IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Senior Airman (E-4) **MONICA R. ARROYO,** United States Air Force *Appellant*	)	No. ACM 40321 28 September 2022

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for her first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on 6 **December 2022**. The record of trial was docketed with this Court on 8 August 2022. From the date of docketing to the present date, 51 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[redacted]

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 September 2022.

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

29 September 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MONICA R. ARROYO, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40321 Panel No. 2

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.

[redacted]

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

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 29 September 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 2
Senior Airman (E-4) **MONICA R. ARROYO,** United States Air Force *Appellant*	)	No. ACM 40321 28 November 2022

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 an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **5 January 2023**. The record of trial was docketed with this Court on 8 August 2022. From the date of docketing to the present date, 112 days have elapsed. On the date requested, 150 days will have elapsed.

On 9 March 2022, at a general court-martial at Tinker Air Force Base, Oklahoma, SrA Arroyo was found guilty, consistent with her pleas, of one specification of assault consummated by a battery in violation of Article 128, Uniform Code of Military Justice (UCMJ). Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 26 April 2022. The military judge sentenced SrA Arroyo to a bad conduct discharge, 37 days of confinement, and reduction in grade to E-2. *Id.* The convening authority took no action on the findings and sentence. ROT Vol. 1, *Convening Authority Decision on Action*, 12 April 2022. SrA Arroyo is not currently confined.

The trial transcript is 154 pages long and the record of trial is comprised of three volumes containing three prosecutions exhibits, twenty defense exhibits, twenty-six appellate exhibits, and one court exhibit.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time for the submission of an Assignments of Error brief for good cause shown.

Respectfully submitted,

[redacted]
HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 November 2022.

Respectfully submitted,

[redacted]
HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

29 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MONICA R. ARROYO, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40321 Panel No. 2

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.

[redacted]

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

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 29 November 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
Senior Airman (E-4) **MONICA R. ARROYO,** United States Air Force *Appellant*	)	No. ACM 40321 28 December 2022

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

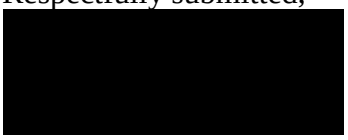
Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **4 February 2023**. The record of trial was docketed with this Court on 8 August 2022. From the date of docketing to the present date, 142 days have elapsed. On the date requested, 180 days will have elapsed.

On 9 March 2022, at a general court-martial at Tinker Air Force Base, Oklahoma, Appellant was found guilty, consistent with her pleas, of one specification of assault consummated by a battery in violation of Article 128, Uniform Code of Military Justice (UCMJ). Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 26 April 2022. The military judge sentenced Appellant to a bad conduct discharge, 37 days of confinement, and reduction in grade to E-2. *Id.* The convening authority took no action on the findings and sentence. ROT Vol. 1, *Convening Authority Decision on Action*, 12 April 2022. Appellant is not currently confined.

The trial transcript is 154 pages long and the record of trial is comprised of three volumes containing three prosecution exhibits, 20 defense exhibits, 26 appellate exhibits, and one court exhibit.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time for the submission of an Assignments of Error brief for good cause shown.

Respectfully submitted,



HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 December 2022.

Respectfully submitted,

[redacted]
HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

29 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MONICA R. ARROYO, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40321 Panel No. 2

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.

[redacted]

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

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 29 December 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*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 2
Senior Airman (E-4) **MONICA R. ARROYO,** United States Air Force *Appellant*	)	No. ACM 40321 27 January 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 an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **6 March 2023**. The record of trial was docketed with this Court on 8 August 2022. From the date of docketing to the present date, 172 days have elapsed. On the date requested, 210 days will have elapsed.

On 9 March 2022, at a general court-martial at Tinker Air Force Base, Oklahoma, Appellant was found guilty, consistent with her pleas, of one specification of assault consummated by a battery in violation of Article 128, Uniform Code of Military Justice (UCMJ). Record of Trial (ROT), Vol. 1, *Entry of Judgment,* 26 April 2022. The military judge sentenced Appellant to a bad conduct discharge, 37 days of confinement, and reduction in grade to E-2. *Id.* The convening authority took no action on the findings and sentence. ROT Vol. 1, *Convening Authority Decision on Action,* 12 April 2022. Appellant is not currently confined.

The trial transcript is 154 pages long and the record of trial is comprised of three volumes containing three prosecution exhibits, 20 defense exhibits, 26 appellate exhibits, and one court exhibit.

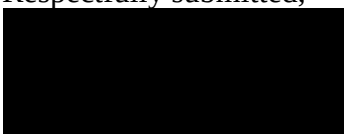
Undersigned counsel is currently assigned 16 cases, with 11 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. One case has priority over the present case:

1. *United States v. Guihama*, ACM 40039: Counsel is currently drafting the Supplement to Petition for Grant of Review, which is due to the CAAF on 2 February 2023.

Appellant was advised of her right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein she consented to the request for this enlargement of time.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time for the submission of an Assignments of Error brief for good cause shown.

Respectfully submitted,



HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 27 January 2023.

Respectfully submitted,

[redacted]
HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

30 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MONICA R. ARROYO, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40321 Panel No. 2

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.

[redacted]

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

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 30 January 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**CONSENT MOTION**
Appellee	)	**TO EXAMINE**
	)	**SEALED MATERIALS**
v.	)	
	)	Before Panel No. 2
Senior Airman (E-4)	)	
MONICA R. ARROYO,	)	No. ACM 40321
United States Air Force	)	
Appellant	)	7 February 2023

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

Pursuant to Rules 3.1 and 23.3(f) of this Court's Rules of Practice and Procedure and Rule for Courts-Martial (R.C.M.) 1113(b)(3(B)(i), the Appellant moves for both parties to examine the following sealed materials:

1) Disc 2 of 2 of the audio recording of the court-martial proceedings which contains the closed session and was ordered sealed by the military judge. R. at 67. This audio recording is of the closed session regarding Military Rule of Evidence (Mil. R. Evid.) 412. Both trial and defense counsel were present during the closed session. R. at 62.
2) Transcript pages 61-66. This transcription is of the closed session referenced above, was attended by trial and defense counsel, and was ordered sealed by the military judge. R. at 67.
3) Appellate Exhibits XI, XII, XIII, XIV, XV, XVI, and XVII were motions under Mil. R. Evid. 412. These matters were reviewed by trial and defense counsel and ordered sealed by the military judge. R. at 16, 152.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these matters is reasonably necessary to appellate counsels' responsibilities, undersigned counsel asserts that review of the referenced exhibits is necessary to conduct a

complete review of the record of trial and be in a position to advocate competently on behalf of Appellant. Undersigned counsel acknowledges that Appellant was ultimately acquitted of the Article 120, UCMJ, offense in Appellant's case pursuant to a plea agreement, however the Mil. R. Evid. 412 motions may contain information pertinent to the Article 128, UCMJ, offense of which Appellant did plead guilty to. This is especially true considering that the named victim from the Article 120 offense is the same named in the Article 128 offense. Regarding disc 2 of 2 of the audio recording of the court-martial proceedings which contains the closed session, undersigned counsel has a duty to ensure the entire record of trial is complete and that all discs are in working order.

Moreover, a review of the entire record of trial is necessary because this Court is empowered by Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, to grant relief based on a review and analysis of "the entire record." To determine whether the record of trial yields grounds for this Court to grant relief under Article 66, UCMJ, 10 U.S.C. § 866, appellate defense counsel must, therefore, examine "the entire record."

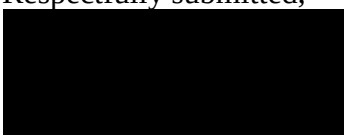
> Although Courts of Criminal Appeals have a broad mandate to review the record unconstrained by an appellant's assignments of error, that broad mandate does not reduce the importance of adequate representation. As we said in *United States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987), independent review is not the same as competent appellate representation.

United States v. May, 47 M.J. 478, 481, (C.A.A.F. 1998). The sealed materials referenced above must be reviewed to ensure undersigned counsel provides "competent appellate representation." *Id*. Accordingly, examination of these exhibits is reasonably necessary since undersigned counsel cannot fulfill her duty of representation under Article 70, UCMJ, 10 U.S.C. § 870, without first reviewing the complete record of trial.

Appellate Government Counsel have been consulted about this motion and consent to the relief sought by the Appellant.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant this motion.

Respectfully submitted,



HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 7 February 2023.

Respectfully submitted,

[redacted]
HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40321**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Monica R. ARROYO	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 7 February 2023, Appellant's counsel submitted a Consent Motion to Examine Sealed Materials, requesting counsel for Appellant and Government be allowed to examine the audio recording of the closed session of Appellant's court-martial proceeding; Appellate Exhibits XI, XII, XIII, XIV, XV, XVI, and XVII; and transcript pages 61–66.*

Appellant's motion states the materials were reviewed by trial and defense counsel and sealed by the military judge. Appellant's counsel avers that viewing the sealed materials is reasonably necessary to fulfill her duty of representation.

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities." Rule for Courts-Martial 1113(b)(3)(B)(i), *Manual for Courts-Martial, United States* (2019 ed.). The court finds Appellant's counsel has made a colorable showing that review of the exhibit is necessary to fulfill counsel's duties of representation to Appellant.

Accordingly, it is by the court on this 10th day of February, 2023,

ORDERED:

The Consent Motion to Examine Sealed Materials is **GRANTED**.

Appellate defense counsel and appellate government counsel may view **the audio recording of the closed season; Appellate Exhibits XI, XII, XIII, XIV, XV, XVI, and XVII; and transcript pages 61–66**, subject to the following conditions:

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* The transcript includes two pages numbered 62.

To view the sealed materials, counsel will coordinate with the court.

No counsel granted access to the materials may photocopy, photograph, reproduce, disclose, or make available the content to any other individual without the court's prior written authorization.

FOR THE COURT

[redacted]

CAROL K. JOYCE
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. 2
Senior Airman (E-4), **MONICA R. ARROYO,** United States Air Force, *Appellant*.	)	No. ACM 40321
	)	Filed on: 25 February 2023

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

Assignments of Error

I.

WHETHER THE MILITARY JUDGE PLAINLY ERRED BY ALLOWING THE VICTIM'S UNSWORN STATEMENT TO ADDRESS MATTERS OUTSIDE THE SCOPE OF PERMISSIBLE "VICTIM IMPACT"?

II.

WHETHER CIRCUIT TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT IN HIS SENTENCING ARGUMENT BY PAINTING SRA ARROYO AS A PREDATOR "LOOKING FOR AN OPPORTUNITY" TO ASSAULT?

III.

WHETHER SRA ARROYO IS ENTITLED TO RELIEF BECAUSE SHE WAS NOT TIMELY SERVED A COPY OF THE VICTIM'S SUBMISSION OF MATTERS NOR WAS SHE PROVIDED AN OPPORTUNITY TO REBUT THE MATTERS IN ACCORDANCE WITH RULE FOR COURTS-MARTIAL 1106A PRIOR TO THE CONVENING AUTHORITY'S DECISION ON ACTION?

Statement of the Case

On 9 March 2022, Senior Airman (SrA) Monica R. Arroyo was convicted, consistent with her pleas, at a general court-martial composed of a military judge alone at Tinker Air Force Base, Oklahoma, of one charge and one specification of assault consummated by a battery for touching

another's leg, in violation of Article 128, Uniform Code of Military Justice (UCMJ),[1] *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*).[2] Record (R.) at 127. Pursuant to a plea agreement, one charge and two specifications of sexual assault in violation of Article 120, UCMJ,[3] were withdrawn and dismissed with prejudice. Record of Trial (ROT), Vol. 2, *Offer of Plea Agreement* [Offer], dated 7 March 2022; ROT, Vol. 1, *Charge Sheet* [Charge Sheet], preferred on 29 June 2021.

The military judge sentenced SrA Arroyo to reduction to the grade of E-2, 37 days of confinement, and a bad conduct discharge. R. at 153. The convening authority took no action on the findings or sentence. ROT, Vol. 1, *Convening Authority Decision on Action* [Action], dated 12 April 2022.

Statement of Facts

Facts of the Case

On 31 December 2020, SrA Arroyo attended a New Year's Eve party at SrA J.C.'s house. Prosecution Exhibit (Pros. Ex.) 1 at 1. Four other Airmen, including the named victim (L.P.), were also at the party. *Id.* at 2. The attendees arrived at approximately 1930, ate dinner, and drank piña coladas. *Id.* The group played a couple of games, making them into drinking games wherein the group would take shots of liquor. *Id.* The group also drank lemonade-vodka mixed drinks. *Id.* At approximately 2315, after SrA Arroyo's family called, she was sitting on the couch next to L.P. *Id.* at 3. While sitting next to L.P., SrA Arroyo touched L.P.'s leg with her hand. *Id.* SrA Arroyo agreed that she did so without L.P.'s consent. *Id.* Though SrA Arroyo had also been drinking

[1] 10 U.S.C. § 928.
[2] All citations to the UCMJ, Rules for Courts-Martial (R.C.M.), or the Military Rules of Evidence (Mil. R. Evid.) are to the 2019 *MCM*.
[3] 10 U.S.C. § 920.

with the group that night, she agreed that her act of touching L.P.'s leg with her hand was done intentionally and that voluntary intoxication was not a defense under the facts and circumstances. *Id.* During the Care inquiry, SrA Arroyo additionally explained that she did not ask permission to touch L.P.'s leg nor had L.P. asked to be touched. R. at 93. SrA Arroyo admitted she had no excuse for her behavior, which she was wrong, and "genuinely" apologized for what she did. *Id.*

SrA Arroyo was originally charged with committing a sexual act on L.P. by penetrating L.P.'s vulva with her fingers when L.P. was incapable of consenting due to being impaired by alcohol. Charge Sheet. SrA Arroyo was also charged with a second specification of committing a sexual act on L.P. by contacting L.P.'s vulva with her mouth when L.P. was incapable of consenting due to being impaired by alcohol. *Id.* Pursuant to the plea agreement, this charge and both specifications were withdrawn after the acceptance of SrA Arroyo's plea by the military judge and dismissed with prejudice after the sentence was announced. *Id.*; R. at 126-27; 153-54. She was solely found guilty of the Article 128, UCMJ, violation, which accused her of touching L.P.'s leg.

