IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (FIRST)**
	)	
v.	)	Before Panel No. 1
	)	
Senior Airman (E-4)	)	No. ACM 40294
ISRAEL E. FLORES,	)	
United States Air Force	)	19 August 2022
Appellant	)	

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 his 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 **27 October 2022**. The record of trial was docketed with this Court on 29 June 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,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 19 August 2022.

Respectfully submitted,

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

22 August 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ISRAEL E. FLORES, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40294 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 22 August 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 1
Senior Airman (E-4) **ISRAEL E. FLORES,** United States Air Force *Appellant*	)	No. ACM 40294 20 October 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 **26 November 2022**. The record of trial was docketed with this Court on 29 June 2022. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

On 7 March 2022, at a general court-martial convened at Joint Base Charleston, South Carolina, SrA Flores was found guilty, consistent with his pleas, of one specification of making a false official statement in violation of Article 107, Uniform Code of Military Justice (UCMJ); and two specifications of assault consummated by a battery in violation of Article 128, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 9 April 2022. Consistent with the plea agreement, the military judge found SrA Flores not guilty of the excepted words: ", a child under the age of 16 years" in both specifications of assault consummated by a battery. *Id.* The military judge sentenced SrA Flores to a bad conduct discharge, total forfeiture of pay and allowances for 12 months, 12 months of confinement, and a reduction to the grade of E-1. *Id.* The convening

authority took no action on the findings and sentence. ROT Vol. 1, *Convening Authority Decision on Action*, 6 April 2022. SrA Flores is currently confined at the Charleston Naval Brig.

The trial transcript is 171 pages long and the record of trial is comprised of three volumes containing six prosecutions exhibits, zero defense exhibits, sixteen appellate exhibits, and zero court exhibits. Undersigned counsel currently represents fourteen clients, with twelve Assignments of Error briefs pending before this Court. Through no fault of SrA Flores, counsel has been unable to review the record of trial, advise SrA Flores, and draft an Assignments of Error brief, and will not reasonably be able to do so before the Court's 27 October 2022 deadline. Counsel has advised SrA Flores on his right to speedy appellate review and SrA Flores concurs with this request.

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
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 20 October 2022.

Respectfully submitted,

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

21 October 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ISRAEL E. FLORES, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40294 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 21 October 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 1
Senior Airman (E-4) **ISRAEL E. FLORES,** United States Air Force *Appellant*	)	No. ACM 40294 18 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 **26 December 2022**. The record of trial was docketed with this Court on 29 June 2022. From the date of docketing to the present date, 142 days have elapsed. On the date requested, 180 days will have elapsed.

On 7 March 2022, at a general court-martial convened at Joint Base Charleston, South Carolina, SrA Flores was found guilty, consistent with his pleas, of one specification of making a false official statement in violation of Article 107, Uniform Code of Military Justice (UCMJ); and two specifications of assault consummated by a battery in violation of Article 128, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 9 April 2022. Consistent with the plea agreement, the military judge found SrA Flores not guilty of the excepted words: ", a child under the age of 16 years" in both specifications of assault consummated by a battery. *Id.* The military judge sentenced SrA Flores to a bad conduct discharge, total forfeiture of pay and allowances for 12 months, 12 months of confinement, and a reduction to the grade of E-1. *Id.* The convening

authority took no action on the findings and sentence. ROT Vol. 1, *Convening Authority Decision on Action*, 6 April 2022. SrA Flores is not currently confined.

The trial transcript is 171 pages long and the record of trial is comprised of three volumes containing six prosecutions exhibits, zero defense exhibits, sixteen appellate exhibits, and zero court exhibits.

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
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 18 November 2022.

Respectfully submitted,

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

21 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ISRAEL E. FLORES, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40294 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 21 November 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 1
Senior Airman (E-4) **ISRAEL E. FLORES,** United States Air Force *Appellant*	)	No. ACM 40294 19 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 (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fourth enlargement of time to file an Assignment of Errors brief. Appellant requests an enlargement for a period of 30 days, which will end on **25 January 2023**. The record of trial was docketed with this Court on 29 June 2022. From the date of docketing to the present date, 172 days have elapsed. On the date requested, 210 days will have elapsed.

On 7 March 2022, at a general court-martial convened at Joint Base Charleston, South Carolina, Appellant was found guilty, consistent with his pleas, of one specification of making a false official statement in violation of Article 107, Uniform Code of Military Justice (UCMJ); and two specifications of assault consummated by a battery in violation of Article 128, UCMJ. Record of Trial (ROT), Vol. 1, Entry of Judgment, 9 April 2022. Consistent with the plea agreement, the military judge found Appellant not guilty of the excepted words: ", a child under the age of 16 years" in both specifications of assault consummated by a battery. Id. The military judge sentenced Appellant to a bad conduct discharge, total forfeiture of pay and allowances for 12

months, 12 months of confinement, and a reduction to the grade of E-1. Id. The convening authority took no action on the findings and sentence. ROT Vol. 1, Convening Authority Decision on Action, 6 April 2022.

The trial transcript is 171 pages long and the record of trial is comprised of three volumes containing six prosecutions exhibits, zero defense exhibits, sixteen appellate exhibits, and zero court exhibits. Appellant is not currently confined.

Undersigned counsel currently represents 16 clients, with 12 initial briefs pending before this Court. Through no fault of Appellant, and due to her duties representing other clients before this Court and others, counsel has been unable to complete review of the ROT and prepare an Assignments of Error brief and will be unable to do so by this Court's current filing deadline.

This case is undersigned counsel's first priority case before this Court. Undersigned counsel has began reviewing the ROT.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 19 December 2022.

Respectfully submitted,

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

19 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) ISRAEL E. FLORES, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40294 Panel No. 1

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

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

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

MATTHEW J. NEIL, Lt Col, USAF
Director of Operations, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 19 December 2022.

MATTHEW J. NEIL, Lt Col, USAF
Director of Operations, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

ISRAEL E. FLORES,
Senior Airman (E-4),
United States Air Force
Appellant.

No. ACM 40294

BRIEF ON BEHALF OF APPELLANT

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

Counsel for Appellant

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 1
Senior Airman (E-4), **ISRAEL E. FLORES,** United States Air Force, *Appellant.*	)	No. ACM 40294
	)	Filed on: 23 January 2023

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

Assignments of Error

I.

WHETHER TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT IN HIS SENTENCING ARGUMENT BY, *INTER ALIA*, FOCUSING ON UNCHARGED MISCONDUCT TO ARTIFICIALLY INFLATE WHAT AN APPROPRIATE SENTENCE SHOULD BE?

II.

WHETHER 12 MONTHS' CONFINEMENT FOR A SINGLE FALSE OFFICIAL STATEMENT THAT HAD NO ADVERSE IMPACT ON THE INVESTIGATION IS INAPPROPRIATELY SEVERE?

Statement of the Case

On 7 March 2022, Senior Airman (SrA) Israel Flores was convicted, consistent with his pleas, at a general court-martial composed of a military judge alone at Joint Base Charleston, South Carolina, of one charge and one specification of making a false official statement, in violation of Article 107, Uniform Code of Military Justice (UCMJ),[1] *Manual for Courts-Martial, United States*

[1] 10 U.S.C. § 907.

(2019 ed.) (*MCM*); [2] and one charge and two specifications of assault consummated by a battery, in violation of Article 128, UCMJ.[3] Record (R.) at 66. As to the Article 128, UCMJ, charge and specifications, the Government initially charged battery upon a child under the age of 16, but SrA Flores pleaded guilty to assault consummated by a battery and not guilty to the excepted words: ", a child under the age of 16 years." *Id.*

The military judge sentenced SrA Flores to a reduction to the grade of E-1, total forfeiture of pay and allowances for 12 months, 12 months of confinement, and a bad conduct discharge. R. at 170. On 17 March 2022, SrA Flores requested deferment of all of the adjudged and automatic forfeitures until the entry of judgment, but the convening authority denied said request. ROT, Vol. 1, *Convening Authority Decision on Action*, dated 6 April 2022. The convening authority took no action on the findings or sentence. *Id.*

Statement of Facts

Background

SrA Flores' single mother raised him in a "crime-infested neighborhood" on the south side of Chicago. R. at 114, 143. It was "one of the more violent communities in the city of Chicago." R. at 114. His mother had four children and was "just scraping by," a challenge magnified by the "very toxic" relationship with her abusive ex-husband. R. at 114-15, 143. Still, SrA Flores was "very close" with his family and extended family. R. at 116. SrA Flores was able to escape the rough city life by joining the Air Force. R. at 143. Soon after joining, he lost both his grandparents in 2017 and 2018. R. at 116. He took the loss "pretty hard," especially his grandfather who was "like a big father figure to him as a positive role model." *Id.*

[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. § 928.

