDER

II. WHETHER THE MILITARY JUDGE ERRED BY NOT PROVIDING AN INSTRUCTION TO THE PANEL ON THE LESSER INCLUDED OFFENSES OF VOLUNTARY AND INVOLUNTARY MANSLAUGHTER

[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided in the Appendix.

Statement of the Case

On 1 August 2023, a general court-martial consisting of a panel of officers convicted appellant, contrary to his pleas, of one specification of murder and one specification of injuring an unborn child in violation of Articles 118 and 119a, Uniform Code of Military Justice, 10 U.S.C. §§ 918 and 919a (2019) [UCMJ]. (Charge Sheet; R. at 3147). The court-martial acquitted appellant of two specifications of domestic violence (Article 128b, UCMJ).

On 2 August 2023, the military judge sentenced appellant to be confined for life with the eligibility for parole for the specification and charge of murder (to run concurrently with the six-month sentence for the specification and charge of injuring of an unborn child), to be reduced to the grade of E-1, and to receive a dishonorable discharge. (R. at 3235). On 11 September 2023, the convening authority approved the findings and sentence. (Action). The military judge entered judgment on 18 September 2023. (Judgment of the Court). This court docketed appellant's case on 28 November 2023. (Referral and Designation of Counsel).

Statement of Facts

On 27 September 2021 appellant arrived home from work at 1634. (R. at 2029). A little less than three hours later, appellant, who appeared "upset" and "frazzled," brought his children to his neighbor's residence. (R. at 2031, 2044). When the neighbor, who was also a physician's assistant (PA), asked appellant if something was wrong, appellant told him his wife was unresponsive and asked if the neighbor could come look at her. (R. at 2044-45).

The government did not establish what happened in appellant's home during those three hours. What is known from the evidence presented at trial is that appellant's wife was an alcoholic and her drinking angered appellant. (Def. Ex. D). A few weeks prior to the incident, appellant recorded Mrs. [redacted] passed out from drinking, noting that she was drunk again. (Pros. Ex. 57). She stashed vodka throughout their home, putting the vodka in water bottles in attempt to hide her drinking from her husband. (R. 2045, 2166; Def. Ex. I, N, R, S, T, E, F, G, WWW, DD, RRR, SSS, TTT, UUU, VVV, AA). The bottles containing vodka were secreted in various locations in the house, and accessible to appellant's children—two Pinnacle vodka bottles were even hidden in a child's Toy Story© backpack. (R. at 2172). She twice surreptitiously asked her neighbor to buy her Pinnacle vodka. (R. at 2048). A home breathalyzer was found at appellant's home. (R. at 2179).

Appellant's wife was heavily intoxicated on the night she sustained her fatal injury. The government's toxicology expert estimated her blood-alcohol content (BAC) at the time of her fatal injury was 0.298, but it could have been as high as 0.323. (R. at 2467). An emergency medical technician who responded to the scene could "smell the alcohol coming off of her." (R. at 2141).

The government argued, inter alia, that appellant punched Mrs. [redacted] in her chest which caused her to lose consciousness and fall. (R. at 2981-982). However, Defense Exhibits FF, KK, OO, PP, QQ, TT, YY, and VV, all show no injuries to appellant's hands. (Def. Ex. FF, KK, OO, PP, QQ, TT, YY, VV). His hands are not just absent of injury, but of any marks at all. (Def. Ex. FF, KK, OO, PP, QQ, TT, YY, VV). The government also argued that appellant hit Mrs. [redacted] with a broom "to teach her a lesson," but neither a broomstick, nor marks consistent with a hit from a broomstick to Mrs. [redacted] chest, were introduced into evidence. (R. at 2981).

Mrs. [redacted] did present to the hospital with several types of injuries, but it was determined Mrs. [redacted] did not have a skull fracture. (R. at 2423). However, she did have a brain hemorrhage which doctors deemed not survivable, and her mother took Mrs. [redacted] off life support. (R. at 2354; 2442). The Chief Medical Examiner who conducted Mrs. [redacted] autopsy, Dr. [redacted] could not speculate as to what

caused her injuries and never made an official determination as to the cause of her death. (R. at 2640; Pros. Ex. 113).