Victim Unsworn Statement

After the Government rested its presentencing case, the military judge asked if there was a crime victim present who desired to be heard. R. at 131. The Victims' Counsel answered in the affirmative and marked L.P.'s written statement as Court Exhibit A. *Id.* The military judge asked, "has the defense had an opportunity to review those matters and/or interview the victim?" R. at 132. Trial defense counsel responded, "Yes, Your Honor." *Id.* Trial defense counsel did not object to the written impact statement at that time. *See id.* The military judge did not ask trial defense counsel if there was an objection to the victim impact statement. *See id.*

L.P. read a victim impact statement to the military judge. R. at 132-35. L.P. started her statement with:

> Your Honor, thank you for allowing me this opportunity to explain the impact of Senior Airman Arroyo's *actions* on my life. When I think back to that New Year's Eve party, I am taken back to my last memory, taking a sip of an alcoholic lemonade drink, and then fast forwarding to waking up the next morning, full of confusion, and with no memory of a huge chunk of the night before. I remember, hours after what Senior Airman Arroyo did, still not being in the right state of mind and under the influence of alcohol. I felt awful and was still nauseous from the night before. I became even more confused and concerned when I realized things felt out of place. When I saw Senior Airmen (sic) Arroyo, I remember immediately her asking if I was okay, and not understanding why she would ask me that. Throughout that day, it became worse and worse as I gathered the details of what she had done to me from the other people at the party. As I came to fully understand the gravity of what happened, and that Senior Airman Arroyo had assaulted me during the part of the night I had no memory, a wave of disbelief and discussed (sic) washed over me and I knew what Senior Airman Arroyo had done was not okay. After deciding to report Senior Airman Arroyo's assault on me, I felt violated, ashamed, and embarrassed. I also had to endure an extensive interview with OSI, where I had to relive a play-by-play of what Senior Airman Arroyo had done. Going through all of this was extremely traumatic.

R. at 132-33 (emphasis added). L.P. went on to describe being fearful of seeing SrA Arroyo on base or at work and doing everything she could to avoid SrA Arroyo. R. at 133. L.P. said she became "extremely depressed and sad" after what SrA Arroyo did. R. at 134.

L.P. described going directly home and trying to sleep "to escape the feelings [she] was having and to avoid having to process what happened." *Id.* L.P. said this went on for weeks until she requested and was granted an expedited transfer to Kadena Air Base, Japan. *Id.* L.P. "felt it was wrong [she] was having to pick up [her] life and start new somewhere else when [she] was not the one who did something wrong." *Id.* L.P. went into a two-week quarantine upon arrival in Japan, where she "was isolated from everyone." *Id.* "During those two weeks it was impossible for [her] to not be confronted with the thoughts of what had happened and the knowledge that [she] was only in Japan because of it." *Id.* L.P. described how she had to build

her reputation in her new unit "from scratch, and restart the process of meeting coworkers and finding friends." *Id.* L.P. found it difficult to trust people she did not know causing her to have difficulty making friends. *Id.* She described "having multiple periods of stress and sadness to the point I felt like I could barely function." R. at 134-35.

L.P. went on to say, SrA Arroyo "taking accountability for her *criminal actions* is a start, but [L.P.] believe[s] she needs a *strong punishment* to hold her accountable for what she did and its impact on [L.P.]." R. at 135 (emphasis added). "So many aspects of [L.P.'s] life changed permanently because of Senior Airman Arroyo." *Id.* L.P. ended her impact statement with:

> New Year's Eve used to be a night to enjoy with friends or family, but now each year it is a painful reminder of the assault. Her punishment should include enough time to ensure she reflects on her inappropriate behavior. I want her to truly realize what she has done, so that she walks away from this process knowing she cannot do this to anyone else. Going through this process for me has been so painful and difficult. It is important for me to explain all of the ways it has impacted my life. *A piece of me died that night, I am not the same person I used to be.* I am working every single day to not let what happened have control over me. I am going to continue to live my life positively and take every step I can on the road to recovery. Thank you, Your Honor.

Id. (emphasis added). Following L.P.'s impact statement, the military judge asked trial defense counsel if Defense had any evidence to present at that time. *Id.* The military judge did not ask trial defense counsel if there were any objections to L.P.'s impact statement. *See id.*

Circuit Trial Counsel Sentencing Argument

Circuit trial counsel started his sentencing argument saying, "this is a case about opportunity." R. at 140. He used the word "opportunity" 14 times in the four pages of his short argument. R. at 140-44. Circuit trial counsel described the New Year's Eve party as "a group of friends" who got together, "were having fun" and "doing what friends do" "except for one person, Senior Airman Monica Arroyo, she was looking for the opportunity." *Id.* Circuit trial counsel explained that Prosecution Exhibit 1 set out the background facts of that night. R. at 141. He said

all the Airmen were having fun together "when the accused was looking for an opportunity. Airman Monica Arroyo was looking for the opportunity and she found it." *Id.* Circuit trial counsel then pointed out L.P.'s impact statement saying the military judge "saw the victim give her unsworn, the impact on her from the accused (sic) crime, from the accused's choice, the intentional choice when the victim was intoxicated." *Id.* He referenced how Prosecution Exhibit 1 "talks about how intoxicated [L.P.] was, how many drinks she had when the accused assaulted her that night." *Id.* Circuit trial counsel argued:

> Your Honor, for the accused (sic) crime of opportunity she deserves to be reduced in rank as no airman should outrank her victim. Your Honor, she should also receive a bad conduct discharge because her conduct was so bad that she deserves that sort of punishment, that lifelong punishment for her actions. And finally, Your Honor, she deserves confinement. She deserves serious confinement for her crime.

Id. Circuit trial counsel then pointed out the character letters and below the zone documents, but asked the military judge to "recognize what's not in any of them." *Id.* He asked the military judge to "[r]ecognize what the accused did not say" that "[SrA Arroyo] does not yet recognize the effect alcohol has on her and the effect alcohol played in the situation." R. at 142. Circuit trial counsel argued SrA Arroyo needed enough confinement "until she really truly understands that she cannot take the opportunity when somebody else is drunk." *Id.* He identified "one of the aggravating things about this particular case is the opportunity [SrA Arroyo] took with the games they were playing." R. at 143. "The opportunity [SrA Arroyo] took as the victim downed drink, after drink, after drink, after drink." *Id.* "Drink after drink, Your Honor, is when [SrA Arroyo] assaulted the victim." *Id.*

Circuit trial counsel asked the military judge to consider that while SrA Arroyo drank alcohol, she admitted she knew what she was doing and to "[c]ompare that to the victim impact that [the military judge] heard where the last thing the victim remember[ed] was that lemon drink."

R. at 143-44. He went on to say, "[t]he lemon drink is the last thing the victim remembers yet the accused didn't take the opportunity then she had another drink, and another drink, and another drink before she assaulted the victim." R. at 144. Circuit trial counsel told the military judge to "[p]rotect people like the victim in the future" and "protect those other people who might be around [SrA Arroyo], who see [SrA Arroyo] as a friend until they drink drink after drink, after drink, after drink, after drink." *Id.* He argued the "sentence should be serious enough that it rehabilitates [SrA Arroyo], that it teaches [SrA Arroyo] to be the person she is when she hasn't had any drinks." *Id.*

The Defense did not object. The military judge made no comment after circuit trial counsel's sentencing argument before trial defense counsel's sentencing argument. *See* R. at 144. The military judge simply asked if trial defense counsel was ready to proceed. *Id.* The motions hearing lasted two hours and 16 minutes. R. at 1, 69. The sentencing proceedings lasted five hours and thirty-five minutes (R. at 70, 154) and deliberations lasted 66 minutes. R. at 152-53.

SrA Arroyo's Submission of Matters

SrA Arroyo's submission of matters was dated 19 March 2022.[4] ROT, Vol. 2, *Clemency Request* [Clemency Request], dated 19 March 2022. SrA Arroyo requested the convening authority suspend her confinement over 14 days and "grant her a probationary period in which to demonstrate her rehabilitation." Clemency Request at 1. She also requested the convening authority suspend or remit her reduction in rank to Airman. *Id.* SrA Arroyo described how she took rehabilitative measures starting in January 2021, prior to her court-martial. Clemency Request, Attachment 1 at 2. SrA Arroyo explained that she "suffer[s] from severe anxiety and

[4] Attachment 6 (Military and Veteran Service Benefits Chart) was missing from the clemency package and not found elsewhere in the record of trial. However, SrA Arroyo is not asserting any prejudice.

depression as [she] worr[ies] about [her] sick father with fear that something may happen to him." *Id.* This fear was something she worried about daily in confinement. *Id.* Being in confinement also "drastically increased [her] anxiety" because she was away from the people who need her most—her family. *Id.*

SrA Arroyo's submission also included a letter from TSgt J.S. who is a Crew Chief by trade, but was also one of three Section Chiefs for SrA Arroyo since September 2021. Clemency Request, Attachment 3 at 1. TSgt J.S. attended SrA Arroyo's trial on 9 March 2022. *Id.* He "felt that the punishment that SrA Arroyo received did not fit into the parameters of the crime that she was convicted of." *Id.* TSgt J.S. believed "that the crime in which she was originally arraigned on (sexual assault) was taken into consideration by the judge that presided over her trial." Clemency Request, Attachment 3 at 1-2. His assessment was based first on the "prosecution failing to change the content of their argument, which was heavily geared towards making SrA Arroyo look like a predator on the night in which that crime occurred." Clemency Request, Attachment 3 at 2. "Additionally, the victim addressed the court on the original offense (sexual assault) and her statement in no way reflected the crime that SrA Arroyo was convicted of." *Id.* TSgt J.S. felt the statements of the prosecution and victim "unfairly comprised of the offenses that [SrA Arroyo] was not convicted of." *Id.* He wrote his letter seeking clemency for SrA Arroyo "on the grounds that information contained within this trial encompassed the argument for the offenses that were not proven and not the offense that she was convicted of." *Id.*

SSgt C.W. who knew SrA Arroyo for three years and was her current supervisor also wrote a letter for her clemency package. Clemency Request, Attachment 3 at 3. SSgt C.W. attended SrA Arroyo's trial and after hearing the statements and charge SrA Arroyo pled to, he believed she "did not receive sentencing based solely on the charge of assault for the unwanted touching of

another airman's leg, which she took ownership of doing." *Id.* "It was obvious that the prosecutor was pushing to paint the original charge of sexual assault." *Id.* SSgt C.W. requested clemency for SrA Arroyo "on the grounds that information contained within this trial encompassed the argument for the dismissed offenses and not the offense that she was convicted of." *Id.*

SrA Arroyo's clemency request stated the sentence received was not proportional to the offense she was actually convicted of. Clemency Request at 1. SrA Arroyo's clemency request also pointed out that her sentence raised questions of fairness by bystanders, referencing the two letters described above. Clemency Request at 2. Specifically, though the military judge did not receive "any direct evidence of the Sexual Assault allegations during findings or sentencing, Trial Counsel nevertheless appeared to bystanders to have argued as though SrA Arroyo had been found guilty of Sexual Assault." *Id.* SrA Arroyo's clemency submission did not make any reference to L.P.'s submission of matters. *See* Clemency Request.

L.P.'s Submission of Matters

L.P.'s submission of matters was undated. ROT, Vol. 2, *Victim Submission of Matters* [L.P. Submission], undated. A receipt for post-trial documents served on SrA Arroyo's defense counsel, dated 22 July 2022, listed the Victim Submission of Matters as being dated 10 March 2022. ROT, Vol. 2, *Receipt for Post-Trial Documents*, dated 22 July 2022. Confusingly, the receipt stated trial defense counsel was served with the Victim Submission of Matters four months earlier on 14 March 2022. *Id.* The receipt was signed by the Area Defense Paralegal on 22 July 2022. *Id.*

The record of trial does not contain a receipt from SrA Arroyo demonstrating she personally received the matters submitted by L.P. before the convening authority signed the Decision on Action memorandum. *See* ROT, Vol. 2, *Post-Sentencing*.

L.P.'s submission of matters started off by stating that she supported the plea agreement. L.P. Submission at 1. Her submission also had the impact statement that she read to the military judge during the court-martial attached. L.P. Submission at 4-6. L.P. stated she believed SrA Arroyo's sentence was "appropriate for [SrA Arroyo's] misconduct" and that SrA Arroyo did not "deserve any additional leniency for her *crimes*." L.P. Submission at 1 (emphasis added). L.P. went on to say SrA Arroyo's sentence while "significant," was only "approximately 1/6th of the amount she could have received from the charge for which she pled guilty." *Id.* L.P. continued:

> Moreover, *had we gone to trial and SrA Arroyo been found guilty of the charge and two specifications of sexual assault, she could have up to 60 years confinement and a dishonorable discharge*. As such, SrA Arroyo has already received the benefit of her plea agreement, and any clemency is not warranted. I ask that you deny any request from her for additional clemency.

