

1 MJ: You have the right to be represented by Captain
2 Rosenow and Captain Princip your detailed military defense
3 counsel. They are provided to you at no expense to you. You
4 also have the right to request a different military lawyer to
5 represent you. If this other military lawyer is reasonably
6 available, he or she would be appointed to represent you free of
7 charge. If your request for this other military lawyer were
8 granted, however, you would not have the right to necessarily
9 keep the services of your detailed counsel because you are
10 entitled to only one military lawyer. You could ask your
11 detailed counsel's superiors to let you keep them or keep one of
12 them on your case, but your request would not have to be
13 granted.

14 ACC: Yes, sir.

15 MJ: In addition, you have the right to be represented by a
16 civilian attorney. A civilian attorney, however, would have to
17 be provided by you at no expense to the government. If you are
18 represented by a civilian attorney, you could keep your military
19 lawyers on the case, to assist your civilian attorney, or you
20 could excuse your military attorneys and only be represented by
21 a civilian attorney.

22 Do you understand these rights?

1 ACC: I do, sir.

2 MJ: Do you have any questions about your rights to
3 counsel?

4 ACC: No, sir.

5 MJ: And by whom do you wish to be represented?

6 ACC: Captain Princip and Captain Rosenow.

7 MJ: And by them alone?

8 ACC: Yes, sir.

9 MJ: I've also been made aware that Captain Rosenow has,
10 since he was assigned to your case, been appointed to a position
11 as a prosecutor, and basically as a senior trial counsel. And
12 that he is currently rated by individuals in the prosecution
13 chain of command. You obviously have the right to an attorney,
14 whose loyalties are undivided toward you and has no interest in
15 whatsoever in the prosecution side of things, have you talked
16 about all that with your counsel?

17 ACC: Yes sir.

18 MJ: Are you fully aware of any potential conflict of
19 interest that Captain Rosenow may have in your case?

20 ACC: Yes sir.

21 MJ: And knowing that, do you still wish he serve as your
22 defense counsel?

1 ACC: Yes sir.

2 MJ: Defense counsel will announce by whom they were
3 detailed and their qualifications.

4 ADC: Sir, I have been detailed to this court-martial by
5 Lieutenant Colonel Thomas Rodriguez, Chief Senior Defense
6 Counsel, Western-Pacific Region. Captain Mark Rosenow has been
7 detailed by Major Wesley McConnell, Senior Defense Counsel,
8 Davis Monthan Region.

9 All detailed members of the defense are qualified and
10 certified under Article 27(b) and sworn under Article 42(a) of
11 the Uniform Code of Military Justice, and we have not acted in
12 any manner which might disqualify us in this court.

13 MJ: I have been properly certified, and sworn and
14 detailed by Colonel Mark Allred, Chief Trial Judge, United
15 States Air Force Trial Judiciary, to this court-martial.

16 Counsel for both sides appear to have the requisite
17 qualifications, and all personnel required to be sworn have been
18 sworn.

19 Trial counsel, would you please announce the general nature
20 of the charges in this case?

21 STC: The general nature of the charges in this case are:
22 One specification of assault consummated by a battery in

1 Violation of 128, UCMJ; one specification of aggravated assault
2 on a child under the age of 16 years, in violation of Article
3 128 UCMJ; one specification of assault consummated by a battery,
4 upon a child under the age of 16 years, in violation of Article
5 128 UCMJ; two specifications of aggravated assault with a loaded
6 firearm, in violation of Article 128 UCMJ; two specifications of
7 aggravated assault with an unloaded firearm, in violation of
8 Article 128, UCMJ.

9 The charge and the additional charge were preferred by
10 Lieutenant Colonel Robert C. Bearden, Commander, 49th Logistics
11 Readiness Squadron, and forwarded with recommendations as to
12 disposition by the same, and Colonel Andrew A. Croft, Commander
13 49th Wing, and investigated by (b) (6), (b) (7)(C) .

14 ATC: Your Honor, are you aware of any matter which might
15 be a ground for challenge against you?

16 MJ: I am not. Does either side desire to question or
17 challenge me?

18 ATC: No, Your Honor.

19 ADC: No, Your Honor.

20 MJ: Okay.

21 **FORUM RIGHTS**

1 MJ: Now, Airman Kelley, you have a right to be tried by a
2 court consisting of at least five officer members. Also, if you
3 request it, you would be tried by a court consisting of at least
4 one-third enlisted members, but none of those enlisted members
5 could come from your unit.

6 You are also advised that no member of court would be
7 junior in rank to you.

8 Do you understand what I've said so far?

9 ACC: Yes, sir.

10 MJ: Now, if you were tried by court members, the members
11 would vote by secret written ballot, and two-thirds of the
12 members must agree before you could be found guilty of any
13 offense. And if you were found guilty of an offense, then two-
14 thirds must also agree in voting on a sentence. And if that
15 sentence included confinement for more than ten years, then
16 three fourths would have to agree.

17 You also have the right to request a trial by military
18 judge alone. And if approved, there will be no members, and the
19 judge alone will determine whether you were guilty or not
20 guilty. And if you are found guilty the judge alone will
21 determine your sentence.

1 Do you understand the difference between trial before
2 members and trial before military judge alone?

3 ACC: Yes, sir.

4 MJ: Do you understand the choices that you have this
5 morning?

6 ACC: I do, sir.

7 MJ: By what type of court do you wish to be tried?

8 ACC: Officer and enlisted members.

9 MJ: That is a court consisting of at least one-third
10 enlisted then?

11 ACC: Yes, sir.

12 MJ: The accused will now be arraigned.

13 **ARRAIGNMENT**

14 ATC: All parties to the trial have been furnished with a
15 copy of the charges. Does the accused want them read?

16 DC: The accused waives the reading of the charges.

17 MJ: The reading may be omitted.

18 **[The Charge Sheet is numbered and attached to this record as**
19 **pages 9.1 through 9.4].**

20

1 ATC: The charges are signed by Lieutenant Colonel Robert
2 C. Bearden, a person subject to the Code as accuser, is properly
3 sworn to before a commissioned officer of the armed forces
4 authorized to administer oaths, and is properly referred to this
5 court for trial by Lieutenant General Robin Rand, Commander, 12th
6 Air Force, the convening authority.

7 MJ: Accused and defense counsel will please rise.

8 [The accused and both defense counsel stood].

9 MJ: Airman First Class Michael C. Kelley, how do you
10 plead? Before receiving your plea, I advise you that any
11 motions to dismiss or to grant other appropriate relief should
12 be made at this time. Your defense counsel will speak for you.

13 ADC: Your Honor, as discussed in the 802 session, we would
14 like to enter into evidence appellate exhibits, motions filed
15 with the court.

16 MJ: Thank you, you may be seated. Before we do that, let
17 me summarize the contents of our session that I held with
18 counsel immediately prior to convening this morning. We
19 discussed mostly logistical issues in terms of how we would
20 proceed. The parties had earlier informed me that a pre-trial
21 agreement had been reached in the case and we discussed whether
22 there would need to be any specific issues I would need to focus

1 on when I went through the providency inquiry as to the accused
2 intended pleas of guilty to specifications 1 and 2 of the
3 charge. We also discussed briefly trial counsel's objections to
4 certain defense counsel's voir dire questions, we discussed that
5 we would cover that again on the record and I would formally
6 rule on those objections and we discussed numbers of witnesses
7 from each side and basically the thoughts about how the day
8 would progress. Counsel any additions or corrections to that
9 summary of our 802?

10 ATC: No sir.

11 ADC: No Your Honor.

12 MJ: I had previously been provided a series of motions by
13 defense counsel, I had ruled on. My understanding is that the
14 pretrial agreement will render the others moot or pursuant to
15 the pretrial agreement rather, that the defense counsel would be
16 withdrawing your remaining motion. The one motion that I did
17 rule on was a motion for immediate release from pre-trial
18 confinement; that was combined with an R.C.M. 305 and Article 13
19 UCMJ motion. Defense counsel why don't we make that Appellate
20 Exhibit I?

21 ADC: Yes Your Honor. I am marking as Appellate Exhibit I,
22 the defense motion for appropriate relief for illegal pretrial

1 confinement punishment. It is an 8-page document. I am
2 providing a copy to trial counsel and am providing a copy to the
3 court reporter.

4 STC: Your Honor let me note for the record, I believe
5 eight pages is the actual motion and there is attachments to it
6 as well.

7 MJ: Defense counsel, are the attachments included in
8 Appellate Exhibit I?

9 ADC: They are Your Honor.

10 MJ: Alright. Trial counsel, I did receive your response
11 as well, why don't we make that Appellate Exhibit II.

12 STC: Yes Your Honor. May I approach?

13 MJ: Yes, and counsel you may approach as you see fit.

14 ADC: Your honor, I believe the defense filed a
15 supplemental motion prior to the government's response, so it
16 might be more practical to enter that as Appellate Exhibit II.

17 STC: We concur with that your honor.

18 MJ: Alright, let's make the supplemental motion Appellate
19 Exhibit II, and the government response, III.

20 ADC: Marking the supplemental motion for appropriate
21 relief, Appellate Exhibit II. It is a three-page document with
22 attachments and am handing the exhibit to the court reporter.

1 STC: Your honor, I've marked as appellate exhibit III, the
2 government's response to the defense motion and supplemental
3 motion. It is a 40-page document including attachments. Showing
4 defense counsel and providing Appellate Exhibit III to the court
5 reporter.

6 MJ: I believe our next motions were a pair of motions to
7 compel.

8 ADC: Yes Your honor, I have here, (b) (6), (b) (7)(C)
9 (b) (6), (b) (7)(C) filed 4 November 2012. I am marking
10 that as Appellate Exhibit IV. It is an 8-page document with
11 attachments and I am showing the document to trial counsel and
12 providing a copy to the court reporter.

13 MJ: Ok, if you could mark the remaining motion to compel
14 as Appellate Exhibit V.

15 ADC: Yes your honor, it is the defense motion to compel
16 production of evidence regarding the (b) (6), (b) (7)(C)
17 (b) (6), (b) (7)(C) Also filed 4 November and marked that Appellate Exhibit
18 V, it is a 9-page document. Showing a copy to the trial counsel
19 and providing Appellate Exhibit V to the court reporter.

20 MJ: Trial counsel, if my memory serves, you did not file a
21 formal response to either of these motions?

22 STC: That is correct Your Honor.

1 MJ: I did transmit a ruling on a portion of Appellate
2 Exhibit I that related to the accused's immediate release from
3 pre-trial confinement. Trial counsel, do you have a copy of that
4 ruling?

5 STC: We don't have a copy with us here, but we can provide
6 one to the court reporter at the next break.

7 MJ: That will be Appellate Exhibit VI then. Yes, if you
8 could provide a copy to the court reporter after the next break
9 that would be fine. Defense counsel, as to the portion of
10 Appellate Exhibit I which I have not yet ruled upon, and
11 Appellate Exhibits IV and V, what are your intentions with
12 regard to going forward?

13 ADC: Your Honor, pursuant to the pretrial agreement that
14 you mention, we will be waiving the remaining issues in
15 Appellate Exhibit I, the motion for pre-trial confinement as
16 well the entirety of the (b) (6), (b) (7)(C)
17 and (b) (6), (b) (7)(C) .

18 MJ: Alright, I will go over that in more detail with
19 Airman Kelley when we discuss that as part of the pretrial
20 agreement. Defense counsel, anything else before we proceed to
21 entry of pleas?

22 ADC: No your Honor.

1 MJ: Accused and defense counsel, please rise.

2 [Accused and counsel stood.]

3 MJ: Let me just call on the accused to plead one more
4 time, just to get formalities in order. Airman First Class
5 Devin P. Kelley, how do you plead? Before receiving your plea,
6 I advise you that any motions to dismiss or to grant other
7 appropriate relief should be made at this time. Your defense
8 counsel will speak for you.

9 ADC: Your Honor, as we discussed, Airman Kelley is
10 withdrawing the remaining issues left in Appellate Exhibit I,
11 the motion for pretrial confinement; and the defense motions to
12 compel, Appellate Exhibits IV and V, pursuant to a pretrial
13 agreement.

14 PLEAS

15 **The accused, A1C Kelley, pleads as follows in accordance with**
16 **the pretrial agreement in this case:**

17 **To Specifications 1 and 2 of the Charge: Guilty**

18 **To Specifications 3, 4, and 5 of the Charge: Not Guilty**

19 **To Specifications 1 and 2 of the additional Charge: Not Guilty**

20 MJ: And the accused plea as to the Charge?

21 ADC: **The accused plea to the Charge, Guilty.**

22 **The accused plea as to the additional Charge, Not Guilty.**

1 MJ: Airman Kelley, your counsel has entered a plea of
2 guilty for you to Specifications 1 and 2 of the Charge. Your
3 plea of guilty will not be accepted unless you understand its
4 meaning and effect. I am going to discuss your plea of guilty
5 with you and you may wish to consult with your defense counsel
6 prior to answering any of my questions. If at any time you do
7 have a question, please feel free to ask. A plea of guilty is
8 equivalent to a conviction and is the strongest form of proof
9 known to the law. On your plea alone and without receiving any
10 evidence, this court can find you guilty of the offenses to
11 which you have plead guilty. Your plea of guilty will not be
12 accepted unless you realize that by your plea you admit every
13 act or omission and element of the offenses to which you have
14 plead guilty and you are pleading guilty because you are
15 actually are, in fact, guilty. If you do not believe you are
16 guilty, then you should not for any reason plead guilty. Do you
17 understand what I've said so far?

18 ACC: Yes sir.

19 MJ: By your plea of guilty you give up three important
20 rights, but you give up these rights only with respect to the
21 offenses to which you have plead guilty. First the right
22 against self-incrimination, that is the right to say nothing at

1 all. Second, the right to trial of the facts by this court that
2 is your right to have this court-martial decide whether or not
3 you are guilty based upon evidence the prosecution would present
4 and on any evidence you may introduce. Third, the right to be
5 confronted by and cross-examine any witness called against you.
6 Do you have any questions about these rights?

7 ACC: No sir.

8 MJ: Do you understand that by pleading guilty, you no
9 longer have these rights?

10 ACC: Yes sir.

11 MJ: If you continue with your guilty plea, you will be
12 placed under oath and I will question you to determine whether
13 you are in fact guilty. Anything you tell me may be used
14 against you in the sentencing portion of the trial. Do you
15 understand that?

16 ACC: Yes sir.

17 MJ: If you tell me anything that is untrue, your
18 statements may be used against you later for charges of perjury
19 or making a false statement. Do you understand that?

20 ACC: Yes sir.

21 MJ: Trial counsel please place the accused under oath.

22 [Senior trial counsel placed the accused under oath.]

1 MJ: Counsel, I was made aware that there is a stipulation
2 of fact in the case?

3 STC: That is correct, your honor.

4 MJ: Trial counsel, go ahead and mark that as Prosecution
5 Exhibit 1 then.

6 STC: Yes your honor. Showing defense what's been marked as
7 Prosecution Exhibit 1 for identification. I'm providing the
8 original of Prosecution Exhibit 1 to the court reporter and a
9 working copy to the military judge.

10 [Senior trial counsel handed the military judge Prosecution
11 Exhibit 1.]

12 And your honor, pursuant to the acceptance of the accused
13 guilty plea, the government offers Prosecution Exhibit 1 for
14 identification as Prosecution Exhibit 1.

15 MJ: Trial counsel, I note that Prosecution Exhibit 1 for
16 identification incorporates by reference Prosecution Exhibits 2,
17 3, and 4. Why don't you go ahead and offer those at this time
18 then?

19 STC: Yes your honor. Showing the defense what's been
20 marked as Prosecution Exhibits 2, 3, and 4 for identification.
21 I am providing the originals of Prosecution Exhibits 2 and 3 to

1 the court reporter and providing a working copy to the military
2 judge, plus the original of Prosecution Exhibit 4.

3 [Senior trial counsel handed Prosecution Exhibits 2 and 3 to the
4 military judge, as well as the original Prosecution Exhibit 4.]

5 I will just offer Prosecution Exhibits 2, 3, and 4 for
6 identification as Prosecution Exhibits 2, 3, and 4.

7 MJ: Airman Kelley, I am looking at Prosecution Exhibit 1
8 for identification which is a three page Stipulation of Fact,
9 along with Prosecution Exhibits 2, 3, and 4; which are all
10 referenced and incorporated as part of that Stipulation of Fact.
11 Did you sign this stipulation?

12 ACC: Yes sir.

13 MJ: Did you read it thoroughly before you signed it?

14 ACC: Yes sir.

15 MJ: And did you know that Prosecution Exhibits 2, 3, and
16 4; the photographs and the video depicted therein were what
17 would be attached to the stipulation at the time you signed?

18 ACC: Yes sir.

19 MJ: Do both counsel agree to the stipulation and your
20 signatures as they appear on the document?

21 STC: Yes Your Honor.

22 SDC: Yes sir.

1 MJ: Airman Kelley, a stipulation of fact is an agreement
2 among the trial counsel and your defense counsel and you that
3 the contents of the stipulation are true and if entered into
4 evidence are un-contradicted facts in this case. No one can be
5 forced to enter into a stipulation so you should enter into it
6 only if you truly want to do so. Do you understand this?

7 ACC: Yes sir.

8 MJ: Are you voluntarily entering into this stipulation
9 because you believe it is in your best interest to do so?

10 ACC: Yes sir.

11 MJ: If I admit this stipulation into evidence, it will be
12 used in two ways. First, I will use it to determine if you are
13 in fact guilty of the offenses to which you have plead guilty.
14 Second, the trial counsel may read it to the court members and
15 they will have it with them when they decide upon your sentence.
16 Do you understand and agree to these uses of the stipulation?

17 ACC: Yes sir.

18 MJ: Do both counsel both agree to these uses?

19 STC: Yes sir.

20 SDC: Yes sir.

21 MJ: Airman Kelley, a stipulation of fact ordinarily cannot
22 be contradicted. If it should be contradicted after I've

1 accepted your guilty plea, I will reopen this inquiry. You
2 should therefore let me know if there is anything whatsoever you
3 disagree with or feel is untrue, do you understand?

4 ACC: Yes sir.

5 MJ: Have you in-fact read every word of this stipulation
6 and had the opportunity to discuss it with your counsel?

7 ACC: Yes sir.

8 MJ: Is everything in the stipulation true?

9 ACC: Yes sir.

10 MJ: Is there anything in the stipulation that you don't
11 want to admit is true?

12 ACC: No sir.

13 MJ: Do you agree then, under oath, that the matters
14 contained in this stipulation are true and correct to the best
15 of your knowledge and belief?

16 ACC: Yes sir.

17 MJ: Defense counsel, any objections to Prosecution
18 Exhibits 1 through 4 for identification?

19 ADC: No sir.

20 MJ: Prosecution Exhibits 1 through 4 for identification
21 are admitted into evidence, subject to my acceptance of the
22 accused's guilty plea.

CARE INQUIRY

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MJ: Airman Kelley, I'm going to explain the elements of the offenses to which you have plead guilty. By, "elements," I mean those facts which the prosecution would have to prove beyond a reasonable doubt before you could be found guilty if you had pled not guilty.

When I state each element, I need you to ask yourself two things: First, is the element true; and second, do you wish to admit that it's true?

After I list the elements for you, be prepared to talk to me about the facts and circumstances surrounding the offenses, okay?

ACC: Yes, sir.

MJ: Do you have a copy of the charge sheet in front of you?

ACC: Yes, sir.

MJ: So, let's take a look now at Specification 1 of the Charge, violation of Article 128 of the Uniform Code of Military Justice. The elements of that offense, assault consummated by a battery, are:

One, that within the continental United States on divers occasions, between on or about 24 June 2011 and on or about 27

1 April 2012, you did bodily harm to Tessa A. Kelley. Two, that
2 you did so by striking her body with your hands, choking her on
3 the neck with your hands, pulling her hair, and kicking on her
4 body with your foot. And three that the bodily harm was done
5 with unlawful force or violence. An assault is an attempt or
6 offer with unlawful force or violence to do bodily harm to
7 another; an assault in which bodily harm is inflicted is called
8 a "battery." A "battery" is an unlawful and intentional
9 application of force or violence to another. The act must be
10 done without legal justification or excuse and without the
11 lawful consent of the victim.

12 "Bodily harm means any physical injury to or offensive
13 touching of another person however slight."

14 "Divers occasions" means on two or more occasions.

15 Do you understand these elements and definitions as I've
16 explained them to you?

17 ACC: Yes sir.

18 MJ: Do you have any questions about any of them?

19 ACC: No sir.

20 MJ: Do you understand that your plea of guilty admits that
21 these elements accurately describe what you did?

22 ACC: Yes sir.

1 MJ: And you believe and admit that the elements and
2 definitions taken together correctly describe what you did?

3 ACC: Yes sir.

4 MJ: Okay, I just want you to tell me in your own words why
5 you feel are guilty of the offense listed in Specification 1 of
6 the Charge? Just tell me what happened.

7 ACC: Between 24 June 2011 and 27 April 2012, I hit my ex-
8 wife Tessa several times. I'm really sorry about what I did.
9 We lived together in base housing after my stepson was taken
10 away. We would get into arguments too many times and I got
11 physical with my wife. I'm sorry to her and I wish I had the
12 chance to apologize. One time around 24 June 2011, during an
13 argument, I grabbed her by the throat with my hands and choked
14 her for about 15 to 20 seconds. Immediately I knew what I did
15 was wrong and I felt really bad about it. I should have never
16 put my hands on her for any reason. Security forces came to the
17 house and she didn't file a report. At least once I pulled her
18 hair hard enough that I pulled some of it out. Um, I know our
19 arguments were very heated, but I can't believe I did something
20 like that. Every day I ask myself how I could get that angry
21 and hurt her, I also punched her in the arms a few times which
22 caused bruises and I also kicked her. I had no legal

1 justification or excuse to put my hands on her. I was just angry
2 and she wasn't even attacking me. I could and should have
3 stopped myself from doing these things and it was wrong of me to
4 do.

5 MJ: First of all, does everything you just described to
6 me, did it happen during the charged time frame between on or
7 about 24 June 2011 and 27 April of 2012?

8 ACC: Yes sir.

9 MJ: Do you know the significance of those two dates?

10 ACC: Sir, on 24 June it was a little bit after (b) had
11 been taken into custody by CYP and 27 April was just about the
12 time I went into Peak for a second time.

13 MJ: So, is there any doubt in your mind that everything
14 you just told me happened between 24 June of 2011 and 27 April
15 2012?

16 ACC: Yes sir.

17 MJ: Perhaps I asked the question wrong. Are you confident
18 that's when everything you told me happened?

19 ACC: Yes sir.

20 MJ: You said basically these things happened in the
21 context of just arguments between you and your wife at the time?

22 ACC: Yes sir.

1 MJ: So this all happened in the context of arguments
2 between the two of you?

3 ACC: Yes sir.

4 MJ: Was there ever a time during any of these arguments
5 where you felt you were personally in danger, that your wife
6 posed a threat to you?

7 ACC: No sir.

8 MJ: So, obviously you have the right to defend yourself if
9 you are being attacked. Did she ever act as the aggressor in
10 any of these arguments?

11 ACC: No sir.

12 MJ: The government has alleged a few different ways that
13 they claim you committed the offense. The first is by striking
14 her body with your hands. So you had mentioned punching her on
15 the arms and leaving bruises, is that why you believe you are
16 guilty by striking her body with your hands?

17 ACC: Yes sir.

18 MJ: You also mentioned that you hit her several times,
19 just describe to me what would happen on those occasions.

20 ACC: Um, could you repeat the question?

1 MJ: Yes, you said that you hit your wife several times and
2 got into arguments and got physical with her. Just describe to
3 me what would happen on those occasions.

4 ACC: Um, we would just be arguing somewhere in the house
5 and I would get really angry and confront her.

6 MJ: so when you say you would hit your wife, was it in the
7 forms of punching then? Or were there other ways you would hit
8 your wife?

9 ACC: Sir, I punched her, choked her and pulled her hair.

10 MJ: When you say punched, are you talking with a closed
11 fist then?

12 ACC: Yes sir.

13 MJ: When you would punch her, where on her body would you
14 punch her?

15 ACC: On the arm.

16 MJ: And you said the punches actually caused bruises, how
17 did it become that you had caused bruises on her arm?

18 ACC: Sir, I would see it the next day.

19 MJ: Describe the bruises, if you could, in the terms of
20 size, color, or whatever you remember about them.

21 ACC: Sometimes they were small; sometimes they were large
22 and really light blue.

1 MJ: Do you have any recollection how long it would take
2 for them to heal or go away?

3 ACC: I don't remember sir.

4 MJ: And when you say on at least one occasion you pulled
5 her hair hard enough to pull some of it out, just describe to me
6 a bit more about what happened there.

7 ACC: Sir, it was nighttime after work, we had just been in
8 the house arguing and I wanted to control her and I just grabbed
9 her hair.

10 MJ: Was she trying to walk away at the time or describe to
11 me what you mean by wanting to control her?

12 ACC: Sir, it was late at night and she wanted to leave the
13 house and I didn't feel that it was safe for her, so I lost the
14 control of being able to control her, in my own mind, so I put
15 my hands on her.

16 MJ: So it was basically to keep her from leaving the house
17 then?

18 ACC: Yes sir.

19 MJ: You also said there was one occasion where you kicked
20 her, describe what happened there.

21 ACC: Sir, we were just arguing and I think it was in the
22 bedroom of my house and I had just lifted my leg and kicked her.

1 MJ: Where was she in relation to you when this happened?

2 ACC: In the same room sir.

3 MJ: Was she on the ground then or where on her body did
4 you kick her?

5 ACC: Sir, I kicked her on the shin.

6 MJ: Was she standing then?

7 ACC: Yes sir.

8 MJ: Did you see whether it had any impact or effect on her
9 when you did kick her, what happened to her afterward?

10 ACC: She started crying.

11 MJ: I described a battery as being an unlawful and
12 intentional application of force or violence to another, so all
13 of these incidents that you've described to me, were they
14 intentional? Did you mean to do what you were doing?

15 ACC: Yes sir.

16 MJ: Was there anything that interfered with your ability
17 to know what you were doing at the time?

18 ACC: No sir. I made those decisions.

19 MJ: Even though you may have later come to regret what you
20 did, at the time you were doing it, did you understand what you
21 were doing was wrong?

22 ACC: Yes sir.

1 MJ: Did your wife do anything to indicate that she
2 consented to you touching her in this fashion?

3 ACC: No sir.

4 MJ: Do counsel for either side believe any further inquiry
5 is required?

6 STC: No Your Honor.

7 ADC: No Your Honor.

8 MJ: Airman Kelley, let's move on to Specification 2 of the
9 Charge, where you are charged with an offense of aggravated
10 assault of a child in violation of Article 128, UCMJ. By
11 pleading guilty to this offense, you are admitting the following
12 elements are true and accurately describe what you did. One,
13 that within the continental United States, on divers occasions,
14 between on or about 27 April 2011 and on or about 16 June 2011,
15 you did bodily harm to (b) (6), (b) (7)(C). Two, that you did so
16 with a certain force by striking him on the head and body with
17 your hands. Three that the bodily harm was done with unlawful
18 force or violence. Four, that the force was used in a manner
19 likely to produce death or grievous bodily harm. Five, at the
20 time of the assaults, (b) (6), (b) (7)(C) was a child under the age
21 of sixteen years. An act of force or violence is unlawful if
22 done without legal justification or excuse and without the

1 lawful consent of the victim. Grievous bodily harm means
2 serious bodily injury. Grievous bodily harm does not mean minor
3 injuries such as a black eye or bloody nose, but does mean
4 fractured or dislocated bones, deep cuts, torn members of the
5 body and serious damage to internal organs or other serious
6 bodily injuries. Force may be any means or object not normally
7 considered a weapon. A force is likely to produce death or
8 grievous bodily harm when the natural or probable result of its
9 particular use would be death or grievous bodily harm. It is
10 not necessary that death or bodily harm actually result. Again,
11 an assault is an attempt or offer with unlawful force or
12 violence to do bodily harm to another. An assault in which
13 bodily harm is inflicted is called a battery. A battery is an
14 unlawful and intentional application of force or violence to
15 another, the term bodily harm means any physical injury to or
16 offensive touching of another person however slight. A victim
17 may not lawfully consent to an assault in which a force is used
18 in a manner likely to produce death or grievous bodily harm, in
19 other words, consent is not a defense to the offense of
20 aggravated sexual assault, or aggravated assault rather if the
21 force used is likely to produce death or grievous bodily harm.

1 Do you understand these elements and definitions as I've read
2 them to you?

3 ACC: Yes sir.

4 MJ: Do you have any questions about any of them?

5 ACC: No sir.

6 MJ: Do you understand that your plea of guilty admits that
7 these elements accurately describe what you did?

8 ACC: Yes sir.

9 MJ: And do you believe and admit that the elements and
10 definitions taken together correctly describe what you did?

11 ACC: Yes sir.

12 MJ: At this time again, if you could just describe in your
13 own words why you are guilty of the offense listed in
14 Specification 2 of the Charge?

15 ACC: Sir, this is the worst thing I've done in my life and
16 I will never allow myself to hurt someone like this again. In
17 2011, end of April, I married Tessa and we moved to base housing
18 on Holloman Air Force Base, with her son (b) (6), (b) (7)(C). A few
19 times I got very frustrated with (b) (6) when he wouldn't stop
20 getting into things. When Tessa wasn't around to take care of
21 him, I slapped him on the face and on the body, more than once
22 when (b) (6), (b) (7) was crawling around and tried to grab things he wasn't

1 supposed to. I pushed him on his butt and he would fall over.
2 One time I pushed him and one time he fell, he landed on his
3 shoulder which made him flip over. Um, another time while we
4 were trying to get (b) (6) to the hospital because he was vomiting
5 with a fever, I was trying to get him dressed. He kept crying
6 and I just got so frustrated that I slapped him across the face
7 and he fell over on his side. He got three bruise marks on the
8 left side of his face and bruising on his ear. I'm so sorry for
9 hurting baby (b) (6). I pray that one day he can forgive me for
10 what I've done.

11 [The accused became emotional]

12 MJ: Counsel, why don't we take about a ten minute recess?
13 We are in recess.

14 [The Article 39(a) session recessed at 0941 hours, 6 November
15 2012.]

16 **END OF PAGE**

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1 **ARTICLE 39(A) SESSION**

2 [The Article 39(a) session was called to order at 0954 hours, 6
3 November 2012. All parties were present. The members were
4 absent.]

5 MJ: Airman Kelley, when we broke, you just told me why you
6 felt you are guilty of Specification 2 of the Charge. I am
7 going to discuss that with you a little bit further. Again, if
8 you need to discuss anything with your counsel, please feel free
9 to do so, if you need a break, just let me know. First of all,
10 did everything you described to me happen between on or about 27
11 April of 2011 and on or about 16 June 2011?

12 ACC: Yes sir.

13 MJ: I believe you said April of 2011, that was when you
14 married your wife and the two of you moved onto Holloman Air
15 Force Base?

16 ACC: Yes sir, April 12th.

17 MJ: And then 16 June of 2011, was that when (b) was
18 removed from the home? (6)

19 ACC: Yes sir.

20 MJ: Now I didn't discuss this specifically with regards to
21 Specification 1, so I will discuss it with regard to both of
22 them. The charge on both of them says that all of the acts

1 happened within the continental United States, so, where did all
2 of this happen that you've discussed with regards to both
3 specifications?

4 ACC: On Holloman Air Force Base sir.

5 MJ: Did everything you described for me happen in your on-
6 base residence on Holloman Air Force Base?

7 ACC: Yes sir.

8 MJ: You basically described to me several instances of
9 slapping or pushing of (b) (6). Again, I described a battery as an
10 unlawful and intentional application of force to another. Did
11 you intend to strike him in that manner in each of these
12 occasions?

13 ACC: Yes sir.

14 MJ: Did anything prevent you from being able to understand
15 what you were doing at the time?

16 ACC: No sir.

17 MJ: Do you believe you had any legal justification or
18 authorization for striking him in that manner?

19 ACC: No sir.

20 MJ: And how old was he at the time when these things
21 occurred?

22 ACC: (b) (6), (b) (7) (C).

1 MJ: So at that age, is it fair to say that no valid
2 disciplinary purpose could be gleamed from striking him?

3 ACC: No sir.

4 MJ: So you didn't have any-parental discipline is a
5 defense to certain assaults, did you have valid purpose of
6 correcting misbehavior on his part?

7 ACC: Sir, it is never right to hit a child.

8 MJ: I also defined the term force likely to produce death
9 or grievous bodily harm, why do you believe that on at least two
10 of these occasions the force that you used was likely to produce
11 death or grievous bodily harm?

12 ACC: Sir, it did cause bruising on him which could have
13 harmed him badly.

14 MJ: I am going to re-read the definition of grievous
15 bodily harm to you. Grievous bodily harm means serious bodily
16 injury. Grievous bodily harm does not mean minor injuries such
17 as a black eye or bloody nose, but does mean fractured or
18 dislocated bones, deep cuts, torn members of the body, and
19 serious damage to internal organs or other serious bodily
20 injuries. So to constitute serious bodily harm, it requires at
21 least the likelihood, it doesn't require grievous bodily harm
22 actually resulted, but it requires that what you did had the

1 potential of causing these serious consequences that I talked
2 about like fractured or dislocated bones, deep cuts, torn
3 members of the body or serious damage to internal organs or
4 other serious bodily injuries. So, if you could tell me again
5 why you believe your conduct at least had the likelihood of
6 producing serious bodily injuries.

7 ACC: Sir, he was a baby, not even (b) (6), (b) (7)
(C), and when I
8 hit him, I hit him with enough force to cause him to fall over
9 on his side. I caused a subdural hematoma and a fractured
10 clavicle, that is why I believe.

11 MJ: And by subdural hematoma, I understand that to be
12 basically a bruise within the skull, is that your understanding?

13 ACC: Yes sir.

14 MJ: And, is your understanding that it was caused by you
15 pushing him with enough force to cause him to bump his head on
16 something?

17 ACC: Yes sir.

18 MJ: What is your understanding of what the results of a
19 subdural hematoma could be?

20 ACC: Sir, possibly brain damage.

21 MJ: Do you have any knowledge of whether a subdural
22 hematoma could be life threatening?

1 ACC: Yes sir.

2 MJ: Do you believe it could be life threatening then?

3 ACC: Yes sir.

4 MJ: And what about the fractured clavicle, do you believe
5 that your actions against (b) caused him to have a fractured
(6),
6 clavicle as well?

7 ACC: Yes sir, I believe whenever he landed on his shoulder
8 and flipped over, that is what caused it.

9 MJ: And do you believe this was a separate incident than
10 the incident that caused the subdural hematoma?

11 ACC: Yes sir.

12 MJ: How did you come to know that (b) had a fractured
(6),
13 clavicle?

14 ACC: We were in the hospital and they had said that he had
15 a healed over, but previous fracture.

16 MJ: Do you believe that it's possible that someone else or
17 something totally innocent could have caused that fractured
18 clavicle?

19 ACC: I don't believe anything totally innocent could cause
20 something like that.

21 MJ: At the end of the day, do you believe that it's your
22 actions that caused that then?

1 ACC: Yes sir.

2 MJ: Does counsel for either side believe any further
3 inquiry is required as to this specification?

4 STC: No Your Honor.

5 ADC: No sir.

6 **MAXIMUM PUNISHMENT**

7 MJ: Trial counsel, what do you calculate to be the
8 maximum punishment authorized in this case based solely on the
9 accused's guilty plea?

10 ATC: Reduction to the grade of E-1, forfeiture of all pay
11 and allowances, confinement for 5 years and 6 months, and a
12 dishonorable discharge.

13 MJ: Defense counsel, do you agree?

14 DC: Yes, Your Honor.

15 MJ: Airman Kelley, the maximum punishment authorized in
16 this case based solely on your guilty plea is reduction to the
17 grade of E-1, forfeiture of all pay and allowances, confinement
18 for five years six months, and a dishonorable discharge. A fine
19 may also be adjudged.

20 On your plea of guilty alone, this Court could sentence you
21 to the maximum punishment which I just stated. Do you
22 understand that?

1 ACC: Yes, sir.

2 MJ: Do you have any questions as to the sentence that
3 could be imposed as a result of your guilty plea?

4 ACC: No, sir.

5 MJ: Trial counsel, as I mentioned, I am aware there is a
6 pretrial agreement in this case. If you would go ahead and mark
7 the offer and quantum portions of the agreement as our next
8 appellate exhibits in order, which would be VII and VIII.

