20 June 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

Airman Basic (E-1)
ANDREW P. HALPIN, USAF
Appellant.

Crim. App. No. S31805
USCA Dkt. No. 12-0418/AF

BRIEF ON BEHALF OF THE APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court of the United States

Court of Appeals for the Armed Forces Cases

Court of Military Appeals

Service Courts

Federal Courts of Appeals Cases

Uniform Code of Military Justice

Rules for Courts-Martial

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**BRIEF IN SUPPORT OF PETITION GRANTED**
v.	)	Crim. App. No. S31805
Airman Basic (E-1) **ANDREW P. HALPIN,** USAF, *Appellant.*	)	USCA Dkt. No. 12-0418/AF

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issues Presented

I.

WHETHER TRIAL COUNSEL'S IMPROPER SENTENCING ARGUMENT AMOUNTED TO PROSECUTORIAL MISCONDUCT.

II.

WHETHER THE MILITARY JUDGE PREJUDICIALLY ERRED WHEN HE FAILED TO STOP TRIAL COUNSEL'S IMPROPER SENTENCING ARGUMENT OR ISSUE A CURATIVE INSTRUCTION.

III.

WHETHER TRIAL DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE WHEN HE FAILED TO OBJECT TO TRIAL COUNSEL'S IMPROPER SENTENCING ARGUMENT.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals reviewed this case pursuant to Article 66(c), UCMJ. This Court has jurisdiction to review this case pursuant to Article 67, UCMJ.

Statement of the Case

On 8 April 2010, Appellant was tried by a special court-martial composed of officer members at Davis-Montham Air Force

Base, Arizona. The Charges and Specifications on which he was arraigned, his pleas, and the findings of the court-martial are as follows: In accordance with his pleas, Appellant was found guilty of violating Article 92, UCMJ, by failing to obey a no-contact order on divers occasions; violating Article 112a, UCMJ, by wrongfully using Adderall, a Schedule II controlled substance, on divers occasions; and violating Article 134, UCMJ, by committing adultery and by wrongfully and wantonly taking his wife home rather than seeking medical attention after witnessing her attempt suicide by consuming Lorazepam tablets, which conduct was likely to cause death or grievous bodily harm.

The members sentenced Appellant to a bad-conduct discharge, confinement for 10 months, and a reprimand. J.A. 182. On 21 May 2010, the convening authority approved the findings and sentence.

On 1 February 2012, the Air Force Court of Criminal Appeals affirmed. (Appendix A). The Appellate Records Branch notified the Appellate Defense Division that a copy of the Court's decision was deposited in the United States mail by first-class certified mail to the last address provided by Appellant on 3 February 2012.

Statement of Facts

In late November 2009, Appellant and his wife were having marital problems. J.A. 184. Because of these problems, Appellant was staying at a civilian friend's apartment. *Id*. On the evening of 25 November 2009, Appellant's wife came to the

apartment. *Id*. They ate supper, had sex, and then began to argue. *Id*. Appellant's wife became upset and consumed about 60 pills of her anti-depressant medication, Lorazepam. *Id*.

Lorazepam is a member of the benzodiazepine family. J.A. 185. Benzodiazepines are centrally acting drugs that are used for a variety of conditions; for example, Lorazepam is typically prescribed to treat anxiety. *Id*. 185-86. Overdosage of benzodiazepines is usually manifested by varying degrees of central nervous system depression ranging from drowsiness to coma. *Id*. 186. In rare instances, overdoses may cause fatal respiratory depression, though deaths from overdoses are extremely rare, even at the most extreme doses. *Id*.

Based on his own experience of attempting suicide via Lorazepam, Appellant took his wife home to sleep off the effects rather than seeking medical attention. J.A. 63-64.

The next day a friend came to his wife's house and was told of the overdose. J.A. 185. Appellant's wife was taken to a hospital where her blood and urine were tested for any toxicity resulting from the overdose; none was found. J.A. 120. She was treated and released from the emergency room the same day. J.A. 73. She was then transferred to the mental health wing of another hospital where she spent an additional four to five days. J.A. 72, 120.

In his sentencing argument, trial counsel recommended a sentence of at least 10 ten months' confinement and a bad-conduct

discharge. J.A. 144. Defense counsel did not object to any part of the sentencing argument, explaining his "characterization of the facts was strategically made more effective when delivered in contrast to trial counsel's extreme portrayal of the same facts." J.A. 228. The members returned a sentence of confinement for 10 months, a bad-conduct discharge, and a reprimand. J.A. 182.

Additional facts are set forth below.

Summary of the Arguments

During sentencing argument, trial counsel fabricated an inflammatory motive for Appellant's acts, made numerous references to facts not in evidence, blurred the line between punitive and administrative discharges, speculated about what Appellant's supervisors would have said had they been present, argued Appellant was a drug distributor though he was only charged with use, and argued factually unsupported secondary effects of using his wife's medications. This was prosecutorial misconduct, which affected the substantial rights of Appellant and the fairness and the integrity of his trial.

Additionally, the military judge failed to stop trial counsel's improper arguments and failed to issue curative instructions in violation of his sua sponte duty to do so.

Lastly, Appellant received ineffective assistance of counsel when defense counsel failed to object to trial counsel's improper argument, failed to address it during his own argument, and failed to request a curative instruction regarding the improper

argument. An ordinary fallible lawyer would have attempted to stop or mitigate the improper argument. Had defense counsel done so, there is a reasonable probability that Appellant would have received a lighter sentence.

Argument

I.

TRIAL COUNSEL'S IMPROPER SENTENCING ARGUMENT AMOUNTED TO PROSECUTORIAL MISCONDUCT.

Standard of Review

Whether there is prosecutorial misconduct and whether such misconduct was prejudicial are questions of law reviewed de novo. *United States v. Edmond*, 63 M.J. 343, 347 (C.A.A.F. 2006).