Id. (emphasis added). L.P. went on to say, "SrA Arroyo's actions on 31 December 2020 were disgusting" and "SrA Arroyo, the predator she is, took advantage of my intoxicated state and assaulted me." *Id.* L.P. explained that a big part of the reason she supported the plea agreement was so she would not have to see SrA Arroyo again." L.P. Submission at 2. She stated that SrA Arroyo needed to serve her entire confinement sentence "to ensure she learns from her actions and does not do this to anyone else in the future." *Id.* Since the plea agreement was approved, L.P. was "plagued by thoughts about whether [she] made the right decision in supporting it." *Id.* "While [she] was glad some accountability was given to SrA Arroyo, and [was] grateful the punishment [SrA Arroyo] received will help [SrA Arroyo] understand the seriousness of [SrA Arroyo's] actions, [L.P.] also [felt] as though [she] ran a marathon and stopped five feet short of the finish line." *Id.* L.P. expressed gratefulness to the convening authority and Air Force for giving her "the opportunity to obtain justice for the *crimes* perpetrated on me." *Id.* (emphasis added).

L.P.'s submission of matters was not served on SrA Arroyo prior to the Convening Authority Decision on Action memorandum being signed. Motion to Attach, at Appendix, *Declaration of SrA Arroyo* [Declaration], dated 22 February 2022; Action. SrA Arroyo did not have an opportunity to rebut L.P.'s submission of matters. Declaration. Had she had an opportunity, SrA Arroyo would have objected to L.P.'s comments concerning the dismissed specifications, her comments concerning her feelings regarding the plea deal, and L.P.'s description of SrA Arroyo as a "predator." *Id.* She would have asked that said comments be stricken and not considered by the convening authority as it is improper for the convening authority to consider the maximum sentence of crimes SrA Arroyo was not convicted of. *Id.* SrA Arroyo also would have told the convening authority that she is not a predator and was not looking for an opportunity to take advantage of L.P. due to her intoxicated state. *Id.* Instead, SrA Arroyo took responsibility for touching L.P.'s leg with her hand because SrA Arroyo did not ask for permission and L.P. had not given it. *Id.* SrA Arroyo would have explained that she was not aware that L.P. had blacked out and would not remember SrA Arroyo touching her leg in the morning. *Id.* SrA Arroyo did not have consent to touch L.P.'s leg and that is what she took responsibility for. *Id.*

Before deciding to take no action on the findings or sentence, the convening authority considered both matters timely submitted by SrA Arroyo under R.C.M. 1106 and the victim under R.C.M. 1106A. Action. The receipt for post-trial documents states the Convening Authority Decision on Action was dated 13 April 2022, but that the Defense received the post-trial documents on 10 March 2022. ROT, Vol. 2, *Receipt for Post-Trial Documents*, dated 27 June 2022.

Argument

I.

THE MILITARY JUDGE PLAINLY ERRED BY ALLOWING THE VICTIM'S UNSWORN STATEMENT TO ADDRESS IMPROPER MATTERS OUTSIDE THE SCOPE OF PERMISSIBLE "VICTIM IMPACT."

Standard of Review

The application of R.C.M. 1001(c)[5] is a question of law this Court reviews *de novo*. *United States v. Edwards*, 82 M.J. 239, 243 (C.A.A.F. 2022) (citing *United States v. Barker*, 77 M.J. 377, 382 (C.A.A.F. 2018) (citations omitted). When an appellant does not raise an issue at trial, this Court reviews a military judge's decision to admit evidence for plain error. *United States v. Schmidt*, 82 M.J. 68, 73 (C.A.A.F. 2022) (internal quotation marks and citations omitted). An appellant must establish all of the following prongs in order to meet the burden of showing plain error: 1) that there was error; 2) that the error was clear or obvious; and 3) the error results in material prejudice to the appellant's substantial rights. *Id.*

Law

Under R.C.M. 1001(c)(2)(B), "victim impact includes any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty." Victim impact statements are not unfettered. *United States v. Hamilton*, 77 M.J. 579, 585 (A.F. Ct. Crim. App. 2017). A military judge acts as a "'gatekeeper to ensure the content of a victim's unsworn statement comports with the parameters established by R.C.M. 1001A." *Edwards*, 82 M.J. at 243 (quoting *United States v. Tyler*, 81 M.J. 108, 113 (C.A.A.F. 2021)). An unsworn victim statement is a right belonging to the victim or victim's

[5] R.C.M. 1001(c) (2019) replaced R.C.M. 1001A, but the case law applicable to R.C.M. 1001A still applies. "R.C.M. 1001(c) is new and incorporates R.C.M. 1001A of the MCM (2016 edition))." 2019 *MCM*, App. 15, at A15-18.

designee alone. *Id.* at 245 (internal citations omitted). It "is not a mechanism for the government may slip in evidence in aggravation that would otherwise be prohibited by the Military Rules of Evidence, or information that does not relate to the impact from the offense of which the accused is convicted." *Id.* (internal quotations and citations omitted).

This Court has concluded that "a victim impact statement under R.C.M. 1001A does not allow 'a never-ending chain of causes and effects' to be relayed to the sentencing authority." *United States v. King*, ACM 39583, 2021 CCA LEXIS 415, at *136 (A.F. Ct. Crim. App. 16 Aug. 2021) (unpub. op.), *rev. granted*, 2022 CAAF LEXIS 227 (C.A.A.F. 22 Mar. 2022) (citation omitted). The Court of Appeals for the Armed Forces (CAAF) has held that "[t]he meaning of 'directly related' under R.C.M. 1001(b)(4) is a function of both what evidence can be considered and how strong a connection that evidence must have to the offenses of which the accused has been convicted." *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007).

If an error occurs in the admission of sentencing evidence, the test for prejudice is "whether the error substantially influenced the adjudged sentence." *Edwards*, 82 M.J. at 246 (internal quotations and citations omitted). This Court assesses whether an error substantially influenced the sentence by considering four factors: "(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question." *Id.* at 247 (internal quotations and citations omitted). An error is more likely to be prejudicial if the information relayed was not already obvious from the other evidence presented at trial. *Id.* (internal citation omitted). It is "harder for the Government to meet its burden of showing that a sentencing error did not have a substantial influence on a sentence than it is to show that an error did not have a substantial influence on the findings." *Id.* The extent to which the evidence provided to the Government's case and to what extent the Government referred

to the evidence in argument are both relevant factors in assessing materiality and quality. *Id.* at 248 (internal quotations and citations omitted).

Analysis

There was no affirmative waiver on the record; the appropriate standard of review is plain error as the issue was forfeited. While the military judge asked if trial defense counsel had reviewed the written victim unsworn (Court Exhibit A) and had an opportunity to interview L.P., the military judge did not ask trial defense counsel if there were any objections to the unsworn. R. at 132. What this means is defense counsel never affirmatively stated on the record there was no objection; the record merely demonstrates an absence of objection. That is forfeiture.

Allowing L.P.'s unsworn to address improper victim impact was clear and obvious error. L.P.'s victim impact statement addressed victim impact not directly relating to or arising from the offense—assault consummated by a battery—of which SrA Arroyo was found guilty. It strains credulity to believe that as a result of a single touch of L.P.'s leg by SrA Arroyo's hand, L.P. suffered the lasting effects discussed in her unsworn statement. Specifically, L.P. ended her impact statement that *"A piece of me died that night, I am not the same person I used to be*." R at 135. L.P. unmistakably was referring to the withdrawn and dismissed specifications of sexual assault especially in light of the theory L.P. advanced throughout her impact statement. According to L.P., her last memory was "taking a sip of an alcoholic lemonade drink." R. at 133. Due to her lack of memory, L.P. gathered details from other people at the party. *Id.* L.P. stated in her unsworn that as she came to "fully understand the gravity of what happened, and that Senior Airman Arroyo had assaulted me during the part of the night I had no memory, a wave of disbelief and discussed (sic) washed over me and I knew what Senior Airman Arroyo had done was not okay." *Id.* However, the Government did not present any evidence SrA Arroyo was aware that L.P. was in a

blackout and she was not recording memory. SrA Arroyo took responsibility for touching L.P.'s leg with her hand without L.P.'s consent, not for touching L.P.'s leg when L.P. was incapable of consenting to the touch due to impairment by alcohol.

L.P. went on to say that "After deciding to report Senior Airman Arroyo's assault on me, I felt violated, ashamed, and embarrassed. I also had to endure an extensive interview with OSI, where I had to relive a play-by-play of what Senior Airman Arroyo had done." R. at 133. However, the OSI investigation was for "sexual assault on or after January 1, 2019" not for assault consummated by a battery.[6] ROT, Vol. 2, *Report of Investigation* (redacted) [ROI], dated 23 March 2021. Clearly, L.P. was referencing what it was like for her to go through hearing about what she believed to be alleged sexual assaults that she did not remember from others and also being interviewed by OSI about such allegations. Furthermore, it was L.P.'s choice to participate in the investigative process. SrA Arroyo should not be faulted for the process of reporting. This is not directly related to or resulting from a leg touch. SrA Arroyo is not "responsible for a never-ending chain of causes and effects." *See Rust*, 41 M.J. at 478 (citation omitted); *King*, unpub. op. at *136 (citation omitted).

In terms of prejudice, this Court examines four factors: "(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question." *Edwards*, 82 M.J. at 247 (internal quotations and citations omitted). The strength of the Government's case was built upon Prosecution Exhibit 1. The strength of the defense case relied upon evidence of SrA Arroyo's rehabilitation evidence, 13 character letters, paperwork showing she was selected for SrA "Below-

[6] In fact, in the entire 106-page report, reference to SrA Arroyo touching L.P.'s leg is only found once. ROI at 9.

the-Zone," a certificate of her Associate's degree in Applied Science – Avionic Systems Technology, photographs of her friends and family, and her unsworn statement. ROT, Vol. 1, *Defense Exhibits*. Even the single Enlisted Performance Report (EPR) admitted as Prosecution Exhibit 3 showed SrA Arroyo's performance in all four blocks, including "Overall Performance," as "[e]xceed most, if not all expectations." Pros. Ex. 3.

The materiality and quality of L.P.'s unsworn statement is significant as seen in the extent it aided the Government's case as the only other evidence presented was Prosecution Exhibit 1 (the stipulation of fact), one Performance Data Sheet (PDS), and a single EPR, which as referenced above, was positive. *Edwards*, 82 M.J. at 247 (internal quotations and citations omitted). Further, L.P.'s unsworn provided information that was not already obvious from the other evidence presented—the impact the allegations of sexual assault had on her—, which makes the error more likely to be prejudicial. *Id.* at 248. In describing how she had been impacted, L.P. went on to describe being fearful of seeing SrA Arroyo on base or at work and doing everything she could to avoid SrA Arroyo. R. at 133. L.P. said she became "extremely depressed and sad" after what SrA Arroyo did and that she would go directly home and trying to sleep "to escape the feelings [she] was having and to avoid having to process what happened." R. at 134. These are clear references to the alleged sexual assaults. L.P. said this went on for weeks until she requested and was granted an expedited transfer to Kadena Air Base, Japan. *Id.* L.P. "felt it was wrong [she] was having to pick up [her] life and start new somewhere else when [she] was not the one who did something wrong." *Id.* Again, this is improper victim impact evidence as it is not directly relating to or arising from the offense that SrA Arroyo was found guilty of. It seems apparent that SrA Arroyo's offensive touching of L.P.'s leg would not warrant L.P. being granted an expedited transfer on its face. Instead, the expedited transfer option, based on Air Force Instruction (AFI)

36-2110, *Total Force Assignments*, ¶ 2.19 (5 Oct. 2018, as amended by AFGM 2020-01, 28 Jul. 2020), is provided to "an Airman who is sexually assaulted and files an unrestricted report" not assault consummated by a battery.[7] Therefore, any reference to an expedited transfer or the impacts from it is not proper victim impact from SrA Arroyo touching L.P.'s leg.

The materiality and quality can also be seen in the extent the circuit trial counsel referenced and relied on it in his sentencing argument (*see* Issue II *infra*). R. at 141, 143-44; *Edwards*, 82 M.J. at 248. Bystanders in the courtroom even recognized that the focus of L.P.'s unsworn and then circuit trial counsel's sentencing argument was not on SrA Arroyo's conviction of touching L.P.'s leg, but on the withdrawn and dismissed specifications of sexual assault. Attachment 3. Specifically, TSgt J.S. perceived the Government's argument to be "heavily geared towards making SrA Arroyo look like a predator." Clemency Request, Attachment 3 at 2. Notably, these non-commissioned officers, each of whom had served on active duty for almost 12 years,[8] took the unusual step of highlighting the Government's argument when requesting clemency on behalf of SrA Arroyo. Both TSgt J.S. and SSgt C.W. requested clemency for SrA Arroyo "on the grounds that information contained within this trial encompassed the argument for the [dismissed] offenses that were not proven and not the offense that she was convicted of." Clemency Request, Attachment 3 at 2-3.

L.P. referenced SrA Arroyo's "actions" and "criminal actions" despite the fact that SrA Arroyo pled guilty to only *one* crime. R. at 132, 135. For example, L.P. said, SrA Arroyo "taking accountability for her *criminal actions* is a start, but [L.P.] believe[s] she needs a *strong*

[7] Victims of stalking or other sexual misconduct (i.e., indecent viewing, visual recording, or broadcasting; forcible pandering; indecent exposure) may also request an expedited transfer. AFI 36-2110, ¶ 2.19.

[8] TSgt J.S. had served on active duty for almost 12 years at the time of writing his letter. Clemency Request, Attachment 3 at 1. SSgt C.W. had served for 12 years. *Id.* at 3.

punishment to hold her accountable for what she did and its impact on [L.P.]." R. at 135 (emphasis added). In the end, it does not stand to reason that L.P. would be "having multiple periods of stress and sadness to the point [she] felt like [she] could barely function" or that "[s]o many aspects of [L.P.'s] life changed permanently" based on an offensive touching of her leg alone—especially given the fact that L.P. alleged she did not remember the touch at all. R. at 134-35. Allowing L.P.'s unsworn to address improper victim impact was clear and obvious error. The Government will not be able to meet its heavier burden of "showing that a sentencing error did not have a substantial influence on a sentence." *Edwards*, 82 M.J. at 248. Given the clearly improper and inflammatory nature of L.P.'s unsworn statement and the sentence adjudged, this Court cannot be confident that L.P.'s unsworn statement did not have a substantial influence on the sentence.