9 STC: Yes, Your Honor. Marking the offer for pretrial
10 agreement as Appellate Exhibit VII and marking Appendix A of the
11 pretrial agreement as Appellate Exhibit VIII. Sir, at this time
12 would you like to be provided copies of both Appellate Exhibit
13 seven and eight?

14 MJ: Yes.

15 STC: Showing defense counsel Appellate seven and eight.
16 [Senior trial counsel handed working copies of both exhibits to
17 the military judge.]

18 STC: Handing the original of Appellate VII and VIII to the
19 court reporter.

20 MJ: Airman Kelley, I am looking at Appellate Exhibit
21 seven, which is the offer portion and Appellate Exhibit eight,

1 which is the quantum portion of your pre-trial agreement, did
2 you sign both of these documents?

3 ACC: Yes sir.

4 MJ: Did you read them thoroughly before you signed them?

5 ACC: Yes sir.

6 MJ: Do you understand the contents of your pretrial
7 agreement?

8 ACC: Yes sir.

9 MJ: Did anyone force you in any way into entering into
10 this agreement?

11 ACC: No sir.

12 MJ: Does this agreement contain all of the understandings
13 and agreements that you have in this case?

14 ACC: Yes sir.

15 MJ: Stated differently, has anyone made any promises to
16 you that are not written into this agreement in attempt to get
17 you to plead guilty?

18 ACC: No sir.

19 MJ: Counsel, are Appellate Exhibits VII and VIII the full
20 and complete agreement in the case and are you satisfied there
21 are no other agreements?

22 ATC: Yes Your honor.

1 ADC: Yes Your Honor.

2 MJ: Basically a pre-trial agreement means that you agree
3 to plead guilty and in return the convening authority agrees to
4 take some favorable action in the case, usually in the form of
5 limiting the sentence he will approve, do you understand that?

6 ACC: Yes sir.

7 MJ: The law requires that I discuss the conditions of your
8 pretrial agreement with you, so let's begin with the offer
9 portion of the agreement. As we look at paragraph one, it
10 contains some introductory information about you and your
11 counsel, indicates that you've discussed the charges with them,
12 and that you basically agree what's listed in those five
13 lettered subparagraphs that follow in exchange for the convening
14 authority approving a sentence limitation consistent with
15 appendix A, and the convening authority withdrawing and
16 dismissing Specifications 3, 4, and 5 of the Charge and
17 Specifications 1 and 2 of the additional Charge, along with the
18 additional Charge. First of all, do you understand that as a
19 result of you complying with the provisions of the pretrial
20 agreement, that the convening authority would then be bound to
21 withdraw and dismiss the remaining charges and specifications as
22 to which you've now plead guilty?

1 ACC: Yes sir.

2 MJ: Even though you had to have plead guilty to the first
3 two Specifications to get the benefit of the convening authority
4 withdrawing all of that; has anything you've told me up to this
5 point been untrue?

6 ACC: No sir.

7 MJ: So everything you've told me has been true and your
8 personal desire to plead guilty in this case?

9 ACC: Yes sir.

10 MJ: I am going to go through those lettered subparagraphs.
11 The first thing you agreed to do was to plead guilty to
12 Specifications 1 and 2 of Charge. Obviously you've already
13 complied with that term of the pretrial agreement, but at the
14 time you signed your pre-trial agreement, did you understand
15 that was what you'd have to do to get the benefit of the
16 pretrial agreement?

17 ACC: Yes sir.

18 MJ: Even though you needed to do it to get the benefit of
19 the pretrial agreement, are you pleading guilty because you are
20 in fact guilty?

21 ACC: Yes sir.

1 MJ: Next thing you had to do was enter into a reasonable
2 stipulation of fact, again you've complied with that by signing
3 Prosecution Exhibit 1, but even though you needed to sign the
4 stipulation to get the benefit of the pretrial agreement, is
5 everything in that stipulation true and accurate to the best of
6 your knowledge and belief?

7 ACC: Yes sir.

8 MJ: The next thing is that you request the travel of only
9 one sentencing witness at government's expense. Do you
10 understand that were it not for this provision, you could have
11 traveled as many sentencing witnesses as either the government
12 was willing to provide or I was willing to compel be provided,
13 who could explain things about you or things about the offenses,
14 that might put them in greater context or might in any way help
15 your case? Did you understand you had the right to have
16 witnesses brought to testify on your behalf?

17 ACC: Yes sir.

18 MJ: Knowing that, did you give up your rights to have more
19 than one witness testify at the government's expense, freely and
20 voluntarily and of your own free will?

21 ACC: Yes sir.

1 MJ: Defense counsel, were there any witnesses who would
2 have testified in person were it not for this provision of the
3 pretrial agreement?

4 SDC: No Your Honor.

5 MJ: Next you indicated that you would request no expert
6 consultants at government expense. Again, were it not for this
7 provision, you would have the right to have appointed to the
8 defense team to assist in understanding the charges or the
9 evidence, any consultants which either the convening authority
10 was willing to pay for or which I determined were reasonably
11 necessary for you or your defense counsel to adequately prepare
12 your defense. Did you discuss that matter with your counsel
13 before agreeing to this provision of your pretrial agreement?
14 And are you willingly giving up your right to have an expert
15 consultant provided to you at government expense?

16 ACC: Yes sir.

17 MJ: Do you understand those expert consultants could
18 uncover exculpatory evidence? In other words, evidence which
19 might point to your innocence or might point to a lesser degree
20 of guilt than what you are admitting to?

21 ACC: Yes.

1 MJ: Alright. Then are you waiving your right to have
2 expert consultants appointed to assist you in your defense
3 because you believe it is in your best interest to do so?

4 ACC: Yes.

5 MJ: Finally, in paragraph 1e, you agree to waive or give
6 up all motions which, under the law, may be waived. In that
7 regard, I advise you that certain motions are waived or given up
8 if your defense counsel does not make the motion prior to you
9 entering your plea. Some motions however, such as a motion to
10 dismiss for lack of jurisdiction or failure to state an offense
11 for example, can never be given up. Do you understand that this
12 term of your pretrial agreement means that you give up the right
13 to make any motion which by law is given up when you plead
14 guilty?

15 ACC: Yes sir.

16 MJ: In particular, do you understand that this term of
17 your pretrial agreement precludes this court or any appellate
18 court from having the opportunity to determine if you are
19 entitled to any relief based upon these motions?

20 ACC: Yes.

1 MJ: When you elected to give up these motions, did your
2 defense counsel explain the term of your pretrial agreement and
3 its consequences to you?

4 ACC: Yes.

5 MJ: Did anyone force you to enter this term of your
6 pretrial agreement?

7 ACC: No sir.

8 MJ: Defense counsel, which side originated the waiver of
9 the motions provision?

10 SDC: Your Honor, we drafted the pretrial agreement and put
11 it in there, but we put it in there with the understanding that
12 it would be a requirement, having dealt with this legal office
13 and the numbered Air Force before.

14 MJ: Alright. Airman Kelley, even though your counsel
15 included this term in your pretrial agreement, under the
16 understanding that it was basically an indispensable requirement
17 for getting the pretrial agreement, did you freely and
18 voluntarily agree to this term of your pretrial agreement in
19 order to receive what you believe to be a beneficial pretrial
20 agreement?

21 ACC: Yes sir.

1 MJ: Defense counsel, I am aware of three motions which
2 were pending; two motions to compel along with a motion for
3 pretrial confinement credit, both for noncompliance with R.C.M.
4 305 and for illegal pretrial punishment. Were there any
5 additional motions that are covered by this term of the
6 agreement?

7 SDC: The other ones we had would have been speculative
8 based Your Honor's ruling on four and five depending on if you
9 released any evidence or possibly admitted any of that evidence
10 during the course of the trial under four and five. And then
11 also, the possibility with the motion to compel discovery, or
12 late in the game we discovered we may require through a
13 discovery request, a forensic pediatric radiologist and I
14 believe the government was working through that, but depending
15 what the convening authority's position on that was we may have
16 come to you and asked for relief on that matter, but those are
17 the only three, besides the one previously discussed.

18 MJ: So, sounds like the final one you mentioned was
19 covered by both paragraphs 1c and 1e.

20 SDC: That's correct sir.

21 MJ: Airman Kelley, I am going to discuss the various
22 motions that are waived just to make sure you understand exactly

1 what you are giving up. The first of those would be a motion
2 that I've already been provided, which asked for certain relief
3 based upon your treatment while in pretrial confinement and some
4 of the procedural requisites that may or may not have been
5 complied with regard to your pretrial confinement review. Had I
6 decided in your favor on that, you could have received
7 additional credit. You will receive credit nonetheless for
8 every day on a one-for-one basis that you've been in pretrial
9 confinement, but based on those motions to grant additional
10 credit, either if I found you were subjected to unlawful
11 punishment or if I found that certain procedural prerequisites
12 were not met with regard to the review of your pretrial
13 confinement. So in addition to the period you could get two for
14 one, three for one, or any number that I determine to be
15 appropriate amount of credit for the time you served in pretrial
16 confinement. Did you understand that you were giving up your
17 right to pursue that additional credit when you agreed to this
18 term of your pretrial agreement?

19 ACC: Yes sir.

20 MJ: Did you do so voluntarily and of your own free will?

21 ACC: Yes sir.

1 MJ: The next two motions you would be giving up would be
2 motions to compel the production of evidence. Both certain
3 (b) (6), (b) (7)(C)
4 (b) (6), (b) (7)(C) . You understand
5 that if I found if those matters were reasonably necessary for
6 your counsel in preparation of your case or might lead to
7 discovery of relevant evidence or might actually contain
8 relevant evidence, that I could sign an order compelling those
9 records be provided for me to review and ultimately to defense
10 counsel to use on your behalf. Did you understand all of that?

11 ACC: Yes sir.

12 MJ: Did you understand that those records could provide
13 information that might either negate your guilt or point to some
14 lesser degree of guilt on your part?

15 ACC: Yes sir.

16 MJ: Knowing what you know about what you did and what
17 might be in those records, do you believe that giving up the
18 right to pursue those motions and receiving the benefit of your
19 pretrial agreement is the best decision for you in this case?

20 ACC: Yes sir.

21 MJ: Finally we discussed this to some degree, but I want
22 to discuss it a little bit more specifically. Do you understand

1 a pediatric radiologist could have been helpful to your defense
2 team in interpreting various x-ray results, for instances, the
3 things you told me about a broken clavicle or any other evidence
4 that may have been out there involving injuries to bone or that
5 nature? Do you understand that the pediatric radiologist could
6 have been helpful to your defense team in that regard?

7 ACC: Yes sir.

8 MJ: Knowing what you know about your case, and what you
9 know about what you did, do you believe that giving up the right
10 to have a pediatric radiologist appointed to assist you, was in
11 your best interest under all the facts and circumstances?

12 ACC: Yes sir.

13 MJ: I am going to move on to paragraph 2 of your pretrial
14 agreement. It states that you understand that once this
15 agreement is signed it becomes a binding offer and you also
16 state that you understand you give up those rights we talked
17 about earlier; that is the right against self-incrimination,
18 your right to be confronted by the witnesses against you, and
19 your right to a trial of the facts by court martial. Did you
20 understand at the time you signed your pretrial agreement that
21 you would be giving up all those rights?

22 ACC: Yes sir.

1 MJ: Did you also understand that you would have a binding
2 agreement with the convening authority; binding on both you and
3 the convening authority once both of you had signed the
4 agreement?

5 ACC: Yes sir.

6 MJ: Moving on to paragraph 3, there are several assertions
7 in there. Basically the first thing is that you are satisfied
8 with your defense counsel. Are you satisfied with your defense
9 counsel and with their advice to you with regard to the pretrial
10 agreement?

11 ACC: Yes sir.

12 MJ: Second is that this offer to plead guilty originated
13 with you and your counsel and no one has attempted to force or
14 coerce you into making this offer to plead guilty. So, has
15 anyone pressured you in any way to make this offer to plead
16 guilty?

17 ACC: No sir.

18 MJ: Third is that your counsel has basically discussed
19 your case fully with you, that you understand the charges
20 against you and you understand the evidence against you and the
21 likelihood of prevailing if you were to plead not guilty in this
22 case. Do you think you've made a fully informed decision as to

1 what's in your best interest with regard to the evidence,
2 witnesses, and everything that would be presented in this case,
3 were you to plead not guilty?

4 ACC: Yes sir.

5 MJ: We've already discussed 1d, that once this is signed
6 it is a binding agreement, but paragraph 3e rather basically
7 goes on to say setting forth certain circumstances under which
8 this binding agreement could be vacated or you could walk away
9 from the agreement. First would be refusal by the court to
10 accept your guilty plea, in other words, you agree when you
11 signed this that you would have to tell me enough to convince me
12 that you are in fact guilty of the offenses, did you understand
13 that?

14 ACC: Yes sir.

15 MJ: Notwithstanding that, has everything you've told me
16 been true and accurate?

17 ACC: Yes sir.

18 MJ: Second would be withdrawal from either party to the
19 agreement before trial. Did you understand even up to the time
20 this court martial started; you had the right to walk away from
21 this agreement if you wanted to?

22 ACC: Yes sir.

1 MJ: And then third would be your failure to agree with
2 counsel on a reasonable stipulation of fact. You've already
3 complied with that but even though you needed to sign the
4 stipulation to get the benefit of your pretrial agreement, was
5 everything in the stipulation true and correct?

6 ACC: Yes sir.

7 MJ: Alright paragraph 4 is another important provision
8 that basically discusses the impact of future misconduct on your
9 part with regard to your pretrial agreement. Basically it
10 states if between the time the sentence is announced in this
11 case and that sentence is approved by the convening authority
12 which could be a matter of weeks, months, there is no way of
13 accurately predicting that. Basically if you commit further
14 misconduct, there could be a subsequent hearing and part of the
15 result of that hearing is that you could lose the benefit of
16 your pretrial agreement. Do you understand that?

17 ACC: Yes sir.

18 MJ: Paragraph 5 basically says if the agreement is
19 cancelled for any reason, it won't be held against you.
20 In other words, no one can come into court and say you offered
21 to plead guilty in order to prove your guilt if you decide to
22 walk away from the agreement. Did you understand that even if

1 you walked away from the agreement, it couldn't be used against
2 you, that you offered to enter into this agreement?

3 ACC: Yes sir.

4 MJ: Finally paragraph 6 says that this agreement is the
5 full and complete agreement in this case. Has anyone promised
6 you anything that is not written into this agreement or appendix
7 A to the agreement?

8 ACC: No sir.

9 MJ: Alright. Moving on to appendix A or Appellate Exhibit
10 VIII then. Basically there are three provisions there. One is
11 that the convening order will dismiss those remaining
12 specifications that we talked about. Is it your understanding
13 that once you comply with the provisions of your pretrial
14 agreement, the convening authority is bound to dismiss with
15 prejudice those remaining specifications?

16 ACC: Yes sir.

17 MJ: The third is a confinement limitation to a specified
18 term which is set forth in paragraph 1b. Do you also understand
19 that any confinement adjudged in this case, if it is in excess
20 of that limitation set forth in paragraph 1b would have to be
21 reduced to a term no more than that amount set forth in
22 paragraph 1b?

1 ACC: Yes sir.

2 MJ: And that there are no other limitations, so you
3 understand that the convening authority can approve any other
4 element of sentence in this case, aside from that one
5 confinement limitation?

6 ACC: Yes sir.

7 MJ: And with regard to appendix A, you get the benefit of
8 whichever is less, that is each element of the sentence of the
9 court, or that contained in the pretrial agreement. So if the
10 sentence adjudged by the court is greater than the one provided
11 in the pretrial agreement the convening authority must reduce
12 the sentence to one no more severe than the one in your pretrial
13 agreement. On the other hand, if the sentence is less than the
14 one in your pretrial agreement, the convening authority cannot
15 increase the sentence adjudged. Do you understand?

16 ACC: Yes sir.

17 MJ: Airman Kelley, have you had enough time to discuss
18 this agreement fully with your defense counsel?

19 ACC: Yes, sir.

20 MJ: Are you satisfied with your defense counsel's advice
21 concerning this pretrial agreement?

22 ACC: Yes, sir.

1 MJ: Did you enter into this agreement of your own free
2 will?

3 ACC: Yes, sir.

4 MJ: Has anyone tried to force you into this pretrial
5 agreement?

6 ACC: No, sir.

7 MJ: Do you have any questions at all about your pretrial
8 agreement?

9 ACC: No sir.

10 MJ: Are you pleading guilty because you not only hope to
11 receive a lighter sentence but because you are convinced that
12 you are in fact guilty?

13 ACC: Yes sir.

14 MJ: Do counsel for both sides agree with the court's
15 interpretation of the pretrial agreement?

16 ATC: Yes sir.

17 ADC: Yes sir.

18 MJ: Airman Kelley, I find that you fully understand the
19 pretrial agreement with the convening authority, that the
20 agreement is in substantial compliance with the requirements of
21 applicable regulations and case law and that it is not contrary

1 to public policy or my own notions of fairness. Therefore the
2 agreement is accepted.

3 MJ: Defense counsel, have you had enough time to discuss
4 the case with Airman Kelley?

5 SDC: We have, Your Honor.

6 MJ: And Airman Kelley, have you had enough time and
7 opportunity to discuss the case with your counsel?

8 ACC: Yes sir.

9 MJ: Have you in fact fully consulted with your defense
10 counsel and received the full benefit of their advice?

11 ACC: Yes.

12 MJ: Are you satisfied that your defense counsel's advice
13 in your best interest?

14 ACC: Yes sir.

15 MJ: Are you satisfied with your defense counsel?

16 ACC: Yes sir.

17 MJ: Are you pleading guilty voluntarily and of your own
18 free will?

19 ACC: Yes sir.

20 MJ: Has anyone made any threat or tried in any way to
21 force you to plead guilty?

22 ACC: No, sir.

1 MJ: Do you fully understand the meaning and effect of a
2 plea of guilty?

3 ACC: Yes, sir.

4 MJ: Okay. Do you understand that even though you believe
5 you are guilty, you have the legal and moral right to plead not
6 guilty, and to place upon the government the burden of proving
7 your guilt beyond a reasonable doubt?

8 ACC: Yes, sir.

9 MJ: Finally, are you a United States citizen?

10 ACC: Yes.

11 MJ: All right. Take a moment now and consult again with
12 your defense counsel, and tell me whether or not you still want
13 to plead guilty.

14 [The accused briefly consulted with both defense counsel.]

15 MJ: Airman Kelley, do you still want to plead guilty?

16 ACC: Yes, sir.

17 MJ: Okay. I find that your plea of guilty is made
18 voluntarily and with full knowledge of its meaning and effect.
19 I further find that you have knowingly, intelligently and
20 consciously waived your rights against self-incrimination, to a
21 trial of the facts by a court-martial, and to be confronted by
22 the witnesses against you. Accordingly, your plea of guilty is

1 provident and is accepted. However, I advise you that you may
2 request to withdraw your guilty plea at any time before the
3 sentence is announced, and if you have good reason for your
4 request, I will grant it. Trial counsel, do you have any
5 motions to make at this time?

6 STC: Yes, Your Honor. The government at this time moves
7 to dismiss with prejudice Specifications 3, 4, and 5 of the
8 Charge and Specifications 1 and 2 of the additional Charge, and
9 the additional Charge.

10 MJ: That motion is granted. Specifications 3, 4, and 5 of
11 the Charge and Specifications 1 and 2 of the additional Charge,
12 and the additional Charge are dismissed with prejudice.

13 MJ: Accused, defense counsel, please rise.

14 [The accused and both defense counsel stood].

15

16

17

FINDINGS

18 **MJ: Airman First Class Devin P. Kelley, in accordance**
19 **with your plea of guilty, this Court finds you:**

20

21

Of Specifications 1 and 2 of the Charge: Guilty

22

Of the Charge: Guilty

1 MJ: You may be seated.

2 [The accused and his defense counsel retook their seats].

3 **SENTENCING PHASE**

4 MJ: Airman Kelley, we're now going to enter the sentencing
5 phase of the trial where you have the right to present matters
6 in extenuation and mitigation, that is matters about the
7 offenses or yourself which you want the court to consider in
8 deciding your sentence. In addition to the testimony of
9 witnesses, and the offering of documentary evidence, you may
10 yourself testify under oath as to these matters or you may
11 remain silent, in which case, the court will not draw any
12 adverse inference from your silence. On the other hand, if you
13 desire, you may make an unsworn statement. Because the
14 statement is unsworn, you cannot be cross-examined on it;
15 however, the government may offer evidence to rebut any
16 statement of fact contained in an unsworn statement. An unsworn
17 statement may be made orally, in writing, or both. It may be
18 made by you, by counsel on your behalf, or by both. Do you
19 understand these rights?

20 ACC: Yes sir.

21 MJ: Counsel is the personal data on the front page of the
22 charge sheet correct?

1 ATC: Yes Your Honor.

2 MJ: Defense counsel, I think we already addressed the
3 issue of illegal pretrial punishment under Article 13, which is
4 waived. And counsel based on the findings, I believe as we've
5 already discussed the maximum punishment in the case is
6 reduction to the grade of E-1, forfeiture of all pay and
7 allowances, confinement for five years and six months, and a
8 dishonorable discharge. Does either counsel request an
9 instruction on a fine?

10 ATC: No Your Honor.

11 ADC: No Your Honor.

12 MJ: Trial counsel, do you have a calculation as to the
13 appropriate amount of credit for the accused's pretrial
14 confinement?

15 ATC: Yes Your Honor, if sentenced today, it would be one
16 hundred and fifty-one days of pretrial confinement credit.

17 MJ: Defense counsel, do you agree?

18 ADC: Yes sir.

19 MJ: As does the court. Trial counsel, before we mark the
20 sentencing worksheet, why don't we mark a few other preliminary
21 matters. We discussed briefly voir dire questions, so let's
22 mark trial counsel voir dire as next appellate exhibit in order,

1 Appellate Exhibit IX. Defense counsel's will be the one after
2 that, so Appellate Exhibit X.

3 STC: The government marks their voir dire as appellate
4 exhibit IX; the original has been provided to the court
5 reporter.

6 ADC: Sir, the defense proposed voir dire has been provided
7 to the court reporter as well and will be marked as appellate
8 exhibit X.

9 MJ: Okay. Defense counsel, any objection to trial counsel
10 proposed voir dire questions?

11 ADC: No Your Honor.

12 MJ: Trial counsel, I note that you did have some
13 objections to defense voir dire questions, if you would state
14 those for the record.

15 STC: Yes Your Honor, government objections were to defense
16 questions 8, 9, and 10, the basis for that is that 8 wasn't a
17 question and 9 and 10 were asked on their member data sheets.
18 Government also objected to question 26 of the defense voir
19 dire, based upon the question already being in trial counsel's
20 voir dire and then also we think it will be misleading the
21 members discussing the federal conviction and pretrial
22 confinement as punishment.

1 MJ: I overrule the objections as to the questions 8
2 through 10, even though they are somewhat cumulative, I don't
3 believe there is any danger in misleading the members. As to
4 question 26, I will sustain the objection as to the words "and
5 the five months he has served in pretrial confinement." I do
6 find that does run an undue risk of confusing the issues since
7 time served is not really a punishment the members could adjudge
8 and they could adjudge up to the amount of the accused's
9 currently served pretrial confinement which would result in no
10 additional punishment, but would be a punishment therefore. As
11 to those words, I will sustain; as to the remainder, I will
12 overrule the trial counsel's objection.

13 Trial counsel, do we have a flyer for the members,
14 reflecting the accused's pleas?

15 STC: We do Your Honor.

16 MJ: Let's mark that as our next appellate exhibit.

17 STC: The court reporter has been provided the original and
18 all parties have been provided working copies in the folders
19 before them; that would be Appellate Exhibit XI.

20 MJ: Alright, trial counsel, do you have a sentencing
21 worksheet then?

1 STC: Your honor, just noticing the sentencing worksheet
2 that I have, one small correction needs to be made, and we would
3 also ask for a comfort break at this time so we can make that
4 change during that.

5 MJ: That would be fine, just so you know my thinking,
6 since we are approaching the lunch hour, we have an
7 extraordinarily large panel and my inclination would be to begin
8 with voir dire after the lunch hour. I wanted to knock out any
9 last minute administrative things we can do and then we will
10 take a lunch break. So, we will withhold the sentence
11 worksheet, but trial counsel do you have any documentary
12 evidence you would like to mark and offer at this time?

13 STC: Yes Your Honor. The government has what's been
14 marked as Prosecution Exhibit 5 for identification, the personal
15 data sheet of the accused and all parties have been provided a
16 copy and the folders before them. The original is with the
17 court reporter. It's a one page document; the government offers
18 Prosecution Exhibit 5 for identification as Prosecution Exhibit
19 5.

20 MJ: Defense counsel, any objection?

1 SDC: Your honor, I just note, on the one I have, in the
2 middle there overseas service, colon, and then there is nothing
3 after that; I think it probably needs a "none".

4 STC: That is correct Your Honor on the copies we have and
5 it can certainly be added.

6 SDC: With that correction, no objection to Prosecution
7 Exhibit 5 for identification.

8 MJ: Okay, we will withhold admitting Prosecution Exhibit 5
9 for identification; I will allow trial counsel to re-offer after
10 the change has been made. Anything else trial counsel?

11 STC: Yes Your Honor, I'm showing defense counsel what's
12 been marked as Prosecution Exhibit 6 through 15 for
13 identification.

14 [Defense counsel reviewing exhibits.]

15 SDC: Your Honor, with your permission, can I have a
16 moment to look through them all?

17 MJ: Yes.

18 STC: Sir, I am providing originals of Prosecution Exhibits
19 6 through 15 to the court reporter and working copies to the
20 military judge. Would you prefer to take these up one at a
21 time?

1 MJ: If you could just describe them each for the record,
2 and then offer them and we will take them by exception.

3 STC: Prosecution Exhibit 6 for identification are the
4 enlisted performance reports of the accused, it is a ten-page
5 document. Prosecution Exhibit 7 for identification is a 22 July
6 2011 letter of counseling received by the accused, a five-page
7 document. Prosecution Exhibit 8 for identification is a 26 July
8 2011, letter of counseling received by the accused, a four-page
9 document. Prosecution Exhibit 9 for identification is a 6
10 September 2011 letter of counseling received by the accused it
11 is a three-page document. Prosecution Exhibit 10 for
12 identification is a 12 September 2011 letter of reprimand
13 received by the accused; it is a three-page document.
14 Prosecution Exhibit 11 for identification is a 29 September 2011
15 letter of counseling received by the accused; it is a six page
16 document. Prosecution exhibit 12 for identification is a 16
17 February 2012 letter of reprimand; it is a five page document.
18 Prosecution exhibit 13 for identification is a 19 March 2012,
19 letter of reprimand, it is a four-page document. Prosecution
20 Exhibit 14 for identification is also a 19 March 2012 letter of
21 reprimand received by the accused for a different incident; it
22 is a four-page document. Prosecution Exhibit 15 for

1 identification is a 20 March 2012 letter of reprimand received
2 by the accused; it is a three-page document. At this time, the
3 government offers Prosecution Exhibits 6 through 15 for
4 identification as Prosecution Exhibits 6 through 15.

5 MJ: Defense counsel, any objections?

6 SDC: Yes sir, we will clear up the ones we have no
7 objection to if that is okay. Defense has no objection to
8 Prosecution Exhibits for identification 6, 7, 9, 10, 12 and 15.
9 So, the only objections we have are to prosecutions exhibits 8,
10 11, 13 and 14.

11 MJ: Okay, prosecution exhibits 6, 7, and 9 for
12 identification are admitted. And 12?

13 SDC: As well as 10, sir. No objection to 10 or 12 or 15.

14 MJ: Okay, prosecution exhibits 10, 12, and 15 for
15 identification are admitted. Okay, let's start then with
16 Prosecution Exhibit 8 for identification.

17 SDC: Sir, all the objections are going to be based on the
18 rule for court martial 1001(b)(2), which I believe the basis for
19 which the government is proposing to enter this evidence, and
20 particularly the requirement that they be maintained in
21 accordance with departmental regulations and we are specifically
22 referencing chapter 3 of the UIF/LOR instruction, 36-2907. Most

1 particularly paragraph 3.5, I'm sure Your Honor is quite
2 familiar with the requirements of that instruction and we would
3 object for this reason on Prosecution Exhibit 8 for
4 identification; if Your Honor turns to page 3 and 4 of this
5 exhibit sir, you see an acknowledgement from this letter sir, on
6 26 July 2011. This is actually the issuing date of the letter
7 as well, that it purports to say that Airman Kelley receipted
8 for it or acknowledged it and if you flip to the third page sir,
9 he actually says that he has receipt of final decision on this,
10 on that same day. We know that can't be right sir, or something
11 happened that has us question whether or not the requirements of
12 AFI 36-2907 and thus 1001(b)(2) were met because if you turn to
13 page four you see that his response was actually dated 27 July
14 2011. So the bottom line is that he acknowledged for the final
15 decision which appears to be in this case that it be standing as
16 written and filed in either the PIF or UIF; it's not clear from
17 the face of the document. But that decision sir happened on the
18 28th and his acknowledgement of that decision happened on the 26th
19 and his actual response happened on the 27th. So, for those
20 concerns, the defense does object to the court considering it
21 because we believe it was not kept in accordance with the

1 departmental requirements and regulations, especially 36-2907,
2 where he does have the three duty days to respond.

3 MJ: Is it the same issue with 11, 13, and 14?

4 SDC: There are variations on a theme sir, there are some
5 bigger problems. For example, if you look at Prosecution 11 for
6 identification, I say bigger, but that may be equally big. On
7 page three of prosecution exhibit 11, here we don't have any
8 filing decision. Nothing is circled at all to say whether this
9 document was supposed to be filed or supposed to be withdrawn.
10 So, I understand it was recovered based on the certification on
11 this exhibit from some place, but we don't have a filing
12 decision on this document. And then we also have a decision
13 comes on the 5th of October it seems, whatever that decision is,
14 and if you turn to page four, you see receipt of the final
15 decision on 17 October and Your Honor knows, there would have
16 been more than three duty days in between them. So, I guess the
17 primary concern for Prosecution Exhibit 11 would be no decision
18 from the author of the letter, and then also the rule for three
19 duty days advising Airman Kelley of what the decision was, was
20 not made.

21 MJ: Alright.

1 other, I'm sure your client would remember what he signed with
2 which letter of reprimand.

3 SDC: I understand—I mean. I am making the objection sir,
4 for what it's worth. It's clear on the face of the document that
5 it doesn't seem to make a lot of sense and I can put together
6 with some inferences what is happening. My client has certainly
7 waived a number of rights coming into this hearing, not all of
8 them, and he certainly has the right to remain silent if that he
9 feels that it's in his interest, even during the sentencing
10 hearing and the admission of evidence. I am not—I don't think we
11 are in a position where we have to ask him for that answer, I
12 just put that out there as an observation. But what I'm saying
13 seems to make sense when you put the two documents together is
14 not evidence; it's just my reflection on it.

15 MJ: I'm just thinking in terms of judicial economy and
16 exercises in futility when we know how they are going to end.

17 SDC: The defense would accept a proffer from the United
18 States and would not need to call him- - that witness, if they
19 could proffer to me what the witness would say if that was his
20 recollection as well sir. We are certainly not going to require
21 a Master Sergeant to come and speak to that. If Your Honor
22 finds that would resolve the issue that we've objected to. Of

1 course we have the same concern on Prosecution Exhibits 14, that
2 there is no filing decision.

3 MJ: Okay, thank you. Trial counsel?

4 STC: Thank you, Your Honor. At least with regards to
5 Prosecution Exhibits 13 and 14, that last page of Prosecution
6 Exhibit 13, I think the defense counsel stated it accurately.
7 We would proffer that it would be the testimony should a witness
8 come in, those issues would be fixed with these exhibits at the
9 next recess. With regard to the rest of the defense counsel's
10 objections and these exhibits, the defense counsel is saying the
11 wrong standard for looking at these. AFI 51-201 talks about
12 what's required, the documents that are admitted from personnel
13 records under R.C.M. 1001(b) and what's required is that counsel
14 be provided a copy of the document, made the document available
15 to opposing counsel prior to trial, and that there is some
16 evidence on the document and attached to it that the accused
17 received a copy of the correspondence and had the opportunity to
18 respond to the allegation and the document is not over five
19 years old from the date the charges were referred to trial.
20 Your Honor what I'm referring to there is paragraph 8.13 and
21 it's subparagraphs of AFI 51-201. That is the proper standard
22 and because we have Air Force Court of Criminal Appeals case law

1 that talks about that. We have both U.S. v. Cain, which was
2 decided in 2010. We also have United States versus Hawks, which
3 was decided in 2011, discussing the requirements for documents
4 admitted from a personnel record, and specifically this says,
5 under R.C.M. 1001(b)(2), Air Force Instruction 51-201,
6 Administration of Military Justice, sets the following
7 guidelines for admission of documents from the accused's
8 personnel information file. And that is what the Air Force
9 Court of Criminal Appeals discusses, is those requirements that
10 I just stated from AFI 51-201. From all the exhibits that the
11 defense objected to, it's clear on the face of the document that
12 this was provided to the accused, he signed for it, and it's
13 clear he had the opportunity to respond, and he did respond. His
14 responses are in fact attached to those documents and for those
15 reasons Your Honor, we would ask that the defense counsel's
16 objections be overruled and subject the corrections to
17 Prosecution Exhibits 13 and 14, that the exhibits defense
18 objected to be admitted.

19 MJ: Defense counsel, anything further?

20 SDC: Sir, it's departmental regulations, I understand case
21 law cited by the United States. I was just drawing your
22 attention again, the most operative, besides the fact that it is

1 a letter of counseling and letter of reprimand; an encouragement
2 towards change of behavior which is the over-arching design of
3 these things; it's also the second thing behind that, the most
4 important thing behind that would be whether or not the response
5 or the justification for my client had an effect on the offer.
6 You would hope that responding to a letter of reprimand or
7 counseling, might change that, and at least two of these
8 documents we have an open question of whether or not that person
9 made the decision to file this and thus allowed to be admitted
10 through the rule that the government's presenting.

11 MJ: Defense counsel, just so I understand, you are asking
12 me to ignore Air Force Court of Military Review precedent
13 because I want to send a message to the unit?

14 SDC: Not at all sir. I am noting the fact that the case
15 law does not say we cannot look at the actual rule. The rule
16 clearly states, not AFI 51-201, not those that are propagated
17 under 51 series or 35 series that it's kept in accordance with
18 the instructions. I would just note and highlight that it's not
19 something along the lines of where the dates are a little bit
20 off on the three duty days; we have the filing decision that is
21 an open question, besides the fact that these appear to have

1 been recovered from a (inaudible). No further objection beyond
2 what's been stated sir; I appreciate the court's time.

3 MJ: Yes. The defense counsel's objections are overruled
4 with regards to Prosecution Exhibits 8 and 11, which are
5 admitted at this time. I do find that AFI 51-201 is the proper
6 standard for determining compliance with Rules for Court Martial
7 1001. It is apparent on the face of these documents that they
8 were provided to the accused and he had an opportunity to
9 respond thereto, as trial counsel pointed out, and in fact did
10 respond. As tempting as it might be to adopt a punitive rule to
11 enforce better compliance with the various regulations, my
12 reading of the case law does not give me the authority to do so.
13 As to 13 and 14, I will allow trial counsel to rearrange the
14 pages and re-offer those documents.

15 Counsel, we still have 5, 13, and 14 outstanding and not
16 admitted at this point. Defense counsel, do you have any
17 documentary evidence you'd like to mark and offer at this time?

18 ADC: Not at this time sir.

19 MJ: Counsel anything else to take up in this Article 39(a)
20 session?

21 STC: No Your Honor.

22 SDC: No sir.

1 MJ: We will be in recess and we will resume with the
2 members present then at 1230 hours.

3 [The Article 39(a) session recessed at 1059 hours, 6 November
4 2012.]

5 **END OF PAGE**

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1 counsel and their client walked out; so he saw them walking out
2 after that recess. There was need for both sides to compose
3 themselves. Given that, at least with the appearance of that,
4 we think a challenge for cause is appropriate at this point and
5 we certainly would go ahead and make that challenge for cause of
6 (b) (6), (b) (7)(C) so he doesn't have to sit through voir
7 dire.