Facts of the Case

Relevant to the court-martial at hand, SrA Flores became involved in a romantic relationship with SSgt E.F. Prosecution Exhibit (Pros. Ex.) 1 at 1. She had a son, J.F. *Id.* SrA Flores dated SSgt E.F. from approximately September 2020 to 25 November 2020. *Id.* Throughout their relationship, SrA Flores took care of J.F. on multiple occasions when SSgt E.F. was not present. *Id.* At that time, SrA Flores was 23 years old and J.F. was two years old. Pros. Ex. 1 at 1. SrA Flores did not have any children of his own and had little experience dealing with children in general, to include two-year olds. R. at 144. On 25 November 2020, SrA Flores was "running off 2 to 3 hours of sleep on a 72-hour period in addition to working night shift, 12- to 14-hour shifts - - grave shifts." R. at 144. That same day while watching J.F., SrA Flores became frustrated with J.F. for spilling coffee grounds and hit him. Pros. Ex. 1 at 2. SSgt E.F. took J.F. to the emergency room later that day. *Id.* At that time, SrA Flores "suffered from chronic night terrors, insomnia, and was sleep-deprived for three days." *Id.* SrA Flores was also diagnosed with adjustment disorder with mixed anxiety and depressed mood. Pros. Ex. 1 at 1. However, SrA Flores did not believe any of those issues condoned his actions against J.F. as they were wrong and he genuinely regretted what he did. R. at 142-43.

Pursuant to a plea agreement, SrA Flores pleaded guilty to making a false official statement under Article 107, UCMJ: "I wasn't even there," or words to that effect (Charge I and its Specification). EOJ; R. at 13-14, 20; Appellate Exhibit (App. Ex.) XV. SrA Flores also pleaded guilty to two specifications of the lesser-included offense of assault consummated by a battery against J.F. under Article 128, UCMJ, 10 U.S.C. § 928: striking him, on diverse occasions, on the face and head with his hand on 25 November 2020 (Charge II, Specification 1) with excepted

language; and striking him on the face and head with a spatula on 25 November 2020 (Charge II, Specification 2) with excepted language. *Id.*

Plea Agreement

The plea agreement stated the minimum and maximum punishments for each charge and specification. App. Ex. XV at 2-3. For the false official statement, the minimum punishment was 6 months' confinement and a bad conduct discharge while the maximum punishment was 3 years' confinement and a dishonorable discharge. App. Ex. XV at 2. For both specifications of assault consummated by a battery, the minimum punishment was a bad conduct discharge while the maximum punishment was the statutory maximum of 6 months' confinement. App. Ex. XV at 2-3. All confinement for the charges and specifications were to be served concurrently. *Id.*

SrA Flores was sentenced to 12 months' confinement for the false official statement charge and 6 months' confinement for each specification of assault consummated by a battery. R. at 170. He was also sentenced to a bad conduct discharge for both charges and all specifications. *Id.*; EOJ.

Stipulation of Fact

Per the plea agreement, SrA Flores entered into a stipulation of fact. *See* Pros. Ex. 1. According to the stipulation of fact, on 26 November 2020, SrA Flores' then-First Sergeant, SMSgt O.M., transported him to the Air Force Office of Special Investigations (AFOSI). Pros. Ex. 1 at 3. After SrA Flores' interview with AFOSI,[4] SMSgt McClellan provided him the phone number for SrA Flores' Area Defense Counsel (ADC). *Id.* SMSgt O.M. further stated, "If you need anything, let's work out places to stay" and "no judgment until all of this stuff shakes out – I'm your shirt." *Id.* SrA Flores responded, "You know it is what it is – it's okay. I've got plenty

[4] When AFOSI read SrA Flores his Article 31 rights, he invoked his rights to legal counsel and the interview was terminated. ROT, Vol. 2, *Report of Investigation*, dated 29 June 2021, at 4.

of stuff on her" and "I wasn't even there." *Id.* The statement, "I wasn't even there," was the single false official statement charged. ROT, Vol. 1, *Charge Sheet*, dated 20 September 2021.

Several uncharged, false statements leading from 1 December 2020 until 16 December 2020 were also included in the stipulation of fact. Pros. Ex. 1 at 3-4. On 1 December 2020, SrA Flores was interviewed by the South Carolina Department of Social Services (DSS) case worker. Pros. Ex. 1 at 3. In that interview, SrA Flores stated: that he did not assault J.F.; that he went to SSgt E.F.'s home that morning to bring breakfast, but then stayed at a friend's house the rest of the day; that he did not know who was watching J.F. while SSgt E.F. had been working. *Id.* SrA Flores provided the names of two friends he claimed to have been with after dropping off breakfast at SSgt E.F.'s home. Pros. Ex. 1 at 4. Both friends denied spending any time with SrA Flores on 25 November 2020. *Id.* On 16 December 2020, SrA Flores filed a petition for a restraining order against SSgt E.F. in the Dorchester County Magistrate Court claiming SSgt E.F. "alleged false allegations against me in that I physically harmed J.F. to which I deny adamantly." *Id.*

Government Presentencing Evidence

Dr. J.M. testified about the injuries J.F. sustained. R. at 74-83. He was recognized as an expert in pediatric medicine and child abuse pediatric medicine. R. at 77. J.F. "was noted to have bruising over the right zygomatic arch and inferior aspect of the right temporal area." R. at 78. There was a superficial scratch extending from the right ear to the hairline on the right temporal area. R. at 80-81. J.F. also had a three-millimeter cut on the left lower lip that extended across the vermillion border. R. at 81.

SSgt E.F. testified during the Government's presentencing case. R. at 86-100. She talked about what she remembered from 25 November 2020. R. at 87-97. SSgt E.F. called her friend,

D.A., who was a paramedic to consult someone in the medical field. R. at 91. She ended up taking J.F. to the hospital for testing until 6-7 a.m. the next morning. R. at 97. SSgt E.F. also shared the longer-term implications as the result, which included J.F. having to spend a year with her extended family due to her schedule as a single mother and not trusting anyone to watch J.F. in a private place. R. at 98.

The Government offered no evidence in aggravation regarding the charged false official statement through witnesses or documentary evidence.

Defense Presentencing Evidence

Mr. W.C. testified during the Defense's presentencing case. R. at 103-11. Mr. W.C. and SrA Flores worked together during a deployment, interacting "every day pretty much." R. at 106. They also maintained contact after the deployment. R. at 107. Mr. W.C. described SrA Flores as having "good leadership qualities" and being able to "stand on his own two feet." *Id.* SrA Flores had "done double duties" before and "filled shifts for other military personnel." *Id.* SrA Flores was also given an award for going above and beyond. R. at 108. Mr. W.C. believed that SrA Flores could "most definitely" bounce back in the future. R. at 109.

SrA Flores' uncle, Mr. M.R., also testified during the Defense's presentencing case. R. at 111-20. Mr. M.R. had been a Chicago police officer for 15 years prior to working for the Chicago Police Academy. R. at 112. Mr. M.R. believed SrA Flores had "potential to go forward with redemption." R. at 117. Mr. M.R. described the strong family and strong network that SrA Flores had with family who "love him and support and encourage him so that he can go forward in life…." R. at 118. Mr. M.R. spoke of a "sense of redemption" from their joint faith and asked the military judge to consider the "whole person" and where SrA Flores has come from. R. at 119.

SSgt A.F. testified during the Defense's presentencing case. R. at 120. SSgt A.F. served with SrA Flores for the entirety of 2021. *Id.* The two spent time together about once or twice a week while SSgt A.F. was on duty. R. at 123. After getting to know each other a little better, they spent time together outside of work about once or twice a month. *Id.* They maintained contact since. *Id.* SSgt A.F. testified that SrA Flores had the "potential to get back to his community and continue working and being a productive member of society." R. at 125.