WHEREFORE, SrA Arroyo respectfully requests that this Honorable Court provide appropriate sentencing relief.

II.

CIRCUIT TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT IN HIS SENTENCING ARGUMENT BY PAINTING SRA ARROYO AS A PREDATOR "LOOKING FOR AN OPPORTUNITY" TO ASSAULT.

Standard of Review

Whether argument is improper is a question of law, reviewed *de novo*. *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018). If no objection is made, this Court reviews for plain error. *See id.* "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *Id.* at 401 (quoting *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005)).

Law

Improper argument, a facet of prosecutorial misconduct, "occurs when trial counsel oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017) (quoting *United States v. Hornback*, 73 M.J. 155, 159–60 (C.A.A.F. 2014)) (internal quotation marks and alterations omitted). A trial counsel "may prosecute with earnestness and vigor . . . . But, while he may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). Indeed, "[i]t is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id*.

The Court of Military Appeals (CMA) "has consistently cautioned counsel to 'limit' arguments on findings or sentencing 'to evidence in the record and to such fair inferences as may be drawn therefrom.'" *United States v. White*, 36 M.J. 306, 308 (C.M.A. 1993) (quoting *United States v. Nelson*, 1 M.J. 235, 239–40 (C.M.A. 1975)). "[W]e must bear in mind that an accused is to be sentenced only for the offenses he has been found guilty of committing beyond a reasonable doubt." *United States v. Buber*, 62 M.J. 476, 478 (C.A.A.F. 2006).

Improper argument will yield relief only if the misconduct "actually impacted on a substantial right of an accused (*i.e.*, resulted in prejudice)." *Fletcher*, 62 M.J. at 178 (quoting *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)). In assessing prejudice, courts look "at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial." *United States v. Erickson*, 65 M.J. 221, 224 (C.A.A.F. 2007) (citing *Fletcher*, 62 M.J. at 184). This determination is based on "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence

to support the conviction." *Norwood*, 81 M.J. at 19 (citing *Voorhees*, 79 M.J. at 12). Indicators of severity of misconduct include:

> (1) the raw numbers - the instances of misconduct as compared to the overall length of the argument, (2) whether the misconduct was confined to the trial counsel's rebuttal or spread throughout the findings argument or the case as a whole; (3) the length of the trial; (4) the length of the panel's deliberations, and (5) whether the trial counsel abided by any rulings from the military judge.

Fletcher, 62 M.J. at 184. The question is whether "trial counsel's comments, taken as a whole, were so damaging that [this Court] cannot be confident that the appellant was sentenced on the basis of the evidence alone." *United States v. Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2013) (citations, internal quotation marks, and alterations omitted).

Analysis

"[T]his is a case about opportunity," or so the circuit trial counsel asserted at the start of his sentencing argument. R. at 140. He went on to describe the night of New Year's Eve on 31 December 2020, saying all the friends were having fun "except for one person, [SrA Arroyo], she was looking for the opportunity." *Id.* He repeated the same over and added that SrA Arroyo "was looking for the opportunity and she found it." R. at 141. Circuit trial counsel then looped in the victim's unsworn statement wherein L.P. also discussed the myriad of ways she had been impacted by the sexual assault allegations, not the offensive touching of her leg that SrA Arroyo pled guilty to (*see* Issue I *supra*). *Id.* Here, circuit trial counsel tried couching the victim's unsworn as "the impact on her from the accused (sic) crime, from the accused's choice, the intentional choice when the victim was intoxicated." *Id.* He pointed out how Prosecution Exhibit 1 described how intoxicated L.P. was and "how many drinks she had when the accused assaulted her that night." *Id.*

To outside observers, such as TSgt J.S. and SSgt S.W., it seemed apparent that circuit trial counsel used the theme and theory originally planned for the charge and specifications of sexual assault. His numerous references to SrA Arroyo seizing her "opportunity" were made to paint SrA Arroyo as a predator who took advantage of L.P. at her most vulnerable. The additional charge of assault consummated by a battery was preferred only two days before the court-martial and referred the same day as the court-martial. ROT, Vol. 1, *Charge Sheet, Additional Charge*, dated 7 March 2022. The stipulation of fact was signed on 8 March 2022, the day in between the two days. *See* Pros. Ex. 1. It was evident in circuit trial counsel's sentencing argument that the theme of SrA Arroyo looking for an opportunity was originally intended for the sexual assault allegations, which were charged as sexual acts committed when L.P. was "incapable of consenting…because she was impaired by alcohol." Charge Sheet.

While the facts that alcohol was consumed, and to what extent, that night by L.P. were facts and circumstances relating to that night, they are not aggravating facts of the additional charge. No evidence was presented that SrA Arroyo was the one forcing alcohol on L.P. Further, there was no evidence proving SrA Arroyo intended to get L.P. drunk or intoxicated to the point of not being able to consent. SrA Arroyo herself was intoxicated and was able to appreciate her criminal conduct of touching L.P.'s leg with her hand without L.P.'s permission. SrA Arroyo was not aware that at the time L.P. was blacked out or unable to record memory. Declaration. Therefore, any facts relating to L.P. drinking were not aggravating facts relating to SrA Arroyo touching L.P.'s leg without first getting permission or previously being given permission. Yet, circuit trial counsel argued those facts and circumstances as aggravation evidence and the sole reason SrA Arroyo should be punished. Specifically, he argued that "*for the accused* (sic) *crime of opportunity she deserves* to be reduced in rank as no airman should outrank her victim," "she

should also receive a bad conduct discharge because her conduct was so bad that she deserves that sort of punishment, that lifelong punishment for her actions," and that "[s]he deserves serious confinement for her crime." R. at 141 (emphasis added). This is either arguing facts not in evidence, mischaracterizing the evidence, or both.

As such, this Court cannot be confident that the military judge sentenced SrA Arroyo for the sole crime of touching L.P.'s leg with her hand. *See Halpin*, 71 M.J. at 480. Using the indicators of the severity of misconduct from *Fletcher*,[9] it can be seen in the 14 times circuit trial counsel used the word "opportunity" over a short, four-page argument. R. at 140-44. The motions hearing, discussing the allegations of sexual assault, lasted two hours and 16 minutes. R. at 1, 69. The sentencing proceeding, regarding only the additional charge of SrA Arroyo touching L.P.'s leg with SrA Arroyo's hand, lasted five hours and thirty-five minutes (R. at 70, 154) and deliberations lasted 66 minutes. R. at 152-53. The important point is circuit trial counsel spent all of his focus in preparation for the case on the sexual assault allegations, but between when the plea agreement was signed and when he delivered the sentencing argument, he did not adapt his argument to only the charge of which SrA Arroyo was convicted. Instead, the crux of circuit trial counsel's sentencing argument as a whole was focused on SrA Arroyo allegedly looking for an opportunity to commit assault on L.P. when she was intoxicated.

While there were no measures adopted to cure the misconduct—by request of trial defense counsel or *sua sponte* by the military judge—the weight of evidence to support the sentence is low. No aggravation evidence for the assault consummated by a battery was admitted. Additionally, Defense introduced evidence of strong rehabilitative potential through 13 character letters wherein military and family members all stated SrA Arroyo was and could continue to be a productive

[9] 62 M.J. at 184.

member of society. Defense Exhibits B-N. Defense also provided a letter from SrA Arroyo's Licensed Professional Counselor stating SrA Arroyo participated in therapy since 28 December 2021 and had shown progress in coping with stressors, was not resistant to change, and was focused on her goals. Defense Exhibit O. SrA Arroyo previously had been selected for SrA "Below-the-Zone" and her past and current leadership all stated that she was continuing to perform at that high level even while awaiting her court-martial. Defense Exhibits B-E, P-Q. Even circuit trial counsel pointed out the character letters and below the zone documents. R. at 141. However, he then minimized their import by focusing on facts that were not an element of the additional charge. Specifically, he asked the military judge to "recognize what's not in any of them," "what the accused did not say," which was that SrA Arroyo did "not yet recognize the effect alcohol has on her and the effect alcohol played in the situation." R. at 141-42. Circuit trial counsel pushed for "enough confinement" so that SrA Arroyo "goes to a facility and has enough time to make that connection." R. at 142. Circuit trial counsel explicitly argued that "one of the aggravating things about this particular case is the opportunity [SrA Arroyo] took with the games they were playing." R. at 143. "The opportunity [SrA Arroyo] took as the victim downed drink, after drink, after drink, after drink." *Id.* "Drink after drink, Your Honor, is when [SrA Arroyo] assaulted the victim." *Id.* Circuit trial counsel put an expectation on SrA Arroyo to acknowledge alcohol as an aggravating factor when alcohol impairment was not an element of the additional charge at all. Further, no evidence was presented that SrA Arroyo had knowledge that L.P. was impaired by alcohol to the point of not being able to appreciate what was happening.

Regardless, circuit trial counsel argued facts not in evidence—that SrA Arroyo intentionally looked for an opportunity to assault L.P. when L.P. was impaired by alcohol and could not consent. In light of the changes to the landscape of the Government's case, circuit trial

counsel still asked the military judge to consider that while SrA Arroyo drank alcohol, she admitted she knew what she was doing and to "[c]ompare that to the victim impact that [the military judge] heard where the last thing the victim remember[ed] was that lemon drink." R. at 143-44. He took it even further arguing, "[t]he lemon drink is the last thing the victim remembers yet the accused didn't take the opportunity then she had another drink, and another drink, and another drink before she assaulted the victim." R. at 144. Circuit trial counsel was essentially saying that SrA Arroyo lied in wait for the opportunity to assault L.P. when she was impaired by alcohol. Again, no evidence was presented that SrA Arroyo knew L.P. had stopped recording memories or that SrA Arroyo knew that L.P.'s last memory was the lemon drink.

Circuit trial counsel also erred when he told the military judge to "[p]rotect people like the victim in the future" and "protect those other people who might be around [SrA Arroyo], who see [SrA Arroyo] as a friend until they drink drink after drink, after drink, after drink, after drink." *Id.*; *see United States v. Brown*, No. ACM 40066 (f rev), 2022 CCA LEXIS 710, at *45 (A.F. Ct. Crim. App. 9 Dec. 2022) (unpub. op). He was essentially arguing that SrA Arroyo was going take the "opportunity" to assault unknown persons at some unknown time in the future and at unknown locations and that the military judge needed to protect those unknown future victims. This argument is clearly error as it was "speculative, irrelevant, and not an appropriate consideration." *Id.*

Circuit trial counsel argued potentially aggravating facts of the sexual assault allegations, which were not aggravating facts of the additional charge, as the crux for why SrA Arroyo should receive a bad conduct discharge—a "lifelong punishment for her actions"—and "serious confinement." R. at 141. This was plain or obvious error that resulted in material prejudice to a substantial right of SrA Arroyo. Instead of being sentenced to 14 days' confinement, she was

sentenced to 37 days and a bad conduct discharge. After receiving the worst punishment available (a bad conduct discharge), no more than 14 days' confinement was appropriate in this case. This was a single specification of SrA Arroyo touching L.P.'s leg without consent. SrA Arroyo did not receive appropriate credit for taking responsibility, saving the Government time and resources, apologizing for her conduct, progressing in coping with stressors, and her high rehabilitative potential.

WHEREFORE, SrA Arroyo requests this Honorable Court grant appropriate sentencing relief.

III.

SRA ARROYO IS ENTITLED TO RELIEF BECAUSE SHE WAS NOT TIMELY SERVED A COPY OF THE VICTIM'S SUBMISSION OF MATTERS OR PROVIDED AN OPPORTUNITY TO REBUT THE MATTERS IN ACCORDANCE WITH R.C.M. 1106(d)(3) PRIOR TO THE CONVENING AUTHORITY'S DECISION ON ACTION.

Standard of Review

The standard of review for determining whether post-trial processing was properly completed is de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000)). When reviewing post-trial errors, this Court will grant relief if an appellant presents "some colorable showing of possible prejudice[.]" *United States v. LeBlanc*, 74 M.J. 650, 660 (A.F. Ct. Crim. App. 2015) (quoting *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005)).

Law

R.C.M. 1106A states, "In a case with a crime victim, after a sentence is announced in a court-martial any crime victim of an offense may submit matters to the convening authority for consideration in the exercise of the convening authority's powers under R.C.M. 1109 or 1110."

R.C.M. 1106A(a). "The convening authority shall ensure any matters submitted by a crime victim under this subsection be provided to the accused as soon as practicable." R.C.M. 1106A(c)(3). If a crime victim submits matters under R.C.M. 1106A, "the accused shall have five days from receipt of those matters to submit any matters in rebuttal." R.C.M. 1106(d)(3). "Before taking or declining to take any action on the sentence under this rule, the convening authority shall consider matters timely submitted under R.C.M. 1106 and 1106A, if any, by the accused and any crime victim." R.C.M. 1109(d)(3)(A). A convening authority "may not consider matters adverse to the accused without providing the accused an opportunity to respond." R.C.M. 1106A(c)(2)(B), *Discussion*.