8 MJ: Alright. Counsel, is it my understanding that you
9 feel fairly confident then that (b) (6), (b) (7)(C) has overheard
10 conversations between counsel as to the substance of the
11 allegations in the case?

12 STC: Yes Your Honor, we'd be very surprised if he hadn't.

13 MJ: Defense counsel?

14 SDC: Same from the defense, we have nothing to add. We
15 also do not oppose the challenge for cause.

16 MJ: I will go ahead and grant the unopposed challenge for
17 cause against (b) (6), (b) (7)(C). It does appear at the very
18 least the appearance of impropriety, given my experience as to
19 the nature matters discussed between counsel in this kind of
20 pretrial conferences. So I will out of an abundance of caution
21 and under the implied bias standard go ahead and grant that
22 challenge. Government once we recess, you can have the case

1 paralegal notify (b) (6), (b) (7)(C) that he has been excused. We
2 will have reconfigured the court room to accommodate for his
3 absence and I believe we are also awaiting the arrival of a
4 member or two. Why don't we use this time to re-attack on
5 Prosecution Exhibits 5, 13, and 14?

6 STC: Yes Your Honor. Handing defense counsel copies of
7 Prosecution Exhibits 5, 13, and 14 for identification and the
8 originals to the court reporter and handing working copies to
9 the military judge.

10 [STC handed copies to military judge.]

11 Sir, the government offers these updated versions as
12 Prosecution Exhibits 5, 13, and 14 into evidence as Prosecution
13 Exhibits 5, 13, and 14.

14 MJ: Trial counsel, just to avoid any confusion, have the
15 previous versions been retrieved from any location that would be
16 in danger of being published to the members?

17 STC: I will retrieve the first originals from the court
18 reporter and all other copies have been taken care of.

19 MJ: Defense counsel, any objections to Prosecution
20 Exhibits 5, 13, or 14?

21 SDC: Sir, there are no further objections to either of
22 these. I would just state for the record that Prosecution

1 Exhibit 13 will be a three page document and 14 would be a five
2 page document.

3 MJ: Alright. Prosecution Exhibit 5 for identification is
4 admitted as Prosecution Exhibit 5. Defense counsel, I just want
5 to clarify for 13 and 14, which of your previous objections you
6 are still standing on? Do you still contest that page five of
7 Prosecution Exhibit 14 is not appropriately appended to
8 Prosecution Exhibit?

9 SDC: No sir, based on the proffer of the United States, we
10 do not have that objection any longer.

11 MJ: Likewise with 13, you concur with the removal of what
12 was the final page of that?

13 SDC: That is right sir. The remaining one would be on
14 Prosecution Exhibit 14 as to be there being a lack from Captain
15 (b) (6), the author of the letter, any filing decision on the
16 (b) (7)(C) second endorsement on page two.

17 MJ: Alright, I understand your remaining objections.
18 Those are overruled. Prosecution Exhibits 13 and 14 for
19 identification are admitted as Prosecution Exhibit 13 and 14. I
20 do find that they do comply with the requirements of AFI 51-201.
21 Counsel, is there anything to take up before we proceed with
22 court members?

1 STC: Sir, I have a sentencing worksheet. I am marking
2 that as the next Appellate Exhibit in line.

3 MJ: Which would be XII.

4 STC: Appellate Exhibit XII. It has previously been
5 provided to the defense and I am providing the original to the
6 court reporter and a working copy to the military judge.

7 [STC handed copy of exhibit to military judge.]

8 MJ: Defense counsel, any objection to Appellate Exhibit
9 XII?

10 STC: Sir, just a note here, I know we've just gone through
11 this again. Normally it goes from least to most severe and I'm
12 looking under the monetary penalty section sir. And those would
13 be transposed from that normal practice; that would be my only
14 concern we have. I don't think it will go to the members any
15 time soon, so if we could substitute that. If the government
16 opposes that, then we can take it up now. But that would be the
17 only change we recommend.

18 MJ: Trial counsel?

19 STC: Sir, all we know is that this is the standard way a
20 sentencing worksheets are in all Air Force courts martial
21 including under monetary penalties to list it this way. This is

1 the standard way we have seen the sentencing worksheet used and
2 we believe the sentencing worksheet is proper.

3 MJ: I don't believe the members will be materially misled
4 by that, but I understand defense counsel's concern, but
5 Appellate Exhibit XII may be provided to the members at the
6 appropriate time. Counsel, anything else?

7 STC: Nothing from the government.

8 SDC: No sir.

9 MJ: We will be in recess to await the arrival of members.

10 [The Article 39(a) session recessed at 1238 hours, 6 November
11 2012.]

12 **END OF PAGE**

13

1 MAJOR RICHARD G. WAGEMAN;

2 (b) (6), (b) (7)(C)

3 MAJOR KENNETH S. DEGON;

4 MAJOR CASEY Y. WOODS;

5 (b) (6), (b) (7)(C)

6 CMSGT DAVID T. STUBBS;

7 (b) (6), (b) (7)(C)

;

8 MSGT RYAN W. MOON;

9 TSGT MARIO G. GONZALEZ; and

10 TSGT SAARA L. MUSTAPHA;

11 The prosecution is ready to proceed with the trial in the
12 case of the United States versus Airman First Class Devin P.
13 Kelley.

14 MJ: The members of the court will now be sworn, all
15 persons in the court room please rise.

16 [All persons in the court did as directed and the members were
17 sworn in accordance with R.C.M. 807]

18 MJ: The court is assembled. Please be seated. Members of
19 the court, good afternoon. It is appropriate at this time that
20 I give you some preliminary instructions. My duty as military
21 judge is to ensure the trial is conducted in a fair and orderly
22 and impartial manner according to the law. I preside over open

1 sessions, rule upon objections, and instruct you on the law
2 applicable to this case. You are required to follow my
3 instructions and you may not consult any other source as to the
4 law pertaining to this case unless it has been admitted into
5 evidence. This rule applies throughout the trial including
6 closed sessions and periods of recess and adjournment. Any
7 questions you have of me should be asked in open court.

8 At a session held earlier, the accused plead guilty to the
9 charges and specifications which you have before you. I accepted
10 that plea of guilty and entered findings of guilty. Therefore
11 you will not have to determine whether the accused is guilty or
12 not guilty, as that has been established by his plea. Your duty
13 will be to determine an appropriate sentence in this case. That
14 duty is a grave responsibility requiring the exercise of wise
15 discretion. Your determination must be based upon all the
16 evidence presented and my instructions I will give you as to the
17 applicable law. Since you cannot properly reach a determination
18 until all of the evidence has been presented and you've been
19 instructed, it is a vital importance that you keep an open mind
20 until all the evidence and instructions have been presented to
21 you. Counsel will soon be given an opportunity to ask you
22 questions and exercise challenges. With regard to challenges,

1 if you know of any matter you feel might affect your
2 impartiality to sit as a court member you must disclose that
3 matter when asked to do so. Bear in mind, any statement you
4 make should be in made in general terms as to not disqualify
5 other members who hear the statement. Some of the grounds for
6 challenge would be if you were the accuser in the case, if you
7 had investigated any offense charged, if you have formed a fixed
8 opinion of what the appropriate punishment would be for this
9 accused, or for any enlisted member that you belong to the same
10 squadron as the accused. In addition, any matter that might
11 affect your impartiality regarding an appropriate sentence for
12 the accused would be a ground for challenge. To determine if
13 grounds for challenge exist, counsel from both side are given an
14 opportunity to question you. These questions are not intended
15 to embarrass your, they are not an attack on your integrity,
16 they are merely asked to determine whether a basis for challenge
17 exists. It is no adverse reflection upon a member to be excused
18 from a particular case. You may be questioned individually or
19 as a group, but in either event, you should indicate an
20 individual response to the questions asked. Unless I indicate
21 otherwise, you are required to answer all questions. You must
22 keep an open mind throughout the trial. You must impartially

1 hear the evidence, the instructions on the law and only when you
2 are in your closed session deliberations may you properly make a
3 determination as to an appropriate sentence after considering
4 all the alternative punishments of which I will later advise
5 you. You may not have a preconceived idea or formula as to the
6 type or amount of punishment which should be imposed if any.
7 Counsel will have the opportunity to question all the witnesses.
8 When counsel is finished if you feel there is substantial
9 questions that should be asked, you will be given an opportunity
10 to do so. The way that we handle that is to require that you
11 write out your question legibly and sign at the bottom of the
12 forms that should be provided to you in your court member
13 packets there. This method gives counsel for both sides and me
14 to review your questions before they are asked because your
15 questions, like the questions of counsel, are subject to
16 objection. I will conduct any needed examination. With regard
17 to the questions, there are a couple things to keep in mind.
18 First, you cannot attempt to help either side by your questions;
19 second, counsel have interviewed the witnesses and know more
20 about the case than we do. Very often they do not ask what they
21 appear to us to be an obvious question because they are aware
22 that this particular witness has no knowledge on the subject.

1 Rules of evidence control what can be received into evidence.
2 As I indicated earlier, questions of witnesses are subject to
3 objection. During the course of the trial if I sustain an
4 objection, you must disregard the question and the answer. If I
5 overrule an objection, you can consider both the question and
6 the answer. During any recess or adjournment you may not
7 discuss the case with anyone, not even among yourselves. You
8 must not listen to or read any account of the trial or consult
9 any source, written or otherwise, as to matters involved in this
10 case. You must hold your discussion of the case until you're
11 all together in your closed session deliberations so that all
12 the members have the benefit of your discussion. Do not
13 purposely visit the scene of any incident alleged in the
14 specifications or involved in the trial.

15 You must also avoid contact with witnesses or potential
16 witnesses in this case. If anyone attempts to discuss the case
17 in your presence during any recess or adjournment you must
18 immediately tell that person to stop and report the occurrence
19 to me at our next session. I may not repeat these matters to
20 you before every break or recess, but you must keep them in mind
21 throughout the trial.

1 We will try to estimate the time needed for recesses or
2 hearings outside of your presence. Frequently their duration of
3 these hearings is extended by consideration of new issues that
4 arise during such hearings, your patience and understanding
5 regarding these matters will contribute greatly to an atmosphere
6 consistent with the fair administration of justice. When you
7 are in your closed session deliberations, only the members will
8 be present. You must remain together and may not allow any
9 unauthorized intrusion into your deliberations. Each of you has
10 an equal voice and vote with the other members in discussing and
11 deciding all issues submitted to you. However, in addition to
12 the duties of the other members, the senior member will act as
13 your presiding officer during your closed session deliberations
14 and will speak for the court in announcing the results.

15 This general order of events can be expected at this court-
16 martial: questioning of court members, followed by challenges
17 and excusals, presentation of evidence, closing arguments by
18 counsel, instructions on the law, which will then be followed by
19 your deliberations, and announcement of the sentence. The
20 appearance and demeanor of all parties to the trial should
21 reflect the seriousness with which the trial is viewed. Careful
22 attention to all that occurs during the trial is required of all

1 parties. If it becomes too hot or too cold in the courtroom, or
2 if you need a break because of drowsiness or for comfort
3 reasons, please tell me so that we can attend to your needs and
4 avoid potential problems that might otherwise arise. Each of
5 you may take notes, if you desire, and use them to refresh your
6 recollection during deliberations, but they may not be read or
7 shown to the other members. At the time of any recess or
8 adjournment you should take your notes with you, or you may turn
9 them face down so that no one is tempted to take a look at them.

10 One other administrative matter, if during the course of
11 the trial any individual member of the court needs to make a
12 statement, if you would preface that statement by stating your
13 name and rank that will make clear on the written record which
14 member is speaking at all times. Are there any questions from
15 any members at this point?

16 MEMBERS: [Negative response from all members.] No
17 questions from the members. Please take a moment to open the
18 folders before you and read the Charges on the flyer that's been
19 provided to you, and make sure your name is correctly reflected
20 on the convening order. If there are corrections to be made,
21 please raise your hand and get my attention.

22 [The members did as directed.]

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MJ: It appears the members have reviewed the convening orders and charges and specifications. Seeing no hands, it appears that no corrections are in order. Actually we have one.

MEMBER: [Major Woods]: I am no longer a member of 6 RS, but in the 49th OSS. Does that matter?

MJ: Okay, that was Major Woods. Were you-?

MEMBER: [Major Woods]: I was when I was selected for this.

MJ: So you just simply changed squadrons since the order was published?

MEMBER: [Major Woods]: Yes sir.

MJ: Any doubt then that you are the person the convening authority intended to appoint?

MEMBER: [Major Woods]: No sir.

MJ: Alright, thank you for that. Trial counsel, would you please announce the general nature of the charges in this case?

ATC: The general nature of the charge in this case is: One specification of assault consummated by a battery; one specification of aggravated assault on a child under the age of 16 years, in violation of Article 128 UCMJ, in violation of Article 128 UCMJ.

1 between the court room and the deliberation room may have been
2 open, and there was at least the potential that some of you may
3 have heard some of the proceedings that were going on outside of
4 your presence. First of all, by show of hands, did any of you
5 overhear any of the proceedings that were ongoing as you were
6 arriving this afternoon?

7 MEMBERS: [Negative response from all members.]

8 MJ: Does anyone know the accused?

9 MEMBERS: [Negative response from all members.]

10 MJ: That's a negative response from all members.

11 Does anyone know any person named in the Specifications?

12 MEMBERS: {Negative response from all members.}

13 MJ: Having seen the accused and having read the Charge and
14 Specifications, does anyone feel that you cannot give the
15 accused a fair trial for any reason?

16 MEMBERS: [Negative response from all members.]

17 MJ: That's a negative response from all members.

18 Does anyone have any prior knowledge of the facts or events
19 in this case?

20 MEMBERS: [Negative response from all members.]

21 MJ: Again, negative response from all members.

1 Has anyone or any member of your family ever been charged
2 with an offense similar to any of those charged in this case?

3 MEMBERS: [Negative response from all members.]

4 MJ: Has anyone or any member of your family or anyone
5 close to you personally ever been a victim of an offense similar
6 to any of those charged in this case?

7 MEMBERS: [Negative response from all members.]

8 MJ: Again, negative response from all members. By show of
9 hands, how many of you are serving as court members for the
10 first time in a trial by courts martial?

11 MEMBERS: [Hands raised.]

12 MJ: So that would be all with the exception of Lt Col
13 Patton, (b) (6), (b) (7)(C) Lt Col Kovich, Major Degon, and

14 (b) (6), (b) (7)(C) Is there anyone else I missed that has not
15 previously served? And (b) (6), (b) (7)(C) .

16 As to those who have previously served, can you put aside
17 anything you may have heard at any previous proceeding and
18 decide this case solely on the basis of the evidence and my
19 instructions as to the applicable law?

20 MEMBERS: [Affirmative response from those members.]

21 MJ: That is an affirmative response from those members.

22 Has any member of the court had any specialized law enforcement

1 training or experience to include duties as a security forces
2 member, off duty security guard, civilian police officer, or
3 comparable duties other than the general law enforcement duties
4 provided to military personnel of your rank and position?

5 MEMBERS: [Negative response by all members.]

6 MJ: That's a negative response, all. I have previously
7 advised you that it is your duty as court members to weigh the
8 evidence and to resolve controverted questions of fact. In so
9 doing, if the evidence is in conflict you will necessarily be
10 required to give more weight to some evidence than to other
11 evidence. The weight if any to be given all of the evidence in
12 this case is solely within your discretion. So it is neither
13 required or expected that you will give equal weight to all the
14 evidence, however it is expected that you will use the same
15 standards in weighing and evaluating all the evidence and the
16 testimony of each witness and you will not give more or less
17 weight to the testimony of a particular witness merely because
18 of that witnesses status, position, or station in life.

19 Will each of you use the same standards in weighing and
20 evaluating the testimony of each witness and not give more or
21 less weight to the testimony of a particular witness solely
22 because of that witness' position or status?

1 MEMBERS: [Affirmative responses by all members.]

2 MJ: Affirmative response by all. Is any member of the
3 court in the rating chain, supervisory chain, or chain of
4 command of any other member?

5 MEMBER: (b) (6), (b) (7)(C) : Yes sir.

6 MJ: Okay, I think that was (b) (6), (b) (7)(C)
7 and Tech Sergeant Gonzalez. And Major Wageman?

8 MEMBER: [Major Wageman]: I am the rater for (b) (6), (b)
9 (b) (6), (b) (7)(C)

10 MJ: Alright, so this first question will be for (b) (6), (b)
11 (b) (6), (b) (7)(C) and Sergeant Gonzalez. Will you feel inhibited or
12 restrained in any way in performing your duties as a court
13 member including the free expression of your views during
14 deliberation because another member holds a position of
15 authority over you?

16 MEMBERS: [Negative response by Sergeant Gonzalez and
17 (b) (6), (b) (7)(C) .]

18 MJ: Negative from those two members. Okay then, for (b)
19 (b) (6), (b) (7)(C) and Major Wageman, will you be embarrassed or
20 restrained in any way in performing your duties as a court
21 member if a member over whom you hold a position of authority
22 should disagree with you?

1 MEMBER: [Negative response from (b) (6), (b) (7)(C) and
2 Major Wageman]

3 MJ: Negative response from those members. Has anyone had
4 any dealing with any of the parties of the trial to include me
5 and counsel, which might affect your performance of duty as
6 court member in any way?

7 MEMBERS: [Negative responses from all members.]

8 MJ: Negative response from all members. Before I ask this
9 next question, let me give you my best estimate as to what the
10 road ahead entails. While this case has been docketed for the
11 remainder of the week, it is my anticipation that we will finish
12 the case either today or tomorrow. It may however require that
13 we go after duty hours and even significantly so on one or both
14 of those days. With that in mind, also in recognition of the
15 fact that today is Election Day; does anyone know of anything of
16 either a personal or professional nature which would cause you
17 to be unable to give your full attention to these proceedings
18 throughout the trial?

19 MEMBERS: [Negative response from all members.]

20 MJ: Specifically to the issue of today being Election Day,
21 if this case were to proceed close to or passed the time the

1 polls closing, is there anybody who would be unable to vote in
2 the election this evening as a result of this court martial?

3 MEMBERS: [Negative response from all members.]

4 MJ: Negative response from all members. It is a ground
5 for challenge if you have an inelastic predisposition toward the
6 imposition of a particular punishment based solely on the nature
7 of the crimes for which the accused is to be sentenced. Does
8 any member, having read the Charge and Specifications, believe
9 that you would be compelled to vote for any particular
10 punishment solely because of the nature of the charges?

11 MEMBERS: [Negative response by all members.]

12 MJ: Negative responses. You will be instructed in detail
13 before you begin your deliberations. I will instruct you on the
14 full range of punishment, from no punishment up to the maximum
15 punishment. You should consider all forms of punishment within
16 that range. "Consider" doesn't necessarily mean that you would
17 vote for that particular punishment, consider means that you
18 think about and make a choice, in your own mind, one way or the
19 other as to whether that is an appropriate punishment. Each
20 member must keep an open mind and not make a choice nor
21 foreclose from consideration any possible sentence until the

1 closed session for deliberations and voting on the sentence.

2 Can each of you follow this instruction?

3 MEMBERS: [Affirmative response from all members.]

4 MJ: Affirmative responses. Can each of you be fair and
5 partial and open minded in your consideration of an appropriate
6 sentence if called upon to do so in this case?

7 MEMBERS: [Affirmative response from all members.]

8 MJ: Affirmative responses. Can each of you reach a
9 decision on a sentence on an individual basis in this particular
10 case and not solely upon the nature of the offenses of which the
11 accused has been convicted?

12 MEMBERS: [Affirmative response from all members.]

13 MJ: Affirmative responses. Is any member aware of any
14 matter which might raise a substantial question concerning your
15 participation in this trial as a court member?

16 MEMBERS: [Negative response from all members.]

17 MJ: Negative responses. Does counsel for either side
18 desire to question the court members?

19 **VOIR DIRE BY SENIOR TRIAL COUNSEL**

20 STC: Yes Your Honor. Lieutenant Colonel Patton, members,
21 my name is Captain Neil; I am a senior trial counsel based out
22 of Scott Air Force Base, Illinois and along with Captain Brett

1 Johnson, represent the United States of America in this
2 proceeding. This is the awkward process where we ask questions
3 and have exaggerated heads nods is going to continue for a
4 little while longer. We are going to ask some questions that
5 are going to build on and go into other areas than the military
6 judge's. And the defense is going to have the opportunity to
7 ask questions as well. The purpose behind that is to ensure the
8 United States of America and the accused in this case, can
9 receive a fair and impartial trial. As we go through this
10 process, if you can continue with what the military judge
11 instructed and if you have a yes answer please keep with the
12 exaggerated head nods and if it is a no, exaggerated head nods
13 with a head shake. Please continue with the head nod or head
14 shake till I make a note of your response for the record. As
15 you can all tell there are a lot of you sitting here in the
16 boxes, so we need to make sure we get the responses noted
17 properly. If at any time a question I ask is unclear, or I note
18 an incorrect response, please just raise your hand and let me
19 know.

20 As the military judge has already told you, the accused has
21 plead guilty to the specifications and the charge that you have
22 before you. So your role in this case would be to determine an

1 appropriate sentence for the accused for the offenses he plead
2 guilty to and that he was found guilty of. Is there any member
3 that is uncomfortable with that role?

4 MEMBERS: [Negative response from all members.]

5 STC: The military judge asked a question of whether or not
6 a family member had ever been accused or convicted of similar
7 offenses, but I am going to ask you a broader question. Has
8 anyone known any individual - whether that be a family member, a
9 friend, a neighbor, a coworker, who has been accused, charged,
10 or convicted of offenses involving domestic violence?

11 MEMBERS: [Affirmative response from (b) (6), (b) (7)(C) and
12 a negative response from other members.]

13 STC: Has anyone been a commander, an accuser, an
14 investigating officer, or a witness in a court-martial or
15 administrative discharge board involving offenses of domestic
16 violence?

17 MEMBERS: [Negative response from all members.]

18 STC: Has any member, either in a personal or professional
19 capacity, worked closely with victims of domestic violence?

20 MEMBERS: [Affirmative response from (b) (6), (b) (7)(C) and
21 a negative response from all other members.]

1 MEMBER: (b) (6), (b) (7)(C) So, as squadron
2 commander, I've dealt with these issues with people under my
3 command, administratively, is that an affirmative answer to your
4 question?

5 STC: Yes sir, and we will probably ask you some more
6 questions about that in an individual setting. For the record,
7 that was (b) (6), (b) (7)(C) that spoke. Thank you sir.

8 There may be some witnesses that may testify over the
9 course of this proceeding and I will go over them. As I say
10 each name, I'd like you to indicate whether you know that
11 individual:

12 a. Captain (b) (6), (b) (7)(C), a pediatrician at
13 Holloman.

14 MEMBERS: [Affirmative response by (b) (6), (b) (7)(C) and
15 negative response from all other members.]

16 STC: b. Master Sergeant (b) (6), (b) (7)(C) he is the 49th
17 Logistics readiness squadron First Sergeant. If you don't know
18 MSgt (b) (6), (b) (7)(C) please raise your hand.

19 MEMBERS: [Affirmative response from Lt Col Patton, Major
20 Wageman, Major Degon, Major Woods, (b) (6), (b) (7)(C) and a
21 negative response from all other members.]

1 STC: So aside from those I just mentioned, everyone else
2 knows MSgt (b) (6),
 (b) (7)(C)

3 MEMBERS: [Affirmative response from those members.]

4 STC: The accused plead guilty earlier to offenses of
5 assaulting his wife on more than one occasion and assaulting his
6 step-son on more than one occasion with force or means likely to
7 cause death or grievous bodily harm. Is there any member that
8 doesn't think those are serious offenses?

9 MEMBERS: [Negative response from all members.]

10 STC: Is there anyone who feels that being young or being
11 stressed is an excuse for an Airman to assault his wife or
12 assault his step-son with force likely enough to cause death or
13 grievous bodily harm?

14 MEMBERS: [Negative response from all members.]

15 STC: Does everyone agree that Airmen should be held
16 accountable for their actions both on and off duty?

17 MEMBERS: [Affirmative response from all members.]

18 STC: By pleading guilty today, the accused now has a
19 federal conviction. Does every member understand that if any
20 member is convicted in any court martial in federal court of any
21 crime, that they have a federal conviction?

1 MEMBERS: [Negative response from MSgt Moon and affirmative
2 from all other members.]

3 STC: Can everyone agree that while having a federal
4 conviction as a result of pleading guilty or being found guilty,
5 that an appropriate sentence gives that federal conviction
6 meaning or context?

7 MEMBERS: [Affirmative response from all members.]

8 STC: Each of you will be required to vote on an
9 appropriate sentence for the accused. The outcome of that vote
10 may have significant effects on the individuals involved in this
11 case, most particularly the victims, the accused, and their
12 families. Is there anyone that has any issue or believes for
13 any reason that you would not be able to objectively decide on
14 an appropriate sentence for this accused?

15 MEMBERS: [Negative response from all members.]

16 STC: The duty of sentencing an accused may not be a
17 pleasant one: Would you agree that while your duty may not be
18 pleasant, it is nonetheless important, both for the accused and
19 the Air Force?

20 MEMBERS: [Affirmative response by all members.]

21 STC: The military judge will give a number of instructions
22 on the types of punishments and the maximum punishment you can

1 impose before you deliberate on an appropriate sentence. One of
2 those options will be to sentence the accused to confinement.
3 Is there any member who would not be able to consider sentencing
4 a military member to confinement for violating the law?

5 MEMBERS: [Negative response by all members.]

6 STC: One of your options in sentencing is a punitive
7 discharge, in this case a Dishonorable or Bad Conduct Discharge.
8 The military judge will instruct you that a punitive discharge
9 is a severe form of punishment and that a punitive discharge
10 will affect an accused future with regard to his legal rights,
11 economic opportunities, and social acceptability. Is there any
12 member who would not be able to consider sentencing the accused
13 to a punitive discharge for violating the law?

14 MEMBERS: [Negative response from all members.]

15 STC: Lieutenant Colonel Patton, members, thank you for
16 your time.

17 MJ: Defense counsel?

18 **VOIR DIRE QUESTIONS FROM DEFENSE COUNSEL**

19 ADC: Thank you Your Honor. Good afternoon members. My
20 name is Captain Danko Princip, and along with Captain Mark
21 Rosenow, represent Airman First Class Devin P. Kelley on the
22 biggest day of his life. I would like to introduce myself, I am

1 the new Area Defense Counsel and have been for a couple months,
2 and prior to that I was at Peterson Air Force Base as the Chief
3 of Military Justice. Captain Mark Rosenow was actually the Area
4 Defense Counsel before me and he has now pcs'd to Lackland Air
5 Force Base to serve as a Senior Trial Counsel. We are here
6 because Airman Kelley as an Airman is entitled to competent
7 defense counsel. Can we all agree in the Air Force, when an
8 Airman is facing court martial, he is entitled to competent
9 defense counsel?

10 MEMBERS: [Affirmative response from all members.]

11 ADC: Now, members, I actually think some of you have seen
12 me in this court room before. And this may be new for some of
13 you and as the judge stated, none of these questions are meant
14 to embarrass you pry into your personal lives, one of the things
15 that Captain Rosenow and I have to do is part of our jobs, part
16 of our due diligence, is we have to ensure that Airman Kelley
17 gets a fair and impartial trial. Can you all agree that it is
18 important that he receives that fair and impartial trial?

19 MEMBERS: [Affirmative response from all members.]

20 ADC: But can you all agree that being fair and impartial,
21 you are not only being fair and impartial to Airman Kelley, but
22 also to the government?

1 MEMBERS: [Affirmative response from all members.]

2 ADC: And, not to beat on a prior issue, but we discussed
3 prior court martial service, so if you could raise your hand if
4 you actually served on a panel; if you sat on a panel past this
5 point we are at now. Please raise your hand.

6 MEMBERS: [Affirmative response from Lt Col Patton, Lt Col
7 Kovich, Major Degon, (b) (6), (b) (7)(C), and (b) (6), (b) (7)(C)]

8 ADC: And for the rest of you, have any of you, for those
9 that did not serve past this point, how many of you got to this
10 point; the questioning?

11 MEMBERS: [Affirmative response from Major Woods and a
12 negative from all others.]

13 ADC: As I mentioned, we do have to do our due diligence.
14 Part of that involves objecting in court when we think that
15 something inappropriate is happening according the rules of
16 court martial. Would you all agree not to hold our objections
17 against Airman Kelley?

18 MEMBERS: [Affirmative response by all members.]

19 ADC: Has anyone here had any negative interactions with
20 either myself or any other area defense counsel, perhaps some
21 other criminal defense attorney?

22 MEMBERS: [Negative response from all members.]

1 ADC: Finally if there is something you don't like about
2 what I'm doing or Captain Rosenow is doing, something about our
3 style, questions, or arguments or if you think it's not
4 appropriate, would you agree not to hold that against Airman
5 Kelley?

6 MEMBERS: [Affirmative response by all members.]

7 ADC: I don't believe this has been addressed previously,
8 but I want to talk about your relationship with the legal
9 office. So, in the course of your professional duties, have you
10 had a chance to work closely with either the Staff Judge
11 Advocate or perhaps another attorney from the legal office?

12 MEMBERS: [Affirmative response from (b) (6), (b) (7)(C) Lt
13 Col Kovich, (b) (6), (b) (7)(C), (b) (6), (b) (7)(C).]

14 MEMBER: [MSgt Moon]: I have a question, what do you mean
15 work closely with them?

16 SDC: Could you tell us what kind of interaction you've
17 had?

18 MEMBER: [MSgt Moon]: When I served as first sergeant, I
19 interacted with them to go over UIFs and seeking guidance from
20 them right now.

21 ADC: Can you tell us who you interacted with for example?

1 MEMBER: [MSgt Moon]: The ones right across the hall, but
2 I can't remember names.

3 ADC: So, some of the paralegals, SSgt (b) (6), (b)
(7)(C)

4 MEMBER: [MSgt Moon]: I tried to contact the Captain.

5 ADC: Is there anything about those interactions that would
6 impact your ability to be fair and impartial as you listen to
7 the evidence and the instructions from the judge?

8 MEMBER: [MSgt Moon]: No.

9 ADC: For the rest of you who answered you had dealings
10 with the legal office, same question, would those interactions
11 that would impact your ability to be fair and impartial as you
12 listen to the evidence and the instructions from the judge?

13 MEMBERS: [Negative response from those members who had
14 dealings with the legal office.]

15 ADC: As a follow up, have any of you had friendships or
16 social relationships with anyone from the legal office?

17 MEMBERS: [Negative response from all members.]

18 MEMBER: (b) (6), (b) (7)(C) You know, I mean I know the
19 SJA as commanders. We've had some minor off-duty-but you know,
20 we are not common-commonly maintaining a friendship.

21 MEMBER: [Lt Col Patton]: I would agree with that too.

1 ADC: So, like base functions and things? So, I would say
2 the same follow up, is there anything about that relationship
3 that would impact your ability to sit here fairly and
4 impartially?

5 MEMBERS: [Negative response from (b) (6), (b) (7)(C) and Lt
6 Col Patton.]

7 ADC: Now as Captain Neil had mentioned, today is a very
8 significant day in Airman Kelley's life. Earlier today he
9 actually plead guilty to assaulting his ex-wife and her son and
10 has accepted responsibility for this. We expect that you may
11 hear evidence about the unstable relationship and home
12 environment of Airman Kelley and now his ex-wife, Tessa Kelley.
13 Just to go deeper into that, do any of you have children?

14 MEMBERS: [Affirmative response from all members except for
15 MSgt Moon.]

16 ADC: Sorry to single you out MSgt Moon. Have any of you
17 had children at a young age, say before you were 21 or soon
18 thereafter?

19 MEMBERS: (b) (6), (b) (7)(C)

20 ADC: Have any of you gotten married around that age?

21 MEMBERS: [Affirmative response from (b) (6), (b) (7)(C) .]

1 ADC: (b) (6), (b) (7)(C) , would you mind telling us when you got
2 married?

3 MEMBER: [(b) (6), (b) (7)(C)] My first marriage, I tried to
4 forget that. In 1989, I was 21.

5 ADC: Um, I am going to get into some deeper issues and
6 promise not to put anyone on the spot. Have any of you been
7 involved in child custody issues or perhaps close family that
8 was involved?

9 MEMBERS: [Affirmative response from (b) (6), (b) (7)(C) Major
10 Wageman, (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) . Negative
11 response from all others.]

12 ADC: Have any of you been personally involved in a witness
13 or (b) (6), (b) (7)(C) ?

14 MEMBERS: [Negative response from all members.]

15 MEMBER: (b) (6), (b) (7)(C) Um, my mother-in-law works
16 for the (b) (6), (b) (7)(C) child protective services, so I've heard
17 some of the things she's experienced in her job. I supervised
18 an Airman, and it never got to court determination, but got very
19 close to her being separated from her children.

20 ADC: Actually, that leads to a follow up question, I'm
21 sure we've heard about the children youth and family, or CYFD,

1 is everyone familiar with that agency here in the state of new
2 Mexico?

3 MEMBERS: [Affirmative response from Lt Col Kovich, MSgt
4 Moon, TSgt Mustafa. Negative response from all other members.]

5 ADC: Children, youth and family department or CYFD, is
6 similar to child protective services. Is anyone familiar with
7 somebody else or do you have a close personal relationship with
8 someone involved with such an agency, either in the state of New
9 Mexico or any other state?

10 MEMBERS: [Negative response from all members, affirmative
11 response from Lt Col Kovich.]

12 ADC: And I think Captain Neil touched on this earlier, but
13 have any of you known or known someone close to you that was
14 close to you involved in any issues with regard to domestic
15 violence?

16 MEMBERS: [Negative response from all members, affirmative
17 response from (b) (6), (b) (7)(C)]

18 MEMBER: (b) (6), (b) (7)(C) In the performance of
19 command, I've had a few instances of that.

20 ADC: Thank you because it leads to my next question, have
21 any of you in your professional capacity, in the Air Force, been
22 involved in the central registry board or CRB, or the HRVRT; the

1 High Risk for Violence Response Team? If you could raise your
2 hand and just leave it up there for me.

3 MEMBERS: [Affirmative response by (b) (6), (b) (7)(C) Chief
4 Stubbs, (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C). Negative response from
5 all other members.]

6 ADC: The HRVRT is a board that sits around and discusses
7 family issues of members.

8 MEMBERS: [After explaining further, affirmative response
9 from Lt Col Kovich.]

10 ADC: Have any of you actually worked in some sort of
11 position such as family advocacy or any other position where you
12 personally dealt or assisted troubled families?

13 MEMBERS: [Negative response from all members, affirmative
14 from (b) (6), (b) (7)(C)]

15 ADC: (b) (6), (b) (7)(C) can you tell us what that position was?

16 MEMBER: [(b) (6), (b) (7)(C)]: I was a foster parent.

17 ADC: Okay. I know (b) (6), (b) (7)(C) you said you dealt
18 with subordinates who had family issues or domestic violence
19 issues, has anybody else in your supervisory or command function
20 dealt with a subordinate who had those issues going on?

21 MEMBERS: [Affirmative response from Lt Col Kovich and
22 (b) (6), (b) (7)(C) and a negative response from all other members.]

1 ADC: Is anybody involved in programs aimed toward helping
2 families in the Air Force? I know it is an odd question. Is
3 anyone aware of any programs out there that are meant to help
4 young families, families with children?

5 MEMBERS: [Affirmative response from (b) (6), (b) (7)(C)
6 Major Wageman, Lt Col Kovich, (b) (6), (b) (7)(C), Chief Stubbs, (b) (6),
7 (b) (6), (b) (7)(C) and TSgt Gonzalez, negative response from all other
8 members.]

9 ADC: And as Captain Neil had mentioned, by pleading guilty
10 earlier today, Airman Kelley faces several punishments; a
11 punitive discharge from the Air Force, forfeiture of pay and
12 allowances, and time in confinement. But there are also other
13 punishments available, including hard labor, restriction,
14 reduction in rank, reprimands; but you can also determine that a
15 federal conviction that he received earlier today is sufficient
16 to the offenses, and no punishment is warranted. Will everyone
17 agree to consider the entire range of sentences in making your
18 decision?

19 MEMBERS: [Affirmative response from all members.]

20 ADC: You will also be presented with evidence today in the
21 sentencing hearing to show you who Airman Kelley is, obviously
22 you've seen the flyer, you know the offenses before you, but you

1 will also see letters from people who know him, to give you a
2 chance to know who he is as a whole person. Do you agree that
3 you need to take all these things into account when deciding an
4 appropriate sentence for him?

