IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,	Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.		Docket No. ARMY 20240332
Master Sergeant (E-8) **RAFAEL AYUSO,** United States Army,	Appellant	Tried at Joint Base Lewis-McChord, Washington, on 19 December 2023, 28 February 2024, 19 March 2024, and 24–27 June 2024 before a general court-martial convened by Commander, I Corps, Lieutenant Colonel Jessica Conn and Lieutenant Colonel Pamela Jones, military judges, presiding.

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

Assignment of Error I[1]

WHETHER THE SPECIFICATION OF CHARGE I IS FACTUALLY INSUFFICIENT.

Assignment of Error II

WHETHER TRIAL DEFENSE COUNSEL WERE INEFFECTIVE FOR FAILING TO GATHER OR PRESENT CONCLUSIVE EVIDENCE THAT THE CONDUCT CHARGED IN THE SPECIFICATION OF CHARGE I OCCURRED OUTSIDE THE STATUTE OF LIMITATIONS.

[1] The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits that they lack merit. Should this court consider any of those matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

PANEL NO. 2

Assignment of Error III

WHETHER THIS COURT SHOULD GRANT APPELLANT'S ARTICLE 73, UCMJ, PETITION FOR A NEW TRIAL AS TO THE SPECIFICATION OF CHARGE I.

Assignment of Error IV

WHETHER THE SPECIFICATION OF CHARGE III IS FACTUALLY INSUFFICIENT.

Assignment of Error V

IS A CO-PARTICIPANT IN CONSENSUAL EXTRAMARITAL SEXUAL ACTIVITY A VICTIM FOR PURPOSES OF ARTICLE 6b, UCMJ? DID THE MILITARY JUDGE ERR BY ALLOWING APPELLANT'S CO-ACTOR TO GIVE A VICTIM IMPACT STATEMENT?

Assignment of Error VI

IS A PERMANENTLY FILED GOMOR RECEIVED BY A GOVERNMENT WITNESS WITHIN THE POSSESSION, CUSTODY, OR CONTROL OF MILITARY AUTHORITIES FOR PURPOSES OF R.C.M. 701? IS RELIEF WARRANTED WHERE THE GOVERNMENT FAILED TO DISCLOSE THAT A KEY GOVERNMENT WITNESS HAD RECEIVED A PERMANENTLY FILED GOMOR?

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Statement of the Case

On 26 June 2024, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of solicitating the distribution of a controlled substance, one specification of simple assault with an unloaded firearm, and two specifications of extramarital sexual conduct, in violation of Articles 82, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 882, 928, and 934 (2019) [UCMJ].[2] (R. at 674). The military judge sentenced appellant to a reduction to the grade of E-5. (R. at 789). The convening authority took no action on the adjudged sentence. (Action). On 1 August 2024, the military judge entered judgment. (Judgment).

Statement of Facts

In March 2023, the government initiated an investigation into appellant after receiving reports he had inappropriately communicated with female officers in the brigade when he learned he would not be promoted to sergeant major on or around 2 March 2023. (Article 32 Preliminary Hearing Report, Encl. 4).

[2] Unless otherwise stated, all references to the UCMJ and Rules for Courts-Martial [R.C.M.] are to the versions in the Manual for Courts-Martial, United States (2019 ed.) [*MCM*].

A. Appellant pointed a firearm at [redacted]

Appellant and [redacted] were married in August 2018 and divorced around December 2018. (R. at 426). [redacted] testified that she and appellant had one domestic dispute, which she described as follows:

> we started play-fighting, and then I had play slapped him in the face, and then he drug me into the room. Something, like, kind of, snapped a little bit. He dragged me into the other room, and then held a shotgun to my head. And then he did not rack the shotgun, and then I held the barrel of the shotgun and, excuse my language, and I said, 'Do it then you a little bitch.' And then he went back to the couch, and then I went and removed myself from the situation, went into the bathroom, and then lock the doors.

(R. at 427). When he pointed the shotgun at [redacted], appellant told her, "We're married now. You can't leave me." (R. at 427). [redacted] told her friends a few weeks later, including SSG [redacted] and [redacted]. (R. at 430). On cross-examination, [redacted] agreed she did not want a Special Victims Counsel after the event occurred because she did not consider it to be a traumatic event. (R. at 447).

SSG [redacted] testified on direct examination that [redacted] called her after she got married in Las Vegas and shared she and appellant went back to his apartment in San Antonio where he held a gun to her head. (R. at 452). On cross-examination, defense asked SSG [redacted] whether [redacted] "told [her] that when she experienced the shotgun incident, that she kind of liked it?" (R. at 457). She responded, "Oh okay.

Well, yea. I mean, it was a messed up situation. They were both drinking, so, yeah. It was uncomfortable all the way around." (R. at 457).

[redacted] testified [redacted] told her she was in fear of her life when appellant pointed the shotgun at her and she ([redacted]) told her to leave the relationship as a result. (R. at 462–63).

B. Appellant's request for 1LT [redacted] Adderall.

1LT [redacted] was the brigade adjutant at the same time appellant was the HHC brigade first sergeant. (R. at 369–70). She testified she had an ADHD diagnosis and had an Adderall prescription. (R. at 367). Appellant first contacted 1LT [redacted] around 0245 on 2 March 2023. (R. at 371, 377). Throughout the day she received a mix of text messages, phone calls, and video chats from him. (R. at 371). Appellant told 1LT [redacted] he had just been notified he did not make the sergeant's major list and that he had been drinking. (R. at 371). In a phone call, he asked for some of her Adderall "because he wanted an upper, because he did not want to come down from his – from his current bender. He wanted to stay up." (R. at 372, 394). 1LT [redacted] did not give him Adderall. (R. at 372). She felt awkward and uncomfortable because even though she technically outranked appellant, he was in a position of authority with respect to her as the first sergeant. (R. at 373). She believed his request to be a serious one. (R. at 387).

C. Appellant's extramarital sexual conduct with [redacted]

[redacted] was a sergeant serving in C Company, 502d Military Intelligence Battalion, 201st Brigade with appellant when he was the company first sergeant. (R. at 195). Appellant became the first sergeant of HHC sometime around March 2022. (R. at 196). [redacted] became a platoon sergeant shortly thereafter, around April 2022, and was promoted to staff sergeant on 1 September 2022. (R. at 196–97). In February 2022, [redacted] decided she wanted to leave the Army, citing the loss of her father as the long-term provider for her family care plan and a loss of faith in the Army. (R. at 197–98). After confiding in appellant, however, she decided to stay in. (R. at 198–99). She testified about her meeting with appellant: "I thought that for the first time in my short career that I had met a leader who genuinely cared about the well being [of his Soldiers]. He wanted to help. He wanted to go above and beyond to help his Soldiers succeed. And I was shocked." (R. at 199).

Over time, appellant and then-SSG [redacted] relationship became more personal, and she felt she could confide in him, including to talk about her marriage. (R. at 200). Appellant ultimately gave her the advice that "divorce was the way to go" and "the single life was the only way to be in the Army." (R. at 201).

Appellant also arranged for then-SSG [redacted] to attend right arm night, even though she didn't meet the rank requirement, and texted her his address to go over

to his apartment after she got into a fight with her husband. (R. at 202). Between June 2022 and February 2023, then-SSG BD went over to appellant's house approximately a dozen times. (R. at 207). Those visits included sexual intercourse. (R. at 207–08). They also had sexual intercourse in his office at the company. (R. at 209–10).

