IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Airman Basic (E-1) **GARRETT PAGAN,** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME (FIRST)** Before Panel No. 1 Case No. ACM S32738 Filed on: 6 November 2022

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a first enlargement of time to file an Assignment of Errors. Appellant requests an enlargement for a period of 60 days, which will end on 26 January 2023. The record was docketed with this Court on 28 September 2022. On the date requested, 120 days will have elapsed from the date this case was docketed.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement.

Respectfully Submitted,

//signedASK6Nov22//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 6 November 2022.

//signedASK6Nov22//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

8 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) GARRETT PAGAN, USAF *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32738 Panel No. 1

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 8 November 2022.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Airman Basic (E-1) **GARRETT PAGAN,** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME (SECOND)** Before Panel No. 1 Case No. ACM S32738 Filed on: 18 January 2023

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a second enlargement of time to file an Assignment of Errors. Appellant requests an enlargement for a period of 30 days, which will end on 25 February 2023. The record was docketed with this Court on 28 September 2022. From the date of docketing to this present date, 112 days have elapsed. On the date requested, 150 days will have elapsed from the date this case was docketed.

The appellant was sentenced to 60 days confinement and a bad conduct discharge for one charge and one specification along with one additional charge and specification of wrongful use of a controlled substance in violation of Article 112a, UCMJ. The record of trial consists of 6 prosecution exhibits, 4 defense exhibits, and 16 appellate exhibits; the transcript is 276 pages. Appellant is not currently confined. Undersigned counsel has been working on other matters and has been unable to complete a brief on Appellant's case. Accordingly, an enlargement of time is

necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement.

Respectfully Submitted,

//signedASK18Jan23//

ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 18 January 2023.

//signedASK18Jan23//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

19 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) GARRETT J. PAGAN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32738 Panel No. 1

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 19 January 2023.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Airman Basic (E-1) **GARRETT PAGAN,** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME (THIRD)** Before Panel No. 1 Case No. ACM S32738 Filed on: 16 February 2023

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a second enlargement of time to file an Assignment of Errors. Appellant requests an enlargement for a period of 30 days, which will end on 27 March 2023. The record was docketed with this Court on 28 September 2022. From the date of docketing to this present date, 141 days have elapsed. On the date requested, 180 days will have elapsed from the date this case was docketed.

The appellant was sentenced to 60 days confinement and a bad conduct discharge for one charge and one specification along with one additional charge and specification of wrongful use of a controlled substance in violation of Article 112a, UCMJ. The record of trial consists of 6 prosecution exhibits, 4 defense exhibits, and 16 appellate exhibits; the transcript is 276 pages. Appellant is not currently confined. Undersigned counsel has been working on other matters and has been unable to complete a brief on Appellant's case. Accordingly, an enlargement of time is

necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement.

Respectfully Submitted,

//signedASK16Feb23//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 16 February 2023.

//signedASK16Feb23//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

16 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) GARRETT J. PAGAN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32738 Panel No. 1

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 16 February 2023.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Airman Basic (E-1) **GARRETT PAGAN,** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)** Before Panel No. 1 Case No. ACM S32738 Filed on: 19 March 2023

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fourth enlargement of time to file an Assignment of Errors. Appellant requests an enlargement for a period of 30 days, which will end on 26 April 2023. The record was docketed with this Court on 28 September 2022. From the date of docketing to this present date, 172 days have elapsed. On the date requested, 210 days will have elapsed from the date this case was docketed.

The appellant was sentenced to 60 days confinement and a bad conduct discharge for one charge and one specification along with one additional charge and specification of wrongful use of a controlled substance in violation of Article 112a, UCMJ. The record of trial consists of 6 prosecution exhibits, 4 defense exhibits, and 16 appellate exhibits; the transcript is 276 pages. Appellant is not currently confined. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not been able to draft the brief. Undersigned counsel is a

reservist that works a full-time civilian job as an Assistant United States Attorney in the Southern District of Indiana. Counsel is currently assigned approximately 25 cases as a federal prosecutor and has 2 other cases that are pending initial AOEs before this Court. None of the other pending AOEs take priority over this case but four civilian matters do.

1. *United States v. Swanson*, 1:20-cr-77 - This is a federal criminal case in the Southern District of Indiana set for sentencing on 22 March 2023. Undersigned counsel is the prosecutor on this case and needs to prepare for and appear at the sentencing hearing.

2. *United States v. Payne*, 1:21-cr-253 - This is a federal criminal case in the Southern District of Indiana set for sentencing on 29 March 2023. Undersigned counsel is the prosecutor on this case and needs to prepare for and appear at the sentencing hearing.

3. *United States v. Henderson*, 1:20-cr-340 - This is a federal criminal case in the Southern District of Indiana set for sentencing on 13 April 2023. Undersigned counsel is the prosecutor on this case and needs to prepare for and appear at the sentencing hearing.

4. *United States v. Brady*, 1:20-cr-263 - This is a federal criminal case in the Southern District of Indiana set for sentencing on 18 April 2023. Undersigned counsel is the prosecutor on this case and needs to prepare for and appear at the sentencing hearing.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement.

Respectfully Submitted,

//signedASK19Mar23//

ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 19 March 2023.

//signedASK19Mar23//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

20 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) GARRETT J. PAGAN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32738 Panel No. 1

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 20 March 2023.

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Airman Basic (E-1) **GARRETT PAGAN,** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)** Before Panel No. 1 Case No. ACM S32738 Filed on: 12 April 2023

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fifth enlargement of time to file an Assignment of Errors. Appellant requests an enlargement for a period of 30 days, which will end on 26 May 2023. The record was docketed with this Court on 28 September 2022. From the date of docketing to this present date, 196 days have elapsed. On the date requested, 240 days will have elapsed from the date this case was docketed.