5 MEMBERS: [Affirmative response from all members.]

6 ADC: (b) (6), (b) (7)(C), I think you were here previously
7 during one of these when we asked these questions; do you feel
8 that somebody who is court martialed for these offenses must
9 automatically without question be punitively discharged without
10 seeing the facts?

11 MEMBER: [(b) (6), (b) (7)(C)]: No.

12 ADC: Does everyone agree with (b) (6), (b) (7)(C) ?

13 MEMBERS: [Affirmative response from all members.]

14 ADC: Similarly, do you all agree, even seeing the offenses
15 without knowing the facts behind it, and knowing who Airman
16 Kelley is, that you can't automatically say without a question
17 that jail time and confinement is automatically needed?

18 MEMBERS: [Affirmative response from all members.]

19 ADC: We have a very large panel, would you all agree that
20 when you go back to the deliberation room, that everyone
21 regardless of rank or experience, that all of you will have an
22 equal say in the chance of voting?

1 MEMBERS: [Affirmative response from all members.]

2 ADC: When you close to deliberate, the military judge is
3 going to give you instructions and one of those instructions is
4 going to be that any of you can propose a sentence, so any of
5 you can on a slip of paper write out a proposed sentence, and
6 put it up to vote. And the junior member will collect those
7 sentences and submit them to the president, who will arrange
8 them in order of severity, and the instructions that the judge
9 will give is you have to start at the lowest or least severe.
10 Can I have your promise that when you see that first slip of
11 paper, the lowest punishment, that you will fairly consider it
12 and give it due consideration?

13 MEMBERS: [Affirmative response from all members.]

14 ADC: Thank you very much for your time.

15 MJ: Members there are now some matters we need to take up
16 outside of your presence, so if you would return to the
17 deliberation room. However, some of you may be recalled for
18 individual questions.

19 [The members departed.]

20 [The court-martial closed at 1326 hours, 6 November 2012.]

21 **END OF PAGE**

22

1 **ARTICLE 39(A) SESSION**

2 [The Article 39(a) session was called to order at 1340 hours, 6
3 November 2012. All parties were present, the members were
4 absent.]

5 MJ: Trial counsel, any additional voir dire?

6 STC: Yes Your Honor, the government is going to request to
7 talk to each member except for Major Wageman and Major Woods.
8 Other than that, we request individual voir dire for the others.

9 MJ: Alright, I think I understand enough as to each of
10 those members. Defense counsel, do you request Major Wageman or
11 Major Woods?

12 ADC: Yes Your Honor we do. Major Wageman did say he was
13 the rater for (b) (6), (b) (7)(C) and he also knows one or two of
14 the government witnesses and same for Major Degon. He does know
15 Master Sergeant (b) (6),
(b) (7)(C)

16 MJ: I believe it was Major Woods. Major Woods was the
17 other that trial counsel does not request individual voir dire.

18 ADC: Yes, I apologize. I think he said he sat through a
19 voir dire previously and I wanted to touch on that.

20 MJ: Okay, sounds like we will hear from everybody. So we
21 will start with Lt Col Patton. Bailiff, if you would ask
22 Lieutenant Colonel Patton to join us.

1 INDIVIDUAL VOIR DIRE

2 [Bailiff retrieved Lieutenant Colonel Patton]

3 MJ: Sir, if you would go ahead and resume your seat there.
4 I think counsel had some follow up for you. Trial counsel?

5 STC: Lt Col Patton, there are just a few areas I wanted to
6 clear up. The first was that you indicated that this was not
7 your first court martial?

8 MEMBER: [Lt Col Patton]: Yes.

9 STC: How many times have you served on a previous court
10 martial?

11 MEMBER: [Lt Col Patton]: Two.

12 STC: Could you describe for us when those were?

13 MEMBER: [Lt Col Patton]: One was about a month ago and I
14 actually believe that Captain Rosenow was actually there and the
15 other one was at my last assignment at Seymour Johnson. It was
16 over a year ago.

17 STC: Do you remember what those two cases were generally
18 about?

19 MEMBER: [Lt Col Patton]: The last one had to do with drug
20 use. And the first one had to do with, I actually don't recall
21 specifics.

1 STC: Do you remember the results that were reached in
2 those two cases?

3 MEMBER: [Lt Col Patton]: Yes.

4 STC: Could you describe what those results were?

5 MEMBER: [Lt Col Patton]: The first one was a dishonorable
6 discharge I believe and the last one was confinement for a few
7 months and loss of pay.

8 STC: Sounds like some of those details, since it happened
9 some time ago, that you don't remember exactly what happened in
10 those cases. Is that correct sir?

11 MEMBER: [Lt Col Patton]: Yes.

12 STC: And based upon that, is there anything about those
13 cases that would affect your ability to give this accused a fair
14 and impartial trial?

15 MEMBER: [Lt Col Patton]: No.

16 STC: And you believe you can put anything from those cases
17 that you remember aside when deciding this case sir?

18 MEMBER: [Lt Col Patton]: Yes.

19 STC: The next thing I wanted to talk to you about is you
20 had talked some or indicated that you had some dealings with the
21 legal office. Could you describe for us what kind of dealings?

1 MEMBER: [Lt Col Patton]: Yes. Strictly professional, I
2 don't know anyone personally. But through squadron commander
3 lunches and wing award ceremonies, you know sitting in an
4 environment with commanders, and I know the SJA in that sense,
5 and that is it.

6 STC: Sir, is there anything about the professional
7 dealings with the legal office that would cause you to give the
8 government any more or less weight or the defense any more or
9 less weight?

10 MEMBER: [Lt Col Patton]: No.

11 STC: And sir it was a little confusing, giving the number
12 of people we had, did you say you indicated that you knew MSgt

13 (b) (6),
14 (b) (7)(C)

15 MEMBER: [Lt Col Patton]: No, I did not.

16 STC: Okay. That is all I have for you, the defense may
17 have some for you.

18 MJ: Defense counsel, any follow up?

19 ADC: Yes. You mentioned that you were on a court martial
20 about a month ago?

21 MEMBER: [Lt Col Patton]: Yes.

22 ADC: You mentioned Captain Rosenow; do you remember if I
was on it?

1 MEMBER: [Lt Col Patton]: I know you were in the room, but
2 don't know if you were on it or not.

3 ADC: Is there anything about Captain Rosenow's performance
4 that would influence what kind of weight you would give to what
5 he's saying today?

6 MEMBER: [Lt Col Patton]: No.

7 ADC: So you think you can be fair and impartial despite
8 having seen him in court before?

9 MEMBER: [Lt Col Patton]: Yes.

10 ADC: Thank you.

11 MJ: Lieutenant Colonel Patton, thank you, you may return
12 to the deliberation room. Please ask (b) (6), (b) (7)(C) to join
13 us.

14 [Lt Col Patton departed the court room.]

15 (b) (6), (b) (7)(C) entered the court room.]

16 MJ: (b) (6), (b) (7)(C), please have a seat on the front
17 row. I believe counsel has some follow up questions for you.
18 Trial counsel?

19 STC: Sir, good afternoon. There were some areas that came
20 up that I want to ask you about. The first is, you've served on
21 a court martial before?

1 MEMBER: [(b) (6), (b) (7)(C)] Yes, I served on a case
2 involving drugs, but I got to the voir dire and got removed.
3 So, I've never actually went through the court proceedings.

4 STC: Ok, so you just went through this process, right
5 here?

6 MEMBER: [(b) (6), (b) (7)(C)]: Yes, not for sentencing; for
7 the trial itself.

8 STC: The actual trial? You were not picked to be on that
9 panel?

10 MEMBER: [(b) (6), (b) (7)(C)] Correct.

11 STC: The next area I wanted to ask you about is, I believe
12 you are in the chain of command of TSgt Gonzalez?

13 MEMBER: [(b) (6), (b) (7)(C)]: Yes.

14 STC: How much interaction do you have with him?

15 MEMBER: [(b) (6), (b) (7)(C)] He's a crew chief at the fire
16 station so I see him once a week. You know, firefighters
17 alternate shifts so some days I am out there, he's not on shift.

18 STC: Based on the fact that he's in your chain of command,
19 is there anything that would make you feel upset if he disagreed
20 with you?

21 MEMBER: [(b) (6), (b) (7)(C)]: No not at all.

1 STC: Do you think TSgt Gonzalez would have any problems
2 disagreeing with you if he did?

3 MEMBER: (b) (6), (b) (7)(C)]: I do not.

4 STC: The next area I wanted to ask you about, you
5 indicated that you had some experience with child custody issues
6 and you talked about your mother in law being, I guess works for
7 department of social services sir?

8 MEMBER: [(b) (6), (b) (7)(C)]: (b) (6) child protective
9 services, at the state level.

10 STC: And when you were answering those questions, were
11 those in the same kind of realm sir, or was there something
12 separate with child custody issues and your mother in law?

13 MEMBER: (b) (6), (b) (7)(C) Um, I reflected after we
14 left. On my wife's side of the family, she has a first cousin
15 whose kids were removed from the family and adopted by her
16 parents. Um, I mentioned when I was a flight commander at
17 Nellis, I had a Senior Airman working for me who had three kids
18 and the issue became neglect and CPS in the state of Nevada got
19 involved and almost removed the kids from the family. I was
20 directly involved because I was her supervisor. Between me, the
21 chief, and the first sergeant had to deal with covering her and
22 her situation.

1 STC: How long ago was that, the situation at Nellis?

2 MEMBER: (b) (6), (b) (7)(C) Probably 2008.

3 STC: How much interaction would you say you had with her
4 and dealing with that situation?

5 MEMBER: (b) (6), (b) (7)(C) Significant.

6 STC: You said there was child neglect, was there any
7 allegation of child abuse?

8 MEMBER: (b) (6), (b) (7)(C) : No.

9 STC: And you said they almost removed the children, I
10 guess the children didn't get removed from the home?

11 MEMBER: [(b) (6), (b) (7)(C)] That is correct.

12 STC: Was there any action taken against the Airman that
13 was working for you?

14 MEMBER: [(b) (6), (b) (7)(C)] : Yea, I believe the only thing
15 was mark downs on EPR because she was single parenting the
16 children um, and after it became knowledge to us what was going
17 on in the household and we had to get involved, her performance
18 dramatically went the other way.

19 STC: With regard to your mother in law, you said she
20 worked with child protective services?

21 MEMBER: [(b) (6), (b) (7)(C)]]: Yes, she did. She just
22 retired.

1 STC: What did she do for child protective services?

2 MEMBER: [(b) (6), (b) (7)(C)]: Well, she was the state case
3 worker and was a case worker for most of her life. But she
4 graduated to head case worker at the state for case workers
5 within the region; I'm not exactly sure. Of course we heard a
6 lot about the very emotional job she was in and so she would
7 talk about struggles and cases she was involved in.

8 STC: How often would you say she would talk about those
9 cases?

10 MEMBER: [(b) (6), (b) (7)(C)] There was always something
11 going on, she often got called to court to testify. That was a
12 lot of time we would visit, she would be in court or testifying
13 in cases.

14 STC: So, when you looked at the charges and specifications
15 in this case, did that come to mind at all, your mother in law's
16 job?

17 MEMBER: [(b) (6), (b) (7)(C)]: No.

18 STC: Do you believe there is anything about what your
19 mother in law job or any of the other issues we've talked about
20 that would affect your ability to give this accused a fair and
21 impartial trial?

22 MEMBER: [(b) (6), (b) (7)(C)]: No.

1 STC: Sir do you believe that you can put whatever you've
2 heard previous to this court martial aside when deciding this
3 case?

4 MEMBER: [(b) (6), (b) (7)(C)]: Yes.

5 STC: Thank you sir. That's all I have.

6 MJ: Defense counsel?

7 ADC: Sir, you also mentioned that you knew some domestic
8 violence cases, is that same through your mother-in law?

9 MEMBER: [(b) (6), (b) (7)(C)]: Negative. As commander, I've
10 had to make disciplinary decisions on assault cases and domestic
11 violence issues.

12 ADC: Would you be able to give a good number of the times
13 you've had to do that?

14 MEMBER: [(b) (6), (b) (7)(C)]: Sure, um, within the last
15 twelve months, there was one case of assault and battery and a
16 case of domestic assault on the spouse; I think that is it.

17 ADC: Do you know how these were handled? Were they
18 downtown criminal action?

19 MEMBER: [(b) (6), (b) (7)(C)]: The first one was an offense
20 at October fest and you know what that means. And the second
21 one was an Airman on base in housing with his spouse.

1 ADC: Do you know what the immediate response was? Were
2 the police called, were there hospital involvements?

3 MEMBER: [(b) (6), (b) (7)(C)]: I will just talk about the
4 lighter case, that was identified when the spouse three days
5 after the incident came out and we were—she basically came
6 forward. The first sergeant got her to go over to mental health
7 and in the process of evaluation they discovered they were
8 having marital issues and in the questioning, they found out
9 there was abuse. At that point, I had to get involved for
10 disciplinary reasons.

11 ADC: What happened with that Airman?

12 MEMBER: [(b) (6), (b) (7)(C)]: That Airman was given an
13 Article 15 with a - - he was a Staff Sergeant select and I put
14 him on a control roster that red lined his stripe and I think I
15 gave 45 days additional duties and a monetary fine for two
16 months. I issued a no contact order and a vacated bust for his
17 Senior Airman stripe. He violated the no contact order by
18 trying to contact the spouse ten days after the incident, and I
19 removed his second stripe and I am looking to discharge him.

20 ADC: Do you know if he is represented by an ADC?

21 MEMBER: [(b) (6), (b) (7)(C)]: Um - - I made an appointment
22 for him to go see one, I'm sure he did the ADC.

1 ADC: Do you know if I was on that case by any chance?

2 MEMBER: (b) (6), (b) (7)(C) I don't believe you were; but
3 I'm not sure.

4 ADC: If so, it wouldn't affect your ability to sit here
5 fair and impartially?

6 MEMBER: (b) (6), (b) (7)(C) No.

7 ADC: Would you tell us a little bit more of what kind of
8 abuse was going on in that case? Was it one time that he hit
9 her or what?

10 MEMBER: (b) (6), (b) (7)(C)]: Yes, it was a - - it
11 appeared to be a one-time incident, although there was a lot of
12 pressure in the house leading up to that. He just boiled over
13 and let his emotions get the better of him and he assaulted her.

14 ADC: Given your time as commander, have you had to deal
15 with local authorities investigating incidents like these?

16 MEMBER: [(b) (6), (b) (7)(C)]: Um, to include OSI?

17 ADC: Sure, OSI is included.

18 MEMBER: [(b) (6), (b) (7)(C)]: Yes we have issues in the
19 squadron pending for not domestic violence, but other criminal
20 activity.

1 ADC: And to go back to your mother in law, when she
2 recounts her experiences, do you know if those were criminal
3 proceedings in court or some sort of civil proceedings?

4 MEMBER: [(b) (6), (b) (7)(C)]: Civil proceedings to maintain
5 custody; custody challenges mostly.

6 ADC: Do you know what happens with criminal law is
7 concerned?

8 MEMBER: [(b) (6), (b) (7)(C)]: No.

9 ADC: And you mentioned you sat on CRBs before, have you
10 heard cases like these? Are these the specific cases you heard
11 when you sat on the CRB?

12 MEMBER: [(b) (6), (b) (7)(C)]: There are other ones that
13 involve - - I can't remember examples. A lot of times here my
14 first sergeant represents me at the CRB and I hear about it
15 afterwards. At other bases I've represented the commander at
16 the CRB, so it could involve various issues between inter-
17 marital relations.

18 ADC: Are you aware of any kind of criminal sentencing in
19 those cases?

20 MEMBER: [(b) (6), (b) (7)(C)] No.

21 ADC: So, given your experience as a commander and dealing
22 with these issues having to discipline Airman for them and given

1 your mother in law's job, can you sit here today and fairly and
2 impartially listen to the evidence?

3 MEMBER: (b) (6), (b) (7)(C) Yes.

4 ADC: Can you listen to the judge's instructions about the
5 law and follow them?

6 MEMBER: [(b) (6), (b) (7)(C)]: Yes.

7 ADC: I have nothing further.

8 MJ: Trial counsel, any follow up?

9 STC: No Your Honor.

10 MJ: I had one, with regard to your Airman at Nellis, you
11 said after the command got involved; her performance went the
12 other way. I just want to make sure I understand what the other
13 way was. You said her performance deteriorated after the
14 command got involved?

15 MEMBER: (b) (6), (b) (7)(C)]: Yes.

16 MJ: Alright. Was there anything in particular that you
17 attributed the deterioration to?

18 MEMBER: (b) (6), (b) (7)(C): Um, I think she did a good
19 job hiding the challenges she was facing and when it became
20 exposed, it wasn't worth hiding anymore. And of course, our
21 first concern was to be there to help her through those troubled
22 times; help her learn to be a better parent and provide her aid

1 and assistance that she needed. She didn't really take to that,
2 it seemed like she became more withdrawn from her parental
3 responsibilities and then that affected her job performance.
4 She was late to work, a lot of appointments, didn't take care of
5 herself anymore, those kinds of things.

6 MJ: Okay, those were my questions. Did those raise any
7 further questions from counsel?

8 STC: No.

9 ADC: No.

10 MJ: Okay, thank you. You may return to the deliberation
11 room and if Lt Col Kovich could join us.

12 (b) (6), (b) (7)(C) departed the court room.]

13 [Lt Col Kovich entered the court room.]

14 MJ: Sir, go ahead and take a seat in the front row.
15 Counsel has some additional questions for you.

16 STC: Sir, good afternoon. I just had some areas I wanted
17 to ask you about that came up in group voir dire. The first
18 area sir, you indicated you served on a court martial
19 previously?

20 MEMBER: [Lt Col Kovich]: I have.

21 STC: How many court martials have you served on?

1 MEMBER: [Lt Col Kovich]: I served on two court martials
2 and then one administrative discharge board.

3 STC: Could you tell us when those court martials occurred?

4 MEMBER: [Lt Col Kovich]: They were between 2004 and 2007
5 at RAF Lakenheath and RAF Mildenhall.

6 STC: Do you remember roughly what those cases were about
7 sir?

8 MEMBER: [Lt Col Kovich]: One individual airman accused of
9 taking ecstasy in the local village and the other was an airman
10 accused of taking laptop computers.

11 STC: Do you remember the results of those two cases?

12 MEMBER: [Lt Col Kovich]: They were both found guilty but I
13 don't remember the exact sentence.

14 STC: Is there anything about those courts martial that
15 would affect your ability to give this accused fair and
16 impartial trial?

17 MEMBER: [Lt Col Kovich]: Nothing.

18 STC: In the administrative discharge board, when was that?

19 MEMBER: [Lt Col Kovich]: Just a month or so ago for a PT
20 failure.

21 STC: Was there any participants of this trial in that
22 administrative discharge board?

1 MEMBER: [Lt Col Kovich]: No they weren't.

2 STC: Do you remember what the result of that board was?

3 MEMBER: [Lt Col Kovich]: The recommendation from the board
4 was to discharge.

5 STC: Is there anything about that board that would affect
6 your ability to give this accused a fair and impartial trial?

7 MEMBER: [Lt Col Kovich]: No.

8 STC: You indicated when Captain Princip was asking
9 questions that you knew someone in a similar agency to CYFD?

10 MEMBER: [Lt Col Kovich]: Um, yea I don't know anyone
11 personally, but I've worked with them as a commander here and
12 I've worked with CYFD on one occasion in particular with an
13 Airman in my squadron and his family.

14 STC: What was that when you had the opportunity to work
15 with CYFD?

16 MEMBER: [Lt Col Kovich]: It was back in August of this
17 year.

18 STC: Is that still an ongoing situation?

19 MEMBER: [Lt Col Kovich]: It is still an ongoing case that
20 CYFD continues to monitor the family's situation.

21 STC: How much involvement have you had?

1 MEMBER: [Lt Col Kovich]: I've not had any personal
2 involvement since meeting with CYFD and the OSI investigator
3 back in August, but since then I know they are doing their job
4 and don't keep regular contact with them.

5 STC: Do you know if that case involves any child abuse or
6 any allegation of child abuse?

7 MEMBER: [Lt Col Kovich]: Not that, more child
8 endangerment, or neglect; that kind of thing. I am not aware of
9 any abuse in that case.

10 STC: When you talked about - - you indicated you had
11 subordinates who had troubled family situation, is that
12 something--the same thing you referred to just now? Or is that
13 different?

14 MEMBER: [Lt Col Kovich]: That case was one and we had
15 another situation in the squadron where one Airman had family
16 issue where we reported to family advocacy and I understand that
17 they contact CYFD. That is a very recent case that just
18 started, I'm not sure of the outcome of that.

19 STC: Anything from those situations that would affect your
20 ability to give this accused a fair and impartial trial here?

21 MEMBER: [Lt Col Kovich]: Nothing at all.

1 STC: The last thing was, were you one of those people who
2 knew MSgt (b) (6),
 (b) (7)(C)

3 MEMBER: [Lt Col Kovich]: I know him, I could point him out
4 in a crowd, but I don't think I've ever had a conversation with
5 him. I know him as a first sergeant.

6 STC: Okay sir, and knowing he's a first sergeant, is that
7 going to cause you to give his testimony, if he was to testify,
8 any more or less weight to any other witness?

9 MEMBER: [Lt Col Kovich]: No.

10 STC: Thank you sir, defense may have some questions for
11 you.

12 MJ: Defense?

13 ADC: Yes sir, just to follow up on those cases you
14 mentioned. Could you just briefly tell us what they were about?

15 MEMBER: [Lt Col Kovich]: The CYFD case, the first one, NCO
16 in my squadron, he and his wife had put their four children in a
17 not very good situation, children had been removed from the
18 household on two separate occasions. Their now back with - - in
19 the home, but I know they are being monitored by family
20 advocacy.

21 ADC: How about the other?

1 MEMBER: [Lt Col Kovich]: Similar situation, house was in a
2 wreck, firearm unattended to lying on the floor with a young
3 child in the household and that was referred to family advocacy
4 and they contacted CYFD. That is all ongoing.

5 ADC: Are you aware of any criminal charges right now, for
6 example downtown?

7 MEMBER: [Lt Col Kovich]: No they were charged with child
8 endangerment here locally - - on the first case and I
9 administered an Article 15 punishment and the second one is
10 still pending.

11 ADC: What kind of punishment did the person receive?

12 MEMBER: [Lt Col Kovich]: For the Article 15 it was a
13 reprimand and additional duty and also a suspended bust.

14 ADC: Did you also mention that you had familiarity with a
15 domestic violence case?

16 MEMBER: [Lt Col Kovich]: No, it was just two cases there.

17 ADC: Have you had prior experience as a commander or
18 supervisor of subordinates who've had domestic violence cases or
19 assaults in the past?

20 MEMBER: [Lt Col Kovich]: Assaults, but not of a domestic
21 violence nature.

22 ADC: Could you tell us about the assaults?

1 MEMBER: [Lt Col Kovich]: Sure, so simple assault was
2 charged. An Airman inappropriately touching another Airman; so
3 it was listed as simple assault on that one. Another separate
4 occasion where it didn't go down as simple assault, but a
5 harassment charge. So both cases handled with nonjudicial
6 punishment.

7 ADC: Were these male to female type of assaults?

8 MEMBER: [Lt Col Kovich]: One case was female to female and
9 the other a male harassing a female.

10 ADC: Do you recall what kind of punishment you imposed?

11 MEMBER: [Lt Col Kovich]: So, these occurred in the AOR,
12 the first one the punishment for the female was reprimand and
13 took a stripe in that case. The second one there was a
14 reprimand and took a stripe there as well and both were sent
15 home early from the AOR.

16 ADC: The reason we ask these questions is because we want
17 today's case to stand on its own and not compare it to prior
18 cases, we just want you to sit here and listen to the evidence
19 in this case today. Are you able to do that fairly?

20 MEMBER: [Lt Col Kovich]: Yes.

21 ADC: That is all sir.

22 MJ: Trial counsel, any follow up?

1 STC: No Your Honor.

2 MJ: Lt Col Kovich, you may return to the deliberation room
3 and if Major Wageman could join us.

4 [Lt Col Kovich departed the court room.]

5 [Major Wageman entered the court room.]

6 MJ: Sir, go ahead and have a seat anywhere in the front
7 row. Counsel has some follow up questions for you. Trial
8 counsel?

9 STC: Thank you. Sir, good afternoon again, I had just
10 some areas I wanted to cover. Real quick, did you indicate that
11 you knew MSgt (b) (6),
(b) (7)(C)

12 MEMBER: [Major Wageman]: I did not.

13 STC: Then I understand that you rate (b) (6), (b) (7)(C) ?

14 MEMBER: [Major Wageman]: Yes sir.

15 STC: How long have you been her rater sir?

16 MEMBER: [Major Wageman]: About four months now.

17 STC: In the context of your every day job, how much
18 interaction would you say you have with her?

19 MEMBER: [Major Wageman]: Pretty significantly, almost
20 daily, she is the (b) (6), (b) (7)(C). And since we are a
21 training squadron, it is our primary emphasis, so I deal with
22 her and her shop almost every day.

1 STC: Despite that and knowing that she's a (b) (6), (b) do you
2 believe that you would feel any anger or embarrassment if she
3 were to disagree with you if you were both picked for his panel?

4 MEMBER: [Major Wageman]: Absolutely not.

5 STC: And since you do interact with her daily, do you
6 think that she would have any hesitation to disagree with you or
7 feel that she would have some bad reaction from you if she were
8 to disagree with you?

9 MEMBER: [Major Wageman]: I do not believe that, no.

10 STC: Do you believe that there's anything about your
11 interactions with (b) (6), (b) (7)(C) or your actions in rating her
12 that would affect your ability to give this accused a full, fair
13 and impartial trial?

14 MEMBER: [Major Wageman]: No.

15 STC: Thank you sir, that is all I have. The defense may
16 have other questions.

17 MJ: Defense?

18 ADC: Yes sir. Just briefly, you mentioned you were
19 familiar with some custody issues with someone you knew or maybe
20 personally?

21 MEMBER: [Major Wageman]: (b) (6), (b) (7)(C)

22 (b) (6), (b) (7)(C)

1 (b) (6), (b) (7)(C)

2 (b) (6), (b) (7)(C)

3 (b) (6), (b) (7)(C)

4 (b) (6), (b) (7)(C)

5 (b) (6), (b) (7)(C)

6 (b) (6), (b) (7)(C) .

7 ADC: I understand. (b) (6), (b) (7)(C)

8 (b) (6), (b) (7)(C)

9 MEMBER: [Major Wageman]: (b) (6), (b) (7)(C)

10 (b) (6), (b) (7)(C)

11 ADC: (b) (6), (b) (7)(C)

12 (b) (6), (b) (7)(C)

13 MEMBER: [Major Wageman]: (b) (6), (b) (7)(C)

14 (b) (6), (b) (7)(C)

15 (b) (6), (b) (7)(C)

16 (b) (6), (b) (7)(C) .

17 ADC: (b) (6), (b) (7)(C)

18 MEMBER: [Major Wageman]: (b) (6), (b) (7)(C)

19 (b) (6), (b) (7)(C)

20 (b) (6), (b) (7)(C)

21 ADC: Thank you sir. Nothing further.

22 MJ: Trial counsel anything further?

1 STC: No Your Honor.

2 MJ: I'm going to follow up on your interactions with
3 **(b) (6), (b) (7)(C)**, in the course of your duties and your
4 interactions with her, can you recall an instance where she has
5 had an opportunity to express an opinion different from yours or
6 disagree with you on any issue?

7 MEMBER: [Major Wageman]: Almost daily and my briefing to
8 her is not to get me involved because there is nothing I can do
9 and don't want to hamper her shop's progress. I encourage her
10 to make all the decisions herself and bring one or two solutions
11 to me to look over.

12 MJ: So when you say that you think she wouldn't have a
13 problem disagreeing with you, you base that on personal
14 experience?

15 MEMBER: [Major Wageman]: Yes sir.

16 MJ: And have you observed that your position or rank has
17 any in anyway deterred her from expressing her honest opinions?

18 MEMBER: [Major Wageman]: No sir.

19 MJ: Those are all the questions, any follow up counsel?

20 STC: No Your Honor.

21 MJ: Sir, you can return to the deliberation room, please
22 ask **(b) (6), (b) (7)(C)** to join us.

1 [Major Wageman departed the court room.]

2 (b) (6), (b) (7)(C) entered the court room.]

3 MJ: (b) (6), (b) (7)(C) please have a seat in any chair on the
4 front row, counsel may have some follow up for you. Trial
5 counsel?

6 STC: Thank you. (b) (6), (b) (7)(C) good afternoon again, just had a
7 few areas I wanted to ask you about. The first one, you've had
8 previous court martial experience?

9 MEMBER: [(b) (6), (b) (7)(C)] Yes.

10 STC: How much court martial experience do you have?

11 MEMBER: (b) (6), (b) (7)(C)]: I've been on two. I actually sat
12 through two.

13 STC: Have you been through this process having questions
14 been asked of you on any more than that?

15 MEMBER: (b) (6), (b) (7)(C)]: More than the two?

16 STC: Yes.

17 MEMBER: [(b) (6), (b) (7)(C)] : No.

18 STC: In those two times, when did those occur?

19 MEMBER: (b) (6), (b) (7)(C)]: Within the last year.

20 STC: Were any parties to this proceeding in those?

21 MEMBER: [(b) (6), (b) (7)(C)] : Captain Rosenow was on one of
22 them.

1 STC: Do you remember what those two court marshals were
2 about ma'am?

3 MEMBER: [(b) (6), (b) (7)(C)]: One was about underage drinking
4 and sodomy and the other was underage drinking, I think.

5 STC: Do you remember what the results of those two trials
6 were?

7 MEMBER: [(b) (6), (b) (7)(C)]: One he plead guilty and we just
8 had to give a sentence and the other one it was, we found him
9 guilty.

10 STC: Do you remember what the sentences were?

11 MEMBER: [(b) (6), (b) (7)(C)]: I don't remember.

12 STC: Is there anything about those cases or your
13 experiences on those cases that would affect your ability to
14 give this accused a full, fair, and impartial trial?

15 MEMBER: [(b) (6), (b) (7)(C)]: No.

16 STC: The other area was that you indicated that you had
17 dealings with the legal office?

18 MEMBER: [(b) (6), (b) (7)(C)]: Yes.

19 STC: Could you describe in general terms your dealings
20 with the legal office?

21 MEMBER: [(b) (6), (b) (7)(C)]: Well I am a commander so I deal
22 with them quite frequently on many issues.

1 STC: Have you dealt with Captain Johnson?

2 MEMBER: [(b) (6), (b) (7)(C)]: No, not yet.

3 STC: And uh, those interactions, would that cause you to
4 give the government's case more or less weight or the defense's
5 case more or less weight?

6 MEMBER: [(b) (6), (b) (7)(C)]: No.

7 STC: I believe Captain Princip asked if anyone's had
8 experience with subordinates that have troubled families, could
9 you describe for us what you were indicating there?

10 MEMBER: [(b) (6), (b) (7)(C)]: I had an Airman who was involved
11 in domestic violence and I had to go through a proceeding with
12 him, went through a divorce with his wife, a barment from base;
13 it was issues with his wife that was the abuser and so I went
14 through that with him and he actually had to get a humanitarian
15 assignment to get him away from Holloman.

16 STC: Okay so it sounds like the Airman you had, he was the
17 victim of domestic violence and it was her that was barred from
18 base?

19 MEMBER: [(b) (6), (b) (7)(C)]: Yes.

20 STC: You said proceedings - - was that a downtown
21 proceeding?

22 MEMBER: [(b) (6), (b) (7)(C)]: Yes.

1 STC: Was that criminal proceedings for her?

2 MEMBER: (b) (6), (b) (7)(C) No, it was just for a restraining
3 order and stuff like that.

4 STC: How long ago was that?

5 MEMBER: [(b) (6), (b) (7)(C)]: About seven months ago.

6 STC: How much personal involvement did you have with that
7 Airman throughout that process?

8 MEMBER: (b) (6), (b) (7)(C)]: I was the one who actually had to
9 put in the package for the barment for her. I did go downtown
10 with him with the shirt for the hearing for the no contact order
11 he tried to pursue.

12 STC: Is there anything about that situation ma'am that you
13 believe would affect your ability to give this accused a full,
14 fair, and impartial trial?

15 MEMBER: (b) (6), (b) (7)(C) No.

16 STC: That is all I have, defense may have some questions
17 for you.

18 MJ: Defense?

19 ADC: The matter you just discussed with Captain Neil, was
20 the wife physically abusive?

21 MEMBER: [(b) (6), (b) (7)(C)]: Yes.

22 ADC: Was it a pattern or just a one-time thing?

1 MEMBER: (b) (6), (b) (7)(C)]: We thought it was an isolated
2 incident but then as it came out, it happened over a period of
3 time.

4 ADC: How did it come out?

5 MEMBER: [(b) (6), (b) (7)(C)]: She held a gun to his head and he
6 came to us and he let us know and we had to start the
7 investigation to that incident.

8 ADC: Did you investigate?

9 MEMBER: (b) (6), (b) (7)(C)]: It was security forces.

10 ADC: Did it turn out that she'd done more than this?

11 MEMBER: (b) (6), (b) (7)(C)]: She didn't do more than that, but
12 she held a gun to his head and that was confirmed which caused
13 us to go through the barment, and bringing him on base and her
14 off base; that was kind of where it left off and he didn't
15 prosecute.

16 ADC: So, he didn't report to police downtown then?

17 MEMBER: (b) (6), (b) (7)(C)]: Actually, he had to after OSI
18 started to investigate it; it had to go downtown.

19 ADC: But he didn't want to pursue anything further?

20 MEMBER: [(b) (6), (b) (7)(C)] Right.

21 ADC: Did they have children by any chance?

22 MEMBER: (b) (6), (b) (7)(C)]: No children.

1 ADC: You understand why I am asking right? What we don't
2 want is for you to draw similarities between the two cases and
3 look at them side by side and keep them separate, can you do
4 that and view this case for what it is today?

5 MEMBER: [(b) (6), (b) (7)(C)]: Yes.

6 ADC: You mentioned that you were familiar with someone who
7 had custody issues?

8 MEMBER: (b) (6), (b) (7)(C)]: (b) (6), (b) (7)(C)

9 (b) (6), (b) (7)(C)

10 (b) (6), (b) (7)(C)

11 (b) (6), (b) (7)(C)

12 (b) (6), (b) (7)(C)

13 ADC: And you also mentioned sitting on a CRB?

14 MEMBER: [(b) (6), (b) (7)(C)]: Yes it was with this Airman I was
15 talking about.

16 ADC: Are you familiar with any other cases and CRBs?

17 MEMBER: [(b) (6), (b) (7)(C)]: No.

18 ADC: Thank you very much. Nothing further.

19 MJ: Thank you (b) (6), (b) (7)(C) , you can return to the
20 deliberation room, if Major Degon can join us.

21 (b) (6), (b) (7)(C) departed the court room.]

22 [Major Degon entered the court room.]

1 MJ: Major Degon, you can take a seat in the front row and
2 I think counsel has some follow up questions for you. Trial
3 counsel?

4 STC: Thank you Your Honor. Sir, good afternoon again. I
5 just have a couple things I wanted to ask you about. First,
6 hopefully it is an easy one, are we pronouncing your name
7 correctly?

8 MEMBER: [Major Degon]: De-gone

9 STC: Okay sir. We apologize for any mispronunciations.
10 First, your previous court martial experiences? How many courts
11 martials have you sat on?

12 MEMBER: [Major Degon]: One.

13 STC: When was that sir?

14 MEMBER: [Major Degon]: Probably a year ago, right here.

15 STC: Do you remember if the parties to this case were on
16 that one?

17 MEMBER: [Major Degon]: Captain Rosenow was there, he's
18 sitting in the same spot.

19 STC: Do you remember what that case was about generally?

20 MEMBER: [Major Degon]: Yea, it was a peeping tom case.
21 The same thing, we didn't have to decide if he was guilty, we
22 just sentenced him.

1 STC: Do you remember what the sentence was sir?

2 MEMBER: [Major Degon]: I think we gave him 90 days
3 confinement and a bad conduct discharge.

4 STC: Is there anything about that experience sir that
5 would affect your ability to give this accused a full, fair, and
6 impartial trial?