Assignment of Error

I. WHETHER THE EVIDENCE IS FACTUALLY AND LEGALLY SUFFICIENT TO AFFIRM A CONVICTION FOR MURDER

Standard of Review

A. Factual Sufficiency

This court reviews questions of factual sufficiency de novo. *United States v. Penaloza,* ARMY 20230473, 2025 CCA LEXIS 76, at *6 (Army Ct. Crim. App. 28 Feb. 2025) (mem. op.) (citing *United States v. Washington,* 57 M.J. 394, 399 (C.A.A.F. 2022)).

Pursuant to the recently amended Article 66, UCMJ, this court may consider whether a finding is correct in fact "upon request of the accused if the accused makes a specific showing of a deficiency in proof." UCMJ art. 66(d)(1)(B)(i).[2] Once these conditions are triggered, this court conducts a review of the controverted questions of fact, giving appropriate deference "to the nature of the evidence at issue." *United States v. Harvey,* 85 M.J. 127, 130 (C.A.A.F. 2024).

[2] The amendment to Article 66(d)(1) applies only to courts-martial where every finding of guilty in the Entry of Judgment is for an offense that occurred on or after 1 January 2021. National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(b), 134 Stat. 3612 (2021).

This court "does not have to give complete deference to the court-martial," because this court "might weigh the evidence different from how the court-martial weighed the evidence." *Id.* at 131.

In conducting its review, this court must decide two things: whether the evidence, "*as the CCA has weighed it*, does not prove that the appellant is guilty beyond a reasonable doubt. Second, the CCA must be clearly convinced of the correctness of this decision." *Penaloza,* 2025 CCA LEXIS 76, at *7-8. (quoting *Harvey,* 85 M.J. at 132) (emphasis in original). "Clearly convinced" refers to a "state of confidence" in the "correctness of the decision" as to the finding of guilty. *Harvey,* 85 M.J. at 132.

The "quantum of proof necessary to sustain a finding of guilty during a factual sufficiency review is 'proof beyond a reasonable doubt,' the same as the quantum of proof necessary to find an accused guilty at trial." *Harvey,* 85 M.J. at 131-32. After review, if this court is "clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding." UCMJ art. 66(d)(1)(B)(iii).

B. Legal Sufficiency

This court reviews questions of legal sufficiency de novo. *United States v. Mendoza,* __ M.J.__, 2024 CAAF LEXIS 590, at *9 (C.A.A.F., 7 Oct. 2024) (internal citations omitted). "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. Smith,* 83 M.J. 350, 359 (C.A.A.F. 2023) (internal quotations omitted).

Law

Murder, per Article 118, UCMJ, is homicide without justification or excuse. Art. 118.a.; *United States v. Vandenack*, 15 M.J. 230, 232 (C.M.A. 1983). To be guilty of murder, the perpetrator must have a "premeditated design to kill;" "an intent to kill or inflict great bodily harm;" or engage in acts inherently dangerous to others, or display "a wanton disregard for human life." Art. 118.a.(1) ;(2); & (3). For both premeditated murder and murder with the intent to kill or inflict great bodily harm, the perpetrator must act with malice. *Vandenack*, 15 M.J. at 233.

The government had to prove appellant's wife was dead; her death was a result of an act or omission on the part of the appellant; the killing was unlawful; and at the time of the killing appellant intended to kill or to inflict great bodily harm on his wife. *Manual for Courts-Martial*, *United States* (2019 ed.) (*MCM*), pt. IV, ¶ 77.b.(2).

But if appellant had an intent to kill or inflict great bodily harm and killed his wife in a sudden heat of passion, he would be guilty of voluntary manslaughter. Article 119(a), UCMJ. And if appellant had no intent to kill or inflict great bodily

harm on his wife but nonetheless killed her by culpable negligence or while perpetrating an assault, he would be guilty of involuntary manslaughter. Article 119(b), UCMJ.