The appellant was sentenced to 60 days confinement and a bad conduct discharge for one charge and one specification along with one additional charge and specification of wrongful use of a controlled substance in violation of Article 112a, UCMJ. The record of trial consists of 6 prosecution exhibits, 4 defense exhibits, and 16 appellate exhibits; the transcript is 276 pages. Appellant is not currently confined. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not been able to complete the brief. Undersigned counsel

is a reservist that works a full-time civilian job as an Assistant United States Attorney in the Southern District of Indiana. Counsel is currently assigned approximately 20 cases as a federal prosecutor and has 2 other cases that are pending initial AOEs before this Court. None of the other pending AOEs take priority over this case but four civilian matters do.

1. *United States v. Henderson*, 1:20-cr-340 - This is a federal criminal case in the Southern District of Indiana set for sentencing on 13 April 2023. Undersigned counsel is the prosecutor on this case and needs to prepare for and appear at the sentencing hearing.

2. *United States v. Brady*, 1:20-cr-263 - This is a federal criminal case in the Southern District of Indiana set for sentencing on 18 April 2023. Undersigned counsel is the prosecutor on this case and needs to prepare for and appear at the sentencing hearing.

3. *United States v. Danford*, 1:20-cr-181 - This is a federal criminal case in the Southern District of Indiana set for sentencing on 21 April 2023. Undersigned counsel is the prosecutor on this case and needs to prepare for and appear at the sentencing hearing.

4. *United States v. Tomlin*, 1:21-cr-328 - This is a federal criminal case in the Southern District of Indiana set for sentencing on 23 May 2023. Undersigned counsel is the prosecutor on this case and needs to prepare for and appear at the sentencing hearing.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement.

Respectfully Submitted,

//signedASK12Apr23//

ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 12 April 2023.

//signedASK12Apr23//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

13 April 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) GARRETT J. PAGAN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32738 Panel No. 1

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 April 2023.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32738**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Garrett J. PAGAN	)	
Airman Basic (E-1)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 12 April 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth), requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 13th day of April, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant's brief will be due **26 May 2023**.

Any subsequent motions for enlargement of time shall, in addition to the matters required under this court's Rules of Practice and Procedure, include a statement as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was advised of the request for an enlargement of time, and (3) whether Appellant agrees with the request for an enlargement of time.

FOR THE COURT

FLEMING E. KEEFE, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 1
Airman Basic (E-1) **GARRETT J. PAGAN** United States Air Force, *Appellant*	)	No. ACM S32738
	)	23 June 2023

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Assignment of Error

DID THE MILITARY JUDGE ERR IN HIS INSTRUCTION TO THE MEMBERS ON A BAD CONDUCT DISCHARGE?

Statement of the Case

On 23 June 2022, Airman Basic (AB) Garrett J. Pagan was tried by officer members sitting as a special court-martial at Barksdale Air Force Base, Louisiana. Record of Trial (ROT) Vol. Entry of Judgement. In accordance with his pleas, the military judge found him guilty of one charge and one specification along with one additional charge and one specification of violations of Article 112a of the Uniform Code of Military Justice (UCMJ) R. at 43. The members sentenced AB Pagan to 60 days confinement and a bad conduct discharge. R. at 274. The Convening Authority took no action on the findings or sentence. Record of Trial (ROT) Vol. 1, Convening Authority Action.

Statement of Facts

AB Pagan entered active duty on 22 January 2019. Pros. Ex. 1. This was the fulfillment of two years of effort that AB Pagan put toward his goal of joining the military. R. at 231. Unfortunately, AB Pagan suffered from anxiety and depression that he dealt with through drug abuse. R. at 232. As a result, he ended up struggling with drugs during his time in the military that culminated with his two court-martial. Prior to this case, he had also sustained a summary court-martial conviction for drug abuse. Pros. Ex. 2.

On 23 July 2022, AB Pagan pled guilty to the charged offenses. R. at 43. During presentencing, trial counsel tendered an instruction on a bad conduct discharge that purported to be from the R.C.M. but deviated from the standard Benchbook instructions. R. at 210. Trial defense counsel objected to this instruction. R. at 211. The military judge modified trial counsel's proposed instruction and asked defense counsel about alterations to that instruction. R. at 241. However, the military judge understood that trial defense counsel's original objection was preserved. *Id.* After a discussion with defense counsel, the military judge provided the modified instruction to the members but did not elaborate on why he was overruling trial defense counsel's objection. R. at 247. In addition to the standard Benchbook language the military judge instructed the members that a bad conduct discharge is for "bad conduct, even though such conduct may not include the commission of serious offenses of a military or civil nature" and that it "may also be adjudged for one who, in the discretion of the court, has been convicted repeatedly of minor offenses and whose punitive separation appears to be necessary, keeping in

mind that the accused is to be punished only for the offenses of which the accused has been found guilty in this court-martial." *Id.*

Trial counsel argued for 60 days confinement and a bad conduct discharge. R. at 249. Trial defense counsel recommended 30 days confinement with no bad conduct discharge. R. at 256. The members sentenced AB Pagan to 60 days confinement and a bad conduct discharge as recommended by trial counsel. R. at 274.

ARGUMENT

Standard of Review

Whether a panel was properly instructed is a question of law reviewed *de novo*. *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011).

Law

While a military judge is not bound by the Military Judge's Benchbook, it is intended to ensure compliance with existing law and he should not deviate significantly from those instructions without explaining his reasoning on the record. *States v. Rush*, 54 M.J. 313, 315 (C.A.A.F. 2001). Regarding a punitive discharge, a sufficient instruction should adequately advise the members that such a discharge is a "severe" punishment, that it has specified adverse consequences, and affect an accused's future rights. *See generally United States v. Rasnick*, 58 M.J. 9 (C.A.A.F. 2003). A military judge's instructions are evaluated "in the context of the overall message conveyed" to the members. *United States v. Prather*, 69 M.J. 338, 344, (C.A.A.F. 2011) (quoting *Humanik v. Beyer*, 871 F.2d 432, 441 (3d Cir. 1989)). Courts have previously stricken down instructions that involve contradictory statements. *See generally United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016).