Additional facts are incorporated below.

Assignment of Error I

WHETHER THE SPECIFICATION OF CHARGE I IS FACTUALLY INSUFFICIENT.

Additional Facts

On 23 August 2023 at 1500, the Summary Court-Martial Convening Authority (SCMCA) received appellant's charge sheet, tolling the statute of limitations. (Charge Sheet). The original preferred charge sheet listed the date range of the Article 128 violation as "between 1 September 2018 and 31 December 2018." (Charge Sheet).[3] On 12 December 2023, before referral, the government

[3] The Preliminary Hearing Officer wrote "it is unclear based on listening to the CID interviews with both [redacted] and [redacted], and reading the preferral packet, where these date ranges came from . . . The government could have narrowed it down by the dates [redacted] and [appellant] were married and divorced, which is a timetable she references when briefly discussing the event with CID, but this is unknown and unclear." (Article 32 Preliminary Hearing Report, 5) (internal citations omitted).

amended the date range to "between 24 August 2018 and 15 September 2018." (Charge Sheet).

The government supported the date range by arguing (1) [redacted] said appellant pointed the gun at her a few days after a particular Facebook picture was taken on 23 August 2018; and (2) the government knew appellant pointed the gun at [redacted] in 2018. (R. at 110). The government also knew from review of appellant's military file the time period he had been married to [redacted], that he pointed the gun shortly after they were married, and then shortly after he pointed the gun at her, they got a divorce. (R. at 112–13). [redacted] testified they were married from August to December 2018. (R. at 426). She also testified that her "best guess" of when the incident happened was the weekend after the Facebook photo was posted, which would have been the 25th or 28th of August. (R. at 431; *see also* App. Ex. XII, 18 ([redacted] Government Witness Interview Notes 14 August 2023) (noting "[t]hey got married in August 2018 during the summer or towards the end of the year . . . the photo was taken on the 23rd and the incident happened days after. They got married days before the photo."); *see also* App. Ex. XX-A (23 August 2018 Photograph)).

The trial defense counsel alleged [redacted] was unable to say with certainty that the misconduct occurred before 23 August and that information surfaced

during pre-sentencing preparation that contradicted what she said on the merits. (R. at 714–15).

Standard of Review

The court of criminal appeals reviews the factual sufficiency of a conviction de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law and Argument

In a factual sufficiency review, the court takes "a fresh, impartial look at the evidence . . . [applying] neither a presumption of innocence nor a presumption of guilty." *Id.* "[A]fter weighing the evidence in the record of trial and making allowances for not having observed the witnesses, [the court must be] themselves convinced of [appellant's] guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). The court is limited to the facts introduced at trial in its factual sufficiency review. *See United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007).

Here, based on the evidence submitted at trial, the Specification of Charge I is factually sufficient as to both the dates of the assault and the requirement that [redacted] "reasonably apprehended" immediate bodily harm.

A. The Specification of Charge I is factually sufficient as to the date of the assault based on the evidence presented at trial.

Article 43(b)(1), UCMJ prohibits trying an offense if it was committed more

than five years before the SCMCA receives the charges. [redacted] testified she believed the assault happened the weekend after a specific Facebook photo taken on the 23rd of August 2018, placing the misconduct on or around the 25th or 28th of August. (R. at 431). SSG [redacted] testimony corroborated that [redacted] called her after she got married in Las Vegas to share she and appellant went back to his apartment in San Antonio and he held a gun to her head. (R. at 452). The statute of limitations tolled on 23 August 2023, when the SCMCA received the charges, placing the offense within five years of the receipt of sworn charges under Article 43. (Charge Sheet). The notion that [redacted] "could not have reasonably been wrong by as little as 48 hours," is speculative. (Appellant's Br. 7). This court should find the charge is factually sufficient as to the dates of the assault based on the evidence admitted at trial.

B. The Specification of Charge I is factually sufficient as to the requirement [redacted] reasonably apprehended immediate bodily harm.

To prove simple assault with an unloaded firearm in violation of Article 128, UCMJ,[4] the government must show (1) appellant offered to do bodily harm to [redacted] by pointing an unloaded firearm at her; and (2) the offer was done with unlawful force or violence. An offer is unlawful when done without legal

[4] References to the UCMJ in this assignment of error are to the version in the Manual for Courts-Martial, United States (2016 ed.) [*MCM*].

justification or excuse, and without the consent of the affected person. *Manual for Courts Martial*, *United States* (2016 ed.) [*MCM*], pt. IV, ¶ 54c.(1)(a). "An 'offer' type assault is an unlawful demonstration of violence . . . by an intentional . . . act . . . which creates in the mind of another a reasonable apprehension of receiving immediate bodily harm." *Id*. at ¶ 54c.(1)(b)(ii).

Here, while the beginning of the altercation started with consensual play-fighting between [redacted] and appellant, the situation devolved into non-consensual conduct when appellant dragged [redacted] across the room, pointed a shotgun at her head, and told her she could not leave him now that they were married. (R. at 427). Fearing for her life, she locked herself in the bathroom. (R. at 462, 427). SSG [redacted] testimony on cross-examination that, "[w]ell, yea. I mean, it was a messed up situation. They were both drinking, so, yeah. It was uncomfortable all the way around," was at most an unclear answer that could have also been referencing the consensual play fighting at the start of the altercation. (R. at 457). Further, [redacted] reluctance to label the altercation "traumatic" or because she handled it with less emotion does not also mean she did not reasonably apprehend appellant was going to harm her with the gun in the immediate moment—she removed herself from the situation, locked herself in the bathroom, and told a friend she did indeed fear for her life. (R. at 427, 462). *See United States v. Milton*, 46 M.J. 317 (C.A.A.F. 1997) (upholding appellant's guilty plea for

offer-type assault when appellant told the victim they would have "serious problems" while showing him a weapon tucked into his pants, causing the victim to flee; the appellant "admitted that he wanted to place [the victim] in fear and did. [The victim] fled into another building and asked a friend to call 911."). The court can properly draw an inference from the testimony here that [redacted] reasonably apprehended bodily harm as a result of appellant's conduct.

After observing the witnesses testify, the military judge gave due weight to [redacted] testimony that she locked herself in the bathroom, and to [redacted] testimony that [redacted] her she feared for her life. Thus, based on the evidence submitted at trial, the Specification of Charge I is factually sufficient as to both the date of the misconduct and the requirement that [redacted] "reasonably apprehended" immediate bodily harm.

Assignment of Error II

WHETHER TRIAL DEFENSE COUNSEL WERE INEFFECTIVE FOR FAILING TO GATHER OR PRESENT CONCLUSIVE EVIDENCE THAT THE CONDUCT CHARGED IN THE SPECIFICATION OF CHARGE I OCCURRED OUTSIDE THE STATUTE OF LIMITATIONS.

Additional Facts

A. Appellant's affidavits.

In his first 11 August 2025 affidavit, appellant avers, under the penalty of perjury, that the text messages attached to the affidavit are true and accurate copies of messages between himself and his ex-wife, [redacted], on the dates listed (11 August 2018 through 22 August 2018). (Def. App. Ex. A, Appellant Aff.). On 17 August 2018 at 1253, the following exchange purportedly occurred:

[redacted]: Omfg

[redacted]: We are done

[Appellant]: Why

[redacted]: Cheater

[redacted]: Well

[redacted]: You held a gun to my head

(Def. App. Ex. A). The message exchange then goes on to suggest that [redacted] left appellant's home at a time directly preceding or during the text exchange and that he wanted her to come back because it was a "wintry mix outside." (Def. App. Ex. A).