SrA Flores' mother, Mrs. R.F., also testified. R. at 131-141. SrA Flores was "a very high achiever" growing up. R. at 134. Mrs. R.F. was aware of the charges SrA Flores pled guilty to and believed those actions were "totally not in character" for him. R. at 137. Mrs. R.F. believed SrA Flores still had the potential to be a productive citizen. *Id.* She said he would "positively be able to get back up there" and that "this is totally out of his character." *Id.* Mrs. R.F. had seen SrA Flores mature since the incident and "strongly believe[d] this will never happen again." R. at 138. Their family would be there support SrA Flores so he could succeed and be able to bounce back. R. at 139

SrA Flores gave an unsworn statement. R. at 142-45. SrA Flores described the lack of sleep he had on 25 November 2020 and the chronic night terrors and insomnia that he suffered from "not [as] an excuse," but to give some insight into how his actions were out of character for him. R. at 144. SrA Flores "felt incredibly bad, horrible," for his actions described under Charge II. *Id.* As for the false official statement, he "got scared" and "ended up lying just out of fear of repercussions of what would happen.[5] *Id.* In light of the "horrible situation" he caused, SrA Flores had sleepless nights and ended up in a "mental facility hospital for months."

[5] SrA Flores also testified under oath during his care inquiry that the reason he made the false statement was "[o]ut of repercussions, fear of repercussions." R. at 33.

R. at 142. SrA Flores since spent over a year in consistent therapy seeking help. R. at 145. He was then heavily medicated for "depression, anxiety, sleep apnea, night terrors, and many more." *Id.* During such time, SrA Flores matured and learned valuable lessons for what he did while taking responsibility for his actions. *Id.* SrA Flores began and ended his unsworn by "sincerely and genuinely" apologizing for his actions, specifically apologizing to both J.F. and SSgt E.F. R. at 142, 145.

Trial Counsel Sentencing Argument

Trial counsel began his sentencing argument by recommending that SrA Flores receive a dishonorable discharge and three years' confinement. R. at 146. He went on to assert, "[SrA Flores] needs three years' confinement and a dishonorable discharge both because the nature of the offenses in this case but also because of the [SrA Flores'] reaction to them. The crimes that the [SrA Flores] has been found guilty of are serious especially when they're put in context." *Id.*

Trial counsel then characterized SrA Flores' actions on his way out of AFOSI as a "lack of respect for the law." R. at 150. Specifically, trial counsel argued SrA Flores made a "calculated statement" to his First Sergeant given the way SrA Flores "lied directly" to him, the timing of the lie, the "seriousness of what [SrA Flores] lied about," and that SrA Flores tried to shift focus from himself to SSgt E.F. R. at 151. As to the seriousness of what SrA Flores lied about, trial counsel averred SrA Flores was saying, "I wasn't even there to assault [J.F.] that night." *Id.*

Trial counsel argued that "the kind of blatant disrespect for the law" and "lack of integrity" was "what needs to be deterred here." R. at 152. He further stated, "Air Force members need to know that you cannot compound your mistakes with dishonesty after dishonesty, and this demands a harsh punishment." *Id.* Only at this point did trial counsel mention rehabilitative potential. *Id.* Specifically, he stated, "[SrA Flores] has extremely low rehabilitative potential in this case, *and*

he has no respect for the law." Id. (emphasis added). Trial counsel next recounted four lies that SrA Flores made to the DSS about five days later. R. at 152-153. The four things trial counsel discussed were: (1) that SrA Flores stated he only went to SSgt E.F.'s home "that morning and then left for the rest of the day"; (2) that the "allegations that [SrA Flores] assaulted [J.F.] were untrue and that he did not harm [J.F.] at all"; (3) that SrA Flores "didn't know who watched [J.F.] on 25 November 2020"; and (4) that SrA Flores spent the rest of the day "after dropping off breakfast that morning…at a friend's house." *Id.* Trial counsel ended that commentary by stating the evidence of low rehabilitation potential did not end there. R. at 153. He went on to say SrA Flores' "conscious decision to file a false complaint in the magistrate court" was another lie. R. at 154. Trial counsel argued that "this is the kind of blatant disrespect and disregard for the truth and disrespect for the law and needs to be punished." R. at 154.

Trial counsel then recounted SrA Flores' lies stating they show SrA Flores' "attitude towards these offenses." R. at 155-56. Trial counsel next articulated that SSgt E.F. trusted the legal process and both she and her son, J.F., were patient and waited for justice in the case. R. at 156. Trial counsel went on to argue that "[SSgt E.F.] and [J.F.]'s restraint and respect for the law needs to be promoted. That needs to be acknowledged. [SrA Flores'] lack of respect for the law, that needs to be punished." *Id.* He ended his argument with:

> Your Honor, all this means nothing if the Court doesn't hold [SrA Flores] accountable. [SrA Flores'] assault, [SrA Flores'] lack of integrity, the pain that [J.F.] went through, [SSgt E.F.'s] restraint, the additional lies that both [SSgt E.F.] and [J.F.] have had to endure and that [SrA Flores] has put forward over the course of weeks, all that means nothing if this Court doesn't hold [SrA Flores] accountable. Based on the circumstances in this case for what has happened over the course of weeks, [SrA Flores] has a long way to go. This Court's sentence should hold [SrA Flores] accountable both for his actions and his attitude. Your Honor, a just sentence based on [SrA Flores'] attitude, based on what he did is a dishonorable discharge and three years' confinement.

Id. Trial counsel used the word "lie" 34 times during his sentencing argument. R. at 146-47, 151-56. There was no rebuttal offered. R. at 156-57. Over the course of a 12 page argument, trial counsel specifically referenced the uncharged lies 16 times. R. at 146, 151-56. The entire trial lasted eight hours and four minutes (R. at 1, 171) and deliberations lasted 40 minutes. R. at 169-70. Trial counsel tied SrA Flores' uncharged, false statements to the "kind of blatant disrespect for the law" that needed to be punished four times. R. at 150, 152, 154, 156. No objection was made by the Defense. The military judge made no comment after trial counsel's sentencing argument before civilian trial defense counsel's sentencing argument. See R. at 156-57.

Argument

I.

TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT IN HIS SENTENCING ARGUMENT BY, *INTER ALIA*, FOCUSING ON UNCHARGED MISCONDUCT TO ARTIFICIALLY INFLATE WHAT AN APPROPRIATE SENTENCE SHOULD BE.

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)).

"[A] defendant's lying under oath [can] be deemed probative of his prospects for rehabilitation . . . ." *United States v. Grayson*, 438 U.S. 41, 42 (1978). "[A] military judge may properly consider that the accused's false testimony in his own defense tends to refute claims of his repentance and readiness for rehabilitation." *United States v. Warren*, 13 M.J. 278, 284 (C.M.A. 1982). However, "the sentence should not be increased as a punishment for perjury or a deterrent to others; if the perjury is to be punished as such, it should be in a separate prosecution for the offense." *Id.* at 284-85. As such, a court-martial "may *not* mete out additional punishment for the false testimony itself." *Id.* at 286 (see also *United States v. Jenkins*, 54 M.J. 12, 20). The CMA cautioned trial counsel that to over-emphasize an accused's false testimony, which is only a factor indicating an accused's rehabilitative potential, inviting the court "to rely on" such false testimony "to the exclusion of" others "borders on inflammatory argument." *Id.* at 285 (quoting *United States v. Lania*, 9 M.J. 100, 104 (C.M.A. 1980)). "[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

The trial counsel impermissibly invited the military judge to punish SrA Flores more severely because of uncharged misconduct. *Buber*, 62 M.J. at 478. Specifically, trial counsel argued again and again that SrA Flores' uncharged, false statements showed the "kind of blatant disrespect for the law" that needed to be punished. R. at 150, 152, 154, 156. Trial counsel argued that SrA Flores' lies should increase the punishment and be used as a deterrent to others in direct opposition to *Warren*. 13 M.J. at 284-85. He went on to assert that "Air Force members need to

know that you cannot compound your mistakes with dishonesty after dishonesty, and this demands a harsh punishment." R. at 152. It was only after this statement that trial counsel first mentions rehabilitative potential. *Id.* A fair reading of the argument is that trial counsel believed the uncharged lies went to more than just rehabilitation; it went to aggravation. But that is not the state of the law.

The Supreme Court and the CMA have clearly stated that additional punishment for uncharged false testimony is improper. Similarly, seeking additional punishment for uncharged lies, which the trial counsel essentially used as aggravation evidence, was plain and obvious error. The military judge's task was to sentence him for one false official statement and two assaults consummated by batteries, not separate lies. *United States v. Cantrell*, 44 M.J. 711, 714 (A.F. Ct. Crim. App. 1996) ("It is axiomatic that an accused must be sentenced only for the offense or offenses of which he has been found guilty.").