Law and Analysis

"Prosecutorial misconduct is generally defined as 'action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon.'" *United States v. Rodriguez-Rivera*, 63 M.J. 372, 378 (C.A.A.F. 2006) (quoting *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)). While prosecutorial misconduct does not automatically require a new trial or dismissal of the charges, relief will be granted if it "actually impacted on a substantial right of an accused (*i.e.,* resulted in prejudice)." *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (quoting *Meek,* 44 M.J. at 5).

Improper comments made by a trial counsel during argument can amount to prosecutorial misconduct. *See Fletcher*, 62 M.J. at 184; *United States v. Modica*, 663 F.2d 1173 (2d Cir.1981). Here, trial counsel committed prosecutorial misconduct by repeatedly making improper comments during his sentencing argument.

"When arguing for what is perceived to be an appropriate sentence, the trial counsel is at liberty to strike hard, but not foul, blows." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000) (citing *United States v. Edwards,* 35 M.J. 351 (C.M.A. 1992); *Berger v. United States,* 295 U.S. 78 (1935)).

"It is appropriate for trial counsel—who is charged with being a zealous advocate for the Government—to argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." *Id*. (citing *United States v. Nelson,* 1 M.J. 235, 239 (C.M.A. 1975)). However, inferences are irrational or arbitrary "unless it can be said with a substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Barnes v. United States*, 412 U.S. 837, 842 (1973) (citation omitted). The Seventh Circuit has explained limitations on inferences in this way:

> At some point, however, the inference asked to be drawn will be unreasonable enough that the suggestion of it cannot be justified as a fair comment on the evidence but instead is more akin to the presentation of wholly new evidence to the jury, which should only be admitted subject to cross-examination, to proper instructions and to the rules of evidence. . . . In considering whether a suggested inference is reasonably deducible from the evidence of record, in addition to inquiring into the logic of the inference a recognized

> consideration is whether the evidence would have been subject to a colorable objection if introduced during the trial. . . . If so, it is important to enforce carefully the limitation that the inference be reasonable not only to avoid abridging the defendant's right to cross-examine possibly untrue testimony but also to prevent a party from presenting to the jury in closing argument a fact that might have been ruled inadmissible at trial (or at least subject to a limiting instruction) simply by asserting in closing argument that the jury could infer it from the evidence that was presented and admitted.

United States v. Vargas, 583 F.2d 380, 385 (7th Cir. 1978).

Further, "[i]t is error for trial counsel to make arguments that 'unduly . . . inflame the passions or prejudices of the court members.'" *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007) (quoting *United States v. Clifton,* 15 M.J. 26, 30 (C.M.A. 1983) and citing R.C.M. 919(b)*, Discussion*). "An accused is supposed to be . . . sentenced as an individual on the basis of the offense(s) charged and the legally and logically relevant evidence presented. Thus, trial counsel is also prohibited from injecting into argument irrelevant matters, such as personal opinions and facts not in evidence." *Id*. (citing *Fletcher*, 62 M.J. at 180).

A. The Improper Comments Were Error

A great amount of trial counsel's misconduct relates to his "theme", which was unsupported by the facts. This resulted from a calculated effort to inflame the members' passions. The actual facts were more mundane.

Trial counsel argued facts not evidence, and twisted these into a theory of homicide for profit. Under this inflammatory

and baseless view, Appellant wanted his wife dead and attempted to hasten her death by hiding her in her home and covering up his involvement. His supposed motive was to collect an insurance payout, stop the arguments with her, and stop their impending divorce. J.A. 149.

Trial counsel's misconduct extended beyond concocting a scandalous film noir plot. He also blurred the line between punitive and administrative discharges, speculated about what Appellant's supervisors would have said had they been present, argued Appellant was a drug distributor though he was only charged with use, and argued factually unsupported secondary effects of using his wife's medications.

1. Trial counsel improperly argues Appellant wanted his wife to die in order to collect an insurance payout, as well as other ancillary benefits from her death.

Trial counsel argued to the members:

> [O]nly [Appellant] knows whether or not he was actually hoping or wanted [his wife] to die but one could certainly argue that this would have worked out pretty well for him if she had passed away. The arguments would stop. The impending divorce, expense and effort of it would be saved. *Potentially, he could collect on her SGLI payout*.

J.A. 149 (emphasis added).

Such fabricated motives were foul blows. They were not based on evidence, nor on reasonable inferences fairly derived from the evidence. First, other than the single argument on the night she took the medication, there was no evidence of arguments, much less arguments bad enough that Appellant would

want his wife to die so they would stop. In fact, his wife said the majority of their marriage was happy. J.A. 81. She also said the night before her suicide attempt was spent with Appellant and was "a really good night" and that Appellant was the greatest man she had ever met. J.A. 84, 114.

That Appellant wanted his wife to die so the expense and effort associated with their divorce would stop is also baseless. While there was evidence of an ongoing divorce, there was no evidence that it was unusually expensive or contentious. There was also no evidence that he wanted to disrupt the divorce. According to his wife, his desire to see the divorce through formed part of her motivation to ingest the medication. J.A. 86. It was Appellant's wife who did not want the divorce. J.A. 89.

Finally, trial counsel's argument that Appellant wanted his wife to die in order to benefit from her insurance proceeds was cut from whole cloth. There is no evidence she had life insurance, that Appellant would be a beneficiary even if she did, or that he wanted her to die so that he could benefit therefrom.

It is improper for trial counsel to make arguments based on inferences that are not reasonable. *United States v. Clifton*, 15 M.J. 26, 29-30 (C.M.A. 1983) (holding trial counsel arguing the fantasies and practices of rapists without a factual basis was improper); *United States v. Hermanek*, 289 F.3d 1076, 1101 (9th Cir. 2002) (finding prosecution's argument regarding the circumstances of codefendant's guilty plea were unreasonable

inferences from the facts and were, therefore, improper); *Vargas*, 583 F.2d at 385-86 (finding prosecution's inference not based on the facts was clearly improper.) Trial counsel's arguments were unreasonable inferences; they were, instead, a calculated effort to inflame the passions of the members and encourage sentencing based not on the facts but on the members' emotional reaction.