Argument

A. The Use of the Hands

From the outset, government argued appellant punched Mrs. [redacted] "so hard in her chest that she [lost] consciousness." (R. at 1995). Yet it is unclear whether this singular punch was the "blunt force trauma" that caused Mrs. [redacted] death. (Charge Sheet). The medical examiner declared that Mrs. [redacted] died from a brain hemorrhage, but there was no evidence that appellant hit or otherwise touched Mrs. [redacted] head. Rather, photos of appellant's hands and arms do not show any marks or contusions, rebutting the notion he punched or otherwise hit her.

Assuming *arguendo* appellant did punch Mrs. [redacted] the law recognizes that an assault with the hands is less likely to carry with it the necessary intent to support a murder conviction. *See* Charles E. Torcia, *Wharton's Criminal Law* § 141 at 252, 255 (15th ed. 1994). *See also* 2 Wayne R. LaFave, *Substantive Criminal Law* § 1.4.2(b) at 432 (2d. ed. 2003). "Since death is not the natural or probable result of a blow with the hand, it seems that no intent to kill will, under ordinary circumstances, be inferred, although death results from an assault thus

committed." M.C. Dranesfield, Annotation, *Inference of Malice or Intent to Kill Where Killing is by Blow Without Weapon*, 22 A.L.R. 2d 854, at 857 (1952).

State court cases provide examples of this principle. "There is a long-standing principle in Illinois that death is not ordinarily contemplated as a natural consequence of blows from bare fists." *People v. Nibbe*, 48 N.E.3d 835, 842-43 (Ill. App. 2016) (internal citations omitted). Similarly, in Virginia the use of a fist is presumed to exclude intent to maim. *Lee v. Commonwealth*, 115 S.E. 671, 673 (Va. 1923). If an accused "only used his fist, then there would be no presumption from that fact alone that he intended to permanently disfigure his adversary." *Id.* (reversing and setting aside a guilty verdict for what was akin to aggravated assault where the court found there could be no intent to "permanently disfigure" from punching). *See also Commonwealth v. Dorazio*, 74 A.2d 125, 129 (Pa. 1950) (An assault made with the fists that results in death is ordinarily manslaughter not murder); *McAndrews v. People*, 208 P. 486 (Col. 1922) (same); *Wilkerson v. State*, 336 P3d 1188, 1195 (Wyo. 2014) (same).

An assault using one's fists or hands will not, in and of itself, generally establish more than an intent to cause more than just simple injury. *United States v. Debaugh*, 35 M.J. 548, 549 (A.C.M.R. 1992). In *Debaugh*, this court held that absent evidence of more than just a punch, the appellant could not be provident as to the element of intending to commit grievous bodily harm. 35 M.J. 548, 549

(A.C.M.R. 1992). *See Nibbe,* 48 N.E.3d at 842-43 (noting that intent to kill or permanently maim can be found "where there was a great disparity in size and strength between the defendant and the victim."). Compare *United States v. Fierro*, 39 M.J. 1046 (A.C.M.R. 1994) (evidence of appellant punching the victim roughly ten times to the back of the head was likely to cause death or grievous bodily harm); *United States v. Nichols,* 38 M.J. 717, 719 (A.C.M.R.) (appellant was a grown man who violently struck his infant in the head eleven times). In the present case, these factors do not exist.

B. Appellant's Efforts to Save His Wife Rebut Intent to Kill

Second, appellant's actions after his wife became non-responsive belie an intent to kill. Just the opposite. As noted throughout the trial, Mrs. [redacted] was an alcoholic who frequently passed out. Appellant's actions, once he realized she truly was non-responsive, were frantic, panicked, not calculated, and were all in an effort to revive her. They were not the actions of a killer.

The government's evidence that appellant hit his wife was based upon appellant's Google searches conducted on the night of his wife's injury, particularly the search he made at around 1811 hours in which he typed, "hit hard in chest and passed out." (R. at 2277). But none of the searches demonstrate appellant had the intent to kill his wife.