7 MEMBER: [Major Degon]: No.

8 STC: Sir, you may have indicated that you knew MSgt Wolfe?

9 MEMBER: [Major Degon]: No.

10 STC: You did not? Okay, I'm sorry. That's all I have for
11 you. The defense may have something for you.

12 MJ: Defense counsel?

13 ADC: Thank you Your Honor. This prior court martial that
14 you say Captain Rosenow was on, is that the only time you've had
15 to observe Captain Rosenow?

16 MEMBER: [Major Degon]: Yes.

17 ADC: Is there anything about his performance during that
18 court martial that would influence you in any way to give his
19 arguments more or less weight in the case before us today?

20 MEMBER: [Major Degon]: No.

21 ADC: Thank you sir.

1 MJ: Major Degon thank you. You may return to the
2 deliberation room, if Major Woods could join us.

3 [Major Degon departed the court room.]

4 [Major Woods entered the court room.]

5 MJ: Major Woods, please have a seat in the front row.
6 Counsel may have some additional questions for you. Trial
7 counsel?

8 STC: Your Honor, the government has no questions for Major
9 Woods at this time.

10 MJ: Alright, defense counsel?

11 ADC: Thank you sir. I just have a couple of very brief
12 questions for you. Do you recognize any of the trial counsel
13 here from prior interactions?

14 MEMBER: [Major Woods]: No sir.

15 ADC: Sir, you mentioned that you previously sat on a court
16 martial and went through the same kind of experience, this voir
17 dire. Is that correct?

18 MEMBER: [Major Woods]: Yes sir.

19 ADC: Do you recall what you discussed there?

20 MEMBER: [Major Woods]: It was a trial, I was an alternate
21 and I don't know how many years ago we did different trials or

1 whatever, but I was an alternate for the board. If you want me
2 to go into what the board was - -

3 ADC: Just generally.

4 MEMBER: [Major Woods]: It is kind of awkward, but it was a
5 woman who took part in three-some act and therefore she was
6 getting eliminated for the gay policy in the Air Force at the
7 time.

8 ADC: So it was an administrative discharge board?

9 MEMBER: [Major Woods]: I have no idea.

10 ADC: Thank you. Nothing further.

11 MJ: Trial counsel, any follow up?

12 STC: No Your Honor.

13 MJ: Okay Major Woods, you may return to the deliberation
14 room and if (b) (6), (b) (7)(C) can join us.

15 [Major Woods departed the court room.]

16 [(b) (6), (b) (7)(C) entered the court room.]

17 MJ: (b) (6), (b) (7)(C), you may have a seat anywhere in the
18 front row, I think counsel may have some follow up questions for
19 you. Trial counsel?

20 STC: Thank you Your Honor. (b) (6), (b) (7)(C), I just had a
21 few questions that I wanted to ask you about. First is, I want

1 to talk to you about your previous court martial experience.

2 How many times have you served on a court martial?

3 MEMBER: [(b) (6), (b) (7)(C)]: I sat on a discharge board once
4 before and a special court martial once before that.

5 STC: Were those both here at Holloman?

6 MEMBER: [(b) (6), (b) (7)(C)]: Yes they were.

7 STC: Were either the defense counsel or trial counsel part
8 of that?

9 MEMBER: [(b) (6), (b) (7)(C)]: Yes, Captain Princip was.

10 STC: Which one was that, the admin discharge board or the
11 court martial?

12 MEMBER: [(b) (6), (b) (7)(C)]: I believe it was the discharge
13 board, but I'm not sure. They were both very recent, within the
14 last few months.

15 STC: Okay, fair enough. Do you remember what the court
16 martial generally was - the charges in that case?

17 MEMBER: [(b) (6), (b) (7)(C)]: Uh, the court martial I am
18 mixing both of them up, the court martial was for ecstasy or
19 drug use and the defendant plead guilty already so it was just a
20 sentencing case.

21 STC: Do you remember what the sentence was that you all
22 reached?

1 MEMBER: [(b) (6), (b) (7)(C)]: Um, it was a reduction in rank
2 and restriction I believe.

3 STC: Is there anything about your previous court martial
4 experience or administrative discharge board experience that
5 would affect your ability to give this accused a full, fair, and
6 impartial trial?

7 MEMBER: [(b) (6), (b) (7)(C)]: No.

8 STC: You also indicated that you knew Captain (b)(6); (b)
(7)(C) ?

9 MEMBER: (b) (6), (b) (7)(C)]: Yes.

10 STC: How do you know him?

11 MEMBER: [(b) (6), (b) (7)(C)]: I have two young children and
12 he's their provider, so I've seen him a number of times over the
13 past two years that I've been at this base.

14 STC: Have you had any interaction with him other than when
15 you've taken your children for appointments?

16 MEMBER: (b) (6), (b) (7)(C) : No, just that.

17 STC: What is your view of him as a pediatrician and as a
18 doctor?

19 MEMBER: [(b) (6), (b) (7)(C)]: Um, we like him.

20 STC: Your interaction with him and having taken your kids
21 to him, is there anything that would cause you to give his
22 testimony more or less weight because of that?

1 MEMBER: [(b) (6), (b) (7)(C)]: No.

2 STC: Do you believe that you would be able to separate in
3 your mind your view of him as a pediatrician when evaluating his
4 testimony if he was to testify?

5 MEMBER: [(b) (6), (b) (7)(C)]: Yes.

6 STC: The last area I wanted to ask you about is you are
7 rated by Major Wageman?

8 MEMBER: [(b) (6), (b) (7)(C)]: Yes.

9 STC: How much interaction would you say you have with
10 Major Wageman?

11 MEMBER: [(b) (6), (b) (7)(C)]: Daily.

12 STC: In that daily interaction, do you have any hesitance
13 to disagree with him or express an opinion that is different
14 than his?

15 MEMBER: [(b) (6), (b) (7)(C)]: No.

16 STC: Do you believe that you would feel in any way
17 restrained from doing so if you were both picked to serve on
18 this panel?

19 MEMBER: [(b) (6), (b) (7)(C)]: No.

20 STC: And do you think there is any possibility that he
21 would feel upset or embarrassed if you were to disagree with
22 him?

1 MEMBER: [(b) (6), (b) (7)(C)]: No.

2 STC: And just to sum it all up, is there anything of the
3 areas we talked about that you feel would affect your ability to
4 give this accused a full, fair, and impartial trial?

5 MEMBER: [(b) (6), (b) (7)(C)]: No.

6 STC: Thank you, that is all I have, defense counsel may
7 have some questions for you.

8 ADC: Thank you (b) (6), (b) (7)(C) , is there anything about my
9 performance in that board or court martial that would affect the
10 way you give weight to what I am saying here today?

11 MEMBER: [(b) (6), (b) (7)(C)]: No.

12 ADC: So, you are going to look at this completely
13 independently from the case you hear today?

14 MEMBER: [(b) (6), (b) (7)(C)]: Yes.

15 ADC: Okay, you go to Captain (b)(6); (b)(7)(C) . How many children
16 do you have?

17 MEMBER: (b) (6), (b) (7)(C) Two.

18 ADC: How old are they?

19 MEMBER: [(b) (6), (b) (7)(C)]: (b) (6), (b) (7)(C)

20 (b) (6),
(b) (7)

21 ADC: (b) (6), (b) (7)(C)

22 MEMBER: [(b) (6), (b) (7)(C)]: Yes.

1 ADC: (b) (6), (b) (7)(C)

2 MEMBER: [(b) (6), (b) (7)(C)]: (b) (6), (b) (7)(C)

3 ADC: (b) (6), (b) (7)(C)

4 (b) (6), (b) (7)(C)

5 MEMBER: (b) (6), (b) (7)(C)]: He likely will be.

6 ADC: Okay, how frequently do you take your kids to him?

7 MEMBER: (b) (6), (b) (7)(C) Um, probably every six months
8 or so; maybe three to six months.

9 ADC: So just check-ups?

10 MEMBER: (b) (6), (b) (7)(C)]: Yes.

11 ADC: Is there ever a time when they were sick and had to
12 take them in more frequently and had to deal with him?

13 MEMBER: (b) (6), (b) (7)(C) No.

14 ADC: And in dealing with him, if he was up there
15 testifying that you would trust him more than any other doctor,
16 just because you personally interacted with him?

17 MEMBER: (b) (6), (b) (7)(C)]: No.

18 ADC: Captain Neil also asked you about whether you are
19 comfortable disagreeing with Major Wageman. Do you remember the
20 last time you disagreed with him?

21 MEMBER: [(b) (6), (b) (7)(C)]: Um, not specifically, maybe a
22 few weeks ago. I work in the training shop in my squadron and

1 sometimes we have different opinions on squadron policies, that
2 sort of thing; nothing major.

3 ADC: Okay, do you feel comfortable walking into his office
4 any time?

5 MEMBER: [(b) (6), (b) (7)(C)] Yes.

6 ADC: Is there anything to cause you some hesitation if you
7 disagreed with something he was saying in the deliberation room?
8 Would you hesitate to speak up and disagree with him?

9 MEMBER: [(b) (6), (b) (7)(C)] No.

10 ADC: Alright, and sorry to put you on the spot, you went
11 to the academy right?

12 MEMBER: [(b) (6), (b) (7)(C)]: Yes.

13 ADC: Do you by any chance recognize Captain Rosenow?

14 MEMBER: [(b) (6), (b) (7)(C)]: I did go to school with him.

15 ADC: Alright, were you in the same major?

16 MEMBER: [(b) (6), (b) (7)(C)]: Yes, we had the same major.

17 ADC: Is there anything about that relationship, well first
18 let me ask you if you were close friends at the time?

19 MEMBER: [(b) (6), (b) (7)(C)] No, we really didn't interact
20 socially outside of class.

21 ADC: Did you hear of him or know of him?

1 MEMBER: [(b) (6), (b) (7)(C)]: Being here? I knew he was at
2 this base but I don't think we ever spoke since school.

3 ADC: Is there anything about your experiences or knowing
4 something about his reputation that would cause you to give what
5 he says more or less weight than anyone else in the court room?

6 MEMBER: [(b) (6), (b) (7)(C)]: No.

7 ADC: Thank you.

8 MJ: Trial counsel, any follow up?

9 STC: Just briefly, I just want to ask you about that last
10 area, we are going to ask you about Captain Rosenow. What
11 interaction did you actually have with him at the academy?

12 MEMBER: [(b) (6), (b) (7)(C)]: Basically just in class, we had
13 a few classes together since we had the same major.

14 STC: Did you have any study groups with him?

15 MEMBER: [(b) (6), (b) (7)(C)]: Not that I can remember.

16 STC: After the academy, have you had any interaction with
17 Captain Rosenow?

18 MEMBER: [(b) (6), (b) (7)(C)]: No.

19 STC: That is all I have.

20 MJ: Alright, [(b) (6), (b) (7)(C)] you may return to the
21 deliberation room. If Chief Stubbs can join us.

22 [(b) (6), (b) (7)(C)] departed the court room.]

1 [Chief Stubbs entered the court room.]

2 MJ: Chief, if you could have a seat anywhere in the front
3 row under a microphone, counsel may have some follow up
4 questions for you. Trial counsel?

5 STC: Thank you, there is just a couple areas we wanted to
6 ask you about. First off, did you indicate that you knew MSgt

7 (b) (6),
(b) (7)(C)

8 MEMBER: [CMSgt Stubbs]: Yes.

9 STC: Could you please describe how you know him?

10 MEMBER: [CMSgt Stubbs]: Sir, I am a maintenance group
11 chief here and he was one of our shirts for our squadron
12 underneath me.

13 STC: How long have you known him?

14 MEMBER: [CMSgt Stubbs]: About a year.

15 STC: How much interaction would you say you've had with
16 him?

17 MEMBER: [CMSgt Stubbs]: Probably daily.

18 STC: What are your opinions of MSgt (b) (6),
(b) (7)(C)

19 MEMBER: [CMSgt Stubbs]: Great first sergeant, I've sought
20 advice from him when stuff comes up from the group; very
21 knowledgeable, well educated first sergeant.

1 MEMBER: [CMSgt Stubbs]: There were so many cases sir, some
2 of them were abuse and neglect; about thirteen different cases
3 on that certain board.

4 STC: So there is number of cases but you can't remember
5 any specific details of any cases?

6 MEMBER: [CMSgt Stubbs]: Yes sir.

7 STC: Is there anything that is going to cause you to meld
8 or compare this case to any of those cases?

9 MEMBER: [CMSgt Stubbs]: No sir.

10 STC: Do you believe you will be able to keep that separate
11 in your mind?

12 MEMBER: [CMSgt Stubbs]: Yes sir.

13 STC: Do you believe there is anything that would affect
14 your ability to give this accused a full, fair, and impartial
15 trial?

16 MEMBER: [CMSgt Stubbs]: No sir.

17 STC: Thank you Chief, that is all I have. Defense may
18 have some questions for you.

19 MJ: Defense counsel?

20 ADC: Thank you, I just have a few follow up questions.

21 Um, do you remember when sergeant (b) (6),
22 group? (b) (7)

1 MEMBER: [CMSgt Stubbs]: Yes sir. It was just last year,
2 and I had got here about thirteen months ago and he was there
3 thirteen months ago when I first came into the squadron.

4 ADC: So, you've known him since say October of 2011?

5 MEMBER: [CMSgt Stubbs]: Yes sir.

6 ADC: Okay and how long was he in the maintenance group?

7 MEMBER: [CMSgt Stubbs]: Sir, I believe just the time I was
8 there was all I knew. I didn't know any time before that.

9 ADC: Do you know if he left since the time you've gotten
10 there?

11 MEMBER: [CMSgt Stubbs]: Yes sir, he has gone over to LRS I
12 believe.

13 ADC: Do you when that happened?

14 MEMBER: [CMSgt Stubbs]: I want to say September of this
15 year.

16 ADC: Okay and you said that you had daily interactions
17 with him, could you explain that further for the record like how
18 you guys would interact?

19 MEMBER: [CMSgt Stubbs]: Yes sir, just daily meetings.
20 Every Monday the first sergeants come to their commander through
21 Colonel (b) (6), (b) (7)(C) and we have a meeting and we discuss our weekend

1 activities and where we are on some cases in the maintenance
2 groups.

3 ADC: Would you discuss troublesome Airmen?

4 MEMBER: [CMSgt Stubbs]: Absolutely sir, yes.

5 ADC: How frequently would you do that?

6 MEMBER: [CMSgt Stubbs]: Every Monday sir, if they had a
7 case brought up. Some weeks we didn't have anything at all; no
8 incidents or accidents, just what happened over the weekend we
9 discussed with our boss.

10 ADC: Would you provide advice to him or what would you
11 discuss? Provide guidance to one another?

12 MEMBER: [CMSgt Stubbs]: No sir, just listen and take it
13 all in. More of a commander's area than myself to offer advice.

14 ADC: Would you see him later in the week as well?

15 MEMBER: [CMSgt Stubbs]: Yes.

16 ADC: Could you tell us about that?

17 MEMBER: [CMSgt Stubbs]: Yes, just normal hey how are you
18 doing; the first sergeants need an oil check once in awhile too,
19 so- -

20 ADC: Alright, yes sir. Did you discuss any advice about
21 the unit outside the meeting? Would he come to you and seek
22 advice or would you go to him to discuss different cases?

1 MEMBER: [CMSgt Stubbs]: A couple of times yes sir, but no
2 legal stuff, just venting on me like Chief; this is getting
3 overwhelming and whatever.

4 ADC: Okay. Did you guys have a social relationship
5 outside of that?

6 MEMBER: [CMSgt Stubbs]: No sir.

7 ADC: Is there any kind of negative experience that you had
8 with him?

9 MEMBER: [CMSgt Stubbs]: No sir.

10 ADC: Everything positive then?

11 MEMBER: [CMSgt Stubbs]: Yes sir.

12 ADC: Did you also mention that you had some, or knew about
13 CYFD?

14 MEMBER: [CMSgt Stubbs]: I did not.

15 ADC: I'm sorry, in those CRBs, you mentioned there were
16 thirteen cases there, do you remember if any of those cases
17 involved involvement from downtown authorities?

18 MEMBER: [CMSgt Stubbs]: No sir, just the OSI.

19 ADC: Okay. Were there any instances of domestic violence?

20 MEMBER: [CMSgt Stubbs]: Yes sir.

21 ADC: Do you remember any specifics?

1 MEMBER: [CMSgt Stubbs]: Just where there was pushing and
2 shoving.

3 ADC: Do you know what the disciplinary result of that was?

4 MEMBER: [CMSgt Stubbs]: No sir.

5 ADC: Do you know what was discussed between command and
6 shirt?

7 MEMBER: [CMSgt Stubbs]: No sir, it is very strict, you
8 either say yes or no on the details; nothing further.

9 ADC: Thank you sir, nothing further.

10 MJ: Thank you Chief, you may return to the deliberation
11 room, if (b) (6), (b) (7)(C) could join us.

12 STC: Sir, if we could request a 39(A) session prior to
13 (b) (6), (b) (7)(C) ?

14 MJ: Actually sir, if you return to the deliberation room,
15 we will ask (b) (6), (b) (7)(C) to join us momentarily.

16 [Chief Stubbs departed the court room.]

17 [The court-martial recessed at 1434 hours, 6 November 2012.]

18 **END OF PAGE**

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1 MEMBER: [(b) (6), (b) (7)(C)]: Approximately a year.

2 STC: Okay. And was it a foster parent for one child or
3 did you have several?

4 MEMBER: [(b) (6), (b) (7)(C)] I cared for seven children but not
5 all at the same time.

6 STC: Okay, those children that you were in the care of did
7 you have any interaction with or involvement in any proceedings
8 involving child abuse or domestic violence?

9 MEMBER: [(b) (6), (b) (7)(C)]: No, neglect.

10 STC: Okay. Is there anything about that sir, being a
11 foster parent that you believe would affect your ability to give
12 this accused a full, fair, and impartial trial?

13 MEMBER: [(b) (6), (b) (7)(C)] No.

14 STC: I believe you indicated that you had some dealings
15 with or knowledge of custody issues?

16 MEMBER: [(b) (6), (b) (7)(C)]: Yes.

17 STC: Were you referring to yourself or someone else?

18 MEMBER: [(b) (6), (b) (7)(C)]: Foster parent, I sat in
19 proceedings with custody issues with concern with that and with
20 myself, I have two adult children.

21 STC: And sir, that custody proceeding you dealt with, that
22 was some time ago?

1 MEMBER: [(b) (6), (b) (7)(C)] Yes.

2 STC: Is there anything about those proceedings that would
3 affect your ability to give this accused a full, fair, and
4 impartial trial?

5 MEMBER: [(b) (6), (b) (7)(C)]: No.

6 STC: Thank you (b) (6),
(b) (7), that is all I have, but defense may
7 have some questions for you.

8 MJ: Defense counsel?

9 ADC: Thank you sir. I'm sorry, but I am going to pry into
10 your business a little bit, but do you know if any of those
11 foster children that you took in, if, do you know what was
12 happening with their parents? Did you get specifics on their
13 cases?

14 MEMBER: [(b) (6), (b) (7)(C)]: I did not, on purpose.

15 ADC: Okay, you would just hear from the kids?

16 MEMBER: [(b) (6), (b) (7)(C)]: The children I had were below the
17 age of five.

18 ADC: Okay, do you remember any of their family scenarios?

19 MEMBER: [(b) (6), (b) (7)(C)]: Rephrase?

20 ADC: Do you remember how any of them came to you, for
21 example, were their parents abusing them in certain cases and

1 what was happening to their parents? Were they being prosecuted
2 in court downtown?

3 MEMBER: [(b) (6), (b) (7)(C)]: Yes.

4 ADC: So, could you tell us a little about that?

5 MEMBER: [(b) (6), (b) (7)(C)] It was all neglect. Most of them
6 were drugs or neglect of the children.

7 ADC: And so, the court while dealing with the parents,
8 were they in contact with you to have you take care of the
9 children?

10 MEMBER: [(b) (6), (b) (7)(C)]: The court would not specifically
11 be in contact with me.

12 ADC: How would the process work? How would the children
13 get to you?

14 MEMBER: [(b) (6), (b) (7)(C)]: The state of Texas would contact
15 through a third party, they would come to me, and I was on
16 emergency status. They would call and ask if I could have
17 children in the home, I would say yes. They would give me a
18 brief synopsis of what the situation was and they would bring
19 the children to my home.

20 ADC: Okay, thank you [(b) (6), (b) (7)(C)] I appreciate it.

21 MJ: Trial counsel, anything further?

22 STC: No sir.

1 MJ: (b) (6), you may return to the deliberation room, please
2 ask MSgt Moon to join us.

3 (b) (6), (b) (7)(C) departed the court room.]

4 [MSgt Moon entered the court room.]

5 MJ: MSgt Moon, please have a seat in the front row under
6 one of the microphones; I believe counsel has some follow up
7 questions for you. Trial counsel?

8 STC: Thank you sir. MSgt Moon, I just had a few questions
9 for you, thank you for your patience waiting back there. The
10 first area was and I know you talked to Captain Princip about
11 it, is working with legal. How often would you say you worked
12 with the legal office?

13 MEMBER: [MSgt Moon]: Um, just recently when I became an
14 additional duty first sergeant. So probably two or three times
15 so far.

16 STC: And most of your involvement is with the paralegals?

17 MEMBER: [MSgt Moon]: Yes.

18 STC: And is that doing paperwork, Article 15's and stuff?

19 MEMBER: [MSgt Moon]: Yes.

20 STC: Have you had negative interactions with the legal
21 office?

22 MEMBER: [MSgt Moon]: No.

1 STC: Your interactions with the legal office, is there
2 anything about those that would cause you to give the
3 government's case more or less weight than you would otherwise?

4 MEMBER: [MSgt Moon]: No.

5 STC: You believe there is anything about your interactions
6 with the legal office that would prevent you from giving this
7 accused a full, fair, and impartial trial?

8 MEMBER: [MSgt Moon]: No.

9 STC: I think you indicated that you knew what CYFD was?

10 MEMBER: [MSgt Moon]: No.

11 STC: Okay, you didn't. That's all I have for you, but
12 defense counsel may have some questions.

13 MJ: Defense counsel?

14 ADC: Thank you. Just briefly, you said some had
15 additional duty shirt issues come up, were any of those related
16 to domestic violence issues or family issues?

17 MEMBER: [MSgt Moon]: No.

18 ADC: Was there anything involving child custody?

19 MEMBER: [MSgt Moon]: NO.

20 ADC: Thank you, nothing further.

21 MJ: Thank you MSgt Moon, you may return to the
22 deliberation room. If TSgt Gonzalez could join us.

1 [MSgt Moon departed the court room.]

2 [TSgt Gonzalez entered the court room.]

3 MJ: TSgt Gonzalez, if you could take a seat in the front
4 row under one of the microphones, I believe counsel has some
5 follow up questions for you. Trial counsel?

6 STC: Thank you Your Honor. Good afternoon, just had one
7 area I wanted to ask you about. You are in the same chain of
8 command as (b) (6), (b) (7)(C) ?

9 MEMBER: [TSgt Gonzalez]: Yes sir.

10 STC: How much interaction would you say that you have with
11 (b) (6), (b) (7)(C) ?

12 MEMBER: [TSgt Gonzalez]: Uh, well since he is in the
13 chain of command, any incident that is major like if we have a
14 fire or whatever, he has to know about it. I would say ninety
15 percent.

16 STC: Is that usually - - how do those interactions work,
17 usually face to face or email?

18 MEMBER: [TSgt Gonzalez]: Most of the time it is face to
19 face if it is something big, but mostly just a telephone call to
20 let him know what happened, what we found, and how do we fix it.

21 STC: In the time you've talked to him, have you had any
22 hesitation expressing your opinion to him?

1 MEMBER: [TSgt Gonzalez]: No sir.

2 STC: Do you believe you have any hesitation expressing
3 your opinion to him or disagreeing with him in the deliberation
4 room?

5 MEMBER: [TSgt Gonzalez]: No sir

6 STC: And do you think that based on your interaction with
7 (b) (6), (b) (7)(C) that he would have any anger or embarrassment
8 if you were or someone in the chain of command would to disagree
9 with him?

10 MEMBER: [TSgt Gonzalez]: No sir.

11 STC: Do you believe there is anything about your
12 interactions with (b) (6), (b) (7)(C) that would affect your
13 ability to give this accused a full, fair, and impartial trial?

14 MEMBER: [TSgt Gonzalez]: No.

15 STC: That is all I have for you, defense may have some
16 questions for you.

17 MJ: Defense?

18 ADC: Thank you sir. Just a couple more questions, what
19 is your current duty title?

20 MEMBER: [TSgt Gonzalez]: I am the assistant fire chief of
21 operations, yes.

1 ADC: Alright. So, when you are talking to (b) (6), (b) (7)(C)

2 (b) (6), (b) (7)(C) what kind of issues are you discussing?

3 MEMBER: [TSgt Gonzalez]: Uh, let's just say, tomorrow
4 morning we are having a meeting about hazmat. If I was the on-
5 duty chief, I would be telling him about sir, this is what we
6 have right now, how we are going to solve the problem, and this
7 is what is going to happen after we solve the problem. So, I
8 just give him the basic information.

9 ADC: Gotcha. Has there been a time in the past that
10 you've disagreed with him?

11 MEMBER: [TSgt Gonzalez]: No.

12 ADC: Thank you so much.

13 MJ: Sergeant Gonzalez, thank you. You may return to the
14 deliberation room and ask TSgt Mustafa to join us.

15 [TSgt Gonzalez departed the court room.]

16 [TSgt Mustafa entered the court room.]

17 MJ: Sergeant Mustafa, please take a seat in the front row
18 under one of the microphones. I believe counsel has some follow
19 up questions for you. Trial counsel?

20 STC: Thank you Your Honor. Good afternoon, we appreciate
21 your patience waiting back there. We just had some areas we
22 wanted to ask you about. The one area I wanted to ask you about

1 is you indicated that you either knew or had some knowledge of
2 what CYFD was?

3 MEMBER: [TSgt Mustafa]: Yes I did.

4 STC: Could you express to us what you were referring to?

5 MEMBER: [TSgt Mustafa]: Only that there is an agency out
6 there but nothing in-depth.

7 STC: Have you had any interaction with them?

8 MEMBER: [TSgt Mustafa]: No.

9 STC: That is all I have, Captain Princip may have
10 something for you.

11 ADC: Do you remember how you came to find out how CYFD
12 exists out there?

13 MEMBER: [TSgt Mustafa]: How? Pretty much just knew.

14 ADC: So like common knowledge?

15 MEMBER: [TSgt Mustafa]: Pretty much yes.

16 ADC: Okay, thank you so much.

17 MJ: Sergeant Mustafa, you may return to the deliberation
18 room. [TSgt Mustafa departed the court room.]

19 MJ: Counsel, let's take a ten minute recess. We are in
20 recess.

21 [The court-martial recessed at 1446 hours, 6 November 2012.]

22 **END OF PAGE**

23

1 **ARTICLE 39(A) SESSION**

2 [The Article 39(a) session was called to order at 1504 hours, 6
3 November 2012. All parties were present, the members were
4 absent.]

5 MJ: The Article 39a session is called to order. Trial
6 counsel, do you have any challenges for cause?

7 STC: No Your Honor.

8 MJ: Defense counsel?

9 ADC: Yes sir. We have three; for (b) (6), (b) (7)(C)
10 (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) , and for (b) (6), (b) (7)(C) .

11 MJ: Alright, trial counsel do you object to any or all?

12 STC: Your Honor, the government does not object to the
13 challenges of (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) , however
14 we object to the challenge of (b) (6), (b) (7)(C)

15 MJ: Great, I see plenty of reason to excuse (b) (6), (b) (7)
(C)

16 (b) (6), (b) (7) and (b) (6), (b) (7)(C) as well, I will grant those
(C)

17 challenges for cause. Defense counsel your basis as to (b) (6),
(b) (7)

18 (b) (6), (b)
(7)(C)

19 ADC: (b) (6), (b) (7)(C) Your Honor, there are a multitude of
20 reasons related to his duties as a foster parent. He noted that
21 he was a foster parent for a year; he was on an emergency list
22 with the state of Texas and actually had seven foster children

1 he took care of. He would receive briefings as to what those
2 children were undergoing, obviously he did this for a year, he
3 was certainly dedicated. He is aware of all these collateral
4 consequences that in this proceeding will not be discussed, but
5 it is certainly implicated in his mind that hey, what kind of
6 burden this is putting on. It is almost evidence in aggravation
7 that hey, this is what we are hearing at this court martial,
8 however in the background you will hear CYFD from Dr. (b) (6), (b)
9 and that CYFD did remove the child from the Kelley's. He will
10 understand the order of events that happened in the background
11 and that's something, that unless the government puts in, that
12 should not be in the members mind, but it will be in his. And
13 his extraordinary devotion to this, as he said, he did not
14 voluntarily stop doing his foster care duties, he actually had
15 to deploy before he stopped. So, based on that we believe there
16 is implied bias, certainly to see past what is being presented
17 in this court martial.

18 MJ: Trial counsel?

19 STC: Thank you Your Honor. The government opposes the
20 challenge for (b) (6), (b) (7)(C) for implied bias. Even with the
21 liberal grant mandate, we don't believe the challenge should be
22 granted. (b) (6), (b) (7)(C) had no hesitation, nor did he show

1 emotion when answering the questions. What was most particular
2 about it, he talked about the foster children and these were all
3 neglect cases. They did not involve abuse cases and
4 particularly when asked by defense counsel, he said he
5 intentionally did not learn the details of what was going on and
6 kept myself removed from that on purpose, and he was simply a
7 foster parent for these children. This case, and there has been
8 no proffer or indication that this case will involve testimony
9 about foster parenting or foster lives. For those reasons, and
10 (b) (6), (b) (7)(C) lack of hesitation when answering, this would not
11 affect his ability to give this accused a fair and impartial
12 trial and his candor in answering the questions, we don't
13 believe there is any implied bias and even with the liberal
14 grant mandate, we ask that the challenge for cause be denied.

15 MJ: Defense counsel?

16 ADC: Your Honor, if I may, the issue concerns the
17 appearance of fairness. We have someone here who is intricately
18 involved with the kind of child protective services role - - he
19 is deeply involved in that. He said I believe when I asked him,
20 did you know about the children's circumstances and he said not
21 on purpose. Clearly he was aware of the system, clearly he did
22 know about some of them. He did say he was briefed on the

1 children, the fact the children were subject to some sort of
2 neglect actually shows that he has some additional implied bias
3 perhaps because what will he be thinking; that there was some
4 neglect in this case as well, something that isn't brought up in
5 the evidence. So, just as a whole, he will be seeing things
6 that are not presented in this court room.

7 MJ: Thank you, after considering the arguments of both
8 sides, my view of both (b) (6), (b) (7)(C) responses and his demeanor
9 cause me no concerns of actual bias, even in terms of implied
10 bias, I am not really concerned that he is hiding something or
11 that there may be something in terms of bias that he is not
12 particularly aware of. My concern chiefly is in the area of
13 appearance. From appearances I can see how an outsider looking
14 in might view (b) (6), (b) (7)(C) as someone who has identified himself
15 as an advocate for abused and neglected children and in that
16 role, I think it would reflect poorly on the military justice
17 system to have someone so identified involved in the case, so
18 under the liberal grant mandate, I will grant the challenge for
19 cause against (b) (6), (b) (7)(C) Trial counsel, do you have a
20 peremptory challenge?

21 STC: One moment Your Honor. Sir, the government has no
22 peremptory challenge.

1 MJ: Trial counsel, by my count we are at ten members, four
2 of whom are enlisted?

3 STC: That is correct Your Honor.

4 MJ: Defense counsel?

5 ADC: Sir, just a brief moment. We would like to use our
6 peremptory strike on (b) (6), (b) (7)(C) .

7 MJ: Very well. (b) (6), (b) (7)(C) , (b) (6), (b)
8 (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) , and (b) (6), (b) (7)(C) will be excused. What
9 we will do is we will take a recess at this point, I will notify
10 those four members that they've been excused and we will use
11 that opportunity to reconfigure the court room and figure out
12 what order the members will come in and then counsel are we
13 ready to proceed with presentation of the case?

14 STC: The government is prepared to proceed Your Honor.

15 MJ: Defense?

16 ADC: Yes Your Honor.

17 MJ: Okay, we are in a brief recess.

18 [The Article 39(a) session recessed at 1511 hours, 6 November
19 2012.]

20 **END OF PAGE**

1 stipulated that all documents referenced herein are admissible
2 for all purposes.

3 The accused is assigned to the 49th Logistics Readiness
4 Squadron at Holloman Air Force Base, New Mexico. He entered
5 active duty on 5 January 2010 and has 2 years and 10 months of
6 total active military service. He is 21 years old, recently
7 divorced as of 17 October 2012, and has no children. At all
8 times relevant to the charged offenses, the accused has been on
9 continuous active duty in the United States Air Force.

10 Tessa K. Kelley is the ex-wife of the accused. She is (b)
11 years old. They met in 2007-2008 in New Braunfels, Texas, and (6)
12 began dating in February 2011. Prior to beginning her
13 relationship with the accused, Tessa Kelley had a child from a
14 former relationship. (b) (6), (b) (7)(C), Tessa Kelley's only child,
15 was born on (b) (6), (b) (7)(C). The accused and Tessa Kelley were
16 married on 12 April 2011. The accused has no children of his
17 own and hoped to raise (b) (6), (b) (7)(C) as his own son.

18 In late April 2011 the accused, Tessa Kelley, and (b)
19 (b) (6), (b) (7)(C) moved into base housing on Holloman Air Force Base, New (6)
20 Mexico, where the accused was stationed. Between on or about 24
21 April 2011 and on or about 16 June 2011, the accused pushed and
22 slapped (b) (6), (b) (7)(C), a child under the age of 16 years, on

1 several occasions on the head and body with his hands when the
2 accused became frustrated with the child's behavior. He also
3 shook (b) (6), (b) (7)(C) on two occasions because the child would not
4 stop crying. During at least one of the times he shook (b)
(6),
5 (b) (6), (b) (7)(C) the force used by the accused was likely to produce
6 death or grievous bodily harm.

7 More than once during the charged timeframe the accused
8 would become frustrated with (b) (6), (b) (7)(C) . (b) (6), (b) (7)(C) would get
9 into things when Tessa Kelley wasn't around and sometimes the
10 accused would slap him in the face and on the body. The accused
11 also became upset with (b) (6), (b) (7)(C) crawling and trying to grab
12 things that he wasn't supposed to. More than once, when (b)
(6),
13 (b) (6), (b) (7)(C) was crawling, the accused pushed (b) (6), (b) (7)(C) on his butt
14 and he fell over on his shoulder. One time, the accused pushed
15 (b) (6), (b) (7)(C) with enough force that (b) (6), (b) (7)(C) fell, landed on
16 his shoulder, and flipped over. On two occasions, the accused
17 shook (b) (6), (b) (7)(C) with his hands because (b) (6), (b) (7)(C) was crying.
18 Tessa Kelley never witnessed any of this abuse.

19 On or about 8 June 2011, (b) (6), (b) (7)(C) appeared sick to Tessa
20 Kelley and she decided he needed to be taken to the hospital.
21 (b) (6), (b) (7)(C) had been hospitalized from 2 June 2011 until 5 June
22 2011 in El Paso, Texas, because of vomiting, diarrhea and

1 seizures. When (b) (6), (b) (7)(C) began vomiting again, Tessa Kelley
2 called the accused and asked him to help her take her son to the
3 hospital again. The accused was released from work and returned
4 to help Tessa Kelley and (b) (6), (b) (7)(C) .