The first time trial counsel mentions rehabilitative potential was seven pages into his sentencing argument. R. at 152. While trial counsel mentions rehabilitative potential prior to and after recounting the four things SrA Flores lied about to the DSS and prior to mentioning the false complaint SrA Flores filed in magistrate court (R. at 152-53), he followed it up with, "this is the kind of blatant disrespect and disregard for the truth and disrespect for the law and needs to be punished." R. at 154. Trial counsel mentions rehabilitative potential a third and final time four pages from the end of the argument. R. at 155. However, he then went beyond that. He did not just argue the lies show low rehabilitative potential, he argued that those lies should be punished. R. at 152, 154, 156.

Trial counsel highlighted that SSgt E.F. trusted the legal process and both she and her son, J.F., were patient and waited for justice. R. at 156. Trial counsel made an additional improper

argument when he then asserted that while "[SSgt E.F.] and [J.F.]'s restraint and respect for the law needs to be promoted," "[SrA Flores'] lack of respect for the law, that needs to be punished." *Id.* SrA Flores should not be punished for any third party's acts. Further, he should not be punished in order to "promote" a third party's acts either.

Trial counsel's argument was inflammatory because his over-emphasis of SrA Flores' uncharged, false statements invited the court to rely on that factor to the exclusion of others. *Warren*, 13 M.J. at 285. Further, trial counsel explicitly asked for increased punishment for SrA Flores' uncharged, false statements specifically when he argued "all this means nothing if the Court doesn't hold the accused accountable." *Id.* at 286. Trial counsel again mentioned the "additional lies" that "the accused has put forward over the course of weeks" (R. at 156), which is important because the charged false official statement happened the day after the assaults, *not* throughout the next couple weeks. Trial counsel had previously mentioned SrA Flores' lies "occur[ing] over the course of weeks" and tied it to SrA Flores low rehabilitative potential. R. at 155. So, it is clear in trial counsel's argument that he was talking about the uncharged, false statements when he said, "the additional lies that both [SSgt E.F.] and [J.F.] have had to endure and that the accused has put forward over the course of *weeks*, all that means nothing if this Court doesn't hold the accused accountable." R. at 156 (emphasis added). Trial counsel cannot save the argument by passing references to rehabilitative potential in one breath and then specifically stating those same uncharged lies deserve punishment. Trial counsel did not just offer the uncharged, false statements as evidence of rehabilitative potential, but argued SrA Flores' lies over the course of weeks as aggravation evidence and as such, the argument is plain and obvious error.

Of note, the uncharged, false statements trial counsel argued were not false testimony under oath. Instead, they were false statements made within the two weeks following the acts for which

he was convicted of. Months later, after ending up in a "mental facility hospital" for months (R. at 142), spending a year in consistent therapy seeking help and getting medication for his chronic medical and mental health issues (R. at 145), SrA Flores pleaded guilty and took responsibility for his misconduct. He did not lie during his *Care* inquiry and for trial counsel to hint otherwise was improper. In fact, SrA Flores' apologies during his sworn testimony (R. at 27-46) and at the beginning and end of his unsworn (R. 142, 145) show a "repentance and readiness for rehabilitation." *Warren*, 13 M.J. at 284.

This Court cannot be confident that the military judge sentenced SrA Flores on the basis of the evidence alone. *See Halpin*, 71 M.J. at 480. Using the indicators of the severity of misconduct from *Fletcher*,[6] it can be seen in the 34 times trial counsel used the word "lie." R. at 146-47, 151-56. Over the course of a 12 page argument, trial counsel specifically referenced the uncharged lies 16 times.[7] R. at 146, 151-56. The entire trial lasted eight hours and four minutes (R. at 1, 171) and deliberations lasted 40 minutes. R. at 169-70. The important point being trial counsel argued the uncharged, false statements were reasons SrA Flores should be punished, which was grossly improper and the crux of their sentencing argument as a whole.

There were also no measures adopted to cure the misconduct as the military judge did not state on the record his intent to not consider any of the uncharged misconduct as aggravation evidence so argued by trial counsel. Further, the weight of evidence to support the sentence is low. While trial counsel presented two witnesses to discuss aggravation evidence for the assaults (R. at 74-83, 86-100), they did not put on any aggravation evidence for the false official statement. Additionally, the Defense introduced evidence of strong rehabilitative potential. Absent trial

[6] 62 M.J. at 184.
[7] There was no rebuttal offered. R. at 156-57.

counsel's inappropriate sentencing argument, SrA Flores would not have been sentenced to 12 months' confinement for a single false official statement. *See* Issue II (arguing sentence inappropriateness). SrA Flores has a strong family who loves him and were going to be there so that SrA Flores could go forward in life. R. at 118. Not only that, but SrA Flores maintained a "sense of redemption" from his faith (R. at 119) and pleaded guilty when he did not have to. He took responsibility for his actions and there was significant evidence of his strong rehabilitative potential (see argument *infra*). If SrA Flores' uncharged, false statements were intended to be punished, they should have been brought in a separate prosecution for an offense. *Warren*, 13 M.J. at 284-85.

WHEREFORE, SrA Flores requests this Honorable Court approve only six months' confinement for the Specification of Charge I. SrA Flores requests this Honorable Court reassess the sentence in total to: reduction to the grade of E-1; confinement for six months for the Specification of Charge I, confinement for six months for Specification 1 of Charge II, confinement for six months for Specification 2 of Charge II—with confinement running concurrently for all charges and specifications; and a bad conduct discharge.

II.

12 MONTHS' CONFINEMENT FOR A SINGLE FALSE OFFICIAL STATEMENT THAT HAD NO ADVERSE IMPACT ON THE INVESTIGATION IS INAPPROPRIATELY SEVERE.

Standard of Review

Sentence appropriateness is reviewed *de novo*. *See United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006).

Law

Under Article 66(d), UCMJ, this Court may only approve "the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). "It follows that a sentence should be approved only to the extent it is found appropriate based on a CCA's review of the entire record." *United States v. Varone*, No. ACM S32685, 2022 CCA LEXIS 426, at *7 (A.F. Ct. Crim. App. 21 Jul. 2022) (unpub. op). This Court's broad power to ensure a just sentence is distinct from the convening authority's clemency power to grant mercy. *See United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted).

In assessing sentence appropriateness, this Court considers "the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (*en banc*) (alteration in original) (citation omitted).

Matters in extenuation of an offense serve to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse. R.C.M. 1001(d)(1)(A).

Analysis

This particular Appellant grew up in a "crime-infested neighborhood" on the south side of Chicago. R. at 143. It was "one of the more violent communities in the city of Chicago on the south side. R. at 114. He was raised by his single mother who had a "very toxic" relationship with her abusive ex-husband. R. at 114-15. At the time of the false official statement, SrA Flores was suffering from adjustment disorder mixed with anxiety and depressed mood. Pros. Ex. 1 at 1. Compounding those diagnoses, SrA Flores struggled with sleep apnea, night terrors, and many

more. R. at 142. While none of these issues or SrA Flores' own childhood justify or excuse his behavior, they do provide some context surrounding why he would get scared and lie about not having been at SSgt E.F.'s house. R. at 144.

Additionally, SrA Flores demonstrated significant rehabilitation potential. Mr. W.C., who interacted with SrA Flores every day on deployment, described SrA Flores as someone who could "most definitely" bounce back in the future. R. at 109. SrA Flores demonstrated leadership qualities by filling shifts for others and receiving awards for going above and beyond. R. at 106, 108. SrA Flores was the type of person who could pull double duties and "stand on his own two feet." R. at 106. SSgt A.F., who served with SrA Flores for the entirety of 2021 (R. at 120) and regularly spent time with him, also testified that SrA Flores had the "potential to get back to his community and continue working and being a productive member of society." R. at 125.

Even more telling was the evidence received from SrA Flores' uncle and mother, who knew SrA Flores much longer than anyone else. R. at 111-20, 131-141. As a former Chicago police officer with 15 years' experience (R. at 112), Mr. M.R. believed SrA Flores had "potential to go forward with redemption." R. at 117. SrA Flores was "a very high achiever" growing up and had the ability to "get back up there" given this conduct was "totally out of his character." R. at 134. Not only that, but Mrs. R.F. had seen SrA Flores mature since the assaults and false official statement – including the uncharged, false statements made the weeks after – and "strongly believe[d] this will never happen again." R. at 138. She believed SrA Flores still had the potential to be a productive citizen and their family would be there to support him. R. at 137, 139.