Analysis

At the outset it is important to note that despite the discussion between the military judge and trial defense counsel regarding the tailoring of the instruction at issue, AB Pagan's trial defense counsel did properly object and preserve this issue for appeal. The military judge acknowledged that the issue was preserved prior to the discussion regarding the language of the instruction by stating, "but now that you've got the actual drafted instruction, I wanted to give you any last concerns you had raised, if you had additional concerns to raise, other than the position that you previously stated, which I understand is a preserved objection to even this modified form." R. at 241. It was only after this comment that defense counsel stated that they had no modifications to the language the military judge went with. R. at 242. Trial defense counsel preserved their objection and did not expressly and unequivocally acquiesce to the military judge's instruction (which would have waived the issue). *See generally United States v. Davis*, 79 M.J. 329 (C.A.A.F. 2020).

The first major issue is that the military judge added on the standard instruction from the Benchbook over the objection of trial defense counsel without explaining on the record why he did it. When trial counsel originally tendered the instruction, he only stated that he would consider the arguments. R. at 211. When the military judge made the decision to incorporate the instruction, he only mentioned the language he tailored from trial counsel's requested instruction and did not state a specific reason he was giving that instruction over defense objection. R. at 241. This is a problem because (as detailed below) this tailored instruction conflicts with the standard instruction given in the Benchbook. This runs counter to court

holdings from cases like *Rush* where such an explanation is explicitly required on the record. In this case no such explanation occurred.

The instruction also made it appear that a bad conduct discharge was necessary in AB Pagan's case. In fact, the instruction explicitly states that such a discharge "may also be adjudged for one who, in the discretion of the court, has been convicted repeatedly of minor offenses and whose punitive separation appears to be necessary". R. at 247. This is AB Pagan's case. He received a summary court-martial conviction for drug abuse prior to the offense he was convicted of. Pros. Ex. 2. The instruction seems to instruct the members that a punitive discharge is necessary in his case, even though it is not required by law.

The military judge attempted to temper this language by stating that AB Pagan could only be sentenced for the offense he pled guilty to. R. at 247. At best that provides confusion to members as that portion was a personally tailored instruction by the military judge that contradicted what came before it as that referenced being "convicted repeatedly of minor offenses." *Id.* This type of instruction bears similarity to the one at issue in *Hills* where there was confusion over different standards of proof within the instruction. The overall instruction also reduces the "severity" of a punitive discharge by including references to repeated convictions for minor offenses as well as references to the offense committed not needing to be serious. R. at 247. Although trial counsel defended this by stating it was pulled from the R.C.M. that does not mean it should have been given to the members. R. at 210. The military judge did not justify the instruction on the record at all. This is

especially a concern when the military judge added his own language that deviated from both the Benchbook and the R.C.M.

In summary, the members did not receive a proper instruction on a bad conduct discharge from the military judge. What they received was an internally contradictory instruction that at times made a bad conduct discharge appear necessary in AB Pagan's case while at others making the punishment seem less severe than it is. The members ultimately sentenced AB Pagan to a bad conduct discharge based on this inappropriate instruction and this court should not allow that.

WHEREFORE, AB Pagan respectfully requests that this Honorable Court set aside the bad conduct discharge portion of his sentence.

Respectfully submitted,

ABHISHEK S. KAMBLI, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 23 June 2023.

Respectfully submitted,

ABHISHEK S. KAMBLI, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' ANSWER
	)	TO ASSIGNMENT OF ERROR[1]
Appellee	)	
	)	
v.	)	Before Panel No. 1
	)	
Airman (E-2)	)	No. ACM S32738
GARRETT J. PAGAN	)	
United States Air Force	)	24 July 2023
Appellant.	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

ISSUE PRESENTED

DID THE MILITARY JUDGE ERR IN HIS INSTRUCTION TO MEMBERS ON A BAD CONDUCT DISCHARGE?

STATEMENT OF CASE

Appellant's statement of the case is correct.

STATEMENT OF FACTS

On 23 June 2022, Appellant pled guilty at Barksdale Air Force Base, Louisiana. (*Entry of Judgement,* 24 July 2022, ROT, Vol. 1). The military judge found the Appellant guilty of two specifications in violation of Article 112a of the Uniform Code of Military Justice (UCMJ) for the wrongful use of cocaine. (Id.) After the presentation of evidence, argument of counsel, instructions on the law, and deliberations, the members returned with a sentence including a bad conduct discharge and 60 days of confinement. (R. at 190-203, 214-235, 239-275; *Entry of Judgement,* 24 July 2022, ROT, Vol.1.)

[1] The United States withdraws its previous filing captioned, "Brief on Behalf of the United States" and substitutes this Answer to Appellant's Assignment of Error.

Before the court-martial, Appellant had used cocaine on numerous occasions. (R. at 190-203, 214-235, 239-275.) Even before the charged conduct, as far back as between on or about 11 October 2021 and 25 October 2021, Appellant began using cocaine. (Pros. Ex. 2.) His misconduct in the Air Force, however, predated even that incident. (Pros. Ex. 4, 5, 6.) Shortly after his first anniversary of joining the U.S. Air Force, Appellant decided to misuse his government travel card, amassing over $1000.00 in unauthorized expenses, $400.00 of which were incurred at clubs and bars. (Pros. Ex. 4.) For this misconduct, Appellant received a nonjudicial punishment which included a suspended reduction in rank and suspended forfeitures. Despite his commander's leniency and Appellant's assurances that he "accepted responsibility" and "regret[ted]" his mistakes, Appellant subsequently committed more misconduct. (Pros. Ex. 5.) Only a few short months later, Appellant's nonjudicial punishment was vacated because he had repeatedly failed to pay his government travel card. (Id.) For Appellant's earlier cocaine use, he was court-martialed and sentenced to 14 days of confinement and reduction to the grade of E-1. (Pros. Ex. 2.) Just days before the first court-martial for his October use of cocaine, Appellant decided to use cocaine again. (R. at 26.) Directly after leaving confinement, Appellant also returned to using cocaine. (R. at 31.) These final uses formed the conduct that is the subject of the present case and the second court-martial. (R. at 26-31.)