Appellant also searched: "How to wake someone up from being unconscious"; "Wife is unconscious how do [I] wake her up"; "Wife is breathing but won't wake up," and "sentinial hospital," all of which indicated appellant's wife was not responding to appellant's efforts to wake her. (R. at 2277-80). These searches rebut the idea appellant intended to kill or cause grievous bodily harm to his wife. Rather, appellant was trying to find ways to revive her and to eventually save her. Appellant's wife had passed out before; this time she was non-responsive.

Even if appellant did strike his wife, his subsequent searches on how to wake her, searches for local hospitals, and his eventually seeking help from a neighbor all show that appellant did not mean to kill or cause grievous bodily harm to Mrs. [redacted] These searches cut against the government's argument that he intended to kill her.

The government argued that appellant's searching for how to rouse his wife showed appellant's callous intent to keep the injuries hidden from the public. But if appellant intended to kill his wife, why would he seek to wake her? And why then did appellant search for hospitals or seek assistance from a neighbor? And why would appellant seek to hide her injuries if it was indeed his intent to kill her? Even his harshest act, holding the lighter to her hand to wake her, shows appellant was desperately trying to awaken his wife – not trying to kill her.

As with the use of the hands, appellant's subsequent attempts to aid his wife cut against his having the intent to kill. *See People v. Schlott*, 129 N.E. 3d 700 Ill. App. 2019). In *People v. Mitchell*, 473 N.E.2d 1270, 1273 (Ill. 1984), an attempted murder case where the defendant Mitchell severely beat her daughter, repeatedly striking the daughter in the head. 473 N.E.2d at 1270. After inflicting the beating, Mitchell sought to comfort her child and sought medical assistance. *Id.* at 1274. The court found Mitchell had ample opportunity to complete the murder but did not. *Id.* Considering the circumstances, specifically Mitchell's efforts to save the child and the fact she had ample opportunity to kill the child but did not, the court found the evidence insufficient to convict Mitchell. *Id.*

Here, appellant tried several methods to revive his wife, going so far as to use a lighter to see if the flame could bring her to. (R. at 2139). He then went next door to summon assistance from his PA neighbor. (R. at 2031). The neighbor described appellant as upset and "his voice was very fast, and he looked like he was kind of frazzled." (R. at 2044). Appellant called 9-1-1. Similar to *Mitchell,* all of these efforts are not that of a murderer.

C. The Government Did Not Establish a Cause of Death That Proved Intent

Appellant's wife had numerous bruises on her body, but the government could not distinguish which injuries resulted from appellant striking her, which

were new, and which were the result of her falling while intoxicated. None save for the Duret hemorrhage were fatal. (R. at 2810; 2442).

What the government's case runs squarely into is that Mrs. [redacted] died from a Duret hemorrhage, not from heart arrythmia or bruising or a broken rib or even a lacerated kidney. The government presented no evidence as to what act of appellant's caused the Duret hemorrhage. A hemorrhage of the brain simply is not a logical outcome of a punch to the chest. Even if this court believes appellant punched Mrs. [redacted] multiple times in the body, there is still nothing indicating that death from a brain hemorrhage was the likely result of blows to the body. As such, the government presented insufficient evidence to establish any act of appellant's caused the brain hemorrhage.

Although appellant's wife had what a government expert referred to as a "constellation of injuries," none but the Duret hemorrhage were fatal. (R. at 2442). And while appellant does not dispute the injuries were severe, the nature of the injuries alone do not prove an intent to kill.

The government presented a number of theories about what may have occurred the night appellant's wife was injured. The government speculated that appellant beat his wife to death. (R. at 2981). Though the government theorized appellant bludgeoned his wife with a broom stick or some other weapon, the government presented no evidence of a broomstick or other weapon. Indeed, the

government switched its focus from the "constellation of injuries" an expert testified appellant's wife had on her body when no expert testified that the bruising was the result of a fist or a boot or a broomstick. That theory too still fails based on the dearth of evidence to support it. And as discussed above the use of the hands generally runs counter to an intent to kill or inflict great bodily harm.