The following matters in extenuation demonstrate why the convicted offenses are not deserving of excessive punishment. On 25 November 2020, SrA Flores had only 2-3 hours of sleep in the middle of working grave shifts. R. at 144. SrA Flores did not have any children of

his own and had little experience dealing with children in general to include two-year olds. R. at 144. These facts were brought up for the specific reason of showing SrA Flores' actions were out of character for him and there was an explanation for the conduct not amounting to an affirmative defense. R. at 144. SrA Flores himself did not believe any of the issues discussed above or his lack of sleep and experience with parenting condoned his actions as they were wrong and he genuinely regretted what he did. R. at 142-43. The nature and seriousness of this single false official statement was one that had no adverse impact on the investigation or medical care for the child.

Twelve months of confinement for a single false official statement is not appropriate. This single false official statement had no adverse effect on the investigation. In fact, SrA Flores did not state this lie to law enforcement at all—he invoked his right to counsel and left. ROT, Vol. 2, *Report of Investigation*, dated 29 June 2021, at 4. Instead, the lie was made after being released from AFOSI to his First Sergeant who had just said "]i]f you need anything, let's work out places to stay" and "no judgment until all of this stuff shakes out – I'm your shirt." Pros. Ex. 1 at 3. SrA Flores intended to deceive because he was fearful of the repercussions (R. at 33, 144), but it was not to lead the investigation astray at this point. It was also to maintain respect from his First Sergeant. Further, the statement did not impact the medical treatment for J.F. as J.F. had already been seen before SrA Flores made the false official statement. Pros. Ex. 1 at 2-3.

This Court has been confronted with a situation like this before. See *United States v. Garrett*, No. ACM 39840, 2021 CCA LEXIS 309 (A.F. Ct. Crim. App. June 25, 2021) (unpub. op.). In a split decision, this Court did not unanimously conclude the appellant's sentence was inappropriately severe. *Id.* at *2. Instead, the dissent provided reasoned analysis about why arguments like these are so problematic. See *id.* at *7. Just as Judge Meginley highlighted in

Garrett, here the single lie was not "sophisticated or diabolical,"—SrA Flores feared repercussions for his prior criminal actions—he pleaded guilty, and law enforcement already knew that SrA Flores had been at SSgt E.F.'s house. *Id.* at *6. Yet, trial counsel argued for three years confinement for this single false official statement because the maximum punishment for each assault specification was six months' confinement. There was no other way to increase the amount of confinement beyond six months, since the time would be served concurrently, except to sensationalize SrA Flores' uncharged, false statements with an arguably "grossly excessive" recommendation of three years' confinement. See *id.* at *7. The circuit trial counsel (CTC) in *Garrett* argued for 18 months' confinement for a single false official statement made by the appellant to AFOSI in an investigation involving rape, of which the appellant was acquitted. *Id.* at *5. In this case, trial counsel advocated for the maximum confinement allowed by the plea agreement for the false official statement charge. R. at 146, 156. The issue is that a single false official statement should not be more than that of the gravamen offenses – the assaults. As such, even 12 months confinement for a single false official statement alone is inappropriately severe.

On the basis of the entire record, only six months of confinement should be approved for the single false official statement. Given SrA Flores' deep remorse, high rehabilitative potential, support of his family, and the fact that he did not lie under oath at his court-martial, an appropriate sentence would be for him to receive only six months of confinement instead of twelve.

WHEREFORE, SrA Flores requests this Honorable Court approve only six months' confinement for the Specification of Charge I. SrA Flores requests this Honorable Court reassess the sentence in total to: reduction to the grade of E-1; confinement for six months for the Specification of Charge I, confinement for six months for Specification 1 of Charge II,

confinement for six months for Specification 2 of Charge II—with confinement running concurrently for all charges and specifications; and a bad conduct discharge.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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22 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR
v.	)	No. ACM 40294
Senior Airman (E-4) ISRAEL E. FLORES, USAF, *Appellant.*	)	Panel No. 1

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

ISSUES PRESENTED

I.

WHETHER TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT IN HIS SENTENCING ARGUMENT BY, *INTER ALIA*, FOCUSING ON UNCHARGED MISCONDUCT TO ARTIFICIALLY INFLATE WHAT AN APPROPRIATE SENTENCE SHOULD BE?

II.

WHETHER 12 MONTHS' CONFINEMENT FOR A SINGLE FALSE OFFICIAL STATEMENT THAT HAD NO ADVERSE IMPACT ON THE INVESTIGATION IS INAPPROPRIATELY SEVERE?

STATEMENT OF THE CASE

On 7 March 2022, at Joint Base Charleston, South Carolina, consistent with his pleas, a general court-martial comprised of a military judge alone convicted Senior Airman Israel E. Flores (Appellant) of one charge and one specification of making a false official statement, in violation of Article 107, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 907, and one charge and two specifications of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928. (*See* Entry of Judgment (EOJ), dated 9 April 2022, Record of Trial (ROT), Vol. 1.)

Appellant was sentenced to a bad conduct discharge, forfeiture of all pay and allowances for a period of twelve months, and a reduction to the grade of E-1. (Id.) For the false official statement charge and specification, Appellant was sentenced to confinement for a period of twelve months. (Id.) For each assault consummated by a battery specification, Appellant was sentenced to confinement for a period of six months. (Id.) All adjudged confinement terms were to be served concurrently with all charges and specifications. (Id.)

The military judge's adjudged sentence fell within the range specified in Appellant's plea agreement. As to the false official statement charge and specification specifically, the agreement limited the minimum amount of confinement to six months, and the maximum amount of confinement to three years (with a bad conduct discharge being the minimum punitive discharge to be adjudged). (*See* Statement of Trial Results, dated 8 March 2022, ROT, Vol. 1.)

The convening authority took no action on the findings or Appellant's sentence. (*See* Convening Authority Decision on Action, dated 6 April 2022, ROT, Vol. 1.)

STATEMENT OF FACTS

Stipulation of Fact

Appellant was twenty-three years old at the time of the charged offenses, and the victim of Appellant's violent crimes (J.F.) was only two years old. (Pros. Ex. 1 at 1.) On 25 November 20202, while babysitting J.F. for SSgt E.F., J.F.'s mother, Appellant "struck J.F. on his head and face with [Appellant's] hand on two or more occasions." (Id. at 2.) Appellant also struck two-year-old J.F. on the head and face with a spatula. (Id.) When SSgt E.F. returned home from work that evening, she found J.F. in his crib and "noticed dry feces on J.F.'s buttocks and genitals." (Id.) She also "noticed marks on J.F.'s face and head." (Id.) When asked about the marks on J.F., Appellant told SSgt E.F. "that J.F. must have fallen in his crib." (Id.)

Appellant eventually admitted to SSgt E.F. that he "slapped [J.F.] a couple times" because "J.F. spilled [some] coffee grounds." (Id.) After Appellant left SSgt E.F.'s home, she noticed additional swelling and a mark on the backside of J.F.'s head. (Id.) SSgt E.F. then drove J.F. to the emergency room, called the local Sheriff's Office, and notified her leadership what had happened. (Pros. Ex. 1 at 3.)

J.F. was evaluated at a local hospital. (Id.) While no skull fractures were observed, "bruising was noted to the upper portion of the left" and right ear, and on the "scalp behind the left ear" as well. (Id.) In addition, hospital personnel noted bruising on the right cheek and an abrasion on J.F.'s inner lower lip. (*See* id.)

The following day, Appellant was escorted by his first sergeant, SMSgt Oran McClellan, to the Office of Special Investigations (OSI). (Id.) After his interview, SMSgt McClellan told Appellant, "I do not want to know anything about the case and you need to get an Area Defense Counsel (ADC)." (Id.) SMSgt McClellan provided Appellant with the ADC's phone number and further stated, "If you need anything, let's work out places to stay" and "no judgment until all this stuff shakes out—I'm your Shirt." (Id.) Unprompted, Appellant replied, "You know[,] it is what it is—it's okay. I've got plenty of stuff on her … I wasn't even there." (Id.)

Days later, when Appellant was interviewed by a South Carolina Department of Social Services case worker, he stated "the allegations that he assaulted J.F. were not true and that he did not do any harm to J.F." (Id.) Appellant also told the case worker that "he did not know who was watching J.F. while SSgt [E.F.] was working." (Id.) Appellant also provided the names of two alibi witnesses who, when interviewed at a later time, "both denied spending any time with [Appellant]" on the day of the assaults. (Pros. Ex. 1 at 4.) Appellant also later made a failed attempt to obtain a restraining order against SSgt E.F. because of her "false allegations against [him] in that [he] physically harmed J.F. to which [Appellant] denied adamantly." (Id.)