5 While preparing (b) (6), (b) (7)(C) to travel to the hospital, the
6 accused was in the living room of their home on Holloman Air
7 Force Base, New Mexico, alone with (b) (6), (b) (7)(C) . Due to his
8 crying, the accused became frustrated with (b) (6), (b) (7)(C) and
9 slapped him across the face with his hand. The accused slapped
10 (b) (6), (6), with enough force that (b) (6), (6), fell over on his side. The
11 slap caused two bruise marks to the left side of (b) (6), (b) (7)(C)
12 face and bruising to his ear. The photographs contained in
13 Prosecution Exhibits 2 and 3 accurately reflect the bruising to
14 (b) (6), (b) (7)(C) face, on 9 June 2011 and 12 June 2011. The
15 accused admits that the photographs are true and accurate
16 depictions of the bruising on (b) (6), (b) (7)(C) face, as it appeared
17 on 9 June 2011 and 12 June 2011. At the time, (b) (6), (b) (7)(C) was
18 (b) (6), (b) (7) old.
(C)

19 On 8 June 2011, the accused and Tessa Kelley took (b) (6),
20 (b) (6), (b) (7)(C) to Gerald Champion Medical Center in Alamogordo, New
21 Mexico, because he was vomiting. The treating pediatrician,
22 Capt (b) (6), (b) (7)(C) , who had seen (b) (6), (b) (7)(C) on 6 June 2011

1 because of the child's vomiting and seizures, noted the bruising
2 to the left side of (b) (6), (b) (7)(C) face. Due to suspected abuse,
3 (b) (6), (b) (7)(C) was admitted to the hospital and placed in the
4 custody of the State of New Mexico. Capt (b) (6), (b) (7)(C) ordered a CT
5 scan and sent (b) (6), (b) (7)(C) to Providence Memorial Hospital to be
6 evaluated by a pediatric neurosurgeon. After being evaluated,
7 (b) (6), (b) (7)(C) was diagnosed with a fractured clavicle and a
8 subdural hemorrhage. A subdural hemorrhage is bleeding on the
9 brain. Since being removed from the custody of the accused and
10 Tessa Kelley, (b) (6), (b) (7)(C) injuries have healed and he should
11 suffer no long term effects.

12 The accused agrees and admits he caused the three bruise
13 marks on (b) (6), (b) (7)(C) face and bruising on his ear, the
14 fractured clavicle, and the subdural hemorrhage. The accused
15 had no legal justification or excuse for his actions; he could
16 have avoided engaging in these actions if he had wanted to, and
17 admits that under the circumstances, his actions were wrongful.
18 The video contained on Prosecution Exhibit 4 is a video of the
19 accused confessing to physically abusing (b) (6), (b) (7)(C) on 27 April
20 2012. The video was created by the accused and the file
21 contained on Prosecution Exhibit 4 is a true and accurate copy

1 of this video. The accused made this confession in part so that
2 Tessa Kelley could regain custody of (b) (6), (b) (7)(C) .

3 After (b) (6), (b) (7)(C) was removed from their house, the accused
4 and Tessa Kelley remained married and living together in base
5 housing. Between on or about 24 June 2011 and on or about 27
6 April 2012, the accused became physically abusive to Tessa
7 Kelley. On multiple occasions the accused struck Tessa Kelley
8 on her body with his hands, choked Tessa Kelley on the neck with
9 his hands, pulled the hair of Tessa Kelley with his hands, and
10 kicked Tessa Kelley on her body with his foot.

11 The physical abuse began on or about 24 June 2011, when the
12 accused grabbed Tessa Kelley by the throat and choked her for
13 approximately 15-20 seconds. On this date, Security Forces was
14 called to their home on Holloman Air Force Base, New Mexico, but
15 Tessa Kelley declined to file a report. From that date forward,
16 additional acts of physical abuse occurred during some heated
17 arguments between the accused and Tessa Kelley. At times, the
18 physical abuse led to Tessa Kelley suffering injuries, although
19 she never sought nor received medical treatment for them.

20 On at least one occasion, the accused pulled Tessa Kelley's
21 hair so hard that clumps of her hair came out. He also punched
22 her in the arm several times causing bruises. The accused had

1 no legal justification or excuse for his actions, he could have
2 avoided engaging in these actions if he had wanted to, and under
3 the circumstances his actions were wrongful.

4 By pleading guilty, the accused has saved the government
5 the significant time and expense of a litigated court-martial.

6 MJ: Trial counsel, you may proceed.

7 STC: At this time the government requests to play the
8 video file contained on Prosecution Exhibit 4.

9 MJ: You may.

10 STC: For the record sir, we will be playing it on the VTC
11 system located in the court room.

12 [Senior trial counsel set up VTC and video recording for
13 members.]

14 [Video began playing at time stamp 1546:23]

15 ACC: My name is Devin Kelley; Social Security number is
16 (b) (6), (b) (7)(C) ; and driver's license number (b) (6), (b)
(7)(C) ; date of
17 birth February 12, 1991; death, uncertain. So in serving CYFD,
18 um, I was the one who hit (b) (6), Tessa did not know. I was told
(b) (7)
19 by lawyers to not say anything; that if I said anything, I would
20 lose my child, which then we would lose (b) (6) anyways, which
(6),
21 inevitably ended up being the wrong choice. Um, there's
22 multiple times where I would get frustrated with him. He would

1 get into things and Tessa wasn't around to take care of him at
2 the time and I would slap him. Um, a lot of times when he would
3 crawl, he would go and try to grab something that's dangerous
4 and I got tired of it and, so I pushed him on his butt one time.
5 He fell and landed on his shoulder and kind of flipped over, so
6 I am assuming that is where he got the clavicle. Um, I had
7 slapped him across the face several times. Like I said, Tessa
8 was unaware the whole time and, you know, one time I heard her
9 crying and saying, "I am sorry, (b) (6), I don't know what
10 happened to you." I mean, it just, it tears me up inside of me,
11 you know, I have been suicidal. It was done at The Peak and
12 nobody really knew why I was suicidal. Nobody in this world
13 knew what I knew, and nobody really is ever going to be able to
14 get into my brain to really see everything, I guess, that
15 happened. Um, so the bruising was caused by me the day before
16 we left to go to that, um, that one -- I don't remember the date
17 exactly, but the day that he had the bruise on the side of his
18 face. He was doing something, getting into something. I got
19 frustrated with him. I slapped him across the face. Tessa was
20 not in the room. I did it in the living room. Sorry if I am
21 looking down I am looking at myself. So Tessa was not in the
22 living room. I believe she was telling me to get him changed.

1 Yup, I can remember correctly a year ago. It was -- I was
2 trying to get his clothes on, I believe, and he was being very
3 baby like, and being a 20-year-old man with no experience with
4 babies, an anger issue, and lack of self-control I smacked him
5 across his face to try to get him to stay still. It didn't
6 work; all it did was make things worse. I slapped him hard
7 enough where he had fallen over on his side. And it's not that
8 I don't love (b) (6), I love my son very much. I made some stupid
9 decisions; really stupid decisions that I could (inaudible) have
10 a life, a good life. Um, he gave me every opportunity in the
11 world and I just dragged him through the mud.

12 Um, I am making this documentary, so everybody knows. OSI, the
13 military and then nobody has a question of what happened. Um, I
14 don't want Tessa to be blind because she had no idea. She was -
15 - I lied to her forever telling her that no-- I didn't hit him.
16 I don't know what happened. I wasn't there. And everybody's
17 convinced; my parents were even convinced, "Oh, you couldn't
18 have been there. You were at work." And, you know, it's not
19 true. It can happen in a split second, you know, it only takes
20 a few seconds to lose control. I believe I regained that
21 control in parenting classes. It's unfortunate that -- sorry --
22 it's unfortunate to let them know I was a sinner. I am not

1 putting the blame on my inexperience. I have a problem -- I
2 have a problem controlling my -- my emotions. It seems to cause
3 me to look rebellious. It seems to cause a lot of problems in
4 my life and it caused problems in my marriage. I am very
5 controlling. And even like I said, his age at the time, you
6 know, they are not doing what I wanted him to do and being a
7 controlling person, not understanding the language of a baby,
8 you know, I reacted as if I were to react to an adult. I have
9 learned a lot since -- since all this, um, since all the
10 classes and it's hard -- it's hard to -- it's hard to deal with
11 knowing that you, uh, that I destroyed three lives: my own, my
12 son's, and my wife. My wife was my best friend. I betrayed
13 her. I hurt her and my son. (b) (6) is the person I love the most
14 in this world- - I hurt him. Nothing makes up for that
15 (crying). Everybody I think knew deep down inside that I did
16 it, but I think because I am military, people want to cover my
17 ass because I represent the government and I think that's why
18 (b) (6), (b) (7)(C) Tessa (b) (6), (b) (7)(C)
19 (b) (6), (b) (7)(C) He diagnosed me with one thing and I definitely
20 know that I have a lot more problems than that. Sorry (crying).
21 Um, basically his diagnosis was horse shit- - didn't mean
22 anything. It had nothing to do with Tessa. Tessa is a very

1 strong person and that used to be a strong person. Um, to my
2 parents, I'm sorry I didn't tell you. I am sorry I lied. You
3 know that is one of my biggest things is I lie, and I lie, and I
4 lie because I am ashamed or, in this case, ashamed and told not
5 to say anything. Um, I believe Tessa -- Tessa is a wonderful
6 mother. She -- she loves her child very much. I want this
7 videotape to be shown to the judge so that he knows me and my
8 wife, you know, we are separating. It's unfortunate because I
9 still love her, but, you know, we all suffer the consequences of
10 the mistakes we make and I have to make one and unfortunately
11 this is not going to be the -- this is not the first mistake,
12 and this is not the last mistake, and there's probably plenty to
13 come unfortunately. I try -- try just try my best to not get to
14 that place. Not, not um -- it's heading here, but, you know,
15 ever since I was a kid I had problems controlling when I felt
16 things weren't fair I hit people, and yell. I wasn't always like
17 that. I was bullied as a kid. I got tired of it at about sixth
18 grade; picked on and decided I was going to be the top dog
19 apparently, you know, and you don't realize how every little
20 thing you do affects your future. Um, it's unfortunate because
21 I love (b) with all my heart. I love him more than anybody,
22 but I know what's right and I have been try -- I have been

1 avoiding it. I know it needs to be done. And I know that
2 people might not agree with my actions and my decisions down the
3 line, but I think it's to the best, you know? I think when
4 you're under a lot of stress sometimes, you know, you can't
5 handle it anymore and you do outrageous things that you'd never
6 do like hit a babe -- like hit a baby. (Crying) And so mom, dad,
7 I'm sorry I lied to you. I still love God. I still love (b) (6),
8 I still love Tessa. You know, this is not your fault (b) (7)
9 (inaudible) from the beginning. If I stopped worrying about
10 myself and started thinking about others maybe this would never
11 have happened. I don't know. Maybe -- maybe it would've turned
12 out different. Maybe I would have been able to keep my family,
13 but my life's changing and unfortunately, today, what day is it?
14 Let me see. Let's see here, the 27th of April happened to be
15 the day that I really didn't -- um, I worry for my wife because
16 she is leaving and willing, um, you know, not saying that I am
17 objecting to it. I asked her to stay, but it's her choice if
18 she feels that the best thing to do to get her kid back is, you
19 know, leave me then I think she should pursue that because this
20 is my fault and I think it is selfish of me to ask her to stay
21 with me and risk losing her child because (b) (6) is special. Um,
22 he is different from other kids, other children. I believe it's

1 that that uh, now that this is happening, I am going to be
2 dropped from the case probably -- I don't know what's going to
3 happen in the future. And I got a pretty good idea, but I will
4 no longer be part of this -- I hope Tessa takes this to (b) (6),
5 and let's her know. You know -- you know it's just like they
6 said in the meetings, um, you can only -- you can only hold it
7 in so much and you can lie, and you can try to push it away, but
8 eventually it comes to the surface. You just can't deal with it
9 anymore. You can't take the shame. You can't take the secrets,
10 and the lies. It's just -- it's too much to bear. I hurt my
11 best friend's child, I mean; God gave me this wonderful future.
12 I had a family. I -- I -- once before I asked (inaudible) can be
13 a family, and want a family. I want children. I want a wife.
14 I want somebody to love me. I want just loving my child. My
15 child is -- well, (b) (6) is the sweetest baby in the world and I
16 didn't (inaudible). I didn't follow the right path and
17 unfortunately you can't take back the past, you can only change
18 the future, but Tessa deserves him back. It's not her fault,
19 it's my fault. You know, um, I am not a doctor. I don't know
20 exactly where (inaudible) the brain injuries, the clavicle
21 (inaudible) multiple times I pushed him when he was crawling.
22 He would be getting into something or I would push him from his

1 butt and he would fall over on his shoulder. I'm assuming
2 that's where it came from. Um, even though I struck him several
3 times, I mean, when he would eat he would -- as a baby; he would
4 spit out his food. I was like trying to feed it to him and
5 every time he would spit it out, and I just -- I got tired of
6 it. It was frustrating to me at the time, now it would be like
7 -- it would be no big deal, but, um, at the time, you know, I'd
8 take the spoon and get it in there and do what I had to do to
9 feed the child and I think he was more a frustration than, you
10 know, with a child you can't be forceful. You have to be
11 gentle, loving, kind because they're fragile. I, um -- this is
12 really embarrassing for me because the whole world's gonna know
13 I'm a child beater, and a wife beater. (Inaudible) Jesus, I
14 don't know if you can see that.

15 I have learned to be a Christian and I screwed up pretty
16 bad. So all I've got to say is I am sorry. I am sorry that I
17 let (inaudible). I am sorry that my spouse is going to have to
18 lose her child because of my inactions, because I lied to her.
19 I lied to my family. I lied to everybody and it's something
20 that I am good at. I'm good at lying. I denied everything. My
21 parents know -- I don't know what else to say. Um, I am going
22 to be honest, this tape is probably going to get me in a lot of

1 trouble, but it's the right thing to do. To, I think, do to
2 come clean and let people know the truth because if I were to
3 die tomorrow in a car accident or, you know, the secret of (b)
(6)
4 would go with me and nobody else in this world would know.
5 Nobody knows (inaudible) about truth. I mean -- I mean, I did
6 more things. You know, I tried -- I tried to push it out of my
7 mind a lot. I really tried, but (inaudible) this, but I'd pick
8 him up and he'd start crying. He didn't want to be picked up.
9 He just wanted to keep getting into messes and stuff and I would
10 shake -- I shook him twice. Um, uh, one of those times was when
11 the ambulance came to the house and uh -- well he was sitting
12 down after that and Tessa came in. He was sitting down and his
13 eyes rolled back in his head and the ambulance came, and
14 apparently he had a seizure. And you would be sitting there
15 thinking, in your brain, and at that moment it is like oh my
16 God, this kid is going to die because I lost my self-control. I
17 lost my military bearing and it's not funny, and it's not cute.
18 It's not -- it's just intolerable. It's -- sometimes you just
19 say no. You got -- you just got to say no. Just, you know,
20 just like the saying, "Just say no." I mean, you can't -- you
21 know, sometimes your mind is going to talk you into doing
22 something and, I mean, um, you know, lions, the ability of

1 lions, you know, they come into a herd, and they come in and
2 then kill the babies to this mother and uh then you reproduce
3 with the mothers so that way the mother has their kids instead
4 of, you know, somebody else's kids.

5 You know, it's kind of -- I don't think we truly understand
6 why people and humans in particular, we're the most complicated,
7 why we do what we do. Some of it I think is natural; some of
8 it, I don't. I don't agree with beating a child. I don't agree
9 with hurting a child at all. I believe that, like Jesus said,
10 you know, "Unless you become like these children, you will never
11 enter the kingdom of heaven." And I tried (inaudible) and I
12 tried to be good. I tried to do what I -- the best I can and
13 like it says, I think, believe its Corinthians, "I do what I do
14 not like -- I do not -- I do what I hate. But I know it's the
15 sin within me then." It is not me doing it, it's just an
16 excuse. I take full blame for what I've done. Um, it's sad
17 that I hurt the person I love most in this world, and as a
18 child. Can I live with myself the rest of my life knowing that
19 I hurt a child? I don't know. I guess we will find out.

20 Please take this into consideration. Tessa doesn't deserve
21 this. (b) doesn't deserve this. He stepped into our lives and
22 I promised him that I would give him a whole new future. All I

1 did was destroy it. It's all I did. I didn't do anything good.
2 To my family, I -- you weren't who -- what you do. You are more
3 than the mistakes you've made, and they are more than choices
4 you make. I let you down (inaudible) I'm a good person. I have
5 done bad things. Some will take me -- be taken to the grave.
6 Um, again it's the best for Tessa. She's got a better chance of
7 getting him back without me. You know, and I think -- I think -
8 - I think I've improved, definitely, but I think, you know, once
9 you're a certain -- I don't -- I don't think adults change. I
10 don't think people change. I believe in miracles. I believe in
11 angels and I believe in demons, but I think for most people,
12 they're going to be who they are and live their lives out, but
13 based on the choices they make, if they're a wife beater,
14 they're gonna probably beat their next wife. If they're a child
15 beater, they'll probably beat their own child. It's not that
16 they don't love them, it's just -- it's complicated. Um, it's
17 been over twenty minutes I've been talking here. I don't know
18 what else to say besides I am the one who caused all of his
19 injuries and tired of lying, tired of having this shadow. All
20 things will be revealed in the end.

21 I now confess -- confess in the things you've done. I am
22 just hoping the day, my last day, whenever that is, whatever

1 date that is, only God can forgive me. Again, well please take
2 this into consideration. It would mean a lot to me. Tessa
3 means a lot to me. She's had a lot of hard things go through
4 her life and she loves this kid more than anything in the whole
5 world. (Crying) Don't take him from her, please, not based on
6 what I've done. It's not her fault. She's got good parenting
7 classes. She's ready to have her son back. Half his life --
8 more than half his life he's been away from his mother. It's
9 not fair. So I would like you to look inside your heart and ask
10 yourself can you live with this if you decide to take her away
11 from him. Could you live with that knowing that she didn't do
12 anything? She was never (inaudible) on him. She loved him.
13 Every time he would cry she would come running across the room.
14 I mean, she would never hurt that child.

15 [Video was stopped at timestamp 1609:24]

16 STC: That concludes the video file contained in
17 Prosecution Exhibit 4.

18 MJ: Would you like to call your next witness or would you
19 like to take a brief recess?

20 STC: Sir, if we could take a brief recess before.

21 MJ: Let's try to keep it to ten minutes; we will be back
22 at twenty after. We are in recess.

1 [The court-martial recessed at 1610 hours, 6 November 2012.]

2 **END OF PAGE**

3

1 WIT: I've been with them for almost two and half years. I
2 PCSd here in July of 2010.

3 STC: Where did you PCS from?

4 WIT: Keesler in Mississippi; I was doing my residency
5 program there and left there in June of 2010.

6 STC: And what do you do for the 49th Medical Group?

7 WIT: I am staff pediatrician and also the (b) (6), (b) (7)(C)
8 of the pediatrics clinic. I am the (b) (6), (b) (7)(C) for all
9 things and details that go into the running of the pediatric
10 clinic here.

11 STC: Can you tell the members a little about what it took to
12 become a pediatrician?

13 WIT: Well, so um typically you do four years of undergrad,
14 get a bachelors' degree. That is followed by four years of
15 medical school and then depending on what specialty you choose to
16 go into, with pediatrics is a three year residency following the
17 four years of medical school. After that you are eligible to take
18 your board certification in your specialty; for me that is
19 pediatrics. Which I did following my residency training and
20 passed my boards in October of 2010.

21 STC: As part of your duties here at Holloman Air Force Base,
22 do you see patients? Children?

1 WIT: Yes, I do. I see everybody from newborn up to age
2 seventeen in my clinic. Typically see about a hundred to a
3 hundred ten patients a week.

4 STC: Do you recognize the accused in this case, Airman First
5 Class Kelley?

6 WIT: Yes, I do.

7 STC: Can you please point him out?

8 WIT: He's right there.

9 [Witness pointed to the accused at defense table.]

10 STC: Correct identification of the accused. How do you know
11 Airman Kelley or how do you recognize him?

12 WIT: I first met Airman Kelley on June 8th in the emergency
13 room at Gerald Champion Regional Medical Center. They had brought
14 (b) (6) in for some medical reasons and I was called in to evaluate
15 him and see if he needed to be admitted to the hospital under my
16 care.

17 STC: Is that (b) (6), (b) (7)(C) you are talking about?

18 WIT: Yes, (b) (6), (b) (7)(C).

19 STC: You said you met Airman Kelley on the 8th of June, had
20 you met (b) (6) prior to that?

21 WIT: I had. My first encounter with (b) (6) was actually two
22 days prior on the 6th of June. He actually came into see me in the

1 clinic following a recent hospitalization he had. He had been
2 admitted to children's hospital in El Paso on June 2nd through June
3 5th and was discharged. Pretty standard procedure is when you are
4 admitted to the hospital; once you are discharged you follow up
5 with your regular doctor within one to three days to make sure
6 everything is ok after being discharged. That was my first
7 encounter, meeting (b) (6), (b) (7) was on the 6th of June.

8 STC: You mentioned the hospitalization from the 2nd through
9 the 5th of June; did you become aware of what the hospitalization
10 was for?

11 WIT: Yes, so when (b) (6), (b) (7) came to me on the 6th of June, it was
12 with his mother and she informed me he had been admitted for, um,
13 several days of nausea and vomiting and dehydration and had been
14 in the hospital for several days recovering from that.

15 STC: In line with his being admitted to the hospital, did
16 you hear anything febrile seizure?

17 WIT: I did, and she also mentioned that prior to that
18 admission, a few days before that she had gone to the emergency
19 room here at Gerald Champion for what was determined to be a
20 febrile seizure.

21 STC: Please explain to the members what a febrile seizure
22 is.

1 WIT: Yes, basically that is a seizure brought on by a fever
2 that is something that is not fairly common but common in
3 pediatrics. It occurs in about two percent of kids and it's
4 typically between the ages of six months and five years. What
5 happens is, if the kid gets sick with any type of illness, an
6 upper respiratory infection or sore throat, it causes a rapid rise
7 in their temperature and it can set off a seizure. Um, it doesn't
8 necessarily mean that there is anything underlying, it just means
9 some kids are more prone to that than others.

10 STC: When you saw (b) (6), (b) (7)(C) on the 6th of June 2011, can
11 you explain to the members how he appeared?

12 WIT: Yes, um so (b) (6), (b) (7)(C) was a well appearing child when I saw
13 him on the 6th of June, he seemed happy and appropriate. He was
14 just under (b) (6), (b) (7)(C) old when I saw him, he was a little small
15 for his age, but again this was the first time I'd seen him so,
16 you can be small because you have small parents. Or it can be
17 because of other things but I didn't think too much of that. Um,
18 but otherwise he seemed happy and interactive with me and seemed
19 like an appropriate (b) (6), (b) (7)(C) old.

20 STC: You also eluded to meeting the accused on the 8th of
21 June 2011? Can you tell the members how you came to see (b) (6),
22 (b) (6), (b) (7)(C) on the 8th of June 2011?

1 and asked you know, do you understand, do you know where these
2 bruises came from; can you tell me what happened there? At that
3 point, I got a very vague response; you know they just kind of
4 appeared today, we don't really know what happened. Um, any time
5 you hear that as a pediatrician in a kid this age it is a little
6 concerning because you should be able to tell when bruising on the
7 face or head occurs. Um especially in a kid who is non-ambulatory
8 or not walking at that point. So I went ahead and finished my
9 physical exam and talked for a few more minutes about what the
10 plan was going to be for the next day or so. Um I was going to
11 admit him overnight just to watch. I came back around to the
12 bruising again and asked are you sure you guys don't know where
13 this bruising came from. And again, I just got a vague answer
14 that is just kind of appeared, we just noticed it today, we don't
15 know where it came from. So, um- -

16 STC: With (b) that day, you already said the accused was
17 there and Tessa Kelley his mother was she present as well?

18 WIT: She was present as well.

19 STC: When you saw the bruising, was that something different
20 than when you saw him on the 6th of June?

21 WIT: Yes, when I saw him on the 6th of June, there was no
22 evidence of bruising on his face. Um, so that was definitely

1 something that happened within - - after I had seen him on the 6th
2 before I saw him on the 8th.

3 STC: And the bruising itself, did that cause you concerns?

4 WIT: Yes, it is. It is very concerning. As I stated, in a
5 child this age, if you have any unexplained bruising around the
6 facial area, you are definitely concerned that it was not
7 accidental in origin. Um, as I stated, he was non-ambulatory.
8 Kids that are up walking around you can expect them to fall and
9 get some bruising but with that vague response, it definitely
10 raises red flags in any pediatrician's mind.

11 STC: Your Honor, I request permission to publish copies of
12 Prosecution Exhibit 2 to the members.

13 MJ: You may.

14 STC: Showing what's being published to the members to
15 defenses counsel. Now publishing copies of Prosecution Exhibit 2
16 to the court members. Your Honor, may I approach the witness?

17 MJ: You may.

18 STC: Showing what's been marked as Prosecution Exhibit 2 to
19 the witness, Captain (b) (6), (b) (7)(C) Could you please take a few moments
20 to look through those photographs that you have before you.

21 [Witness reviewing exhibits.]

22 STC: Do you recognize those photographs?

1 WIT: I do, yes.

2 STC: Do you recognize the child in the photographs?

3 WIT: I do, that is (b) (6),
(b) (7)

4 STC: I would like you to take the members page by page and
5 describe what is depicted there. I am looking at page one of
6 Prosecution Exhibit 2.

7 WIT: So, um, it is kind of difficult to see, but you can
8 see there is two horizontal bruises. One is about four
9 centimeters in length, the other is about two or three, um and
10 then there is a third vertical bruise that is closer to his
11 cheekbone. Those are the three bruises you can see in this
12 photo. Um, that is very concerning, because it looks like a
13 handprint.

14 ADC: Objection Your Honor. The trial counsel has failed
15 to lay an appropriate qualification for the doctor to offer
16 opinions, which has until now, but he is now going into the
17 source or causality of the injury and he certainly hasn't been
18 qualified a doctor to make that determination.

19 STC: Your Honor, the witness doesn't have to be qualified
20 as an expert to offer an opinion, he has already talked about
21 he's a pediatrician, he saw (b) (6) that night, saw the bruises on
22 his face. He can certainly offer any lay opinion about what the

1 actual bruise looked like and how it created concerns for him,
2 because it also goes to his state of mind.

3 MJ: I will overrule the objection; I think the trial
4 counsel has laid significant foundation to elicit opinions from
5 this witness. Trial counsel, you may continue.

6 STC: Thank you Your Honor, Doctor if you could continue
7 with what you were saying.

8 WIT: Yes, so as I was saying, this is concerning for a
9 hand print and basically just looking through the rest of the
10 pictures, I think it is more of the same, I don't think I need
11 to go into any more, but like on page four you can see a little
12 bit of bruising on the inside of his ear. But the main thing
13 that is concerning to me is the pattern of the bruising and to
14 go a little bit more into that, as a pediatrician, unfortunately
15 this is something that we have to deal with more frequently than
16 we would like to. Um, being board certified, we are definitely
17 confident in identifying things like this, um, if you go into
18 any medical textbook on child abuse, and you are looking for a
19 handprint, this is pretty much the photograph you are going to
20 see.

21 STC: And Doctor (b) (6), (b) (7)(C) I apologize for interrupting, but
22 you talked about page four showing some bruising to the ear, and

1 pages two and three, they appear to be the same bruises as
2 prior?

3 WIT: Yes, they are the same bruises like on page one.

4 STC: Is it fair to say those are close-ups of different
5 angles of those bruises?

6 WIT: Yes that is correct.

7 STC: Do the photographs accurately depict the bruises you
8 noted on (b) (6), (b) (7)(C) when you saw him on the 8th of June 2011?

9 WIT: They do and the only thing I could say, and it could
10 be a color thing, they were a little darker when I saw him that
11 evening on the 8th and they already had started to clear a little
12 bit and fade by the time these photos were taken on the 9th. But
13 again, it could just be the color on the photos, but they were a
14 little darker than what's depicted here.

15 STC: I am retrieving the copy of Prosecution Exhibit 2
16 from the witness. Dr. (b) (6), (b) (7)(C) did you see (b) (6), (b) (7)(C) - -
17 before we get to what was done, did you see (b) (6), (b) (7)(C) again
18 after the 8th of June?

19 WIT: Only when I was taking care of him during the
20 hospitalization, through the 10th.

1 STC: Despite not having seen him, did you have the
2 opportunity to review the photographs that were taken on the 12th
3 of June 2011?

4 WIT: Um, I have since that time. Yes.

5 STC: Your Honor, at this time the government requests
6 permission to publish copies of Prosecution Exhibit 3 to the
7 court members.

8 MJ: You may.

9 STC: Showing defense what will be published to the
10 members. Now publishing copies of Prosecution Exhibit 3 to the
11 court members. Now handing the witness a copy of Prosecution
12 Exhibit 3. Please take a few moments Dr. (b) (6), (b)
13 through these photographs. (7)(C)

14 [Witness reviewing exhibit.]

15 STC: Looking at page one of four, do you recognize the
16 child in these photographs?

17 WIT: I do, it is the same child. That is (b) (6),
18 (b) (7)

19 STC: Now flipping through pages two through four, what do
20 those pictures depict?

21 WIT: Again, it appears to be the same bruising noted in
22 the previous photographs. These look a little older or like
these photos were taken a few days later. Um, those of you who

1 have kids know, bruises tend to go through stages of different
2 color before they heal and that's all this appears to be it is
3 just a bruise that has had several days to progress.

4 STC: And looking at those photographs, does it appear to
5 be the same bruises in the same areas that you what you
6 witnessed on (b) (6), (b) (7)(C) on the 8th of June 2011?

7 WIT: Yes they do.

8 STC: Retrieving copy of Prosecution Exhibit 3 from the
9 witness. Captain (b) (6), (b) (7)(C) I'd like to get into now, you already
10 told the members about seeing the bruising, and asking Airman
11 Kelley and Tessa Kelley what was going on and getting a vague
12 answer, what action did you take in response to these things
13 that were occurring?

14 WIT: Right, so as I was getting into earlier, when you see
15 bruising in a child this age and you don't have a good answer,
16 you are concerned about some non-accidental trauma, so my number
17 one priority at that point was to make sure the child was safe
18 so I admitted him to the hospital that night under my service
19 and got them a room and told the nurses what I was worried about
20 so they could keep a close eye on things. And then the
21 following morning, I went back to see (b) (6) and see how things
22 had gone overnight and after I examined him and talked to them,

1 I approached the bruising for a third time and said, can you
2 guys give me a better idea of where the bruising came from, or
3 do you have any idea; I got the same response I had the previous
4 two times, you know, they kind of just appeared yesterday, we
5 don't know what happened. It was at that point that I informed
6 the Kelley's that I would have to contact CPS and OSI and CYFB
7 because of the bruising and it because it was unexplained and I
8 was obligated to do it with a child of this age, um by law. At
9 that point when I did that, I noticed a change in Airman
10 Kelley's demeanor toward me. Up to that point he had been very
11 forthcoming with trying to be helpful in answering my questions
12 the previous night in the ER and up to that point that morning.
13 After I informed them of that, I continued to talk to them for a
14 few more minutes what was going to happen over the next few days
15 and he seemed to distance himself a little bit from me and
16 didn't really want to interact with me anymore I felt. Um, a
17 nurse came in shortly thereafter and he stepped off to the side
18 and talked to her for the remainder of my time there that
19 morning when I was going over what was going to happen next.

20 STC: And after - - you said that was a change from his
21 demeanor prior to that point?

22 WIT: That's correct.

1 WIT: Yes, so, um. There are several different layers,
2 your brain is not right next to the skull, you can think of it
3 like connected tissue or layers of skin as kind of a barrier
4 between the brain and skull itself. There are different blood
5 vessels in those areas and depending on what kind of injury you
6 have; you can have bleeding in any of those spaces in between
7 the skull all the way down to the brain. Um, and so depending
8 on what kind of bleed, you can potentially see if you need to be
9 more or less concerned about that.

10 STC: As a pediatrician, what is the concern if there is a
11 bleed in the brain?

12 WIT: So any bleed in the brain, respective of where it is
13 and what level it is, is very concerning. Those can progress to
14 be potentially life altering or life ending so um, like I
15 stated, if there is anything there you need to make sure that
16 you identify it as soon as possible and get them the appropriate
17 treatment if it is needed.

18 STC: You indicated a CT scan was done the next day, did
19 it note anything or was there anything on (b) (6), (b) (7)(C) CT scan of his
20 brain?

21 WIT: There was, there was a bleed, it was a subdural
22 hematoma which is one of the three types of bleed you can see,

1 when you are talking about differences in intracranial bleeding.
2 It was pretty much right under the spot where the bruising had
3 occurred in his temporal area. The thing about subdural bleeds
4 versus the other two types, in children under two a subdural
5 bleed three times out of four is due to non-accidental trauma or
6 abusive head trauma, while as the other two bleeds are due to a
7 fall from a height or some other type of accidental trauma. And
8 the reasoning why you see the types of bleeds is because again
9 of the different blood vessels and the different levels. So
10 your epidural bleeds, the ones that are accidental are typically
11 a fall from a height which is a direct impact versus a subdural
12 bleed which is typically due to a rotational thing and so it's
13 not the impact itself, it is the acceleration of the head around
14 its axis, so left to right that causes those bridging veins in
15 the subdural space to break and give you the subdural bleed.

16 STC: When you noted that (b) had a subdural bleed, what
17 action did you take as a result of the subdural bleed?

18 WIT: So as I said, that is a potentially life threatening
19 thing, so that warrants a pediatric neurosurgeon consult to make
20 sure nothing needs to be done surgically to evacuate the blood.
21 Um, I tried to accomplish that here but we don't have those
22 capabilities in Alamogordo, so the closest place for that to

1 occur was in El Paso so at that point I set up the transfer for
2 (b) (6) to go to El Paso to have that evaluation done.

3 STC: Now, after he was evaluated in El Paso, did it turn
4 out to be life threatening?

5 WIT: It was not.

6 STC: Should any of the injuries, is (b) (6) remain at this
7 point, do you have any reason to believe he will suffer any long
8 term affects from any of his injuries?

9 WIT: I do not. He's no longer under our care here at this
10 facility, but to the best of my knowledge he is not suffering
11 any long term sequelae because of this.

12 STC: After (b) (6), (b) (7)(C) evaluation in El Paso, did you become
13 aware of another injury he had suffered?

14 WIT: I did, in the discharge summary from El Paso which
15 was 16 June when he was discharged, it was noted that he had a
16 clavicle fracture as well as the small bleed in his brain.

17 STC: What is a clavicle fracture?

18 WIT: So it is a fractured bone in your clavicle, which is
19 this bone right here.

20 [Witness pointing to clavicle bone on himself.]

1 STC: So, when the witness said this bone right here he put
2 his left hand on his right collar bone and his left collar bone,
3 is that accurate?

4 WIT: Yes that is accurate.

5 STC: Now, the fractured collar bone, is that life
6 threatening?

7 WIT: No, it's not a life threatening injury.

8 STC: Despite it not being life threatening, can you
9 describe some symptoms or pain a child might suffer from an
10 injury like that?

11 WIT: So, with any fracture, a child is going to have a
12 significant amount of pain. With a clavicle fracture, it is not
13 a weight bearing bone, it is a bone that is used to support your
14 shoulder girdle so you are going to have a significant amount of
15 pain for a few days but within a week to ten days, the kid is
16 going to be using his arm again just like nothing happened.
17 Kids um, heal very well, so typically a fracture on a non weight
18 bearing bone is going to completely resolve in five to six
19 weeks.

20 STC: From your understanding, the clavicle fracture that
21 (b) had, was that a fresh fracture or something that had been
22 (6) healing?

1 WIT: My understanding is that it was a fresh fracture.

2 STC: Captain (b) (6), (b) (7)(C) thank you. That is all I have at
3 this time Your Honor.

4 MJ: Defense?

5 **CROSS-EXAMINATION**

6 **Questions by Defense counsel:**

7 ADC: Dr. (b) (6), (b) (7)(C) just a couple of follow up questions, I
8 want to make sure I have the time line correct in my head. So,
9 you see (b) (6), (b) (7)(C) on 6 June?

10 WIT: That's correct.

11 ADC: And that is a follow up visit because on 30 May 2011
12 and 2 to 5 June 2011, he went to a hospital correct?

13 WIT: That is correct.

14 ADC: On 30 May he went to Gerald Champion and 2 to 5 June
15 he went to a hospital in El Paso?

16 WIT: That is correct.

17 ADC: And both of those things are for the febrile seizure,
18 the vomiting and diarrhea?

19 WIT: The 30 May was for the febrile seizure and yes, you
20 are right the vomiting and diarrhea was for the 2 to 5 June
21 visit in El Paso.

1 ADC: And you described the febrile seizure as when the
2 fever spikes too quickly; too high too quickly?

3 WIT: That is correct yes.

4 ADC: And some babies it just happens?

5 WIT: That is correct.

6 ADC: So these hospital stays were related to this febrile
7 seizure, vomiting and diarrhea. Did he have a bug or what was
8 going on?

