IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	
	)	Before Panel No. 1
Senior Airman (E-4) **MIGUEL A. SANTA CRUZ JR.,** United States Air Force, *Appellant.*	)	No. ACM S32769
	)	26 March 2024

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 60 days, which will end on **7 June 2024**. The record of trial was docketed with this Court on 8 February 2024. From the date of docketing to the present date, 47 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,

SAMANTHA M. CASTANIEN, Capt, 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 was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 26 March 2024.

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

26 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MIGUEL A. SANTA CRUZ JR., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32769 Before 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.

PETE FERRELL, Lt Col, USAF
Director of Operations
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 26 March 2024.

PETE FERRELL, Lt Col, USAF
Director of Operations
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 (SECOND)**
v.	)	
	)	Before Panel No. 1
Senior Airman (E-4) **MIGUEL A. SANTA CRUZ JR.,** United States Air Force, *Appellant.*	)	No. ACM S32769
	)	29 May 2024

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 Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **7 July 2024**. The record of trial was docketed with this Court on 8 February 2024. From the date of docketing to the present date, 111 days have elapsed. On the date requested, 150 days will have elapsed.

On 26 October 2023, at a special court-martial convened at Sheppard AFB, Texas, and comprised of a military judge alone, Appellant was found guilty, consistent with his pleas, of one charge and two specifications in violation of Article 112a, Uniform Code of Military Justice (UCMJ) (one specification of distribution of a controlled substance and one specification of use of a controlled substance). R. at 1, 10, 12, 14, 63. After acceptance of pleas, the Government withdrew and dismissed without prejudice one specification of introduction of a controlled substance onto a military installation, in violation of Article 112a, UCMJ, and one additional charge and specification of obstruction of justice, in violation of Article 131b, UCMJ. R. at 63. The military judge sentenced Appellant to a bad conduct discharge, a total of 85 days confinement (all confinement running concurrently), to be reduced to the grade of E-1, and to be reprimanded. R. at 127. The convening

authority took no action on the findings, approved the sentence in its entirety, and denied Appellant's request to waive "all automatic forfeitures for the remainder of his adjudged confinement." Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action* – United States v. SrA Miguel A. Santa Cruz Jr., dated 9 November 2023.

The trial transcript is 134 pages long and the record of trial is comprised of three volumes containing four Prosecution Exhibits, 14 Defense Exhibits, and four Appellate Exhibits. Appellant is not currently confined.

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

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

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, 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 was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 29 May 2024.

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

29 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MIGUEL A. SANTA CRUZ JR., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32769 Before 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.

BRITTANY M. SPEIRS, Maj, USAFR
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 29 May 2024.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32769**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Miguel A. SANTA CRUZ JR.	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 29 May 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Second) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 30th day of May, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Second) is **GRANTED**. Appellant shall file any assignments of error not later than **7 July 2024**.

Each request for an enlargement of time will be considered on its merits. Appellant's counsel is advised that any subsequent motions for enlargement of time shall include, in addition to matters required under this court's Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time.

FOR THE COURT

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	
	)	Before Panel No. 1
Senior Airman (E-4) **MIGUEL A. SANTA CRUZ JR.,** United States Air Force,	)	No. ACM S32769
Appellant.	)	24 June 2024

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 Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **6 August 2024**. The record of trial was docketed with this Court on 8 February 2024. From the date of docketing to the present date, 137 days have elapsed. On the date requested, 180 days will have elapsed.

On 26 October 2023, at a special court-martial convened at Sheppard AFB, Texas, and comprised of a military judge alone, Appellant was found guilty, consistent with his pleas, of one charge and two specifications in violation of Article 112a, Uniform Code of Military Justice (UCMJ) (one specification of distribution of a controlled substance and one specification of use of a controlled substance). R. at 1, 10, 12, 14, 63. After acceptance of pleas, the Government withdrew and dismissed without prejudice one specification of introduction of a controlled substance onto a military installation, in violation of Article 112a, UCMJ, and one additional charge and specification of obstruction of justice, in violation of Article 131b, UCMJ. R. at 63. The military judge sentenced Appellant to a bad conduct discharge, a total of 85 days confinement (all confinement running concurrently), to be reduced to the grade of E-1, and to be reprimanded. R. at 127. The convening

authority took no action on the findings, approved the sentence in its entirety, and denied Appellant's request to waive "all automatic forfeitures for the remainder of his adjudged confinement." Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action* – United States v. SrA Miguel A. Santa Cruz Jr., dated 9 November 2023.

The trial transcript is 134 pages long and the record of trial is comprised of three volumes containing four Prosecution Exhibits, 14 Defense Exhibits, and four Appellate Exhibits. Appellant is not currently confined.

Appellant was advised of his right to a timely appeal. Appellant has been provided an update of the status of undersigned counsel's progress on his case. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

Through no fault of Appellant, undersigned counsel has been unable complete her review of Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise him regarding potential errors.

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

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, 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 was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 24 June 2024.

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

25 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MIGUEL A. SANTA CRUZ JR., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32769 Before 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.

J. PETE FERRELL, Lt Col, USAF
Director of Operations
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 25 June 2024.

J. PETE FERRELL, Lt Col, USAF
Director of Operations
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) **MIGUEL A. SANTA CRUZ JR.,** United States Air Force,	)	No. ACM S32769
Appellant.	)	26 July 2024

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 an enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **5 September 2024**. The record of trial was docketed with this Court on 8 February 2024. From the date of docketing to the present date, 169 days have elapsed. On the date requested, 210 days will have elapsed.

On 26 October 2023, at a special court-martial convened at Sheppard AFB, Texas, and comprised of a military judge alone, Appellant was found guilty, consistent with his pleas, of one charge and two specifications in violation of Article 112a, Uniform Code of Military Justice (UCMJ) (one specification of distribution of a controlled substance and one specification of use of a controlled substance). R. at 1, 10, 12, 14, 63. After acceptance of pleas, the Government withdrew and dismissed without prejudice one specification of introduction of a controlled substance onto a military installation, in violation of Article 112a, UCMJ, and one additional charge and specification of obstruction of justice, in violation of Article 131b, UCMJ. R. at 63. The military judge sentenced Appellant to a bad conduct discharge, a total of 85 days confinement (all confinement running concurrently), to be reduced to the grade of E-1, and to be reprimanded. R. at 127. The convening

authority took no action on the findings, approved the sentence in its entirety, and denied Appellant's request to waive "all automatic forfeitures for the remainder of his adjudged confinement." Record of Trial (ROT) Vol. 1, *Convening Authority Decision on Action* – United States v. SrA Miguel A. Santa Cruz Jr., dated 9 November 2023.

The trial transcript is 134 pages long and the record of trial is comprised of three volumes containing four Prosecution Exhibits, 14 Defense Exhibits, and four Appellate Exhibits. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel also provide the following information. Reservist appellate defense counsel, Lieutenant Colonel (Lt Col) Anthony Ghiotto, represents two appellate clients. Lt Col Ghiotto currently has two cases pending before this Court in which an AOE brief has not yet been filed, but this case is his first priority before this Court. Lt Col Ghiotto has completed his review of the record of trial and is currently researching and outlining for the AOE brief.

Active-duty appellate defense counsel, Captain (Capt) Samantha Castanien, is currently assigned 41 cases;[1] 31 cases are pending before this Court (23 cases are pending AOEs) and nine cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). On 19 July 2024, Capt Castanien filed a motion to withdraw as counsel from this case. The motion is still pending before this Court. Consequently, seven cases have priority over the present case:

1. *United States v. Giles*, No. ACM 40482 –The trial transcript is 791 pages long and the record of trial is comprised of seven volumes containing seven Prosecution Exhibits, 14 Defense Exhibits, and 49 Appellate Exhibits. Capt Castanien is currently reviewing this record.

[1] When two new military appellate defense counsel arrive in the office, this caseload will likely be reduced, but only as to the number of cases currently assigned to counsel pending before this Court.

2. *United States v. Baumgartner*, No. ACM 40413 – This appellant's AOE was submitted on 3 June 2024. This Court ordered affidavits from trial defense counsel in this case, which were provided on 23 July 2024. The Government's Answer is expected within 14 days after, upon which Capt Castanien will work on any Reply Brief.

3. *United States v. Casillas*, No. 24-0089/AF – Capt Castanien was assigned to take over this case from an appellate defense counsel who is changing assignments. This case was granted at the CAAF, and undersigned counsel assisted with the Grant Brief (submitted 19 July 2024) and will be handling the Reply Brief and any oral argument.

4. *United States v. Santiago Roldan*, No. ACM S32761 – Capt Castanien has requested to withdraw as counsel from this case so a more available military appellate defense counsel can review the case. This motion is pending, and unless and until it is granted, this case remains prioritized above Appellant's.

5. *United States v. Singleton*, No. ACM 40535 – The trial transcript is 1,738 pages long and the record of trial is comprised of twelve volumes containing six Prosecution Exhibits, 17 Defense Exhibits, one Court Exhibit, and 89 Appellate Exhibits. Appellant is currently confined. Capt Castanien has not yet completed her review of this appellant's record.

6. *United States v. Kim*, No. ACM 24007 – The record of trial is five volumes consisting of five Prosecution Exhibits, three Defense Exhibits, 27 Appellate Exhibits, and one court exhibit. The transcript is 421 pages. Appellant is not currently confined. Capt Castanien has not yet completed her review of this appellant's record.

7. *United States v. Hunt*, No. ACM 40563 - The record of trial is three volumes consisting of six Prosecution Exhibits, two Defense Exhibits, and 18 Appellate Exhibits. The transcript is 423

pages. Appellant is not currently confined. Capt Castanien has not yet completed her review of this appellant's record.

Appellant was advised of his right to a timely appeal. Appellant has been provided an update of the status of undersigned counsel's progress on his case. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

Through no fault of Appellant, undersigned counsel have been unable complete their review of Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise him regarding potential errors.

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

Respectfully submitted,

ANTHONY J. GHIOTTO, Lt Col, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

SAMANTHA M. CASTANIEN, Capt, 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 was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 26 July 2024.

ANTHONY J. GHIOTTO, Lt Col, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

26 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MIGUEL A. SANTA CRUZ JR., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32769 Before 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.

J. PETE FERRELL, Lt Col, USAF
Director of Operations
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 26 July 2024.

J. PETE FERRELL, Lt Col, USAF
Director of Operations
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,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 1
Senior Airman (E-4) **MIGUEL A. SANTA CRUZ JR.,** United States Air Force, *Appellant.*	)	No. ACM S32769 5 September 2024

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

ASSIGNMENTS OF ERROR

I.[1]

WHETHER TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT BY IMPERMISSIBILY INVITING THE MILITARY JUDGE TO SENTENCE SENIOR AIRMAN SANTA CRUZ MORE SEVERELY BASED UPON CHARGES THAT HAD BEEN WITHDRAWN AND DISMISSED.

II.

WHETHER SENIOR AIRMAN SANTA CRUZ'S SENTENCE IS INAPPROPERIATELY SEVERE.

STATEMENT OF THE CASE

On 26 October 2023, Appellant, Senior Airman (SrA) Miguel Santa Cruz, Jr., was tried by a special court-martial at Sheppard Air Force Base, Texas. In accordance with his pleas, the military judge found Appellant guilty of one charge, two specifications of distribution and use of cocaine, in violation of Article 112(a), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a (2018). The military judge sentenced Appellant to a reprimand, to a reduction in pay grade

[1] Issues I and II are raised in the Appendix pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

to E-1, to be discharged from the Air Force with a bad-conduct discharge (BCD), and to be confined for 85 days. Entry of Judgement; R. at 247. The Convening Authority took no action on the findings or sentence and denied the Appellant's request for waiver of all automatic forfeitures. Convening Authority Decision on Action.

ISSUES AND ARGUMENT

The undersigned appellate defense counsel attests that he has, on behalf of Appellant, carefully examined the record of trial in this case. Appellant does not admit the findings or sentence are correct in law and fact, but submits the case to this Honorable Court on its merits. However, Appellant personally submits two errors for this Court's consideration.

Respectfully submitted,

ANTHONY J. GHIOTTO, Lt Col, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

APPENDIX

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), SrA Santa Cruz, through appellate defense counsel, personally requests that this Court consider the following matters:

I.

TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT BY IMPERMISSIBILY INVITING THE MILITARY JUDGE TO SENTENCE SENIOR AIRMAN SANTA CRUZ MORE SEVERELY BASED UPON CHARGES THAT HAD BEEN WITHDRAWN AND DISMISSED.

FACTS

SrA Santa Cruz enlisted in the Air Force on or about 11 April 2017. Prosecution Exhibit (Pros. Ex.) 2. His initial assignment was to Kadena Air Base, Japan, as an outbound cargo technician. Pros. Ex. 3 at 1. During his time at Kadena Air Base, SrA Santa Cruz was married and the father to two young children. R. at 109.

In 2021, SrA Santa Cruz was reassigned to the 82d Logistics Readiness Squadron, Sheppard Air Force, Texas. Pros. Ex. 3 at 5. During his time at Sheppard Air Force Base, SrA Santa Cruz excelled professionally. He received recognition as the John Levitow Award winner at his Airman Leadership School, which recognized him as the top graduate of the course. R. at 97-99. Despite his professional success, he began struggling in his personal life. His marriage ended in divorce, and he was geographically separated from his two young children. R. at 109. This separation caused SrA Santa Cruz great stress and heartache. *Id.*

On or about 11 January 2023, the Air Force Office of Special Investigations (AFOSI) received information alleging that SrA Santa Cruz sold cocaine to a fellow junior enlisted member, Q.C. Pros. Ex. 1 at 2. AFOSI commenced an investigation and video-recorded SrA Santa Cruz selling cocaine to Q.C. *Id.* They also received search authorization of SrA Santa Cruz's vehicle,

located at Sheppard Air Force Base, where they found a substance later determined to be cocaine. *Id.* Later, AFOSI provided Q.C. with marked currency to use to purchase cocaine from SrA Santa Cruz. *Id.* at 3. Following the sale, AFOSI obtained the currency from SrA Santa Cruz's wallet. *Id.* Subsequently, SrA Santa Cruz's commander ordered SrA Santa Cruz to submit to a urinalysis. *Id.* His urine tested positive for cocaine. *Id.*

On or about 18 August 2023, SrA Santa Cruz's commander referred one charge in violation of Article 112(a), UCMJ, 10 U.S.C. § 912(a) to a special court-martial. Charge Sheet, 18 August 2023. The charge contained three specifications: one specification alleging the wrongful distribution of cocaine on divers occasions; one specification alleging the wrongful use of cocaine; and one specification of the wrongful introduction of cocaine onto Sheppard Air Force Base. *Id.* On or about 19 September 2023, SrA Santa Cruz's commander referred an additional charge to a special court-martial. Charge Sheet, 19 September 2023. This additional charge alleged that SrA Santa Cruz obstructed justice, in violation of Article 131(b), UCMJ, 10 U.S.C. § 931(b), by wrongfully attempting to persuade Q.C. not to testify at SrA Santa Cruz's court-martial. *Id.*

On or about 24 October 2024, SrA Santa Cruz agreed to a pretrial agreement with the convening authority. App. Ex. III at 4. Pursuant to the pretrial agreement, SrA Santa Cruz agreed to by tried by military judge alone and to plead guilty to the Article 112(a), UCMJ, charge, along with the first two specifications (wrongful distribution of cocaine on divers occasions and wrongful use of cocaine). *Id.* at 1-2. SrA Santa Cruz also agreed to enter into a stipulation of fact, which included six attachments, for a total of 193 pages. Pros. Ex. 1 at 1-4. In exchange for his guilty plea, the convening authority agreed to withdraw the third specification of the Article 112(a), UCMJ, charge (wrongful introduction of cocaine onto Sheppard Air Force Base) and the Article 131(b), UCMJ, obstruction of justice charge, which related to the allegation that SrA Santa Cruz

discouraged Q.C. from testifying against him. *Id.* at 2. The convening authority also agreed to limit the maximum confinement time to no more than three months. *Id.*

SrA Santa Cruz faced court-martial on 26 October 2023. Pursuant to his pleas, the military judge found SrA Santa Cruz guilty of violating Article 112(a), UCMJ, wrongful use of cocaine and wrongful distribution of cocaine on divers occasions. R. at 63. The convening authority withdrew and dismissed without prejudice the Article 131(b), UCMJ, charge, along with its specification, and the third specification of the Article 112(a), UCMJ, charge. *Id.*

During sentencing argument, trial counsel introduced a record of Non-Judicial Punishment SrA Santa Cruz received in 2017. Pros. Ex. 4. SrA Santa Cruz received the Non-Judicial Punishment for allowing a member of the opposite sex into his dorm room at technical school. *Id.* argued the facts that formed the bases for the withdrawn and dismissed charges. Specifically, trial counsel argued that "you'll see where Senior Ariman Santa Cruz's wallet was found in the vehicle … you'll see the cocaine that was found in his wallet that he brought onto the installation." R. at 114. Further, trial counsel argued that "[b]oth offenses for which Senior Airman Santa Cruz has been found guilty of are serious offenses, distribution and use, and should receive a severe punishment due to the nature of the offenses. Aggravating the distribution and use is the fact that he brought cocaine onto base." R. at 117. Similarly, trial counsel argued, "[y]ou can hear Senior Airman Santa Cruz tell [Q.C.] to delete her messages. This shows Senior Airman Santa Cruz's knowledge of what he was doing was illegal and a blatant disrespect for the law." R. at 114. Defense counsel did not object to this argument.

STANDARD OF REVIEW

Claims of prosecutorial misconduct and improper argument are reviewed de novo. *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019) (citation omitted). "When a party does not object

to comments by the prosecutor during voir dire, opening statement, argument on the findings, or argument on the sentence, we review for plain error." *United States v. Palacios Cueto*, 82 M.J. 323, 333 (C.A.A.F. 2022) (citations omitted).

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. *United States v. Erickson,* 65 M.J. 221, 223 (C.A.A.F. 2007). The burden to establish plain error is on the appellant. *Id.*

LAW

"Trial prosecutorial misconduct is behavior by the prosecuting attorney that 'oversteps the bounds of that proprietary and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'" *United States v Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005) (quoting *Berger v. United States,* 295 U.S. 78, 84 (1935)). "Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, *e.g.*, a constitutional provision, a statute, a Manual rule, or an applicable professional ethics cannon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996) (citing *Berger*, 295 U.S. at 88).

A prosecutor arguing uncharged misconduct during sentencing arguments may constitute prosecutorial misconduct. *United States v. Tyler*, 81 M.J. 108, 111 (C.A.A.F. 2021). In determining whether the use of uncharged misconduct in a sentencing argument constitutes prosecutorial misconduct, military appellate courts will consider whether there was error, whether the error was clear or obvious, and whether the error results in material prejudice to a substantial right of the accused. *Id.* In determining whether the use of uncharged misconduct in sentencing argument prejudices the accused, the Court of Appeals for the Armed Forces balances three factors: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and

(3) the weight of evidence supporting the conviction." *Palacios Cueto*, 82 M.J. at 334 (quoting *Fletcher*, 62 M.J. at 184). The burden to establish plain error, including prejudice, is on the appellant. *Id.*

When analyzing allegations of prosecutorial misconduct in the context of improper sentencing argument, military courts will "consider whether trial counsel's comments, taken as a whole, were so damaging that we 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) (citation omitted). Military judges are presumed to know the law and to follow it, absent evidence to the contrary. *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997).

ANALYSIS

Here, trial counsel used previously charged – but later dismissed and withdrawn – conduct throughout the sentencing argument, constituting clear error. This effort to induce the military judge to sentence SrA Santa Cruz for bringing cocaine onto an Air Force installation and suggesting to Q.C. that she delete text messages related to cocaine materially prejudiced SrA Santa Cruz's right to be sentenced based on the conduct for which he was convicted for three reasons.

First, trial counsel argued uncharged misconduct and such argument amounts to error. After withdrawing and dismissing allegations about the wrongful introduction of cocaine onto an Air Force installation and attempting to persuade Q.C. from testifying at his trial, trial counsel argued as if those offenses were still before the Court. R. at 113-19. This argument was improper because the law required SrA Santa Cruz be sentenced for the offenses of which he was convicted, not those unrelated offenses about which the government had agreed to withdraw and dismiss.

Second, such errors were clear and obvious. The government withdrew and dismissed the specifications prior to sentencing, of which the military judge was aware. R. at 63. Trial counsel

explicitly argued that bringing the cocaine onto the installation aggravated the offense. R. 114. Further, trial counsel specified that SrA Santa Cruz requested Q.C. delete her text messages. *Id.* While these facts were included in the Stipulation of Fact, they were used by trial counsel in sentencing in a manner befitting charged misconduct. Pros. Ex. 1. But again, the government withdrew and dismissed both the introduction and obstruction of justice charge prior to sentencing. As such, the error in arguing previously charged, but at the time uncharged misconduct, was clear and obvious.

Third, trial counsel arguing of uncharged misconduct resulted in material prejudice to a substantial right of SrA Santa Cruz. Such an analysis begins by considering the severity of the misconduct. *Fletcher*, 62 M.J. at 184. Here, the argued uncharged misconduct was serious in nature. By trial counsel's own admission, the charged misconduct – distributing cocaine – was made more egregious by the fact that SrA Santa Cruz allegedly brought the cocaine onto an Air Force installation. Comparably, trial counsel argued that SrA Santa Cruz requesting Q.C. delete her text messages proved he had knowledge of the wrongfulness of his actions and that he disregarded the lawfulness of them. Both instances of uncharged misconduct were used as matters of aggravation. Additionally, the government did initially charge SrA Santa Cruz with both these offenses, highlighting that the government considered them serious enough to warrant preferral and referral of charges. Thus, these instances of what was, at the time of sentencing, uncharged misconduct were serious in nature.

Additionally, the analysis of whether the use of uncharged misconduct in sentencing results in material prejudice of a substantial right of SrA Santa Cruz requires considering the measures adopted to cure the misconduct. *Fletcher*, 62 M.J. at 82. There were no measures to cure this misconduct. There was no objection from trial defense counsel, and neither the military judge nor

counsel articulated the proper use of this uncharged misconduct. While the court in *United States v. Gilley* found the "lack of a defense objection is some measure of the minimal impact of a prosecutor's improper comment," that is not the end of the analysis. *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001) (internal quotation marks and citation omitted). As *Erickson* points out, while there is a presumption that the military judge is expected to know and follow the law, evidence in the record could rebut that presumption. *Erickson*, 65 M.J. at 225. For example, in a judge alone case, when the military judge is presumed to know the law, prejudice can still be established. *See generally United States v. Cannon*, ARMY 20180580, 2020 CCA LEXIS 254, at *11 (A. Ct. Crim. App. Jul. 31, 2020) (holding a military judge's decision to consider and admit uncharged misconduct in error resulted in prejudice to the accused by influencing the adjudged sentence when it was both cumulative in nature and tied to the specific request that the military judge consider it when sentencing the accused). As such, the presumption that the military judge knows the law can be overcome based on the record itself.

The record itself supports that the military judge failed to follow the law by allowing the trial counsel to argue uncharged misconduct that had previously been charged but dismissed and withdrawn by the government. During the court-martial proceedings, SrA Santa Cruz pled not guilty to the introduction specification and the obstruction of justice charge. R. at 14. The military judge received the pretrial agreement where the convening authority agreed to withdraw and dismiss these charges. R. at 42-60. From these exchanges in the record, the military judge was well-aware that SrA Santa Cruz was no longer charged with introduction of cocaine or obstruction of justice. Nonetheless, the military judge allowed trial counsel to argue these matters in aggravation during sentencing.

The final consideration is considering whether the weight of the evidence supported the adjudged sentence. SrA Santa Cruz admitted during this court-martial to using and distributing cocaine. R. at 17-63. In turn, the government relied heavily upon these admissions in arguing for a BCD. However, the government obtained this evidence – SrA Santa Cruz's admissions – through his own statements during the court-martial. SrA Santa Cruz agreed to plead guilty, knowing that he would have to explain his guilt to the military judge during the court-martial, in exchange for the convening authority withdrawing and dismissing the introduction and obstruction of justice charges. Allowing the government to obtain a guilty plea, obtain evidence to support the guilty plea through the accused's own admissions at a guilty plea by promising to dismiss and withdraw charges, and then use those very dismissed charges to argue matters in aggravation, materially prejudiced the right of SrA Santa Cruz to receive a fair and impartial sentence. SrA Santa Cruz received nearly the maximum punishment allowed by his pretrial agreement – 85 days of confinement – in addition to a BCD that was not required as part of the pretrial agreement. App. Ex. III, Entry of Judgment. The comments made by trial counsel in sentencing, relying on uncharged introduction of cocaine and obstruction of justice to argue for a severe punishment, materially prejudiced SrA Santa Cruz's right to be sentenced for the offenses he was convicted of and, that this Court cannot be confident that SrA Santa Cruz was punished merely on the evidence presented.

II.

SENIOR AIRMAN SANTA CRUZ'S SENTENCE IS INAPPROPERIATELY SEVERE.

STANDARD OF REVIEW

The appropriateness of a sentence is reviewed de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006).

LAW

This Court "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as [it] finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1)(A), UCMJ, 10 U.S.C. § 866(d)(1)(A). Considerations include "the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." *United States v. Fields*, 74 M.J. 619, 625 (A.F. Ct. Crim. App. 2015) (quoting *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006)). "The breadth of the power granted to the Courts of Criminal Appeals to review a case for sentence appropriateness is one of the unique and longstanding features of the [UCMJ]." *United States v. Hutchison*, 57 M.J. 231, 233 (C.A.A.F. 2002) (citations omitted). This Court's role in reviewing sentences under Article 66(d) is to "do justice," as distinguished from the discretionary power of the convening authority to grant mercy. *See United States v. Boone*, 49 M.J. 187, 192 (C.A.A.F. 1998). In reviewing sentence appropriateness, the Court must also be sensitive to considerations of uniformity and even-handedness. *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001).

ANALYSIS

Here, when considering the charge, the facts surrounding the charged offenses, SrA Santa Cruz's life experiences and prior service, and his acceptance of complete responsibility, the military judge's sentencing of a BCD is inappropriately severe.

First, the facts surrounding the charged offenses suggest the BCD was overly severe. The military judge found SrA Santa Cruz guilty of distribution and use of cocaine. Entry of Judgment. Beginning with the use of cocaine, SrA Santa Cruz admitted to a single use of cocaine. R. at 37-40. By SrA Santa Cruz's own admission, he was suffering from depression and guilt for not

being present for his two younger children at the time of his use. R. at 109-10. While this depression led him to use cocaine one single time as a coping mechanism, he did not go back for a second try. *Id.* Regarding the distribution specification, although SrA Santa Cruz admitted to distributing cocaine to a fellow Airman on five separate occasions, the surrounding context reveals that it was not for a corrupting purpose. Instead, each distribution was to Q.C. and at Q.C.'s request, with SrA Santa Cruz apprehending that Q.C. was a prior user. Pros. Ex. 1 at 2; R. at 25-34. There was no evidence that SrA Santa Cruz initiated any distribution, sought out other airmen seeking cocaine, or influenced any other airmen into using cocaine. His distribution ultimately consisted of serving as a middleman, obtaining cocaine from a civilian off-base and then providing it to Q.C. When placed in such context, the permanent stain of a BCD is overly severe.

Second, SrA Santa Cruz's life experiences and prior service render the BCD overly severe. At the sentencing proceedings, SrA Santa Cruz presented testimony from four witnesses who testified to his positive character and his potential for rehabilitation. R. at 87-107. His mother highlighted that he was a mentor in their church, a teacher, and a tutor to children, helping them learn English. R. at 89. His supervisor testified that SrA Santa Cruz won the Levitow Award at Airman Leadership School as the top graduate, in addition to winning quarterly wing recognition. R. at 97-98. His prior commander testified that SrA Santa Cruz was a "quiet and humble leader" and that his squadron capitalized on SrA Santa Cruz's "awesome mentorship and other things." R. at 106. This testimony was in addition to character statements provided by twelve other witnesses that attested to SrA Santa Cruz's character and rehabilitative potential. Defense Exhibits B-M.

While the government argued that SrA Santa Cruz's service was not so admirable, highlighting Non-Judicial Punishment he received in 2017, that Non-Judicial Punishment was for allowing a member of the opposite sex into his dorm room. Pros. Ex. 4. SrA Santa Cruz had submitted matters in mitigation of that Non-Judicial Punishment, but the government did not offer the response into evidence at this court-martial, asserting the response was not maintained by the government. R. at 67-69. As such, the military judge did not have any context relating to the Non-Judicial Punishment when he sentenced SrA Santa Cruz to a BCD. Further, this Non-Judicial Punishment was the only prior misconduct presented by the government. R. at 65-74. For the nearly seven years that followed the Non-Judicial Punishment, SrA Santa Cruz exhibited honorable service. If anything, the Non-Judicial Punishment reflected a positive change in SrA Santa Cruz. Department of the Air Force Instruction (DAFI) 51-202, ¶ 1.1 (4 January 2022). Overall, when considering SrA Santa Cruz's life experience entire military service, a BCD is overly severe.

Third, the BCD fails to take into consideration SrA Santa Cruz's acceptance of complete responsibility. SrA Santa Cruz pled guilty to distribution and use of cocaine. In doing so, he saved the government the time and resources required to prove his guilt. Throughout his court-martial proceedings, SrA Santa Cruz recognized his actions and the consequences that arose from them. He refused to make excuses or to blame others for his misconduct. His acceptance of complete responsibility has come at great cost for SrA Santa Cruz. He now has three children and a wife to provide for. Clemency Request, 6 November 2023. The BCD serves as a permanent stain on his service, restricting him from obtaining veteran services and from securing stable civilian employment. Therefore, based on the convicted offenses and the mitigation and extenuation evidence provided at sentencing by SrA Santa Cruz, a BCD is overly severe.

WHEREFOR, SrA Santa Cruz respectfully requests this Honorable Court disapprove his BCD, leaving his underlying conviction in place.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 5 September 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENT OF ERROR
v.	)	Before Panel No. 1
Senior Airman (E-4) **MIGUEL A. SANTA CRUZ** United States Air Force *Appellant.*	)	No. ACM S32769 7 October 2024

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

ISSUES PRESENTED

I.

WHETHER TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT BY IMPERMISSIBILY INVITING THE MILITARY JUDGE TO SENTENCE SENIOR AIRMAN SANTA CRUZ MORE SEVERELY BASED UPON CHARGES THAT HAD BEEN WITHDRAWN AND DISMISSED.

II.

WHETHER SENIOR AIRMAN SANTA CRUZ'S SENTENCE IS INAPPROPERIATELY SEVERE.

STATEMENT OF CASE

The United States generally agrees with Appellant's statement of the case. Appellant raises both issues pursuant to United States v. Grostefon, 12 M.J.431 (C.M.A. 1982).

STATEMENT OF FACTS

1. Plea Agreement

Appellant signed a plea agreement with the Government on 24 October 2024. (ROT, Vol 2). Appellant agreed to plead guilty to the Charge, Specification 1, distribution of cocaine, and

Specification 2, use of cocaine, both in violation of Article 112a, Uniform Code of military Justice (UCMJ). In exchange for this plea, the Convening Authority agreed to withdraw and dismiss both Specification 3 of the Charge, wrongful introduction of cocaine onto Sheppard Air Force Base (AFB), TX, and the Additional Charge, obstructing justice in violation of Article 131b, UCMJ. In addition, a single limitation was placed on the military judge's ability to sentence Appellant: a maximum of 90 days confinement to be served concurrently for Specifications 1 and 2. No other sentencing limitations were placed, outside of those inherent to a special court-martial.

2. Stipulation of Fact

Pursuant to the plea agreement, Appellant and the Government signed a Stipulation of Fact on 25 October 2023. In the opening preamble, the stipulation clarified that "[t]he attachments to this document are agreed upon by the parties and admissible for all purposes, to include any findings and sentencing proceedings, relating to the charge and specifications." (ROT, Vol. 1).

Within the Stipulation of Fact, Appellant admitted that the Air Force Office of Special Investigations found cocaine in his vehicle during a lawful search. (ROT, Vol 1). Attachment 2 to the Stipulation of Fact contains photographs of the vehicle on Sheppard Air Force Base, TX taken during this search. Id. Attachment 1 to the Stipulation of Fact is a recording of Appellant selling cocaine to another airman, QC. Id. Appellant tells her to "delete her messages" regarding their transaction. Id. When discussing another person's desire to use marijuana, Appellant told QC to "just be careful," and "if you need something just let me know." Id.

3. Appellant's Rights Advisement by Military Judge.

Appellant pled guilty to Specifications 1 and 2. (R. at 14). The military judge then discussed what a guilty plea meant with Appellant. Id. Appellant stated on the record that he understood he was waiving his rights against self-incrimination, to a trial on the facts, and to be confronted by and cross-examine witnesses. (R. at 15-16). Appellant further stated he understood that anything he said while under oath to the military judge might be used against him in sentencing. (R. at 16).

Before accepting the Stipulation of Fact as evidence, the military judge advised Appellant that Appellant was asserting the contents of the Stipulation of Fact were true and would be treated as uncontradicted facts. (R. at 18). The military judge further asked Appellant if he was entering into the Stipulation of Fact voluntarily, and Appellant answered in the affirmative. Id. The military judge then advised Appellant that, if entered into evidence, the contents of the Stipulation of Fact could be considered as evidence of both Appellant's guilt and to determine an appropriate sentence. Id. Appellant stated he understood. Id. Both the military judge and Appellant silently read through the Stipulation of Fact in open court, and Appellant confirmed he had no corrections or disagreements with the contents. (R. at 19-20). The Stipulation of Fact was admitted in its entirety as Prosecution Exhibit 1. (R. at 20).

The military judge accepted Appellant's plea. (R. at 62). Following this, the military judge further advised Appellant of his ability to request to withdraw his plea anytime between acceptance of his plea and announcement of his sentence. (R. at 62). Trial Counsel withdrew and dismissed Specification 3 and the Additional Charge.

4. Trial Counsel's Sentencing Argument

When discussing the recorded sale of cocaine by Appellant to AC, trial counsel advised

the military judge that he could "hear [Appellant] tell [AC] to delete her messages." (R. at 114). Trial counsel pointed to this statement as evidence Appellant knew "what he was doing was illegal and a blatant disrespect for the law." Id. Trial counsel then invited the military judge to examine Attachment 2 of the Stipulation of Fact for the photographs of the cocaine "found in [Appellant's] wallet that he brought onto the installation." Id. When advocating for Appellant to receive a bad-conduct discharge, trial counsel later stated, "[a]ggravating the distribution and use is the fact that he brought cocaine onto base." (R. at 117). When discussing a fine, trial counsel advocated for Appellant to be fined a total of $490, $70 of which would be for "the cocaine he brought onto the installation." (R. at 118). Trial defense counsel did not object to any of these statements.

Following completion of trial counsel's sentencing argument, Appellant made no request to withdraw his plea prior to announcement of his sentence.

5. Adjudged Sentence

The military judge sentenced Appellant to a reprimand, a total of 85 days confinement, reduction to Airman Basic, and a bad-conduct discharge.

ARGUMENT

I.

TRIAL COUNSEL DID NOT MAKE IMPROPER ARGUMENT THROUGH REFERENCE TO EVIDENCE CONTAINED WITHIN THE STIPULATION OF FACT[1]

Standard of Review

This Court reviews "prosecutorial misconduct and improper argument de novo." United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019) (citing United States v. Andrews, 77 M.J. 393,

[1] This issue is raised in the appendix pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

398 (C.A.A.F. 2018). If no objection was made by trial defense counsel, this Court reviews for plain error. Id. The burden of proof under a plain error review is on the appellant. Id. To prevail under a plain error analysis, an appellant must demonstrate that: "(1) there was an error; (2) it was clear or obvious; and (3) the error materially prejudiced a substantial right of the accused." United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005).

A plain error review of a failure to object to an argument at the time of trial rule exists "to prevent defense counsel from remaining silent, making no objection, and then raising the issue on appeal for the first time, long after any possibility of curing the problem has vanished. It is important to encourage all trial participants to seek a fair and accurate trial the first time around." United States v. Reist, 50 M.J. 108, 110 (C.A.A.F. 1999) (internal quotations omitted).

Law and Analysis

"During sentencing argument, 'the trial counsel is at liberty to strike hard, but not foul, blows.'" United States v. Halpin, 71 M.J. 477, 479 (C.A.A.F. 2013) (citing United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000). "[T]rial counsel may 'argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence.'" Id.

There was no error in this case save for trial counsel's request that $70 of the recommended fine be attributed to the cocaine Appellant brought onto Sheppard AFB. (R. at 118). And that error did not prejudice Appellant who was not adjudged a fine.

Appellant understood from both his Stipulation of Fact and his advisement by the military judge that any evidence admitted for his guilty plea might be used against him to determine a proper sentence. (R. at 18; ROT, Vol 1). Trial counsel then properly argued such evidence in aggravation under Rules for Court-Martial (RCM) 1001(b)(4). Appellant's decision to bring cocaine onto Sheppard AFB and keep it in his wallet for easy access directly related to

his convictions for use of cocaine. In the same vein, Appellant's statement to QC to delete her messages did reasonably create an inference that he knew his conduct was wrong and proceeded with his course of action anyway. That evidence was directly related to his conviction for distribution of cocaine to QC on divers occasions. This evidence was properly admitted during findings, and trial counsel was permitted to comment on it. In contrast, trial counsel's request that Appellant be fined for bringing cocaine onto the installation was outside the bounds of proper argument. However, as discussed below, this error did not prejudice Appellant.

Even assuming trial counsel's other comments somehow constituted an error, it was not clear or obvious. Under RCM 910(h) and as he was advised by the military judge, Appellant could have requested to withdraw his plea at any time after acceptance but before the sentence was announced. Despite hearing trial counsel's sentencing argument, he made no effort to do so. Trial defense counsel likewise did not object to trial counsel's statements because there was no clear and obvious error in the argument.

Finally, there was no prejudice to Appellant. When assessing prejudice stemming from prosecutorial misconduct in findings argument, a balancing test is conducted weighing: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." Fletcher, 62 M.J. at 184. For prosecutorial misconduct in sentencing arguments, this same test is applied to determine "whether trial counsel's comments, taken as a whole, were so damaging that [this Court] cannot be confident that [Appellant] was sentenced on the basis of the evidence alone." United States v. Erickson, 65 M.J. 221, 224 (C.A.A.F. 2007) (internal quotation marks omitted). In Voorhees, CAAF said the test for prejudice amounts to whether there was "a reasonable probability that, but for the error,

the outcome of the proceeding would have been different." Voorhees, 79 M.J. at 9 (*quoting* United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017).

Appellant was sentenced based on the evidence, and there is no reasonable probability that Appellant's sentence would have been different absent trial counsel's comments.

Addressing first the recommendation of a fine partially based on Appellant's introduction of cocaine onto the installation, this Court can be certain Appellant was not prejudiced because the military judge did not adjudge *any* fine in this case. None of Appellant's sentence can be tied to that portion of trial counsel's argument.

For the other two comments, compared to Voorhees trial counsel's references, even if they were error, were not "severe" or "sustained throughout [the] argument." 79 M.J. at 12. Trial counsel's sentencing argument covers approximately six pages of the transcript. Excluding trial defense counsel's unrelated objection, trial counsel used just under 1250 words. Of those, only 54 pertained to Appellant's introduction of cocaine onto the installation and his instruction to QC to delete her messages. The majority of trial counsel's argument focused on the five sales of cocaine to one of his fellow airman and his numerous text messages regarding cocaine.

Per RCM 1002(a)(2), the military judge sentenced Appellant in line with his plea agreement, and in fact sentenced him to *less* than the maximum confinement permitted. There is no evidence that the military judge found trial counsel's reference to Appellant's introduction of cocaine to the installation or his instruction to QC to delete her text messages so persuasive that it altered his sentence determination.

Next, there were no curative measures necessary in this case. Military judges are presumed to know and follow the law. *See* United States v. Mason, 45 M.J. 483, 484 (C.A.A.F. 1997). The military judge was permitted to sentence Appellant on the "basis of the evidence

alone." Erickson, 65 M.J. at 224. Military judges are also presumed to be "able to distinguish between proper and improper sentencing arguments." Id. at 225. Appellant believes that the military judge's decision to listen to trial counsel's argument without comment on the withdrawn and dismissed charges rebuts the presumption that the military judge knew and followed the law. (App. Br. at 9). However, when there is no panel of members to hear improper remarks, the military judge need not provide a curative instruction. Id. (internal citations omitted). Erickson addressed almost Appellant's exact scenario and found the military judge's failure to reference an improper argument and "state on the record that he would not consider" does not rebut the presumption that he followed the law. In this case the military judge, when responding to a different objection by trial defense counsel during trial counsel's sentencing argument, went so far as to state on the record that he was "certainly aware that arguments of counsel aren't evidence and will consider the evidence as it exists." The military judge knew the law, and sentenced Appellant accordingly. Nothing in the record suggests that the military judge believed that he could sentence Appellant for uncharged misconduct. The military judge's correct understanding of the law is bolstered by the fact that he rejected trial counsel's improper request for a fine.

Finally, the weight of the evidence supported Appellant's sentence. Excluding trial counsel's commentary about introduction and deleting messages, Appellant admitted to distributing cocaine to a fellow airman on five separate occasions and then proceeded to use cocaine himself. As trial counsel stated, distributing cocaine to a coworker can "destroy careers, discipline, morale, and unit cohesion." (R. at 117). The evidence against Appellant supported the sentence adjudged.

There was no error in trial counsel's sentencing argument, save for the argument regarding the fine. Even if there was, it was not clear and obvious, and no error prejudiced any of Appellant's substantial rights. This Court should deny this assignment of error.

II.

APPELLANT'S SENTENCE WAS NOT INAPPROPRIATELY SEVERE[2]

Standard of Review

Under Article 66(d), UCMJ, the Court of Criminal Appeals reviews sentence appropriateness de novo. United States v. McAlhaney, 83 M.J. 164, 166 (C.A.A.F. 2023) (citing Lane, 64 M.J. at 2). "The Court may affirm only 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." 10 U.S.C. § 866(d)(1)(A), UCMJ (2021)

Law and Analysis

An adjudged sentence "is a matter within the discretion of the court-martial. A court-martial may adjudge any punishment authorized in this Manual in order to achieve the purposes of sentencing." R.C.M. 1002(a). Sentence appropriateness is assessed "by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial." United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009). Although this Court has great discretion to determine whether a sentence is appropriate, the Court lacks any authority grant mercy. United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted). Unlike the act of bestowing mercy through clemency, which was delegated to other channels by Congress, this Court is entrusted with the

[2] This issue is raised in the appendix pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

task of determining sentence appropriateness, thereby ensuring the accused gets the punishment he deserves. United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988).

Appellant's sentence should be affirmed as entered on the Entry of Judgment because Appellant received the punishment he deserved. A bad-conduct discharge is "a punishment for bad-conduct rather than as a punishment for serious offenses of either a civilian or military nature." R.C.M. 1003(b)(8)(C) (emphasis added). A bad-conduct discharge does not require some level of severity. In fact, the exact opposite is true; multiple minor infractions could warrant a bad-conduct discharge. A bad-conduct discharge "is also appropriate for an accused who has been convicted repeatedly of minor offenses and whose punitive separation appears to be necessary." R.C.M. 1003(b)(8)(C) (emphasis added). Appellant was convicted of use and distribution of cocaine. His distribution conviction was for divers occasions, and the evidence captured five instances where he sold cocaine for $70 to another airman.

The military judge considered the evidence and demonstrated his discretion as the sentencing authority by adjudging no forfeitures, less than the maximum permitted confinement, reduction to Airman Basic, and a bad-conduct discharge. (*Entry of Judgment*, ROT, Vol. 1). Each of these punishments was authorized under the UCMJ and plea agreement and are appropriate in this case.

Appellant was not entitled to a sentence without a punitive discharge just because he was willing to plead guilty. Had that been his goal, he could have demanded a ban on a punitive discharge be included in the plea agreement. If trial counsel had not agreed, Appellant had the right to proceed to trial. Furthermore, the plea agreement need not *require* a bad-conduct discharge for a military judge to adjudge one. The repetitive nature of Appellant's conduct with another airman makes a bad-conduct discharge appropriate and well within the military judge's

discretion as the sentencing authority. As trial counsel pointed out, Appellant had "knowledge of what he was doing was illegal and a blatant disrespect for the law." Appellant's disagreement with the military judge does not make his bad-conduct discharge an inappropriately severe punishment.

Appellant's attempt to downplay the severity of his offenses is also unpersuasive. Despite saying he only sold to QC at her request, on the recording he invited her to contact him if she "need[ed] something," encouraging future use of him as a self-described "middleman" in drug deals. (App. Brief at 12; ROT, Vol 1). Appellant's actions jeopardized not only his own Air Force career, but also QC's. Rather than help her stay away from drugs like a good wingman, Appellant support QC's illegal drug use and offered to continue to do so.

Appellant's protest that he only used cocaine a single time while depressed likewise fails. Appellant had access to the same resources as all military members: mental health, the chaplain, and his leadership. Instead of using these, he used cocaine. His depression regarding his familial situation did not force him to use cocaine, and it did not force him to distribute it to QC on multiple occasions. His voluntary admission and regret do not make his bad-conduct discharge inappropriately severe.

What Appellant is asking of this court is for an act of clemency, which is not permitted under the law. While the adjudged bad-conduct discharge will have lasting consequences on Appellant's life outside of military service, that does not make it inappropriately severe given the facts of his case.

This Court should find Appellant's arguments unpersuasive and his sentence including a bad-conduct discharge appropriate. Appellant's claim does not warrant leniency, and this Court has no authority to grant mercy. This Court should deny this assignment of error.

CONCLUSION

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

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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 7 October 2024.

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