IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**NOTICE OF DIRECT APPEAL PURSUANT TO ARTICLE 66(b)(1)(A), UCMJ**
v.	)	
CAPTAIN (O-3) **LUKE M. TOZER,** United States Air Force *Appellant.*	)	21 September 2023

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

On 21 December 2022, a military judge, in a Special Court-Martial, convicted Captain (Capt) Luke M. Tozer, 324th Intelligence Squadron, Joint Base Pearl Harbor-Hickam, Hawaii, consistent with his pleas, of violating Article 113, Uniform Code of Military Justice (UCMJ). The military judge sentenced Capt Tozer to forfeitures of $4,321 pay per month for five (5) months and a reprimand.

Capt Tozer has not submitted any materials to The Judge Advocate General in accordance with Article 69, UCMJ. On 16 August 2023, the Government sent the required notice of his right to appeal within 90 days. Pursuant to Article 66(b)(1)(A), Capt Tozer respectfully files his notice of direct appeal with this Court.

Respectfully submitted,

[redacted]

NICOLE J. HERZBERS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: nicole.herbers@us.af.mil

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 21 September 2023.

Respectfully submitted,

[redacted]

NICOLE J. HERBERS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4777
Email: nicole.herbers@us.af.mil

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM _____**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Luke M. TOZER	)	**DOCKETING**
Captain (O-3)	)	
U.S. Air Force	)	
Appellant	)	

On 21 September 2023, this court received a notice of direct appeal from Appellant in the above-styled case, pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A).

As of the date of this notice, the court has not yet received a record of trial in Appellant's case.

Accordingly, it is by the court on this 4th day of October, 2023,

ORDERED:

The case in the above-styled matter is referred to Panel 3.

It is further ordered:

The Government will forward a copy of the record of trial to the court forthwith.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM _____**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Luke M. TOZER	)	
Captain (O-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 21 September 2023, Appellant filed a "Notice of Direct Appeal Pursuant to Article 66(b)(1)(A), UCMJ," with this court. The above-styled case was docketed on 4 October 2023 and the court ordered the Government to "forward a copy of the record of trial to the court forthwith." Over 120 days have elapsed and, to date, the record has not been provided to the court.

Accordingly, it is by the court on this 5th day of February, 2024,

ORDERED:

Government appellate counsel will inform the court in writing not later than **29 February 2024** of the status of this case with regard to this court's 4 October 2023 order.

FOR THE COURT

[redacted]E, Capt, 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 (FIRST)**
v.	)	Before Panel No. 3
Captain (O-3) **LUKE M. TOZER,** United States Air Force, *Appellant.*	)	No. ACM 24021
	)	7 June 2024

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

Pursuant to Rule 23.3(m)(1), (2), (4), and (6) of this Honorable Court's Rules of Practice and Procedure, Captain (Capt) Luke M. Tozer, Appellant, hereby moves for an enlargement of time to file assignments of error. Capt Tozer requests an enlargement for a period of only 30 days, which will end on **18 July 2024**. The record of trial was docketed with this Court on 4 October 2023. On 5 February 2024, the Court ordered the Government to inform the court in writing on the status of this case no later than 29 February 2024. Order, 5 Feb. 2024. As of 29 February 2024, the transcript had been completed. United States' Notice of Status Compliance, 29 Feb. 2024. However, the Court did not receipt for the record of trial until 19 April 2024.

From the date of docketing to the present date, 247 days have elapsed. From the date of receipt of the record of trial to the present date, 49 days have elapsed. From docketing to the date requested, 288 days will have elapsed. From the date of receipt of the record of trial to the date requested, 90 days will have elapsed.

On 21 December 2022, at Joint Base Pearl Harbor-Hickam, Hawaii, Appellant was convicted and sentenced in accordance with his plea of guilty to one charge and specification of drunk driving in violation of Article 113, Uniform Code of Military Justice (UCMJ). Entry of Judgment (EOJ),

2 Jun. 2023. The military judge sentenced Appellant to forfeit $4,321 of pay per month for 5 months. *Id.* On 26 January 2023, the convening authority took no action on the findings or sentence. Convening Authority Decision on Action (CADA), 26 Jan. 2023.

The record of trial consists of four prosecution exhibits, 10 defense exhibits, and four appellate exhibits. The transcript is 105 pages. Appellant is not confined, understands his right to speedy appellate review, and consents to this request for an enlargement of time.

Since receipt of the verbatim transcript on 19 April 2024, counsel has submitted a brief on behalf of Appellant for *United States v. Matti*, ACM 22072. Counsel is a reservist, with orders starting 2 June. Counsel is assigned eight cases, with five pending initial AOEs before this Court. This case is counsel's priority.

Counsel has started to review and expects to complete review of the record forthwith. An enlargement of time is necessary to allow the undersigned to finalize review of Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

[redacted]

NICOLE J. HERBERS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: nicole.herbers@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 7 June 2024.

NICOLE J. HERBERS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: nicole.herbers@us.af.mil

10 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Captain (O-3) LUKE M. TOZER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24021 Panel No. 3

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

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

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

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 10 June 2024.

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**CONSENT MOTION TO ATTACH**
v.	)	No. ACM 24021
Captain (O-3) **LUKE M. TOZER** United States Air Force *Appellant*	)	Before Panel 3 11 June 2024

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1114, Rule 23.1(b) and 23.3(b)(1) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel, with consent of the United States, hereby moves to attach the court-reporter certification of the verbatim transcript to the record of trial. Appendix.

The certification was completed in accordance with R.C.M. 1114 but did not make it into the record of trial. Inclusion of this document ensures this Court, and any reviewing authority, is relying on a certified verbatim transcript. The United States consents to this motion to attach. Given the certification was completed, and in light of Appellant's right to speedy appellate review, attaching this document will ensure this Court can review this record without unnecessary delay.

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

Respectfully submitted,

[redacted]

NICOLE J. HERBERS, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that this document was sent via email to the Court and the Government Trial and Appellate Operations Division on 11 June 2024.

Respectfully submitted,

NICOLE J. HERBERS, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 3
Captain (O-3) **LUKE M. TOZER,** United States Air Force *Appellant*	)	No. ACM 24021
	)	15 July 2024

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

ASSIGNMENTS OF ERROR

I.

WHETHER GOVERNMENT COUNSEL'S IMPROPER SENTENCING ARGUMENT PREJUDICED A SUBSTANTIAL RIGHT OF CAPT TOZER.

II.

WHETHER THE SENTENCE IS INAPPROPRIATELY SEVERE.

STATEMENT OF THE CASE

On 21 December 2022, at Joint Base Pearl Harbor-Hickam, Hawaii, a special court-martial composed of a military judge alone found Captain (Capt) Luke M. Tozer guilty, consistent with his pleas, of one charge and specification of physically controlling a vehicle while drunk in violation of Article 113, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892.[1] R. at 58-59; Entry of Judgment (EOJ), 2 Jun.

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

2023. The military judge sentenced Capt Tozer to forfeit $4,321 of pay per month for five months. R. at 105. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 26 Jan. 2023.

On 16 August 2023, Eleventh Air Force notified Capt Tozer of his right to submit a Direct Appeal. Notice of Right to Submit Direct Appeal, 16 Aug. 2023. On 21 September 2023, Capt Tozer submitted his notice to this Court, and the Court docketed his case on 4 October 2023. Notice of Docketing, 4 Oct. 2023. This Court receipted for the Record of Trial on 19 April 2024.

STATEMENT OF FACTS

The charge and specification stem from a traffic stop when Capt Tozer attempted to re-enter Joint Base Pearl Harbor-Hickam to retrieve his military identification on 12 May 2022. Capt Tozer was newly assigned at Joint Base Pearl Harbor-Hickam and 12 May was to be his first night shift. R. at 25. Capt Tozer was not originally scheduled to work that night. *Id.* He did not know it then, but he was also suffering severe sleep apnea; his sleep was poor and not restorative leading up to and including that day. *Id.*

In an attempt to sleep prior to his shift on 12 May, Capt Tozer consumed several alcoholic beverages, starting at approximately 1400 hours. R. at 26. Prior to his 2000 hours report time for work, he got in his car and started to drive to work off-installation, but realized he left his common-access card at Joint Base Pearl Harbor-Hickam. *Id.* He returned to base and the guard stopped him at the gate for swerving and for stopping at the wrong line. Prosecution Exhibit (Pros. Ex.) 1 at 1. Capt Tozer

was suspected of driving under the influence; he failed the field sobriety tests and ultimately a blood draw showed a blood alcohol content of .235g. *Id.* at 2. There were no injuries or property damage as a result of Capt Tozer controlling his vehicle while drunk. Pros. Ex. 1.

The Government admitted, without defense objection, Capt Tozer's Article 15 from December of 2019 for physically controlling a vehicle while drunk. Pros. Ex. 4. It is unclear if this came in as part of his service record, or as matters in aggravation. *See* R. at 64-65.

The Government argued Capt Tozer's Article 15 from 2019 as a matter in aggravation, without any defense objection. The Government argued the court-martial conviction "was not even his first time getting into trouble with driving while intoxicated." R. at 90. And as a result, the Government argued that the court-martial conviction as his second offense was evidence Capt Tozer "did not care or have an appreciation for the consequences or doesn't really appreciate the seriousness of this offense." R. at 91. In making a specific deterrence argument, the Government compared the prior punishment in the Article 15 for the 2019 offense as a basis for the military judge to sentence Capt Tozer more harshly now through the maximum authorized punishment under the plea agreement. R. at 91-92. Capt Tozer was punished in 2019 with forfeiture of $1,000 pay for one month. Pros. Ex. 4. The sentence adjudged at court-martial was twenty-one times higher, with forfeiture of $4,321 pay per month for five months. EOJ.

The Government also admitted evidence of unit impact through Capt Tozer's commander, Lieutenant Colonel (Lt Col) D.N. Lt Col D.N. explained the mission of Capt Tozer's unit at the time of the offense. His unit provided signals intelligence to the intelligence community and the President of the United States.[2] R. at 66. Capt Tozer was a senior operations officer (SOO) on 12 May 2022, and was responsible for overseeing signals intelligence production for the National Security Agency (NSA) Hawaii. R. at 68. This was a joint environment, where Capt Tozer would work with Air Force, Marine Corps, and Navy service members as well as with civilians. R. at 69. At the time, there were two SOOs in the squadron. *Id.* Lt Col D.N. went on to describe the manning of the unit, the length of time it would take to train a new SOO, and that a top-secret security clearance was required for the position. R. at 70-71. Lt Col D.N. testified about impact on the Navy and attributed a six-month period of coverage issues back to Capt Tozer. R. at 75. Lt Col D.N. testified he removed Capt Tozer's access to information—thus, he was removed as SOO—as a result of this offense but did not testify whether that action was discretionary for him as commander. *Id.* Notably, Capt Tozer held this position as an SOO after his prior Article 15 in 2019 for the same offense. *See* Pros. Ex. 4; R. at 68. Lt Col D.N. also testified the mission never failed and there was never a gap in SOO coverage. R. at 74. The Government argued, "[S]ince his unit had to deal with the consequences for six months, he should have to deal with the consequences for

[2] The "intelligence community" is a collection of cooperating agencies from across the federal government. *See* 50 U.S.C. § 3003(4).

the max amount of consequences, which is two-thirds forfeitures for five months." R. at 94. The Government argued the time required to train new individuals was also justification for the maximum punishment of Capt Tozer. *Id.*

The military judge sentenced Capt Tozer to the maximum punishment under the plea agreement and the military judge approved the reprimand language for his "second incident of driving under the influence of alcohol" when she signed the EOJ. EOJ; Appellate Exhibit (App. Ex.) III.