2. Trial counsel improperly argues Appellant wanted to cover up Appellant's attempt to hasten his wife's death and his insurance payout.

Trial counsel characterized Appellant's actions on the as a "cover up", though the record did not support that inference. J.A. 147. According to the trial counsel's argument, before Appellant placed his Air Force jacket on his wife, he put her wedding rings back on her finger, and lined up pill bottles on her dresser in order to stage "a scene of a grieving wife, pining after her estranged husband, alone, wearing her wedding ring, wrapped in his jacket, taking a whole slew of pills." J.A. 148.

While the record established that Appellant placed his jacket on his wife before he left (J.A. 185), that is all he did. The facts do not establish that he put her rings back on or lined up the pill bottles. In fact, his wife testified it was possible that she took those actions herself, but she could not remember. J.A. 119. Neither did she remember texting Appellant after he left or receiving several phone calls from him after he left, one lasting 14 minutes. J.A. 118.

Trial counsel broadened the scope of the Appellant's supposedly insidious plans by telling the members:

> Now, there are no eyewitnesses to show that Airman Halpin did that but it sure sounds like someone is trying to stage a scene. . . . Members, a scene like that would most likely go to show that he wasn't involved in that event. It would actually be pretty good for him if she was found like that.

J.A. 148-49. Trial counsel argued this to the members even though, as he then said, "But, again, there is no evidence to show that he did that." *Id*.

Trial counsel's flawed inference that Appellant took those actions, coupled with the further inference of the motivation Appellant must have had while taking those actions, was improper.

3. Other improper arguments by trial counsel.

Additionally, trial counsel took a reckless endangerment offense and argued it into a more culpable offense. By arguing that Appellant took his wife home with the hope that she would die and then covered up his involvement in her impending death so he could gain an insurance payment, trial counsel is, in effect, arguing an attempted premeditated murder by omission or manslaughter theory. Arguing in sentencing for greater culpability than what was adjudicated is improper. *See United States v. Martinez*, 30 M.J. 1194, 1197 (A.F.C.M.R. 1990).

Blurring the distinction between a punitive discharge and an administrative discharge is also improper. *See United States v. Motsinger*, 34 M.J. 255, 257 (C.M.A. 1992). Despite this, trial counsel argued, "Members, there is a vast difference between the

service of all the hard-working law-abiding airmen in our Air Force, and his record needs to reflect that. Consequently, he needs to be punished by having neither the privilege of wearing this uniform nor an honorable service record. A BCD is absolutely appropriate." J.A. 156. Arguing that a bad-conduct discharge was appropriate because Appellant should not have "the privilege of wearing this uniform" is a euphemism for saying a bad-conduct discharge is appropriate because Appellant should not be in the Air Force. That is always improper.

Trial counsel also improperly argued facts not in evidence, in reference to the Appellant's unsworn statement. Trial counsel argued, "Now in addition he mentions many, and it's on the second page here, many of [Appellant's] supervisors enjoyed having [Appellant] around working with him. Does anyone here actually buy that?" J.A. at 158-59. This is similar to the argument in *United States v. Shows*. 5 M.J. 892, 893 (A.F.C.M.R. 1972). The court in *Shows* said, "The clear implication of the trial counsel's argument is that the accused's squadron commander and supervisor would testify that the accused's duty performance was unsatisfactory." *Id*. at 893. The court continued, "There is no evidence of this in the record and to imply that other evidence unfavorable to an accused is available, without actually presenting such evidence, is clear error." *Id*. (citing *United States v. Cordero*, No. 22357 (A.F.C.M.R. 9 June 1978)). The clear implication of the trial counsel's argument in the instant

case is that had Appellant's supervisors testified, they would say the opposite, and, thus, Appellant is lying to the members.

Trial counsel continued arguing facts not in evidence, as well as uncharged misconduct, by arguing Appellant distributed drugs to other airmen even though he was only charged with simple use. He argued, "Why did he feel the need to share [prescription medications taken from Appellant's wife] with another airman, Airman Hodges? Members, the truth is that [Appellant] used the drugs because he wanted to get high, that's why he snorted, that's why he shared it with another person." J.A. 158. The only facts on the record regarding Airman Hodges appear in the stipulation of fact. *See* J.A. 184. The stipulation says only, "Among his uses AB Halpin used with another airman, A1C Stephen Hodges, on more than one occasion." *Id*.

Trial counsel argued additional facts not in evidence when he argued that by taking his wife's medication, Appellant "endanger[ed] the welfare of his wife who needed that drug to treat her depression." J.A. 158. The record is devoid of any effects - much less welfare-endangering effects - Appellant's wife experienced by Appellant's use of some of her medication.

B. The Errors Were Plain

The impropriety of trial counsel's remarks was plain. Plain means clear or obvious. *United States v. Boyd*, 52 M.J. 758, 761 (A.F. Ct. Crim. App. 2000)(citing *United States v. Olano,* 507 U.S. 725, 732-34 (1993)).

It is clear that fabricating motives is improper. As discussed above, the record does not fairly establish that Appellant put wedding rings on back on his wife's fingers or lined pill bottles across her dresser in an effort to stage a scene. Nor does the record establish Appellant's wife had life insurance, that he was the beneficiary, or that he wanted her to die so that he could collect from it.

Further, it is axiomatic that an accused is to be sentenced only for those offenses for which he is charged and convicted. *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007). The prohibitions against arguing uncharged misconduct and facts not in evidence are necessary corollaries to that axiom. Yet the prohibition was broken when trial counsel argued that Appellant's unsworn could not be trusted and that he distributed drugs.

Additionally, at least since 1989 it has been clear that blurring the distinction between a punitive discharge and an administrative separation is prohibited, yet the trial counsel did exactly that. *See United States v. Ohrt,* 28 M.J. 301, 306 (C.M.A. 1989).

C. The Improper Comments Materially Prejudiced a Substantial Right of Appellant's

For prosecutorial misconduct, prejudice is determined by looking at the "cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and the integrity of his trial[.]" *United States v. Erickson*, 65 M.J. 221, 224 (C.A.A.F. 2007)(quoting *Fletcher*, 62 M.J. at 184).

"[T]he best approach involves a balancing of three factors: (1) The severity of the misconduct, (2) the measures adopted to cure the misconduct, (3) the weight of the evidence supporting the conviction." *Id*. "We consider the *Fletcher* factors to determine 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.'" *Id*.

1. The Severity of the Misconduct.

The trial counsel's misconduct was severe. While "[i]ndicators of severity include (1) the raw numbers-the instances of misconduct as compared to the overall length of the argument, (2) whether the misconduct was confined to the trial counsel's rebuttal or was spread throughout the findings argument or the case as a whole, (3) the length of the trial, (4) the length of the panel's deliberations, and (5) whether the trial counsel abided by any rulings from the military judge," these factors are not exhaustive. *Fletcher*, 62 M.J. at 185.

The trial counsel's improper comments during his were not made to a military judge, who is presumed to ignore or weed out improper arguments, but to a panel of members who are not trained in the law, do not know the difference between proper and improper arguments, and can easily be misled.

Further, the severity is increased when considered in context. This is not a case of an isolated comment where the

trial counsel briefly overreaches or oversells. Improper comments pepper his entire sentencing argument.

Also, these comments came during the course of a one-day trial. Indeed, the panel first learned of the facts of the case In the afternoon of 8 April 2010. J.A. 79. Less than three hours later the members listened as trial counsel told them, among other things, that Appellant hid his wife in her house and staged a scene of a grieving estranged wife in the hopes that she would die so he could get an insurance payout. J.A. 142. So many improper comments made during such a short period concentrates and magnifies the severity of the misconduct.

Nor can the trial counsel's comments be dismissed as inadvertent or accidental. This was a prepared argument. Long before trial counsel ever stepped into the courtroom, he knew what he was going to say. His inflammatory comments were planned and intentionally included in his argument.

Finally, this Court should consider the egregiousness of trial counsel's comments. Trial counsel's fabrication of an attempted murder for profit, which was as inflammatory as it was factually baseless, is a severe form of misconduct.

2. The Measures Adopted to Cure the Misconduct.

No curative measures specifically targeting the improper comments were adopted. While the standard instructions were given, such generic limiting instructions are "woefully

inadequate to cure improper argument." *United States v. Horn*, 9 M.J. 429, 430 (C.M.A 1980).

3. Weight of the Evidence Supporting the Sentence.

While this prong was originally phrased as the weight of the evidence supporting the conviction, in *Erickson* this Honorable Court adjusted the analysis to the weight of the evidence supporting the sentence. *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007).

Trial counsel's focus was directed toward the reckless endangerment specification. Indeed, he even described it to the members as the "most egregious" of the Appellant's offenses. J.A. 157. But, stripped of the improper comments, trial counsel's argument would have been to little effect.

Without the improper comments, trial counsel had only a weak sentencing case. The record presents a picture of the Appellant as a young man who did not know how to react to his wife's suicide attempt. J.A. 64. Facing his uncertainty, he did what he knew to do based on his own experience of multiple suicide attempts using the same medication: he took his wife home to sleep it off. J.A. 63-64. This is a much different picture than the trial counsel presented, in which the Appellant was made out to be deviously orchestrating a scene in order to benefit monetarily from his wife's death.

The adultery specification and the no-contact order violation are more in the realm of nonjudicial punishment. They provide little support for the imposed sentence.

This leaves the Appellant's wrongful use of his wife's prescription medication. This is another area the trial counsel bolstered his sentence recommendation with improper comments. Because there was little aggravation available, trial counsel created aggravating facts and circumstances. In the hands of the trial counsel, a simple use morphed into a welfare-endangering crime compounded by distribution to another airman.

Once stripped of the trial counsel's improper comments, it is clear that the weight of the evidence did not support a bad-conduct discharge, confinement for 10 months, and a reprimand.

WHEREFORE, Appellant requests this Honorable Court set aside his sentence and remand for a new sentencing hearing free from prosecutorial misconduct.

II.

THE MILITARY JUDGE ERRED TO THE PREJUDICE OF APPELLANT BY FAILING TO STOP TRIAL COUNSEL'S IMPROPER SENTENCING ARGUMENT OR TO PROVIDE CURATIVE INSTRUCTIONS TO THE PANEL OF MEMBERS.

Standard of Review

"Failure to object to an instruction or to omission of an instruction before the members close to deliberate on the sentence constitutes waiver of the objection in the absence of plain error." Rules for Courts Martial 1005(f). However,

"mandatory instructions" are reviewed de novo. *See United States v. Schumacher*, 70 M.J. 387, 389 (C.A.A.F. 2011).

Military courts have treated instructions for which a military judge has a sua sponte duty to provide as being the same as "mandatory instructions." *See United States v. Maynulet*, 68 M.J. 374, 376 (C.A.A.F. 2010) (military judges generally have substantial discretionary power to decide what instructions to give, they have a sua sponte duty to instruct on affirmative defenses); *United States v. Smith*, 50 M.J. 451 (C.A.A.F.) (stating that case law is well established that a "military judge is required to instruct, sua sponte, on any all lesser included offenses); *United States v. Davidson*, 14 M.J. 81, 85 (C.M.A. 1982) (even when defense counsel fails to request the instruction, it is error for a military judge to fail to particularly instruct the members to consider an accused's time in pretrial confinement).

Likewise, because a military judge has a sua sponte duty to give instructions curing improper comments made by trial counsel, such instructions are mandatory. *See generally United States v. Rhodes*, 64 M.J. 630, 633 (A.F. Ct. Crim. App. 2007)(quoting *United States v. Rutherford,* 29 M.J. 1030, 1031 (A.C.M.R.1990)); *United States v. Sitton*, 4 M.J. 726, 727 (A.F.C.M.R. 1977). Therefore, the standard of review is de novo.

Law and Analysis

"The trial judge is more than a mere referee, and as such he is required to assure that the accused receives a fair trial." *United States v. Shamberger*, 1 M.J. 377, 379 (C.M.A. 1976). Pursuant to this role, a military judge has a duty to stop improper arguments and take appropriate curative measures including providing cautionary instructions. *See United States v. Knickerbocker*, 2 M.J. 128, 129 (C.M.A. 1977)("At the very least, the judge should have interrupted the trial counsel before he ran the full course of his impermissible argument. Corrective instructions at an early point might have dispelled the taint of the initial remarks."); *United States v. Rhodes*, 64 M.J. 630, 633 (A.F. Ct. Crim. App. 2007) (quoting *United States v. Rutherford,* 29 M.J. 1030, 1031 (A.C.M.R. 1990)). This affirmative duty arises "when there is a 'fair risk' that an improper argument will have an appreciable effect upon members." *United States v. Williams*, 23 M.J. 525, 527 (A.C.M.R. 1986) (citing *United States v. Roser,* 21 M.J. 883, 885 (A.C.M.R.1986)). *But cf. United States v. Shows*, 5 M.J. 892, 893 (A.F.C.M.R. 1978).

There was such a fair risk here. Trial counsel argued for greater culpability than Appellant was convicted of, argued facts not in evidence, blurred the distinction between a punitive discharge and an administrative separation, again argued facts not in evidence, and argued a fabricated motive to inflame the passions of the members. It would be unreasonable to believe

that members, without proper guidance, would separate matters that were appropriate to consider from those that were not.

The military judge's failure to discharge his affirmative duty prejudiced Appellant. By not stopping the improper argument or providing the members the instructions to guide their sentence deliberation, the military judge consigned Appellant to be sentenced by an inflamed and misled panel of members.

WHEREFORE, Appellant requests this Honorable Court set aside his sentence and remand for a new sentencing hearing.

III.

THE TRIAL DEFENSE COUNSEL WAS INEFFECTIVE BY NOT OBJECTING TO THE TRIAL COUNSEL'S INFLAMMATORY SENTENCING ARGUMENT, NOT ADDRESSING THE ARGUMENT DURING HIS ARGUMENT, AND NOT REQUESTING A CURATIVE INSTRUCTION.

Standard of Review

Whether counsel was ineffective and whether any ineffective assistance was prejudicial are issues reviewed *de novo*. *United States v. Wiley*, 47 M.J. 158 (C.A.A.F. 1997).

Law and Analysis

The Sixth Amendment to the United States Constitution guarantees an accused the right to "effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970). The same right is afforded service members in trials by court-martial under Article 27(b), UCMJ, 10 U.S.C. §827(b). *United States v. Polk*, 32 M.J. 150 (C.M.A. 1991).

The Supreme Court's test for effectiveness of counsel articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), has been adopted by the Court of Appeals for the Armed Forces. *See United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000). In *United States v. Polk*, the Court adopted the following three-pronged test to determine if the defense counsel was ineffective:

> (1) Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
>
> (2) If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance…[ordinarily expected] of fallible lawyers"? and
>
> (3) If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result?

32 M.J. 150, 153 (C.M.A. 1991). The threshold for showing prejudice is low. *United States v. Lee*, 52 M.J. 51, 53 (C.A.A.F. 1999). Additionally, while a court "will not second-guess the strategic or tactical decisions made at trial by defense counsel," *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993), an unreasonable "tactical" decision will not defeat a claim of ineffective assistance of counsel. *United States v. Rivas*, 3 M.J. 282 (C.M.A. 1977).

A. There was no reasonable explanation for the trial defense counsel's actions, or lack thereof.

Defense counsel failed to object to any of trial counsel's impermissible and prejudicial statements to the panel of members during his sentencing argument. Further, defense counsel did not

ask for any curative instructions in an effort to mitigate the prejudicial effects of the trial counsel's impermissible comments, nor attempt to rebut the comments during his sentencing argument. Appellant received no benefit from these omissions, nor is there any reasonable explanation for these inactions.

Even defense counsel's declaration fails to explain if he recognized trial counsel's arguments as being improper, much less that he had a reasonable reason for not responding to the arguments in some fashion. *See* J.A. 228. Instead, it merely states that his "characterization of the facts was strategically made more effective when delivered in contrast to trial counsel's extreme portrayal of the same facts." *Id*.

This post hoc rationalization is unpersuasive. First, defense counsel seems to argue that his inaction actually made his argument more effective because the inaction allowed a contrast to develop between his "characterization of the facts" and trial counsel's "extreme portrayal of the same facts." *Id*. However, this argument falls short of providing a reasonable explanation for the inaction because there was no contrast. Rather than contrast the true facts of the case with trial counsel's fabricated facts, defense counsel actually bolstered trial counsel's argument. After trial counsel argued Appellant wanted his wife to die so he could collect the life insurance, defense counsel almost immediately told the panel, "[e]verything that the prosecution just argued confirms really who [Appellant]

really is." R. 283. He went on to characterize Appellant's acts as "horrible decisions" (J.A. 163), characterized Appellant as a "very troubled young man" (J.A. 164), and characterized Appellant's marriage as one that had come "to a horrible end." J.A. 165. From the members' perspective, this must have seemed to be more of an concurrence with the trial counsel's characterization, than a contrast.

Even if it is true that defense counsel's characterization of the facts "was strategically made more effective" by failing to address trial counsel's argument in some fashion, nothing shows that he made a conscious decision to achieve that result. "I got lucky when I failed to take action" is not a reasonable explanation for the inaction. In other words, before it can be said that a decision not to act was reasonable, it must be shown that a decision was made in the first place.

Further, that does not explain why defense counsel would allow the members to deliberate without challenging trial counsel's version of the events either in argument or by requesting a curative instruction. His argument would not have been weakened by challenging the trial counsel's inflammatory arguments. In fact, his argument could have only been strengthened had the military judge instructed the members to disregard portions of the trial counsel's argument.

B. The trial defense counsel's level of advocacy fell measurably below the performance ordinarily expected of fallible lawyers.

When improper comments reach a panel without admonition from the court because of defense counsel's failure to object, counsel's level of advocacy fell measurably below the performance ordinarily expected of fallible lawyers. *See Girts v. Yanai*, 501 F.3d 743, 757 (6th Cir. 2007). That is precisely what happened here. As a result, counsel's advocacy fell below the performance expected of fallible lawyers.

Defense counsel's level of advocacy also fell short when he failed to request a curative instruction from the military judge. That alone is deficient performance. *See Musladin v. Lamarque*, 555 F.3d 830, 846 (9th Cir. 2009)(holding that "[a]fter the prosecutor drew the jury's attention to the damaging statement and invited them to draw the precise inference that a limiting instruction would have forbidden, [the appellant's] trial counsel's failure to request a limiting instruction 'fell below an objective standard of reasonableness.'").

C. There was a reasonable probability that, absent the errors, there would have been a different result.

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington,* 466 U.S. 668, 694 (1984). The outcome at issue is Appellant's sentence: a bad-conduct discharge, 10 months' confinement, and a reprimand. This sentence is a direct result of trial counsel's improper, inflammatory, and misleading sentencing argument that proceeded without objection. Had objections been made, the military judge would have sustained them, perhaps cautioned the trial counsel, and would have given curative instructions. At

that point the members would have known the trial counsel's comments were improper and would have disregarded them. Trial counsel would have been left with a weak sentencing case to justify his recommended sentence.

However, because the comments were neither objected to nor addressed by the defense counsel during argument, the members could only have been left with the firm conviction that the trial counsel's comments were appropriate for their consideration during sentencing deliberations. The likelihood that the members did in fact consider these comments to the prejudice of Appellant appears high given the correlation between the trial counsel's sentence recommendation to the sentence handed down.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside his sentence and remand his case for a new sentencing hearing.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

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LUKE D. WILSON, Capt, USAF
Attorney for AB Andrew P. Halpin
Dated: 21 June 2012

APPENDIX A

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic ANDREW P. HALPIN
United States Air Force

ACM S31805

01 February 2012

Sentence adjudged 8 April 2010 by SPCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: Joseph S. Kiefer.

Approved sentence: Bad-conduct discharge, confinement for 10 months, and a reprimand.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; and Captain Luke D. Wilson.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Deanna Daly; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

GREGORY, Senior Judge:

At arraignment before a special court-martial, the appellant entered pleas of guilty to one specification of violating a lawful order, one specification of divers wrongful use of a Schedule II controlled substance, one specification of adultery, and one specification of reckless endangerment, in violation of Articles 92, 112a, and 134, UCMJ, 10 U.S.C. §§ 892, 912a, 934, respectively. The military judge accepted the pleas of guilty, and a panel of officers sentenced the appellant to a bad-conduct discharge, confinement for 10 months, and a reprimand. A pretrial agreement capped confinement at the

jurisdictional limit of a special court-martial, and the convening authority approved the sentence adjudged. The appellant asserts that his plea of guilty to reckless endangerment was improvident and that the trial counsel's sentencing argument constituted prejudicial error.[*] We will also address two additional issues concerning whether the Article 134, UCMJ, specifications are sufficient to state an offense in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), and whether delay in post-trial review prejudiced the appellant in light of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006).

Sufficiency of the Reckless Endangerment Guilty Plea Inquiry

A military judge must determine whether an adequate basis in law and fact exists to support a guilty plea by establishing on the record that the "acts or omissions of the accused constitute the offense or offenses to which he is pleading guilty." *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969). Acceptance of a guilty plea is reviewed for an abuse of discretion, and questions of law arising from the plea are reviewed de novo. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). We afford significant deference to the military judge's determination that a factual basis exists to support the plea. *Id*. (citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)). Among the reasons for giving broad discretion to military judges in accepting guilty pleas is the often undeveloped factual record in such cases as compared to that of a litigated trial. *See Jordan*, 57 M.J. at 238. Rejection of a guilty plea requires that the record show a substantial basis in law and fact for questioning the providence of the plea. *Inabinette*, 66 M.J. at 322; *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

The plea inquiry and stipulation of fact show that, at the time of the offense, the appellant and his then wife, CH, were separated. On 25 November 2009, CH went to the apartment where the appellant resided. When the appellant renewed his demand for a divorce, CH took a 50-60 pill overdose of Lorazepam and the appellant told her, "[Y]ou're not going to die in my apartment." In response, she told the appellant that he was "going to watch [her] die." Rather than take CH for medical care, the appellant took her back to the home where she lived alone, put her in the bed, placed his Air Force jacket on her, and left. A friend of CH learned of the overdose the next morning and took her to the hospital. Based on these events, the appellant pled guilty to recklessly endangering CH by taking her home and leaving her alone rather than seeking medical attention after observing her attempt suicide.

The military judge began the inquiry into this offense by correctly advising the appellant of the elements of the offense:

[*] The appellant breaks the argument concerning trial counsel's sentencing argument into three separate issues which we will address in the aggregate: (1) whether the argument was improper, (2) whether the military judge should have sua sponte stopped the argument, and (3) whether trial defense counsel was ineffective by not objecting to the argument.

> 1. That at or near Tucson, Arizona, on or about 25 November 2009, you did engage in certain conduct to wit: after witnessing your wife, [CH], attempt to commit suicide by consuming multiple Lorazepam . . . tablets, you failed to seek medical attention for [CH] and instead transported [CH] to a different location where you then left [CH] alone.
>
> 2. That your conduct was wrongful and wanton.
>
> 3. That your conduct was likely to produce death or grievous bodily harm to [CH]. And,
>
> 4. That under the circumstances your conduct was to the prejudice of good order and discipline in the Armed Forces or was of a nature to bring discredit upon the Armed Forces.

The military judge provided detailed definitions of all relevant terms in the elements, and he particularly described how risk of harm and magnitude of harm combine to determine whether the circumstances show a likelihood of grievous bodily harm or death. The appellant told the military judge that he understood all the elements and definitions and that he had no questions about them.

Based on these elements and definitions, the appellant explained why he believed he was guilty of reckless endangerment: "I had attempted suicide by consuming Lorazepam twice and knew from my own experience that there was a likelihood of harm to her system." The military judge probed the appellant's belief that liver damage could result from the overdose taken by CH:

> MJ: I kind of need to get a sense of your understanding of the likelihood of liver damage from taking this many Lorazepam pills.
>
> ACC: Your Honor, in my attempts, which I spoke about in here, I had taken 20 to 30 at a time. I did not suffer liver damage, but since she had taken double that amount, she took 50 to 60, that increased the likelihood in my eyes that, you know, liver damage or some other organ damage can occur.

Beyond his belief that CH could suffer damage to internal organs as a result of the overdose, the appellant stipulated as fact that he knew on the evening CH took the overdose "there was a chance she might die." The military judge ensured that the appellant understood the risk of death to be a real possibility and not just speculative or fanciful.

The appellant now argues that his conduct added nothing to the danger created by CH taking the overdose. However, during the plea inquiry, the appellant told the military judge how his conduct contributed to the danger created by his wife's overdose: "Due to

the stumbling and the slurring speech, I could tell that she was suffering from an overdose, a large overdose, and by my own choice I decided to take her home instead of calling." The appellant admitted that he knew his wife could suffer serious injury or possibly die from the overdose, but, rather than seek medical attention, he took her to a location where she would not receive medical care and left her – an action which he described to the military judge as "the worst decision of my life." The appellant knowingly and willfully decided to intervene in a way that increased the likelihood of harm, and, having done so, providently pled guilty to reckless endangerment.

The record discloses no substantial legal or factual basis for questioning the appellant's plea, and the military judge is entitled to rely upon the appellant's admissions absent any substantial inconsistencies raised by the plea. In *United States v. Ferguson*, 68 M.J. 431 (C.A.A.F. 2010), the Court reaffirmed that a guilty plea forecloses the opportunity to litigate the offense on appeal: "Appellant could have pled not guilty . . . and challenged the prosecution's theory of the specification. . . . Appellant chose not to. . . . By doing so, Appellant relinquished his right to contest the prosecution's theory on appeal . . . unless the record discloses matter inconsistent with the plea." *Id*. at 435 (internal citations omitted). As in *Ferguson*, the military judge correctly advised the appellant of the elements and definitions of the offense as well as the consequences of pleading guilty. He thoroughly questioned the appellant about the offense and gave him the opportunity to consult with his counsel and ask questions. The appellant described in detail why he believed he was guilty, and we find no substantial basis in law or fact for questioning that belief.

The offense of reckless endangerment is intended to prohibit conduct that creates a substantial risk of death or grievous bodily harm. *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 100a.c.(1) (2008 ed.). Much more than a mere bystander or passerby, the appellant repeatedly acknowledged that his willful, knowing, and intentional acts of transporting and leaving CH alone after he watched her take a dangerous overdose of drugs substantially increased the likelihood that she would suffer death or grievous bodily harm. Under these circumstances, the military judge did not abuse his discretion in accepting the appellant's plea of guilty to reckless endangerment in violation of Article 134, UCMJ.

Trial Counsel's Sentencing Argument

Despite the lack of any objection at trial, the appellant makes a broadside attack on the trial counsel's sentencing argument, claiming that his "improper comments" were so far out of bounds that they (1) constituted prosecutorial misconduct which substantially prejudiced the appellant's right to a fair trial, (2) required sua sponte intervention by the military judge, and (3) showed that the appellant received ineffective assistance of counsel. Failure to object to improper argument before the start of sentencing instructions waives the objection. Rule for Courts-Martial 1001(g). Absent objection,

argument is reviewed for plain error. *United States v. Burton*, 67 M.J. 150, 152 (C.A.A.F. 2009). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice." *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005). Error is not "plain and obvious" if, in the context of the entire trial, the appellant fails to show that the military judge should have intervened sua sponte. *Burton*, 67 M.J. at 153 (citing *United States v. Maynard*, 66 M.J. 242, 245 (C.A.A.F. 2008)).

The appellant emphasizes what he describes as the trial counsel's "mastermind theme" to show prosecutorial misconduct by arguing facts not in evidence. Prosecutorial misconduct is "action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996). Trial counsel may, and is indeed required, to make "vigorous arguments for sentencing . . . based on a fair reading of the record." *United States v. Kropf*, 39 M.J. 107, 108 (C.M.A. 1994) (citing A.B.A. MODEL R. PROF. CONDUCT 1.3, Comment (1989); *United States v. Edwards*, 35 M.J. 351 (C.M.A. 1992), *aff'd*, 41 M.J. 87 (C.A.A.F. 1994) (mem.)). Consistent with his duty of zealous advocacy, trial counsel in the present case argued the facts and the reasonable inferences from those facts. For example, salient features of the "mastermind theme" were argued as follows:

> When [the appellant] finally decides to leave that night, [CH] emerges from the bedroom one last time. She begs him not to go and then she collapses on the couch. [The appellant's] response is to pick her up, carry her back in the bedroom, lay her in the bed and put his Air Force jacket on her. . . . You heard from [CH] that she had kept her ring in her purse but somehow that ring got placed on her fingers [sic] as well. And then there were those pill bottles. The pills that she had, prescription medication, everything else in the house that she had kept in medicine cabinets, that she had kept in kitchen cabinets, all those pills somehow ended up lined up in a neat little pile on her dresser. Think about that for a second. Now, there are no eyewitnesses to show that [the appellant] did that but it sure sounds like someone is trying to stage a scene, a scene of a grieving wife, pinning after her estranged husband, alone, wearing her wedding ring, wrapped in his jacket, taking a whole slew of pills. Members, a scene like that would most likely go to show that he wasn't involved in that event.

Contrary to the appellant's assertions, we find the argument is based on a fair reading of the record. The stipulation of fact, the appellant's statements during the plea inquiry, and the testimony of CH provide a sufficient evidentiary foundation for trial counsel's theory. Having considered the entire argument in the context of the record as a whole and giving particular attention to those portions of the argument cited by the appellant, we find that the instances of argument cited by the appellant do not rise to the level of either

prosecutorial misconduct or plain error, and they merit no relief. *See United States v. Doctor*, 21 C.M.R. 252, 261 (C.M.A. 1956) ("It is a little difficult for us to find misconduct which compels a reversal when it purportedly arises out of an argument which had so little impact on defense counsel that they sat silently by and failed to mention it ... at the time of trial.").

Nor do we find trial defense counsel ineffective for not objecting during the argument. We review claims of ineffective assistance of counsel by applying the two-part test established by *Strickland v. Washington*, 466 U.S. 668 (1984), which requires the appellant to show (1) that counsel's performance was so deficient, the errors so serious that the counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and (2) that the errors were such as to deprive the appellant of a fair trial whose result is reliable. We find no error in trial defense counsel's lack of objection that comes even close to overcoming the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Having successfully negotiated a pretrial agreement that limited the charged offenses' combined maximum confinement of 7.5 years to the 12 month maximum of a special court-martial, trial defense counsel elected not to object to the Government's sentencing argument but instead chose to counter the Government's argument with a more sympathetic portrayal of the appellant – a tactic that resulted in adjudged confinement of even less than that authorized by the pretrial agreement. Under these circumstances, even if there was error in not objecting, such error can hardly be seen as causing prejudice so great as to deprive the appellant of a fair trial.

Legal Sufficiency of the Article 134, UCMJ, Specifications

The appellant pled guilty to one specification of adultery and one specification of reckless endangerment alleged under Charge III as a violation of Article 134, UCMJ. Article 134, UCMJ, criminalizes three categories of offenses not specifically covered in other articles of the UCMJ: Clause 1 offenses require proof that the conduct alleged be prejudicial to good order and discipline; Clause 2 offenses require proof that the conduct be service discrediting; Clause 3 offenses involve noncapital Federal crimes made applicable by the Federal Assimilative Crimes Act, 18 U.S.C. § 13. As the specifications at issue do not reference the Assimilative Crimes Act, they necessarily involve Clause 1 or 2. The language of each specification complies with the model specification but does not expressly allege the terminal element that such conduct was either prejudicial to good order and discipline or service discrediting. Because the specifications do not expressly allege the terminal element, we will review de novo whether either is sufficient to allege an offense in light of *Fosler*.

In *Fosler*, the Court invalidated a conviction of adultery under Article 134, UCMJ, because the military judge improperly denied a defense motion to dismiss the specification on the basis that it failed to expressly allege the terminal element of either

Clause 1 or 2. While recognizing "the possibility that an element could be implied," the Court stated that "in contested cases, when the charge and specification are first challenged at trial, we read the wording more narrowly and will only adopt interpretations that hew closely to the plain text." *Id*. at 230. The Court implies that the result would have been different had the appellant not challenged the specification: "Because Appellant made an R.C.M. 907 motion at trial, we review the language of the charge and specification more narrowly than we might at later stages." *Id*. at 232.

While narrowly construing the specification in the posture of the case, the Court reiterated that the military is a notice-pleading jurisdiction: "A charge and specification will be found sufficient if they, 'first, contain[ ] the elements of the offense charged and fairly inform[ ] a defendant of the charge against which he must defend, and, second, enable[ ] him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" *Id*. at 229 (citations omitted). Failure to object to the legal sufficiency of a specification does not constitute waiver, but "[s]pecifications which are challenged immediately at trial will be viewed in a more critical light than those which are challenged for the first time on appeal." *United States v. French*, 31 M.J. 57, 59 (C.M.A. 1990). *See also United States v. Bryant*, 30 M.J. 72, 73 (C.M.A. 1990).

Where an appellant did not challenge a defective specification at trial, entered pleas of guilty to it, and acknowledged understanding all the elements after the military judge correctly explained those elements, the specification is sufficient to charge the crime unless it "is 'so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had.'" *United States v. Watkins*, 21 M.J. 208, 210 (C.M.A. 1986) (quoting *United States v. Thompson*, 356 F.2d 216, 226 (2d Cir. 1965), *cert. denied*, 384 U.S. 964 (1966) (citations omitted)). Such is the case here: the appellant made no motion to dismiss the Article 134, UCMJ, charge and entered pleas of guilty to both specifications under the charge. The military judge thoroughly covered the elements of each offense to include the terminal elements of conduct prejudicial to good order and discipline and service discrediting conduct. The appellant acknowledged understanding *all* the elements and explained to the military judge why he believed his conduct violated those elements.

Applying a liberal construction to each specification alleged under Article 134, UCMJ, we find that each reasonably implies the terminal element. The adultery specification identifies the other party as the same Airman with whom the appellant was ordered to have no contact – an order which he providently pled guilty to violating. The military judge advised the appellant during the plea inquiry that a required element of adultery is that it be either prejudicial to good order and discipline or service discrediting, and the appellant acknowledged that, by committing adultery with an Airmen who was the subject of a no-contact order, he engaged in conduct which was prejudicial to good order and discipline. Concerning the second Article 134, UCMJ, offense of reckless endangerment, the military judge likewise advised the appellant that his conduct must

either be prejudicial to good order and discipline or service discrediting to constitute this offense and, again, the appellant acknowledged understanding all the elements and that his conduct met those elements. A specification that alleges recklessly endangering another in a manner likely to produce death or grievous bodily harm reasonably implies that such conduct would be service discrediting and, therefore, charges a violation of Article 134, UCMJ. *See Watkins*.

Appellate Delay

We note that the overall delay of over 18 months between the time the case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine "the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530[] (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Moreno*, 63 M.J. at 135-36. When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case: the appellant has been released from confinement, the record shows no particularized anxiety or concern beyond that normally experienced by those awaiting appellate resolution of their cases, and we discern no specific impairment to either the appellant's basis of his appeal or his prospects at a rehearing should the case ultimately be reversed. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

Accordingly, the findings and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court