"[T]he convening authority is an appellant's 'best hope for sentence relief.'" *United States v. Bischoff*, 74 M.J. 664, 669 (A.F. Ct. Crim. App. 2015) (quoting *United States v. Lee*, 50 M.J. 296, 297 (C.A.A.F. 1999)). "Post-trial conduct must consist of fair play, specifically giving the appellant 'notice and an opportunity to respond.'" *United States v. Hunter*, No. 201700036, 2017 CCA LEXIS 527, at *4 (N.M. Ct. Crim. App. 8 Aug. 2017) (unpub. op.) (quoting *United States v. Leal*, 44 M.J. 235, 237 (C.A.A.F. 1996)). "Serving victim clemency correspondence on the accused for comment before convening authority action protects an accused's due process rights under the Rules for Courts-Martial and preserves the actual and perceived fairness of the military justice system." *United States v. Bartlett*, 64 M.J. 641, 649 (A. Ct. Crim. App. 2007).

In order to obtain relief for issues such as this, an appellant must "demonstrate prejudice by stating what, if anything, would have been submitted to 'deny, counter or explain' the new matter." *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997). "[T]he threshold should be low, and if an appellant makes some colorable showing of possible prejudice, we will give that appellant the benefit of the doubt and 'we will not speculate on what the convening authority might

have done' if defense counsel had been given an opportunity to comment." *Id.* at 323-34 (quoting *United States v. Jones*, 44 M.J. 242, 244 (C.A.A.F. 1996)). The low threshold for material prejudice "reflects the convening authority's vast power in granting clemency and is designed to avoid undue speculation as to how certain information might impact the convening authority's exercise of such broad discretion." *Scalo*, 60 M.J. at 437. "If the appellant makes such a showing, the Court of Criminal Appeals must either provide meaningful relief or return the case to the Judge Advocate General concerned for a remand to a convening authority" for new post-trial action. *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998).

Analysis

L.P.'s submission of matters was not served on SrA Arroyo before the convening authority signed the Decision on Action as required by R.C.M. 1106 and 1106A. The record of trial contains no receipt showing SrA Arroyo received L.P.'s submission of matters and SrA Arroyo personally attests that they were not. *See* Declaration. While L.P.'s submission of matters attached a copy of the unsworn statement that she read during SrA Arroyo's court-martial, it also contained new information that was adverse to SrA Arroyo. L.P. Submission. As a result of not being served with L.P.'s matters, SrA Arroyo was unable to respond to this new adverse information, resulting in prejudice as her clemency request was denied.

This Court previously found error in *United States v. Halter* when a convening authority did not ensure the appellant was provided the victim's submission of matters prior to signing the Decision on Action and without providing the appellant an opportunity to rebut said victim matters. No. ACM S32666, 2022 CCA LEXIS 9, at *7-8 (A.F. Ct. Crim. App. 6 Jan. 2022) (unpub. op.). The same happened in this case.

While L.P.'s unsworn inappropriately referenced SrA Arroyo's "crimes" when SrA Arroyo was only convicted of one crime of touching L.P.'s leg with her hand (*see* Issue I *supra*) and her matters also incorrectly referenced "crimes," that does not make the latter statements appropriate. It does, however, illustrate that L.P. was describing the impact that the sexual assault allegations had on her in her unsworn—not the additional charge of SrA Arroyo putting her hand on L.P.'s leg—and that L.P.'s submission of matters was also focused on the sexual assault allegations to the point of second guessing her decision to support the plea agreement at all, which was new information adverse to SrA Arroyo. Specifically, L.P.'s submission of matters explained that a "big part" of the reason she supported the plea agreement was so she would not have to see SrA Arroyo again. L.P. Submission at 2. L.P. even said she was second guessing supporting the plea agreement saying she was "plagued by thoughts about whether [she] made the right decision in supporting it" and that she "also [felt] as though [she] ran a marathon and stopped five feet short of the finish line." *Id.* L.P.'s regret in supporting the plea agreement was not raised in her unsworn statement at trial, nor was this an appropriate matter for the Convening Authority to consider in determining whether to provide SrA Arroyo relief under Article 60, UCMJ. *Compare* ROT, Vol. 2, *Victim Submission of Matters*, undated, *with* Court Exhibit A.

Even more recently in *United States v. Valentin-Andino*, this Court remanded the case in order for the appellant to be provided an opportunity to rebut the matters prior to the convening authority signing the Decision on Action memorandum. __ M.J. __, No. ACM 40185, 2023 CCA LEXIS 45, at *2 (A.F. Ct. Crim. App. 30 Jan. 2023). In that case, the victim stated in her submission of matters that the sentence fell "well below the maximum allowable sentence" for the appellant's crime, that the crime would affect her for the rest of her life, and requested the convening authority not grant clemency. *Id.* at *3-4. Similar to the victim in *Valentin-Andino*,

L.P. argued that SrA Arroyo's sentence was significantly below the maximum allowable. L.P. Submission at 1. What's more, L.P. also compared her sentence to the maximum allowed for alleged crimes SrA Arroyo was not convicted of. *Id.* L.P. explicitly used the previously charged sexual assaults as a reason for justifying why the convening authority should not grant SrA Arroyo leniency saying, "Moreover, *had we gone to trial and SrA Arroyo been found guilty of the charge and two specifications of sexual assault, she could have up to 60 years confinement and a dishonorable discharge*. As such, SrA Arroyo has already received the benefit of her plea agreement, and any clemency is not warranted. I ask that you deny any request from her for additional clemency." *Id.* (emphasis added). L.P. called SrA Arroyo a "predator" and stated SrA Arroyo "took advantage of my intoxicated state and assaulted me." *Id.* These statements were not just inappropriate matters for the convening authority to consider in clemency, but also highly adverse to SrA Arroyo. They also directly cut against her request in clemency that the convening authority suspend or remit any confinement over 14 days. As L.P.'s submission of matters contained new adverse information, the Government was also *required* to serve these matters upon SrA Arroyo in accordance with R.C.M. 1109(d)(3)(C)(i).

This was clear error. Furthermore, SrA Arroyo has demonstrated some colorable showing of possible prejudice. Unlike the appellant in *Valentin-Andino*, SrA Arroyo did request clemency during the post-trial processing of her case. *See* 2023 CCA LEXIS 45, at *15. Further, SrA Arroyo's declaration does include rebuttal matters she would have submitted to the convening authority regarding clemency in response to L.P.'s matters. Declaration. The low threshold for material prejudice is "designed to avoid undue speculation as to how certain information might impact the convening authority's exercise of such broad discretion." *Scalo*, 60 M.J. at 437. Had

SrA Arroyo been served with L.P.'s submission of matters, she would have submitted a statement to counter L.P.'s statements. *See* Declaration.

SrA Arroyo explained in her submission of matters that she was suffering from "severe anxiety and depression as [she] worr[ied] about [her] sick father with fear that something may happen to him." Clemency Request, Attachment 1 at 2. This fear was something she worried about daily in confinement. *Id.* Being in confinement also "drastically increased [her] anxiety" because she was away from the people who need her most—her family. *Id.* SrA Arroyo asked the convening authority to suspend or remit any confinement over 14 days and reduction in rank. Clemency Request at 1. The convening authority could have done so, but did not showing SrA Arroyo was prejudiced. Given the passage of time, even if this Court were to order new post-trial processing, it is unlikely to result in meaningful relief to SrA Arroyo. Thus, this Court should grant SrA Arroyo meaningful sentencing relief by setting aside her bad conduct discharge, or otherwise reducing her sentence.

WHEREFORE, SrA Arroyo respectfully requests that this Honorable Court provide meaningful sentencing relief.

Respectfully submitted,

[redacted]
HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 25 February 2023.

Respectfully submitted,

[redacted]
HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION TO ATTACH DOCUMENT**
v.	)	Before Panel No. 2
Senior Airman (E-4), **MONICA R. ARROYO,** United States Air Force, *Appellant.*	)	No. ACM 40321
	)	25 February 2023

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

Pursuant to Rule 23(b) of this Honorable Court's Rules of Practice and Procedure, Appellant, SrA Monica R. Arroyo, hereby moves to attach the following document to the Record of Trial:

1. Declaration of SrA Monica R. Arroyo, dated 22 February 2023, 2 pages (Appendix)

The attached document is the sworn declaration of SrA Monica R. Arroyo. She provides this declaration in support of her argument relating to Assignment of Error III. Specifically, SrA Arroyo's declaration is relevant to this Court's consideration of Assignment of Error III because SrA Arroyo's declaration provides additional support for her assertion that she was not timely served with L.P.'s submission of matters. It is also necessary because it provides an essential factual predicate for determining SrA Arroyo did not, in fact, receive the victim matters. SrA Arroyo's declaration expounds upon the areas of L.P.'s submission of matters that she would have addressed, corrected, or clarified if she had been timely served L.P.'s submission of matters. SrA Arroyo's areas of rebuttal relating to L.P.'s submission of matters were never presented to the convening authority. Therefore, her declaration is relevant and necessary to this Court's consideration of whether she has demonstrated "some colorable showing of possible prejudice"

concerning Issue III (L.P.'s submission of matters). *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005).

In *United States v. Jessie*, 79 M.J. 437, 445 (C.A.A.F. 2020), the Court of Appeals for the Armed Forces continued the practice of allowing consideration of matters outside the record to resolve issues reasonably raised by materials in the record but not fully resolvable by those materials. The failure to timely serve SrA Arroyo with L.P.'s submission of matters is reasonably raised by materials in SrA Arroyo's record, but not fully resolvable from the materials in the record.

WHEREFORE, SrA Arroyo respectfully requests this motion be granted.

Respectfully submitted,

[redacted]
HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 25 February 2023.

Respectfully submitted,

[redacted]

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	Before Panel No. 2
Senior Airman (E-4), **MONICA R. ARROYO**, United States Air Force, *Appellant.*	)	No. ACM 40321
	)	27 March 2023

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

ASSIGNMENTS OF ERROR

I.

WHETHER THE MILITARY JUDGE PLAINLY ERRED BY ALLOWING THE VICTIM'S UNSWORN STATEMENT TO ADDRESS MATTERS OUTSIDE THE SCOPE OF PERMISSIBLE "VICTIM IMPACT"?

II.

WHETHER CIRCUIT TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT IN HIS SENTENCING ARGUMENT BY PAINTING APPELLANT AS A PREDATOR "LOOKING FOR AN OPPORTUNITY" TO ASSAULT?

III.

WHETHER APPELLANT IS ENTITLED TO RELIEF BECAUSE SHE WAS NOT TIMELY SERVED A COPY OF THE VICTIM'S SUBMISSION OF MATTERS NOR WAS SHE PROVIDED AN OPPORTUNITY TO REBUT THE MATTERS IN ACCORDANCE WITH RULE FOR COURTS-MARTIAL 1106A PRIOR TO THE CONVENING AUTHORITY'S DECISION ON ACTION?

STATEMENT OF THE CASE

The United States generally accepts Appellant's statement of the case.

STATEMENT OF FACTS

On 31 December 2020, SrA JC hosted a New Year's Eve party at his home. (Pros. Ex. 1 at 1.) Six other airmen from SrA JC's squadron, including Appellant and LP, attended the party. (Id. at 2.) All guests arrived at SrA JC's home by approximately 1930. (Id.) After dinner, the attendees played various drinking games. (Id.) Between approximately 1930 and 2315, LP consumed at least eight alcoholic drinks. (Id.)

Following the New Year's Eve party, Appellant was charged with one Charge and two Specifications of violating Article 120, UCMJ.[1] (*Charge Sheet*, Record of Trial (ROT), Vol. 1.) Specification 1 alleged that Appellant sexually assaulted LP when LP was incapable of consenting because LP was impaired by alcohol. (Id.) Specification 2 alleged that Appellant committed abusive sexual contact on LP when LP was incapable of consenting because LP was impaired by alcohol. (Id.)

Trial was scheduled to begin on 7 March 2022. (R. at 75.) On 7 March 2022, shortly before the parties began the proceeding on the record, the military judge granted a joint request for a continuance until 9 March 2022 based on the parties' representation that a plea agreement was being negotiated. (Id.) The same day, 7 March 2022, the Defense submitted its Offer for Plea Agreement. (App. Ex. XXI.) In relevant part, Appellant offered to elect a trial by military judge alone and plead guilty to an Additional Charge and Specification alleging an assault consummated by a battery in violation of Article 128, UCMJ. (Id. at 1-2.) In exchange, the General Court-Martial Convening Authority ("GCMCA") agreed to direct trial counsel to withdraw and dismiss the Charge and its Specifications after the military judge accepted

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

Appellant's plea of guilty to the Additional Charge. (Id. at 2.) The Offer for Plea Agreement also specified that the military judge's sentence must include, at a minimum, a bad-conduct discharge and confinement for a period of 14 days. (Id.) On 8 March 2022, the GCMCA approved and accepted the Defense's Offer for Plea Agreement. (Id. at 5.) On 9 March 2022, the Additional Charge and its Specification were referred and served on Appellant. (*Charge Sheet – Additional Charge*, ROT, Vol. 1.)

Pursuant to the plea agreement, Appellant pled guilty to the Additional Charge and its Specification. (R. at 82.) Appellant admitted that during the New Year's Eve party, on 31 December 2020 at approximately 2315, Appellant used her hand to touch LP's leg while they sat next to each other on the living room couch. (Pros. Ex. 1 at 3.) Appellant admitted she caused bodily harm to LP because her touching of LP's leg was an offensive touching. (Id.) Appellant also admitted she knew this was an offensive touching because LP never said LP was comfortable with physical contact. (R. at 93.) Appellant acknowledged LP never acted in any manner that indicated to Appellant that LP wanted to be touched. (Id.) Finally, Appellant admitted her offensive touching of LP's leg was done unlawfully and with force or violence. (Pros. Ex. 1 at 3.)

The Charge and its Specifications were withdrawn after the military judge accepted Appellant's plea of guilty to the Additional Charge and its Specification, and dismissed with prejudice after the military judge announced the sentence. (R. at 126, 153-54.)

ARGUMENT

I.