Appellant's stipulation of fact with the Government admitted as true and correct that he "with intent to deceive, verbally [told] SMSgt Oran McClellan, 'I was not even there,' or words to that effect, referring to SSgt [E.F.]'s home on 25 November 2020." (Pros. Ex. 4 at 4; R. at 27.) In so doing, Appellant admitted that he "knew this statement was false at the time [he] made it" and that he "made the false statement with the intent to deceive, and the false statement was made to SMSgt McClellan, who was carrying out his military duties as First Sergeant at the time." (Id).

Appellant's Care Inquiry

During his guilty plea inquiry, Appellant told the military judge that he lied to SMSgt McClellan "[o]ut of repercussions, fear of repercussions." (R. at 33.) Appellant also admitted that he purposely intended to deceive his first sergeant, that he knew what he was doing was wrong, that he could have avoided lying if he had wanted to, and that he did not believe he had any legal justification or excuse for making the false statement. (*See* R. at 34.) Appellant also acknowledged that SMSgt McClellan did nothing to elicit Appellant's statement, and that Appellant thus offered the statement unprompted. (*See* id. at 36-37.)

Trial Counsel's Argument

Trial counsel recommended to the military judge that Appellant receive "a dishonorable discharge and three years' confinement." (R. at 146.) Trial counsel's argument focused first on the crimes directed toward J.F. and the immediate aggravating circumstances surrounding those incidents. (*See* R. at 146-50.) His argument then shifted focus to Appellant's false official statement and the circumstances surrounding Appellant's unprompted and voluntary mendacity. (*See* R. at 150-52.) Next, trial counsel shifted his argument to Appellant's "extremely low rehabilitative potential[.]" (R. at 152.) Trial counsel highlighted Appellant's lies to the social services case worker (R. at 152-53), as well as Appellant's "conscious decision to file a false complaint in the magistrate court to try to get a restraining order against" SSgt E.F (R. at 153-54.)

Both instances were raised in the context of Appellant's rehabilitative potential—a subject trial counsel was rebutting in argument given the Defense's sentencing case. (*See, e.g.*, R. at 153 ("But the evidence of the [Appellant's] low rehab potential doesn't stop there, ma'am.").)

After highlighting that Appellant "is not completely ignorant of the criminal justice system" since "he's a member of Security Forces," trial counsel stated that Appellant's lies were "calculated and self-serving." (R. at 154.) Trial counsel continued that "this is the kind of blatant disrespect and disregard for the truth and disrespect for the law that needs to be punished." (R. at 154.) Further, trial counsel asserted that Appellant's decision to lie to his first sergeant, after having the time to reflect, "revealed Appellant's low rehabilitative potential[.]" (R. at 155.)

Finally, trial counsel argued that Appellant's "lack of respect for the law … needs to be punished." (R. at 156.) And trial counsel concluded his sentencing argument by stating that Appellant's "assault, [his] lack of integrity, the pain that [J.F.] went through, [SSgt E.F.'s] restraint, the additional lies that both [SSgt E.F. and J.F.] have had to endure and that [Appellant] has put forward over the course of weeks, all that means nothing if this Court doesn't hold [Appellant] accountable." (Id.) Trial counsel's argument drew no objections.

ARGUMENT

I.

TRIAL COUNSEL DID NOT ENGAGE IN PROSECUTORIAL MISCONDUCT.

Standard of Review

Prosecutorial misconduct and improper argument are reviewed *de novo* and where, as here, no objection was made, this Court reviews for plain error. *See* 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." Id. (citing United States v. Sewell, 76 M.J. 14, 18 (C.A.A.F. 2017)).

"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. at 401 (internal quotation marks omitted) (quoting United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005)). Therefore, this Court must determine: (1) whether trial counsel's argument amounted to clear, obvious error; and (2) if so, whether there was "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017) (internal quotation marks omitted) (quoting Molina-Martinez v. United States, 136 S. Ct. 1338, 1343 (2016); *see also* United States v. Tovarchavez, 78 M.J. 458 (2019) (explaining that, where nonconstitutional error is forfeited, the Molina-Martinez test should be applied).

Law and Analysis

Appellant claims that trial counsel committed prosecutorial misconduct by "impermissibly invit[ing] the military judge to punish [Appellant] more severely because of uncharged misconduct." (App. Br. at 12.) Trial counsel did no such thing.

Trial prosecutorial misconduct is behavior by the prosecuting attorney that "oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." Berger v. United States, 295 U.S. 78, 84 (1935). "Improper argument is one facet of prosecutorial misconduct." Sewell, 76 M.J. at 18 (citing United States v. Young, 470 U.S. 1, 7-11 (1985)). "The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." United States v. Cooper, No. ACM 40092 (f rev), 2023 CCA LEXIS 7, at *52 (A.F. Ct. Crim. App. 11 January 2023) (unpub. op.) (finding trial counsel's sentencing argument not plainly erroneous) (quoting United States v. Frey, 73 M.J. 245, 248 (C.A.A.F. 2014)).

"It is axiomatic that an accused must be sentenced only for the offense or offenses of which he has been found guilty." United States v. Cantrell, 44 M.J. 711, 714 (A.F. Ct. Crim. App. 1996) (finding no prosecutorial misconduct where trial counsel argued that appellant's numerous prior convictions demonstrated a lack of rehabilitative potential). That said, trial counsel "is entitled to argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." Frey, 73 M.J. at 248. Moreover, trial counsel's argument "must be viewed within the context of the entire court-martial" and the focus of this Court's "inquiry should not be on the words in isolation, but on the argument as viewed in context." *See* Cooper, 2023 CCA LEXIS 7, at *53 (quoting United States v. Baer, 53 M.J. 235, 238 (C.A.A.F. 2000)).

In the context of a sentencing argument, "the best approach" to the prejudice determination involves balancing 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 conviction"—in addition to considering (for sentencing arguments) whether "'trial counsel's comments, taken as a whole, were so damaging that [the 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 omitted) (finding no prejudice). Our superior Court has also identified five indicators when it comes to the severity of an improper argument:

> (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. In assessing prejudice, the lack of a defense objection is "'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) (quoting United States v. Carpenter, 51 M.J. 393, 397 (C.A.A.F. 1999)).

"In a military judge alone case [this Court] normally presume[s] that the military judge would disregard any improper comments by counsel during argument and such comments would have no effect on determining an appropriate sentence." United States v. Cunningham, No. ACM 40093, 2022 CCA LEXIS 527, at *49 (A.F. Ct. Crim. App. 9 September 2022) (unpub, op.) (citation omitted) (finding that trial counsel did not engage in improper argument by asserting that appellant's lying about an offense constituted aggravating evidence), *rev. granted*, 2022 CAAF LEXIS 888 (C.A.A.F. 13 December 2022).

Rule for Courts-Martial (R.C.M.) 1001(b)(4) states that "[t]rial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." "[T]he meaning of 'directly related' under R.C.M. 1001(b)(4) is partly a function of how strong a connection the aggravating evidence has to the offenses for which appellant has been convicted." United States v. Beehler, No. ACM 39964, 2022 CCA LEXIS 84, at *11-14 (A.F. Ct. Crim. App. 10 February 2022) (unpub. op.) (no plain error where uncharged misconduct was referenced in trial counsel's sentencing argument) (quoting United States v. Hardison, 64 M.J. 279, 281 (C.A.A.F. 2007). The connection "must be direct as the rule states, and closely related in time, type, and/or often outcome, to the convicted crime." Hardison, 64 M.J. at 282.

Here, Appellant has not met his burden to demonstrate that trial counsel's unobjected-to argument plainly or obviously amounted to prosecutorial misconduct, nor has Appellant come anywhere close to meeting his burden to demonstrate prejudice. *See, e.g.*, Halpin, 71 M.J. at 480. At the outset, it is important to note that trial counsel was not offering his personal opinion that Appellant repeatedly lied. Rather, trial counsel brought up Appellant's *admitted and stipulated* lies in the context of Appellant's rehabilitative potential. Taken in context, trial counsel's

argument did not seek to increase Appellant's punishment merely because of his uncharged misconduct; instead, trial counsel argued that Appellant lacked rehabilitative potential because he continued to lie about the incident with J.F. even after having significant time to deliberate on the initial lie to his first sergeant (*see, e.g.*, R. at 152 ("Six days after he assaulted [J.F.] and five days after he lied to his first sergeant's face, he decided to lie to the Department of Social Services"). *See also* Cantrell, 44 M.J. at 715 ("The prosecutor argued that [appellant's] numerous prior convictions demonstrated the appellant's lack of rehabilitation potential. This was not only a fair inference from the evidence, but proper argument, since it related to the appellant's amenability to the demands of good citizenship in our society."). In fact, each time trial counsel brought up an uncharged falsehood, it was accompanied by a reference to rehabilitative potential, (*see* R. at 152 ("the accused has extremely low rehabilitative potential in this case"), 153 ("evidence of low rehab potential doesn't stop there, ma'am"), 155 ("He had time to reflect, and he made conscious decisions, and those conscious decisions show his low rehabilitative potential, Your Honor.")).