ARGUMENT

I.

GOVERNMENT COUNSEL'S IMPROPER SENTENCING ARGUMENT PREJUDICED A SUBSTANTIAL RIGHT OF CAPT TOZER.

Standard of Review

Improper argument is a question of law, reviewed de novo. *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011). Where no objection is made, the issue is reviewed for plain error. *United States v. Erickson,* 65 M.J. 221, 223 (C.A.A.F. 2007).

Plain error occurs when (1) there is error, (2), the error is clear or obvious, and (3) the error results in material prejudice to a substantial right of the accused. *Id.* The burden is on appellant to establish plain error. *Id.*

Law and Analysis

Article 15

Under R.C.M 1001(b)(2), the Government may enter the character of the prior service of the accused, which can include evidence of disciplinary actions under Article 15.

Evidence from an accused's service record is relevant as to rehabilitative potential. *United States v. Sauer*, 15 M.J. 113, 115 (C.M.A. 1983). Thus, while Capt Tozer's Article 15 from 2019 could be used by the Government in terms of Capt Tozer's rehabilitative potential, it could not serve to increase his punishment. *Compare United States v. Mandy*, 73 M.J. 619, 628 (A.F. Ct. Crim. App. 2014) (pointing to the propriety of the Government's argument tying prior nonjudicial punishment to a lack of rehabilitative potential and response to lesser forms of punishment) *with United States v. Warren*, 13 M.J. 278, 284 (C.M.A. 1982) (evidence of rehabilitative potential (or lack thereof) cannot be used to increase punishment). Trial counsel can comment on, but not overemphasize, an accused's disciplinary history. *United States v. Ivy*, No. ACM S31406, 2009 CCA LEXIS 91, at *6-8 (A.F. Ct. Crim. App. 17 Mar. 2009) (unpub. op.).

The Government's argument violated these principles by harnessing the 2019 Article 15 for a DUI as an aggravating factor to increase Capt Tozer's punishment for this DUI conviction. The Government argued the military judge knew it was not the first time Capt Tozer had gotten into trouble with driving while intoxicated by pointing to the 2019 Article 15 for the same offense. R. at 90. In turn, the

Government supported its argument that the maximum punishment was appropriate for his current conviction because of the existence of the 2019 Article 15 for the same offense. R. at 91. With this argument, the Government wanted to ensure the military judge punished Capt Tozer not just for his current conviction, but because this was his "second offense." *See* R. at 90-92. The use of the 2019 Article 15 as a means to increase his punishment for this conviction is the exact prohibited use for matters within Capt Tozer's service record. *Warren*, 13 M.J. at 284.

The Rules for Courts-martial reinforce the prohibited nature of how the Government sought to use Capt Tozer's 2019 Article 15. R.C.M. 1003(d) contemplates an increase in punitive liability based on prior convictions. The exclusion of Article 15 actions from this provision means the fact of an Article 15 action, even for a similar offense, may not, on its own, amplify an accused's punishment. Additionally, the Government's argument focused on the 2019 Article 15 action, which overemphasized Capt Tozer's disciplinary history. That emphasis on the 2019 Article 15 action demonstrates the argument was not about Capt Tozer's rehabilitative potential, but rather a means to increase Capt Tozer's punishment. *See Ivy*, 2009 CCA LEXIS at *6-8.

Yet, the Government mentioned the 2019 Article 15 five times and explicitly cited it as the justification for the maximum punishment for the conviction now before this Court. R. at 90-92, 95. This focus on the 2019 Article 15 as a basis to increase the sentence, rather than to comment on Capt Tozer's rehabilitative potential, was error. *See* R. at 90-95, *Warren*, 13 M.J. at 284.

Unit Impact

1. Unit Impact Argument was not Directly Related to the Offense of which Capt Tozer was Convicted

Evidence in aggravation can be evidence of a significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense. R.C.M. 1001(b)(4). To be "directly related" demands a greater showing that mere relevance. *See United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995) (citation omitted).

The meaning of "directly related" under R.C.M. 1001(b)(4) is a function of both what evidence can be considered and how strong a connection that evidence must have to the offenses of which the accused has been convicted. *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007). The link must be as direct as the rule states, and closely related in time, type, and/or often outcome, to the convicted crime. *Id.* at 282. Evidence that is directly related includes uncharged misconduct that was directly preparatory to the crime. *United States v. Wingart*, 27 M.J. 128, 135 (C.M.A. 1988). Directly related evidence could be evidence that was "interwoven" in the res gestae of the crime and provided evidence of identity and intent. *United States v. Metz*, 34 M.J. 349, 351-52 (C.M.A. 1992).

Evidence that is directly related to the offense may also include "evidence of the natural and probable consequences of the offenses of which an accused has been found guilty," but an accused is not "responsible for a never-ending chain of causes and effects." *United States v. Stapp*, 60 M.J. 795, 800 (A. Ct. Crim. App. 2004), *aff'd*, 64 M.J. 179 (C.A.A.F. 2006) (quoting *United States v. Witt*, 21 M.J. 637, 640 n.3

(A.C.M.R. 1985)); *see also Rust*, 41 M.J. at 478. "The evidence sought to be admitted must establish that the offense of which appellant has been found guilty contributed to those effects which the government is trying to introduce in evidence." *Witt*, 21 M.J. at 641. "Moreover, appellant's offense must play a material role in bringing about the effect at issue; the military judge should not admit evidence of an alleged consequence if an independent, intervening event played the only important part in bringing about the effect." *Rust*, 41 M.J. at 478.

Here, the Government argued Capt Tozer was responsible for a never-ending chain of events and couched it as unit impact. The offending arguments were: (1) that Capt Tozer must be held accountable with forfeitures for five months because the unit had to deal with the consequences for six months; and (2) that a flight commander, the Navy, and NCOs had additional manpower burdens because of the shift in personnel with Capt Tozer's absence and because it took 90 days to train a new SOO. R. at 94. To understand whether these arguments are proper, the underlying evidence for that argument must be reviewed to determine if the evidence was actually "directly related" to the offense of which Capt Tozer was convicted.

Lt Col D.N. removed Capt Tozer from his position due to the DUI. R. at 70-71. However, Capt Tozer held his top-secret security clearance after the prior DUI in 2019. Capt Tozer arrived in Hawaii in 2022 and was put in the position of SOO, which means he had been qualified despite that prior DUI. *Compare* Pros. Ex. 4 with R. at 25-26, 66, 68. It is not clear whether that action by Lt Col. D.N. was discretionary from direct testimony, but it appears it was given Capt Tozer had been

put in the position of SOO despite an earlier DUI offense. *Id.* Lt Col D.N.'s action, then, in removing Capt Tozer from his position was an independent and intervening event which broke the chain to make the "unit impact" argued by the Government no longer directly related to Capt Tozer's offense. *See Rust*, 41 M.J. at 478.

Therefore, when the Government argued Capt Tozer should be sentenced more harshly for the six-month period of coverage issues and increased demands on personnel assigned to this mission that occurred only after the discretionary, independent action of Lt Col D.N., it was error. *See* R. at 93-94, 25-26, 66, 68. Specifically, the Government argued the length of time the unit dealt with manning issues due to training demands for the SOO position to replace Capt Tozer should correlate directly to the need for five months of forfeitures for Capt Tozer's DUI offense. R. at 93-94. This argument was improper because the time to replace Capt Tozer in his position as SOO was not directly related to the offense of which Capt Tozer was convicted. *See* R.C.M. 1001(b)(4); *Stapp*, 60 M.J. at 800; *Witt*, 21 M.J. at 640 n.3; *see also Rust*, 41 M.J. at 478. Because of the independent, discretionary action of Lt Col D.N., the unit impact argued by the Government was not a proper matter in aggravation before the military judge and argument equating that evidence to an increased need for punishment was clear and obvious error.

Additionally, while unit impact can stem from the consequences of Capt Tozer's conduct, he is not responsible for the never-ending consequences of his command's actions, nor for impact that is exacerbated by the unit's manning, the training process, or outside agency requirements to fill his position (for example, security

clearance requirements). In *Hardison*, the court found preservice admissions of drug use, and acknowledgment of the Navy's zero tolerance policy on drug use were not "directly related" to a member's current conviction for drug use. *Id.* The evidence was not directly related because a circumstance that was applicable to all recruits (acknowledgement of the drug policy) would render the words "directly related" devoid of meaning. *Id.* Using *Hardison* as comparison, there is a similar lack of causal connection between the described mission impact and Capt Tozer's DUI because the impacts described were from circumstances that would be aggravating for any crime where an accused was removed from his position – low manning and slow training pipelines. *Hardison*, 64 M.J. at 283. Thus, the unit impact argued by the Government was not directly related to Capt Tozer's DUI.

Finding this unit impact is not directly related to Capt Tozer's DUI is also consistent with the principles highlighted in the continuous course of conduct cases, where there must be a direct, logical, and specific tie between other conduct and the charged offenses to demonstrate it is "directly related." *See United States v. Mullens*, 29 M.J. 398, 400 (C.M.A. 1990) (holding admissible uncharged misconduct that consisted of "a continuous course of conduct involving the same or similar crimes, the same victims, and a similar situs"); and *United States v. Silva*, 21 M.J. 336, 337 (C.M.A. 1986) (uncharged misconduct was admissible when it was an "integral part of [the accused's] criminal course of conduct"). There is no direct, logical, and specific tie between a DUI and Capt Tozer's inability to hold the position of an SOO. In fact, he held the position despite his earlier Article 15 for the same offense, as outlined

above. Similarly, there is no direct, logical, and specific tie between Capt Tozer's DUI in 2022 with either the unit manning, the authorized number of SOO's assigned to the unit, nor to the length of time it would take to replace an SOO. Additionally, there is no direct, logical, and specific tie between Capt Tozer's DUI and the Navy's manning. Thus, when the Government argued Capt Tozer should be punished more harshly due to "unit impact" attributable to a never-ending course of conduct without a direct, logical, and specific tie to Capt Tozer's DUI, it was error. *See generally Mullins*, 29 M.J. 398.

2. Unit Impact Argument was Akin to Arguing for an Increase in Punishment Based Solely on Duty Position

The Government's argument to increase Capt Tozer's punishment because the unit had to deal with the consequences for six months was also inconsistent with this Court's repeated holdings that an accused's duty position, without something more, cannot be considered as a matter in aggravation to increase a sentence. *See United States v. Bobby*, 61 M.J. 750 (A.F. Ct. Crim. App. 2005) (where an accused's position as an F-117 crew chief was in no way connected to his use of cocaine and marijuana, and there was no evidence the drug use had a reasonably direct impact on the performance of his duties despite testimony that as a result of drug use, he was removed from his position); *United States v. Collins*, 3 M.J. 518 (A.F.C.M.R. 1977), *aff'd*, 6 M.J. 256 (C.M.A. 1979) (where the sale of LSD was not tied to the accused's status in the security police unit).

While the Government never explicitly stated Capt Tozer should be punished more harshly because he was an SOO, the Government argued factors outside of Capt

Tozer's control as unit impact, which amounts to arguing Capt Tozer should be punished because he was an SOO. R. at 94. Here, as outlined above, Capt Tozer was in a two-deep position as an SOO. R. at 71. He was not in control of the unit manning, the Navy's manning, nor the number of eligible officers who could hold the position of an SOO that were assigned to his unit. Additionally, he was not in control of the length of time it would take to train his replacement.

Yet the Government still argued that all those factors, which contributed to manning strains, were adverse unit impact attributable to Capt Tozer's misconduct. R. at 93-94. Given all those factors were outside Capt Tozer's control, they were attributable to the position he held—that of an SOO requiring a security clearance, specialized access, training, and the fact that the SOO was a two-deep position. When the Government argued Capt Tozer should be punished for those second and third-order consequences, it was akin to arguing Capt Tozer should be punished more harshly because he was an SOO, and not for the offense he committed. In light of *Bobby*, and *Collins* this was error. *See generally Bobby*, 61 M.J. 750; *Collins*, 3 M.J. 518.

In sum, the arguments offered by the Government related to both the 2019 Article 15 and the unit impact arguments which stemmed from evidence not directly related to Capt Tozer's DUI and which were akin to arguing an increase in sentence due to his duty position were plain and obvious. However, the analysis does not end here. To grant relief, this Court must find material prejudice to one of Capt Tozer's substantial rights. 10 U.S.C. § 859(a).

Prejudice

The test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused. *United States v. Frey*, 73 M.J. 245, 248 (C.A.A.F. 2014). Three factors to consider in evaluating the prejudicial effect of improper argument are (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. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017) (quoting *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005)). When analyzing allegations of improper sentencing argument in a judge-alone forum, the reviewing court can presume "a military judge is able to distinguish between proper and improper sentencing arguments." *Erickson*, 65 M.J. 225.

The Government's argument prejudiced a substantial right of Capt Tozer – to be sentenced only for the offense of which he was convicted. *Erickson*, 65 M.J. at 223. Article 56(c)(1), UCMJ, 10 U.S.C. § 856(c)(1), states:

> In sentencing an accused under [Article 53, UCMJ, 10 U.S.C. § 853], a court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces, taking into consideration—(A) the nature and circumstances of the offense and the history and characteristics of the accused; (B) the impact of the offense on—(i) the financial, social, psychological, or medical well-being of any victim of the offense; and (ii) the mission, discipline, or efficiency of the command of the accused and any victim of the offense; [and] (C) the need for the sentence—(i) to reflect the seriousness of the offense; (ii) to promote respect for the law; (iii) to provide just punishment for the offense; (iv) to promote adequate deterrence of misconduct; (v) to protect others from further crimes by the accused; (vi) to rehabilitate the accused; and (vii) to provide, in appropriate cases, the opportunity for retraining and return to duty to meet the needs of the service[.]

While a military judge is assumed "to be able to appropriately consider only relevant material in assessing sentencing," *Hardison*, 64 M.J. at 284 (citation omitted), the unchecked argument invited the military judge to improperly punish Capt Tozer not only for this offense, but because it was his *second* incident. And the record supports that the military judge did just that based on (i) the military judge's ratification of the EOJ affirmatively reprimanded Capt Tozer as part of his punishment for a *second* alcohol-related incident, and (ii) assessment of the *Fletcher* factors, discussed below.

In applying the *Fletcher* factors in the context of an allegedly improper sentencing argument, the consideration is whether trial counsel's comments, taken as a whole, were so damaging that the court cannot be confident that appellant was sentenced on the basis of the evidence alone. *United States v. Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2013).

As to the first factor – the Government's use of the Article 15 action and unit impact were pervasive throughout the argument, and the Government specifically asked the military judge to adjudge a harsher sentence because this was Capt Tozer's second offense and because of the six-months the unit had to wait to get a fully qualified individual in Capt Tozer's position. R. at 91-92, 94. The Government referenced the 2019 Article 15 action five times and tied the 2019 Article 15 to the need for the maximum or harsher punishment. R. at 90, 91 ln. 1-2, ln. 16-17, 92, 95. In terms of unit impact, out of the seven pages of the transcribed argument, the

Government spent nearly a quarter[3] of the argument on the erroneous unit impact. *See* R. at 89-94.[4] The Government also tied the erroneous unit impact to the justification for the maximum punishment for Capt Tozer. *Id.* This factor resolves in Capt Tozer's favor.

As to the second factor, there were no measures to cure this misconduct. There was no objection from trial defense counsel at the admission of the Article 15 nor testimony on the unit impact. The record does not disclose any articulation of the proper use for the Article 15 action, nor was there discussion of the extent to which the military judge would consider the evidence offered as unit impact. Additionally, trial defense counsel did not object to the Government's use of this evidence in sentencing argument. While the court in *United States v. Gilley* found the "lack of a defense objection is some measure of the minimal impact of a prosecutor's improper argument," that is not the end of the analysis. *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2011) (internal quotation marks and citation omitted). As *Erickson* points out, while there is a presumption that the military judge is expected to know and follow the law, evidence in the record could rebut that presumption. *See Erickson*, 65 M.J. at 225. An illustration of when this presumption may be overcome can be found in *United States v. Cannon*, ARMY 20480580, 2020 CCA LEXIS 254, at

[3] One-and-a-half of the seven pages were spent arguing the "unit impact" that occurred after Lt Col D.N. removed Capt Tozer from his position as SOO. *See* R. at 93-94.

[4] The Government couched the unit impact as "other subsequent consequences." R. at 94. This tends to show even the Government acknowledged the unit impact was not a direct consequence of Capt Tozer's DUI.

*11 (A. Ct. Crim. App. 31 Jul. 2020 (unpub. op.). In that case, where a military judge was sitting alone, the Army Court focused on the compounding effect of the military judge's errors. *Id.* The military judge in *Cannon* first erroneously admitted uncharged misconduct. *Id.* That same improperly admitted uncharged conduct was cited by the prosecution as the specific reason for its requested sentence. *Id.* The Army Court found prejudice and reassessed the sentence. *Id.* Thus, the presumption that the military judge knows the law can be overcome based on the record itself.

Capt Tozer's case mirrors the trajectory of *Cannon.* Here, the Government argued about the 2019 Article 15 action five times, in the context of increasing Capt Tozer's punishment, and spent nearly a quarter of the argument on the never ending-consequences couched as "unit impact," also with a request for the military judge to sentence Capt Tozer to the maximum punishment. R. at 90, 91 ln. 1-2, ln. 16-17, 92, 93-95. Like *Cannon*, this evidence came in despite being beyond the bounds of proper aggravation evidence, then was specifically—and improperly—cited as the basis for the Government's requested sentence. Considering both *Erickson*, *Gilley*, and reviewing the rationale in *Cannon*, supra, here the military judge cannot be presumed to have followed the law given the frequency of the improper argument when it was tied to the specific sentence the military judge adjudged. *Compare* R. at 94 (Government's argument for the maximum punishment because the unit had to deal with the consequences for six months) with R. at 105 (where the military judge sentences Capt Tozer to the maximum punishment argued for by the Government).

The improper influence this sentence argument had on the military judge is also documented in the reprimand itself. While the military judge does not specify the reprimand language, R.C.M. 1003(b)(1), the military judge ratified the reprimand she issued when she signed the EOJ, which punished Capt Tozer for a *second* offense. EOJ. Thus, the facts in the record demonstrate that the military judge was influenced by this improper argument and the presumption that she knew and followed the law can be overcome. This factor resolves in Capt Tozer's favor.

As to the third factor, the strength of the Government's case: while the Government had evidence of a prior Article 15 action to argue poor rehabilitative potential, and evidence from Lt Col D.N. as to Capt Tozer's rehabilitative potential, there are minimal other matters in aggravation which are directly attributable to Capt Tozer and which might support the maximum sentence adjudged. For example, there was no property damage or personal injury. Pros. Ex. 1. There was evidence of an immediate impact on the unit, in that Capt Tozer could not report for night shift on 12 May 2022, but there was no other evidence of sustained unit impact directly relating to Capt Tozer's conduct. The remaining unit impact elicited at trial and argued by the Government was attributable to command's discretionary actions and stemmed from Capt Tozer's position as an SOO, not from his offense. As matters in mitigation, the record also documented Capt Tozer was suffering at the time from severe sleep apnea. R. at 25. Additionally, the offense occurred when Capt Tozer was switching to night shift and had been unable to get restorative sleep. *Id.* After the Article 15 action in 2019, Capt Tozer went on to earn an Air Force Commendation

Medal and serve satisfactorily, which tends to show the restorative effect of the 2019 Article 15 action. Def. Ex. C; Pros. Ex. 3, p. 7-10. Moreover, despite the lack of proper matters in aggravation and the noted matters in mitigation, Capt Tozer received the maximum punishment under the plea agreement. EOJ, App. Ex. III. This factor weighs in favor of Appellant.

Further, in assessing prejudice, the fact that Capt Tozer bargained for a plea of guilty before a special court-martial and for a range of punishment that included the sentence adjudged, that alone does not preclude a finding of prejudice. *Halpin*, 71 M.J at 484 (Erdmann, J., dissenting). The inquiry into prejudice should focus on the effect the argument had on the sentence Capt Tozer received, and while we cannot know the exact impact of the argument, it can be viewed as persuasive, to the extent that the judge handed down the exact sentence which trial counsel requested. *See Id.*

All three factors are met to establish plain error because Government counsel argued the Article 15 to increase the punishment for Capt Tozer rather than address his rehabilitative potential and argued unit impact that was not directly attributable to Capt Tozer to increase his punishment. When the military judge embraced this improper argument and sentenced Capt Tozer to the maximum punishment available under his plea agreement—and the exact sentence requested by the Government—the Government's improper argument resulted in a material prejudice to a substantial right of Capt Tozer. Relief is therefore warranted.

WHEREFORE, Capt Tozer respectfully requests this Honorable Court reassess the sentence.

II.

THE SENTENCE IS INAPPROPRIATELY SEVERE.

Standard of Review

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

Law and Analysis

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

In determining whether a sentence should be approved, the Court's authority is "not legality alone, but legality limited by appropriateness." *United States v. Atkins*, 23 C.M.R. 301, 303 (C.M.A. 1957). In reviewing sentence appropriateness, the Court must also be sensitive to considerations of uniformity and even-handedness. *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001).

Capt Tozer's sentence is inappropriately severe in light of the nature of the offense of which he was convicted. First, there were minimal matters properly offered in aggravation. As outlined above in part I, the actual unit impact from Capt Tozer's crime was minimal – the majority of the argument focused on the second and third-order effects from Capt Tozer being removed from his position as SOO, which were not directly related to his offense. There were no injuries, property damage, nor direct unit impact outside of the one-night Capt Tozer could not report for work. *See* Pros. Ex. 1.

Given the lack of matters in aggravation, granting relief from this sentence is consistent with this Court's duties to approve only so much of the sentence that is correct in law and fact. While this Court has declined to find a sentence too severe when the circumstances of the crime are aggravating, conversely, this Court has granted relief when the circumstances of the crime are not "particularly aggravating." *Compare United States v. Flores*, No. ACM 40294, 2023 CCA LEXIS 165, at *18 (A.F. Ct. Crim. App. 13 Apr. 2023) (unpub. op.), *aff'd*, *United States v. Flores*, 84 M.J. 277 (C.A.A.F. 2024)), *with United States v. Douglas*, No. ACM 40324, 2024 CCA LEXIS 254, at *9, (A.F. Ct. Crim. App. 27 Jun. 2024) (unpub. op.). Like *Douglas*, given the

lack of any matters that are particularly aggravating, relief is warranted.

Second, matters in mitigation support relief. This offense occurred as Capt Tozer was transitioning to night shift and he was not originally scheduled to work that night. R. at 25. Although he did not know it, he was suffering at the time from severe sleep apnea. *Id.* His sleep was poor and not restorative as he attempted to transition to night shift. *Id.* Moreover, Capt Tozer accepted responsibility for his conduct and pled guilty. In considering the nature of the offense and this particular accused, relief here would in no way minimize the importance of deterring drinking and driving in the Air Force. Rather, looking at Capt Tozer, his record of service, and the matters in mitigation, relief is warranted to ensure the sentence is correct in law and fact. *See* Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1), *Fields*, 74 M.J. at 625.

Third, the punishment adjudged here was more than twenty times more severe than the punishment adjudged in the 2019 Article 15 action. *Compare* EOJ, R. at 105 *with* Pros. Ex. 4. Additionally, the sentence adjudged is approximately thirteen times greater than the maximum financial penalty available in the State of Hawaii, where the offense occurred. Clemency Request – *United States v. Capt Luke M. Tozer*, 29 December 2022. The severity of the sentence in light of both the prior punishment in 2019 through an Article 15 action, and in light of punishment that could have been imposed by the state of Hawaii are offered – not to compare the sentences – but to show the sentence is unduly harsh despite the lack of matters properly offered and argued in aggravation, as outlined above. Reassessment is proper given the need for uniformity and even-handedness in sentencing, and considering Capt Tozer, the

nature and seriousness of this DUI with no injury or property damage, the appellant's record of service, and all matters contained in the record of trial. *See Sothen*, 54 M.J. at 296; *Fields*, 74 M.J. at 625.

Reassessing the sentence will not negate the seriousness of the offense Capt Tozer committed – nor the impact on the unit for the night he missed work as a result of his DUI, but it will ensure the sentence is no more severe than warranted by the entire record of trial and consistent with justice.

WHEREFORE, Capt Tozer respectfully requests this Honorable Court reassess the sentence.

Respectfully submitted,

[redacted]

NICOLE J. HERBERS, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

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 Government Trial and Appellate Operations Division on 15 July 2024.

NICOLE J. HERBERS, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	Before Panel No. 3
Captain (O-3) **LUKE M. TOZER** United States Air Force *Appellant.*	)	No. ACM 24021
	)	14 August 2024

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

ISSUES PRESENTED

I.

WHETHER GOVERNMENT COUNSEL'S IMPROPER SENTENCING ARGUMENT PREJUDICED A SUBSTANTIAL RIGHT OF [APPELLANT].

II.

WHETHER THE SENTENCE IS INAPPROPRIATELY SEVERE.

STATEMENT OF CASE

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

STATEMENT OF FACTS

Appellant volunteered to work the night shift as a Senior Operations Officer (SSO), and command notified Appellant of the night shift approximately a week ahead of time. (R. at 25, 31). Appellant claimed he was unable to sleep restfully despite the use of sleep aids the week leading up to the night shift. (R. at 25). So, the day he was scheduled to work at 2000 hours, he decided to use alcohol as a sleep aid, and he drank alcohol from 1400 to 1600 hours to get some

sleep – stopping just four to six hours before his shift was to begin at 2000 hours. (R. at 25, 26, 30). He drank "several" 24-ounce hard seltzer beverages in two hours, but he did not keep track of the number of drinks he consumed. (R. at 29, 30). He then tried to sleep for a few hours. (R. at 26).

Appellant woke up and got ready for his shift that started at 2000 hours. (R. at 26; Pros. Ex. 1 at 1). He started driving the 40 minutes to his duty location, and "as [he] approached [his] work center in Wahiawa, [he] realized [he] did not have [his] military ID." (R. at 26, 67). He turned around and drove back to his house on Joint Base Pearl Harbor–Hickam arriving to the gate around 2100 hours. (R. at 26; Pros. Ex. 1 at 5). When approaching the gate, he swerved and then stopped at the wrong line. (Pros. Ex. 1 at 5). When he rolled down his window, the gate guard smelled alcohol on Appellant. (Id. at 5, 7). A patrolman conducted field sobriety tests on Appellant. (Id. at 7). Appellant failed. (Id.). Law enforcement detained Appellant at about 2200 hours and took him to the Honolulu Airport Sherriff's Department to collect a breath sample to determine his blood alcohol content. (Id. at 2).

At the Sheriff's office, Appellant refused a breathalyzer test. (Id.). So, Security Forces sought and received authorization to draw Appellant's blood. (Id.). The blood draw occurred at 0100 hours – nine hours after Appellant claimed he stopped drinking. (Id.). His blood alcohol level was 0.235% – three times the legal limit of 0.08%. (Id.).

The government charged Appellant with one charge and one specification of drunken operation of a vehicle in violation of Article 113, UCMJ, and the convening authority referred it to a general court-martial. (*Charge Sheet*, dated 20 December 2022, ROT, Vol. 1). The convening authority then agreed to a plea agreement that referred Appellant's case to a special court-martial in exchange for a military judge alone guilty plea. (App. Ex. III). Appellant

pleaded guilty. (R. at 15). The parties agreed that the maximum punishment authorized by law based solely on Appellant's guilty plea was two-thirds forfeitures of pay for 12 months and a reprimand. (R. at 35). The military judge sentenced him to $4,321 forfeitures pay per month for five months and a reprimand – the maximum permitted under the plea agreement. (*Entry of Judgment*, dated 2 June 2023, ROT, Vol. 1; App. Ex. III).

ARGUMENT

I.

TRIAL COUNSEL'S SENTENCING ARGUMENT WAS PROPER AND NOT PREJUDICIAL.

Additional Facts

Pursuant to the plea agreement, Appellant waived any objection to the admissibility of his nonjudicial punishment for drunken operation of a vehicle in violation of Article 113, UCMJ. (App. Ex. III at 2; Pros. Ex. 4). The military judge admitted the nonjudicial punishment without any objection from trial defense counsel. (R. at 65; Pros. Ex. 4).

During the Government's presentencing case, trial counsel called Appellant's commander as a witness, and he discussed the impact Appellant's drunk driving had on the unit.

Trial Counsel's Argument Discussing Appellant's 2019 Nonjudicial Punishment

During sentencing argument trial counsel argued:

> So, hours after . . . so, hours after he stopped drinking, he purportedly stopped drinking at 1400 hours, he tests at .235, three times the legal limit. ***And we now know that this isn't even his first time getting into trouble with driving while intoxicated.*** Because we know, based off the NJP he received back in 2019, he got an NJP for driving while under the influence. And, so, it is clear that the accused does ***not care or have an appreciation for the consequences, or doesn't really appreciate the seriousness of this offense.***

> And, so, that is why we are asking for the max punishment in this case. We are asking for two-thirds forfeitures for five months and a reprimand. This punishment is necessary to specifically deter the accused from committing this offense again and also protecting the general community from him ever driving while intoxicated. And, also, it provides a general deterrence to the general public, and it promotes respectability for the law and reflects the seriousness of the offense.

(R. at 90-91) (Emphasis added to the portions defense argues are problematic).

The government used the apparent inefficacy of the prior punishment in the nonjudicial punishment for Appellant's 2019 drunk driving incident to show Appellant was undeterred by the previous punishment and to demonstrate his lack of rehabilitative potential. (R. at 91-92). Trial counsel stated:

> And, so, when we talk about specific deterrence, as I mentioned earlier, he got an NJP for this; and, as punishment, he got, or he received $1,000 forfeiture and a reprimand. And that was supposed to be a clear warning to Captain Tozer. That was supposed to be a clear warning that his conduct of driving under the influence would not be tolerated and that he needs to change his actions; because, as a junior officer, he is responsible for leading Airmen, he is responsible for mentoring Airmen and being somebody that they can look up to.
>
> However, not even three years later, we see him getting in trouble for the same type of misconduct. We see him driving three times the legal limit, three times the legal limit, going to work. So, it is evident that that previous punishment of $1,000 forfeitures did not have any effect on Captain Tozer. He did not get that message.

(Id.).

Trial Counsel's Argument Referencing Unit Impact

Then trial counsel discussed the impact Appellant's actions had on the unit, specifically manning within the unit:

> And even after that incident, as you heard from Colonel [DN], it had ripple effects throughout the unit, ripple effects that lasted six months. And that's why we're asking for the two-thirds forfeitures

> for five months, because ***since his unit had to deal with those consequences for six months, he should have to deal with the consequences for the max amount of consequences, which is two-thirds forfeitures for five months.***
>
> And as you heard from Colonel [DN], they had to pull another CGO, who was billeted to be a flight commander, they had to pull him to get him trained up to be the special operations officer. And, as you heard, it takes about 90 days to get trained up. And in the meantime, the Navy had to pick up the slack and provide somebody else to fill that position.
>
> And, then, we also heard those other subsequent consequences. We heard from Colonel [DN] that because that CGO flight commander had to be pulled to be a special operations officer, that left three senior NCOs to pick up that CGO's work, and that caused them stress. That caused additional stress because they had to do their normal duties in addition to flight commander duties.
>
> And, so, when you look at this misconduct in whole, you see that this misconduct had drastic ramifications, not just to himself, but to the joint environment, to the Navy and to the unit themselves.

(R. at 93-95). Trial defense counsel did not object to Lt Col DN's testimony. In response to trial counsel's mission impact argument, trial defense counsel countered, "This is a case where you heard that there was no mission failure that resulted from Captain Tozer's actions." (R. at 102).

Standard of Review

This Court reviews "prosecutorial misconduct and improper argument de novo and where, as here, no objection is made, [] review[s] for plain error." United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019) (*citing* United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018)). To prevail under a plain error analysis, an appellant must demonstrate that: "(1) there was an error; (2) it was clear or obvious; and (3) the error materially prejudiced a substantial right of the accused." Id. (*quoting* United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005)).

Law

When analyzing allegations of improper sentencing argument in a judge-alone forum, we presume a "military judge is able to distinguish between proper and improper sentencing arguments." United States v. Erickson, 65 M.J. 221, 225 (C.A.A.F. 2007). "The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." United States v. Frey, 73 M.J. 245, 248 (C.A.A.F. 2014) (*quoting* United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000)). Three factors "guide our determination of the prejudicial effect of improper argument: '(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction[s].'" United States v. Sewell, 76 M.J. 14, 18 (C.A.A.F. 2017) (alteration in original) (*quoting* United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005)). "In applying the Fletcher factors in the context of an allegedly improper sentencing argument, we consider whether trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the appellant was sentenced on the basis of the evidence alone." United States v. Halpin, 71 M.J. 477, 480 (C.A.A.F. 2013) (alteration, internal quotation marks, and citation omitted).

"[A]rgument by a trial counsel must be viewed within the context of the entire court-martial. The focus of [the] inquiry should not be on words in isolation but on the argument as 'viewed in context.'" Baer, 53 M.J. at 238 (quoting United States v. Young, 470 U.S. 1, 16 (1985)). "[I]t is improper to 'surgically carve' out a portion of the argument with no regard to its context." Baer, 53 M.J. at 238. As quoted by our superior Court in Baer, "[i]f every remark made by counsel outside of the testimony were ground for reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most

experienced counsel are occasionally carried away by this temptation." Baer, 53 M.J. at 238 (*quoting* Dunlop v. United States, 165 U.S. 486, 498 (1897)).

Trial counsel is "charged with being as zealous an advocate for the government as defense counsel is for the accused." United States v. McPhaul, 22 M.J. 808, 814 (A.C.M.R. 1986), pet. denied, 23 M.J. 266 (C.M.A. 1986). It is well established that arguments may be based on the evidence as well as reasonable inferences drawn therefrom. United States v. Nelson, 1 M.J. 235, 239 (C.M.A. 1975). Trial counsel "may strike hard blows but they must be fair." United States v. Doctor, 21 C.M.R. 252, 256 (C.M.A. 1956).

"Trial counsel is entitled to argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." Frey, 73 M.J. at 248 (internal quotation marks and citation omitted). "During sentencing argument, the trial counsel is at liberty to strike hard, but not foul, blows." Halpin, 71 M.J. at 479 (internal quotation marks and citation omitted). "[T]he argument by a trial counsel must be viewed within the context of the entire court-martial." Baer, 53 M.J. at 238. "The focus of our inquiry should not be on words in isolation, but on the argument as viewed in context." Id. (internal quotation marks and citations omitted).

Analysis

A. Trial counsel did not commit prosecutorial misconduct by arguing specific deterrence and Appellant's rehabilitative potential.

When referencing Appellant's previous nonjudicial punishment for drunk driving, trial counsel tied his arguments to rehabilitative potential or specific deterrence – appropriate considerations for the sentencing authority to consider in determining a sentence. R.C.M. 1002(f). Thus, his arguments did not constitute prosecutorial misconduct under the plain error standard – or any standard. Trial counsel argued:

> And we now know that this isn't even his first time getting into trouble with driving while intoxicated. Because we know, based off the NJP he received back in 2019, he got an NJP for driving while under the influence. And, so, it is clear that the accused does not care or have an appreciation for the consequences, or doesn't really appreciate the seriousness of this offense.

(R. at 91-92). In the next sentence, trial counsel recommended a sentence of "two-thirds forfeitures for five months" and immediately tied the sentence recommendation to sentencing principles laid out in R.C.M. 1002(f). Trial counsel explained, "This punishment is necessary to ***specifically deter*** the accused from committing this offense again and also ***protecting the general community*** from him ever driving while intoxicated." (R. at 90-91) (emphasis added). "[T]he argument by a trial counsel must be viewed within the context of the entire court-martial." Baer, 53 M.J. at 238. When placed in context, the statements Appellant takes issue with are no longer problematic because trial counsel tied his arguments to sentencing principles, trial counsel's argument was not clearly erroneous, especially under a plain error standard.

Appellant cites to Ivy for the proposition that "[t]rial counsel can comment on, but not overemphasize, an accused's disciplinary history." (App. Br. at 6); United States v. Ivy, No. ACM S31406, 2009 CCA LEXIS 91, at *6-8 (A.F. Ct. Crim. App. 17 Mar. 2009) (unpub. op.). In Ivy, this Court decided that trial counsel presented argument in accordance with R.C.M. 1001(g). Id at *6. And the trial counsel in Ivy was allowed to comment on whether the appellant "'learned from his mistakes' and had high rehabilitative potential." Id. But trial counsel was not permitted to "urge the members to sentence the appellant *based on* his prior disciplinary history." Id. (emphasis added). Here trial counsel did not argue that the military judge should sentence Appellant for his prior disciplinary record. Trial counsel argued Appellant's disciplinary history demonstrated low rehabilitative potential and a need for specific deterrence. (R. at 91-92).

Appellant argues the government "harness[ed] the 2019 Article 15 for a DUI as an aggravating factor to increase Capt Tozer's punishment for this DUI conviction." (App. Br. at 6). The government properly tied the nonjudicial punishment to specific deterrence and rehabilitation potential. (R. at 91-92). Appellant drove drunk in 2019, and he received a nonjudicial punishment for his actions. (Pros. Ex. 4). Yet this administrative punishment failed to deter him from repeating his choice to drink and drive. In making a specific deterrence argument, trial counsel specifically highlighted the inefficacy of the prior punishment Appellant received because Appellant once again committed "the same type of misconduct." (R. at 91-92).

> And, so, when we talk about specific deterrence, as I mentioned earlier, he got an NJP for this; and, as punishment, he got, or he received $1,000 forfeiture and a reprimand. And that was supposed to be a clear warning to Captain Tozer. That was supposed to be a clear warning that his conduct of driving under the influence would not be tolerated . . .
>
> However, not even three years later, we see him getting in trouble for the same type of misconduct. We see him driving three times the legal limit, three times the legal limit, going to work. So, it is evident that that previous punishment of $1,000 forfeitures did not have any effect on Captain Tozer. He did not get that message.

(R. at 91-92).

Appellant states, trial counsel "argued the military judge knew it was not the first time Capt Tozer had gotten into trouble with driving while intoxicated by pointing to the 2019 Article 15 for the same offense." (App. Br. at 6). This is an accurate statement of the facts in the record. Appellant's nonjudicial punishment was admitted into evidence without objection per the terms of Appellant's plea agreement – trial defense counsel agreed to its admission. (App. Ex. III). The government provided the military judge with Appellant's nonjudicial punishment, and it was proper for her to consider this information to craft a sentence in accordance with R.C.M. 1002(g)(1) ("[T]he court-martial . . . may consider any evidence admitted by the military judge

during the presentencing proceeding under R.C.M. 1001."). The record supports that the military judge would have known about the prior nonjudicial punishment, and trial counsel's comment was not plain error.

The record does not support Appellant's assertion "[t]hat emphasis on the 2019 Article 15 action demonstrates the argument was not about Capt Tozer's rehabilitative potential, but rather a means to increase Capt Tozer's punishment." (App. Br. at 7). Nor does it support his assertion that the "Government wanted to ensure the military judge punished Capt Tozer not just for his current conviction, but because this was his 'second offense.'" (App. Br. at 7). Appellant cites to Warren for the proposition that evidence of rehabilitative potential cannot be used to increase punishment. (App. Br. at 6); United States v. Warren, 13 M.J. 278, 284 (C.M.A. 1982). But Warren does not disallow what trial counsel argued in this case. It says trial counsel cannot argue for additional punishment for uncharged misconduct or lying. Warren, 13 M.J. at 285. Punishment is always properly tied to rehabilitation and specific deterrence as it was in this case. Trial counsel explained that the nonjudicial punishment "was supposed to be a clear warning that his conduct of driving under the influence would not be tolerated . . . However, not even three years later, we see him getting in trouble for the same type of misconduct." (R. at 91-92). Within the context of the argument, trial counsel was discussing deterrence and Appellant's ability to learn from his previous mistakes – rehabilitative potential. If this Court finds ambiguity in the remark, this Court should "not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning." Donnelly v. Dechristoforo, 416 U.S. 637, 647 (1974). Trial counsel's comments were tied to sentencing principles; thus, they were not plain error.

B. Trial counsel did not commit prosecutorial misconduct by arguing unit impact.

Trial counsel's arguments about unit impact were tethered to admitted evidence; thus, they were not improper. R.C.M. 1002(g)(2). Appellant claims that trial counsel's unit impact argument was not directly related to the offense of which Appellant was convicted. (App. Br. at 8). Appellant conflates the standard for admission of evidence and the standard for improper argument to paint trial counsel's argument as impermissible. It was not. Appellant cites to United States v. Rust, 41 M.J. 472 (C.A.A.F. 1995) for the proposition that "to be 'directly related' demands a greater showing that mere relevance." (App. Br. at 8). But Rust and the relevance standard inform whether evidence should have been admitted in the first place. It does not weigh on how trial counsel may argue the evidence once its admitted. The time to object to any causal chain of events or lack of direct link to the offense of which Appellant was found guilty was at the admission of Lt Col DN's testimony, not indirectly through an improper argument assignment of error.

Lt Col DN testified to the impact of Appellant's misconduct on the unit. (R. at 71-73). He explained that Appellant lost his top secret security clearance due to the misconduct. (R. at 70). SOO's are required to have a top secret clearance. (Id.) Because his security clearance was removed, Appellant was no longer able to work as an SOO, and Appellant was moved to a different position. Id. Appellant argues that the specific misconduct in this case – driving while intoxicated – did not necessitate removal of Appellant's security clearance. (App. Br. at 10). But Lt Col DN testified, "The day of the incident, [Appellant's] top secret was removed." (R. at 70). The fact that Appellant's security clearance was immediately removed or suspended aligns with Department of Defense policy that if a person is arrested or under investigation a top secret clearance may be suspended pending an investigation. Department of Defense Manual (DoDM)

5200.02, *Procedures for The DoD Personnel Security Program*, §9.4, dated 3 April 2017 (updated 29 October 2020). Per Department of Defense policy, the fact that Appellant was under investigation for *any* misconduct was grounds to suspend his security clearance at least temporarily. Id. This was an administrative action taken as a direct result of Appellant's misconduct, and directly impacted the mission of Appellant's unit. Our superior court determined testimony about the revocation of a security clearance is admissible to show mission impact. United States v. Thornton, 32 M.J. 112, 113 (C.M.A. 1991). In Thornton, the company commander provided proper unit impact when he "merely recited the fact that appellant was no longer permitted access to classified materials based on" the commander's revocation of the appellant's security clearance "following discovery of the offense." Id. In this case, Lt Col DN did the same thing – merely reciting the fact that Appellant's security clearance was revoked immediately after the drunk driving incident, and he could not work in his assigned position. (R. at 70). Thus, discussion of Appellant's security clearance revocation was proper unit impact evidence, and trial counsel was permitted to comment on the evidence.

Appellant's removal impacted the manning of the unit.[1] (R. at 71). Trial defense counsel did not object to this evidence at trial, and Appellant still does not object to the admission of this evidence on appeal. Thus, these were facts in evidence on which trial counsel could comment. R.C.M. 1002(g)(2). Once admitted, "[t]rial counsel is entitled to argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." Frey, 73 M.J. at 248

[1] Even if this Court evaluates the initial admission of the unit impact evidence the military judge did not abuse her discretion in admitting it. In Key, this Court found that testimony that an accused's removal from customer service section for misconduct left it "short-handed and heavily tasked," and "required everyone else to work harder, reduced efficiency, and lowered morale" is admissible under R.C.M. 1001(b)(4). United States v. Key, 55 M.J. 537, 538-539 (A.F. Ct. Crim. App. 2001), *aff'd*, 57 M.J. 246 (2002).

(internal quotation marks and citation omitted). Trial counsel's arguments about unit impact were not plainly erroneous.

Appellant claims that "[w]hen the Government argued Capt Tozer should be punished for those second and third order consequences, it was akin to arguing Capt Tozer should be punished more harshly because he was an SOO, and not for the offense he committed." (App. Br. at 13). Appellant's argument stretches trial counsel's words to the most damaging interpretation possible. "A court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." Donnelly, 416 U.S. at 647. Trial counsel never argued that Appellant should receive a harsher punishment because of his position as an SOO, and Appellant conceded that in his brief despite his inference that such an argument was made. (App. Br. at 12). Rather trial defense counsel argued that Appellant's misconduct directly impacted the unit – a fair argument based on the evidence presented by Lt Col DN. R.C.M. 1001(b)(4) permits evidence of "significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense" to be admitted in sentencing. Lt Col DN provided this testimony without objection from trial defense counsel. The evidence was properly admitted, and trial counsel argued reasonable inferences from the evidence Lt Col DN presented to the court. Trial counsel's argument was not improper and not plainly erroneous. Relief is not warranted.

C. Trial counsel's argument did not prejudice Appellant because the severity of the misconduct was low; no curative measures were necessary; and the government's case used Appellant's own words to secure the conviction.

Trial counsel's argument was not plain error. But if this Court finds error, Appellant fails to show that there was "a reasonable probability that, but for the error, the outcome of the

proceeding would have been different." Voorhees, 79 M.J. at 9 (*quoting* United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017). To evaluate prejudice, this Court looks at the three Fletcher 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." Fletcher, 62 M.J. at 184. Taken as a whole the comments must be so damaging that this Court "cannot be confident that the members convicted the appellant on the basis of the evidence alone." United States v. Schroder, 65 M.J. 49, 58 (C.A.A.F. 2007) (*quoting* Fletcher, 62 M.J. at 184). The comments were not so damaging in this case. Appellant's argument fails all three Fletcher factors.

First, the prosecutor's comments did not constitute severe misconduct. Fletcher, 62 M.J. at 184. Trial counsel referenced the nonjudicial punishment, but in doing so attempted to tie the argument to rehabilitative potential – a proper argument for Appellant's service record that contained a properly admitted nonjudicial punishment. Even if those comments constituted plain and obvious error, his comments were not pervasive throughout the entirety of the trial, and this Court must look at the context of the entire court-martial. Baer, 53 M.J. at 238.

Appellant claims the unit impact trial counsel made up a quarter of the government's sentencing argument. (App. Br at 16). But this argument did not influence the sentence because trial defense counsel commandeered the argument. Trial defense counsel never objected to the unit impact but chose instead to dispose of the unit impact argument by pointing out, "This is a case where you heard that there was ***no mission failure*** that resulted from Captain Tozer's actions." (R. at 102) (emphasis added). Trial defense counsel effectively rebutted trial counsel's argument essentially negating any weight given to those arguments.

A plain error review of a failure to object to an argument at the time of trial rule exists "to prevent defense counsel from remaining silent, making no objection, and then raising the issue

on appeal for the first time, long after any possibility of curing the problem has vanished. It is important to encourage all trial participants to seek a fair and accurate trial the first time around." United States v. Reist, 50 M.J. 108, 110 (C.A.A.F. 1999) (internal quotations omitted). Trial defense counsel did not find it necessary to object to trial counsel's rehabilitative potential or unit impact arguments. The "lack of a defense objection is some measure of the minimal impact of a prosecutor's improper comment." United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001) (internal quotation marks and citation omitted). Thus, the arguments did not constitute severe misconduct.

The second Fletcher factor evaluates "the measure adopted to cure the misconduct." Fletcher, 62 M.J. at 184. But no curative instructions were necessary because Appellant opted for a judge alone forum. Fletcher, 62 M.J. at 184. This Court presumes military judges follow the law and can delineate between proper and improper sentencing argument. Erickson, 65 M.J. at 225; (R. at 13).

The presumption may only be overcome if clear evidence contradicts it. United States v. Mason, 45 M.J. 483, 484 (C.A.A.F. 1997). Appellant argues that "the unchecked argument invited the military judge to improperly punish [Appellant] not only for this offense, but because it was his second incident." (App. Br at 15). Even if it was an invitation, the military judge did not accept it. The record does not reflect a lack of legal understanding about how the military judge could use the nonjudicial punishment when crafting a sentence. Unless this Court assumes the military judge abdicated her responsibilities as the presiding officer of the court-martial, this Court can "be confident that the appellant was sentenced on the basis of the evidence alone," and not based on "trial counsel's comments, taken as a whole." Halpin, 71 M.J. at 480 (alteration, internal quotation marks, and citation omitted).

Appellant argues the presumption should be overcome because "the military judge ratified the reprimand she issued when she signed the EOJ, which punished [Appellant] for a second offense." (App. Br. at 18). But the military judge does not have the authority to write or even correct a reprimand. R.C.M. 1003(b)(1). "A court-martial ***shall not*** specify the terms or wording of a reprimand." Id. (emphasis added). Correcting the reprimand before signing the Entry of Judgment, especially in the absence of any complaint by trial defense counsel, would constitute specifying the wording of a reprimand, and the military judge does not have such authority. The reprimand belongs to the convening authority. Had the military judge ignored R.C.M. 1003(b)(1) and edited the reprimand, then she would have committed a legal error worthy of overriding the presumption that she knew the law. She did not. The military judge did not ratify the language of the reprimand because she did not have any authority over it.

Appellant cites to United States v. Cannon as an example of how a presumption that the military judge understands the law may be overcome. ARMY 20480580, 2020 CCA LEXIS 254 (A. Ct. Crim. App. 2020). Appellant lists the mistakes the Cannon trial court made. (App. Br. at 17). The military judge improperly admitted uncharged misconduct, and then trial counsel used the improper evidence in the government's sentencing argument. Cannon, ARMY 20480580, 2020 CCA LEXIS 254. The ACCA determined the appellant experienced prejudice due to the compounded error. Id. But this case does not parallel Cannon as Appellant claims because here the military judge did not erroneously admit Appellant's 2019 nonjudicial punishment. The parties – specifically Appellant – agreed in the plea agreement that the document was admissible, and trial defense counsel did not object to the admission. (App. Ex. III). Appellant fails to point to an error by this military judge that was compounded by trial counsel's argument thus overcoming the presumption that the military judge knew the law.

Appellant cites to the Halpin dissent arguing that "the fact that Capt Tozer bargained for a plea of guilty before a special court-martial and for a range of punishment that included the sentence adjudged, that alone does not preclude a finding of prejudice." (App. Br. at 19)(*citing* Halpin, 71 M.J at 484 (Erdmann, J., dissenting)). The favorable plea is a consideration for this Court and evidence of the plea's fairness, but that is not the only part of the record that thwarts Appellant's prejudice claim. The government's case against Appellant – the third Fletcher factor – spoils Appellant's claim.

If the strength of the government's case against Appellant (the third Fletcher factor) so clearly favors the government, then Appellant fails to show he experienced prejudice. Andrews, 77 M.J. at 402. Appellant's sworn guilty plea inquiry and the stipulation of fact are uncontroverted evidence that Appellant cannot overcome to demonstrate prejudice. (R. at 22-35; Pros. Ex. 1). Appellant's argument fails on the third prong because the government's evidence was strong and uncontested. Although Appellant attempted to downplay the egregious nature of his offense by emphasizing the lack of injury or property damage, he drove approximately 80 minutes to work and back home while drunk. (R. at 26, 67). Nine hours after he claimed that he stopped drinking his blood alcohol content was 0.235% – three times the legal limit of 0.08%. (Pros. Ex. 1). The third Fletcher factor so clearly favors the government that Appellant cannot show prejudice. Andrews, 77 M.J. at 402. Appellant's argument fails on this prong alone and relief is unwarranted.

Trial counsel's sentencing argument was not plain error. Even if this Court finds plain error, this Court can be confident that Appellant was sentenced based on the evidence of his drunk driving with a blood alcohol content of 0.235% and not any plainly erroneous argument. Trial counsel's argument, if error, did not constitute severe misconduct. The military judge was

presumed to know the law, and she did not require curative measures. And the weight of the evidence against Appellant supported the sentence. This Court should not grant relief on this assignment of error.

II.

APPELLANT'S SENTENCE WAS APPROPRIATE FOR DRIVING DRUNK WITH A 0.235% BLOOD ALCOHOL CONTENT, AND RELIEF IS UNWARRANTED.

Standard of Review

Under Article 66(d), UCMJ, the Court of Criminal Appeals reviews sentence appropriateness de novo. United States v. McAlhaney, 83 M.J. 164, 166 (C.A.A.F. 2023) (*citing* United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006)). "The Court may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." 10 U.S.C. § 866(d)(1)(A), UCMJ (2021).

Law and Analysis

Appellant's sentence of two-thirds forfeitures for five months and a reprimand is appropriate, and relief is unwarranted where Appellant drove for approximately 80 minutes with a blood alcohol content of 0.235%. (Pros. Ex. 1; R. at 26, 67). Sentence appropriateness is assessed "by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial." United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009). In assessing this case, this Court should consider, the seriousness of Appellant's conduct and his average military record.

The nature and seriousness of the offense warrants the adjudged punishment. (*Entry of Judgment*, ROT, Vol 1). Appellant self-medicated and drank to excess to make himself pass out so he could sleep, stopping just four to six hours before he needed to be at work. (R. at 26).

After learning Appellant's blood alcohol content was 0.235%, someone with a basic understanding of alcohol metabolism would be able to determine Appellant was unfit to drive and unfit to work. Appellant drove 40 minutes to work, and then realized he forgot his common access card (CAC) at home on Joint Base Pearl Harbor-Hickam. (R. at 26). He turned around and drove the 40 minutes back home before security forces stopped and investigated him for swerving at the front gate and stopping at the incorrect line. (Pros. Ex. 1; R. at 67). He spent 80 minutes on the road with a blood alcohol content of at least 0.235%. (Pros. Ex. 1; R. at 26, 67). No one was injured – likely because he drove between 1900 and 2100 hours, after typical rush hour traffic. But this situation is more serious than a person driving with a blood alcohol content just over the legal limit. Here Appellant tripled the legal limit; thus, his conduct warrants punishment.

Appellant's record of service was rather average. His record lacked "any particular acts of good conduct or bravery and evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a servicemember." R.C.M. 1001(d)(1)(B); *see also* United States v. Talkington, 73 M.J. 212, n.2 (C.A.A.F. 2014)(reiterating the standard for matters in extenuation and mitigation in R.C.M. 1001(d)(1)(B)). He provided a copy of awards and decorations that show he did his job to an acceptable level. (Def. Ex. B, C). And he possessed academic accolades – a bachelor's degree and a master's degree. (Def. Ex. D, E). But none of these indicate exemplary service are capable of outweighing Appellant's blatant disregard for his safety and the safety of others on the road.

Although this Court has great discretion to determine whether a sentence is appropriate, the Court lacks any authority grant mercy. United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F.

2010) (citation omitted). Unlike the act of bestowing mercy through clemency, which was delegated to other channels by Congress, CCAs are entrusted with the task of determining sentence appropriateness, thereby ensuring the accused gets the punishment he deserves. United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988). Appellant received the punishment he deserved based on his actions and the exceptionally favorable plea agreement he negotiated. This Court should no provide further relief.

Appellant advances four reasons why he should receive leniency, and this Court should deem them unpersuasive, distinctly and in the aggregate: (1) "there were minimal matters properly offered in aggravation;" (2) "matters in mitigation support relief;" (3) "the punishment adjudged here was more than twenty times more severe than the punishment adjudged in the 2019 Article 15 action;" and (4) "[r]eassessment is proper given the need for uniformity and even-handedness in sentencing." (App Br. at 21-22). This Court should find these arguments unconvincing for two reasons. First, Appellant understood and agreed that two-third forfeitures for five months was a possible and fair sentence. Second, the military judge considered Appellant's service record and matters in mitigation, and determined they did not outweigh the aggravating facts of the offense.

A. Appellant understood and agreed that two-third forfeitures for five months was a possible and fair sentence.

Appellant asks this Court to reduce his punishment significantly even though the plea agreement he negotiated already lowered his punitive exposure and the military judge sentenced him in accordance with the plea agreement. (App. Ex. III). An "accused's own sentence proposal is a reasonable indication of its probable fairness to him." United States v. Fields, 74 M.J. 619, 625 (A.F. Ct. Crim. App. 2015) (citations omitted). *See* United States v. Jackson, 2024 CCA LEXIS 9, *18 (A.F. Ct. Crim. App. 2024)(unpub. op.) ("A plea agreement with the

convening authority is some indication of the fairness and appropriateness of [an appellant's] sentence." (citation omitted)). Per the terms of his plea agreement, Appellant avoided a dismissal and six months confinement for drunken operation of a vehicle with a 0.235% blood alcohol content – three time higher than the legal limit of 0.08%. (App. Ex. III; Pros. Ex. 1); MCM, pt. IV, ¶51a(b)(3). Had Appellant been prosecuted before a general court-martial, he would have faced a maximum punishment of forfeiture of all pay and allowances, confinement for six months, and a dismissal for driving while drunk. MCM, pt. IV, ¶51d.(2) (2019 ed.); R.C.M. 1003(b)(8)(A). Pursuant to his plea agreement, the charge and specification were referred to a special court-martial; thus, reducing his punitive exposure significantly. (App. Ex. III). The maximum punishment available for an officer at the forum was forfeitures of two-thirds pay for 12 months and a reprimand. MCM, pt. IV, ¶51d.(2) (2019 ed.); R.C.M. 1003(b)(8)(A) (only a general court-martial may adjudge a dismissal); R.C.M. 1003(c)(2)(A)(ii) (only a general court-martial may adjudge confinement for an officer accused). The plea agreement further reduced his punitive exposure by limiting the two-thirds forfeitures to no less than two months and no more than five months. (App. Ex. III). In accordance with the plea agreement, the military judge sentenced Appellant to two-third's forfeitures for five months and reprimand. (*Entry of Judgment*, ROT, Vol. 1).

Appellant successfully negotiated a plea agreement limiting the court's available punishments, and the military judge adjudged a sentence within that range. Appellant should not gain a windfall on appeal because he is upset that he received the maximum available under the lenient terms to which he negotiated and agreed.

B. The military judge considered the mitigation evidence and aggravating facts presented at trial and arrived at an appropriate sentence.

The military judge considered the mitigation evidence presented by Appellant and the aggravating facts Appellant admitted to in his guilty plea inquiry when determining an appropriate sentence for him. This Court should decline to reevaluate the military judge's sentence based on the same mitigation evidence on appeal.

Appellant argues that "this Court has declined to find a sentence too severe when the circumstances of the crime are aggravating, conversely, this Court has granted relief when the circumstances of the crime are not 'particularly aggravating.'" (App. Br at 21). He then claims that his circumstances are not aggravating.

Appellant claims no aggravating evidence was properly admitted. But the sentencing authority may consider "[a]ny evidence admitted by the military judge during the findings proceeding." R.C.M. 1002(g)(2). And driving with a blood alcohol content three times the legal limit is aggravating evidence that was provided via the stipulation of fact during the findings phase of the court-martial. (Pros. Ex. 1). Appellant drank to excess only a few hours before leaving for work. He would have arrived to work drunk had he not forgotten his common access card and turned around to retrieve it. (R. at 26). He luckily did not injure anyone in the approximately 80 minutes he was driving. (R. at 67). These facts – found in the record – support the military judge's adjudged sentence of two-thirds forfeitures for five months.

Appellant also claims, "Although he did not know it, he was suffering at the time from severe sleep apnea. [] His sleep was poor and not restorative as he attempted to transition to night shift. []" (App. Br. at 22). Appellant stated in his guilty plea inquiry and unsworn statement that he had sleep apnea, but he did not provide the court-martial with any evidence of a medical diagnosis or efforts to seek medical intervention. *See* (Def. Ex. A-J). The military judge

sitting alone considered the guilty plea inquiry and unsworn statement in which Appellant discussed his sleep apnea. (R. at 65). Then the military judge weighed the alleged medical concern against the stipulation of fact and Appellant's own sworn testimony that rather than seeking medical attention Appellant self-medicated with alcohol just four to six hours before his shift started. (Pros. Ex. 1; R. at 26). This evidence was available to the military judge when she sentenced Appellant.

Appellant points out that "Capt Tozer accepted responsibility for his conduct and pled guilty." (App. Br. xx). The government agrees that a military judge may consider a guilty plea as evidence in mitigation. United States v. Edwards, 35 M.J. 351, 355 (C.A.A.F. 1992). The military judge – knowing this was proper mitigation under the law – already considered this fact when coming to an appropriate sentence for Appellant at trial. Erickson, 65 M.J. at 225. But now on appeal, Appellant's willingness to take responsibility does not warrant *additional* relief.

After considering the sleep apnea evidence and Appellant's willingness to plead guilty as mitigation, the military judge adjudged a punishment within the realm of available, lawful sentences. The sentence was appropriate, and this Court should deny Appellant relief.

C. This Court should not engage in sentence comparison between Appellant's court-martial sentence and either his 2019 nonjudicial punishment action or the potential punishments in Hawaiian state court.

Appellant also argues "the punishment adjudged here was more than twenty times more severe than the punishment adjudged in the 2019 Article 15 action." (App. Br. at 22). Appellant argues in Issue I that trial counsel improperly used Appellant's previous drunk driving nonjudicial punishment in argument as a reason to punish Appellant more harshly. But now Appellant uses the same nonjudicial punishment to argue that this Court should punish him less harshly. Nonjudicial punishment is just that, not judicial but rather administrative, and should

not influence the sentence at the court-martial unless the charged conduct arises from the same incident as a previous nonjudicial punishment. United States v. Pierce, 27 M.J. 367 (C.M.R. 1989). This Court refuses to engage in sentence comparison when two courts-martial are being compared, unless "sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases." United States v. Ballard, 20 M.J. 282, 283 (C.M.A. 1985). This Court should decline to compare a court-martial punishment to administrative punishment. The choice of forum does not lend itself to comparison because by law the maximum punishments available under Article 15 are significantly lower than court-martial maximums – in this case for drunken hazarding of a vehicle. *Compare* 10 U.S.C. 815 *with* MCM, pt. IV, ¶51d.(2) (2019 ed.).

Appellant goes on to argue that "the sentence adjudged is approximately thirteen times greater than the maximum financial penalty available in the State of Hawaii, where the offense occurred." (App. Br. at 22). But each sovereign jurisdiction is entitled to set its own maximum penalties for criminal conduct, and military law exists separately from state and federal law. *See generally* Burns v. Wilson, 346 U.S. 137, 140 (1953) ("Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment."). State sovereignty is "the right of a state to self-government; the supreme authority exercised by each state." State Sovereignty, BLACK'S LAW DICTIONARY (11th edition). Sovereign power is "the power to make and enforce laws." Sovereign Power, BLACK'S LAW DICTIONARY (11th edition). Hawaii's state law is not charged in this case. Thus, it should have no bearing on the sentence. One jurisdiction's maximum penalties should not influence the sentence in another when the legislative bodies for each have determined what is appropriate for

their sovereign. In this case, the President determined the maximum punishment for drunk driving. 10 U.S.C. 836; MCM, pt IV, ¶51d.(2)(2019 ed.).

This Court should find Appellant's arguments unpersuasive. Appellant's sentence of two-thirds forfeitures for five months and a reprimand is appropriate. Appellant's claim does not warrant leniency. This Court should deny this assignment of error.

CONCLUSION

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

[redacted]
JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

[redacted]
MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 14 August 2024.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24021**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Luke M. TOZER	)	**PANEL CHANGE**
Captain (O-3)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 20th day of August, 2024,

ORDERED:

The record of trial in the above styled matter is withdrawn from Panel 3 and referred to a Special Panel for appellate review.

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

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
BREEN, DANIEL J., Lieutenant Colonel, Appellate Military Judge
WARREN, CHARLES G., Lieutenant Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	)	**REPLY BRIEF**
	)	Before Special Panel
v.	)	
	)	No. ACM 24021
Captain (O-3) **LUKE M. TOZER,** United States Air Force *Appellant*	)	21 August 2024

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

Pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, Captain (Capt) Luke M. Tozer (Appellant), hereby files this reply to the Appellee's Answer, filed 14 August 2024 (Answer). Appellant stands on the arguments in his brief, filed 15 July 2024 (Appellant's Br.), and in reply to the Answer submits the additional arguments for the issues listed below.

I.

GOVERNMENT COUNSEL'S IMPROPER SENTENCING ARGUMENT PREJUDICED A SUBSTANTIAL RIGHT OF CAPT TOZER.

1. *Government counsel's argument on the 2019 Article 15 action was never tied to rehabilitative potential nor any other lawful consideration for matters from the service record.*

In the sentencing argument, Government counsel did not tie Capt Tozer's 2019 Article 15 action to his rehabilitative potential. Despite the assertions this argument was proper because it was tied to Capt Tozer's rehabilitative potential, Answer at 4,

7, the Government could not cite to actual evidence of argument on rehabilitative potential. *See* Answer at 8, 10.

Regardless of the other appropriate considerations in crafting a sentence found in R.C.M. 1001, there are limits on the use of evidence from an accused's service record; it is relevant as to rehabilitative potential. *United States v. Sauer*, 15 M.J. 113, 115 (C.M.A. 1983). Examples of proper argument on rehabilitative potential using the service record are: argument that prior negative paperwork is "a reflection of [the accused's] poor rehabilitative potential." *United States v. Freeman*, No. ACM 38494, 2015 CCA LEXIS 100, at *18-19 (A.F. Ct. Crim. App. 23 Mar. 2015) (unpub. op.). Another example of proper argument is when the Government argued that prior attempts to correct the accused's "behavior and instill in him discipline and professionalism" had failed and thus "harsher measures are now necessary." *United States v. Shelby*, No. ACM S32613, 2021 CCA LEXIS 121, at *17 (A.F. Ct. Crim. App. 24 Feb. 2021).

What these cases illustrate as proper argument is missing here. Those cases have the common component of tying the prior disciplinary action to an assertion of prior correction or attempts to reform behavior had failed. There is no such tie-in here. In contrast, Government counsel asked the military judge to adjudge a harsher punishment because the 2019 Article 15 action merely existed. Government counsel argued the existence of the 2019 Article 15 action showed Capt Tozer's alleged lack of care for the law, R. at 95, and alleged cavalier attitude toward this offense, R. at 91. As a result, the Government's specific deterrence argument did not comment on

Capt Tozer's prior service record to demonstrate his rehabilitative potential but harnessed the 2019 Article 15 for a DUI as an aggravating factor to increase his punishment for this DUI conviction. The use of the 2019 Article 15 as a means to increase his punishment for this conviction is the exact prohibited use for matters within Capt Tozer's service record. *United States v. Warren*, 13 M.J. 278, 284 (C.M.A. 1982).

2. The mere admission of evidence[1] does not empower Government counsel to make an improper unit impact argument.

Argument on unit impact must be linked to the offense, just as the actual evidence of unit impact must be linked to the offense to be relevant for admission. To be directly related, and thus proper for argument on unit impact, an "[a]ppellant's offense must play a material role in bringing about the effect at issue; the military judge should not admit evidence of an alleged consequence if an independent, intervening event played the only important part in bringing about the effect." *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995) (citation omitted).

Contrary to the Government's argument in its brief, Answer at 11-13, the argument that the time to replace Capt Tozer in his position as Senior Operations Officer (SOO) due to the unit manning, the training process, or need for a security clearance was not directly related to the offense of which Capt Tozer was convicted. *See* R.C.M. 1001(b)(4); *United States v. Stapp*, 60 M.J. 795, 800 (A. Ct. Crim. App.

[1] Capt Tozer's trial defense counsel did not object to this evidence of unit impact at trial. However, this Court, in determining whether unit impact argument is proper, can also determine whether the evidence was a proper matter in aggravation. *See United States v. Hardy*, 77 M.J. 442-43 (C.A.A.F. 2018).

2004), *aff'd*, 64 M.J. 179 (C.A.A.F. 2006); *United States v. Witt*, 21 M.J. 637, 640 n.3 (A.C.M.R. 1985); *see also Rust*, 41 M.J. at 478. Because of the independent, discretionary action of D.N.,[2] the unit impact argued by the Government was not a proper matter in aggravation before the military judge and the argument equating that evidence to an increased need for punishment was plain and obvious error.

Argument on unit impact to justify a punishment must still be based on evidence that is directly related, which excludes evidence of an alleged consequence if an independent, intervening event played the only important part in bringing about the effect. *Rust*, 41 M.J. at 478. The removal of Capt Tozer's security clearance here is one intervening event that played a part in bringing out the alleged unit impact thus arguing those consequences following the removal were matters in aggravation was improper.

Additionally, Capt Tozer's job as an SOO was unique, with staffing requirements that were onerous to the unit. R. at 69, 70-71. Those facts are another set of intervening events which brought about the alleged unit impact, and which are not attributable to Capt Tozer when calculating effects of the Government's argument on unit impact. Yet the Government argued Capt Tozer should be punished because his position as an SOO had onerous staffing requirements causing the unit to deal with staffing issues for six months, which was akin to arguing Capt Tozer should be

[2] D.N.'s military rank was included in Appellant's initial brief but is omitted here to comport with this Court's guidance concerning Article 140a, UCMJ. References to D.N. in this brief are to the same D.N. referenced in Appellant's initial brief.

punished more harshly because he was an SOO, and not for the offense he committed. This was error. *See United States v. Bobby*, 61 M.J. 750 (A.F. Ct. Crim. App. 2005).

3. Capt Tozer was prejudiced by Government counsel's improper argument.

Appellant stands on the initial brief for the analysis of the first factor under *Fletcher*[3], and provides additional argument on the second and third factor.

As to the second factor, the Government concedes that there were no measures to cure this misconduct, but contends no curative instructions were necessary because Capt Tozer was tried by a military judge alone. Answer at 15. Contrary to the Government's argument, in evaluating whether the military judge knew and applied the law as it relates to only considering proper argument and evidence in sentencing – the actions of the military judge in signing the Entry of Judgment demonstrates how the military judge may have been influenced by the errant argument. EOJ. While the military judge is not able to specify the wording of the reprimand, Answer at 16, this does not justify a ratification of a reprimand that clearly stated Capt Tozer was being punitively reprimanded not for this DUI conviction, but for a *second offense*. *See* EOJ. The military judge, as the signatory, is affirming the punishment is correct as adjudged by the court-martial, which only contained one conviction for a DUI. R.C.M. 1111(a)(2). Thus, there is evidence the military judge may have improperly sentenced Capt Tozer for his second offense, as argued by Government counsel, R. at 90-92, when the military judge signed the Entry of Judgment with a reprimand for a second offense. EOJ.

[3] *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005).

As to the third factor, the focus is on the effect the argument had on sentencing. To the extent that the argument produced the exact result requested, here, the maximum punishment under the plea—that is indicative of the impact of such an argument. *United States v. Halpin*, 71 M.J. 477, 484 (C.A.A.F. 2013) (Erdmann, J., dissenting). Additionally, the plea inquiry and stipulation of fact are not "uncontroverted evidence" that Capt Tozer cannot overcome to establish prejudice from the sentencing argument. Answer at 17. The focus here is on the argument and the evidence available at sentencing and whether this Court can be confident Capt Tozer was only sentenced for the offense of which he was convicted. *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007). Further as outlined in section II, there was no evidence Capt Tozer drove with any specific blood alcohol content, in contrast to the Government's assertion Capt Tozer drove with a blood alcohol content (BAC) of .235%. Answer at 17. In light of the multiple errors in sentencing argument, where Government counsel improperly argued the 2019 Article 15 to punish Capt Tozer more harshly as a second offense, where Government counsel improperly argued matters as unit impact which were not directly related to Capt Tozer's DUI, and where Government counsel argued Capt Tozer, in effect, should be punished more harshly because of his duty position, prejudice has been established. When coupled with the facts in aggravation as outlined in section II, alongside the arguments themselves, the totality of the record establishes these arguments operated to the prejudice of Capt Tozer. Stated differently, if this Court excludes these improper arguments from consideration, the record demonstrates the military judge would not

have adjudged the maximum punishment because the adjudged punishment was not commensurate with the nature and seriousness of this offense, and all matters properly before the court.

WHEREFORE, Capt Tozer respectfully requests this Honorable Court reassess the sentence.

II.

THE SENTENCE IS INAPPROPRIATELY SEVERE.

The terms of a plea agreement are one consideration in determining the appropriateness of a sentence, however a sentence within the range of a plea agreement may still be inappropriately severe. *See United States v. Fields*, 74 M.J. 619, 626 (A.F. Ct. Crim. App. 2015). This is because the Court's authority to review a case for sentence appropriateness "reflects the unique history and attributes of the military justice system, [and] includes, but is not limited to, considerations of uniformity and evenhandedness of sentencing decisions." *United States v. Sothen,* 54 M.J. 294, 296 (C.A.A.F. 2001) (citations omitted).

Contrary to the Government's argument, Answer at 21, whether a sentence is appropriate should not focus on what punishments were taken off the table through that plea agreement but whether the punishment *as adjudged* is appropriate in light of the record. *See United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). If it were

proper to prioritize consideration of what punishments neither party[4] thought were appropriate for the circumstances of Capt Tozer's driving under the influence, it would be contrary to the principles of sentencing. Capt Tozer should have been sentenced for the crime he committed, considering his service record, and who he is. *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). As such, in assessing whether Capt Tozer's punishment is appropriate, consider the uncontested matters in mitigation and extenuation, his service record, and the nature of the actual offense. Appellant's Br. at 20-23.

As to the matters in mitigation and extenuation, they are uncontested by the Government. Answer at 18. Capt Tozer properly put forth evidence of his obstructive sleep apnea under oath with the military judge during the *Care* inquiry.[5] R. at 25. He provided evidence of his attempts to regulate his sleep unsuccessfully in his unsworn statement. R. at 84. When offered the ability to rebut anything within the unsworn statement, or offer additional evidence in support of the plea, the Government declined. R. at 89, 35. Thus, the Government did not rebut the sworn testimony Capt Tozer was suffering from obstructive sleep apnea nor that he struggled to regulate his sleep schedule.

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[4] The Convening Authority did not think a dismissal, confinement, or more than 5 months of two-thirds forfeitures was appropriate given the approval of the plea agreement to a special court-martial with the specified sentencing limitations and those that operate by law. App. Ex. III.

[5] The original brief mislabeled Capt Tozer's difficulty with regulating his sleep and undiagnosed obstructive sleep apnea as matters in mitigation, but in this reply brief, those matters are discussed as matters in extenuation. Appellant's Br. at 18.

Second, the Government's labeling of Capt Tozer's record as just "average" is not supported by the record. Answer at 19. His service record establishes that he would be an "outstanding officer." Pros. Ex. 3 at 1. He graduated the Intelligence Officer Course with a 93% academic average. Pros. Ex. 3 at 2. He was an exceptional and instrumental, visionary leader. Pros. Ex. 3 at 3. In response to his Article 15 in 2019, Capt Tozer dedicated more time to support roles and increased his workload to demonstrate his commitment to rehabilitation. Pros. Ex. 3 at 5. During the next two rating periods, he exceeded expected MQ-9 support with low-manning operations and was again championed as innovative, with high initiative and dedication. Pros. Ex. 3 at 7, 9.

Third, the Government's brief overstates the aggravating nature of the offense. For instance, there was no testimony that Capt Tozer drank to "pass out" as alleged by the Government. *Compare* Answer at 18 (asserting Capt Tozer drank in excess to pass out), *with* Pros. Ex. 1 (where Capt Tozer stipulated to no facts related to how much he drank), *and* R. at 26 (where Capt Tozer admitted he drank alcohol to help him sleep but had not actually slept). Additionally, the record does not support the assertion that Capt Tozer drove at three times the legal limit. Answer at 19, 22. The Government did not offer expert testimony to extrapolate Capt Tozer's blood alcohol content at the time he was driving based on the later blood draw. Contrary to the Government's conjecture in its brief, *see* Answer at 19, there are no facts under which the Government or this Court can determine that no injury or property damage resulted in this case because of lack of traffic, that Capt Tozer was driving

dangerously, or that Capt Tozer drove with a blood alcohol content at any specific rate above the legal limit. The facts are that Capt Tozer swerved when he was deciding whether he needed to go to the Visitor's Center or to the gate, R. at 32-33, that the swerve was observed by the guard at the gate, Pros. Ex. 1, and that Capt Tozer felt tired, not 100%. R. at 31. Further, while the guard smelled alcohol, he did not state that Capt Tozer was belligerent, uncooperative, unable to control his movements, or unable to follow commands. Pros. Ex. 1. The Government was free to supplement Capt Tozer's plea to this offense and did not do so either after the *Care* inquiry nor during sentencing.

Finally, Capt Tozer is not asking this Court to engage in sentence comparisons. Rather, Capt Tozer offered evidence from the record concerning what punishments would be more consistent with the nature and seriousness of this offense. Appellant's Br. at 22. The punishment from the 2019 Article 15 ($1,000) simply shows what incremental increase in punishment is necessary to meet the principles of sentencing for Capt Tozer's conviction for this offense. Similarly, the notation of what Capt Tozer would face had he been stopped off-installation in Hawaii is another indication of the appropriateness of the sentence given the Government also saw fit here to limit Capt Tozer's punitive exposure to merely a financial penalty similar to what he would face in Hawaii. *Compare* App Ex. III (the plea agreement limiting the punishment to only forfeiture of pay by forum), *with* Clemency Request – *United States v. Capt Luke M. Tozer*, 29 December 2022 (where Capt Tozer's forfeiture of $21,605 was 13 times more than the financial penalty he would have faced in Hawaii (approximately $1,661)).

Thus, the amounts of $1,000 and $1,661 show that a punishment of over $21,000 was greater than necessary to promote justice and to maintain good order and discipline. This is true particularly when considering who Capt Tozer is, the need to rehabilitate Capt Tozer, and the principles of sentencing. *See* R.C.M. 1002(c)(1)-(4).

WHEREFORE, Capt Tozer respectfully requests this Honorable Court reassess the sentence.

Respectfully submitted,

[redacted]

NICOLE J. HERBERS, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

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 Government Trial and Appellate Operations Division on 21 August 2024.

[redacted]

NICOLE J. HERBERS, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770