In his second 11 August 2025 affidavit, appellant writes that he "believes" he shared text messages from August 2018, to include messages from 17 August 2018, with his trial defense counsel. (Def. App. Ex. B). He also writes that he was "not in a good place of mental or intellectual functioning." (Def. App. Ex. B).

B. Trial defense counsels' affidavits.

Both of appellant's trial defense counsel ("defense counsel") independently verified that they never received the text messages in Defense Appellate Exhibit A. (Gov't App. Ex. 1, 2; Gov't App. Ex. 2, 3). When they discussed the assault with appellant, he denied it occurred altogether and alleged [redacted] was lying. (Gov't App. Ex. 1, 1–2; Gov't App. Ex. 2, 2). This information from appellant formed the basis of defense counsel's trial strategy—they focused on [redacted] motive to fabricate the assault as one of the reasons there was reasonable doubt for Charge I and its Specification. (Gov't App. Ex. 1, 3–4; Gov't App. Ex. 2, 4–5).

When the case was preferred in August 2023, defense counsel requested all texts, emails, and other communications between appellant and [redacted] for the Specification of Charge I. (Gov't App. Ex. 1, 1; *see also* Gov't App. Ex. 2, 2; Gov't App. Ex. 2, Encl. 3 (requesting any text messages and emails between appellant and his accusers on 26 September 2023)). Defense counsel and appellant had multiple conversations about why the communication between him and [redacted] was necessary for their investigation and to prepare for trial. (Gov't App. Ex. 1, 1; Gov't App. Ex. 2, 2). Defense counsel specifically asked appellant "to give us any messages from between July 2018 and September 2018 that mentioned any incident with a gun, or messages that tend to disprove that the incident occurred." (Gov't App. Ex. 1, 1). Appellant did provide screenshots of text messages, emails,

and photos between himself and [redacted] (Gov't App. Ex. 2, 2; Gov't App. Ex. 2, Encl. 5), but produced no text messages from on or before 23 August 2018—instead telling defense counsel he had no messages from before that time and that he did not identify any messages that alleged anything about a gun when he searched through his messages. (Gov't App. Ex. 1, 2). Defense counsel also asked appellant "to provide . . . evidence that, from his perspective, would be helpful . . . [Appellant] provided us with loosely organized notes . . . which included copies of paperwork, and screenshots of texts and emails between himself and all his accusers, including [redacted]." (Gov't App. Ex. 2, 2; Gov't App. Ex. 2, Encl. 4).

Despite appellant's denial that the conduct in Charge I and its Specification occurred, defense counsel attempted to investigate whether the conduct occurred outside the statute of limitations and to show the same to try to get the charge dismissed. (Gov't App. Ex. 1, 2). When interviewed by defense counsel on 26 January 2024, [redacted] reiterated that her best estimate of when the offense occurred was around the August 2018 Facebook post. (Gov't App. Ex. 1, 2). Defense counsel made the strategic choice to not make a discovery request for her devices in the event there was unfavorable evidence on those devices of which the Government was unaware. (Gov't App. Ex. 1, 2).

Defense counsel first raised an Article 43(b), UCMJ objection at the Article 32 preliminary hearing on 11 October 2023. (Gov't App. Ex. 1, 2; Article 32

Preliminary Hearing Report, 5). Defense counsel argued that the CID interview with [redacted] only contained evidence that the charge occurred "some time during 2018," demonstrating that there was no probable cause to believe the misconduct occurred on the dates outlined in the Charge and its Specification. (Gov't App. Ex. 1, Encl. 3). On 20 February 2024, defense counsel filed a motion to dismiss Charge I and its Specification based on the statute of limitations. (App. Ex. XII). The primary statute of limitations argument throughout appellant's case was that the government could not provide specifics about the date the misconduct occurred, and thus the factfinder could not also conclude beyond a reasonable doubt that the offense occurred within the required five-year period. (Gov't App. Ex. 1, 3).

Defense counsel also asked [redacted] during sentencing whether it was possible the offense occurred before August 23, 2018—the date the statute of limitations was tolled. (R. at 707–08). She "contacted defense counsel before sentencing, attempting to amend her testimony on direct to "the offense possibly occurred in July 2018 or before, instead of what I said during my direct examination" or words to that effect. (Gov't App. Ex. 1, 3). As a result, defense submitted a motion for reconsideration on the findings and statute of limitations for Charge I and its Specification. (R. at 713–22).

Appellant was not suffering from a mental health condition that prevented his participation or impacted his understanding of the proceedings. (Gov't App.

Ex. 1, 4). He gave defense counsel the impression that he understood what was happening in his case: he was responsive to their requests, and he provided information to counsel on his own accord. (Gov't App. Ex. 2, 2). Defense counsel were also satisfied with the analysis of appellant's R.C.M. 706 board. (Gov't App. Ex. 2, 3) (Gov't App. Ex. 1, Encl. 2).

Standard of Review

Claims of ineffective assistance of counsel are mixed questions of law and fact, where the "[c]ourt reviews factual findings under a clearly erroneous standard [and] looks at the questions of deficient performance and prejudice de novo." *United States v. Gutierrez*, 66 M.J. 329, 330–31 (C.A.A.F. 2008).

Law and Argument

The Sixth Amendment guarantees the right to an attorney to an individual accused of a crime. *See also* Article 27(a), UCMJ (guaranteeing the right to servicemembers accused of a crime). Defense counsel is considered ineffective when the accused establishes (1) his counsel's performance was deficient and therefore not acting as "counsel" within the meaning of the Sixth Amendment; and (2) prejudice—but for his counsel's incompetence, there is a reasonable probability the results of his trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Under the first prong, appellant must show his trial defense counsel "fell

below an objective standard of reasonableness . . . [which] may be determined or substantially influenced by a defendant's own statements or actions." *Id.* at 688, 691. Appellant must overcome the presumption that his counsel was competent. *United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000). To determine whether appellant has overcome this presumption, the CAAF considers whether appellant's allegations are true; if so, whether (a) "there [is] a reasonable explanation for counsel's actions"; and (b) "defense counsel's level of advocacy '[fell] measurably below the performance . . . [ordinarily expected] of fallible lawyers.'" *United States v. Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011). "Strategic choices made by counsel after a thorough investigation of the law and facts are virtually unchallengeable." *Strickland*, 466 U.S. at 690–91.

When conflict exists between affidavits submitted by the parties, the court of criminal appeals cannot decide disputed questions of fact about a post-trial claim based on the affidavits alone. *United States v. Ginn*, 47 M.J. 236, 243 (C.A.A.F. 1997). A *Dubay* hearing is the appropriate mechanism for handling post-trial claims of ineffective assistance of counsel unless the "appellate court can conclude that 'the motion and the files and records of the case . . . conclusively show that [an appellant] is entitled to no relief.'" *Id.* at 244 (discussing considerations for a guilty plea).

Here, the motion, files, and records of this case show appellant is entitled to

no relief. Appellant cannot show his trial defense counsel were deficient under *Strickland*'s first prong because he merely "believes" he gave these text messages to his defense counsel.[5] His counsel explicitly asked for messages like the text messages appellant has now produced and which, at the time, he told his counsel did not exist. Defense counsel rely on their client to provide true and accurate evidence to support their preparation and to inform their trial strategy. Defense counsel here relied on the information appellant provided to inform their strategic choices—appellant told them the assault against [redacted] never occurred, and they based their trial strategy off of that information. Defense counsel tried themselves to interview the only other witness to the assault, [redacted], but she reiterated the date of the offense. Defense counsel's preparation was thorough, and as a result, their strategic decisions to not request a copy of [redacted] text messages with appellant and focus on her possible motive to fabricate are "virtually unchallengeable."

> Defense counsel cannot force a client to tell the truth, even though doing so would be in the client's best interest . . . An appellant may not profit on appeal by successfully misleading his own counsel before trial. If appellant's defense was undermined by appellant's lies to his

[5] Should this court determine a *Dubay* hearing is necessary, the government respectfully requests the hearing determine the validity of the text messages appellant submitted through his appellate defense counsel. Either appellant possessed the text messages when trial defense counsel requested them before trial and was not honest with his trial defense counsel, or the text messages have been fabricated. Confirming the validity of these messages will assist the court in determining the appropriate relief for any possible statute of limitations issue.

own lawyers, appellant has only one person to blame: himself.

United States v. Carter, ARMY 20160770, 2019 CCA LEXIS 140, at *12–13 (Army Ct. Crim. App. 28 Mar. 2019) (mem. op.).

Appellant provides *Scott* as an example of when a counsel's failure to investigate constitutes ineffective assistance of counsel. (Appellant's Br. 12). *Scott* involved an egregious set of facts where the defense attorney failed to investigate the appellant's alibi defense. There, counsel failed to investigate the alibi because he "hoped" the case was not going to trial. *United States v. Scott*, 24 M.J. 186, 191 (C.M.A. 1987). Defense counsel's actions here could not be farther from those in *Scott*. Even though appellant failed to provide any evidence that the charged conduct occurred outside the statute of limitations—despite their requests—defense counsel *did* argue the statute of limitations issue numerous times—from the Article 32 preliminary hearing through the presentencing stage—conduct and advocacy well beyond inaction in the hopes the case would not go to trial.

This court should find the trial defense counsel were not ineffective because appellant cannot overcome the presumption that his defense counsel acted competently.

Assignment of Error III

WHETHER THIS COURT SHOULD GRANT APPELLANT'S ARTICLE 73, UCMJ, PETITION

FOR A NEW TRIAL AS TO THE SPECIFICATION OF CHARGE I.

Additional Facts

On 26 August 2025, appellant submitted a petition for a new trial under Article 73, UCMJ. (Petition for a New Trial). Appellant alleges the petition should be granted based on fraud upon the court because the text messages submitted on appeal show the charged conduct occurred outside the statute of limitations and that the evidence at trial placing the conduct within the statute of limitations was false. (Appellant's Br. 13).

Standard of Review

The determination as to whether appellant has met the requirements for a new trial under R.C.M. 1210 rests with the authority considering the petition. *United States v. Bacon*, 12 M.J. 489, 492 (C.M.A. 1982).

Law and Argument

Article 73, UCMJ permits an accused to petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court. Similarly, R.C.M. 1210(f)(1) provides that a "new trial may be granted *only* on grounds of newly discovered evidence or fraud on the court-martial." (emphasis added). Appellant has not met either of these grounds: there is no "newly discovered evidence" and he has not proven fraud.

A. There is no "newly discovered evidence."

First, to constitute "newly discovered evidence" under R.C.M. 1210(f), the evidence (a) must be discovered after trial; (b) must not be "such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence;" and (c) "would probably produce a substantially more favorable result for the accused" if considered in the light of all the other pertinent evidence. These text messages, assuming they are true, *would* have been discovered at the time of trial in the exercise of due diligence. Thus, appellant cannot show—and indeed, does not argue—that these text messages are "newly discovered" evidence to support his petition for a new trial.

B. Appellant cannot show "fraud upon the court."

Second, appellant's argument that evidence of the date of the offense was "fraud upon the court" also fails. Fraud on the court martial only warrants a new trial when it had a substantial contributing effect on a guilty finding or the sentence. R.C.M. 1210(f)(3). "Fraud" means "[a] knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment." *Black's Law Dictionary*, 775 (10th ed. 2015). While not defined in the rules, the discussion to R.C.M. 1210 provides "[e]xamples of fraud on a court-martial which may warrant granting a new trial are: confessed or proved perjury in testimony." "Perjury" means "[t]he act or an instance of a person's deliberately

making material false or misleading statements under oath; esp., the willful utterance of untruthful testimony . . . .” *Black’s Law Dictionary*, 1321 (10th ed. 2015).

Even if the text messages appellant provided are true, this does not also prove that those who testified to the time of the conduct perjured themselves or committed fraud upon the court.

If [redacted] were mistaken about precisely when the misconduct occurred, this does not rise to perjury. At most, her statements about the date demonstrate an effort to accurately remember, not intentional dishonesty. Further, there is no evidence in the record to suggest [redacted] would lie simply to convict appellant; she testified for defense at trial, testifying that she and appellant had an amicable relationship with no ill will. (R. at 710). Finally, there is no indication that any other evidence about when the assault occurred was deliberately false. *See Turpiano v. United States*, 2018 CCA LEXIS 307, at *6 (A. F. Ct. Crim. App. 21 June 2018) (unpub. op.) (“While admitted perjury by the purported victim would constitute fraud on the court . . . simple inaccuracies or inconsistencies are not considered materially false and do not necessitate a new trial.”) (internal citations omitted).

An argument of fraud upon the court should be supported by affidavits and exhibits. *See generally Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 332 U.S.

238, 238 (1944) (discussing petitioner supported the argument of fraud upon the court with affidavits and exhibits) (holding that equity permits courts to grant relief to correct certain injustices later superseded by statute); *see also United States v. Stewart*, ARMY 20090751, 2012 CCA LEXIS 276, *at 4 (Army Ct. Crim. App. 26 Jul. 2012) (mem. op. and action on petition for new trial) (finding petition contained no evidence of fraud when it included no affidavits and only referenced evidence already addressed at a post-trial hearing). Here, appellant has provided the court with what is purportedly evidence he possessed at the time of trial, but no affidavits or other evidence showing any testimony at trial was *deliberately fraudulent*. Appellant has shown neither "confessed" nor "proved" perjury. He has not met the grounds for a new trial under Article 73 and R.C.M. 1210(f) and thus his petition should be denied.

Assignment of Error IV

WHETHER THE SPECIFICATION OF CHARGE III IS FACTUALLY INSUFFICIENT.

Additional Facts

A. 1LT [redacted] Attention-Deficit/Hyperactivity Disorder (ADHD) diagnosis.

1LT [redacted] was open about her ADHD diagnosis and how her medication affects her in both her personal and professional lives. (R. at 368). Appellant knew about her diagnosis and that she took Adderall. (R. at 371).

[redacted], defense's expert witness in forensic psychology, testified that memory issues are very common for individuals with ADHD. (R. at 518–19). [redacted] testified that medication and behavioral modifications are the best way to treat someone with ADHD. (R. at 520–21). Moderate to severe ADHD in particular may require medication, some of which are in effect for as little as a couple hours at a time, and he would recommend that an individual with such ADHD carry a notebook to write information down immediately. (R. at 521). However, [redacted] had not treated 1LT [redacted] and was not familiar with her medical history or medication dosage. (R. at 537–39).

When asked about how ADHD affected her memory, 1LT [redacted] testified that sometimes she may not remember what happened the day before, but when something impactful happens, she will remember it like it was yesterday. (R. at 383–84). She testified that appellant asking her for Adderall was an impactful situation. (R. at 384).

B. Appellant's request for 1LT [redacted] Adderall.

Trial defense counsel highlighted that 1LT [redacted] did not take notes contemporaneously with her conversation with appellant. (R. at 375). Defense also attempted to show that 1LT [redacted] was inconsistent in her statements about what time of day her conversation with appellant occurred and the precise form of appellant's request, though she testified she had multiple conversations with appellant about

his request for Adderall and that he clearly asked her for Adderall to continue drinking. (R. at 377, 394–95).

In response to a question about his mental state, 1LT [redacted] testified that he seemed apathetic towards life, but that he told her he would not seek behavioral health treatment until he was out of the Army. (R. at 379, 382). She did not think appellant believed he was experiencing a mental health crisis at the time he contacted her for her Adderall. (R. at 382). She also testified that appellant went to the brigade behavioral health officer, CPT [redacted], to seek drugs, not to receive mental health treatment. (R. at 382).

The court took judicial notice that Adderall is an amphetamine and a controlled substance. (R. at 369).

Standard of Review

See supra Assignment of Error I.

Law and Argument

See supra Assignment of Error I, "Law and Argument," para one. To prove a violation of Article 82, UCMJ, the government must show: (1) appellant solicited or advised 1LT [redacted] to commit a certain offense under the UCMJ—here, a violation of Article 112a, UCMJ; and (2) appellant did so with the intent that the offense actually be committed. To "solicit" or "advise" includes any oral statement or other conduct "which reasonably may be construed as a serious request . . . to commit

the offense." *Manual for Courts Martial*, *United States* (2019 ed.) [*MCM*], pt. IV, ¶ 6c.(2). The offense is complete when the solicitation is made; it is not necessary the person solicited agree to act upon it. *Id.* at ¶ 6c.(1). Voluntary intoxication is not a defense, though may be introduced for determining whether appellant possessed the specific intent to commit the crime. R.C.M. 916(l)(2); *see also* Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 5-12 (29 Feb. 2020) [Benchbook] (voluntary intoxication can, but does not necessarily, materially affect an accused's specific intent because a person "may be drunk yet still aware at that time of his actions and their probable results"). The factfinder can also consider evidence of appellant's mental condition to determine whether appellant "entertained a state of mind necessary to be proven as an element of the offense." R.C.M. 916(k) discussion.

Here, the government proved beyond a reasonable doubt that appellant solicited 1LT [redacted] to violate Article 112a, UCMJ when he asked her for Adderall on 2 March 2023 and he did so with the specific intent that she violate Article 112a. *See* Article 112a, UCMJ (defining wrongful distribution as (a) distributing a certain amount of a controlled substance and (b) that the distribution was wrongful).

First, defense attempted to suggest 1LT [redacted] memory issues precluded her from remembering the details of appellant's request, but her testimony was clear—

appellant asked her to give him Adderall, a controlled substance, on 2 March 2023, and she believed his request to be a serious one. (R. at. 369, 372, 387). The government also proved appellant had the specific intent 1LT [redacted] "consummate the solicited crime," *United States v. Rogers*, ARMY 20190032, 2019 CCA LEXIS 507, at *14 (Army Ct. Crim. App. 12 Dec. 2019) (mem. op.). There was no ambiguity about what appellant asked her for, testifying that "he wanted an upper, because he did not want to come down from his . . . current bender." (R. at 372). Contrary to appellant's argument, there is no evidence in the record to suggest his request was in jest. (Appellant's Br. 17). Rather, it is apparent appellant was upset he was not going to be promoted and looking for an outlet.

Further, though defense attempted to impeach inconsistencies across 1LT [redacted] testimony to the investigating officer and at trial, her testimony about the elements of the crime were the same—on 2 March 2023, appellant asked her for her Adderall after he was removed from the sergeant's major list so he could continue drinking. The military judge determined 1LT [redacted] was credible and was not persuaded that any memory issues she might have would have prevented her from remembering that appellant asked her for a controlled substance she was not authorized to share.

Finally, appellant argues it is "possible" he was not able to form the specific intent to solicit Adderall due to his intoxication and mental state, but there is no

evidence in the record to show how much alcohol appellant consumed prior to contacting 1LT [redacted]. (Appellant's Br. 17). Appellant intended the probable result of his actions—he wanted Adderall so he could stay up to continue drinking. There is also limited evidence to suggest appellant's mental state prohibited him from forming the specific intent that 1LT [redacted] give him Adderall. *See* (R. at 379, 382).

Thus, the government proved beyond a reasonable doubt that appellant solicited 1LT [redacted] to violate Article 112a, UCMJ when he asked her for Adderall on 2 March 2023 and he did so with the specific intent that she violate Article 112a.

Assignment of Error V

IS A CO-PARTICIPANT IN CONSENSUAL EXTRAMARITAL SEXUAL ACTIVITY A VICTIM FOR PURPOSES OF ARTICLE 6b, UCMJ? DID THE MILITARY JUDGE ERR BY ALLOWING APPELLANT'S CO-ACTOR TO GIVE A VICTIM IMPACT STATEMENT?

Additional Facts

A. Appellant's objection to [redacted] victim impact statement.

During presentencing, [redacted] Special Victim's Counsel (SVC) requested the opportunity to be heard. (R. at 690–91). Trial defense counsel objected, arguing [redacted] was not a victim because although she was named in two charges—maltreatment and extramarital sexual conduct—appellant was acquitted of the maltreatment and only convicted of the extramarital sexual conduct. (R. at 692).

The government argued [redacted] suffered emotional harm because of the extramarital offense which met the definition of "victim." (R. at 692–93).[6]

The SVC argued the harm [redacted] suffered was a result of the Article 134 offense and that neither R.C.M. 1001 nor Article 6(b) contained exclusions about who constitutes a "victim." (R. at 694). The SVC also argued that under the facts of this case, [redacted] was a "victim" entitled to make an unsworn statement. (R. at 696).

The government did not call [redacted] for matters in aggravation in its sentencing case under R.C.M. 1001. (R. at 693). The government presented no sentencing case, other than responding to defense counsel's motion for Article 13 credit. (R. at 679–90).

The military judge ruled [redacted] had standing under Article 6(b) because the Article merely requires direct physical, emotional, or pecuniary harm as a result of the commission of an offense; it is not fact specific to a particular offense. (R. at 696). The military judge limited the content of [redacted] statement to harm as a result of the Article 134 offense only. (R. at 699).

[6] [redacted] (then-SSG [redacted] was originally assigned a SVC because of allegations that were not brought before the present court-martial. (R. at 693).