Taking the evidence in the light most favorable to the government, *arguendo*, it could be established that through his Google searches that appellant struck his wife once in the chest. (R. at 2277). But the rest of the injuries (i.e. the bruises and internal injuries) could not be dated or timed by any of the government's experts. (R. at 2788-89). Nor was there evidence of any specific blow to the head or a fracture of the skull. (R. at 2659). As such, what is left is evidence of one punch to the chest.

D. Government's Inconsistent Theories

The government never proved how Mrs. [redacted] attained her fatal injury, let alone any act of the appellant's that may have caused it. In its closing argument, the government merely guessed at appellant's alleged acts. Could appellant have caused blunt force trauma with his "fists, feet, elbows, a broomstick," this court cannot be sure. (R. at 2981). *See Rucker v. State*, 129 S.W.2d 208, 210 (Tenn. 1939) ("Where it is equally possible and probable that the death resulted from one cause as from another cause and the defendant is not responsible for one of the

causes, then any determination of the cause of death can only be speculative and conjectural and the evidence will be held insufficient to support a verdict of guilty"). A bedrock principle of the military justice system, indeed any United States system of criminal justice, is proof beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 375 (1970). The government failed to carry its burden.

The government presented evidence and subsequent arguments that were inapposite of each other. In its opening, the government argued that appellant "cause[d] trauma to...her head," that he "bludgeon[ed] his wife to death." (R. at 1991; 1995). This theory was based on the notion that appellant hit Mrs. [redacted] so hard in the head that it caused the hemorrhage. There was no mention of her receiving the fatal injury through a collapse or a fall. The government spent ample time during its case-in-chief attempting to disprove that appellant's wife could have received her injuries – especially the brain hemorrhage – from collapsing or falling down, but very little effort in establishing how she was injured. (R. at 2822; 2845-46; 2853-55).

Yet the government's own experts arrived at no conclusions as to how she was injured, and no evidence supported what actually caused the fatal injury.[3] In its closing the government argued appellant hit Mrs. [redacted] so hard in the chest he

[3] "...potentially a fist or an object or a strike on the person causing them to fall and strike their head when falling." (R. at 2670).

cracked her rib and immediately stopped her heart, which led to her collapse. (R. at 2981).[4] But the government presented no evidence to support that theory, and its closing argument left open the possibility that Mrs. [redacted] received the fatal injury when she collapsed to the floor because of appellant's punch to her chest. (R. at 2981).

At no point did the government present evidence that 1) she did collapse because of the punch or 2) upon her collapse did appellant punch, kick, or bludgeon Mrs. [redacted] in the head. All the things it "could be" were never actually presented as evidence to the trier of fact, but only advanced during the government's opening statement and closing argument. (R. at 1995; 2981). Indeed, the government's grab bag of an opening put forth appellant's failure to immediately call for assistance was the basis for his culpability. (R. at 1995).

Trial counsel's notions of what happened, unsupported by evidence, is not proof beyond a reasonable doubt. Importantly, the medical examiner noted Mrs. [redacted] did not have a fracture to her skull, even though multiple experts hypothesized that Mrs. [redacted] received blunt force trauma to the head with force akin to a car crash or skiing into a tree. (R. 2659; 2782; 2657).

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[4] This argument is not supported by the evidence. [redacted] testified that a hit to the chest could cause the heart to skip or cause arrythmia, which could lead to someone collapsing if it indeed stopped the heart. However, no evidence was presented that Mrs. [redacted] heart stopped. (R. at 2828).

Appellant's case is similar to *United States v. Riley I*, 50 M.J. 410 (C.A.A.F. 1999) (remanded on other grounds). Riley was charged with premeditated murder of her infant child by fracturing the child's skull. *Id.* at 414. The government claimed Riley intentionally fractured the baby's skull, while the defense argued the baby's skull was fractured by falling to the floor during the birthing process. *Id.* Riley was convicted by a panel of premediated murder, but after reconsidering its decision, was convicted of unpremeditated murder. *Id.*

The Air Force Court of Criminal Appeals (Air Force Court) set aside the unpremeditated murder as factually insufficient and affirmed the lesser included offense of involuntary manslaughter. *Id.* at 411, 414. Importantly, the Air Force Court found none of the government's theories persuasive as to Riley's intent to kill. *Id.* at 414. Similar to *Riley I,* this court should find that "[n]one of the physical evidence or expert testimony presented in this case persuades [the court] to accept any one of the many possible explanations for the injuries." 47 M.J. at 608.

Not only did the government not prove how Mrs. [redacted] received her fatal injury, the government's theory as to appellant's intent changed multiple times. For instance, in its opening statement, the government referenced appellant's plan "to stop [Mrs. [redacted] from leaving him at all costs." (R. at 1991). Though appellant was charged with unpremeditated murder, the government's theory

appeared to assert that appellant had a well-formed, long-thought out plan to murder his wife to stop her from leaving him.

However, like the other government theories, this notion as to appellant's "plan" morphed. In its closing argument, the government argued appellant was provoked when he saw a message on his phone indicating Mrs. [redacted] was attempting to secure a job in Florida. (R. at 2976-77). But when that theory failed to land with the members, the government backtracked, "So if you're not on board with this, it doesn't mean the government has not proved this case beyond a reasonable doubt." (R. at 2977).

Yet another of the government's theory was appellant wanted to teach his wife a lesson. (R. at 2981). Appellant's plan was to show her "an important lesson: Don't drink or else. Don't drink or else this happens." (R. at 2981). But if that was appellant's plan, he is not guilty of murder.

The explanation as to competing theories is: 1) the government did not prove what actually occurred that evening and did not have enough evidence to prove any theory; and 2) the government could not prove appellant's mental state—that appellant intended to murder his wife. That is so because no evidence establishes appellant intended to murder his wife or inflict grievous bodily harm on her.

Just as in *Riley I,* the government in this case inappropriately relied on "the members to sort out the details." 47 M.J. at 608. The panel gave indications it was

struggling with the evidence, even taking the rather extraordinary step to reconsider its findings. (R. at 3076).

As such, the government failed to prove its case either factually or legally, and this court cannot affirm a conviction for murder.

Assignment of Error

II. WHETHER THE MILITARY JUDGE ERRED BY NOT PROVIDING AN INSTRUCTION TO THE PANEL ON THE LESSER INCLUDED OFFENSES OF VOLUNTARY AND INVOLUNTARY MANSLAUGHTER

Standard of Review

This court reviews whether the panel was properly instructed de novo. *United States v. Killion*, 75 M.J. 209, 215 (C.A.A.F. 2016); *United States v. Miergrimado*, 66 M.J. 34, 36 (C.A.A.F. 2008).

Law

Article 79(a), UCMJ, allows an accused to be found guilty of a lesser included offense [LIO], and Article 79(b) defines a "lesser included offense" as meaning either "(1) an offense that is necessarily included in the offense charged or (2) any lesser included offense so designated by regulation prescribed by the President."

Voluntary manslaughter is a lesser included offense of murder. *MCM,* Appendix 12A; Executive Order 13,825, 83 Fed. Reg. 9889 (March 1, 2018). Likewise, involuntary manslaughter is a lesser included offense of unpremeditated

murder. *Miergrimado*, 66 M.J. at 36 (C.A.A.F. 2008); *United States v. Dalton,* 71 M.J. 632, 633 (N.M. Ct. Crim. App. 2012) (aff. without op. by C.A.A.F., 72 M.J. 446 (C.A.A.F. 2013)).

Argument

"A military judge has a sua sponte duty to instruct the members on lesser included offenses reasonably raised by the evidence." *United States v. Upham,* 66 M.J. 83, 87 (C.A.A.F. 2008) (citing *Meirgrimado,* 66 M.J. at 36); *see United States v. Jones*, 68 M.J. 465, 468, (C.A.A.F. 2010) ("Military judges *must* instruct the members on LIOs reasonably raised by the evidence.") (emphasis added). This duty is enumerated in R.C.M. 920(e)(2), which requires military judges to instruct on "the elements of each lesser included offense in issue."

Consistent with *Sansone v. United States,* 380 U.S. 343, 350 (1965), the CAAF "has long recognized that a military judge can only instruct on a lesser included offense where the greater offense requires the members to find a disputed factual element which is not required for conviction of the lesser violation." *Miergrimado*, 66 M.J. at 36. "[A]n instruction on a lesser included offense may appropriately be requested by either the government or the defense." *Id.* Further, military judges have a duty to "'provide appropriate legal guidelines to assist the jury in its deliberations.'" *Killion,* 75 M.J. at 213 (quoting *United States v. Wolford*, 62 M.J. 418, 419 (C.A.A.F. 2006). "'Failure to provide correct and

complete instructions to the panel before deliberations begin may amount to a denial of due process.'" *Id.*

While an accused "may seek to waive an instruction on lesser included offenses and present an 'all or nothing' defense," this tactic does not absolve the military judge from his duty to instruct the members. *Upham,* 66 M.J. at 87. If an issue is in dispute, the military judge *must* instruct on the lesser included offense. *Id.* Even if the issue was forfeited, the failure to instruct on lesser included offenses is still plain error. *United States v. Rodriguez,* 2022 CCA LEXIS 744, at *11 (Army Ct. Crim. App. 30 Dec. 2022).

A. The Military Judge Had A Sua Sponte Duty to Instruct on the Lesser Included Offenses of Voluntary Manslaughter and Involuntary Manslaughter

1. Elements of Murder Were In Dispute

As to the charge of murder, all the elements, to include the intent and the act, were disputed at trial. The substantive difference between unpremeditated murder and voluntary manslaughter is that voluntary manslaughter contemplates the killing "committed in the heat of sudden passion caused by adequate provocation. Heat of passion may result from fear or rage." Article 119, UCMJ; *MCM* pt. IV, para. 57.c.(1)(a). Involuntary manslaughter revolves around either the "culpably negligent act" of appellant or that he "was perpetrating or attempting to perpetrate an offense directly affecting the person." Article 119, UCMJ; *MCM* pt. IV, para.

57.b.(2). Because these issues were in dispute, the judge had an affirmative duty to instruct on the lesser include offenses. *Upham,* 66 M.J. at 87.

In *Upham*, the accused at trial was charged with aggravated assault. *Id.* at 84-85. Both parties at trial agreed to instruct only on the charged aggravated assault offense and not have the military judge instruct on any lesser included offenses. *Id.* at 85. Upham was convicted of aggravated assault. *Id.*

On appeal, the Coast Guard Court of Criminal Appeals (Coast Guard Court) found the military judge erred in instructing on the aggravated offense but affirmed on a lesser included offense of assault consummated by a battery. *Id.* at 86. Before CAAF, Upham claimed that it was inappropriate for the Coast Guard Court to do so because both parties had waived the lesser included offense instruction. *Id.* at 87.

The Court determined that the Coast Guard Court had the statutory authority to affirm a lesser included offense, even when both parties waive all lesser included offense instructions. *Id.* at 88. First, the Court observed that military judges have a *sua sponte* duty to instruct on lesser included offenses. *Id.* at 87. The Court also observed that the parties can nonetheless waive lesser included offenses. *Id.* The Court determined that it was Article 66, UCMJ, that afforded the Coast Guard Court the authority to affirm a lesser included offense, even when the parties waive it at trial. *Id.* at 88.

> Generally, in military jurisprudence, we have long recognized that an appellate court may disapprove a finding because proof of an essential element is lacking or, as a result of instructional errors concerning lesser-included offenses, may substitute a lesser-included offense for the disapproved findings. This is true even if the lesser-included offense was neither considered nor instructed upon at the trial of the case.

Id., quoting *United States v, McKinley*, 27 M.J. 78, 79 (C.M.A. 1988). If this court finds appellant was responsible for his wife's injuries and ultimate death, this court should follow *Upham*.

The government introduced a number of theories that appellant may have been reacting to some provocation. Whether that was finding out his wife loved another man (R. at 2399) or that she had gotten a job in Florida and was leaving appellant (R. at 2343), the nature of appellant's intent and *mens rea* were central to the case.

As previously established, the government never provided a singular, coherent theory throughout trial. But in its attempt to put forth a winning formula, the government, perhaps unwittingly, put forth theories that necessarily implicated both voluntary and involuntary manslaughter, not just unpremeditated murder.

The defense sought to exploit the government's poor presentation of the case and affirmatively declined to request an instruction on voluntary manslaughter. (R. at 2942). But the defense never affirmatively waived the involuntary manslaughter instruction. According to the defense in its R.C.M. 1106 submission, "The MJ

informed counsel in an 802 session that the bench book did not authorize the lesser included offense of involuntary manslaughter." (R.C.M. 1106 Matters, p. 3). During appellant's court-martial, the military judge stated, "So, I'm not hiding our discussions in an 802, I just find that it's not required to be put on the record exactly how we reached certain things." (R. at 2939). Yet involuntary manslaughter is an authorized LIO and the military judge's failure to account for this was error.

The evidence simply does not establish that appellant had the intent to kill his wife. As the government tacitly admitted in its closing argument, appellant could have been punishing his wife for her continued drinking. (R. at 2981).

Thus, this court should find the military judge committed plain error in failing to instruct on the lesser included offense of involuntary manslaughter and should affirm that offense.

Conclusion

Appellant respectfully asks this honorable court to set aside the findings and sentence.

[redacted]

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Appendix A: Matters Submitted Pursuant to *United States v. Grostefon*

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

I. WHETHER THE REMOVAL OF ALL 5TH SPECIAL FORCES GROUP MEMBERS BY A PARALEGAL WITHIN THE OSJA, WITHOUT APPROVAL OF THE CONVENING AUTHORITY, CONSTITUTED UNLAWFUL COMMAND INFLUENCE AND AN IMPROPER SELECTION OF PANEL MEMBERS IN VIOLATION OF ARTICLE 25, UCMJ

II. WHETHER THE MILITARY JUDGE ERRED WHEN HE ALLOWED IN DIGITAL EVIDENCE AND TEXT MESSAGES THAT WERE OBTAINED FROM APPELLANT'S PHONE IN VIOLATION OF HIS 4TH AMENDMENT RIGHTS AND MISAPPLIED THE LAW AS TO EXIGENCIES

III. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED DEFENSE'S MOTION FOR DISMISSAL AFTER THE GOVERNMENT COMMITTED MULTIPLE DISCOVERY VIOLATIONS

IV. WHETHER THE MILITARY JUDGE ERRED WHEN HE DID NOT ORDER A *DAUBERT* HEARING TO BE CONDUCTED PRIOR TO THE INTRODUCTION OF EVIDENCE BY DR. DANIEL COUSIN

V. WHETHER THE MILITARY JUDGE ERRED BY ALLOWING PHOTOS OF MRS. [redacted] FROM THE AMBULANCE AND HOSPITAL TO BE INTRODUCED AND PUBLISHED

VI. WHETHER PREVIOUSLY UNDISCLOSED EXCULPATORY STATEMENTS BY APPELLANT, ELICITED FROM CID SPECIAL AGENT KL IN THE MIDDLE OF TRIAL, CONSTITUTED A *BRADY* VIOLATION

VII. WHETHER THE MILITARY JUDGE ERRED IN HIS RULING AS TO THE PANEL'S REQUEST TO RECONSIDER FINDINGS

VIII. WHETHER APPELLANT IS ENTITLED TO RELIEF FOR DILATORY POST-TRIAL DELAY WHEN IT TOOK 531 DAYS FOR APPELLANT TO RECEIVE HIS COPY OF THE RECORD OF TRIAL

IX. WHETHER THIS COURT SHOULD OVERRULE ITS EARLIER DECISION ALLOWING THE GOVERNMENT TO ADMIT HEARSAY STATEMENTS FROM APPELLANT'S WIFE PURSUANT TO THE FORFEITURE BY WRONGDOING EXCEPTION TO MRE 804

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically filed with the Army Court and Government Appellate Division on May 21, 2025.

[redacted]

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