THE MILITARY JUDGE DID NOT PLAINLY ERR BY ACCEPTING A VICTIM IMPACT STATEMENT THAT ADDRESSED "VICTIM IMPACT" RESULTING DIRECTLY FROM APPELLANT'S CONVICTED OFFENSE.

Additional Facts

Following the Government's pre-sentencing case, LP's Victims' Counsel submitted LP's written unsworn statement to the military judge. (R. at 131-32; Court Ex. A.) The military judge appropriately inquired whether "the defense had an opportunity to review the statement and/or interview the victim?" (R. at 132.) Trial defense counsel responded, "Yes, Your Honor." (Id.) Trial defense counsel did not object to LP's written unsworn statement. (Id.) Victims' Counsel then told the military judge that LP intended to read her written unsworn statement aloud to the military judge. (Id.) The military judge permitted LP to do so. (Id.)

In her unsworn statement, LP described waking up the morning after the New Year's Eve party still under the influence of alcohol, nauseous, "full of confusion, and with no memory of a huge chunk of the night before." (R. at 133; Court Ex. A at 1.) LP said once she gathered details from others who were at the party, she "came to fully understand the gravity of what happened"—that Appellant "assaulted" her. (Id.) LP said she felt "violated, ashamed, and embarrassed" after she reported the assault. (Id.) LP added that the lengthy interview was OSI was "extremely traumatic." (Id.)

LP explained that in the days after the party, she feared seeing Appellant on base or at work. (Id.) She also took steps to avoid seeing the other airmen who were at the party. (Id.) She became "extremely depressed and sad," and would go to sleep early to escape the feelings

she was experiencing. (R. at 134; Court Ex. A at 2.) LP said she eventually requested an expedited transfer and was given the option of moving to Kadena Air Base, Japan. (Id.) LP said she was reluctant to accept the assignment because she would be leaving behind her support system. (Id.) Moreover, LP said she felt it was "wrong" she had to start a new life elsewhere "when I was not the one who did something wrong." (Id.) LP then detailed the difficulties she encountered after moving to Japan. (R. at 134-35; Court Ex. A at 2-3.)

Next, LP acknowledged that Appellant's "taking accountability for her criminal actions is a start." (R. at 135; Court Ex. A at 3.) Nonetheless, LP said she believed Appellant "needs a strong punishment to hold her accountable for what she did and its impact on me." (Id.) LP added, "New Year's Eve used to be a night to enjoy with friends or family, but now each year it is a painful reminder of the assault." (Id.) LP concluded by saying, "[a] piece of me died that night, I am not the same person I used to be," and that she was "on the road to recovery." (Id.)

Trial defense counsel did not object at any time while LP read her statement to the military judge. (R. at 132-135.)

Standard of Review

This Court reviews a military judge's decision to accept a victim impact statement for an abuse of discretion. United States v. Barker, 77 M.J. 377, 383 (C.A.A.F. 2018). A military judge abuses his discretion when he accepts a victim impact statement based on an erroneous view of the law. Id. (citations omitted). When an Appellant fails to object to the admission of a victim impact statement at trial, this Court reviews for plain error. United States v. Tellor, No. ACM 39770 (f rev), 2021 CCA LEXIS 444, at *17 (A.F. Ct. Crim. App. 1 September 2021) (unpub. op.). To prevail under the plain error standard, "an appellant must show '(1) there was

an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right.'" Id. at *18 (quoting United States v. Erickson, 65 M.J. 221, 223 (C.A.A.F. 2007)).

Law

A crime victim of an offense has the right to be reasonably heard at an accused's presentencing proceeding relating to that offense. *See* R.C.M. 1001(c)(1). In non-capital cases, a crime victim can exercise her right to be reasonably heard by making "a sworn statement, an unsworn statement, or both." R.C.M. 1001(c)(2)(D)(ii). A victim's unsworn statement "may only include victim impact and matters in mitigation." R.C.M. 1001(c)(3). "Victim impact" is defined as "any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty." R.C.M. 1001(c)(2)(B). *See also* Barker, 77 M.J. at 383 (limiting the scope of victim unsworn statements to victim impact as defined in the Rules for Courts-Martial).

Analysis

A. LP's victim impact statement addressed proper "victim impact" as defined by R.C.M. 1001(c)(2)(B).

Appellant was convicted of assaulting A1C LP. Therefore, LP was a "crime victim" within the meaning of R.C.M. 1001(c) and had the right to present an unsworn statement. LP exercised her right and did so properly by limiting the contents of her unsworn statement to the "social [and] psychological" impacts that directly related to or arose from Appellant's assault. R.C.M. 1001(c)(2)(B).

LP described many social and psychological impacts stemming from Appellant's assault. She described her feelings of confusion and eventual "disbelief and disgust" once she realized Appellant assaulted her during the New Year's Eve party. (R. at 133; Court Ex. A at 1.) She said she "felt violated, ashamed, and embarrassed" after she reported the assault, and she described the interview process with OSI as "extremely traumatic." (Id.) LP described

how Appellant's assault led LP to become more reserved in her unit and do "everything possible" to avoid Appellant and others who attended the New Year's Eve party. (Id.) LP said she struggled with extreme depression for weeks after the assault. (R. at 134; Court Ex. A at 2.) As a result of Appellant's assault, LP was given the option of moving to Kadena Air Base in Japan. (Id.) LP said she reluctantly accepted the assignment and "felt extremely alone" during the PCS process. (Id.) After arriving at her new base, LP said she faced difficulties adjusting to her new unit and making new friends. (R. at 134-35; Court Ex. A at 2-3.) In her concluding remarks, LP summed up the impact of Appellant's assault: "A piece of me died that night, I am not the same person I used to be." (R. at 135; Court Ex. A at 3.)

Appellant lodges two categories of complaints about LP's unsworn statement. First, Appellant claims LP could not possibly have suffered the effects she described "as a result of a single touch of [LP's] leg by [Appellant's] hand." (App. Br. at 14.) The effects LP described, Appellant argues, were instead an "unmistakabl[e] refer[ence] to the withdrawn and dismissed specifications of sexual assault." (Id.) As an initial matter, this argument incorrectly presumes one could never feel "violated, ashamed, and embarrassed" (R. at 133), "extremely depressed and sad" (R. at 134), or that they are "not the same person" (R. at 135) after being assaulted. These are entirely reasonable and foreseeable reactions to being assaulted. In any event, there is no right or wrong way for a victim to react, and this Court has recognized as much: "The notion that everyone is unique and that people respond differently is well within the knowledge and experience of a factfinder." United States v. Scilluffo, No. ACM 39539, 2020 CCA LEXIS 62, at *66 (A.F. Ct. Crim. App. 4 March 2020) (unpub. op.). Moreover, nowhere in LP's unsworn statement did she mention the withdrawn and dismissed offenses. Instead, LP explicitly said it was the offense of which Appellant was convicted—the assault—that led to the negative impacts she described. (R. at 133 ("[Appellant] had assaulted

me"), 135 ("[N]ow each year [New Year's Eve] is a painful reminder of the assault").) And while LP referenced Appellant's "actions" and "criminal actions" in the plural (R. at 132, 135), there is no reason for this Court to presume these were impermissible references to the withdrawn and dismissed offenses, rather than a broad reference to Appellant's conduct surrounding the convicted offense.

Second, Appellant argues any impact LP suffered from the OSI interview and expedited transfer is improper. (App. Br. at 15-17.) According to Appellant, any negative impact LP suffered from the OSI interview cannot be mentioned because the OSI interview was for alleged sexual assault, not for assault consummated by a battery. (App. Br. at 15.) Notwithstanding what specific criminal misconduct was explored during the OSI interview, the reality is that Appellant's assault of LP directly led to LP's report to law enforcement, and thus it was proper for LP to describe the negative feelings she experienced during the ensuing interview.

Appellant also argues any reference to the expedited transfer was improper because expedited transfers are for victims of sexual assault, not assault consummated by a battery. (App. Br. at 17.) It is true that, for purposes of R.C.M. 1001(c), LP is not a victim of sexual assault because Appellant was not convicted of that offense. But Air Force regulations do not limit expedited transfers to only those airmen who are victims of sexual assault committed *by an airman convicted of sexual assault*. Rather, expedited transfers are available to airmen who simply "file an unrestricted report for sexual assault." Department of the Air Force Instruction (DAFI) 36-2110, *Total Force Assignments*, para. 3.19.1.1 (15 November 2021). LP was eligible for an expedited transfer because, based on the events of 31 December 2020, she believed Appellant sexually assaulted her and filed an unrestricted report. Ultimately, two days before trial, Appellant obtained a favorable plea agreement and pleaded guilty only to an assault

consummated by a battery. But the way Appellant's case ended does not change the fact that Appellant's conduct during the New Year's Eve party—for which she was convicted of assault consummated by a battery—directly resulted in LP's expedited transfer. Therefore, it was proper for LP to describe the social and psychological impacts of the expedited transfer.

The United States is mindful that a victim impact statement may not address "a never-ending chain of causes and effects." United States v. King, No. ACM 39583, 2021 CCA LEXIS 415, at *136 (A.F. Ct. Crim. App. 16 August 2021) (unpub. op.) (citing United States v. Dunlap, No. ACM 39567, 2020 CCA LEXIS 148, at *20 (A.F. Ct. Crim. App. 4 May 2020) (unpub. op.) (citation omitted), *rev. denied*, 80 M.J. 347 (C.A.A.F. 2020)), *aff'd*, No. 22-0008/AF, 2023 CAAF LEXIS 112 (C.A.A.F. 23 February 2023). But the social and psychological impacts LP endured are not far attenuated from the offense for which Appellant was convicted. Instead, the impacts she described were foreseeable and had "a direct nexus" to the assault Appellant committed on LP. Dunlap, unpub. op. at *24. In fact, Appellant's assault was the but-for cause of the impacts LP described in her impact statement. Even if this Court disagrees, it is "no large leap" for this Court to conclude the assault was "at least a substantial contributing factor" for each of the impacts LP described. Id. at *23. Because the scope of LP's unsworn statement was proper, it was not error—much less plain or obvious error—for the military judge to accept LP's unsworn statement.

B. Assuming error, the error did not substantially influence Appellant's sentence.

If this Court finds plain error in the military judge's decision to accept LP's victim unsworn statement, Appellant is still not entitled to relief because the error did not materially prejudice a substantial right. "The test for prejudice is whether the error substantially influenced the adjudged sentence." Barker, 77 M.J. at 384 (internal quotation marks and citations omitted). Under the Barker test, this Court examines four factors: (1) the strength of the Government's

case; (2) the strength of the Defense's case; and (3) the materiality and (4) quality of the victim impact statement. Id.

Here, the strength of the Government's case outweighed the strength of the Defense's case. The Government submitted a Stipulation of Fact that showed the circumstances of Appellant's crime were aggravating. (Pros. Ex. 1.) Specifically, the Stipulation of Fact demonstrated that Appellant assaulted LP during a party among coworkers, and after LP had consumed at least eight alcoholic drinks in four hours and in a vulnerable state. (Pros. Ex. 1 at 1-3.) In contrast, the Defense's case consisted of character letters, photographs, and Appellant's unsworn statement. (Def Ex. A-T.) A central theme of the Defense's case was Appellant's character as a good wingman and friend. (*See, e.g.*, Def. Ex. A-K.) This theme was of minimal value given LP's conviction of assaulting a fellow airman from the same squadron.

Turning to the third and fourth factors of the Barker test, both the materiality and quality of the victim impact statement were limited. The statement was simply LP's story of how the assault affected her personally and was not "intended to evoke a strong emotional response" from the military judge. United States v. Edwards, 82 M.J. 239, 247 (C.A.A.F. 2022).

The maximum sentence available in this case was a bad-conduct discharge, confinement for a period of 6 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. (R. at 97; MCM, pt. IV, para. 77.d.(2)(a).) Pursuant to the plea agreement, the military judge was required to impose, at a minimum, a bad-conduct discharge and confinement for 14 days. (R. at 112; App. Ex. XXI at 2.) The military judge sentenced Appellant to a bad-conduct discharge, confinement for 37 days, and reduction to the grade of E-2. (R. at 153.) The military judge's sentence to confinement was only 23 days more than the minimum provided for in the

plea agreement, and far less than the maximum confinement he could have imposed. And the military judge declined to reduce Appellant to the lowest grade.

Importantly, this Court considers it "highly relevant when analyzing the impact of the error on the sentence that the case was tried before a military judge." United States v. McInnis, No. ACM 39576, 2020 CCA LEXIS 194, at *47 (A.F. Ct. Crim. App. 29 May 2020) (unpub. op.). This is because military judges are presumed to know the law and to follow it absent clear evidence to the contrary. *See* Erickson, 65 M.J. at 225 (citing United States v. Mason, 45 M.J. 483, 484 (C.A.A.F. 1997)). Nothing in the record suggests the military judge was improperly swayed by LP's statement in adjudging the sentence. Therefore, even if this Court finds the military judge erred in accepting LP's victim impact statement, this error did not substantially influence Appellant's sentence.

Conclusion

The military judge did not plainly err when he accepted LP's victim impact statement. The statement addressed proper "victim impact" that was a direct result of Appellant's assault of LP. Even if this Court finds plain error, however, there was no prejudice because the error did not substantially influence Appellant's sentence. Therefore, Appellant is entitled to no relief.

II.

CIRCUIT TRIAL COUNSEL'S SENTENCING ARGUMENT DID NOT AMOUNT TO PLAIN ERROR.