B. [redacted] victim impact statement.

In her statement, [redacted] shared that appellant made her role as the platoon sergeant permanent and she questioned whether she got the role because of merit, or under false pretenses. (R. at 702). She stated appellant made comments about being in a "trust tree" and that she started to confide in him about challenges in her marriage. (R. at 703). Every time he was responsible for something positive happening to her, he would tell her, "I will be repaid in full." (R. at 703). [redacted] ultimately reported the relationship to her command team and her husband. (R. at 704). [redacted] said:

> I spiraled downward, fearing I was not the good NCO I had been led to believe. I questioned everything about myself. I was what was wrong with the Army. I had allowed myself to be so manipulated that I didn't even see it happening. I needed to get out of the Army to remove the malignant tumor I had allowed myself to become. I resolved that no one would believe what he had done to me. I just needed out. Yes, I use the excuse of a parenthood chapter, but in my mind I no longer adhered to the NCO Creed or the Army Values. I bowed down believing I was no longer fit to wear stripes.

(R. at 704).

Standard of Review

Interpretations of R.C.M. 1001(c)(1) are questions of law this court reviews de novo. *See United States v. Barker*, 77 M.J. 377, 382 (C.A.A.F. 2018) (considering whether a victim's unsworn statement is admissible under R.C.M.

1001A (2016 ed.)[7]). "Abuse of discretion is the proper standard of review for determining whether a military judge erroneously admitted an unsworn statement under R.C.M. 1001A." *United States v. Edwards*, 82 M.J. 239, 242 (C.A.A.F. 2022). A military judge abuses her discretion when she admits evidence as a result of an erroneous view of the law or if she makes clearly erroneous findings of fact. *Barker*, 77 M.J. at 383. "The abuse of discretion standard calls for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Stanley*, ARMY 20190034, 2020 CCA LEXIS 264, at *6 (Army Ct. Crim. App. 7 Aug. 2020) (mem. op.).

Law and Argument

The military judge properly interpreted the meaning of "crime victim" and properly considered the rule's requirement of harm. Thus, she did not abuse her discretion in admitting [redacted] unsworn victim impact statement. Even if this court determines the military judge did abuse her discretion, there was no prejudice.

A. The military judge properly interpreted the meaning of "crime victim."

Under Article 6b, a crime victim has the right to be reasonably heard during

[7] In the 2019 edition of the Manual for Courts-Martial, R.C.M. 1001A has been incorporated into R.C.M. 1001 as R.C.M. 1001(c).

a sentencing hearing; "[t]his statutory right is given effect by R.C.M. 1001(c)." *United States v. Goins*, 85 M.J. 643, 649 (Army Ct. Crim. App. 2025); pet. pending (citing *Barker*, 77 M.J. at 378). The "right to be reasonably heard" means the right to make an unsworn statement, the contents of which may only include in relevant part, victim impact. R.C.M. 1001(c). "Victim impact includes any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which appellant had been found guilty." R.C.M. 1001(c)(2)(B).

A "crime victim" under R.C.M. 1001(c) "is an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty or the individual's lawful representative or designee appointed by the military judge under these rules." Courts engage in a fact-specific analysis to determine who meets the definition of a "crime victim" in a particular case. *See United States v. Da Silva*, ACM 39599, 2020 CCA LEXIS 213, at *49–50 (A.F. Ct. Crim. App. 25 June 2020) (unpub. op.) ("[T]he military judge must make an individual decision about each person who seeks to exercise their right to be reasonably heard."); *see also United States v. Dunlap*, ACM 39567, 2020 CCA LEXIS 148, at *19 (A.F. Ct. Crim. App. 4 May 2020) (unpub. op.) (declining to determine *per se* victims in the context of adultery).

In *United States v. Brooks*, ACM S32394, 2017 CCA LEXIS 190, at *12–13

(A.F. Ct. Crim. App. 22 Mar. 2017) (unpub. op.), the appellant argued a trainee was not a "victim" because no non-consensual act was charged and because she too had a duty not to engage in an unprofessional relationship. *Id.* The court disagreed, finding,

> it is entirely foreseeable that [the trainee] might have suffered direct emotional . . . harm as a result of Appellant's [crime] Appellant was [the trainee's] superior both by virtue of his rank and his position as her instructor. The record indicates he initiated and pursued the relationship [with the trainee]. Regardless of any independent duty on [the trainee's] part to avoid such a relationship, Appellant's actions could foreseeably have caused emotional or pecuniary harm to [the trainee] through damage to her Air Force career or otherwise.

Id. at 13.

Similarly, [redacted] was a crime victim under the facts of this case. Her statement highlighted the emotional harm she endured and the damage to her career as a staff sergeant under appellant—the first sergeant—as a result of their extramarital sexual conduct. She questioned whether she received positions of authority because she deserved it or because of this relationship with appellant. (R. at 702). She cites the extramarital conduct as one of the reasons she ultimately decided to leave the Army and why she believed she was no longer fit to be a non-commissioned officer. (R. at 704). Further, the government did *not* concede at trial that an adultery co-actor does not qualify as a victim under Article 6(b), as appellant argues. (Appellant's Br. 22). The government conceded that two specific

individuals did not qualify as victims. (App. Ex. XVII at 1).

B. The military judge properly considered the "harm" requirement.

Appellant advances several arguments about why the requirement the victim suffer "harm" from his commission of the offense has not been met, none of which have merit.

First, appellant summarily argues the harm is not logically and causally related to the offense appellant was convicted of, and that [redacted] actions were an intervening cause. (Appellant's Br. 22). Not so. In *Goins*, this court wrote, "[a]pplying the plain language of the rule, the test of whether a harm is direct under R.C.M. 1001(c) is whether the harm is logically and causally related to the offense of which the accused is convicted. Additionally, there must be no intervening cause." *Goins*, 85 M.J. at 649. The terminal element of Article 134 provides a number of factors to consider when determining whether the extramarital conduct is of a nature to bring discredit upon the armed forces, including "[t]he impact, if any, of the extramarital conduct on the ability of the . . . co-actor . . . to perform their duties in support of the armed forces." Article 134c.(1)(d), UCMJ. Here, [redacted] felt manipulated, she questioned whether she received better positions, she questioned her self-worth, and she questioned, and ultimately determined, she was no longer fit to be a non-commissioned officer because of the extramarital conduct with appellant. (R. at 702–04). These

emotional and career-related harms are logically and causally related to the Article 134 offense of which appellant was convicted. Further, the argument that [redacted] actions served as an intervening cause is without merit. An accused is not absolved of his criminal responsibility even if the victim themselves also has some responsibility. *Compare Goins*, 85 M.J. at 649 (finding insufficient causal ties in a husband's unsworn victim impact statement that discussed (a) the emotional toll to his wife, not him; and (b) the loss of friendships which was not clearly linked to appellant's crimes).

Second, appellant seemingly argues that a victim impact statement would never be appropriate for any crime with the element of "service discrediting conduct" because the "harm of service discrediting is to the service, not the individual." (Appellant's Br. 20). But these harms are not mutually exclusive; an individual can still suffer some sort of harm from a criminal offense that also harms the service.

The military judge properly acknowledged that the determination of who meets the definition of "crime victim" is a fact-specific inquiry and limited [redacted] statement to a discussion of only the harm she suffered as a result of the Article 134 offense of which appellant was convicted. The military judge's conclusion of law interpreting "victim" was correct, she properly considered the "harm" requirement, and thus, her decision to admit [redacted] unsworn statement

was not erroneous. Appellant has not shown she abused her discretion.

C. Even if the military judge abused her discretion in admitting the statement, there was no prejudice.

"When there is error in the admission of sentencing evidence, the test for prejudice 'is whether the error substantially influenced the adjudged sentence.'" *United States v. Barker*, 77 M.J. 377, 384 (C.A.A.F. 2018) (determining whether improperly admitted victim impact statement resulted in prejudice). To determine whether an error "substantially influenced" the sentence, the court reviews: (1) the strength of the government's case; (2) the strength of the defense's case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question. *Id*. If the facts contained in the error were not already obvious from other evidence presented at trial and would have provided "new ammunition," the error is more likely prejudicial. *Id*. Here, the government's case focused on [redacted] testimony about the extramarital conduct. The defense's case focused on the possibility that there were legitimate reasons for [redacted] promotion to platoon sergeant, differences between her testimony in court and her statement to the investigating officer, and her motivation for reporting the offense. While the content of [redacted] statement was material for sentencing purposes, appellant's case was tried in front of a military judge, and the themes and harms outlined in her statement about extramarital conduct between a superior and subordinate are

"well known to the law and thus presumed to have been known to the military judge." *Id*. The information in [redacted] unsworn statement had also already been presented through her testimony—there was no "new ammunition" —and, it could have been admissible to prove the terminal element of Article 134. *See* Article 134c.(1)(d), UCMJ. Further, appellant was convicted of three separate charges spread across four specifications, and received only a reduction in rank, despite facing the possibility of a dishonorable discharge, total forfeiture, and confinement for fifteen years. Thus, even if [redacted] statement was erroneously admitted, the error did not "substantially influence" the adjudged sentence—appellant's conduct did. There was no prejudice.

Assignment of Error VI

IS A PERMANENTLY FILED GOMOR RECEIVED BY A GOVERNMENT WITNESS WITHIN THE POSSESSION, CUSTODY, OR CONTROL OF MILITARY AUTHORITIES FOR PURPOSES OF R.C.M. 701? IS RELIEF WARRANTED WHERE THE GOVERNMENT FAILED TO DISCLOSE THAT A KEY GOVERNMENT WITNESS HAD RECEIVED A PERMANENTLY FILED GOMOR?

Additional Facts

A. The parties learn about the GOMOR.

On 27 June 2024, after the government and defense had rested, the defense notified the military judge that one of the government witnesses had an

undisclosed General Officer Memorandum of Reprimand (GOMOR). (R. at 757). [redacted] Defense counsel argued this non-disclosure was a *Stellato* violation, asserting defense was denied inquiring into a possible avenue for impeachment and bias. (R. at 759). Defense asked for a mistrial on Charge I and its Specification. (R. at 759–60).

The government disagreed, arguing [redacted] was not in the possession of the government, and that defense also had adequate opportunity to meet with [redacted] before trial. (R. at 761). The government argued they did not know of the GOMOR at any point, acknowledging that if the GOMOR had been permanently filed in [redacted] Army Military Human Resource Record (AMHRR) it would have been discovered. (R. at 761, 765–66). The government provided screenshots from [redacted] action in Military Justice Online (MJO) to support the position that they did not know about the GOMOR before trial. (App. Ex. XXXVIII; R. at 767–68).

The military judge found [redacted] GOMOR was not material evidence, that defense did not make a specific request, and that trial counsel did not have a

duty to search for a GOMOR unrelated to the Specification of Charge I. (R. at 770–72).

B. The timeline of GOMOR filing and discovery requests.

The MJO screenshots show: (1) [redacted]

On 14 December 2023, defense submitted their initial discovery request. (App. Ex. XXXV). The government responded to defense's discovery request and submitted their initial witness list on 12 January 2024. (App. Ex. XXXVI; App. Ex. XXXVII). [redacted] was included on the government's initial witness list. (App. Ex. XXXVII). [redacted] On 27 June 2024, the government provided the MJO

[redacted] At the time of his court-martial, appellant belonged to the 201st Expeditionary Military Intelligence Brigade out of Joint Base Lewis-McChord, Washington. (Charge Sheet). The convening authority and prosecution team belonged to I Corps. (Charge Sheet).

screenshots when defense raised the GOMOR issue. (App. Ex. XXXVIII; R. at 767–68).

C. Defense's discovery request.

Appellate Exhibit XXXV provides, in relevant part:

> In accordance with references (a) through (l), the defense requests the government produce for use, inspection, and/or copying the following in the subject case . . . d. Witnesses . . . (4) Evidence or information known to the government or agents thereof, including closely aligned civilian authorities or entities that go to bias, credibility, or character for truthfulness of any potential government witness. This request includes any information regarding prior civilian or military convictions, and evidence of other character, conduct, or bias bearing on a witness's credibility, including letters of reprimand . . . (5) Any and all other evidence from unit personnel files demonstrating any disciplinary actions against a potential government witness.

(App. Ex. XXXV, para 1.d.(4), (5)).

Standard of Review

A military judge's discovery ruling is reviewed for an abuse of discretion. *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015). Appellate courts "will not reverse a military judge's determination on a mistrial absent clear evidence of an abuse of discretion." *United States v. Shorts*, 76 M.J. 523, 536 (Army Ct. Crim. App. 2017).

Law and Argument

There are two categories of the government's discovery disclosure requirements: (1) information turned over in response to a defense request, such as

R.C.M. 701(a)(2); and (2) information the government must turn over without a request, such as R.C.M. 701(a)(6). *Id*. at 530. While *Brady* "sets the constitutional floor of government discovery . . . the Rules for Courts-Martial provide for much broader . . . disclosure." *Id.* at n.6. Here, [redacted] GOMOR did not need to be disclosed under R.C.M. 701(a)(2) because defense did not make a specific request. The GOMOR also did not need to be disclosed under R.C.M. 701(a)(6) and *Brady* because the trial counsel was not aware it existed until 27 June 2024. Appellant has also satisfied neither of the *Brady* requirements. Finally, even if the GOMOR did need to be disclosed, there was no prejudice.

A. The GOMOR did not need to be disclosed under R.C.M. 701(a)(2).

Under R.C.M. 701(a)(2), upon defense request, the government must disclose materials within military control that (a) are relevant to defense preparation; (b) the government intends to use in their case-in-chief; (c) the government anticipates using in rebuttal; or (d) were obtained from or belong to the accused. Defense's request "must be specific enough that the trial counsel, through the exercise of due diligence, knows where to look." *Shorts*, 76 M.J. at 535. A request is not "specific" where defense generally requests disciplinary evidence, including "[a]ny record of prior conviction, and/or nonjudicial punishment of any prosecution witness." *See United States v. Green*, 37 M.J. 88, 90 (C.A.A.F. 1993) (suggesting request was not specific and using *Brady*

reasonable probability test instead of constitutional harmlessness under *Hart*); *cf. United States v. Roberts*, 59 M.J. 323, 327 (C.A.A.F. 2004) (determining a request that identified a specific file for the disciplinary record of the lead investigator constituted a "specific request"); *see also United States v. Cano*, 61 M.J. 74, 76–78 (C.A.A.F. 2005) (a by-name request for clinical notes from victim's therapist was a "specific request" and the relevance was plain).

In *Ellis*, this court held that the substance of defense's discovery request controls. *United States v. Ellis*, 77 M.J. 671, 680 (Army Ct. Crim. App. 2018). The determination of whether a request is "specific" has three parts: (1) "the request must, on its face or by clear implication, identify the specific file, document or evidence in question;" (2) the request must identify where the evidence is or who possesses it, unless the trial counsel already possesses it; and (3) the request should include a statement about the expected materiality of the evidence for defense's case, unless the "relevance is plain." *Id.* at 681.

Here, defense made a general request for any records of letters of reprimand from any government witnesses. (App. Ex. XXXV, para 1.d.(4), (5)). The request did not facially identify or clearly imply that they were requesting [redacted] GOMOR. Defense's request also did not identify the custodian of [redacted] GOMOR. The trial counsel at I Corps is not "in possession of" a GOMOR stored at [redacted] until that GOMOR is uploaded into the Soldier's

AMHRR—an action that didn't occur until sometime *after* the export to HRC on 15 May 2024, and after [redacted] Further, the 14 December 2023 discovery request did not contain a statement explaining how [redacted] GOMOR would be material evidence for defense's case, and its relevance would not have been plain, as the misconduct was unrelated to [redacted]. Therefore, [redacted] GOMOR did not need to be disclosed under R.C.M. 701(a)(2) because defense did not make a specific request. The military judge did not abuse her discretion in finding that defense did not make a "specific request."

B. The GOMOR did not need to be disclosed under *Brady v. Maryland* and R.C.M. 701(a)(6).

First, the Fifth Amendment Due Process Clause requires the government to disclose evidence that is both material and favorable to defense. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Evidence is favorable if it can impeach the government's case or if it is exculpatory, substantive evidence. *United States v.*

[9] "The only method for submitting records of . . . reprimands to HRC for permanent filing in the iPerms is through the HRC-Export function within the MJO application." Army Regulation 27-10, Legal Services: Military Justice, para. 14-3 (8 Jan. 2025) [AR 27-10]; *see also United States v. Lewis*, ARMY 20210179, 2022 CCA LEXIS 303, at *8–9 (Army Ct. Crim. App. 20 May 2022) (mem. op.) ("The MJO application is not a personnel *file*, but rather, an official Army *application* for creating and processing adverse administrative actions and NJP and for data analysis.").

Behenna, 71 M.J. 228, 238 (C.A.A.F. 2012). Evidence is material if "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Id*. Here, [redacted] GOMOR was not "favorable"—[redacted] does not impact a witness's credibility or character for truthfulness, the GOMOR is not a criminal conviction, nor is it exculpatory evidence. Second, even assuming there is a possibility the GOMOR could have been used to impeach the government's case, it was not "material" —there is no reasonable probability that the military judge would have decided Charge I and its Specification differently had the GOMOR been produced. [redacted] has no bearing on [redacted] testimony that [redacted] told [redacted] about appellant's assault.

The government may be required to look outside their own files for *Brady* evidence, *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999), but trial counsel's duty to discover favorable evidence is not limitless. The scope of this search is generally constrained to (1) "the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses; (2) investigative files in a related case maintained by an entity closely aligned with the prosecution; and (3) other files, as designated in a defense discovery request,

that involved a specified type of information within a specified entity[.]"[10] *Id.* at 441. The government may have a duty to search files of a closely related entity when there is "some reasonable prospect or notice of finding exculpatory evidence." *United States v. Shorts*, 76 M.J. 523, 533 (Army Ct. Crim. App. 2017) (finding no reasonable prospect or notice when there was no evidence in the record the trial counsel had actual knowledge of, or should have known, of an administrative investigation at another unit).

Second, R.C.M. 701(a)(6) provides that trial counsel shall provide and disclose, "the existence of evidence known to the trial counsel which reasonably tends to . . . [a]dversely affect the credibility of any prosecution witness or evidence." The rule "requires trial counsel to turn over what he or she has but does not create an obligation to get information of which the trial counsel is unaware." *Shorts*, 76 M.J. at 531.

Most importantly, in asking this court to find that the government has duty to learn of all prior adverse government action against government witnesses, appellant overstates the required scope of the government's discovery due diligence under *Brady* and R.C.M. 701(a)(6). Nothing in the record indicates the investigation into [redacted] became part of the CID investigation into appellant's assault with an unloaded

[10] The government addresses the third argument *supra*, part A.

firearm against his wife. There is nothing in the record to indicate anything to signal to the trial counsel that this GOMOR existed. *See United States v. Ellis*, 77 M.J. 671, 675 (Army Ct. Crim. App. 2018) ("[t]he record reveals few clues that would have signaled to the trial counsel the existence of the investigation"). There was also no "related case" into [redacted] for this prosecution team—the misconduct was adjudicated at a different installation and the GOMOR had not yet been filed in [redacted] AMHRR. *See id.* at 676 ("[a]s the duty is on the government, we understand the term 'related case' to be viewed from the trial counsel's perspective."). Unless the GOMOR had been uploaded into [redacted] AMHRR, the trial team at I Corps at Joint Base Lewis-McChord would not have known [redacted] Therefore, the GOMOR did not fall within the ambit of evidence the trial counsel was required to turn over to the defense under *Brady*. The military judge did not abuse her discretion.

C. Even if the GOMOR did need to be disclosed, there was no prejudice.

There are three separate standards for assessing prejudice for alleged disclosure violations: (1) when defense makes a specific request for disclosure (*Hart* test); (2) *Brady* violations; and (3) when defense made no specific request and the disclosure violation does not run afoul of *Brady*. *Ellis*, 77 M.J. at 679. Should this court find the government violated a disclosure requirement, neither

Hart nor *Brady* applies; instead, the test is whether there was material prejudice to a substantial right in accordance with Article 59(a), UCMJ.

In *United States v. Hart*, the CAAF held "where prosecutorial misconduct is present or where the Government fails to disclose information pursuant to a specific request, the evidence will be considered material unless failure to disclose can be demonstrated to be harmless beyond a reasonable doubt." *United States v. Hart*, 29 M.J. 407, 410 (C.M.A. 1990). There was neither prosecutorial misconduct nor a specific request for [redacted] GOMOR in this case, and thus the constitutional harmless beyond a reasonable doubt standard from *Hart* does not apply.

A *Brady* violation is always prejudicial, but courts only grant relief when there is a "*reasonable probability* that the verdict would have been different had the government provided the information in question." *Ellis*, 77 M.J. at 679 (emphasis added). Even assuming a *Brady* violation, appellant cannot show the military judge would have decided Charge I and its Specification differently had she reviewed [redacted] GOMOR.

Finally, "[i]f the government violates any other disclosure requirement [courts] will test for material prejudice to a substantial right in accordance with Article 59(a), UCMJ." *Ellis*, 77 M.J. at 679. [redacted] GOMOR would not have been admissible, and thus appellant's substantial rights were not materially

prejudiced. *See United States v. Brassell*, ARMY 20160746, 2018 CCA LEXIS 45, at *7 (Army Ct. Crim. App. 31 Jan. 2018) (summ. disp.) (concluding no material prejudice because the information appellant argued he would have introduced was inadmissible).

Thus, [redacted] GOMOR did not need to be disclosed under R.C.M. 701(a)(2), R.C.M. 701(a)(6), or *Brady*. However, even if the GOMOR did need to be disclosed, there was no prejudice.

Conclusion

WHEREFORE, the government respectfully requests This Honorable Court affirm the findings and sentence.

[redacted]

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CERTIFICATE OF SERVICE

UNITED STATES v. AYUSO, ARMY 20240332

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] and Mr. Daniel Conway, at [redacted] on the 23 day of December 2025.

[redacted]

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PANEL NO. 2