9 WIT: Yea, so I think previously before that he had been
10 seen by another provider in my clinic on the 19th of May for
11 vomiting and diarrhea, so it is very likely he had a viral
12 gastroenteritis or stomach bug.

13 ADC: So, he got sick?

14 WIT: Yes, he got sick.

15 ADC: And that is the only seizure you saw in the records?

16 WIT: That is correct.

17 ADC: It didn't seem to be related to any kind of injury or
18 abuse?

19 WIT: No, so a febrile seizure has nothing to do with any
20 type of trauma.

21 ADC: Okay, and the CT scan you mentioned that was done on
22 8 June, that is the one - -

1 WIT: It was done on 9 June, that is correct.

2 ADC: That is when you saw the subdural hematoma?

3 WIT: That is correct.

4 ADC: You reviewed the records for (b) (6), (b) (7)(C) stay in the
5 hospital in El Paso for 2 to 5 June?

6 WIT: That is correct.

7 ADC: And 2 and 5 June they did a CT scan as well?

8 WIT: That is correct.

9 ADC: And that one came back negative?

10 WIT: That is true.

11 ADC: And what that means is that there is no injury?

12 WIT: That is correct.

13 ADC: So when you saw him on 6 June you said he looked
14 good, he looked fine?

15 WIT: That is correct.

16 ADC: And then on 8 June you noticed the bruising?

17 WIT: That is correct.

18 ADC: Then you mentioned that you sent him back to El Paso
19 after you seen him with bruising; so he's going to be fine?

20 WIT: Yes. I believe so.

21 ADC: Thank you very much; I just wanted to clear that up.

22 MJ: Trial counsel, redirect?

1 STC: No Your Honor.

2 MJ: Do any of the court members have any questions for
3 this witness?

4 [Negative response from court members.]

5 MJ: No questions from the court members. Captain (b) (6), (b)
6 you may step down. (7)(C)

7 [The witness was excused and departed the court room.]

8 Trial counsel?

9 STC: Sir, at this time the government requests permission
10 to publish copies of Prosecution Exhibits 5 through 15 to the
11 members.

12 MJ: You may.

13 STC: Showing defense what's being published to the members
14 and also I will be publishing Prosecution Exhibit 1 as well.

15 MJ: You may.

16 STC: Now publishing Prosecution Exhibits 1 and 5 through
17 15 to the court members.

18 MJ: Members, that is where we are going to stop for the
19 day. With regard to the prosecution exhibits that were just
20 published to you, you can start to review those, you can even
21 take them with you to review if you would like. If you do
22 decide to take them with you, please keep in mind that this is

1 an ongoing proceeding, don't share them with anyone and take
2 measures to appropriately secure them. Also, it would be
3 inappropriate to begin to discuss them either among yourselves
4 or with anyone else because your discussions of the case must be
5 held until you're together in your closed session deliberations.
6 Additionally, remember the instructions I gave you earlier not
7 to discuss the case with anyone, not even among yourselves.
8 Also, I know the internet presents a temptation to do some
9 independent research, again your decision must be based on the
10 evidence presented here in court and on my instructions to you
11 as to the law, so please resist the temptation to do any
12 independent research on your own. Are there any questions from
13 the members before we recess for the evening?

14 [Negative response from the members.]

15 MJ: We will be in recess until 0830 tomorrow, counsel we
16 will reconvene at 0815 tomorrow. We are in recess.

17 [The court-martial recessed at 1652 hours, 6 November 2012.]

18 **END OF PAGE**

19

20

1 COURT RESUMED

2 MJ: Members of the court, you may recall at one point in
3 that inquiry I used the term aggravated sexual assault. That
4 was entirely a misstatement on my part, there is no indication
5 or allegation of any sexual offense by the accused. Aggravated
6 assault is another term for what the accused is charged with
7 which is assault with a means or force likely to produce death
8 or grievous bodily harm, but again the statement aggravated
9 sexual assault was entirely a misstatement on my part. Trial
10 counsel, you may proceed.

11 STC: At this time the government requests permission to
12 provide to the court president Prosecution Exhibit 4, which
13 contains the video that was played yesterday in court.

14 MJ: You may.

15 STC: Showing defense Prosecution Exhibit 4 and providing
16 it to the president.

17 MJ: And trial counsel, will the members have facilities in
18 the deliberation room to be able to play back of that if they
19 desire to do so?

20 STC: Yes sir. That was going to be my next comment, we
21 will make a laptop available to the members should they wish to
22 view the video along with external speakers as well.

1 MJ: Alright, members if you do make use of the laptop, use
2 it only for the purpose for playing the video.

3 STC: Your Honor, at this time the government rests.

4 MJ: Defense counsel?

5 ADC: Sir, the defense would like to request a ten minute
6 break.

7 MJ: Alright, we will be in recess; let's make it fifteen
8 after.

9 [The court-martial recessed at 0902 hours, 7 November 2012.]

10 **END OF PAGE**

11

1 ADC: Yes sir.

2 MJ: Trial counsel?

3 STC: Your Honor, the government objects to Defense Exhibit
4 B through M for identification on the basis of hearsay,
5 foundation, and authentication.

6 MJ: Defense counsel?

7 ADC: At this time Your Honor, the Defense moves to relax
8 the rules of evidence.

9 MJ: Rules of evidence will be relaxed as to Defense
10 Exhibits, there being no further objections, Defense Exhibits A
11 through M are admitted.

12 ADC: Thank you Your Honor. At this time, the defense
13 would like to call Mr. (b) (6), (b) (7)(C) to the stand.

14 MR. (b) (6), (b) (7)(C)
15 was called as a witness by the defense, was sworn, and testified
16 substantially as follows.

17 DIRECT EXAMINATION

18 Questions by defense counsel:

19 STC: Can you please state your name.

20 WIT: (b) (6), (b) (7)(C) .

21 STC: Where do you currently live? City and state is fine.

22 WIT: (b)(6); (b)(7)(C)

1 STC: Could you please spell (b)(6); (b)(7)(C) for us?

2 WIT: (b)(6); (b)(7)(C)

3 STC: And Airman Kelley, he is your son?

4 WIT: Yes.

5 ADC: Sir, you are Airman Kelley's father?

6 WIT: Yes.

7 ADC: Can you give us a little background for the members so

8 they can understand who Airman Kelley is? Uh, are you married?

9 WIT: Yes I am.

10 ADC: How long have you been married?

11 WIT: Uh, we've been married thirty three years and we were

12 together six years before that. We were high school sweethearts.

13 ADC: Congratulations, that is a beautiful marriage. What is

14 your wife's name?

15 WIT: (b) (6), (b) she goes by (b) (6),
 (7)(C) (b) (7)(C)

16 ADC: How many kids do you and (b) (6), have?
 (b) (7)

17 WIT: (b)(6), (b)(7)(C)

18 ADC: Obviously Devin is one of them, what is your other

19 kid's names?

20 WIT: (b) (6), (b) (7)(C)

21 ADC: Can you tell us their ages?

22 WIT: (b) (6), (b) (7)(C)

1 ADC: How old is Airman Kelley?

2 WIT: Right now he is 21.

3 ADC: So, he is the - -?

4 WIT: (b)(6); (b)(7)(C)

5 ADC: He is your only son?

6 WIT: Yes.

7 ADC: Tell us a little about where you live. You mentioned

8 (b)(6); (b)(7)(C) is that where Devin grew up?

9 WIT: Uh yes he was born there, we originally lived in the
10 city and we decided to move out into the country when he was two
11 years old; that's when we moved out into the country.

12 ADC: Tell us about your home there; is it a large parcel of
13 land?

14 WIT: Well, it is twenty eight acres, um, when we originally
15 got it, it was totally raw land and we put our house on the market
16 and the real estate declined and we figured we'd have time to get
17 something put together out there and we put our house on the
18 market and it sold in two weeks, so we had to hurry up and build a
19 barn and get some road, septic, and electric and phone in.

20 ADC: So, twenty eight acres is a lot of land, do you have
21 animals or a farm?

1 WIT: Yes, we have cows and horses and at one point we had
2 guineas; which is a type of wild chicken. We had cats, dogs, and
3 whatever stray shows up.

4 ADC: Tell the members a little bit about Devin as a child;
5 was he involved there with the animals or farming?

6 WIT: Well, course he was two years old when we first moved
7 out there and you know we had to live in the barn and pop up for
8 the first couple years while we - - my wife and I decided to build
9 our house ourselves and so we lived in the pop up with him and his
10 older sister; to them it was a great adventure, camping. Mom and
11 Dad didn't necessarily see it that way. He grew up exploring the
12 woods if you will, you know helping me with the cows and horses
13 and of course we've always had dogs and cats.

14 ADC: And was he good with the animals?

15 WIT: Very good, in fact as a two year old, when we moved out
16 there we had a momma cat pregnant and she gave birth in the back
17 and so at two years old he was helping us take care of five or six
18 baby kittens. He always had a natural attraction to animals and
19 loving and caring with them. I remember even in high school, I
20 was looking at family pictures recently, and I saw a picture of
21 him when he was in high school we had just had a baby calf and you
22 know the cord was still sticking out and he was out there helping

1 me check her over and make sure everything was okay. Since he and
2 I were the ones who always worked with the outdoor animals the
3 most, the momma cows were never really worried about us, they
4 would let us get in and touch the calf and check them out and play
5 with them and things like that.

6 ADC: Tell us a little about Devin's relationship with his
7 siblings. How was he with his younger sister?

8 WIT: Well, with his youngest sister, he was bubba. He doted
9 over her. And you know, I remember him taking her out walking and
10 he would say, "now that is a cactus, that will hurt, that's a
11 sticker," you know. Anything she wanted, he would give to her.
12 If she wanted his piece of pizza or his piece of cake, you know,
13 he gladly gave it to her.

14 [Witness crying.]

15 ADC: Sir, can you tell us what kind of activities Airman
16 Kelley was involved in when he was a kid.

17 WIT: Well, I mean, he was my little buddy and we did
18 everything together. We are a very active outdoor kind of family
19 so we did all sorts of hiking and going through the trees on our
20 property looking for ancient artifacts and exploring. I would
21 hide old rusty horse shoes and let him find them. He got, as a
22 young kid, we got involved in cub scouts and he went through cub

1 scouts and up through the ranks into boy scouts. He played flag
2 football as a young kid. At our school, the high school seniors
3 on the football team coach the little kids flag football so it's a
4 great interaction between the older teenage boys and mentoring the
5 younger boys and he did that every year that you can; four years
6 in a row.

7 ADC: You mentioned as part of the scouts, the scouts are in
8 a way similar to the military with their discipline, tell us about
9 how Airman Kelley functioned in that environment.

10 WIT: Well, I mean, Devin, we've had a lot of exposure to
11 military in our family. Uh, my dad was in the Corps, my brother
12 and I were in the Corps, and his uncle (b) (6), (b) (7)(C) was in the Corps.
13 His uncle (b) (6) was in ROTC in Florida and went into the Army, so
14 Devin has been around a lot of military stuff all of his life and
15 so scouts was kind of a natural thing for him. After couple
16 years, they couldn't get enough volunteers from the fathers, so I
17 volunteered to be one of the den dads and you can see the little
18 kids, they don't care if their uniform is dirty or untucked or
19 patches coming off, but when you look back at all the pictures,
20 Devin was always very meticulous and made sure his shirt was
21 tucked in and his badges he wanted to earn everything to get all
22 of the arrows and things like that. When he moved on, he liked

1 doing the cars, the soapbox derby, and all of that together. And
2 he transitioned in Webelos and I don't know if you are all
3 familiar with that, but he did the arrow of light. There is only
4 two of the boys that stayed with it and Devin earned every stripe
5 he could and then he was the only one who transitioned into boy
6 scouts.

7 ADC: And, leading into the Air Force, how did it make you
8 feel when he decided to join the Air Force?

9 WIT: You know it made me very proud. Can I have a minute?
10 [Witness crying.] Um, my dad had served in the Air Force in the
11 Korean War and um, you know as a boy I wanted to play Army stuff
12 and get into his patches and uniform and all that, and I remember
13 he had a duffel bag that was shipped back after his tour from
14 Japan and it had a lock on it. As a little kid, you know I wanted
15 to get into dad's cool stuff and the answer was always, I don't
16 know where the key is. I tore apart the house looking for the key
17 and never found it and begged him to let me open the lock and he
18 said no. Well, when Devin was young, my dad was much older then,
19 and you know, he brought the duffel bag out and told Devin, "I
20 still don't have the key, but we are going to bust this open for
21 you." Devin wanted to get in and play with that kind of stuff, so
22 after fifty years of being in a duffel bag, I got to watch my son

1 pull out his grand dad's Air Force stuff. So, you know when he
2 decided to go into the Air Force it was a very meaningful thing to
3 me. Unfortunately my dad didn't get to live to see it but - -
4 it's hard.

5 ADC: I will give you a moment. Sir, obviously these are
6 unfortunate circumstances to be telling this story to the members.
7 I just want to get a little bit of background, tell us a bit about
8 his relationship with his ex-wife Tessa. Tell me how this
9 started, had they dated?

10 WIT: Well, as I understand it, we never really knew her
11 before, but I understand it they worked together at a fast food
12 place the summer after Devin's junior year in high school. We
13 didn't know her and then when Devin was in his tech school in
14 Richmond, I understand they started texting and emailing and then
15 when he finished up with tech school, I flew up to Washington to
16 drive back with him. We went and met his (b)(6); (b)(7)(C) that was working
17 up there and did some of the sights and all that and then drove
18 back. So I think he had a couple weeks before he had to report
19 here and he had told us that he was going to see an old friend of
20 his and that she had a little baby and everything, but we really
21 didn't know anything. Um, they chose to get married. We didn't
22 know about it until afterwards.

1 ADC: Did you attend the proceedings?

2 WIT: No we didn't; we didn't know about it at all. And
3 Devin told me that he didn't talk to me because he knew what I
4 would say.

5 ADC: What would you have said?

6 WIT: Well, his mother and I were together for six years
7 through high school and college and it allowed us to go through a
8 lot of the growing pains that relationships have at a young age
9 and we both agreed we wouldn't get married until we both got our
10 degrees. His mother and I are incredibly close; we are each
11 other's best friend and after all these years, almost 40 years of
12 being together, we still like each other. We get to work together
13 each day with each other and right now she's back at home with
14 Devin's younger sister in school. It is very difficult for us as
15 it has been this last year being apart so much and trying to help
16 both Devin and Tessa and everything that's been going on. So,
17 when we found out they were married, we said okay Tessa is going
18 to be part of our family and we opened our arms up and I became
19 gramps to (b) (6) and my wife became Grammy and we tried to be there
20 for them and help them and everything because we knew that Devin
21 was barely twenty years old and Tessa I believe was (b) (6), (b)
(7)(C) with
22 a young baby. We knew it was not going to be easy. They were

1 both, he wouldn't want me to say this because he doesn't think
2 this way, but to me he was still a kid and certainly at age twenty
3 to jump in the middle of you know, a young wife and kid and moving
4 away from home for the first time and trying to establish a life
5 and career; we knew it would be tough.

6 ADC: Safe to say, you didn't think the two of them were
7 ready to be - -

8 WIT: No, neither of them were really ready to be married,
9 let alone in a situation like they were with a young child and
10 trying to start a career and her (b)(6), (b)(7)(C) and you
11 know, not having a driver's license; it was going to be a tough
12 road to hoe. We tried to pitch in and put our arms around her and
13 be inclusive of her into our family.

14 ADC: Before the events we've discussed so far in this court
15 martial, did you and your wife spend much time with Devin and
16 Tessa and (b)(6),
(b)(7)

17 WIT: Well, of course, they got married and were only here a
18 month and half or whatever, um, and my wife and I both grew up in
19 El Paso and so we've had a family connection since the 1940's to
20 Ruidoso. And so we had a place up here and so when they got out
21 here I told my wife, we were planning to come and stay for summer
22 anyways, and I told my wife that I was going to leave early and go

1 up there. Devin, Tessa, and (b) (6) had all been trading this flu
2 bug around each other for almost a month and I remember Devin had
3 to go to the hospital and have IVs for fluids. So, I told my wife
4 that since (b) (6) wasn't out of school yet, but I am going to go
5 early and try to help and be there and you guys follow up when
6 (b) (6) gets out of school. So I came up here and they came up to
7 the cabin and Devin wanted to take Tessa to go do the girlie
8 touristy thing downtown and I said I will watch (b) (6), (b) (6) and I
9 played together the afternoon and then of course, they went home
10 and transferred the bug to me and then I transferred it to my
11 family. But we spent that time and happened to transpired we were
12 still up there and the pictures of (b) (6) that you see there, that
13 is actually my wife holding (b) (6), (b) (7) You can't see her face, but
14 that is actually her holding and comforting baby (b) (6), (b) (7)

15 ADC: Mr. (b) (6), (b) (7)(C) I have here Prosecution Exhibit 2, is that
16 what you are talking about?

17 WIT: Yes, that is my wife. So, we were there trying to be
18 whatever help or comfort we could be, in fact out of everyone
19 besides Devin and Tessa, my wife and I were there the most out of
20 everyone. We made the decision to not force our daughter to be
21 stuck here in the middle of it so we transferred back and forth
22 and traded out every minute of hospital time; either my wife or I

1 was there. We would trade keys in the airport and say well, I'm
2 parked here and all that. We did all of that all last summer um,
3 coming up being there for Devin and Tessa and trying to help them
4 and work through everything, be supportive and nurturing and
5 everything as much as we could because we knew it would be tough
6 for them.

7 ADC: Safe to say that you love (b) (6),
(b) (7)

8 WIT: I know he is not my blood, baby (b) (6) was our first
9 grandbaby and we knew it was going to be tough. And you know we
10 literally took him in and didn't think about if he was someone
11 else's blood or not, he was my son's son. I remember Devin
12 telling me that he was so proud. He said I am going to do (b) (6),
13 like you did me and teach him everything. I am going to teach him
14 how to ride horses, how to ski, how to skateboard, go camping; we
15 are going to all of that just like you did with me. I was just -
16 [Witness crying]

17 ADC: Is (b) (6) with Tessa now?

18 WIT: No, it is my understanding that he is - -

19 STC: Objection Your Honor, may we have a 39(a) session?

20 MJ: Members I am going to ask that you depart for the
21 moment and we will take up something outside your presence.

22 [The court-martial recessed at 0937 hours, 7 November 2012.]

END OF PAGE

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1 evidence certainly outweighs any probative value because again
2 there is no probative value in the government's estimation to
3 the extenuation or mitigation of the accused crimes.

4 MJ: What is the unfair prejudice?

5 STC: Your Honor, we believe that this will at least paint
6 in the eyes of the members is that Tessa Kelley - - as
7 negatively on Tessa Kelley, and [REDACTED]
8 [REDACTED] and again the probative value there we don't
9 believe - - and also confusion of the issues. The issue here is
10 not where (b) (6) is now or who has (b) (6), (b) (7)(C) [REDACTED], the
11 issue is what in this case extenuates or mitigates the accused
12 crimes as proper sentencing evidence.

13 MJ: Defense counsel?

14 ADC: Your Honor, this is certainly proper mitigating
15 sentencing evidence. It goes specifically to the protection of
16 society; I mean, (b) (6) is one of the victims in this case and
17 it's important to show that he has been taken out of this
18 situation and not hurt anymore. Specific (inaudible) Airman
19 Kelley will not be hurting (b) (6) again and these are all very
20 important principles and facts that go to the principles of
21 sentencing that will allow the members to understand that hey
22 this is not someone who is going to get (b) (6) back and - -

1 MJ: Alright. Defense counsel, do you intend to go any
2 further down the road?

3 ADC: No sir.

4 MJ: The objection is overruled, bailiff you can bring the
5 members back in.

6 [The Article 39(a) session closed at 0939 hours, 7 November
7 2012.]

8 **END OF PAGE**

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1 Devin has to go back to after he serves out his sentence. Does
2 he have a home to go back to?

3 WIT: Absolutely. We are a close family, extended family
4 all in central Texas and we spent holidays doing river walk in
5 San Antonio where extended family from all over comes over and
6 everybody is looking forward for Devin to be able to do those
7 things again and Easter too. Devin absolutely has a home to
8 come back too to make sure we get him moving on with the rest of
9 his life as best as he can given the nature of all of this.

10 ADC: Sir, tell the members, is he ever going to do
11 anything like this again?

12 STC: Objection, calls for speculation.

13 MJ: Overruled.

14 WIT: Devin is my only son, and I've been very proud of his
15 accomplishments in life. Devin didn't have to make that video
16 and we wouldn't be here. Devin would be going on with his life.
17 But, we are Aggies and we live by the Aggie code and Devin was
18 raised with honor and integrity. And he could have skipped all
19 that but he didn't. I know my son better than anyone else in
20 this world and there is absolutely no question, no doubt in my
21 mind whatsoever, that he understands there is no such thing as
22 excuses; no matter how sick you are. No matter how strenuous or

1 how much stress you are under, there is no excuses from crossing
2 the line. And he understands his mistake. I've spent a lot of
3 time visiting with him and we've been making the six hundred
4 mile trip, my wife and I both for a year and half now. And, I
5 spent a lot of time with him and I know Devin has grown and I
6 know he has learned from this. His faith is so much stronger
7 than mine. Um, there is no doubt whatsoever in my mind, that as
8 a man, he knows what's happened, knows there are consequences
9 and he is going to move forward one way or another without a
10 doubt.

11 ADC: Thank you sir.

12 MJ: Trial counsel?

13 STC: The government has no cross examination for this
14 witness.

15 MJ: Court members, any questions for Mr. (b) (6), (b)
(7)(C)

16 [Negative response by all members.]

17 MJ: No questions then, Mr. (b) (6), (b)
(7)(C) you may step down.

18 [The witness was excused and returned to his seat in the
19 gallery.]

20 Defense counsel?

21 ADC: Sir, at this time we would like to publish the
22 defense exhibits to the members.

1 MJ: Alright, counsel I notice that the copy I've been
2 provided does not have B, so if we could just make sure that
3 Defense Exhibit B is in that packet.

4 ADC: Yes sir. The packages certainly do and I will
5 provide you a copy.

6 MJ: Thank you, you may publish.

7 STC: Your Honor, if I could just take a look at what he is
8 going to provide to the members.

9 ADC: I am showing a copy of the defense exhibits to the
10 government, and am providing a copy to the members and
11 president.

12 [Defense counsel handed exhibits to members.]

13 MJ: Defense counsel?

14 ADC: Sir, with that the defense rests.

15 MJ: Trial counsel, any rebuttal?

16 STC: No Your Honor.

17 MJ: Members you now have heard all the evidence in the
18 case, at this time I will need to have a brief session with
19 counsel to go over the instructions I will give you. During
20 that time, you can begin to review the documents you have before
21 you. But it is still premature to begin your discussions. So
22 with that, the members may return to the deliberation room.

1 [The court-martial recessed at 0946 hours, 7 November 2012.]

2 **END OF PAGE**

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1 guilty. Your determination of the kind and amount of
2 punishment, if any, is a grave responsibility requiring the
3 exercise of wise discretion. Although you must give due
4 consideration to all matters in mitigation and extenuation, as
5 well as to those in aggravation, you must bear in mind that the
6 accused is to be sentenced only for the offenses of which he has
7 been found guilty.

8 You must not adjudge an excessive sentence in reliance upon
9 possible mitigating action by the convening or higher authority.
10 A single sentence shall be adjudged for all offenses of which
11 the accused has been found guilty. The maximum punishment that
12 may be adjudged in this case is:

- 13 a. Reduction to the grade of E-1;
- 14 b. Forfeiture of all pay and allowances;
- 15 c. Confinement for 5 years and 6 months; and
- 16 d. A dishonorable discharge.

17 The maximum punishment is a ceiling on your discretion. You are
18 at liberty to arrive at any lesser legal sentence. In adjudging
19 a sentence, you are restricted to the kinds of punishment which
20 I will now describe or you may adjudge no punishment. There are
21 several matters which you should consider in determining an
22 appropriate sentence. You should bear in mind that our society

1 recognizes five principal reasons for the sentence of those who
2 violate the law. They are rehabilitation of the wrongdoer,
3 punishment of the wrongdoer, protection of society from the
4 wrongdoer, preservation of good order and discipline in the
5 military, and deterrence of the wrongdoer and those who know of
6 his crimes and his sentence from committing the same or similar
7 offenses. The weight to be given any or all of these reasons,
8 along with all other sentencing matters in this case, rests
9 solely within your discretion.

10 Types of Punishment; this court may adjudge a reprimand, being
11 in the nature of a censure. The court shall not specify the
12 terms or wording of any adjudged reprimand.

13 This court may adjudge reduction to the lowest or any
14 intermediate enlisted grade, either alone or in connection with
15 any other kind of punishment within the maximum limitation. A
16 reduction carries both the loss of military status and the
17 incidents thereof and results in a corresponding reduction of
18 military pay. You should designate only the pay grade to which
19 the accused is to be reduced, for example, E-2.

20 This court may adjudge restriction to limits for a maximum
21 period not exceeding two months. For such a penalty, it is
22 necessary for the court to specify the limits of the restriction

1 and the period it is to run. Restriction to limits will not
2 exempt an accused from any assigned military duty.

3 This court may sentence the accused to hard labor without
4 confinement for a maximum period not exceeding three months.
5 Such hard labor would be performed in addition to other military
6 duties which would normally be assigned. In the usual course of
7 business, the immediate commanding officer assigns the amount
8 and character of the hard labor to be performed.

9 As I have already indicated, this court may sentence the
10 accused to confinement for a maximum of 5 years and 6 months. A
11 sentence to confinement should be adjudged in either full days,
12 full months, or full years; fractions should not be employed.

13 In determining an appropriate sentence in this case, you
14 should consider that the accused has spent 152 days in pretrial
15 confinement. If you adjudge confinement as part of your
16 sentence, the days the accused spent in pretrial confinement
17 will be credited against any sentence to confinement you may
18 adjudge. This credit will be given by the authorities at the
19 correctional facility where the accused is sent to serve his
20 confinement, and will be given on a day for day basis.

21 This court may sentence the accused to forfeit all pay and
22 allowances. A forfeiture is a financial penalty which deprives

1 an accused of military pay as it accrues. In determining the
2 amount of forfeiture, if any, the court should consider the
3 implications to the accused of such a loss of income. Unless a
4 total forfeiture is adjudged, a sentence to forfeiture should
5 include an express statement of a whole dollar amount to be
6 forfeited each month and the number of months the forfeiture is
7 to continue. The accused is in pay grade E-3 with over 2 years
8 of service, the total basic pay being \$1,868.10 per month.

9 If reduced to the grade of E-2 the accused's total basic
10 pay would be \$ 1,671.00. If reduced to the grade of E-1 the
11 accused's total basic pay would be \$ 1,491.00. This court may
12 adjudge any forfeiture up to and including forfeiture of all pay
13 and allowances.

14 Any sentence which includes either confinement for more
15 than six months or some amount of confinement along with a
16 punitive discharge will require the accused, by operation of
17 law, to forfeit all pay and allowances during the period of
18 confinement. However, if the court wishes to adjudge any
19 forfeitures of pay and/or pay and allowances, the court should
20 explicitly state the forfeiture as a separate element of the
21 sentence.

1 The stigma of a punitive discharge is commonly recognized
2 by our society. A punitive discharge will place limitations on
3 employment opportunities and will deny the accused other
4 advantages which are enjoyed by one whose discharge
5 characterization indicates that he has served honorably. A
6 punitive discharge will affect an accused's future with regard
7 to his legal rights, economic opportunities, and social
8 acceptability. This court may adjudge either a dishonorable
9 discharge or a bad conduct discharge. Such a discharge deprives
10 one of substantially all benefits administered by the Department
11 of Veterans Affairs and the Air Force establishment. A
12 dishonorable discharge should be reserved for those who, in the
13 opinion of the court, should be separated under conditions of
14 dishonor after conviction of serious offenses of a civil or
15 military nature warranting such severe punishment. A bad
16 conduct discharge is a severe punishment, although less severe
17 than a dishonorable discharge, and may be adjudged for one who
18 in the discretion of the court warrants severe punishment for
19 bad conduct even though such bad conduct may not include the
20 commission of serious offenses of a military or civil nature.

21 Finally, if you wish, this court may sentence the accused
22 to no punishment.

1 In determining the sentence, you should consider all the
2 facts and circumstances of the offenses of which the accused has
3 been convicted and all matters concerning the accused. Thus,
4 you should consider the accused's background, his character, his
5 service record, the duration and character of the accused's
6 pretrial confinement, all matters in extenuation and mitigation,
7 and any other evidence he presented. You should also consider
8 any matters in aggravation.

9 A plea of guilty is a matter in mitigation which must be
10 considered along with all other facts and circumstances of the
11 case. Time, effort, and expense to the government have been
12 saved by a plea of guilty. Such a plea may be the first step
13 towards rehabilitation.

14 During argument, counsel may recommend that you consider a
15 specific sentence in this case. You are advised that the
16 arguments of counsel and their recommendations are only their
17 individual suggestions and may not be considered as the
18 recommendation or opinion of anyone other than such counsel.

19 MJ: Trial counsel, you may present argument.

20 **GOVERNMENT SENTENCING ARGUMENT**

21 ATC: You heard discussion this morning from the accused's
22 father that he was raised under the principles of honor and

1 integrity, though what happened over the past year of abuse of a
2 (b) (6), (b) (7) old and his own wife, that keep in mind that before
(C)
3 that he was raised under principles of honor and integrity. He
4 would have you believe that this was a mistake, this was not a
5 mistake. This was twelve months of abuse to a defenseless child
6 who could not even speak for himself. In the words of the
7 accused in the video you saw yesterday, "the whole world is
8 going to know, I'm a child beater. I am a wife beater."
9 Members keep in mind everything you've seen in the court today
10 and yesterday and the video he recorded back in April, the
11 emotion, the profession that this is the worst mistake I ever
12 made, the tears, keep in mind there was a (b) (6), (b) (7) old child on
(C)
13 June 8th, 2011 so sick that he needed to be taken to the
14 emergency room. Crying, vomiting, (b) (6), (b) (7) old; he gets
(C)
15 frustrated with him while trying to dress him and take him to
16 the hospital; what does he do? He slaps him across the face so
17 hard that it leaves bruises on his cheek. He slaps this child
18 with such force that he causes bleeding on the brain. He pushes
19 him, a child that can't even walk, lands on his shoulder, flips
20 over and breaks his collarbone. Was this all in one day? No.
21 When did he arrive at Holloman Air Force Base, April of 2011.

1 Read in the stipulation of fact, he abused that child from April
2 of 2011 till June of 2011.

3 SDC: Sir, we object to the statement of facts; that is the
4 charged time frame. I believe the care inquiry the members
5 heard, there were two occasions in which he's been found guilty,
6 that is the divers, so that is the objection sir.

7 MJ: Members, arguments of counsel are not evidence. You
8 are the final arbiters of what the evidence in the case is, so I
9 invite you to look over the evidence very carefully and make
10 your determination of what the facts are. Trial counsel, you
11 may continue.

12 ATC: Consider that the last day that the (b) (6), (b) (7)
(C) old
13 baby lived in the same home as the accused, the last day, what
14 did he do; he slapped him. This isn't something that he's
15 voluntarily brought under control himself, this is Dr. (b) (6), (b)
(7)(C)
16 Keep in mind that at the hospital you heard mention of a video,
17 as his dad mentioned, his father clearly loves him. A father
18 that clearly raised him with every chance to succeed in life,
19 consider that back in June when the injuries were fresh and Dr.
20 (b) (6), (b) (7)(C) asked him where did the bruises come from; "I don't
21 know, they just appeared." Listen to the date in the video,
22 when did he make the video confession? April 2012, (b) (6),
(b) (7)(C) taken

1 into the custody of the state back in June. Did he have to make
2 the video, no, he did not. Go ahead and give him credit for
3 that. But he didn't have to lie to Dr. (b) (6), (b) (7)(C) either. Three
4 times Dr. (b) (6), (b) (7)(C) asked him, and three times "I don't know, it
5 just appeared." And what happened after the baby was taken out
6 of the home? He turns his aggression to the only other person
7 living in the home, his wife. You heard him say that this is
8 the "worst mistake of his life;" beating (b) (6) was the worst
9 mistake of his life. Less than three weeks later he gets mad at
10 Tessa Kelley, wraps his hands around her throat and chokes her
11 for how long? [Counsel timed on his watch and paced in front of
12 members.]

13 ATC: At least fifteen seconds, and confesses "worst
14 mistake of my life and I will never hurt anyone again." Three
15 weeks after he'd already forgot the harm he did to baby (b) (6),
(b) (7) And members take that into consideration when you decide how to
16 balance mercy and justice in this case. Keep in mind that when
17 (b) (6) was crying, when he needed comfort, love, and empathy, he
18 got slapped. And taking all things into consideration,
19 everything you've heard, the fact that he has come in here and
20 plead guilty, that he has saved the government time and money
21 from having to litigate an entire trial, he has saved Tessa
22

1 (b) (6), from having to re-live her experience on the witness
(b) (7)(C)
2 stand. But also the fact that he is the reason that we are
3 here. An appropriate sentence, first the maximum you heard what
4 the judge say what the maximum was. Reduction to E1, total
5 forfeitures of all pay, confinement five years six months, and a
6 dishonorable discharge. An appropriate sentence is a reduction
7 to E1, four years of confinement, and a bad conduct discharge.
8 Now let's go through those.

9 Reduction to E1, that is easy. Take both of those stripes.
10 We don't let people wear stripes that beat children and that
11 beat their spouses. If you want it to be symbolic, take a
12 stripe for each of the victims. No one should have to look up
13 to him, nobody. He attacked the defenseless. Confinement, the
14 maximum is five years six months, we are asking for four. Now
15 you might be thinking, four years isn't enough for what he's
16 done, the pictures, look at what he did to (b) (6), a broken bone,
(b) (7)
17 bleeding on the brain, choking his wife, pulling her hair with
18 such force that it comes out in clumps; four years isn't enough.
19 You also might be thinking Dr. (b) (6), (b) also said that there is
(7)(C)
20 no permanent damage to (b) (6) thankfully. But he doesn't get
(6)
21 credit for that. He doesn't get credit for the fact that even
22 though he says that he shook him and he watched his eyes roll

1 back in the back of his head, that he broke his collar bone and
2 he caused a bleeding on the brain that could result in death; he
3 doesn't get credit for that. If you want to credit divine
4 inspiration, modern medicine, pure dumb luck, but don't give him
5 credit for the fact that the ten month old boy will have no
6 permanent physical disability. You may also consider that he is
7 going to have a federal conviction, is that enough? Think,
8 someone goes into a national park and litters, federal
9 conviction. Someone murders someone in a federal park, federal
10 conviction. The only way we can tell the seriousness of the
11 crime is by the sentence you give. Four years is the
12 appropriate amount. Is a federal conviction enough that when
13 (b) is finally old enough to understand and hears what happened
14 (6), to him, yea, your collar bone was broken, he caused a bleeding
15 on your brain, he slapped you several times, he shook you, but
16 don't worry he got a federal conviction; or do we need something
17 a little more substantial, four years. It strikes the right
18 balance, remember this is not a one-time crime, this did not
19 happen in one episode, this happened over a course of twelve
20 months and two different dates; people he proposed to love very
21 much. Who's next? What are we going to do to ensure that this
22 does not happen again? That the next time he lashes out in

1 anger to strike a child, to choke a woman, let him think back to
2 the four months he sat in confinement, then maybe he will think
3 again. Maybe then he will get his anger under control, and
4 maybe the lessons of honor and integrity will sink in that he
5 was raised with for twenty years, twenty years. How long will
6 it take him to unlearn the behavior that made him think it's
7 okay to choke someone and what did he say, "I immediately
8 realized it was wrong." Fifteen to twenty seconds is
9 immediately? To have his hands around her throat, he
10 immediately realized it was wrong? No he didn't, four years
11 will teach him that lesson. It will ensure that for at least
12 four years that there won't be another victim.

13 Punitive discharge, a dishonorable is clearly appropriate
14 in this case, so don't think for a minute the fact that I am
15 suggesting a bad conduct discharge that you should not consider
16 a dishonorable. You are to look at all of the evidence. If you
17 are going to give him credit, for the fact he plead guilty here
18 today, what should you do, it's up to you to determine the
19 amount of credit he deserves for that, but do it there. Give
20 him a bad conduct discharge instead of a dishonorable if you
21 think it rises to that level. If you think that it is
22 mitigating enough, that he made the video ten months later, he

1 still lied when he had the chance. Is a bad conduct discharge
2 or dishonorable discharge a punishment, absolutely? It should
3 come as no surprise though that we punish child abusers, we
4 punish wife beaters. We don't allow those individuals to have
5 the same standing in the community of having served their
6 country with honor, when in the short time he's been in the Air
7 Force, have these serious charges, because the injuries to (b) (6)
8 and Tessa were serious. To (b) (6) they were serious enough, he
9 shook him, he struck him with enough force to cause death or
10 serious bodily harm. So, consider the dishonorable discharge.
11 If it is merited, give him a bad conduct discharge. Now let's
12 talk about potential for rehabilitation, members this morning,
13 well yesterday you received a stack of paperwork; letters of
14 counseling, letters of reprimand, that will give you an insight
15 to the person you need to sentence. It goes to his
16 rehabilitative potential. Nine of them from July of 2011 to
17 March of 2012, nine times the Air Force has tried to
18 rehabilitate him. And this is after twenty years of coming from
19 a loving family that raised him with honor and integrity. You
20 see a common theme throughout these. "I take full
21 responsibility," this is of course after he lists his excuses of
22 why he messed up. "I take full responsibility, but I

1 respectfully ask that this LOC be rescinded." July of 2011,
2 excuses, that said "I take full responsibility and respectfully
3 ask that this LOC be rescinded." September 2011, "I take full
4 responsibility for my actions and respectfully ask that this LOC
5 be rescinded." Again, September 2011, "I take full
6 responsibility for my actions; I respectfully ask this LOR be
7 rescinded." September 2011 another one; February 2012 another
8 one; you will have those back with you, review them, and see
9 what's in them. March of 2012, more excuses, that said "I take
10 full responsibility for the mistake I made, I apologize for it.
11 I respectfully ask this LOR be rescinded." March of 2012, "I
12 accept that I made a mistake and I'm sorry." Finally, March of
13 2012, "I sincerely apologize for my actions and I will not
14 repeat them, I respectfully ask that the control roster be
15 rescinded." Do you see a pattern of excuses? I take full
16 responsibility but please don't give me any consequences. It's
17 the same thing why we're here today. His military career has
18 not been very long, let's take into account his life before. He
19 has character letters that you received from defense today.
20 From his aunt, she talks about that "when a young man is drawn
21 to playing with, taking care of, and comforting a child, it is a
22 unique trait that is usually noted by observing women. Grown

1 women and mature young women look at this as a desirable
2 characteristic and noting the qualities to becoming an
3 outstanding father. Devin has this unique characteristic."
4 Does this sound like the evidence that you heard today, bruising
5 on the cheek, a broken collar bone, bleeding on the brain; an
6 outstanding father? "He has always curled babies in his arms
7 and comforted the little ones that fell." Remember him saying
8 he "slapped him so hard he fell over on his side?" This while
9 he is getting ready to take him to the emergency room because he
10 is so sick he's been vomiting. And then "I know that he has
11 owned up to his mistakes in court." We've heard that before.
12 Another aunt, "I would be completely comfortable with him
13 babysitting my daughters at any time." Can you imagine that?
14 Do you have any references, yes; I have a federal conviction for
15 child and spouse abuse. Oh, what happened? I broke my son's
16 collar bone; I slapped him and hit him so hard it caused
17 bleeding on the brain, great, when can you start? Trust him
18 with children? They don't know him. Nobody knows him and he
19 told you that himself. I lie and I lie and I lie and I am good
20 at it. He's been lying to his family; these people don't know
21 him. From Ms. (b) (6), (b) (7)(C) "I know he is sorry beyond belief for
22 what he has done and he accepts responsibility for his actions,"

1 sound familiar? This from an attorney that represented him, "it
2 would have been much easier for Mr. Kelley to simply walk away
3 from the situation involving his wife and her child, however he
4 elected to stand by her and to do whatever it took to regain
5 control over his wife's minor child. Mr. Kelley, in my opinion,
6 showed great character in his efforts to try to keep his little
7 family together." Great character? For twelve months of abuse
8 in his home, great character, of course when he is in the
9 lawyer's office and when he's in court, he is going to be on his
10 best behavior. But as soon as you close the door and no one is
11 looking, he's choking a woman, he's beating a child. "I know he
12 is taking responsibility in pleading guilty. I believe Mr.
13 Kelley has learned from his mistakes and has the potential and
14 desire to get his life back on track and become a productive
15 member of society. Mr. Kelley is truly a fine young man who
16 finds himself in a terrible situation." No, he does not find
17 himself in a terrible situation, he created a terrible situation
18 for (b) (6), for this child it was a terrible situation. For (b)
(b) (7) (6).
19 (b) (6), it was a terrible situation. You don't get to start a
(b) (7)(C)
20 house fire and put it out and get an award for it. He created
21 this; his actions are what brought everybody here today.
22 Members, if you want to know what kind of troop he his, look at

1 his EPRs. You will have those back there. He requires
2 continuous supervisor involvement. Before making your final
3 sentence, remember that when he should have extended the hand of
4 love, of empathy and compassion, he slapped a defenseless
5 crying, sick child. That is the Airman he is. Yes, take
6 everything under consideration, but remember he is much
7 different when he is behind closed doors, and as he told you
8 himself, he's a child beater and a wife beater and the
9 appropriate sentence in this case is reduction to E1, four years
10 of confinement, and at least a bad conduct discharge. Thank
11 you.

12 MJ: Defense counsel you may present argument.

13 **DEFENSE COUNSEL SENTENCING ARGUMENT**

14 SDC: Hot blood begets hot thoughts; hot thoughts beget hot
15 deeds; that is Shakespeare, that's highfalutin. I won't be
16 highfalutin. I'm not going to be swinging on a trapeze up here
17 as an attorney, but I do want to start with a little comparison
18 and the conversation I want to have. There is a way that you
19 can do with rhetoric, rising and falling action, to make
20 something sound like it makes sense, but when you step back and
21 take another and another, and you look at it from a different
22 angle, it doesn't hold water. And the government's argument

1 doesn't hold water. Their explanation of what happened in this
2 case hopefully you are having some cognitive dissonance about
3 some (inaudible), well, this doesn't quite match what I think
4 happened. What happened is what Shakespeare says but in plainer
5 terms. This is a young, anxious, socially inept, under-
6 developed kid who gets himself into a relationship with a young
7 woman with a ton of baggage that he's completely and horribly
8 ill-equipped. The love of a good father doesn't make a good
9 father; you have to grow into that. And his dad with apologies
10 to his son calling him a child needs no apologies. He himself
11 was a child and took on the burden of a man and he was found
12 wanting, so you punish him in that context. That is what was
13 going on in this case. It's worth noting members that all the
14 abuse we are talking about and it is abuse, and we won't shy
15 away from that and these are serious and severe injuries that
16 these people - - at least (b)(6); (b)(7) had suffered in the course of
17 this. But look at when it happens, it happens when he loses
18 control, it happens inside of arguments. It doesn't come from
19 this evil planned kind of abuse; the systemic like I'm going to
20 control you, I know he uses that language up there on the video
21 but it comes out of a kid who is not following, who's not
22 controlling his emotions and we have to expect more of an Airman

1 who puts on this blue suit, but we also have to understand who
2 he is as an human being because this whole proceeding right now
3 and you go back there, is not about being riled up by the
4 government's argument. It's about looking at the facts, it's
5 about feeling the emotion of the event and it is an emotional
6 event for every single person who has to sit in this court room,
7 but it is fashioning an appropriate sentence, that is what the
8 proceeding is; that is the bottom line on what you deliver
9 today. That is the grade, do you deliver the appropriate
10 sentence; that is your charge. It is not to be convinced of
11 anything, it's not to say this argument made sense or this
12 argument did not make sense, it is to take what's useful and
13 what I can present to you in the limited time that I have,
14 reject the stuff that's not useful, and have a conversation back
15 there about what is the exact appropriate sentence in this case.
16 Because if you punish too much, that is not just at all, but if
17 you punish too little and absolutely, there is a too little
18 amount of punishment, no punishment; that would be too little.
19 You can't come back with no punishment I can tell you that right
20 now, that is the functional equivalent of me getting up here and
21 histrionics saying four years, a BCD, reduction to E1; no. He
22 needs some punishment and I know you will deliver on it; I'm

1 confident. One of the other things I'd like to talk to you
2 about as a pre-sep before I go into some of the details about
3 the arguments of principles of sentencing that I think might be
4 useful for you, is I ask you and I think this is helpful in
5 understanding this case and understanding my client Airman Devin
6 Kelley, I'd ask you to focus on the timeline in this case. The
7 government didn't talk about it but they've built a timeline for
8 you. They've shown you exactly what happened in this case and
9 it explains everything and it squares everything from what you
10 heard from his dad, everything from what you heard from his
11 aunt, and everything in this case. It is as simple as this; it
12 is the timeline of the case. It's not a year of abuse to (b)(6);
13 it is less than two months that the government charged. They (b)(7)
14 just charge that because it's the best they can approximate it.
15 You can do it, you can use your common sense, knowledge, and the
16 ways of the world, you heard from the doctor and talked about
17 how long it would take for a broken clavicle to be resolved and
18 then you heard when that clavicle was discovered in the
19 beginning of June, so you can see going back in time; so that's
20 why they go back to April, because that's when it's charged.

21 Okay, and you have him abusing (b)(6) in that time and what
22 happens? He gets removed from the home. We have to note the

1 fact that he didn't go to the hospital to be treated for those
2 injuries, it was something else; it was that bug, as you heard a
3 couple people refer to it. So, put that into context. Yes, the
4 force likely but it didn't produce death certainly it's a
5 different case. Likely, but it didn't produce those things we
6 were talking about. So then they go, he goes in there and they
7 lose the child, it's horrible. It's great for (b) but it is a
8 horrible event. He did, he's guilty in that moment sure. And
9 he lies, and he's not charged with lying, but he does he lies.
10 He denies at least three times by the government's account, and
11 in this entire case you see born out in every decision he makes,
12 every failure he has on duty, every video he records, every plea
13 he enters to, yesterday and every emotion you see fall or
14 cascade across his chest and face across the course of this
15 court martial, which didn't get any observation by the
16 government or observation of the fact, none needed, about how
17 this has impacted him as you've seen over the course of two
18 days. What happened? Everything changes for him and he has
19 that crushing, that soul destroying, that hollowing guilt of
20 what he did so he lies and he starts to get away with it for a
21 little bit. But the lies don't stay underneath you, you can't
22 just go on. He told you that in the video, in the treatment he

1 goes into and tries to get the family back together, he is still
2 this impetuous, stupid, young man who is not living up to the
3 charge that he has as an Airman in the United States Air Force.
4 So what happens the next time that he is in this tumultuous
5 relationship with his young wife? What happens when his
6 emotions overflow out of this crushing sense of guilt and it
7 doesn't in any way forgive what he did, but it explains it. He
8 hates himself, he's self-loathing, he lashes out even more; we
9 see that and you know this from your common sense, your
10 knowledge of human nature, when you are hiding something and are
11 independently responsible you tend to project and tend to push
12 it out and get even more self-defensive. That is exactly what
13 happens in this case, he's lashing out even more because he is
14 crushing himself with this weight on his shoulders and you've
15 seen over the course of this trial a brick come off his
16 shoulders when he pleads guilty. You've seen a brick come off
17 his shoulders when he's found guilty, and you've seen a brick
18 come off his shoulders when he weathers the storm of hearing all
19 these things in front of you and he has to accept responsibility
20 again and again; it is about rehabilitation and about what is
21 happening in his future. And you see even before that in all
22 the prosecution exhibits, they hold them up here dramatically,

1 nine letters, show me the letter that comes before he hits (b)(6);
(b)(7).
2 Show me that comes after the great upbringing and he then fails
3 to live up to the standards of his father. You won't find it;
4 what you will find he's a dumb, impetuous guy who slaps his kid
5 and he's wrong on it, he's wrong, he's wrong. He doesn't know
6 how to deal with the choice he made and it overflows into other
7 parts of his life and thank god it does. Does it forgive the
8 things that he did, the subsequent crimes he committed against
9 Tessa? But thank god he has some emotion about this again
10 expressed in the worst ways imagined, continued screwing up at
11 work and continued screwing up at home, but at least he's
12 wearing it. At least we can see that there is something in him
13 that recognizes how horrible this is, so what we have to look at
14 it is how are we going to help this young man start patrolling
15 himself because he has a life ahead of him. Their punishment
16 has nothing to do with helping this young man, their punishment
17 has nothing to do with rehabilitation and that is what this case
18 is about members, I would submit to you. It's your choice,
19 there are five principles, this isn't about good order and
20 discipline necessarily, it isn't about protection of society
21 necessarily, and I would submit to you that this is really a
22 case about specific deterrence. This young man needs to have a

1 better relationship with women, with young children and it's
2 also about rehabilitation. You have the opportunity here to
3 help rehabilitate. I want you to feel in this court room, and I
4 ask you to begin to take that remorse, all of us can certainly
5 feel some level of sympathy and some level of love and affection
6 and we don't really want to impose punishment, but you can feel
7 all those things and feel anger at the same time and you can
8 feel compassion at the same time and you can make a reach out
9 for healing. This case can really be about healing. This case
10 is over actually, that is a misstatement on my part, but this
11 sentence can be about healing. It can be about giving him a
12 charge, not a vote of hope for him or a confidence that he is
13 going to do the right thing necessarily in the future, but
14 recognition that you have a tool box to go back there with and
15 you will fashion an appropriate sentence. He is not defined by
16 the fact that the maximum punishment is five years and six
17 months. Because its five years and six months and we've done
18 something less that makes sense, where is the four years? Why
19 is it the four years? Why does that make sense? You have a
20 hundred and fifty-two days that he's been in confinement, you
21 have a revelation to his Lord Jesus Christ that he put in front
22 of you and in his unsworn statement that says he's sitting there

1 in the jail cell and it didn't even hit him immediately, he's
2 sitting there watching TV, he's reading books and eventually has
3 this revelation; this come to Jesus moment, maybe he should have
4 had it earlier in his life, certainly, but he's having it.
5 Can't we vote a little bit towards that? Can't we take that
6 into account when we are fashioning an appropriate sentence?
7 The military judge already instructed you and you will have his
8 written instructions, I believe it is Appellate Exhibit
9 thirteen. A guilty plea may be the first step in
10 rehabilitation. And in this case, he's wrong. The law is
11 correct certainly, but we just know for a fact that the first
12 step in rehabilitation in this case predates the guilty plea
13 that happened yesterday by several months. It's the 27th of
14 April 2012, when he makes that tape. That video members, you
15 notice is not where you might expect an AFOSI detachment 421,
16 out in the corner, where you have a trained agent sitting there
17 and leaning in, establishing rapport, the lights flickering in
18 the corner, and saying hey, we've pulled you in here to ask you
19 some questions. That video is in a bathroom somewhere, you can
20 tell, it looks like it's on his laptop or a personal camera,
21 it's made and the stipulation of fact tells you this, for at
22 least one purpose, to help Tessa to get (b) (6) back. It is self-

1 sacrificing in a way that he should have been self-sacrificing
2 long before, but he makes that video. He records himself and
3 there is no helicopters or lights flashing outside, rest assured
4 the United States government with all their resources, if they
5 had some evidence that the heat was on, that he was about to be
6 found out, and it was only under the duress of a closing
7 investigation that he made that video, they would have shown it
8 or at least cross-examined Mr. Kelley on it when he took the
9 stand. He could have walked away but he made the video. Inside
10 that video tape confession members, what you have in Prosecution
11 Exhibit 4, a couple of notes, he says it only takes a few
12 seconds to lose control; he has a problem controlling his
13 emotions which causes him to seem rebellious at different times.
14 He lies, yes he lies and lies and is good at it but the trial
15 counsel missed what he said after that, he lies because he's
16 ashamed. It's shameful, these are shameful crimes, make no
17 doubt about it, but they are crimes that require an appropriate
18 sentence; a tailored and measured specific sentence; not
19 something that is well, we could do this much so we are going to
20 ask for this since it seems more reasonable. He says every
21 little thing you do affects your future, that's recognition,
22 that is cognition, that is something you would have hoped to

1 have back on the 8th of June 2011, but you know he has by
2 suffering through all the consequences that flowed in terms of
3 his career and crushing guilt over the intervening (Inaudible)
4 to you. And then he says this, and I think this is important,
5 and I hope it's important to you when you go back there, "I know
6 I am going to get in trouble for making this video, but it's the
7 right thing to do." Why is that important? I called him dumb,
8 apologies to my client, I've called him young or hot-blooded or
9 whatever you want call it, innocent or naïve, but he recognizes
10 when he makes that video that he's going to get in trouble and
11 you know that there is no one operating that camera. And you
12 know from the timeline, the video from the 27th of April, it
13 doesn't just sit around. It gets found out and it gets passed
14 along and doesn't get destroyed. So, with recognition or a
15 lawyer sitting there advising him in a room with him, he says I
16 am going to get in trouble for saying this and he realizes
17 belatedly, he recognizes that he has to put this thing forward.
18 I'd ask you to see that as a light, something you can steer
19 towards to fashion an appropriate sentence. He's recognizing
20 what is going on and he even makes reference in the video of
21 treatment he had received with Tessa, so there's value in there.
22 And although the military judge has instructed you that the

1 first step towards rehabilitation is a guilty plea, we also know
2 he waived his rights to counsel in that care inquiry. Under
3 oath he answered every single one of the military judge's
4 questions. At the end of the military judge's inquiry, you
5 heard this morning, counsel do you have anything to add, no. No
6 additional questions needed, he answered all the questions so
7 clearly that the government of the United States as well as the
8 defense needed nothing further.

9 STC: Objection Your Honor, this is improper argument.

10 MJ: Overruled.

11 SDC: We needed nothing else to explain that he had been
12 found guilty of those crimes; he answered every question that
13 was put to him. And then the stipulation of fact, members a lot
14 of the evidence that we've been given from the United States is
15 essentially my client's words right, it's the video, it's the
16 care inquiry, or his sworn testimony that you heard for about 40
17 minutes, and it's that stipulation of fact, it is the first
18 thing you see on Prosecution Exhibit 1. It is Airman Kelley
19 waiving all his rights saying this is exactly what happened.
20 You know he travels to the Beacon and then goes into confinement
21 and changes there; he told you that in his unsworn and then,
22 it's a small consideration, but we put it in there, its

1 paragraph 13 in the stipulation of fact and the government
2 counsel referenced it; he has saved the time and money and the
3 expense. He's also saved Tessa the heartache from getting up
4 there on the stand, so whatever motivation that gives you to
5 fashion an appropriate sentence for him, I ask you to take that
6 into consideration.

7 But specifically, as I round out here, a little bit about
8 the government's recommendations and what these punishments mean
9 in terms of rehabilitation for Airman Kelley. Confinement,
10 well, we are there, that affect has happened members and
11 dramatically so, a hundred and fifty two days, it's not a month
12 or two or three, it's five. Five months, a hundred fifty two
13 days, members we just had an election and whether or not you are
14 happy about the results, we just had an election. And what will
15 happen, President Obama when he comes in, is that they are going
16 to look at those first hundred days and they don't do it because
17 we've got ten fingers and we work in decades, but because a
18 hundred days is enough to really measure what's happening in the
19 administration. Even though it's the second one, they are going
20 to look for it. He's been in there a hundred days and then a
21 half again, sitting in that confinement cell, being escorted
22 around by guards everywhere he goes and being monitored on

1 everything he does. What is he doing inside that cell; you have
2 the unsworn statement in Defense Exhibit B in front of you.
3 He's reading the bible, listening to the radio, watching TV and
4 has read different books. Does that sound like that's enough
5 for him to be rehabilitated? I would submit to you, no. He
6 needs to be in treatment, going to those classes that he
7 referenced inside that video from 27 April, but you don't hear
8 anything about in his unsworn and the government had every
9 opportunity to rebut anything he said in there. Confinement
10 just keeps him there even longer and if you are talking about
11 the deterrent effect of you will go into this jail cell, it will
12 close behind you, it is a cold dark and lonely place for you,
13 you wife beater and you baby beater. That is a hundred and
14 fifty two days, and in the interim of the hundred fifty two days
15 what's happened? He's lost his wife and that means something.
16 Doesn't that mean something that he's lost his wife? He loved
17 her. I know it's hard to see this through all this but he did;
18 there was love in that. How do you know this, Prosecution
19 Exhibit 1, paragraph 5. He's not a horrible father to (b) (6),
20 what happens when he's at work and (b) (6), (b) (7) for probably the third
21 time in a row is nauseous, you have a stipulation in this case
22 Tessa calls him from work because she doesn't want to take him

1 to the hospital without Devin being there with them. Without
2 Airman Kelley being a part of that, their young small family and
3 then you heard from Mr. (b) (6), (b) (7)(C) when they went up to Ruidoso and
4 was referred to as Gramps. What does he do, he wants to take
5 Tessa downtown and show her around and do all the girlie things
6 in Ruidoso. So there is love there; but that's gone, he's
7 thrown that away, he's destroyed it and crushed it on the rocks.
8 His relationship with his first son, treated mean fully; as his
9 father's first grandson; is destroyed. He's thrown that away.
10 It's not a punishment you can adjudge but the universe certainly
11 has already adjudged that punishment. And he will forever carry
12 that burden or that shame around his neck before any punitive
13 discharge and before any additional sentence to lengthy
14 confinement. You also know that these people are safe from him.
15 You know that she's divorced him and moved on and you know that
16 (b) (6) is in a safe place as well, you heard that from Mr. (b) (6), (b) (7)(C)
17 He's with Tessa's (b) (6), (b) (7) Take that into account please when
18 crafting an appropriate sentence. This isn't an explosive
19 nitroglycerin situation for him to get back into, that's not
20 going to happen, these people have moved on, they have moved
21 away from him and his life has been held waiting for today. But
22 in the interim, he has been serving out one hundred and fifty

1 two days in jail, so the government should at least acknowledge
2 that in their recommendation. The fact that he has already been
3 sitting there and the absolute deterrent effect of confinement
4 which is throwing a person in there and not having it go on
5 continuously and endlessly but that initial dramatic effect
6 which he describes to you in his unsworn how it changes over
7 time, that is what matters about confinement and that is done
8 before we come into this court room; that has been accomplished,
9 so we are fashioning an additional sentence to confinement I ask
10 that you take that into account, because that is serious, he's
11 had that development. A discharge is also inappropriate in this
12 case, that has to be reserved for the more serious offenses. It
13 just has to, the government has even acknowledged they wouldn't
14 ask for the DD, but ask for the BCD, the bad conduct discharge,
15 we ask you to think about this. But that is their
16 recommendation that they think you should look at a bad conduct
17 discharge. You'd like to reserve that for cases where there is
18 more serious offenses, you'd like to reserve that for case where
19 somebody does actually suffer the type of injuries they are
20 talking about. It is horrible to talk about because even a kid
21 being caught in a wet diaper makes your heart sink a little bit
22 and you want to go out and help the kid, so I understand that.

1 I am not going to stand up here and dismiss that any suffering
2 by a child is serious suffering, I get that. But I would just
3 submit to you that when you go back and decide on whether or not
4 a punitive discharge is appropriate, it has to matter when you
5 use that, when you label someone, that is what the government is
6 talking about, is labeling someone. And the government also
7 talked about as well what a federal conviction would mean. You
8 get a dishonorable or bad conduct discharge in this case, what
9 does that mean for the comparison case, where someone else would
10 have a bad conduct discharge or dishonorable discharge? If you
11 feel that it is appropriate in this case, if you come to that
12 conclusion, then I would submit to you by one sentence
13 recommendation, I'm not asking for the bad conduct discharge,
14 Airman Kelley is not asking for a dishonorable discharge, or
15 punitive discharge. But I would say this, if you fashion a
16 sentence that includes a punitive discharge, some level of rank
17 or forfeitures, and maybe restriction or something like that, he
18 needs no additional confinement. He can go on because he
19 already has a hundred and fifty two days; this is hundred and
20 fifty third day today. If you fashion a sentence that includes
21 punitive discharge, there is no need for additional confinement.
22 He has the promise of youth I ask you to consider as well; you

1 see that in the cub scouts with his father and his letters. We
2 have the time line that we've discussed, and I ask you to
3 question carefully out of the gate, he says every little thing
4 you do and that's what you heard from the care inquiry, every
5 little thing you do affects your future. I'd ask you and you
6 can play it back from the court reporter when you go back to the
7 deliberations, but we listened for about forty minutes this
8 morning and this is one of the last things I want to point to as
9 you go back and make your considerations. All I can do is give
10 you thoughts; I'm not going to convince myself that I can
11 convince you of anything. Um, he says during the care inquiry
12 where there were some complicated legal questions that went back
13 and forth; why do you think this might have resulted in this and
14 you saw some breaks and gaps where he was obviously thinking
15 about or consulting with us or whatever it was, you didn't hear
16 anything on the record. When the military judge asked him about
17 hitting (b) (6), there was this one time where there was - - he
18 spoke over the judge- - and it was the only time I saw that when
19 I was listening and I defer to what your recollection is of the
20 evidence, but there is one time where he almost chased over the
21 judge's end of his question, he says it's never right to hurt a
22 child. It was in the context of discussing parental discipline,

1 because he asks was there any legal justification or excuse for
2 what you did, and it he said, it's never right to hit a child.
3 Can we not take into account that it was his response just
4 yesterday? Can we not take into account the fact, when
5 fashioning an appropriate sentence that he's been sitting in
6 jail for a hundred fifty two days, given up his relationship
7 with (b) and Tessa, and he's absolutely reformed his
8 relationship with his dad but it will never be the same. His
9 dad will never see him that way. These are all the wages of sin
10 and he uses that word and I will again at the end of his unsworn
11 statement, Defense Exhibit B. He talks about atoning for his
12 sins, that is what this is. It's not an exercise in creative
13 theatre, or an exercise in comparison between what the maximum
14 is and what is permissible under the law, it's an exercise
15 members. It's a conversation, a deliberation, left to you and
16 your learned judgment. It took 270 electoral votes to elect a
17 president. It's going to take six to fashion an appropriate
18 sentence in this case and there is a reason the law requires you
19 to vote from the bottom to the top. Punish enough, please,
20 punish him enough; but not too much.

21 MJ: When you close to deliberate and vote, only the
22 members will be present. I remind you that you all must remain

1 together in the deliberation room during deliberations. I also
2 remind you that you may not allow any unauthorized intrusion
3 into your deliberations. You may not make communications to or
4 receive communications from anyone outside the deliberations
5 room, by telephone or otherwise. Should you need to take a
6 recess or have a question, or when you have reached a decision,
7 you may notify the Bailiff, who will then notify me of your
8 desire to return to open court to make your desires or decision
9 known.

10 Your deliberations should begin with a full and free
11 discussion on the subject of sentencing. The influence of
12 superiority in rank shall not be employed in any manner to
13 control the independence of members in the exercise of their
14 judgment. When you have completed your discussion, then any
15 member who desires to do so may propose a sentence. You do that
16 by writing out on a slip of paper a complete sentence. The
17 junior member collects the proposed sentences and submits them
18 to the president, who will arrange them in order of their
19 severity.

20 You then vote on the proposed sentences by secret written
21 ballot. All must vote; you may not abstain. Vote on each
22 proposed sentence in its entirety, beginning with the lightest,

1 until you arrive at the required concurrence, which is two-
2 thirds or 6 members.

3 The junior member will collect and count the votes. The
4 count is then checked by the president who shall announce the
5 result of the ballot to the members. If you vote on all of the
6 proposed sentences without arriving at the required concurrence,
7 you may then repeat the process of discussion, proposal of
8 sentences and voting. But once a proposal has been agreed to by
9 the required concurrence, then that is your sentence.

10 You may reconsider your sentence at any time prior to its being
11 announced in open court. If after you determine your sentence,
12 any member suggests you reconsider the sentence, open the court
13 and the president should announce that reconsideration has been
14 proposed without reference to whether the proposed rebalot
15 concerns increasing or decreasing the sentence. I will give you
16 specific instructions on the procedure for reconsideration.

17 As an aid in putting the sentence in proper form, the court
18 may use the Sentence Worksheet marked Appellate Exhibit XII
19 which the bailiff may now hand to the president. Extreme care
20 should be exercised in using this worksheet and in selecting the
21 sentence form which properly reflects the sentence of the court.

22 If you have any questions concerning sentencing matters,

1 you should request further instructions in open court in the
2 presence of all parties to the trial. In this connection, you
3 are again reminded that you may not consult the Manual for
4 Courts-Martial or any other publication or writing not properly
5 admitted or received during this trial. These instructions must
6 not be interpreted as indicating an opinion as to the sentence
7 which should be adjudged, for you alone are responsible for
8 determining an appropriate sentence in this case. In arriving
9 at your determination, you should select the sentence which will
10 best serve the ends of good order and discipline, the needs of
11 the accused, and the welfare of society. When the court has
12 determined a sentence, the inapplicable portions of the Sentence
13 Worksheet should be lined through. When the court returns, I
14 will examine the Sentence Worksheet. The president will then
15 announce the sentence.

16 MJ: Do counsel for either side have any objections or
17 requests for additional instructions?

18 STC: No sir.

19 SDC: No sir.

20 MJ: Members should you desire a recess during your
21 deliberation, we must first formally come into the court room,
22 formally recess, and then reform in the court room and then

1 formally close again for deliberations. I say that in part
2 because I know there is not a latrine attached to the
3 deliberation room, I'm correct in that. Um, so if you would
4 like to take a comfort break at this time before beginning your
5 deliberations, I am getting some affirmative nods, so why don't
6 we take a fifteen minute recess at this point before we begin
7 deliberations.

8 [The court-martial recessed at 1100 hours, 7 November 2012.]

9 **END OF PAGE**

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1 members? Looks like Chief Stubbs may have a question and you
2 can keep your seat; that is fine.

3 MEMBER [CMSgt Stubbs]: Yes sir, my first question is, has
4 the accused Devin P. Kelley received any treatment during his
5 152 days of confinement? If so, what type of treatment?

6 MJ: I don't have an answer for you right now, I will
7 discuss it with the attorneys whether we will be able to give
8 you an answer to that question.

9 MEMBER [CMSgt Stubbs]: My second question is, was there
10 any psych evaluation conducted? If so, is there any results?

11 MJ: Again, I will discuss that with counsel and see if we
12 can get you an answer. Any other members? Lt Col Kovich?

13 MEMBER [Lt Col Kovich]: Yes sir, just reading through the
14 records and EPR dated 18 April 2012, mentioned in there as cause
15 for referral, LOR for assault on family member, but I didn't see
16 that in the package and just wanted to know if that was actually
17 done. And if that was done, if we can get a copy of that or
18 rebuttal that goes along with it.

19 MJ: With regard to that, in as much as you don't have the
20 letter of reprimand in evidence, you should not consider that as
21 having occurred. It is simply a matter not in evidence; you can
22 certainly consider the EPR but don't speculate what's beyond the

1 face of the EPR. What we will do is let you begin your
2 deliberations, and when we arrive at an answer to Chief Stubbs'
3 questions we will probably bring you back in to let you know our
4 decision and what we are providing in that regard to. The
5 members may depart, the court is closed.

6 [The court-martial closed at 1117 hours, 7 November 2012.]

7 **END OF PAGE**

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1 SDC: Same position sir. Just another instruction along
2 the lines that you are not to speculate as to whether or not he
3 had - - just what the evidence is presented to you.

4 MJ: Basically neither side desires to present any evidence
5 on that point; you're comfortable with the members considering
6 all the evidence they have?

7 SDC: Yes sir, I tend to agree with Captain Neil, that I
8 think it opens the door to some more things that we don't
9 necessarily need to go into for them fashioning an appropriate
10 sentence.

11 MJ: Right. What about psychological evaluation?

12 SDC: Same.

13 STC: Sir, I think there has been but I think that might
14 open a door; I think that both sides - -

15 SDC: There was a sanity board accomplished in this case
16 sir. I just wanted you to be aware, so we would prefer not to
17 open that door either.

18 MJ: Then what I will instruct the members is whatever
19 evidence they have is what they have to base their decision on
20 and not speculate on anything that may or may have not been done
21 that they don't have any evidence of.

22 STC: Yes Your Honor, we have no objection to that.

1 MJ: Okay, bailiff can you bring the members back in.

2 SDC: And Lt Col Kovich's question, if you wanted to take
3 that up too? I didn't know if you were going to go past that?

4 MJ: I was not going to do anything further unless counsel
5 wanted anything else.

6 SDC: Here is what I would ask for sir, I think the parties
7 can agree that it was a letter of reprimand specifically for
8 what he was ultimately court martialed for, so I would like an
9 instruction to make it clear that the letter of reprimand wasn't
10 presented because it's the charge at issue in the case; or
11 something along those lines just to make it clear that this is
12 not a separate instance in which he was reprimanded by the
13 United States Air Force for an unrelated domestic abuse issue.

14 STC: We would agree that this was a letter of reprimand
15 that was given for part of what he was court martialed for; even
16 part of that spec, it wasn't everything that he plead guilty to.
17 So, I think the government is fine with saying don't speculate
18 further than what's beyond the face of the EPR and I think that
19 the instruction is sufficient; that is what the government will
20 be asking for.

1 MJ: Alright, if I instruct the members that the particular
2 letter of reprimand referenced in the EPR is not a matter in
3 evidence because it covered matters that are before the court.

4 SDC: At least in part.

5 STC: And we would have no objection to that instruction
6 Your Honor.

7 MJ: Alright, I will give that instruction. Bailiff,
8 please call the members.

9 [The Article 39(a) Session closed at 1120 hours, 7 November
10 2012.]

11 **END OF PAGE**

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1 before you. With that, the court is again closed and the
2 members may return to deliberate.

3 [The court-martial closed at 1122 hours, 7 November 2012.]

4 **END OF PAGE**

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1 ACC: Yes sir.

2 MJ: Do you have any questions about your post-trial and
3 appellate rights?

4 ACC: No sir.

5 MJ: Handing Appellate Exhibit XIV to the court reporter at
6 this time then. Which counsel will be responsible for post-
7 trial actions in the case and upon whom should the staff judge
8 advocate recommendation be served?

9 ADC: It would be me Your Honor, Captain Princip.

10 MJ: Counsel, is there anything else from either side?

11 STC: No Your Honor.

12 ADC: No sir.

13 MJ: This Article 39(a) session is terminated to await the
14 member's sentence.

15 [The Article 39(a) session closed at 1124 hours, 7 November
16 2012.]

17 **END OF PAGE**

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1 SENTENCE

2 PRES: Airman First Class Devin E. Kelley, this court-
3 martial sentences you:

4 To be reduced to the grade of E-1;

5 To be confined for 12 months; and

6 To be discharged from service with a bad conduct
7 discharge.

8 MJ: You may be seated.

9 [Accused and defense counsel took their seats.]

10 MJ: Members of the court, before I excuse you, let me
11 advise you of one matter. In the event you are asked about your
12 service on this court martial, I remind you of the oath you
13 took. Essentially, that oath prevents you from discussing your
14 deliberations with anyone, to include stating any member's
15 opinion or vote, unless ordered to do so by a court. You may,
16 of course, discuss your personal observations in the courtroom
17 and the process of how a court martial functions, but not what
18 was discussed during your deliberations. Thank you for your
19 attendance and service. You are excused. Counsel and the
20 accused will remain.

21 [The court-martial closed at 1320 hours, 7 November 2012.]

22 **END OF PAGE**

1 **ARTICLE 39(A) SESSION**

2 [The Article 39(a) session was called to order at 1320 hours, 7
3 November 2012. All parties were present, the members were
4 absent.]

5 MJ: Please be seated, this Article 39a session is called
6 to order. The members have withdrawn from the courtroom. The
7 accused will be credited with 152 days of pretrial confinement
8 against the accused's term of confinement. Airman Kelley, with
9 regard to your pretrial agreement, my understanding is that the
10 convening authority it at liberty to approve the entire sentence
11 as adjudged. Do you agree with that interpretation?

12 ACC: Yes sir.

13 MJ: Do counsel also agree with that interpretation?

14 STC: Yes Your Honor.

15 SDC: Yes sir.

16 MJ: Are there other matters to take up before this court
17 adjourns?

18 STC: No Your Honor.

19 SDC: No sir.

20 MJ: This court is adjourned.

21 [The court-martial adjourned at 1321 hours, 7 November 2012.]

22 **END OF PAGE**