Our superior Court has repeatedly opined that mendacity *under oath* is probative to rehabilitative potential, *see* United States v. Warren, 13 M.J. 278 (C.M.A. 1982), but the lies stipulated to here were not rendered by Appellant under oath. Nevertheless, evidence can come into a trial by way of stipulation (even in cases where the evidence is otherwise inadmissible under the Miliary Rules of Evidence). *See* United States v. Glazier, 26 M.J. 268, 270 (C.M.A. 1988) (citing United States v. Kinman, 25 M.J. 99, 100 n.2 (C.M.A. 1987)); *see also* Mil. R. Evid. 811. Appellant voluntarily stipulated to the evidence here, and it was offered and admitted without a defense objection. Trial counsel was thus within the bounds of propriety to highlight the stipulated evidence in his argument and place it into context by framing it as relevant to Appellant's potential to be rehabilitated. *See* R.C.M. 1001(b)(5), 1002(f)(3)(F); *see also* Cantrell, 44 M.J. at 715.

Moreover, Appellant's stipulated lies were directly relevant to the assaults and false official statement that he pled guilty to because Appellant continued to repeat *the same false statement* he told his first sergeant (*i.e.*, that he "wasn't there"). Viewed in this light, Appellant's doubling (and tripling) down of the exact same falsehood to different individuals was not just reflective of a lack of rehabilitative potential, but it also constituted evidence in aggravation. *See* R.C.M. 1001(b)(4); *see also, e.g.*, United States v. Mullens, 29 M.J. 398, 400 (C.M.A. 1990) ("Clearly, the uncharged misconduct delineated in this stipulation was directly related to the conduct for which appellant was found guilty. The stipulation evidenced a continuous course of conduct involving the same or similar crimes …"). The additional uncharged lies demonstrated the depth of Appellant's desire to avoid responsibility, and those lies also potentially inhibited the authorities' ability to discover the full extent of J.F.'s injuries and to determine who was ultimately responsible for those injuries.

Appellant admitted during his guilty plea that he concocted the lie because he "fear[ed the] … repercussions." (R. at 33). The fact Appellant repeated the same falsehood to other individuals to deflect responsibility (despite having plenty of time to "set the record straight") was a relevant fact in aggravation that the judge could properly consider in rendering her sentence. *See, e.g.*, Beehler, No. ACM 39964, 2022 CCA LEXIS 84, at *6 ("the evidence of uncharged misconduct was closely related in time, type, and outcome" of charged criminal acts). Accordingly, trial counsel's argument was not erroneous, let alone plainly erroneous.

Yet even if this Court somehow finds that trial counsel's argument amounted to plain error, Appellant has not met his burden to demonstrate prejudice. For one, trial counsel's single reference to Appellant's "dishonesty after dishonesty," which required "harsh punishment" was quite brief relative to the rest of trial counsel's argument and quickly followed by a reference to Appellant's low rehabilitative potential. (R. at 152.) Thus, trial counsel's conduct was not

"severe", prolonged, nor damaging. Second, and as mentioned above, each reference to Appellant's lies was taken directly from Appellant's stipulation of fact and was juxtaposed with a reference to Appellant's low rehabilitative potential. Third, and as discussed below, the weight of the evidence in sentencing supported the military judge's sentence for the false official statement: Appellant volunteered the lie without even being asked a question, he did so to avoid responsibility for brutally assaulting a two-year-old multiple times, and his lie (which was later repeated several times to multiple individuals) had the potential to thwart both social services and law enforcement from knowing the true extent of J.F.'s injuries, as well as the correct perpetrator. Fourth, Appellant was sentenced to only twelve months confinement despite the plea agreement's maximum (and trial counsel's recommendation) being three years. And, last, military judges are presumed to know the law and to follow it absent clear evidence to the contrary. *See* United States v. Erickson, 65 M.J. 221, 225 (C.A.A.F. 2007). No evidence to rebut that presumption exists here. Therefore, there was no reasonable probability the outcome of this proceeding would have been any different absent the alleged error. *See* United States v. Norwood, 81 M.J. 12, 20 (C.A.A.F. 2021).

At bottom, trial counsel did not commit prosecutorial misconduct in Appellant's trial, and the military judge did not plainly err by not *sua sponte* correcting trial counsel's argument. Nor did Appellant suffer any prejudice in this judge-alone plea agreement case. Appellant was sentenced based on the evidence alone, and this assignment of error thus warrants no relief.

II.

APPELLANT'S SENTENCE WAS NOT INAPPROPRIATELY SEVERE.

Standard of Review

Sentence appropriateness is reviewed *de novo*. *See* United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006).

Law and Analysis

Appellant argues that "[t]welve months of confinement for a single false official statement is not appropriate." (App. Br. at 19.) But Appellant appears to forget that, in his own plea agreement, he voluntarily agreed that the range of appropriate punishments for his false official statement spanned between six months and *three years* of confinement (along with a bad conduct discharge). Appellant's argument, therefore, lacks merit.

This court may affirm only so much of the sentence "as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d), UCMJ, 10 U.S.C. § 866(d). "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988). The review requires an "individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender." United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982) (citation and internal quotation marks omitted). Although this Court is accorded "great discretion in determining whether a particular sentence is appropriate," the Court is "not authorized to engage in exercises of clemency." United States v. Nerad, 69 MJ. 138, 146 (C.A.A.F. 2010).

Appellant's argument here is entirely inconsistent with his position at trial. At trial, Appellant agreed that a confinement term of up to three years was an appropriate punishment for his false official statement. (*See* App. Ex. XV.) This inconsistency alone is sufficient cause to deny Appellant's request for relief on appeal, and perfectly demonstrates why courts of criminal appeals "generally refrain from second guessing … a sentence that flows from a lawful pretrial agreement…" United States v. Widak, No. 201500309, 2016 CCA LEXIS 172, at *7 (N-M. Ct. Crim. App. 22 March 2016) (unpub. op.); *see also* United States v. Casuso, No. 202000114, 2021

CCA LEXIS 328, at *8 (N-M. Ct. Crim. App. 30 June 2021) (unpub. op.) (questioning an appellant's "claim of inappropriate severity when the sentence he received was within the range of punishment he was expressly willing to accept in exchange for his pleas of guilty.")

Moreover, Appellant faced up to three years confinement and a dishonorable discharge for his false official statement (trial counsel argued for the maximum in his sentencing argument), but Appellant only received twelve months' confinement and a bad conduct discharge. It is accordingly apparent that the military judge gave Appellant's mitigation and extenuation matters, which Appellant raises again here, the due consideration they warranted. And while extenuation and mitigation "matters are appropriate considerations during clemency, they do not show [Appellant]'s sentence is inappropriately severe." United States v. Mock, No. ACM 40072, 2022 CCA LEXIS 519, *(1 September 2022) (unpub. op.) (finding sentence *not* inappropriately severe) (quoting United States v. Aguilar, 70 M.J. 563, 567 (A.F. Ct. Crim. App. 2011)).

Finally, the weight of the evidence supported the judge's sentence for the false official statement: Appellant volunteered the lie without even being asked a question by his first sergeant, he did so to avoid responsibility for brutally assaulting a two-year-old multiple times, he repeated the same falsehood several times and on several occasions to multiple individuals, and Appellant's false statement was intended to and had the potential to thwart both social services and law enforcement from knowing the true extent of J.F.'s injuries, as well as the correct perpetrator. Moreover, with regard to "the character of the offender—in Appellant's relatively short time in the Air Force, he accumulated mediocre enlisted performance reports, (*see* Pros. Ex. 3), an Article 15 for drunk driving, (*see* Pros. Ex. 4), and a letter of counseling for failing to obey a lawful order, (*see* Pros. Ex. 5).

Appellant already agreed that twelve months confinement was not inappropriately severe when he voluntarily and freely entered into his plea agreement, which stipulated that a sentence three times as "severe" was potentially appropriate for his false official statement. Further, after an individualized consideration of Appellant based on the nature and seriousness of his false official statement, as well as Appellant's character, it is apparent that the judge's sentence was not inappropriately severe. Appellant is thus not entitled to relief.

CONCLUSION

WHEREFORE, this Court should affirm the findings and sentence.

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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 22 February 2023 via electronic filing.

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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. 1
Senior Airman (E-4), **ISRAEL E. FLORES,** United States Air Force, *Appellant.*	)	No. ACM 40294
	)	Filed on: 1 March 2023

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

COMES NOW, Appellant, Senior Airman (SrA) Israel E. Flores, by and through his 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 on 22 February 2023 (hereinafter Gov. Ans.). Appellant primarily rests on the arguments contained in his Brief on Behalf of Appellant, filed on 23 January 2022 (hereinafter App. Br), but provides the following additional arguments in reply to the Government's Answer.

Argument

I.

TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT IN HIS SENTENCING ARGUMENT BY, *INTER ALIA*, FOCUSING ON UNCHARGED MISCONDUCT TO ARTIFICIALLY INFLATE WHAT AN APPROPRIATE SENTENCE SHOULD BE.

In his initial brief, SrA Flores asserted that trial counsel inappropriately argued the uncharged lies as aggravation evidence. App. Br. at 13. The Government's Answer claims "trial counsel's argument did not seek to increase [SrA Flores'] punishment merely because of his uncharged misconduct; instead, trial counsel argued that [SrA Flores] lacked rehabilitative potential because he continued to lie about the incident with J.F." Gov. Ans. at 8-9. If that were

true, SrA Flores would not take issue with trial counsel's argument. However, the actual verbiage of trial counsel's argument, and the Government's further contentions, demonstrate that trial counsel's argument regarding the uncharged lies extended far beyond a lack of rehabilitation potential. App. Br. at 13. For example, if "each time trial counsel brought up an uncharged falsehood, it was accompanied by a reference to rehabilitative potential" (Gov. Ans. at 9) as the Government contends, then trial counsel would have said the words "rehabilitative potential" more than three times (R. at 152, 153, 155), but instead at least 16 times since that is how many times he specifically referenced the uncharged lies. R. at 146, 151-56.

The Government then claims that trial counsel properly argued the uncharged lies as evidence in aggravation since they "demonstrated the depth of [SrA Flores'] desire to avoid responsibility, and those lies also potentially inhibited the authorities' ability to discover the full extent of J.F.'s injuries and to determine who was ultimately responsible for those injuries." Gov. Ans. at 10. But this argument is so speculative as to fall outside the realm of R.C.M. 1001(b)(4), which requires aggravation evidence "directly relating to or resulting from the offenses of which the accused has been found guilty." Here, the *potential* for uncharged lies to inhibit the ability to discover the extent of J.F.'s injuries falls outside R.C.M. 1001(b)(4). There was simply no *actual* impact from his uncharged lies in the record.

Viewing trial counsel's argument in context, without "surgically carv[ing] out a portion," demonstrates that the overarching theme was that SrA Flores should be punished more severely due to his "dishonesty after dishonesty." R. at 152; *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000) (internal quotation marks omitted). The Government attempts to minimize the impact of trial counsel's improper argument, stating "trial counsel's single reference to [SrA Flores'] 'dishonesty after dishonesty,' which required 'harsh punishment' was quite brief relative

to the rest of trial counsel's argument and quickly followed by a reference to [SrA Flores'] low rehabilitative potential." Gov. Ans. at 10; R. at 152. But the Government's argument that this was one fleeting reference cannot square with its argument that these uncharged lies "supported the military judge's sentence." Gov. Ans. at 11.

The Government also cites to *United States v. Cunningham*,[1] stating this Court found "that trial counsel did not engage in improper argument by asserting that appellant's lying about an offense constituted aggravating evidence." Gov. Ans. at 8. However, this case is not similar to *Cunningham* as the trial counsel in that case "connected the false statements to the negative impact on ZC's medical care." *Id.* Though the Government states twice that SrA Flores' lie "was intended to" (Gov. Ans. at 13) and "had the potential to thwart both social services and law enforcement from knowing the true extent of J.F.'s injuries, as well as the correct perpetrator," the Government's efforts to draw a parallel to *Cunningham* fall flat. Gov. Ans. at 11, 13. Unlike *Cunningham*, here J.F. had *already* received medical care before SrA Flores made his false official statement, which occurred long before any of the uncharged lies occurred. Pros. Ex. 1 at 2-3. J.F. had been seen the same day as the assaults with his mother, E.F., in the hospital with him. *Id.* Furthermore, E.F. already had information relevant to the medical treatment of J.F. as she had confronted SrA Flores about the marks and SrA Flores admitted to the assaults. *Id.* Specifically, E.F. said, "Listen. I just need to know if my son's hurt, because if he's hurt, I need to take him to the hospital and get him medical care. I just need to know what happened." R. at 90. SrA Flores did not make any false statements that would directly impact J.F.'s medical care, but instead

[1] No. ACM 40093, 2022 CCA LEXIS 527, at *53 (A.F. Ct. Crim. App. 9 September 2022) (unpub. op.), *rev. granted*, 2022 CAAF LEXIS 888 (C.A.A.F. 13 December 2022). Of note, the point the Government is arguing here is one of the issues that the Court of Appeals for the Armed Forces (CAAF) specifically granted on. *Id.*

"admitted [to E.F.] that he had slapped [J.F.] across the face a couple of times." *Id.* This is not the same case as *Cunningham* where the appellant made statements "in complete disregard to the well-being and safety of his baby." *Cunningham*, unpub. op. at *53.

To the degree the Government frames SrA Flores' uncharged lies like a continuous course of conduct, a rationale created on appeal that trial counsel never argued, this is not one of those cases. The Government referenced *United States v. Mullens* for their assertion that SrA Flores' later uncharged lies were a continuous course of conduct. Gov. Ans. at 10 (citing 29 M.J. 398, 400 (C.M.A. 1990)). However, the two cases are incredibly different. In *Mullens*, the appellant was charged with a specification of committing acts of sodomy on his son on numerous occasions and two specifications of indecent liberties (numerous acts) on his son and daughter. *Mullens*, 29 M.J. at 399. The uncharged acts were identical to those charged, but had occurred earlier. *Id.* On its face, the uncharged acts directly related to the identically charged crimes, which the court found to "demonstrate not only the depth of the appellant's sexual problems, but also the true impact of the charged offenses on the members of his family." *Mullens*, 29 M.J. at 400. These are fundamentally different cases with *Mullens* specifically tying the identical uncharged crimes to the same named victims in that case. *Id.* The Government cannot treat the uncharged lies as a course of conduct; there is one charged lie, then a series of different lies in different contexts to different people. The Government is essentially arguing that anything vaguely similar may then become aggravation evidence.

The Government in making their argument also cites to *United States v. Beehler* to support its case, but *Beehler* is distinguishable and does not support their position for several reasons. No. ACM 39964, 2022 CCA LEXIS 84 (A.F. Ct. Crim. App. 10 February 2022) (unpub. op). *Beehler* was a case involving the possession of child pornography where the issue involved two exhibits

containing uncharged child erotica images being argued by trial counsel as aggravation evidence. *Id.* This Court held the uncharged conduct was "closely related in time, type, and outcome to [the appellant's] possession of child pornography." *Beehler*, unpub. op. at *1. There, the charged and uncharged conduct was interwoven together. Here, they are not. Additionally, trial counsel in *Beehler* spent the bulk of his sentencing argument focused on the crimes the appellant was convicted of (referencing the uncharged misconduct only four times in an approximately 10-page argument) and on at least two occasions, reinforced that the appellant could only be sentenced for those convicted offenses. *Beehler*, unpub. op. at *12-13. In contrast, trial counsel here used the word "lie" 34 times over the course of a 12-page argument, specifically referencing the uncharged lies 16 times. R. at 146-47, 151-56. And instead of emphasizing that SrA Flores should be sentenced for charged conduct, trial counsel here improperly stated that "dishonestly after dishonesty…demands a harsh punishment." R. at 152. The Government on appeal is repeating trial counsel's error at trial arguing that SrA Flores should be punished more severely based on uncharged misconduct.

WHEREFORE, SrA Flores requests this Honorable Court approve only six months' confinement for the Specification of Charge I.

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 1 March 2023.

Respectfully submitted,

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