During the presentencing hearing, trial counsel attempted to admit evidence Appellant was previously convicted of an offense and the Stipulation of Fact from that first court-martial for using cocaine. (R. at 139-140, 148-160.) Appellant had no objection regarding the evidence of the prior conviction. (R. at 138; Pros. Ex. 2.) Appellant did object to the corresponding Stipulation of Fact. (R. at 139; Pros. Ex. 3.) The trial judge sustained the Defense's Mil. R. Evid. 403 objection to the admission of the Stipulation of Fact. (R. at 158.) The trial judge

emphasized the importance of Appellant only being punished for the current court-martial as the reason. (R. at 160). Discussing the exhibit, the judge explained:

> If [the members] had got the entirety of the stipulation of fact, we are drawing their focus away again from what their charge will be, which is to adjudge an appropriate sentence for this accused and for the crimes for which he is to be punished, not the ones that he was previously punished.

(R. at 160.)

Ultimately, despite finding there was probative value to the first stipulation of fact, the judge determined that the probative weight was substantially outweighed by the danger of unfair prejudice. (Id.)

Later in the presentencing hearing, trial counsel requested the judge provide a sentencing instruction that differed from the standard Military Judge's Benchbook instruction regarding the punishment of a bad conduct discharge. (R. at 209-10; App. Ex. XI); Dept't of Army, Pam. 27-9, Military Judge's Benchbook, 2-6-10 (29 Feb 2020). The military judge immediately challenged trial counsel, "Why would I compare it to a dishonorable discharge if they are not allowed to adjudge a dishonorable discharge." Trial counsel conceded the point, "Understood your honor. Yeah, we could take that part out. That's just essentially the exact definition from the Rules." (R. at 210.) The proposed instruction read:

> A bad conduct discharge is less severe than a dishonorable discharge and is designed as a punishment for bad conduct rather than as a punishment for serious offenses of either a civilian or military nature. It is also appropriate for an accused who has been convicted repeatedly of minor offenses and whose punitive separation appears to be necessary.

The trial counsel's proposed instruction mirrored the Rules for Court-Martial legal definition of a "bad conduct discharge." R.C.M. 1003(b)(8)(C). The proposed instruction from trial counsel did not include the entire paragraph from the Rules for Court-Martial on a bad conduct discharge.

(App. Ex. XI.; R.C.M. 1003(b)(8)(C).) The trial counsel proposed instruction omitted the prefatory language in the R.C.M. which explains that a bad conduct discharge only applies to enlisted members and cannot be adjudged in the new military judge alone special court-martial under Article 16 of the U.C.M.J. (Id.)

In addition to the concerns raised by the trial judge, the Defense voiced concerns that trial counsel's instruction would cause confusion and that it differed from the Military Judge's Benchbook instruction. (R. at 211). Having highlighted his concerns and noting the Defense's concern, the military judge promised he had already drafted an instruction on this point, and it would not "be this," referring to the trial counsel's proposed instruction. (R. at 211.) He clarified that his instruction would be "in line with the typical sentencing instructions." (Id.) Regardless, the military judge promised that at a later point, both parties would "have something to look at it" and that they would all be able to "discuss those things." (Id.)

The Department of the Army, Pamphlet 27-9 (Benchbook) instruction for a bad conduct discharge (when a dishonorable discharge is not authorized) reads as follows:

> (ONLY BAD-CONDUCT DISCHARGE ALLOWED:) MJ: This court may adjudge a bad-conduct discharge. Such a discharge may deprive one of substantially all benefits administered by the Department of Veterans Affairs and the military establishment. A bad-conduct discharge is a severe punishment and may be adjudged for one who in the discretion of the court warrants severe punishment for bad conduct (even though such bad conduct may not include the commission of serious offenses of a military or civil nature.)

Dept't of Army, Pam. 27-9, Military Judge's Benchbook, 2-6-10 (29 Feb 2020).

After the presentation of the evidence, the military judge, trial counsel, and defense counsel discussed the military judge's bad conduct discharge instruction. (R. at 241.) The

military judge's instruction differed in some respects from the standard Benchbook instruction. It stated the following:

> This court may adjudge a bad-conduct discharge. Such a discharge deprives one of substantially all benefits administered by the Department of Veterans Affairs and the military establishment. A bad-conduct discharge is a severe punishment and may be adjudged for one who, in the discretion of the court, warrants severe punishment for bad conduct, even though such bad conduct may not include the commission of serious offenses of a military or civil nature. A bad-conduct discharge may also be adjudged for one who, in the discretion of the court, has been convicted repeatedly of minor offenses and whose punitive separation appears to be necessary, keeping in mind that the accused is to be punished only for the offenses of which the accused has been found guilty in this court-martial. Finally, if you wish, this court may sentence the accused to no punishment.

(R. at 246.) After reviewing the military judge's instruction, the Defense counsel clarified that "the only potential modification we would request would be immediately before the following period, Your Honor, reading, 'in this court-martial however, a punitive discharge--a punitive separation need not be adjudged.'" (R. at 241.)

In response to this "potential" request from the defense, the military judge explained that his instruction already highlighted at two places the member's agency in the matter, containing the word "may" twice. (R. at 242.) He further directed defense counsel to take notice that at the end of the bad conduct discharge instruction, it stated, "this court may sentence the accused to no punishment." (Id.) After that clarification, the military judge informed defense counsel that he was ready to "hear from you" and that "I'll consider it before deciding on finalized language." (Id.) The Defense offered nothing. (Id.) Without any additional objection to the sentencing instructions, the military judge provided the instruction as outlined. (R. at. 246.) The military judge's instruction followed the Military Judge's Benchbook in all other respects and were unobjected to. (R. at 244-248.)

ARGUMENT

Standard of Review

"Whether a panel was properly instructed is a question of law reviewed de novo." United States v. Hale, 78 M.J. 268, 274 (C.A.A.F. 2019). A military judge's determination to give or not to give a requested instruction is reviewed under an abuse of discretion standard. United States v. Rasnick, 58 M.J. 9, 10 (C.A.A.F. 2003) (citing United States v. Damatta-Olivera, 37 M.J. 474, 478 (C.M.A. 1993)); United States v. Zamberlan, 45 M.J. 491 (C.A.A.F. 1997). Whether an error, constitutional or otherwise, was harmless is a question of law that we review de novo. United States v. Walker, 57 M.J. 174, 178 (C.A.A.F. 2002); United States v. Grijalva, 55 M.J. 223, 228 (C.A.A.F. 2001).

Law

Although military judges have some discretion, they must provide instructions that provide "an accurate, complete, and intelligible statement of the law." United States v. Wolford, 62 M.J. 418, 419 (C.A.A.F. 2006); United States v. Behenna, 71 M.J. 228, 232 (C.A.A.F. 2012). To aid military judges in drafting instructions for members, the Department of the Army produces a "pamphlet" to assist judges in that task. (Dept't of Army, Pam. 27-9, Military Judge's Benchbook, 2-6-10 (29 Feb 2020); United States v. Rush, 54 M.J. 313, 315 (C.A.A.F. 2001). The Court of Appeals for the Armed Force has cautioned that judges should not generally "deviate significantly" from the Military Judge's Benchbook "because the standard Benchbook instructions are based on a careful analysis of current case law and statute." Rush, 54 M.J. at 315.

Although the Military Judge's Benchbook instructions should generally be adhered to, judges have a duty foremost to provide accurate instructions on the law and the evidence. United States v. Killion, 75 M.J. 209 (C.A.A.F. 2015); Soriano, 20 M.J. at 337 (C.M.A. 1985) (citing

United States v. Slaton, 6 M.J. 254, 255 (C.M.A. 1979)). The Military Judge's Benchbook is not binding nor is it a primary source of law. United States v. Riley, 72 M.J. 115, 122 (C.A.A.F. 2013); United States v. Bigelow, 57 M.J. 64, 67 (C.A.A.F. 2002). Keeping those limitations in mind, the Court of Appeals declared long ago that a trial judge at sentencing "must tailor instructions on sentencing to both the law and the evidence." Soriano, 20 M.J. at 342; United States v. Slaton, 6 M.J. 254, 255 (C.M.A. 1979); United States v. Wheeler, 38 C.M.R. 72 (C.M.A. 1967).

The Rules for Court-Martial require that certain instructions must be provided to aid the members in their sentencing deliberations. R.C.M. 1005(e). Aside from the potential effect on the accused's entitlement to pay, the Rules for Court-Martial do not specifically require any instructions regarding the appropriateness, effect, or seriousness of a bad conduct discharge. R.C.M. 1005(e). Notwithstanding, the case law long ago established that military judges must also instruct the members that a punitive discharge is intended to be a "severe" punishment. Soriano, 20 M.J. at 342 (referencing among others United States v. McNally, 16 M.J. 32 (C.M.A. 1983); *United States v. Dukes*, 5 M.J. 71 (C.M.A. 1983)).

The Rules for Courts-Martial provide the legal definitions and explanations for the various available punishments. R.C.M. 1003. Importantly, the Rules for Court-Martial provide the legal definition for a bad conduct discharge:

> Bad-conduct discharge. A bad-conduct discharge applies only to enlisted persons and may be adjudged by a general court-martial and by a special court-martial that has met the requirements of R.C.M. 201(f)(2)(B). A bad-conduct discharge is less severe than a dishonorable discharge and is designed as a punishment for bad conduct rather than as a punishment for serious offenses of either a civilian or military nature. It is also appropriate for an accused who has been convicted repeatedly of minor offenses and whose punitive separation appears to be necessary.

R.C.M. 1003(b)(8)(C).

In addition to legal definition of a bad conduct discharge the Rules for Court-Martial require seven additional matters be instructed upon. R.C.M. 1005(e)(1-7). Those required instructions cover the (1) maximum punishment, (2) punishment effects on the entitlement to pay, (3) the process of deliberations, (4) prohibition against considering subsequent mitigating action, (5) requirement to consider all mattes in extenuation, mitigation, and aggravation including all matters introduced under R.C.M. 1001(b)(1) [service data on the charge sheet], (2) [personal data and character of prior service], (3) [prior convictions], (5) [rehabilitative potential]. Id.

Relatedly, the Rules for Court-Martial explain the uses of this evidence as it relates to the imposition of sentence. R.C.M. 1002(f). In determining the appropriate sentence, the Rules for Court-Martial require many factors necessary for carefully consideration. Id. Specifically, the Rules require consideration the need for the sentence to promote respect for the law, promote adequate deterrence of misconduct, and to rehabilitate the accused. Id. In furtherance of those considerations, the Rules highlight that "any evidence admitted by the military judge during the presentencing proceeding" may be considered. R.C.M. 1002(g)(1).

Absent Constitutional implications, instructional errors are tested for prejudice under the harmless error standard. United States v. Soriano, 20 M.J. 337, 342-43 (C.M.A. 1985); Article 59(a), U.C.M.J. Before prejudice can be found under the harmless error review for sentencing the court must determine the error caused a substantive influence on the sentence. *See* United States v. McCollum, 58 M.J. 323, 343 (C.A.A.F. 2003); Miller, 58 M.J. 266, 271 (C.A.A.F. 2003).

Analysis

Appellant's request for relief should be denied for several reasons. First, the military judge did not abuse his discretion by correctly instructing on the law and the evidence. (R. at 246.) Second, there was no legal error in the military judge's instruction; it was not confusing nor internally inconsistent. Finally, even if this Court were to determine the judge incorrectly instructed on the law, any instructional error in this case was harmless error. An Airman determined to continuously commit escalating misconduct—including using cocaine multiple times both before and after being court-martialed—is an Airman deserving of a severe punishment: a bad conduct discharge.

Instructions on the Bad Conduct Discharge

The military judge did not abuse his discretion by tailoring the bad conduct instruction to accommodate the requests of counsel, the law, and the evidence. A trial judge at sentencing "must tailor instructions on sentencing to both the law and the evidence." Soriano, 20 M.J. at 342; United States v. Slaton, 6 M.J. 254, 255 (C.M.A. 1979); United States v. Wheeler, 38 C.M.R. 72 (C.M.A. 1967). Even with the trial judge's small tailoring, his instruction on the bad conduct discharge does not deviate "significantly" from the proposed bad conduct discharge from the Military Judge's Benchbook. (R. at 246); Dept't of Army, Pam. 27-9, Military Judge's Benchbook, 2-6-10 (29 Feb. 2020); Rush, 54 M.J. at 315. Indeed, a close comparison reveals the military judge only made two changes to the Military Judge's Benchbook proposed instruction. (R. at 246); Dept't of Army, Pam. 27-9, Military Judge's Benchbook, 2-6-10 (29 Feb 2020). All the explanatory, protective, and --importantly-- language regarding the severe nature and lasting impacts of a punitive discharge remained untouched. (R. at 246.)

The military judge did discuss his version of the instruction with counsel on the record (R. at 241.) He explained that his instructions would be "in line with the typical sentencing instructions, so I'll wait until all of the evidence comes in." (R. at 211.) He provided a copy of the instruction for Appellant to review and discuss on the record. (R. at 241-2.) In response to Appellant's continued "potential" objection, he highlighted the protective provisions that were contained within his instruction. (R. at 242.) After that, Appellant's counsel informed the military judge that they had no suggested additional language and that they were now "comfortable" with the instruction as drafted. (R. at 242.) The on the record discussion of the instruction ended then. (R. at 242.)

The military judge's changes were small and supported by the law and evidence. First, the military judge included extra language to ensure the Appellant's earlier court-martial would not be used inappropriately against him: "keeping in mind that the accused is to be punished only for the offenses of which the accused has been found guilty in this court-martial." (R. at 246). Of course, such language is ordinarily not required. Here the military judge appropriately tailored the instruction to the evidence to ensure the Appellant's interests were protected. (R. at 241; 246.) Presumably, this added language explains why Appellant felt so "comfortable" and declined to object further despite earlier concerns with trial counsel's drafted instruction. (R. at 209-210, 242.) The military judge also included some additional law in the instruction. (R. at 246.) The additional law was taken directly from R.C.M. 1003(b)(8)(C), the legal definition of the bad conduct discharge. The military judge instructed a bad conduct discharge may also be adjudged for one who "in the discretion of the court, has been convicted repeatedly of minor offenses and whose punitive separation appears to be necessary, keeping in mind that the accused is to be punished only for the offenses of which the accused has been found guilty in this

court-martial." (R. at 246.) This additional language was both correct legally and raised by the evidence at trial. R.C.M. 1003(b)(8)(C); (*Entry of Judgement*, ROT Vol. 1; Pros. Ex. 2.) Appellant was convicted multiple times. (Id.) The military judge did not abuse his discretion by correctly tailoring the instruction in accordance with the law and the evidence in this case. Appellant's claim of instructional error thus has no support.

The military judge's instruction kept the members focused on the correct law and the evidence introduced at trial. Contrary to the Appellant's position, the military judge's instruction confused nothing. The military judge's instruction tracked closely to the Military Judge's Benchbook. (R. at 246.); Dept't of Army, Pam. 27-9, Military Judge's Benchbook, 2-6-10 (29 Feb. 2020). The two additions, as discussed above, do not confuse the matter but add clarity. The Military Judge's Benchbook cannot be drafted to imagine every possible case and factual scenario. Simply put, the proposed Military Judge's Benchbook instruction does not anticipate an Appellant with this much-repeated criminal misconduct. (Entry of Judgement, ROT, Vol. 1.; Pros. Ex. 2-5.) The military judge identified this potentially confusing issue and provided precise, accurate, and protective instructions, in accordance with the R.C.M.s, ensuring the members were correctly instructed on the law and the evidence. (R. at 246).

The military judge's instruction does not contain a contradiction. Instead, the military judge's instruction appropriately highlights the types of evidence that can be considered and for what purposes. (R. at 246.) The military judge admitted evidence that Appellant was convicted at an earlier court-martial. (Pros. Ex. 2.) The introduction of that evidence was not objected to, and its relevance is unquestioned. R.C.M. 1002(g)(1); (R. at 138). The law explicitly allows for the consideration of multiple convictions as a circumstance under which a bad conduction discharge "may" "appear[] necessary." R.C.M. 1003(b)(8)(C). Appellant cannot be punished

again for his earlier conviction, as the judge instructed (R. at 246), but it is a fact that may be considered in adjudging the appropriate sentence for this conviction. R.C.M. 1003(b)(8)(C). Stated another way, the members were permitted to consider the earlier conviction when analyzing how much punishment would be necessary to deter Appellant, rehabilitate Appellant, and promote respect for the law. R.C.M. 1002(f)(3)(B), (D), (F). Sentencing, fundamentally, asks the member to consider the full context of an appellant's crimes (the good and the bad) while at the same time only punishing him for the actual crimes of that particular case. Appellant's suggestions to the contrary simply reflect a misapprehension as to how sentencing evidence and instructions operate.

The members were not instructed that any sentence was required. (R.at 246-47.) Quite the opposite, the military judge's instructions repeatedly informed the members that they were free to arrive at any appropriate sentence, to include no punishment at all. (R. at 246-47.) Indeed, the members were cautioned that they "may" adjudge a bad conduct discharge "in their discretion" on two separate occasions. (R. at 247.) Directly following those instructions, the military judge prudentially provided a limiting instruction regarding the multiple conviction evidence: "the accused is to be punished only for the offenses of which the accused has been found guilty in this court-martial." (R.at 247.) Finally, the judge instructed the members that his instructions "must not be interpreted as indicating an opinion as to the sentence which should be adjudged." (R. at 259.) The military judge cautiously and appropriately instructed the members of what to consider and how to consider it. There was no instructional error.

Harmless Error

Notwithstanding the purported error, given the instructions and evidence the members would still have been entitled to consider, any instructional error would not have influenced

Appellant's sentence. McCollum, 58 M.J. at 343. The members were appropriately provided evidence of Appellant's earlier conviction. R.C.M. 1001(b)(3). The members were appropriately instructed on what they could consider in determining an appropriate sentence along with all the evidence admitted in sentencing. R.C.M. 1001(b)(3). Furthermore, the members were appropriately instructed directly from the Military Judge's Benchbook that a bad conduct discharge is a severe punishment "even though such bad conduct may not include the commission of serious offenses of a military or civil nature." (R. at 247); Dept't of Army, Pam. 27-9, Military Judge's Benchbook, 2-6-10 (29 Feb. 2020). Appellant's punishment of a bad conduct discharge was not the result of prejudice from an instructional error. The difference between the purported erroneous instruction and the appropriately given instruction is small.

Appellant's determined, repeated, and serious misconduct demonstrated a pattern of reckless disregard for his military duties, his oath, and the Air Force's repeated efforts to deter, reform, and rehabilitate him. (Entry of Judgement, ROT, Vol 1.; Pros. Ex. 2-5.) Although the Appellant purported to suffer from anxiety and depression (R. at 232), such struggles are not unique nor even uncommon. For comparison, in this case Appellant was so committed to wrongfully using cocaine that he used it even on the eve of incarceration and then again directly after release from confinement. (R. at 249-252.) Such determination and unrepentant repeated criminal misconduct is not common. Stated another way, Appellant's short Air Force career is distinguished only by his ability to stack criminal misconduct and disciplinary proceedings – all of which were committed before his first enlisted performance report. (R. at 204.) Even if this court were to find an instructional error, Appellant suffered no prejudice from such error. The difference between Appellant's desired instruction and the given instruction is too small, and the powerful evidence of Appellant's determined, repeated criminal misconduct is too strong to have

been overcome. Any instructional error did not substantially influence Appellant's sentence, accordingly any error can be considered harmless. McCollum, 58 M.J. at 343.

The military judge in this case carefully drafted instructions to incorporate the law and the facts of this case, paying special attention to protecting the Appellant's interests. This was not an abuse of discretion, nor was it confusing. Even if there was an error, it did not prejudice Appellant. Appellant's request for relief should be denied as it is not supported by facts or law.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the findings and sentence in this case.

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Chief, Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

MARY ELLEN PAYNE
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 24 July 2023.

MATTHEW D. TALCOTT, Colonel, USAF
Chief, Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32738**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Garrett J. PAGAN	)	
Airman Basic (E-1)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 27th day of July, 2023,

ORDERED:

The Record of Trial in the above-styled matter is withdrawn from Panel 1 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
GRUEN, PATRICIA A., Colonel, Appellate Military Judge
MASON, BRIAN C., Lieutenant Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S REPLY BRIEF**
Appellee	)	
	)	
v.	)	Before Panel No. 1
	)	
Airman Basic (E-1)	)	No. ACM S32738
GARRETT PAGAN	)	
United States Air Force	)	28 July 2023
Appellant	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

AB Pagan, by and through his undersigned counsel and pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this reply to the Appellee's answer on 24 July 2023 (hereinafter "Answer"). AB Pagan stands on the arguments in his initial brief, filed on 23 June 2023 (hereinafter "AOE") and in reply to the Answer, submits additional arguments for the issues listed below.

ASSIGNMENT OF ERROR

THE MILITARY JUDGE ERRED IN HIS INSTRUCTION ON A BAD CONDUCT DISCHARGE TO THE PANEL

"This Court reviews a military judge's decision to give an instruction, as well as the substance of that instruction, *de novo*." *United States v. Smith*, 50 M.J. 451, 455 (C.A.A.F. 1999) (citing *United States v. Maxwell*, 45 M.J. 406, 424-25 (1996)). This court has followed that same principle in *United States v. Small*, 68 M.J. 569, 571 (A.F. Ct. Crim. App. 2009), *aff'd on other grounds*, 69 M.J. 228 (C.A.A.F. 2010) where in a case involving deviation from the *Benchbook* this court held that determining whether a jury was properly instructed was a question of law to be reviewed *de novo*. This was repeated in *United States v. Small*, 2018 CCA LEXIS 121 (A.F. Ct. Crim. App. 6 Mar. 2018)(unpublished), another case where the military

judge deviated from the *Benchbook* and the court held the same unless there is a failure to object the standard of review is *de novo*. Thus, given the military judge provided a non-standard *Benchbook* instruction, which the Defense objected to, the standard of review for this issue should be *de novo*. Under the *de novo* standard of review, the military judge committed error that was not harmless, and AB Pagan is entitled to relief.

The Answer states that a judge's decision to give or not give an instruction is reviewed for abuse of discretion. Answer at 9. That is incorrect. While abuse of discretion is the correct standard for a judge's denial of a defense requested instruction, it is not the appropriate standard for the military judge giving a prosecution requested instruction over defense objection. All three of the cases the Answer cited were ones that involve the military judge denying giving a defense requested instruction. *See United States v. Rasnick*, 58 M.J. 9, 10 (C.A.A.F. 2003)(citing *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993); *United States v. Zamberlan*, 45 M.J. 491 (C.A.A.F. 1997). This case presents a prosecution-requested objection that trial defense counsel preserved through objection. Based on that, *de novo* is the proper standard of review.

When reviewed under the de *novo* standard the military judge erred. The instruction (1) deviated from the *Benchbook* without an explanation from the judge on the record as to the reasoning, (2) reduced the severity of a punitive discharge by making it seem necessary, and (3) sent a confusing overall message to members.

While the Government speculates as to the military judge's reasoning, suggesting he did so to provide "clarity" due to AB Pagan's repeated misconduct (Answer at 11), the Government's reasoning is not supported by the record because the military judge never explained why he gave this instruction over defense objections. It is also inaccurate to say that the military judge "identified" the issue. Answer at 11. This was an instruction tendered by the Government. R. at 210.

However, this line of speculation does highlight the problem with a military judge not putting his reasoning on the record. When that happens, an appellate court has no assurance that it was proper. In *United States v. Rush*, 54 M.J. 313, 315 (C.A.A.F. 2001) the court stated, "the military judge has a duty to explain why he is refusing to give a standard instruction" and "meaningful appellate review of the trial judge's decision on this important sentencing matter requires that he articulate his reason for his decision." (internal citations omitted). Although that case involved a refusal to give a defense instruction (and as a result the judge committed error under an abuse of discretion standard) it is equally (if not more) necessary for a judge to articulate his reasoning when giving an instruction over the Defense's objection.

This is especially true when it involves a proposed instruction that deviates from the *Benchbook*. While the *Benchbook* is not sacrosanct, military judges are encouraged not to deviate significantly from the standard instructions. *Staton*, 68 M.J. at 572 (internal citations omitted). As noted above, it is an abuse of discretion for military judge to fail to explain his reasoning on the record for *refusing* to give an instruction. That duty is magnified when the standard of review is *de novo* and the proposed instruction deviates from the *Benchbook* (that military judges are encouraged not to deviate significantly from). The military judge did not fulfill that duty and as a result, it was error.

The Government also focuses on the confusion piece of AB Pagan's argument and ignores the fact that the instruction lessened the severity of a punitive discharge. Answer at 9. In *Rush*, the Court noted that they "share the lower appellate court's concern that military members be properly instructed as to the *severe* nature of a punitive discharge." *Rush*, 54 M.J. at 315 (emphasis added). The issue in that case was the judge failed to give a standard instruction on the "ineradicable stigma" of a punitive discharge. *Id.* at 314. This case presents a bigger

problem. The military judge instructed the members that "A bad conduct discharge may be adjudged for one who in the discretion of the court has been repeatedly of minor offenses and whose punitive separation appears to be necessary". App. Ex. XIII. By doing so, the military judge implied to the members that a punitive discharge was less severe than it was (and implied it was necessary) which is problematic, especially when reviewed *de novo*.

The final issue with the military judge's tailored instruction is that it sent a message to the members that was confusing at best, and suggested a punitive discharge, a *severe* punishment, was necessary at worst. In either scenario, it was not appropriate. The standard *Benchbook* instru,ctions gave the members everything they needed to appropriately consider whether a bad conduct discharge was appropriate in AB Pagan's case. There was no need for an additional instruction (even if it was adopted in part from the R.C.M.). The overall message it sent to members was that a bad conduct discharge appeared necessary for AB Pagan because he had a prior summary court-martial conviction. The extra language about punishing AB Pagan only for the conduct he is found guilty of only served to confuse the members because it contradicted the prior portion. The military judge could have avoided this confusion by simply giving the standard instruction. Deviating in the manner that the military judge did, over the defense's objection, produced an instruction that inappropriate under the facts of this case and was therefore error.

The Government's argument that the error was harmless fails to appreciate the nature of the offense, or to account for the mitigating evidence presented by AB Pagan's defense. As a starting point, this was purely a drug use case. There was no evidence of distribution or any other aggravating factor in the charged offense. AB Pagan harmed no one except himself. There were also mitigating factors such as the fact that AB Pagan was dealing with anxiety and

depression during this period. R. at 232. There was certainly the prior summary court-martial conviction, and it was ultimately a close call whether the most severe punishment available at a special court-martial should have been given.

Further illustrating the prejudice wrought by the military judge's erroneous instruction, the inappropriate instruction likely played a substantial role in swaying what was ultimately a junior panel. In *Rush*, the court held that error was harmless in part because the panel (two colonels, two lieutenant colonels, and three command master sergeants) was experienced and could reasonably be expected to appreciate the severity of a bad conduct discharge on their own. *Rush*, 54 M.J. at 315. In this case the panel consisted of a major, two captains, and a first lieutenant. R. at 136. These more-junior offices, at least in comparison to *Rush*, are unlikely to have had the experience to appreciate the severity of a bad conduct discharge on their own and needed to be appropriately guided by the military judge. This tailored instruction did not do that and as a result, AB Pagan suffered prejudice.

WHEREFORE, Appellant respectfully requests that this Court reassess his sentence and set aside the bad conduct discharge.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 28 July 2023.

Respectfully submitted,

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