Additional Facts

Circuit Trial Counsel delivered a short, four-page sentencing argument. (R. at 140-44.) The main theme of his argument was that Appellant's assault of LP was a "crime of opportunity." (R. at 141.) Circuit Trial Counsel argued Appellant was looking for the opportunity to assault LP and seized that opportunity when LP was intoxicated: after

LP "downed drink, after drink, after drink, after drink." (R. at 143.) Circuit Trial Counsel directed the military judge to the Stipulation of Fact, which he argued established "the minimum amount of alcohol the victim had in her system before [Appellant] assaulted [LP]." (Id.) He criticized Appellant's unsworn statement by highlighting Appellant's failure to recognize "the effect alcohol has on [Appellant] and the effect alcohol played in the situation." (R. at 142.) Circuit Trial Counsel asked the military judge to impose a serious punishment to send Appellant the "message that drinking with the victim is not the opportunity, not the time to assault somebody." (R. at 144.)

Circuit Trial Counsel asked the military judge to adjudge "a reduction, two months confinement and a bad conduct discharge." (R. at 144.) He argued a bad-conduct discharge was appropriate "because [Appellant's] conduct was so bad that she deserves . . . that lifelong punishment for her actions." (R. at 141.) He argued for a reduction but did not specifically ask for a reduction to the grade of E-1, saying only that "no airman should outrank her victim." (Id.) Circuit Trial Counsel spent a significant portion of his argument justifying his confinement recommendation. Returning to his "opportunity" theme, he argued Appellant needed enough confinement for her to "truly understand[] that she cannot take the opportunity" to assault someone who is drunk. (R. at 142.) The appropriate amount of confinement, according to Circuit Trial Counsel, was "not two weeks," but rather "no less than two months." (Id.) Trial defense counsel did not object to Circuit Trial Counsel's sentencing argument. (*See* R. at 140-44.)

Trial defense counsel asked the military judge to adjudge "no more than two weeks confinement," a bad-conduct discharge and, if the military judge deemed it necessary, reduction in grade. (R. at 149.) The military judge sentenced Appellant to a bad-conduct discharge, confinement for 37 days, and reduction to the grade of E-2. (R. at 153.)

Standard of Review

Allegations of improper argument and prosecutorial misconduct are reviewed *de novo.* United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019) (citation omitted). However, when an accused fails to object on this basis during trial, this Court reviews for plain error. United States v. Norwood, 81 M.J. 12, 19 (C.A.A.F. 2021) (citing United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018)).

"The burden of proof under plain error review is on the appellant." Voorhees, 79 M.J. at 9. "Plain error occurs when (1) there is error, (2) the error is clear or obvious, and (3) the error results in material prejudice to a substantial right of the accused." Id. "Failure to establish any one of the prongs is fatal to a plain error claim." United States v. Bungert, 62 M.J. 346, 348 (C.A.A.F. 2006).

Law

"A trial counsel is charged with being a zealous advocate for the government." United States v. Barrazamartinez, 58 M.J. 173, 176 (C.A.A.F. 2003) (citation omitted). He may argue not only the evidence that is within the record, but also "all reasonable inferences fairly derived from such evidence." United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000). In determining whether an argument is improper, the Court does not review a comment in isolation, but rather the entire argument "viewed in context." Id. at 238 (citing United States v. Young, 470 U.S. 1, 16 (1985)).

A finding of error in a trial counsel's sentencing argument does not automatically entitle an appellant to relief. Relief is warranted only if this Court determines the argument "materially prejudiced the substantial rights of the accused." United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000). In assessing prejudice, this Court balances three factors: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the

evidence supporting the [sentence]." United States v. Halpin, 71 M.J. 477, 480 (C.A.A.F. 2013) (citing United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005) and extending the Fletcher test to improper sentencing arguments). This Court considers the lack of a defense objection to be "some measure of the minimal impact of a prosecutor's improper comment." United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001) (internal quotation marks and citation omitted). Ultimately, this Court will grant relief only when "trial counsel's comments, taken as a whole, were so damaging that [this Court] cannot be confident that the appellant was sentenced on the basis of the evidence alone." Halpin, 71 M.J. at 480 (alteration, internal quotation marks, and citation omitted).

Analysis

A. Circuit Trial Counsel's Sentencing Argument Was Proper.

Appellant takes issue with three aspects of Circuit Trial Counsel's sentencing argument: (1) the "crime of opportunity" theme; (2) references to LP's level of intoxication; and (3) comments regarding the need for the sentence to "protect" others. This Court should deny relief because Appellant has failed to demonstrate any error in Circuit Trial Counsel's argument, let alone plain or obvious error.

Circuit Trial Counsel's "crime of opportunity" theme was proper because it was amply supported by the Stipulation of Fact. According to the Stipulation of Fact, Appellant did not assault LP until after LP consumed at least eight alcoholic drinks in a span of four hours. (Pros. Ex. 1 at 2-3.) Circuit Trial Counsel was permitted to argue reasonable inferences from this evidence—specifically, that the assault was a "crime of opportunity" because Appellant waited until LP was under the influence of alcohol to assault her. *See* Baer, 53 M.J. at 237 (holding trial counsel may argue "all reasonable inferences fairly derived" from the evidence of record). In a separate attack on this theme, Appellant claims the theme "was

originally intended for the sexual assault allegations," and accuses Circuit Trial Counsel of failing to "adapt his argument to only the charge of which [Appellant] convicted." (Id. at 22.) This is argument finds no support in the record and is speculation at best. In any event, the theme was a fair comment on the evidence before the military judge.

Circuit Trial Counsel's references to LP's level of intoxication were also proper because they were reasonable inferences from the evidence. During his argument, Circuit Trial Counsel argued that Appellant assaulted LP when LP was "intoxicated" (R. at 141) and "drunk" (R. at 142). While the Stipulation of Fact did not establish whether A1C LP was in fact intoxicated or drunk, the Stipulation of Fact did establish that LP consumed at least eight alcoholic drinks in four hours. (Pros. Ex. 1 at 2.) It is a reasonable inference that one who consumes eight alcoholic drinks in four hours would become "intoxicated" or "drunk," so Circuit Trial Counsel was permitted to make this argument. *See* Baer, 53 M.J. at 237 (permitting trial counsel to argue all reasonable inferences derived from the evidence).

Finally, Circuit Trial Counsel's argument that the sentence should "protect" others was proper because it was grounded in well-recognized sentencing principles. The full context of Circuit Trial Counsel's "protection" argument is as follows:

> Your Honor, your sentence should also recognize the preservation of good order and discipline. So that when airmen spend time together they recognize that this is not when you assault someone. Send that message to them and send that message to her. *Protect people like the victim in the future, Your Honor.* When [Appellant] finishes her sentence, when [Appellant] is living in the civilian world, she should remember what she learned about opportunity and *protect those other people who might be around her*, who see her as a friend until they drink drink after drink, after drink, after drink, after drink.

(R. at 144 (emphases added).) Appellant characterizes this argument as speculative and irrelevant since Circuit Trial Counsel was asking the military judge to protect "unknown persons at some unknown time in the future and at unknown locations." (App. Br. at 24.) In support of

this argument, Appellant cites United States v. Brown, No. ACM 40066 (f rev), 2022 CCA LEXIS 710, at *45 (A.F. Ct. Crim. App. 9 December 2022) (unpub. op.). But Brown is distinguishable from the facts here.

In Brown, this Court determined that a trial counsel's suggestion that the court members' verdict could "make it impossible for [other victims] to get justice" was clear error because "[t]rial counsel is prohibited from arguing irrelevant matters." Brown, unpub. op. at *45. Here, Circuit Trial Counsel did not suggest that a lenient sentence would somehow impact the ability of other victims of assault from receiving justice. Rather, when viewing his argument in context, he was asking the military judge to take into consideration four sentencing principles when fashioning an appropriate sentence: preservation of good order and discipline; general and specific deterrence; rehabilitation; and *protection* of others from further crimes by Appellant. *See* R.C.M. 1002(f). This type of argument, which was qualitatively different than the one in Brown, is wholly permissible.

B. Assuming error, the error did not substantially influence Appellant's sentence.

Yet even if this Court finds error, Appellant cannot demonstrate material prejudice or that the error substantially influenced her sentence. The first Fletcher factor considers "the severity of the misconduct." Fletcher, 62 M.J. at 184. Here, any prosecutorial misconduct on the part of Circuit Trial Counsel was a misstep in the characterization of the evidence rather than a personal attack or disparagement of Appellant meant to unduly inflame the passions of the military judge. Voorhees, 79 M.J. at 11. Moreover, Circuit Trial Counsel's argument was short, occupying just four pages of the trial transcript. (R. at 140-44.) Therefore, the misconduct was not severe and, accordingly, this factor favors the Government.

The second Fletcher factor examines "the measures adopted to cure the misconduct." Fletcher, 62 M.J. at 184. Appellant was sentenced by a military judge sitting alone. (R. at 153.)

In such cases, this Court has held "no curative instruction [is] necessary because . . . military judges are presumed to know and follow the law, absent clear evidence to the contrary." United States v. Halter, No. ACM S32666 (f rev), 2022 CCA LEXIS 254, at *21 (A.F. Ct. Crim. App. 4 May 2022) (unpub. op.) (citing United States v. Mason, 45 M.J. 483, 484 (C.A.A.F. 1997)) (citation omitted)). Appellant cites to no evidence that the military judge did not know or follow the law. And Appellant cites to no evidence that the military judge was unable to distinguish between proper and improper sentencing arguments. *See* Erickson, 65 M.J. at 223 (presuming that military judges are able to distinguish between proper and improper sentencing arguments). This factor also favors the Government.

The third Fletcher factor examines "the weight of the evidence supporting [the sentence]." Fletcher, 62 M.J. at 184. The evidence showed Appellant assaulted LP—a member of the same squadron—when LP was under the influence of alcohol. (Pros. Ex. 1 at 2-3.) Admittedly, the circumstances of this assault were not the most aggravating that one could imagine. But, contrary to Appellant's argument, this offense was more than a simple "touching [of LP's] leg without consent" and deserved more than the minimum punishment specified in the plea agreement, notwithstanding the relatively weak Defense case. (App. Br. at 25.) Thus, this factor also favors the Government.

In the end, the sentence imposed by the military judge demonstrates the minimal, if any, impact of Circuit Trial Counsel's sentencing argument. Circuit Trial Counsel recommended a bad-conduct discharge, two months of confinement, and a reduction in grade. (R. at 144.) Trial defense counsel recommended a bad-conduct discharge, 14 days of confinement, and reduction in grade. (R. at 149.) Pursuant to the plea agreement, the military judge was required to impose, *at a minimum*, a bad-conduct discharge and 14 days of confinement. (App. Ex. XI at 2.) The military judge sentenced Appellant to a bad-conduct discharge and 37 days of confinement—23

days more than trial defense counsel's recommendation and approximately 23 days fewer than Circuit Trial Counsel's recommendation. This sentence suggests the military judge was not unduly impacted by trial defense counsel's argument that Appellant deserved the minimum punishment specified in the plea agreement, nor by Circuit Trial Counsel's argument that two months confinement was appropriate. Rather, the military judge appears to have split the difference after appropriately weighing both the mitigating and aggravating evidence.

All three Fletcher factors weigh in favor of the Government. And the military judge's reasonable sentence indicates he was not improperly swayed by Circuit Trial Counsel's sentencing argument. Appellant cannot demonstrate material prejudice and this Court can be "confident that Appellant was sentenced based on the evidence alone." Halpin, 71 M.J. at 480.

Conclusion

Circuit Trial Counsel's argument was proper because he argued reasonable inferences from the evidence and grounded his sentence recommendation on well-recognized sentencing principles. But even if this Court disagrees and finds plain or obvious error, the Fletcher factors and the military judge's reasonable sentence rebut any claim of prejudice. Therefore, Appellant is entitled to no relief.

III.

APPELLANT WAS NOT TIMELY SERVED A COPY OF LP'S SUBMISSION OF MATTERS. THEREFORE, THIS COURT SHOULD REMAND APPELLANT'S CASE.

Additional Facts

On 19 March 2022, Appellant submitted matters to the convening authority in accordance with R.C.M. 1106. (*Clemency Request*, 19 March 2022, ROT, Vol. 2.) Appellant requested the convening authority suspend or remit both the reduction in grade and the period of confinement over 14 days. (Id. at 1.) LP submitted matters to the convening authority in accordance

with R.C.M. 1106A. (*Victim Submission of Matters*, ROT, Vol. 2.) In her submission, LP stated she "believe[d] that [Appellant's] conviction and sentence are appropriate for her misconduct" and requested the convening authority "deny any request from [Appellant] for additional clemency." (Id. at 1.) LP's submission was undated. (Id.) Appellant did not submit rebuttal matters in accordance with R.C.M. 1106(d)(3).

On 12 April 2022, the convening authority issued his decision on action memorandum. (*Convening Authority Decision on Action*, 12 April 2022, ROT, Vol. 1.) The convening authority took no action on the findings and sentence and stated he considered the matters submitted by Appellant and LP before coming to this decision. (Id.)

On 22 July 2022, the paralegal for Appellant's trial defense counsel acknowledged receipt of LP's R.C.M. 1106A submission of matters. (*Receipt of Victim Submission of Matters*, 22 July 2022, ROT, Vol. 2.)

Standard of Review

"The standard of review for determining whether post-trial processing was properly completed is de novo." United States v. Sheffield, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing United States v. Kho, 54 M.J. 63 (C.A.A.F. 2000)).

Law

"In a case with a crime victim, after a sentence is announced in a court-martial any crime victim of an offense may submit matters to the convening authority for consideration in the exercise of the convening authority's powers under R.C.M. 1109 or 1110." R.C.M. 1106A(a). "The convening authority shall ensure any matters submitted by a crime victim under this subsection be provided to the accused as soon as practicable." R.C.M. 1106A(c)(3). If a victim submits R.C.M. 1106A matters, "the accused shall have five days from receipt of those matters to submit any matters in rebuttal." R.C.M. 1106(d)(3). "Before taking or declining to take

action on the sentence . . . the convening authority shall consider matters timely submitted under R.C.M. 1106 and 1106A, if any, by the accused and any crime victim." R.C.M. 1109(d)(3)(A).

Regarding post-trial rebuttal matters, this Court requires "an appellant to demonstrate prejudice by stating what, if anything, would have been submitted to deny, counter, or explain the new matter." United States v. Chatman, 46 M.J. 321, 323 (C.A.A.F. 1997) (internal quotation marks and citation omitted). While the threshold is low, an appellant must make "some colorable showing of possible prejudice." Id. at 324. "If the appellant makes such a showing, the Court of Criminal Appeals must either provide meaningful relief or return the case to the Judge Advocate General concerned for a remand to a convening authority for a new . . . action." United States v. Wheelus, 49 M.J. 283, 289 (C.A.A.F. 1998).

Analysis

The United States acknowledges that Appellant was not provided with LP's R.C.M. 1106A matters until after the convening authority's decision on action. And because LP's submission of matters contained new material not otherwise presented at trial, the United States also acknowledges that Appellant has made "some colorable showing of possible prejudice" resulting from the untimely service of LP's R.C.M. 1106A matters on Appellant. Chatman, 46 M.J. at 324.

Appellant asks this Court to grant her "meaningful sentencing relief by setting aside her bad conduct discharge, or otherwise reducing her sentence." (App. Br. at 30.) But in similar cases, this Court has said the appropriate relief "is to provide Appellant with what [s]he is entitled to: the right to be served with [the victim's] submission of matters, and the opportunity to submit rebuttal matters for the convening authority's consideration before deciding whether to grant Appellant sentence relief." United States v. Baker, No. ACM 40091, 2022 CCA LEXIS

523, at *9 (A.F. Ct. Crim. App. 6 September 2022) (unpub. op.). Therefore, this Court should remand Appellant's case for new post-trial processing.

CONCLUSION

The United States respectfully requests this Honorable Court deny the relief Appellant requests in Assignments of Error I and II. As to Assignment of Error III, the United States respectfully requests this Honorable Court remand Appellant's case for new post-trial processing.

[redacted]
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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 27 March 2023.

[redacted]

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 2
Senior Airman (E-4), **MONICA R. ARROYO,** United States Air Force, *Appellant.*	)	No. ACM 40321
	)	Filed on: 31 March 2023

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

COMES NOW, Appellant, Senior Airman (SrA) Monica R. Arroyo, by and through her undersigned counsel pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, and submits this reply to the Government's Answer, filed 27 March 2023 (hereinafter Gov. Ans.). Appellant primarily rests on the arguments contained in her Brief on Behalf of Appellant, filed on 25 February 2023 (hereinafter App. Br.), but provides the following additional arguments in reply to the Government's Answer.

Argument

I.

THE MILITARY JUDGE PLAINLY ERRED BY ALLOWING THE VICTIM'S UNSWORN STATEMENT TO ADDRESS IMPROPER MATTERS OUTSIDE THE SCOPE OF PERMISSIBLE "VICTIM IMPACT."

The Government asserts that L.P.'s unsworn statement was limited to "'social [and] psychological' impacts that directly related to or arose from [SrA Arroyo's] assault." Gov. Ans. at 6. It is implausible to believe that when L.P. says she "came to fully understand the gravity of what happened me" that she was talking about SrA Arroyo touching L.P.'s leg without consent. R. at 133. Appellant does not "presume[] one could never feel 'violated, ashamed, and

embarrassed' (R. at 133), 'extremely depressed and sad' (R. at 134), or that they are 'not the same person' (R. at 135) after being assaulted" generally. Gov. Ans. at 7. However, in this case, the offensive touching *however slight*[1] was the touching of L.P.'s leg by SrA Arroyo's hand without consent. Given that L.P. also believed that she had been sexually assaulted, it follows that theses social and psychological impacts were the direct result of the alleged sexual assaults and *not* directly resulting from the slight touch of L.P.'s leg by SrA Arroyo's hand.

Next, the Government contends that "the reality is that [SrA Arroyo's] assault of [L.P.] directly led to [L.P.'s] report to law enforcement." Gov. Ans. at 8. However, the "extensive interview with OSI" (R. at 133) that L.P. endured was directly related to L.P.'s allegations of *sexual* assault, not SrA Arroyo touching L.P.'s leg with SrA Arroyo's hand without consent. In fact, OSI exclusively investigates any alleged matter involving sexual assault or abusive sexual contact and any assault committed during the commission of another crime investigated by the Office of Special Investigations (OSI). Air Force Instruction (AFI) 71-101V1, *Criminal Investigations Program*, Attachment 2 at 29, 36 (1 Jul. 2019). Had L.P. only reported the leg touch, it is more than likely that Security Forces would have investigated, not OSI. Regardless, it is clear from the Report of Investigation (ROI) alone that what directly led L.P. to make a report is her belief that she was sexually assaulted, not that SrA Arroyo touched her leg – a point that was only referenced once in the entire 106-page ROI. Record of Trial (ROT), Vol. 2, *Report of Investigation* (redacted) [ROI] at 6, dated 23 March 2021.

Further, L.P.'s expedited transfer and the effects stemming from said transfer were again all a direct result of L.P.'s allegation of sexual assault not the leg touch. The Government's concession that "expedited transfers are available to airmen who simply 'file an unrestricted report

[1] *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*) pt. IV, ¶ 77c(1)(a).

for sexual assault'" actually supports SrA Arroyo's argument in her initial brief (App. Br. at 16-17), contrary to the Government's misinterpretation in its Answer of said argument. Gov. Ans. at 8. The Government's position seems to be that because L.P. believed she was sexually assaulted on the same night as the leg touch, any social and psychological impacts of the expedited transfer granted to L.P. as someone who filed an unrestricted report of sexual assault are proper victim impact. Gov. Ans. at 9. The Government contends that "the way [SrA Arroyo's] case ended does not change the fact that [SrA Arroyo's] conduct during the New Year's Eve Party…directly resulted in A1C LP's expedited transfer." *Id.* Following the Government's logic, SrA Arroyo is responsible for the purported impact on L.P. of the specifications which were withdrawn and dismissed with prejudice, despite SrA Arroyo not being convicted of those specifications. And despite the convening authority's decision to withdraw and dismiss these specifications as part of SrA Arroyo's plea agreement. The Government cannot have it both ways. Their argument stands in direct contrast to the text of R.C.M. 1001 which limits victim impact to that "directly relating to or arising from *the offense of which the accused has been found guilty*." R.C.M. 1001(c)(2)(B) (emphasis added). So it would seem that it does not matter that SrA Arroyo pled guilty to only a leg touch, she needed to also take responsibility for the impact on L.P. from the specifications that were withdrawn and dismissed with prejudice as well.

Finally, the Government argues, while referencing *United States v. Dunlap*,[2] that the social and psychological impacts L.P. "endured are not far attenuated from the offense for which [SrA Arroyo] was convicted," that the impacts actually had a "direct nexus" to the assault and that the assault was the "but-for cause of the impacts." Gov. Ans. at 9. However, *Dunlap* involved the

[2] No. ACM 39567, 2020 CCA LEXIS 148 (A.F. Ct. Crim. App. 4 May 2020) (unpub. op.), *rev. denied*, 80 M.J. 347 (C.A.A.F. 2020).

impacts the appellant's adultery had on his spouse and whether said impacts had a direct nexus to the adultery. Here, the Government is asserting that the social and psychological impacts of the alleged sexual assaults also have a direct nexus with the leg touch, or at least there is "'no large leap' for this Court to conclude the assault was 'at least a substantial contributing factor' for each of the impacts [L.P.] described," but that simply does not land. Gov. Ans. at 9 (quoting *Dunlap*, 2020 CCA LEXIS 148, at *23). It is untenable that the leg touch was any "substantial contributing factor" for any of the impacts L.P. described. It is also telling that the Government did not address the two letters from the bystanders in the courtroom who interpreted SrA Arroyo's sentence as being for the sexual assault allegations not the leg touch. ROT, Vol. 2, *Clemency Request*, Attachment 3, dated 19 March 2022.

The error substantially influenced the adjudged sentence. *United States v. Edwards*, 82 M.J. 239, 384 (C.A.A.F. 2022). The Government asserts that the strength of the Government's case outweighed that of the Defense. Gov. Ans. at 10. The Government points to the stipulation of fact (Pros. Ex. 1), which was essentially the entirety of the Government's case, reasoning that the circumstances of SrA Arroyo's crime were aggravating because SrA Arroyo assaulted L.P. after L.P. had "consumed at least eight alcoholic drinks in four hours and in a vulnerable state." *Id.* The stipulation of fact did set up the facts surrounding the night, but none depict L.P. in a "vulnerable state" (Gov. Ans. at 10) and the stipulation did not tie L.P.'s drinking to SrA Arroyo's intent—that was done by L.P.'s unsworn statement and then reinforced by the circuit trial counsel as his theme in his sentencing argument. Additionally, the Government significantly undersold the strength of the Defense's case in their Answer. The central theme of the Defense's case was not about "good character as a wingman and friend" (Gov. Ans. at 10), it was about SrA Arroyo's exceedingly strong rehabilitative potential as seen in the 13 character letters (Defense Exhibits

(Def. Ex.) B-N) and a letter from SrA Arroyo's Licensed Professional Counselor (Def. Ex. O). It was also about her work performance having been selected for Senior Airman "Below-the-Zone" and how she continued to perform at that high level even while under investigation and awaiting trial. Def. Ex. B-E, P-Q. Furthermore, contrary to the Government's position that L.P.'s unsworn simply told her "story of how the assault affected her personally and was not 'intended to evoke a strong emotional response,'" (Gov. Ans. at 10 (*quoting Edwards*, 82 M.J. at 247)), clearly the opposite was seen and heard in L.P.'s parting words: "A piece of me died that night" (R. at 135). The victim impact and this closing statement impermissibly related to the alleged sexual assaults, not the leg touch.

WHEREFORE, SrA Arroyo respectfully requests that this Honorable Court provide appropriate sentencing relief.

II.

CIRCUIT TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT IN HIS SENTENCING ARGUMENT BY PAINTING SRA ARROYO AS A PREDATOR "LOOKING FOR AN OPPORTUNITY" TO ASSAULT.

The Government posits that the "'crime of opportunity' theme was proper because it was amply supported by the Stipulation of Fact." Gov. Ans. at 14. The main reasoning being that the stipulation of fact established that the leg touch happened after L.P. "consumed at least eight alcoholic drinks in the span of four hours" and that it is "a reasonable inference that one who consumes eight alcoholic drinks in four hours would become 'intoxicated' or 'drunk.'" Gov. Ans. at 14-15. These speculations overlook the two plates of hot wings, macaroni and cheese, and French fries that L.P. ate (Pros. Ex. 1 at 2) and does not take into consideration whether L.P. was experienced in drinking alcohol distinguishing her from an average person "who consumes eight alcoholic drinks in four hours."

The next glaring issue with this analysis is that there is no evidence that SrA Arroyo knew or believed L.P. to be intoxicated nor that SrA Arroyo was intentionally lying in wait for L.P. to become intoxicated so SrA Arroyo could put her hand on L.P.'s leg. In fact, an entire hour after SrA Arroyo put her hand on L.P.'s leg, L.P. is seen drinking another shot. *Compare* Pros. Ex. 1 at 3 *with* Pros. Ex. 1, Attachment 3 at 2. While L.P. says her "last memory" was "taking a sip of an alcoholic lemonade drink" (R. at 133), which seemingly happened much earlier in the evening based on the stipulation of fact, there are clearly hours afterwards where L.P. was observed functioning just fine without the concern of others in the group. There are no facts in evidence that this was a "crime of opportunity," because that would require some sort of knowledge or intent on behalf of SrA Arroyo, which was simply not established. In fact, quite the opposite is true. During her providence inquiry, SrA Arroyo testified to her own consumption of alcohol that night including piña coladas and various shots of alcohol, however she remained aware of what was going on around her. R. at 93. At no point did SrA Arroyo indicate that she knew or believed L.P. did not have the same capabilities when SrA Arroyo touched her leg. Instead, the wrongfulness of SrA Arroyo's actions comes from the fact that she touched L.P.'s leg without L.P.'s consent. *Id.*

Circuit trial counsel's use of the theme "crime of opportunity" was not simply a "misstep in the characterization of the evidence." Gov. Ans. at 16. Circuit trial counsel used the word "opportunity" 14 times in the short, four-page argument—that is not a mere "misstep," it is a purposeful mischaracterization of the evidence. Moreover, the Government concedes that "the circumstances of this assault were not the most aggravating that one could imagine." Gov. Ans. at 17. This was not a case where SrA Arroyo was soberly lurking around the corner waiting for L.P. to "drink enough" in order to touch her leg. SrA Arroyo was drinking the same drinks and

playing the same card games as the rest of the group. She made a bad judgement call by putting her hand on L.P.'s leg without first asking if it was permissible. Framing the entire argument and case as a crime of opportunity substantially influenced SrA Arroyo's sentence.

WHEREFORE, SrA Arroyo requests this Honorable Court grant appropriate sentencing relief.

Respectfully submitted,

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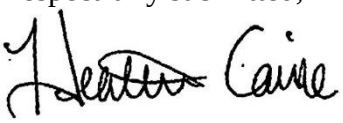
CERTIFICATE OF FILING AND SERVICE

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 31 March 2023.

Respectfully submitted,



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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40321**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Monica R. ARROYO	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 15th day of June, 2023,

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Panel 2 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

RICHARDSON, NATALIE D., Colonel, Senior Appellate Military Judge
RAMÍREZ, ROBERTO, Lieutenant Colonel, Appellate Military Judge
ANNEXSTAD, WILLIAM J., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal