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. 2
Senior Airman (E-4), **MIGUEL A. LOZORIA** United States Air Force *Appellant*	)	No. ACM S32723 9 May 2022

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file an assignments of error. Appellant requests an enlargement for a period of 60 days, which will end on **16 July 2022.** The record of trial was docketed with this Court on 18 March 2022. From the date of docketing to the present date, 52 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.

[redacted]
MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division (AF/JAJA)
[redacted]

GRANTED
10 MAY 2022

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 9 May 2022.

[redacted]
MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division (AF/JAJA)
[redacted]

9 May 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MIGUEL A. LOZORIA, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32723 Panel No. 2

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

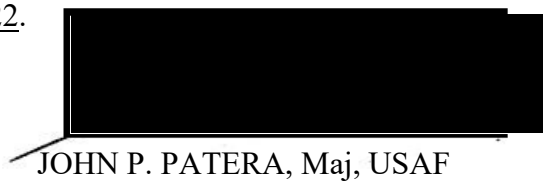
Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

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

[redacted]
JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 9 May 2022.



JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Senior Airman (E-4), **MIGUEL A. LOZORIA** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)** Before Panel No. 2 No. ACM S32723 6 July 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **15 August 2022.** The record of trial was docketed with this Court on 18 March 2022. From the date of docketing to the present date, 110 days have elapsed. On the date requested, 150 days will have elapsed.

On 16 January 2022, at a special court-martial at Scott Air Force Base (AFB), Illinois, Senior Airman Miguel A. Lozoria pleaded guilty before a military judge to wrongful use of lysergic acid diethylamide (LSD) and wrongful introduction of LSD onto Scott AFB, in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a (2019). (Record (R.) at 13, 16; Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 22 Feb. 2022.) The military judge sentenced SrA Lozoria to 31 days' nt, hard labor without confinement for 60 days, a bad-conduct discharge, he grade of E-1, and a reprimand. (R. at 155.) The convening authority took

GRANTED
7 JULY 2022

no action on the findings or sentence. (Convening Authority Decision on Action, ROT Vol. 1, 1 Feb. 2022.)

The record of trial consists of five prosecution exhibits, nine defense exhibits, and four appellate exhibits. The transcript is 156 pages. SrA Lozoria is not currently confined.

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

[redacted]
MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
(AF/JAJA)
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 6 July 2022.

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
(AF/JAJA)
[redacted]

7 July 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MIGUEL A. LOZORIA, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32723 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 7 July 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Senior Airman (E-4), **MIGUEL A. LOZORIA** United States Air Force *Appellant*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)** Before Panel No. 2 No. ACM S32723 1 August 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **14 September 2022.** The record of trial was docketed with this Court on 18 March 2022. From the date of docketing to the present date, 136 days have elapsed. On the date requested, 180 days will have elapsed.

On 16 January 2022, at a special court-martial at Scott Air Force Base (AFB), Illinois, Senior Airman Miguel A. Lozoria pleaded guilty before a military judge to wrongful use of lysergic acid diethylamide (LSD) and wrongful introduction of LSD onto Scott AFB, in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a (2019). (Record (R.) at 13, 16; Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 22 Feb. 2022.) The military judge sentenced SrA Lozoria to 31 days' c hard labor without confinement for 60 days, a bad-conduct discharge, r grade of E-1, and a reprimand. (R. at 155.) The convening authority took

GRANTED
2 AUG 2022

no action on the findings or sentence. (Convening Authority Decision on Action, ROT Vol. 1, 1 Feb. 2022.)

The record of trial consists of five prosecution exhibits, nine defense exhibits, and four appellate exhibits. The transcript is 156 pages. SrA Lozoria is not currently confined.

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

[redacted]
MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
(AF/JAJA)
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 1 August 2022.

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
(AF/JAJA)
[redacted]

2 August 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MIGUEL A. LOZORIA, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32723 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 2 August 2022.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	
	)	Before Panel No. 2
Senior Airman (E-4), **MIGUEL A. LOZORIA** United States Air Force	)	No. ACM S32723
Appellant	)	30 August 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **14 October 2022.** The record of trial was docketed with this Court on 18 March 2022. From the date of docketing to the present date, 165 days have elapsed. On the date requested, 210 days will have elapsed.

On 16 January 2022, at a special court-martial at Scott Air Force Base (AFB), Illinois, Senior Airman Miguel A. Lozoria pleaded guilty before a military judge to wrongful use of lysergic acid diethylamide (LSD) and wrongful introduction of LSD onto Scott AFB, in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a (2019). (Record (R.) at 13, 16; Entry of Judgment (EOJ), Record of Vol. 1, 22 Feb. 2022.) The military judge sentenced SrA Lozoria to 31 days' t, hard labor without confinement for 60 days, a bad-conduct discharge, e grade of E-1, and a reprimand. (R. at 155.) The convening authority took

GRANTED
1 SEP 2022

no action on the findings or sentence. (Convening Authority Decision on Action, ROT Vol. 1, 1 Feb. 2022.)

The record of trial consists of five prosecution exhibits, nine defense exhibits, and four appellate exhibits. The transcript is 156 pages. SrA Lozoria is not currently confined.

Counsel is currently assigned 21 cases, with 7 pending initial brief before this Court. Counsel has not yet begun review in this case. Three cases at the Air Force Court has priority over this case:

1. *United States v. Williamson*, ACM 40211. The record of trial consists of 18 prosecution exhibits, 28 defense exhibits, 42 appellate exhibits, and 2 court exhibits. The transcript is 653 pages. Counsel has completed review of this record and begun drafting the AOE.
2. *United States v. Palik*, ACM 40225. The record of trial consists of 5 prosecution exhibits, 15 defense exhibits, 50 appellate exhibits, and 1 court exhibit. The transcript is 1002 pages. Counsel has begun review of this record.
3. *United States v. Paugh*, ACM 40231. The record of trial consists of 13 prosecution exhibits, 10 defense exhibits, 7 appellate exhibits, and 1 court exhibit. The transcript is 224 pages. Counsel has not yet begun review of this record.

Additionally, counsel will be preparing for oral argument in *United States v. Day*, ACM 39962, and *United States v. Harrington*, ACM 39825, which will be argued at the CAAF on consecutive days in late October.

Through no fault of SrA Lozoria, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. SrA Lozoria was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review SrA Lozoria's case and advise him regarding potential errors.

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

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
(AF/JAJA)
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 30 August 2022.

[redacted]
MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
(AF/JAJA)
[redacted]

31 August 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MIGUEL A. LOZORIA, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32723 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 31 August 2022.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	
	)	Before Panel No. 2
Senior Airman (E-4), **MIGUEL A. LOZORIA** United States Air Force	)	No. ACM S32723
Appellant	)	3 October 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **13 November 2022.** The record of trial was docketed with this Court on 18 March 2022. From the date of docketing to the present date, 199 days have elapsed. On the date requested, 240 days will have elapsed.

On 16 January 2022, at a special court-martial at Scott Air Force Base (AFB), Illinois, Senior Airman Miguel A. Lozoria pleaded guilty before a military judge to wrongful use of lysergic acid diethylamide (LSD) and wrongful introduction of LSD onto Scott AFB, in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a (2019). (Record (R.) at 13, 16; Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 22 Feb. 2022.) The military judge sentenced SrA Lozoria to 31 days' confinement, hard labor without confinement for 60 days, a bad-conduct discharge, reduction the grade of E-1, and a reprimand. (R. at 155.) The convening authority took

no action on the findings or sentence. (Convening Authority Decision on Action, ROT Vol. 1, 1 Feb. 2022.)

The record of trial consists of five prosecution exhibits, nine defense exhibits, and four appellate exhibits. The transcript is 156 pages. SrA Lozoria is not currently confined.

Counsel is currently assigned 22 cases, with 8 pending initial brief before this Court. Counsel has not yet begun review in this case. Three cases at the Air Force Court have priority over this case:

1. *United States v. Williamson*, ACM 40211. The record of trial consists of 18 prosecution exhibits, 28 defense exhibits, 42 appellate exhibits, and 2 court exhibits. The transcript is 653 pages. Counsel has completed review of this record and completed significant work on the AOE.
2. *United States v. Palik*, ACM 40225. The record of trial consists of 5 prosecution exhibits, 15 defense exhibits, 50 appellate exhibits, and 1 court exhibit. The transcript is 1002 pages. Counsel has begun review of this record and begun drafting the AOE.
3. *United States v. Paugh*, ACM 40231. The record of trial consists of 13 prosecution exhibits, 10 defense exhibits, 7 appellate exhibits, and 1 court exhibit. The transcript is 224 pages. Counsel has not yet begun review of this record.

Additionally, counsel will be preparing for oral argument in *United States v. Day*, ACM 39962, and *United States v. Harrington*, ACM 39825, which will be argued at the CAAF on consecutive days in late October.

Through no fault of SrA Lozoria, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. SrA Lozoria was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review SrA Lozoria's case and advise him regarding potential errors.

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

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
(AF/JAJA)
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 3 October 2022.

[redacted]
MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
(AF/JAJA)
[redacted]

4 October 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MIGUEL A. LOZORIA, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32723 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 4 October 2022.

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32723**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Miguel A. LOZORIA	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 3 October 2022, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 5th day of October, 2022,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **13 November 2022**.

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

FOR THE COURT

[redacted], Maj, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Senior Airman (E-4), **MIGUEL A. LOZORIA** United States Air Force *Appellant*	))))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)** Before Panel No. 2 No. ACM S32723 31 October 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **13 December 2022.** The record of trial was docketed with this Court on 18 March 2022. From the date of docketing to the present date, 227 days have elapsed. On the date requested, 270 days will have elapsed.

On 16 January 2022, at a special court-martial at Scott Air Force Base (AFB), Illinois, Senior Airman Miguel A. Lozoria pleaded guilty before a military judge to wrongful use of lysergic acid diethylamide (LSD) and wrongful introduction of LSD onto Scott AFB, in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a (2019). (Record (R.) at 13, 16; Entry of Judgment (EOJ), Record of T[illegible] Vol. 1, 22 Feb. 2022.) The military judge sentenced SrA Lozoria to 31 days' c[illegible] hard labor without confinement for 60 days, a bad-conduct discharge, reduction the grade of E-1, and a reprimand. (R. at 155.) The convening authority took

GRANTED

2 NOVEMBER 2022

no action on the findings or sentence. (Convening Authority Decision on Action, ROT Vol. 1, 1 Feb. 2022.)

The record of trial consists of five prosecution exhibits, nine defense exhibits, and four appellate exhibits. The transcript is 156 pages. SrA Lozoria is not currently confined.

Counsel is currently assigned 22 cases, with 8 pending initial brief before this Court. Counsel has not yet begun review in this case. Three cases at the Air Force Court have priority over this case:

1. *United States v. Williamson*, ACM 40211. The record of trial consists of 18 prosecution exhibits, 28 defense exhibits, 42 appellate exhibits, and 2 court exhibits. The transcript is 653 pages. Counsel has completed review of this record and completed significant work on the AOE.
2. *United States v. Palik*, ACM 40225. The record of trial consists of 5 prosecution exhibits, 15 defense exhibits, 50 appellate exhibits, and 1 court exhibit. The transcript is 1002 pages. Counsel has drafted the AOE and will submit after finalizing *Grostefon* issues with the client.
3. *United States v. Paugh*, ACM 40231. The record of trial consists of 13 prosecution exhibits, 10 defense exhibits, 7 appellate exhibits, and 1 court exhibit. The transcript is 224 pages. Counsel has not yet begun review of this record.

Through no fault of SrA Lozoria, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. SrA Lozoria was

specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review SrA Lozoria's case and advise him regarding potential errors.

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

Respectfully submitted,

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
(AF/JAJA)
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 31 October 2022.

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
(AF/JAJA)
[redacted]

1 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MIGUEL A. LOZORIA, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32723 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 1 November 2022.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Senior Airman (E-4), **MIGUEL A. LOZORIA** United States Air Force *Appellant*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)** Before Panel No. 2 No. ACM S32723 5 December 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **12 January 2023.** The record of trial was docketed with this Court on 18 March 2022. From the date of docketing to the present date, 262 days have elapsed. On the date requested, 300 days will have elapsed.

On 16 January 2022, at a special court-martial at Scott Air Force Base (AFB), Illinois, Senior Airman Miguel A. Lozoria pleaded guilty before a military judge to wrongful use of lysergic acid diethylamide (LSD) and wrongful introduction of LSD onto Scott AFB, in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a (2019). (Record (R.) at 13, 16; Entry of Judgment (EOJ), Record of Tr l. 1, 22 Feb. 2022.) The military judge sentenced SrA Lozoria to 31 days' co ard labor without confinement for 60 days, a bad-conduct discharge, re rade of E-1, and a reprimand. (R. at 155.) The convening authority took

GRANTED

8 DEC 2022

no action on the findings or sentence. (Convening Authority Decision on Action, ROT Vol. 1, 1 Feb. 2022.)

The record of trial consists of five prosecution exhibits, nine defense exhibits, and four appellate exhibits. The transcript is 156 pages. SrA Lozoria is not currently confined.

Counsel is currently assigned 23 cases, with 9 pending initial brief before this Court. Counsel has not yet begun review in this case. Three cases at the Air Force Court have priority over this case:

1. *United States v. Williamson*, ACM 40211. The record of trial consists of 18 prosecution exhibits, 28 defense exhibits, 42 appellate exhibits, and 2 court exhibits. The transcript is 653 pages. Counsel has completed review of this record and will file the AOE shortly.
2. *In re United States (Robinson)*, Misc. Dkt. No. 2022-09, 2022-10, and 2022-15. The record in this extraordinary writ contains 3 defense exhibits and 39 appellate exhibits. The transcript is 377 pages. Counsel has begun review of the record in this case.
3. *United States v. Paugh*, ACM 40231. The record of trial consists of 13 prosecution exhibits, 10 defense exhibits, 7 appellate exhibits, and 1 court exhibit. The transcript is 224 pages. Counsel has not yet begun review of this record.

Through no fault of SrA Lozoria, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. SrA Lozoria was

specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review SrA Lozoria's case and advise him regarding potential errors.

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

Respectfully submitted,

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
(AF/JAJA)
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 5 December 2022.

[redacted]
MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
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[redacted]

5 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MIGUEL A. LOZORIA, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32723 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 300 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 8 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 5 December 2022.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32723**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Miguel A. LOZORIA	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 4 January 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) 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 5th day of January, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than **11 February 2023**.

Appellant's counsel is advised that given the number of enlargements granted thus far, any further requests for an enlargement of time may necessitate a status conference.

FOR THE COURT

[redacted]

ANTHONY F. ROCK, Maj, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	
	)	Before Panel No. 2
Senior Airman (E-4), **MIGUEL A. LOZORIA** United States Air Force	)	No. ACM S32723
Appellant	)	4 January 2023

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **11 February 2023.** The record of trial was docketed with this Court on 18 March 2022. From the date of docketing to the present date, 292 days have elapsed. On the date requested, 330 days will have elapsed.

On 16 January 2022, at a special court-martial at Scott Air Force Base (AFB), Illinois, Senior Airman Miguel A. Lozoria pleaded guilty before a military judge to wrongful use of lysergic acid diethylamide (LSD) and wrongful introduction of LSD onto Scott AFB, in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a (2019). (Record (R.) at 13, 16; Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 22 Feb. 2022.) The military judge sentenced SrA Lozoria to 31 days' confinement, hard labor without confinement for 60 days, a bad-conduct discharge, reduction the grade of E-1, and a reprimand. (R. at 155.) The convening authority took

no action on the findings or sentence. (Convening Authority Decision on Action, ROT Vol. 1, 1 Feb. 2022.)

The record of trial consists of five prosecution exhibits, nine defense exhibits, and four appellate exhibits. The transcript is 156 pages. SrA Lozoria is not currently confined.

Counsel is currently assigned 23 cases, with 8 pending initial brief before this Court. Counsel has not yet begun review in this case. One case at the Air Force Court have priority over this case: *United States v. Paugh*, ACM 40231. The record of trial consists of 13 prosecution exhibits, 10 defense exhibits, 7 appellate exhibits, and 1 court exhibit. The transcript is 224 pages. Counsel has completed review and begun drafting the assignment of errors.

Through no fault of SrA Lozoria, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. SrA Lozoria was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review SrA Lozoria's case and advise him regarding potential errors.

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

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel

Air Force Appellate Defense Division
(AF/JAJA)
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 4 January 2023.

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
(AF/JAJA)
[redacted]

4 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MIGUEL A. LOZORIA, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32723 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 330 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 7 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 4 January 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	
	)	Before Panel No. 2
Senior Airman (E-4), **MIGUEL A. LOZORIA** United States Air Force	)	No. ACM S32723
Appellant	)	30 January 2023

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **13 March 2023.** The record of trial was docketed with this Court on 18 March 2022. From the date of docketing to the present date, 318 days have elapsed. On the date requested, 360 days will have elapsed.

On 16 January 2022, at a special court-martial at Scott Air Force Base (AFB), Illinois, Senior Airman Miguel A. Lozoria pleaded guilty before a military judge to wrongful use of lysergic acid diethylamide (LSD) and wrongful introduction of LSD onto Scott AFB, in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a (2019). (Record (R.) at 13, 16; Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 22 Feb. 2022.) The military judge sentenced SrA Lozoria to 31 days' confinement, hard labor without confinement for 60 days, a bad-conduct discharge, reduction the grade of E-1, and a reprimand. (R. at 155.) The convening authority took

no action on the findings or sentence. (Convening Authority Decision on Action, ROT Vol. 1, 1 Feb. 2022.)

The record of trial consists of five prosecution exhibits, nine defense exhibits, and four appellate exhibits. The transcript is 156 pages. SrA Lozoria is not currently confined.

Counsel is currently assigned 23 cases, with 8 pending initial brief before this Court. Counsel has not yet begun review in this case. This is counsel's top priority case at the Air Force Court. However, counsel will be arguing before the CAAF on 7 February 2023 in the case of *United States v. Behunin*, Dkt. No. 22-0276/AF, and will be unable to work on SrA Lozoria's case until then.

Through no fault of SrA Lozoria, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. SrA Lozoria was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review SrA Lozoria's case and advise him regarding potential errors.

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

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
(AF/JAJA)

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 30 January 2023.

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
(AF/JAJA)
[redacted]

31 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MIGUEL A. LOZORIA, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32723 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 360 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 31 January 2023.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32723**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Miguel A. LOZORIA	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 30 January 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Ninth) 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 1st day of February, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Ninth) is **GRANTED**. Appellant shall file any assignments of error not later than **13 March 2023**.

Appellant's counsel is advised that given the nature of this case and the number of enlargements granted thus far, absent exceptional circumstances, no further enlargement of time will be granted.

FOR THE COURT

[redacted]

ANTHONY F. ROCK, Maj, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 2
Senior Airman (E-4), **MIGUEL A. LOZORIA** United States Air Force *Appellant*	)	No. ACM S32723 24 February 2023

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

ASSIGNMENTS OF ERROR

I.

WHETHER THIS COURT SHOULD STRIKE AN INACCURATE, INFLAMMATORY, AND INAPPROPRIATE PORTION OF THE CONVENING AUTHORITY'S REPRIMAND.

II.

WHETHER THE TRIAL COUNSEL ENGAGED IN IMPROPER ARGUMENT BY: (1) SUGGESTING SRA LOZORIA'S OCCUPATION HAD BEARING ON THE SENTENCE; (2) ARGUING FACTS NOT IN EVIDENCE; (3) PROVIDING HIS OWN DEFINITION OF REHABILITATION POTENTIAL; AND, (4) ARGUING FOR MORE CONFINEMENT TO KEEP SRA LOZORIA FROM LIVING WITH A FRIEND.

STATEMENT OF THE CASE

On 19 January 2022, at a special court-martial at Scott Air Force Base (AFB), Illinois, Senior Airman (SrA) Miguel A. Lozoria pleaded guilty before a military judge to wrongful use of lysergic acid diethylamide (LSD) and wrongful introduction of LSD onto Scott AFB, in violation of Article 112a, Uniform Code of Military Justice (UCMJ),

10 U.S.C. § 912a (2019).[1] (Record (R.) at 13, 16; Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 22 Feb. 2022.[2]) The military judge sentenced SrA Lozoria to 31 days' confinement, hard labor without confinement for 60 days, a bad-conduct discharge, reduction to the grade of E-1, and a reprimand. (R. at 155.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action, ROT Vol. 1, 1 Feb. 2022.)

STATEMENT OF FACTS

Background

SrA Lozoria grew up in a close-knit family that moved from state to state for his father's construction jobs. (Defense Exhibit (DE) I at 1.) He finally found a place he considered home in Texas, where he excelled in high school and joined the Junior Reserve Officer Training Corps (JROTC). (*Id.* at 2.) He took a class in nursing during high school that piqued his interest in medicine and showed a way "to impact people's lives in a positive way"; he then secured entry into the Air Force as a medical technician. (*Id.*) Scott AFB was his first permanent duty station. (*Id.* at 3.) He performed his military duty off base at the O'Fallon Medical Clinic, both treating patients and teaching new physicians about being in the military. (*Id.*)

[1] All references to the UCMJ are to the *Manual for Courts-Martial*, *United States* (2019 ed.) [*MCM*].

[2] Both the EOJ and the Statement of Trial Results (STR) fail to state the plea and findings for the Charge; instead, each only lists the resolution for each of the component specifications. (EOJ, ROT Vol. 1, 22 Feb. 2022; STR, ROT Vol. 1, 19 Jan. 2022). This Honorable Court should order correction of the EOJ.

The Offenses

SrA Lozoria lived off base. (Prosecution Exhibit (PE) 1 at 2.) He discussed using LSD with a friend, SrA ER (ER); ER suggested they use LSD at his on-base residence in a "safe environment." (*Id.*) SrA Lozoria brought the LSD onto Scott AFB to ER's residence where they, along with their friend A1C DS (DS), consumed it. (*Id.*) ER began to "freak out," becoming confused and worrying that he would never see his family again. (*Id.*) He called his wife, who was out of town, and spoke with her for four hours. (*Id.*) ER's wife became upset at his behavior and called one of her own friends, who reported the drug use to Security Forces. (*Id.*) The record does not show that SrA Lozoria, ER, or DS left the home at all that night.

Presentencing Proceedings and the Sentence

SrA Lozoria pleaded guilty, pursuant to a plea agreement, to one specification of wrongful use of LSD and one specification of wrongful introduction of LSD onto a military installation.[3] (EOJ, ROT Vol. 1, 22 Feb. 2022; Appellate Exhibit III.) The Government called MSgt RL, SrA Lozoria's First Sergeant, in presentencing to testify about the impact of the drug use. (R. at 88.) MSgt RL confirmed that SrA Lozoria remained in patient care at the clinic throughout the investigation up until the court-martial. (R. at 92–93.) He assessed SrA Lozoria's rehabilitation potential as "medium." (R. at 89.) The remainder of the Government's presentencing case included a personal data sheet, one enlisted performance report, one letter of

[3] For the quantity, neither specification says either the amount, "some," or "an unknown quantity of," as the *MCM* suggests. Part IV, ¶ 50.c.(7). SrA Lorozia does not assert that this undermines the plea or fails to state an offense.

counseling for a fitness assessment failure, and one letter of reprimand for a fitness assessment failure. (PE 2–5.)

The Defense called DS to discuss SrA Lozoria's immediate and sincere remorse for the drug use, even before they were under investigation. (R. at 114–15.) The Defense also called SrA Lozoria's sister, GH, who touted his ability to learn from his mistakes. (R. at 128.) Both DS and GH assessed SrA Lozoria's rehabilitation potential as "high." (R. at 116, 128.) Additionally, six people, including two flight commanders, wrote letters in support of SrA Lozoria. (DE B–G.) In his unsworn statement, SrA Lozoria explained that the experience was "humbling," that he knew he had given away his goal of retiring after 20 years' service, and that he was truly sorry for what he did. (DE I at 3–4.)

The military judge sentenced SrA Lozoria to 31 days' confinement, hard labor without confinement for 60 days, a bad-conduct discharge, reduction the grade of E-1, and a reprimand. (R. at 155.)

This brief will provide additional facts as necessary below.

ARGUMENT

I.

THIS COURT SHOULD STRIKE AN INACCURATE, INAPPROPRIATE, AND INFLAMMATORY PORTION OF THE CONVENING AUTHORITY'S REPRIMAND.

Additional Facts

The convening authority issued a reprimand which contained the following sentence: "Your willingness to use Lysergic Acid Diethylamide (LSD) with your

wingmen and bring LSD onto the installation put the entire base population at risk." (Convening Authority Decision on Action, ROT Vol. 1, 1 Feb. 2022.)

Standard of Review

This Court reviews sentence appropriateness, factual sufficiency, and legal sufficiency *de novo*.[4] *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), UCMJ, 10 U.S.C. § 866(d). The phrase "correct in law and fact" in Article 66, UCMJ, is synonymous with legal and factual sufficiency. *United States v. Nerad*, 69 M.J. 138, n.1 (C.A.A.F. 2010) (citing *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007)).

Through Article 66, UCMJ, Congress has vested responsibility for determining sentence appropriateness in the service courts of criminal appeals. *United States v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001). This power "reflects unique history and attributes of the military justice system" and includes "considerations of uniformity and evenhandedness of sentencing decisions." *Id*. (citations omitted); *see also United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (concluding the sentence appropriateness provision "is a sweeping Congressional mandate to ensure a fair and just punishment for every accused" (internal quotation marks omitted)).

[4] The resolution of *United States v. McAlhaney*, currently pending before the Court of Appeals for the Armed Forces (CAAF), will potentially impact the standard of review for reprimands. 82 M.J. 419 (C.A.A.F. 2022) (order granting review).

A reprimand is a punitive censure, and is an authorized punishment for persons found guilty of an offense at a court-martial. R.C.M. 1003(a); (b)(1); (b)(1), Discussion. If adjudged and approved, a reprimand shall be issued in writing by the convening authority; a court-martial "shall not" specify the terms or wording of a reprimand. R.C.M. 1003(b)(1). In *United States v. Wolcott*, also a case coming from Scott AFB, this Court held that a convening authority's discretion to reprimand an accused is not "unfettered," and that, in practice, a reprimand is "a frank and common-sense expression of formal disapproval by the convening authority to the accused regarding the offenses for which the individual was sentenced." No. ACM 39639, 2020 CCA LEXIS 234, at *18 (A.F. Ct. Crim. App. 15 Jul. 2020) (unpub. op.). The reprimand may be based on "the offenses, the evidence and testimony admitted at trial, and other matters that are properly before the convening authority." *Id.* at *16.

Analysis

The language used in SrA Lozoria's reprimand was untethered to the convicted offenses. Nothing in the record explains how three Airmen using LSD in an on-base residence, and never leaving that residence, placed the "entire base population at risk." Certainly, there is a scenario where LSD use could put the entire base population at risk—driving under the influence, working on an aircraft while under the influence, or other such behavior. There is simply no evidence of this anywhere in the record that the hundreds or thousands of people on the installation were at risk. If trial counsel were to argue something similar, the proper objection would be

"facts not in evidence." Similarly, the convening authority, even with broad discretion on reprimands, cannot simply invent or embellish facts.

This Court has multiple avenues to strike the offending language. First, this Court may hold the sentence is inappropriately severe because the reprimand is utterly unsupported by the evidence in the record. It thus improperly exaggerates the nature of the conduct at issue. Furthermore, the EOJ is the permanent record of his conviction that he will have to provide to future employers and that will be publicly available under Article 140a, UCMJ, 10 U.S.C. § 940a. There is a real consequence to allowing this inappropriate reprimand to stand. The proper resolution would be to strike the offending sentence from the reprimand. Alternatively, this Court can strike the offending language as factually and legally insufficient. Article 66 does not distinguish between findings or sentence when it requires each to be "correct in law and fact." This Court can strike the offending portion of the sentence as incorrect in fact. By either means, this Honorable Court should exercise its Article 66, UMCJ, authority to strike the offending portion of the reprimand. *Cf. United States v. Hawes*, 51 M.J. 258, 261 (C.A.A.F. 1999) (setting aside language from the reprimand that referenced offense that resulted in acquittal).

WHEREFORE, SrA Lozoria respectfully requests this Honorable Court set aside the third sentence of his reprimand.

II.

THE TRIAL COUNSEL ENGAGED IN IMPROPER ARGUMENT BY: (1) SUGGESTING SRA LOZORIA'S OCCUPATION HAD BEARING ON THE SENTENCE; (2) ARGUING FACTS NOT IN EVIDENCE; (3) PROVIDING HIS OWN DEFINITION OF REHABILITATION POTENTIAL; AND, (4) ARGUING FOR MORE CONFINEMENT TO KEEP SRA LOZORIA FROM LIVING WITH A FRIEND.

Additional Facts

The Importance of Where SrA Lozoria Works

During sentencing argument, the trial counsel explained that SrA Lozoria's workplace—an off-base medical clinic—"is an extremely relevant factor[] in the situation." (R. at 135.) He continued:

> But it's not just a clinic, it's an extension of the Air Force. It's an extension of the Air Force into our local community. We are representatives, and they are the face of the Air Force. And what did he do at work? He sought out two different employees, two different coworkers, two different uniformed members of the Air Force, and made a plan to use drugs.

(R. at 136.) The Government presented no evidence that any planning occurred in the workplace, or that their place of work or occupation had any role in the offenses.

Coercion

The trial counsel then addressed SrA Lozoria's role in ER and DS's use of LSD as follows:

> Drugs they wouldn't have had access to, and wouldn't have used if not for his providing them, and for his knowledge of how it gets out of your system to coerce them into using it.

(R. at 137–38.)

Rehabilitation Potential

The trial counsel delivered the following argument on rehabilitative potential:

> Rehabilitation is the most important sentencing factor. And part of rehabilitation is knowing when to do the right thing. He's taken some accountability by showing up today and telling us that he made a mistake. That he broke the law; that he brought the controlled substance onto this base. But showing up when there's a deal on the table, is not the same thing as taking accountability. "Doing the right thing when nobody is watching" means not doing it in the first place, and when you make a mistake, owning up to it right away.

(R. at 139.)

Living With His "Coconspirator"

The trial counsel also delivered argument on the role of "protection of the public" in an appropriate sentence. He argued that:

> Possibly the most important factor to consider here. He is returning to the public. He is going out there and living with his coconspirator, the person he did drugs with. They need a break. They have remained really good best friends up and through this process. They're still talking all the time, they're still hanging out; they're going to live together. They see each other five to seven days a week. They need time apart, because when they're together they clearly make the wrong call.

(R. at 140.) The Defense did not object to any of these arguments, nor did the military judge provide any comment.

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 "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)). Additionally, the trial counsel may not mischaracterize the evidence. *See United States v. Toro*, 37 M.J. 313, 318 (C.A.A.F. 1993) (citing *United States v. Carroll*, 678 F.2d 1208 (4th Cir. 1982)). A military judge has a *sua sponte* duty to ensure a fair trial. *United States v. Voorhees*, 79 M.J. 11, 14 (C.A.A.F. 2019).

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)). When assessing prosecutorial misconduct's prejudicial effect, the CAAF has outlined a balancing approach of 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." *Id.* 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).

R.C.M. 1001(b)(5) defines "rehabilitative potential" as "the accused's potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society."

Analysis

1. *SrA Lozoria's workplace and occupation have no bearing on the sentence.*

Trial counsel cannot argue for greater punishment based on duty position unless that position was integral to the offense. *See United States v. Moore*, 6 M.J. 661, 663 (A.F.C.M.R. 1978) (trial counsel improperly argued that base hospital duty assignment aggravated a marijuana offense because the accused's position at the base hospital did not facilitate the offense, nor did his status play a role in committing the offense). And yet here the trial counsel claimed it was "an extremely relevant factor in the situation." (R. at 135.) Trial counsel argued that the clinic was an extension of the Air Force off base, then asked "And what did he do at work?" (R. at

136.) He then answered his own question by suggesting they planned or SrA Lozoria sought out people to use drugs in the workplace. (*Id.*) This would be probative aggravation evidence, but the problem for the trial counsel is that it never happened. This dual improper argument—a misplaced emphasis on position and facts not in evidence—was plain and obvious error.

2. The trial counsel's argument that SrA Lozoria "coerced" his friends has no basis in the record.

The trial counsel also manufactured a narrative that SrA Lozoria "coerce[d]" his friends ER and DS to use LSD. (R. at 137–38.) This is utterly without foundation in the evidence. ER explained that he used LSD because he was not going to speak with his family for the rest of the night, and because SrA Lozoria told him it would be out of his system in a few days. (PE 1 at 13–14.) DS acknowledged that he would not have used LSD that night without SrA Lozoria bringing it, but that he might have if presented an opportunity in a different context. (R. at 117.) Coercing other Airman to use drugs is a very serious offense, one that he did not commit nor was he charged with. Arguing that he did was plain and obvious error.

3. The trial counsel formed his own, erroneous definition of rehabilitative potential and supported it with facts not in evidence.

The trial counsel claimed "[r]ehabilitation is the most important sentencing factor. And part of rehabilitation is knowing when to do the right thing." (R. at 139.) The trial counsel then denigrated SrA Lozoria's guilty plea by arguing, "showing up when there's a deal on the table, is not the same thing as taking accountability." (*Id.*) Finally, the trial counsel argued, "'Doing the right thing when nobody is watching'

means not doing it in the first place, and when you make a mistake, owning up to it right away." (*Id.*)

Whatever trial counsel believed rehabilitative potential to mean, it was not the same as the Rules for Courts-Martial: "the accused's potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society." R.C.M. 1001(b)(5). The trial counsel essentially argued that accepting a plea deal does not count as taking accountability, a curious proposition. This is contrary to the basic principles of guilty pleas and the language of the stipulation of fact. (PE 1 at 3; *Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9 at 92 (29 Feb. 2020). Moreover, the evidence is the record shows the opposite—DS explained that SrA Lozoria demonstrated immediate remorse. Next, the trial counsel broke new ground on rehabilitative potential by arguing failure to immediately confess to the offense is somehow required. Rehabilitative potential is not frozen at the moment the offense occurs; to the contrary, rehabilitation evidence typically comes from actions taken by an accused *after* the commission of the offense to show remorse or other such behaviors.

In sum, the trial counsel created his own novel conception of rehabilitative potential and filled in the details with facts not in evidence. This was plain and obvious error.

4. Trial counsel cannot ask for confinement to keep SrA Lozoria and DS from living together.

Under the questionable rubric of "protection of the public," the trial counsel raised the specter of a threat by emphasizing that SrA Lozoria was "going out there

and living with his coconspirator." (R. at 139.) Conspiracy was not charged. Further, he argued that "they need time apart, because when they're together they clearly make the wrong call." (*Id.*) Placed in perspective, trial counsel asked for confinement to keep two people from living together based on a single drug use one year earlier. Protection of the public cannot encompass confinement for the purpose of keeping co-actors from living together. To suggest this was appropriate punishment was error, plain and obvious.

5. Conclusion

The ATC's repeated improper arguments offered the military judge numerous bases for adjudging a sentence on a different basis than admitted evidence. The misconduct was pervasive and severe, even in a brief argument: improperly arguing SrA Lozoria's position, the meaning of rehabilitation potential, protection of the public, and a fanciful notion that SrA Lozoria "coerced" his friends into using drugs. While defense counsel did not object, the military judge also had a *sua sponte* duty to ensure a fair trial. *Voorhees*, 79 M.J. at 14. The military judge's failure to intervene suggests she did not view the arguments as improper, which undermines the normal rule that military judges are presumed to know the law. *See United States v. Erikson*, 65 M.J. 221, 225 (C.A.A.F. 2007). Finally, SrA Lozoria's sentencing case was strong for a junior enlisted Airmen, including recommendations from flight commanders, while the Government had very little to offer—only paperwork related to fitness failures. This Court cannot be confident that SrA Lozoria was sentenced on the basis of the evidence alone. *See Halpin*, 71 M.J. at 480.

WHEREFORE, this Honorable Court should reassess the sentence.

Respectfully submitted,

[redacted]
YTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify pthat the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 24 February 2023.

[redacted]

MATTHEW L. BLYTH, Maj, USAF
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Appellate Defense Division (AF/JAJA)
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before Panel No. 2
Senior Airman (E-4) **MIGUEL A. LOZORIA** United States Air Force *Appellant.*	)	No. ACM S32723 27 March 2023

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

ISSUES PRESENTED

I.

WHETHER THIS COURT SHOULD STRIKE AN INACCURATE, INFLAMMATORY, AND INAPPROPRIATE PORTION OF THE CONVENING AUTHORITY'S REPRIMAND.

II.

WHETHER THE TRIAL COUNSEL ENGAGED IN IMPROPER ARGUMENT BY: (1) SUGGESTING SRA LOZORIA'S OCCUPATION HAD BEARING ON THE SENTENCE; (2) ARGUING FACTS NOT IN EVIDENCE; (3) PROVIDING HIS OWN DEFINITION OF REHABILITATION POTENTIAL; AND, (4) ARGUING FOR MORE CONFINEMENT TO KEEP SRA LOZORIA FROM LIVING WITH A FRIEND.

STATEMENT OF CASE

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

STATEMENT OF FACTS

Facts necessary for the disposition of this case are set forth in the analysis sections below.

ARGUMENT

I.

THE REPRIMAND ISSUED IN THIS CASE WAS PROPER.

Additional Facts

Pursuant to the military judge's sentence, the Convening Authority issued the following reprimand:

> You are hereby reprimanded! Not only was your judgment in this case exceptionally poor, your conduct was inexcusable and a disgrace to the Air Force. Your willingness to use Lysergic Acid Diethylamide (LSD) with your wingmen and bring LSD onto the installation put the entire base population at risk. As an Airman, you have a personal responsibility and commitment to uphold Air Force standards even when no one is watching. This act has brought your integrity and credibility into question. Your behavior demonstrated a lack of self-control and is an extreme departure from the Air Force Core Values. From this point forward, I expect your conduct to be above reproach, as nothing less will be tolerated.

(Convening Authority Decision on Action, ROT Vol. 1, 1 February 2022.)

Standard of Review

Generally, this Court reviews sentence appropriateness de novo. United States v. McAlhaney, No. 22-0170, 2023 CAAF LEXIS 165 (C.A.A.F. Mar. 24, 2023).

Law

Under R.C.M. 1003(b)(1), "A court-martial shall not specify the terms or wording of a reprimand. A reprimand, if approved, shall be issued, in writing, by the convening authority." Further, "[o]nly the convening authority may specify the terms of the reprimand. When a court-martial adjudges a reprimand, the convening authority shall issue the reprimand in writing or may disapprove, reduce, commute, or suspend the reprimand in accordance with R.C.M. 1109 or R.C.M. 1110." R.C.M. 1003(b)(1), Discussion.

Colonel William Winthrop, in his landmark treatise, treated reprimands as a discretionary adjudgment by the court that was left to the convening authority for execution. *See* William Winthrop, *Military Law and Precedents* 415 (2d ed., Government Printing Office 1920) (1895). Winthrop explained that, while reprimands may be private or public, and may include language like "by the general commanding" such language is not necessary since, "the duty properly devolving in all cases upon the legal reviewing authority—the officer who convened the court…" Id. Further, "the court in its sentence cannot properly direct as to the terms of the reprimand, nor as to the time and place at which it is to be given." Id.

This Court has fairly recently expounded on reprimands: "In practice, [a reprimand] is a frank and common-sense expression of formal disapproval by the convening authority to the accused regarding the offenses for which the individual was sentenced." United States v. Wolcott, No. ACM 39639, 2020 CCA LEXIS 234, at *16 (A.F. Ct. Crim. App. 15 Jul 2020) (unpub. op.) This Court has also stressed that the military justice system grants the authority to issue reprimands to the convening authorities, who, "[w]ith few exceptions, in the Air Force…are senior officers with a responsibility to preserve good order and discipline for the Airmen in their command." Id.

Analysis

Appellant argues that the language used in the convening authority's reprimand "was untethered to the convicted offenses." (App. Br. at 6.) Specifically, Appellant posits that absent "driving under the influence, working on an aircraft while under the influence or other such behavior" (none of which were present in this case) "[n]othing in the record explains how three Airmen using LSD in an on-base residence, and never leaving that residence, placed the 'entire base population at risk.'" (Id.) Appellant asks this court to exercise one of three remedies: 1) to

overturn the sentence because the reprimand was unsupported by the evidence and an improper exaggeration of the nature of the conduct, (2) strike the language at issue from the Entry of Judgment, or (3) strike the language as factually and legally insufficient. (Id at 7.) Appellant's arguments miss the mark.

To start, a reprimand's language typically falls under the purview of the convening authority's broad discretion. R.C.M. 1003(b)(1). While not binding, Winthrop's treatise provides this Court with a foundation to properly apply the function of a reprimand – namely, that it is a tool available exclusively to commanders without influence from military courts as to the time, place, and language. As this Court explained in Wolcott, the reason convening authorities are granted broad discretion in wording reprimands is because they are "senior officers who are charged with preserving good order and discipline in the units under their command." Wolcott, slip op at 16.

In the current case, the reprimand language that Appellant challenges speaks to notions of good order and discipline—two things that commanders are directly charged with protecting. While the evidence in this case did not show that Appellant drove or performed his job under the influence of LSD, it did not need to in order for the convening authority to issue reprimand language cautioning him about the potentially adverse impact of his LSD use on a military installation. In addition, preservation of good order and discipline is also a principle that counsel are allowed to argue in sentencing. *See, e.g.*, R.C.M. 1003(f)(2)(B) (listing "the mission, discipline, or efficiency of the command" as a sentencing consideration). To that end, nothing in the R.C.M. or corresponding jurisprudence precludes a convening authority from talking about the potential harms of a crime in a reprimand. The concept of good order and discipline was thus

a critical consideration in Appellant's case, and it took on the form of language from the convening authority within the reprimand.

The language was also appropriate because it reflected the seriousness of Appellant's offenses. Using illegal drugs is, no doubt, a serious offense under the UCMJ, especially when it is committed on a military installation. It also had the potential to put those on the base at risk—some or indeed all of them under certain circumstances. Further, Appellant brought the LSD onto the base through the gate and used it with two other wingmen who worked with him inside base housing. (*See* R. at 50.) A convening authority pointing out the serious nature of these offenses, as well as potential consequences was appropriate given the circumstances of the case. Accordingly, the use of this language was not error.

Next, Appellant argues that the language was "inaccurate, inappropriate, and inflammatory." (App. Br. at 4.) Appellant is mistaken. First, the language was accurate—an airman who uses and brings illegal substances onto a military installation can potentially risk others. Here, Appellant's use of the drug caused him to "see vivid colors, and other effects." (R. at 42.) Appellant also described that he "began to feel, not normal" and saw visual changes in just what was around me; colors were more vibrant. I saw slight hallucinations and had an altered mental status." (R. at 44.) Acknowledging that there was no evidence to show Appellant left the house these mental states, if Appellant had indeed left the house, he was in no condition to drive, function normally, or perform his job. The convening authority's language was proper in light of the potential effects of LSD, and Appellant's knowledge of those effects. It was appropriate for the convening authority to highlight the reasons why drug use is prohibited in the military.

Second, the language was not inappropriate or inflammatory in any way. On the contrary, the language was both measured and direct. The convening authority did not personally attack Appellant or use inappropriate language. He issued a frank and common-sense expression of his formal disapproval, which is what this court in Wolcott interpreted as the function of a proper reprimand. Wolcott, slip op at 16. Instead, the language is but a small portion of Appellant's sentence that is both correct and proper considering the nature of Appellant's convictions.

As a result, there was no error or prejudice to Appellant in this case, and no relief is warranted.

II.

TRIAL COUNSEL'S SENTENCING ARGUMENT WAS NOT IMPROPER.

Additional Facts

Reference to Appellant's Workplace

During his sentencing argument, trial counsel discussed Appellant's workplace in the following manner:

> Now, where he works is an extremely relevant factor, in the situation. Airman Lozoria, [E.R.], and [D.S.] all work out in the community, at the O'Fallon Family Medical Clinic, at St. Elizabeth's Hospital in O'Fallon, Illinois. A civilian operated facility. But it's not just a clinic, it's an extension of the Air Force. It's an extension of the Air Force into our local community. We are representatives, and they are the face of the Air Force. And what did he do at work? He sought out two different employees, two different coworkers, two different uniformed members of the Air Force, and made a plan to use drugs.

(R. at 135-136.)

Reference to Coercion

Trial counsel stated the following regarding Appellant's informing [D.S.] and [E.R.] about the effects of LSD:

> TC: Now, they get to Ralph's house, they hangout for a while, [D.S.] shows up. [E.R.] has a conversation with his wife, finds out she's not going to be talking to him for the rest of the night. [E.R.] who had initially declined to use drugs, and wasn't going to take the LSD, is told by the Accused that it will get out of his system in a few days. If you will look at [E.R.]'s 1168 you will see he was going on leave. He's telling him he wouldn't get caught if he did the drug. Doing the right thing when nobody is watching. Telling others that they won't get caught, is not doing the right thing.
>
> [E.R.] agrees, all three start using drugs.
>
> . . .
>
> It is worth looking at the adjectives that [E.R.] and [D.S.] use in their 1168s: Bad trip; jumpy; panic; started seeing colors and shapes; freaking out. Both [D.S.] and [E.R.] needed to be calmed down at different points in the night. They both were having negative experiences with the drugs that were brought onto base by the Accused. Drugs they wouldn't have had access to, and wouldn't have used if not for his providing them, and for his knowledge of how it gets out of your system to coerce them into using it.

(R. at 137-138.)

Reference to Accountability and Rehabilitative Potential

At sentencing, Appellant gave an unsworn statement in which he said, "And hopefully you consider my plea and my acceptance of responsibility as a step in the right direction." (R. at 132.) Further, he stated, "I accept responsibility for what I've done and accept all the consequences that I have—that are going to follow." (R. at 133.)

Trial counsel rebutted Appellant's statements about taking responsibility by stating,

> Rehabilitation is the most important sentencing factor. And part of rehabilitation is knowing when to do the right thing. He's taken some accountability by showing up today and telling us that he made

> a mistake. That he broke the law; that he brought the controlled substance onto this base. But showing up when there's a deal on the table, is not the same thing as taking accountability. Doing the right thing when nobody is watching means not doing it in the first place, and when you make a mistake, owning up to it right away.

(R. at 138.)

Trial defense counsel incorporated trial counsel's argument about accountability into his own argument, stating:

> He took responsibility by pleading guilty here today. You know, he could have put the government, you know, took up the government's time, took up the government's money, took up the resources, travel all of us out here for a couple of weeks, let us experience St. Louis. But he didn't. He didn't, Your Honor. He accepted responsibility, he pled guilty for what he thought it was worth.

(R. at 143.)

Living with D.S.

Finally, trial counsel addressed Appellant's connection with D.S. in the following context:

> Protection of the Public. Possibly the most important factor to consider here. He is returning to the public. He is going out there and living with his coconspirator, the person he did drugs with. They need a break. They have remained really good best friends up and through this process. They're still talking all the time, they're still hanging out; they're going to live together. The [sic] see each other five to seven days a week. They need time apart, because when they're together they clearly make the wrong call.
>
> [D.S.] would not have used that drug, he would not have used LSD, on the 27th of March, if it wasn't brought onto this base.

(R. at 140-141.) After this statement, trial defense counsel objected on the grounds of mischaracterization of the evidence. (R. at 141.) The military judge overruled the objection, stating, "Trial Counsel's argument is not evidence. I will be sure to consider the evidence and trial counsel is free to argue what he believes to be a fair inference." (R. at 141.) However, Appellant

does not challenge this objection in his brief. Trial defense counsel did not make any other objections during trial counsel's sentencing argument.

Trial defense counsel also asserted the following point in his sentencing argument:

> Trial counsel made a big ole talk about how often him and [D.S.] are buddies, and how they are going to hangout, and that, you know, that he's going to make the wrong, you know, wrong decisions, no one are watching or things like that. You can use remorse—you can use his evidence of remorse to show that he's not going to do it again. Use that, Your Honor. And we have that here. We have ample evidence of remorse.

(R. at 144-145.)

Standard of Review

Allegations of improper argument and prosecutorial misconduct are reviewed *de novo*. *See* United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019). When no objection is made, this Court reviews for plain error. United States v. Andrews, 77 M.J. at 393, 398 (C.A.A.F. 2018).

"The burden of proof under plain error is on the appellant." Voorhees, 79 M.J. at 9. "Plain error occurs when (1) there is error, (2) the error is clear and obvious, and (3) the error results in material prejudice to a substantial right of the accused." Id. In the improper argument context, this Court "[m]ust determine: (1) whether trial counsel's arguments 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." Id. "Failure to establish any one of the prongs is fatal to a plain error claim." United States v. Bungert, 62 M.J. 346, 348 (C.A.A.F. 2006).

Law

Prosecutorial misconduct "can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard. . ." United States v. Sewell, 76 M.J. 14, 18 (C.A.A.F. 2017). When improper argument occurs during sentencing, this Court determines whether it can be "confident that the appellant as sentenced on the basis of the evidence alone." Id.

(citing United States v. Halpin, 71 M.J. 477, 480 (C.A.A.F. 2013)); Additionally, in assessing prejudice, the lack of an objection by trial defense counsel is "some measure of the minimal impact" of an improper argument by trial counsel. United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001).

When addressing a claim of improper argument, the inquiry should not be on words in isolation, but rather focused on the argument in the context of the entire court-martial." United States v. Baer, 53 M.J. 235, 238 (C.A.A.F. 2000). It is "improper to 'surgically carve' out a portion of the argument with no regard to its context." Id. However, "[i]n cases of improper argument, each case must rest on its own peculiar facts." Baer, 53 M.J. at 239. Trial counsel is not "prohibited from offering a comment that provides a fair response to claims made by the defense." United States v. Carter, 61 M.J. 30, 33 (C.A.A.F. 2005).

Generally, trial counsel cannot argue that an appellant should "be punished more harshly solely because of the nature of his official duties or military position." United States v. Condon, No. ACM 38765, 2017 CCA LEXIS 187, at *70-71 (A.F. Ct. Crim. App. 10 March 2017) (unpub. op.). Nor can trial counsel impermissibly argue that appellant "should be held to higher standards simply because of his assigned career field." Id.

During sentencing argument, "the trial counsel is at liberty to strike hard, but not foul, blows." Baer, 53 M.J. at 237. As a zealous advocate for the government, trial counsel may "argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." Halpin, 71 M.J. at 479.

For claims of prosecutorial misconduct, assessing prejudice under the plain error test is accomplished by balancing the following 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. United States v. Fletcher, 62 M.J. 174, 184 (C.A.A.F. 2005). These factors are also extended to the context of improper sentencing argument, which considers "whether trial counsel's comments, taken as a whole, were so damaging that the court cannot be confident the appellant was convicted on the basis of the evidence alone." Halpin, 71 M.J. at 480 (citing United States v. Erickson, 65 M.J. 221 (C.A.A.F. 2007)). Courts are not required to weigh all the factors equally when conducting their analysis. United States v. Frey, 73 M.J. 245, 251 (C.A.A.F. 2014). One factor can weigh so heavily in favor of the government, it can provide the needed confidence that the appellant was sentenced on the evidence alone. Id.

The R.C.M.s mandate that the imposition of a sentence must take into consideration "the nature and circumstances of the offense and history and characteristics of the accused…" R.C.M. 1002(f)(1). Further, a sentence should "(A) reflect the seriousness of the offense; (B) promote respect for the law; (C) provide punishment for the offense; (D) promote adequate deterrence of misconduct; (E) protect others from further crimes by the accused; (F) rehabilitate the accused; and (G) provide, in appropriate cases, the opportunity for retraining and returning to duty to meet the needs of the service." R.C.M. 1002(f)(3).

"When the issue of plain error involves a judge-alone trial, an appellant faces a particularly high hurdle." United States v. Hays, 62 M.J. 158, 166 (C.A.A.F. 2005) (quoting United States v. Robbins, 52 M.J. 455, 457 (C.A.A.F. 2000)). This is because a "military judge is presumed to know the law and apply it correctly, [and] is presumed capable of filtering out inadmissible evidence." Robbins, 52 M.J. at 457 (citation omitted). As part of the presumption that military judges know and follow the law absent clear evidence to the contrary, this Court must "presume that the military judge is able to distinguish between proper and improper sentencing arguments." United States v. Hill, No. ACM 38979, 2017 CCA LEXIS 477, at *19-

20 (A.F. Ct. Crim. App. 12 July 2017) (unpub. op.) (quoting Erickson, 65 M.J. at 225). This is true regardless of whether the military judge states on the record what portion of the argument is improper and will not be considered. *See* Erickson, 65 M.J. at 225. Therefore, "plain error before a military judge sitting alone is rare indeed." United States v. Raya, 45 M.J. 251, 253 (C.A.A.F. 1996). After all, "argument by counsel is not evidence." United States v. Bodoh, 78 M.J. 231, 236 (C.A.A.F. 2019).

Analysis

Appellant is only claiming improper argument for statements to which trial defense counsel did not object at trial. And because trial defense counsel did not object during the relevant portions of trial counsel's sentencing argument here, this issue must be reviewed for plain error. Viewed in its entirety, trial counsel's sentencing argument was proper, and the military judge did not commit plain error by allowing the argument to proceed.

Trial counsel's argument was not plain error because 1) there was no error, 2) any error was not clear and obvious, and 3) there was no material prejudice to a substantial right of the accused.

a. There was no error.

Under the first prong of the plain error test, there was no error in this case. However, contrary to CAAF's holding in Baer, Appellant surgically carves out portions of trial counsel's argument without regard to its greater context. Appellant focuses on the words in isolation but fails to consider the fact that trial counsel tied in each assertion to an overarching sentencing principle.

Appellant argues four main areas where trial counsel made improper argument. Each argument is addressed below.

i. Trial counsel did not improperly invoke Appellant's workplace and occupation in asking for a specific sentence.

Appellant argues that trial counsel improperly invoked his place of work and his occupation in asking for a sentence. Specifically, Appellant takes issue with trial counsel's statement that Appellant's place of work – a civilian operated facility – was "not just a clinic," but rather, it was

> an extension of the Air Force into our local community. We are representatives, and they are the face of the Air Force. And what did he do at work? He sought out two different employees, two different coworkers, two different uniformed members of the Air Force, and made a plan to use drugs.

(R. at 136-136.)

In its proper context, trial counsel did not make this statement to argue that by nature of Appellant's job, he should receive a harsher sentence. Rather, reading the language plainly and applying the most reasonable understanding, Appellant recruited other airmen in his workplace to also use LSD, which is an aggravating factor. Also, it was simply a fact and circumstance of the case. The other two airmen were also convicted and sentenced for these offenses, and one of them, D.S. testified for Appellant at sentencing.

Appellant's case is not the scenario envisioned in Condon, for example, when this Court held that trial counsel cannot argue for an appellant to be held to a higher standard based on his career field. Trial counsel did not ask the military judge to sentence Appellant harshly because he was a medical professional, or because, as a medical professional, he should be held to a higher standard. Rather, trial counsel appropriately tied Appellant's offenses to an important aggravating factor – that Appellant also inspired two other airmen from his workplace to commit the same offense. Therefore, this argument was permissible and not plain error.

ii. Trial counsel's argument that Appellant "coerced" his friends was proper.

Next, Appellant argues that trial counsel "manufactured a narrative that SrA Lozoria coerced his friends ER and DS to used LSD." (App. Br. at 12.) However, trial counsel's argument was firmly rooted in the evidence. For example, on the day of the incident, E.R. initially "declined to use the LSD. However, after the Accused told him it would be out of his system in a few days and [E.R.] realized his family would be busy for the remainder of the day, he decided to consume the LSD." (Pros. Ex. 1 at 2.) Trial counsel asked D.S. at sentencing, "Would you have used drugs if Airman Lozoria had not brought it to [E.R.]'s house? D.S. responded, 'Um, maybe not that day, but I believe there is potential that if presented to I may have still—okay, like may have still made the decision to do it.'" (R. at 116.) Based on these facts, it was a fair inference that Appellant strongly influenced his friends to use LSD.

Further, the context of trial counsel's comment was not focused on the use or meaning of the word "coerce," but rather on the impact of Appellant's words on his co-actors' decision to use LSD. Trial counsel argued that the LSD impacted Appellant, E.R., and D.S. with a "bad trip; panic; [and they] started seeing colors and shapes, freaking out." (R. at 138.) Trial counsel stated that they would not have taken the LSD had Appellant not assured them it would be out of their system in a few days. (R. at 137.) Again, viewed reasonably, this statement was also meant to demonstrate the aggravating nature of Appellant's offenses. Appellant admitted in the Stipulation of Fact that he had been friends with E.R. and D.S. since around June 2019. (Pros. Ex. 1 at 1.) Appellant was the one who brought the LSD onto base. And he was the one who assured his friends that the drugs would be out of their system in a few days. Taken together, these facts serve to show a direct connection between Appellant's actions and the decisions of

his co-actors to use LSD. Therefore, trial counsel properly argued this issue, and did not commit plain error.

iii. Trial counsel properly applied the facts to Appellant's rehabilitative potential.

Next, Appellant takes issue with trial counsel's comment that "showing up when there is a deal on the table, is not the same thing as taking accountability." (App. Br. at 12.) Appellant argues that this is not proper evidence of rehabilitative potential. (Id.) He says, "[t]he trial counsel essentially argued that accepting a plea deal does not count as taking accountability, a curious proposition. This is contrary to the basic principles of guilty pleas and the language of the stipulation of fact." (App. Br. at 13.) However, trial counsel's comment was directly in response to Appellant's statement during his unsworn statement where he asked the military judge to consider his plea and acceptance of responsibility when adjudging a sentence. (R. at 132.) Appellant also stated, "I accept responsibility for what I've done and accept all the consequences that I have—that are going to follow." (R. at 133.)

In response, trial counsel stressed that Appellant broke the law by bringing LSD onto base. (R. at 138.) Trial counsel also stated that while Appellant has "taken some accountability by showing up today and telling us he made a mistake…showing up when there's a deal on the table, is not the same thing as taking accountability." (Id.) To further stress this point, trial counsel added, "Doing the right thing when nobody is watching" means not doing it in the first place, and when you make a mistake, owning up to it right away." (Id.)

Taken in the context of Appellant's unsworn statement, trial counsel's response specifically spoke to the issue of how the military judge should consider Appellant's guilty plea. Trial counsel simply asked the military judge to place a lower emphasis on the fact that Appellant pled guilty when determining the sentence, especially in light of the fact that the plea

agreement already took into account Appellant's willingness to plead guilty. (R. at 141.) Trial counsel was essentially arguing that while Appellant's plea is one consideration, that it did not amount to Appellant taking complete responsibility for his actions. This was a fair comment on the need for the sentence to rehabilitate Appellant – which is an appropriate consideration for the sentencing authority. R.C.M. 1002(f).

Additionally, not only did trial defense counsel *not* object to this argument, but he also incorporated it into his own argument, stating,

> He took responsibility by pleading guilty here today. You know, he could have put the government, you know, took up the government's time, took up the government's money, took up the resources, travel all of us out here for a couple of weeks, let us experience St. Louis. But he didn't. He didn't, Your Honor. He accepted responsibility, he pled guilty for what he thought it was worth.

(R. at 143.)

Appellant should not be allowed to adopt the Government's argument (with no objection) for his own purposes and then gain relief on appeal. Further, the fact that trial defense counsel incorporated the Government's argument shows that Appellant believed it had some value. Trial defense counsel's attempt to highlight how Appellant's guilty plea saved government resources showed that Appellant hoped this fact would serve as a mitigating factor. In light of that understanding, trial counsel could properly ask the military judge not to give significant weight to the fact that Appellant pled guilty. The mere fact that Appellant did not agree with trial counsel's sentencing argument does not make it error.

Therefore, taken in its proper context, this argument by trial counsel was not plain error and does not merit relief.

iv. Trial counsel's request for confinement was a proper application of the sentencing principle of protection of others.

The final issue that Appellant argues is that "[u]nder the questionable rubric of 'protection of the public,' the trial counsel raised the specter of a threat by emphasizing that SrA Lozoria was 'going out there and living with his coconspirator.'" (App. Br. at 13-14.) However, trial counsel's argument, taken in the correct context, was proper.

At the outset, trial counsel began his argument with the maximum punishment allowed in this case: a bad conduct discharge, 120 days of confinement for each specification, reduction in grade to E-1, forfeiture of two-thirds pay, and a reprimand. (R. at 134.) But, throughout the argument, trial counsel treated all of these components of the sentence jointly when discussing what was appropriate. He did not just focus on confinement. Trial counsel argued, "They need time apart, because when they are together they clearly make the wrong call." (R. at 140-141.) Trial counsel tied that comment in as a "consequence" of his actions, which could include confinement, among other punishments. This is not the same as saying that the military judge should confine Appellant to prevent him from living with D.S.

More importantly, a protection of society argument – that giving Appellant confinement will prevent him from involving others in his offenses, including future roommates – is entirely proper. The facts of this case show that Appellant influenced others to use drugs. And in the language at issue, where trial counsel states that Appellant remains good friends with D.S. and is going back into the public to live with D.S., was a way to show that, when the two were together, they made decisions that could potentially harm the public. This is exactly the type of argument that trial counsel is allowed to make when discussing protection of the public. Trial counsel is able to make a direct connection between Appellant's generally influencing others to use LSD, specifically influencing D.S. to do the same, and the two of them living together in society where

they can potentially to the same with others. Appellant points to no case law to support the notion that preventing him from influencing others to commit crimes in the future is an improper argument.

Further, trial defense counsel again incorporated the argument into his own,

> Trial counsel made a big ole talk about how often him and [D.S.] are buddies, and how they are going to hangout, and that, you know, that he's going to make the wrong, you know, wrong decisions, no one are watching or things like that. You can use remorse—you can use his evidence of remorse to show that he's not going to do it again. Use that, Your Honor. And we have that here. We have ample evidence of remorse.

(R. at 144-145.)

As stated above, Appellant should not be permitted to use trial counsel's argument as both a sword and a shield. There was no plain error in this argument.

b. Appellant suffered no prejudice.

Even if trial counsel's sentencing argument exceeded the bounds of what was permissible, such references did not materially prejudice a substantial right of Appellant. To the extent that any of trial counsel's argument may have been improper (which it was not), the military judge addressed any issue in response to the defense counsel's objection when she stated, "Trial Counsel's argument is not evidence. I will be sure to consider the evidence and trial counsel is free to argue what he believes to be a fair inference." (R. at 141.) Appellant fails on the first Fletcher factor, the severity of the misconduct.

Second, the military judge's remark about only considering the evidence admitted at trial was enough to cure any possible misconduct that trial counsel may have committed through his argument. But even if there was some improper argument, because this was a military judge-alone forum, the risk for prejudice is low because as part of the presumption that military judges

know and follow the law absent clear evidence to the contrary, this Court must "presume that the military judge is able to distinguish between proper and improper sentencing arguments." Hill, slip op at *19-20. This is true regardless of whether the military judge states on the record what portion of the argument is improper and will not be considered. Erickson, 65 M.J. at 225. Here, the military judge did state on the record that she would only consider the appropriate evidence. Therefore, even if the argument was error, the military judge is presumed to have filtered out any inappropriate argument.

Third, the weight of the evidence supporting the adjudged sentence was high. For sentencing, the military judge considered all of the evidence from findings, including the Stipulation of Fact and its attachments and Appellant's plea colloquy, as well as the government and trial defense's sentencing evidence. Trial counsel introduced Appellant's service record, which included a Letter of Counseling and a Letter of Reprimand. (R. at 83-84.) Trial counsel also called MSgt R.L. to testify to the impact of Appellant's actions on the unit and the potential for rehabilitation. (R. at 86.) Trial counsel asked MSgt R.L. about the how the "knowledge of one of your troops using drugs affects you as a command decision-maker," to which MSgt R.L. responded,

> The effects it has when you're talking about a member that conducts patient care is the discussion leads towards, was there any patient safety risk, could there have been any patient safety risks, and is there any other patient safety risks, if we leave this member in the form patient care.

(R. at 89.)

When asked about Appellant's potential for rehabilitation, MSgt R.L. described it as "medium." (Id.) Trial defense counsel put up D.S., Appellant's co-actor, to testify that he and the Appellant felt "remorse" for their actions. (R. at 114.) Upon further examination by the

military judge, D.S. stated that he had previously been convicted of the same offense. He told the military judge, "I'm testifying with the defense on my own accord. But I did have an agreement to testify, as well with the government." (R. at 120.) Trial defense counsel also included a short testimony from Appellant's sister, and an unsworn statement by Appellant.

All of this evidence – Appellant's admission to using LSD and bringing it onto base, the Stipulation of Fact, testimony of witnesses at sentencing, and Appellant's prior service record with administrative paperwork – was strong enough to account for the military judge's sentence. Further, Appellant concurred with the parameters of the adjudged sentenced by function of his plea agreement, which shows that he also thought it was a fair representation of the evidence. Thus, Appellant's sentence was properly supported by the evidence, and his argument fails on this factor.

Overall, trial counsel did not engage in prosecutorial misconduct through improper argument and Appellant's claim should be denied.

CONCLUSION

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

[redacted]
DEEPA M. PATEL, Maj, USAF
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MARY ELLEN PAYNE
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 27 March 2023.

[redacted]
DEEPA M. PATEL, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S REPLY BRIEF**
v.	)	Before Panel No. 2
Senior Airman (E-4), **MIGUEL A. LOZORIA** United States Air Force *Appellant*	)	No. ACM S32723 30 March 2023

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

Appellant, Senior Airman (SrA) Miguel A. Lozoria, pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this Reply to the Appellee's Answer, dated 27 March 2023 (Ans.). In addition to the arguments in his opening brief, filed on 24 February 2023 (App. Br.), SrA Lozoria submits the following arguments for the issues listed below.

I.

THIS COURT SHOULD STRIKE AN INACCURATE, INFLAMMATORY, AND INAPPROPRIATE PORTION OF THE CONVENING AUTHORITY'S REPRIMAND.

The Government interprets this issue as a request either: "(1) to overturn the sentence because the reprimand was unsupported by the evidence and an improper exaggeration of the nature of the conduct, (2) strike the language at issue from the Entry of Judgment [(EOJ)], or (3) strike the language as factually and legally insufficient." (Ans. at 3–4.) To be clear, SrA Lozoria is not seeking an unjustified windfall from the convening authority's error. SrA Lozoria's prayer at the end of Issue I only asks this Court to set aside the offending sentence in the EOJ, not the

sentence itself. The Assignment of Error simply outlined multiple means for achieving this end. (App. Br. at 6–7.)

As to the merits, the Government finds no error in the convening authority's reprimand, but its efforts to defend the reprimand underscore why it *is* inaccurate. The Government writes that "an airman who uses and brings illegal substances onto a military installation can potentially risk others." (Ans. at 5.) Perhaps so. But the reprimand affirmatively stated that he "put the entire base population at risk," which finds no support in the record. (EOJ, ROT Vol. 1, 1 Feb. 2022.) The Government acknowledges, as it must, that there was no evidence SrA Lozoria left the home, thus it theorizes about what *might* have happened had he left. (Ans. at 5.) All this is true and beside the point. A reprimand is part of the punishment for what SrA Lozoria actually did. It is not an opportunity to inject facts not present in the case or unrealized risks.

The EOJ is the permanent record of his conviction. And it reads as though he *actually* put the base at risk. No reasonable reader—such as a future employer—would equate "put the entire base population at risk" with sitting in a home with friends and not leaving. All SrA Lozoria asks here is for this Court to recognize the error and, using its de novo power of review of the reprimand, strike the third sentence of the reprimand. *See United States v. McAlhaney*, No. 22-0170, __ M.J. __, 2023 CAAF LEXIS 165, at *8 (C.A.A.F. 24 Mar. 2023).

WHEREFORE, SrA Lozoria respectfully requests this Honorable Court set aside the third sentence of his reprimand.

II.

WHETHER THE TRIAL COUNSEL ENGAGED IN IMPROPER ARGUMENT BY: (1) SUGGESTING SRA LOZORIA'S OCCUPATION HAD BEARING ON THE SENTENCE; (2) ARGUING FACTS NOT IN EVIDENCE; (3) PROVIDING HIS OWN DEFINITION OF REHABILITATION POTENTIAL; AND, (4) ARGUING FOR MORE CONFINEMENT TO KEEP SRA LOZORIA FROM LIVING WITH A FRIEND.

SrA Lozoria's Occupation and Workplace

The Government excuses the trial counsel's emphasis on SrA Lozoria's occupation and workplace, claiming that "reading the [argument's] language plainly and applying the most reasonable understanding, Appellant recruited other airmen in his workplace to also use LSD, which is an aggravating factor." (Ans. at 13.) The Government is largely correct in its reading of this part of the argument. And that is precisely the problem: there is no evidence that anything related to LSD happened in the workplace. The Government—at trial and on appeal—cannot point to evidence supporting its argument. This matters when the trial counsel tells the sentencing authority that the workplace "is an extremely relevant factor" and then proceeds to talk about how SrA Lozoria is the face of the Air Force at that off-base clinic. (R. at 135.)

Coercion

Coercion is a powerful word, and it would indeed greatly increase the gravity of the offense if SrA Lozoria coerced his friends to use drugs. But he did not, despite trial counsel's mischaracterization. The Government cannot bring itself to call it coercion; the most it will say is that he "strongly influenced" his friends. (Ans. at 14.) Moreover, the trial counsel overstated whom SrA Lozoria "coerced," claiming that ER

and DS used "[d]rugs they wouldn't have had access to, and wouldn't have used if not for his providing them, and for his knowledge of how it gets out of your system to coerce them into using it." (R. at 138–39.) But the knowledge of how LSD leaves the body was only part of a conversation with ER, not DS. (Prosecution Exhibit (PE) 1 at 13–14.) Notably, the Government repeats this as fact but does not have a citation. (Ans. at 15.) In essence, the Government blesses the trial counsel's transformation of a mere "connection" between SrA Lozoria and others' drug use into coercion.

Rehabilitative Potential

Once more, the Government embraces trial counsel's improper argument. The Government does not engage with the fact that trial counsel's notions of what rehabilitation potential means–including "doing the right thing when nobody is watching" and that taking a plea agreement shows lower potential—are legal definitions conjured from nothing. The Government instead excuses the comments as trial counsel "essentially arguing that while Appellant's plea is one consideration, that it did not amount to Appellant taking complete responsibility for his actions." (Ans. at 16.) But the Government cannot explain why trial counsel, on the facts here, can denigrate a guilty plea, especially when its value is explicitly stated in the Stipulation of Fact (PE 1 at 3), and in the *Military Judges' Benchbook*. Dept. of the Army Pamphlet 27-9 at 92 (29 Feb. 2020). And neither the Government on appeal nor the trial counsel explain why SrA Lozoria has not taken complete responsibility for his actions. Yet again, the trial counsel argued a different, more convenient version of the case that does not exist.

Additionally, the Government faults the defense counsel for arguing back against the trial counsel's misstatements. Having missed the opportunity to object, what else could they do to push back against the weight of improper argument? That defense counsel sought to soften the impact does not take the comments outside the realm of plain and obvious error.

Each of these arguments were plain and obvious error. Taken together, this Court cannot be certain that SrA Lozoria was sentenced on the basis of the evidence alone. *See United States v. Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2013).

WHEREFORE, this Honorable Court should reassess the sentence.

Respectfully submitted,

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 30 March 2023.

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32723**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Miguel A. LOZORIA	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 13th day of April, 2023,

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Panel 2 and referred to a Special Panel for appellate review.

The Special Panel in this matter shall be constituted as follows:

RICHARDSON, NATALIE D., Colonel, Senior Appellate Military Judge
RAMÍREZ, ROBERTO, Lieutenant Colonel, Appellate Military Judge
CADOTTE, ERIC J., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal