IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

KRISTOPHER D. COLE,
Airman First Class (E-3),
United States Air Force,
Appellant.

USCA Dkt. No. 23-0162/AF

Crim. App. Dkt. No. 40189

REPLY BRIEF ON BEHALF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Supreme Court of the United States

Court of Appeals for the Armed Forces and Court of Military Appeals

Service Courts of Criminal Appeals

Statutes and Other Authorities

Pursuant to Rules 19(a)(7)(B) and 34(a) of this Court's Rules of Practice and Procedure, Airman First Class (A1C) Kristopher D. Cole, the Appellant, hereby replies to the Government's brief (hereinafter Gov. Br.), filed on September 5, 2023.

ARGUMENT

THE MILITARY JUDGE'S MISAPPREHENSION OF THE OFFENSE WAS AN ERROR OF CONSTITUTIONAL MAGNITUDE AND APPELLANT SUFFERED MATERIAL PREJUDICE WHEN THE MILITARY JUDGE SENTENCED HIM WHILE LABORING UNDER THIS MISAPPREHENSION.

The Government concedes the military judge erred, does not contest that the errors were plain or obvious, and asserts "only the prejudice analysis remains." Gov. Br. at 15.

A. The military judge's questions exceeded Appellant's knowing and voluntary waiver and violated his right against self-incrimination.

The military judge's questions about erroneous additional elements were not "closely related to" the offense Appellant was pleading guilty to because they were for an entirely separate uncharged aggravated offense. Gov. Br. at 16.

The Government asserts the military judge "did not ask Appellant if his firearm was *actually* used as a dangerous weapon." Gov. Br. at 16-17. This is incorrect. The military judge asked Appellant whether he admitted the elements and definitions correctly described his conduct. JA at 73. When eliciting Appellant's response, the military judge had already misadvised Appellant that the fourth element of the offense was "that the weapon was a dangerous weapon." JA at 72-

73. The judge had also already defined a dangerous weapon by explaining: "[a] weapon is a dangerous weapon when it is used in a manner capable of inflicting death or grievous bodily harm." JA at 73. The Government attempts to downplay the significance of Appellant's admission that the unloaded firearm was a dangerous weapon by stating "Appellant did not admit any fact that was not encompassed by the offense as charged." Gov. Br. at 17. However, Appellant's admission that the firearm was a dangerous weapon—which by definition includes it was used as one—is a fact that was not encompassed by the charged offense. This admission by Appellant, though legally incorrect, was then used by the military judge to satisfy the dangerous weapon element of aggravated assault with a dangerous weapon. No matter the number of times the military judge and Appellant referred to the firearm as unloaded, the mistaken belief remained that the unloaded firearm was a dangerous weapon.

The Government similarly incorrectly argues the military judge did not elicit the aggravated element of specific intent from Appellant. The military judge misadvised Appellant that he must have "intended to do bodily harm." JA at 72. After explaining this to Appellant, the military judge asked Appellant whether he admitted the elements and definitions correctly described his conduct. JA at 73. The military judge was attempting to satisfy the specific intent element of aggravated assault with a dangerous weapon when he asked Appellant (1) if he intended to point

the gun, and (2) if pointing the gun and stating what he stated constituted "bodily harm." JA at 75. When an accused is pleading guilty, the providence inquiry is arguably the most important part of the trial and a military judge's words during that inquiry have meaning to both the accused and the military judge. *Cf. United States v. Day*, 83 M.J. 53, 57 (C.A.A.F. 2022) (rejecting the Government's argument that a plea agreement is unaffected when the military judge had misadvised an appellant on the meaning of their plea agreement). While the Government attempts to discount Appellant's admissions, the military judge did not. The military judge explained what elements he thought needed to be satisfied for the offense (JA at 72) and using Appellant's admissions, the military judge accepted his plea (JA at 95).

The military judge's questions—which elicited admissions from Appellant to an aggravated dangerous weapon element and specific intent element—were not directly related to the offenses that Appellant agreed to plead guilty to. As comparison, in *United States v. Holt*, 27 M.J. 57, 58 (C.M.A. 1988), the military judge asked questions about the offenses that the soldier was pleading guilty to. The military judge did not exceed the information that was needed to satisfy the correct elements. *Id*. Rather, the issue was that the soldier told the military judge something different than what he had told investigators. *Id*. The Court of Military Appeals determined the appellant's statements to the military judge could be considered in sentencing because "[u]nless the military judge has ranged far afield during the

providence inquiry, the accused's sworn testimony will provide evidence 'directly relating to' the offenses to which he has pleaded guilty." *Id*. at 60.

In *United States v. Price*, 76 M.J. 136, 137-38 (C.A.A.F. 2017), the military judge asked about the facts pertaining to the offenses that the appellant was pleading guilty to (use, possession, and distribution of various controlled substances). As an example, when determining whether there was a factual basis for wrongfully using cocaine on divers occasions, the military judge inquired about the number of times the appellant had used cocaine. *Id*. at 137. In *Price*, the military judge's questions did not exceed the scope of permissible inquiry because his questions asked about—and were therefore "closely connected to"—the elements of the *charged* offenses to which the appellant pleaded guilty. *Id*. at 139 (citing *Holt*, 27 M.J. at 60).

Here, unlike *Holt* and *Price*, the military judge "ranged far afield" when he inquired about *the wrong offense*. In so doing, the military judge's questions on the wrong elements were not closely connected to the charged offense. Moreover, *Holt* recognized that if the possibility of a "defense is suggested, the judge may need to examine uncharged misconduct in order to determine whether [a defense exists]." 27 M.J. at 60. However, here, the military judge's questions were not the result of the Appellant wavering in his answers or the need to follow up on a potential defense. They were entirely due to the military judge's incorrect understanding.

As *Holt* explained "the inquiry into uncharged misconduct would not seem reasonably foreseeable as part of the process of establishing the factual basis for guilty pleas," therefore, "the waiver of Article 31, [Uniform Code of Military Justice], 10 USC § 831, rights and the privilege against self-incrimination involved in entering pleas of guilty would not extend to this uncharged misconduct."[1] *Id.* (internal citations omitted). The military judge ran far afield during the providence inquiry, and, as result, Appellant's constitutional right against self-incrimination was violated.

While this Court provides substantial deference to "military judges when they decide which facts to elicit during a providence inquiry in order to establish a factual basis for a guilty plea," that deference is not warranted here because the military judge was attempting to satisfy the factual basis for the wrong offense. *Price*, 76 M.J. at 139-40 (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)).

B. Appellant lacked notice that the military judge would sentence him while wrongly believing he committed a different, aggravated offense.

Appellant agreed to plead guilty to, and be sentenced for, simple assault with an unloaded firearm. JA at 33, 110. Appellant agrees this was the offense listed on the charge sheet. Gov. Br. at 19; JA at 33. Appellant does not allege the

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

specification or charge sheet failed to provide him notice, but rather that he was denied due process when the military judge sentenced him while incorrectly believing the offense was the uncharged and more serious offense of aggravated assault with a dangerous weapon. For this, Appellant was not on notice.

Simply put, the military judge was playing on a different sheet of music than everyone else in the courtroom. He believed Appellant was pleading guilty to aggravated assault with a dangerous weapon. JA at 72-75. When the military judge decided Appellant's sentence, he misunderstood the offense he was sentencing Appellant for. And Appellant did not know and had not agreed to be sentenced for the offense the military judge incorrectly believed was charged.

C. This Court should not overturn *United States v. Tovarchavez*, 78 M.J. 458 (C.A.A.F. 2019).

With no stare decisis analysis, the Government asserts that this Court should overturn its precedent. Gov. Br. at 31-32. As a result, Appellant is forced to address what would be a landmark change to the military-justice system on reply. This Court should not consider this issue as the Government, an interested party with room to spare in its word count (Gov. Br. at 35), failed to fully brief this matter. This Court and all appellants are deserving of full briefing on this issue before it is considered by this Court and without it, this case is not the appropriate case to address it.

However, should this Court determine this is an appropriate case for considering whether *Tovarchavez* should be overturned, each stare decisis factor weighs against it.

When this Court is asked to overturn precedent, it analyzes the matter under the doctrine of stare decisis. *United States v. Cardenas*, 80 M.J. 420, 423 (C.A.A.F. 2021) (citing *United States v. Blanks*, 77 M.J. 239, 241-42 (C.A.A.F. 2018)). "Stare decisis is the doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again." *Id*. (citing *United States v. Andrews*, 77 M.J. 393, 399 (C.A.A.F. 2018)). "[A]dherence to precedent is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* However, this Court is "not bound by precedent when there is a significant change in circumstances after the adoption of a legal rule, or an error in legal analysis." *Id.*

In evaluating the application of stare decisis, this Court considers: "whether the prior decision is unworkable or poorly reasoned; any intervening events; the reasonable expectations of servicemembers; and the risk of undermining public confidence in the law." *Id.* (citation omitted).

1. No intervening events dictate that *Tovarchavez* should be overturned.

This Court in *United States v. Long*, 81 M.J. 362, 371 (C.A.A.F. 2021), and the Government in its brief (Gov. Br. at 31-32), question whether *Tovarchavez*'s holding is implicated by the standard of review utilized in *Greer v. United States*, 141 S. Ct. 2090, 210 L. Ed. 2d 121 (2021). It is not.

Greer "reviewed a forfeited nonstructural constitutional error for plain error under FED. R. CRIM. P. 52(b) and did not require the government to prove that the error was harmless beyond a reasonable doubt." *Long*, 81 M.J. at 371 (internal citation omitted). But this was not the first time the Supreme Court has placed the burden on the appellant when reviewing forfeited nonstructural constitutional error under FED. R. CRIM. P. 52(b). In *United States v. Marcus*, 560 U.S. 258, 130 S. Ct. 2159, 176 L. Ed. 2d 1012 (2010), for example, the Supreme Court placed the same burden on the appellant when reviewing for plain error under FED. R. CRIM. P. 52(b). In that case, the Supreme Court reviewed the Second Circuit's "plain error" review of a constitutional due process violation not raised at trial under FED. R. CRIM. P. 52(b). *Id.* at 265. The Supreme Court decided the error was nonstructural and placed the burden on the appellant to prove, *inter alia*, that "the error 'affected the appellant's substantial rights.'" *Id.* at 262. The Supreme Court continued, "[A] 'plain error' must 'affec[t]' the appellant's 'substantial rights.' In the ordinary case, to meet this standard an error must be 'prejudicial,' which means that there must be

a reasonable probability that the error affected the outcome of the trial." *Id*. (internal citation omitted). The Supreme Court found the lower court had misapplied this test and remanded the case to the lower court to, in part, place the burden on the appellant to prove there was a reasonable probability that the error affected the outcome. *Id*. at 266-67.

The application of this same standard under FED. R. CRIM. P. 52(b) in *Greer* is not an intervening event, as the application of plain error review under FED. R. CRIM. P. 52(b) to forfeited nonstructural constitutional errors had already been settled by the Supreme Court. Judge Maggs also explained this in his dissenting opinion in *Tovarchavez*. 78 M.J. at 470 (Maggs, J., dissenting) ("Although the Supreme Court did not distinguish between preserved and forfeited objections in *Chapman* [*v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)], the Supreme Court in subsequent cases has not applied *Chapman*'s test when reviewing forfeited constitutional objections.") Judge Maggs cited to *Johnson v. United States*, 520 U.S. 461, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997) and *United States v. Cotton*, 535 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) as examples where the Supreme Court "did not require the government to prove that the forfeited constitutional error was harmless beyond a reasonable doubt." *Greer* did not overturn existing precedent or decide a new question of law.

Further, *Greer* did not analyze or implicate Article 59(a), UCMJ. It solely analyzed FED. R. CRIM. P. 52. Lastly, Congress has also not changed Article 59(a), UCMJ, despite making several other significant changes to the military-justice system.

2. *Tovarchavez* is not unworkable or poorly reasoned.

Tovarchavez is not unworkable. It has been applied several times over by this Court and the Courts of Criminal Appeals (CCA). *See, e.g.*, *Long*, 81 M.J. at 370; *United States v. Upshaw*, 81 M.J. 71 (C.A.A.F. 2021); *United States v. Prasad*, 80 M.J. 23 (C.A.A.F. 2020); *United States v. Armendariz*, 82 M.J. 712, 724 (N-M. Ct. Crim. App. 2022).

Moreover, the holding in *Tovarchavez* that requires the Government show forfeited nonstructural constitutional errors are harmless beyond a reasonable doubt is not poorly reasoned, and it was settled law prior to *Tovarchavez*. *See, e.g., United States v. Sweeney*, 70 M.J. 296, 304 (C.A.A.F. 2011) (explaining under plain error review, where the alleged error is constitutional, the prejudice prong is fulfilled where the Government cannot show that the error was harmless beyond a reasonable doubt); *United States v. Harcrow*, 66 M.J. 154, 160 (C.A.A.F. 2008) (finding under plain error review, the Government had met its burden to show the constitutional error was harmless beyond a reasonable doubt). The Court's faithfulness to precedent in *Tovarchavez* was not poorly reasoned, especially as *Chapman* remained

and still remains good law, superseded by statute (28 U.S.C. § 2254(d)) only for writs of habeas corpus.

Furthermore, this Court was right to differentiate between the assessment of prejudice under FED. R. CRIM. P. 52(b) versus Article 59, UCMJ. This Court determined that the different allocation of burden provided in *United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) was based on "its interpretation of FED. R. CRIM. P. 52(a) (preserved error) and FED. R. CRIM. P. 52(b) (forfeited error)." 78 M.J. at 462, fn. 6. "In contrast, Article 59, UCMJ, does not delineate between preserved and forfeited error." *Id*. Nor is it contrary to Supreme Court precedent for "material prejudice" under Article 59, UCMJ, to be understood by reference to the nature of the violated right.

This Court considered its precedent and the federal precedent which provides a different test under FED. R. CRIM. P. 52(b), and through thoughtful reasoning it determined the *Chapman* standard still applies when assessing prejudice for forfeited constitutional errors under Article 59, UCMJ. *Id*. at 468. While there can be a difference of opinion on the rightness or wrongness of this decision, it was not poorly reasoned.

3. Continued application of *Tovarchavez* protects the reasonable expectation of servicemembers.

Servicemembers rely on this Court's continued application of *Tovarchavez. See, e.g., Long*, 81 M.J. at 370; *Upshaw*, 81 M.J. at 76, *Prasad*, 80 M.J. at 29; *Armendariz*, 82 M.J. at 724.

More broadly, however, servicemembers rely on the application of the *Chapman* standard as one of the safeguards that protects them in the military-justice system. FED. R. CRIM. P. 52 and Article 59, UCMJ, are different. They exist in different systems, and these different systems require different protections. *Cf. United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023) (explaining "the principle that courts-martial are fundamentally different from civilian trials"). The application of *Chapman* to forfeited constitutional errors is just one of the ways that servicemembers are ensured a fair justice system.

Servicemembers do not benefit from grand juries or unanimous verdicts, for example, and simultaneously must contend with the possibility of unlawful influence and amorphous charging under Article 134. The military-justice system tries to provide a counterbalance by providing servicemembers the ability to request individual military counsel, as example, and robust review on appeal, providing, inter alia, factual sufficiency and sentence appropriateness review. The CCAs have "broad discretion to determine whether a sentence should be approved, a power that has no direct parallel in the federal civilian sector." *United States v. Behunin*, 83

M.J. 158, 161 (C.A.A.F. 2023) (citing *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001)). Requiring the Government to prove a constitutional error was harmless beyond a reasonable doubt—whether forfeited or not—is a protection under Article 59, UCMJ. Congress has taken no action to intervene in this, and this Court should not either. *Watson v. United States*, 552 U.S. 74, 82-83, 128 S. Ct. 579, 169 L. Ed. 2d 472 (2007) (stating that "long congressional acquiescence 'has enhanced even the usual precedential force' we accord to our interpretations of statutes") (quoting *Shepard v. United States*, 544 U.S. 13, 23, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005)).

4. Overturning *Tovarchavez* risks undermining public confidence in the law.

Servicemembers have raised their hands to protect and defend the Constitution. If their rights are then violated by the same military that serves in the effort to protect and defend the Constitution, the burden should be on the Government (i.e., the military-justice system) to answer for that violation. Overturning *Tovarchavez* and placing the burden on the Appellant risks undermining the integrity of the military-justice system and the trust that is placed in it.

Given the lack of change from Congress or in precedent, the Government's request to overturn *Tovarchavez* which was decided only four years ago creates the appearance that this issue is being renewed simply to place it before different members of this Court in hopes of a different vote. That is a dangerous appearance

that risks undermining the public's confidence in this Court and the military-justice system.

This case is not appropriately suited for addressing this issue because the Government chose to not fully brief the issue. However, should the Court consider it, each stare decisis factor weighs against overturning *Tovarchavez*.

D. Appellant suffered material prejudice.

This Court should find, after placing the burden on the Government, that the military judge's errors were not harmless beyond a reasonable doubt. However, if this Court disagrees, the military judge's error nevertheless had a substantial influence on Appellant's sentence. *See Kotteakos v. United States*, 328 U.S. 750, 765, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946); *United States v. Boyd*, 55 M.J. 217, 221 (C.A.A.F. 2001).

The military judge considered legally incorrect and aggravating elements that he believed were proven through the strongest form of proof in our legal system—Appellant's admissions. JA at 46; *see United States v. Langston*, 53 M.J. 335, 337 (C.A.A.F. 2000) (explaining the appellant's responses under oath were "judicial admissions, the strongest form of proof in our legal system"). In doing so, he viewed the entire offense and all facts through the aggravated lens of the wrong crime, sentencing Appellant to the greatest punishment permitted.

1. The military judge found the elements of aggravated assault with a dangerous weapon had been met.

While the facts the military judge elicited from Appellant may not establish the factual basis for aggravated assault with a dangerous weapon, the military judge believed they did. He specifically sought out the elements of this offense believing them to be necessary and accepted Appellant's plea, without ever shifting course to explain any correction in his statements or understanding. JA at 72-75, 95. If the military judge realized he had advised Appellant of the elements of the wrong offense and then asked about those elements, one would reasonably anticipate he would have corrected himself on the record. But this never happened. Moreover, this military judge would not be the first military judge to have found an appellant guilty of an offense based on the appellant's agreement with legal conclusions vice factual admissions. In *United States v. Jordan*, 57 M.J. 236, 239 (C.A.A.F. 2002), this Court found "appellant simply responded 'Yes, sir' to the several questions put to him," and there were no factual admissions to support the military judge's conclusion that the appellant's conduct was prejudicial to good order and discipline.

2. The military judge understood the firearm was unloaded and yet he believed it was a dangerous weapon.

The Government asks this Court to place weight in the fact that the military judge knew the firearm was unloaded (Gov. Br. at 22-24), but this misses the point. Appellant does not assert the military judge believed the offense was aggravated

assault *with a loaded firearm*. The issue is that the military judge incorrectly believed that the offense required Appellant to have used a *dangerous weapon* and that the unloaded firearm—which was not used in manner capable of inflicting death or grievous bodily harm—was a dangerous weapon. While the Government asserts "the military judge could not have realistically thought, based on the facts elicited, that Appellant could have actually harmed the victim" (Gov. Br. at 21), there is no confusion in the record that the military judge elicited and accepted that the unloaded firearm was a dangerous weapon. JA at 72-73, 95. Moreover, it is far from unfathomable that the military judge accepted this because he had found an unloaded firearm was a dangerous weapon in another court-martial just two months before Appellant's court-martial. *United States v. Dominguez-Garcia*, No. ACM S32694, 2022 CCA LEXIS 582, *1 (A.F. Ct. Crim. App. Oct. 11, 2022).

The stipulation of fact did not remind the military judge what offense was charged; it only explained that the firearm was unloaded, which did not impact the military judge's incorrect understanding of the offense. While the Government attempts to assert the "headers in the stipulation of fact stated the general nature of the offense" (Gov. Br. at 23), they did not do so with helpful specificity. The "header" for this offense stated only "Assault with an Unloaded Firearm." JA at 119. It does not state *simple* assault with an unloaded firearm. *See id*.

Moreover, any argument that the headers in the stipulation of fact put the military judge on notice of the correct offenses is easily discounted in two ways. First, when the military judge was reading the stipulation of fact out loud to Appellant, he skipped over the header and did not read it (*compare* JA at 062 *with* JA 119), not dissimilar to when he directed trial counsel to skip over the reading of the charges (JA at 43). Second, the military judge read over the stipulation of fact with Appellant *before* incorrectly advising Appellant of the name of the offense and the required elements and definitions.[2] *Compare* JA 50-67 *with* JA 72-75. The fact that the military judge read over the stipulation of fact (and skipped the headers, after skipping the reading of the general nature of the charges) and then made the significant errors he made during the providence inquiry demonstrate the stipulation of fact did not assist the military judge to understand the offense charged.

3. The military judge sentenced Appellant while laboring under the incorrect understanding that he was sentencing Appellant for aggravated assault with a dangerous weapon.

The military judge's findings—which followed his recitation of the elements of the wrong offense and questions indicating his misunderstanding, demonstrate he

[2] The military judge also advised Appellant "[a] victim may not lawfully consent to an assault with a dangerous weapon. Consent is not a defense to this offense." JA at 73. This instruction applies to aggravated assault with a dangerous weapon. *See* Dep't of Army Pam. 27-9, Legal Services: Military Judges' Benchbook (February 29, 2020) at 1529, n. 5 ("Under certain circumstances, consent may be a defense to simple assault or assault consummated by a battery. . . . Consent is not generally a defense to aggravated assault.")

believed Appellant was guilty of aggravated assault with a dangerous weapon. JA at 72-75. When he sentenced Appellant, he utilized Appellant's admissions and believed he was sentencing Appellant for aggravated assault with a dangerous weapon. S*ee* JA at 47 (explaining anything said under oath during the providence inquiry would be used against Appellant in sentencing), 72-75.

While trial counsel did not capitalize on the military judge's incorrect understanding in her sentencing argument, the military judge's incorrect understanding existed nonetheless and remained uncorrected. Had the military judge recognized his error, he likely would have reopened the providence inquiry. But he did not.

The Government attempts to demonstrate that the military judge understood the offense by comparing the maximum punishment for simple assault with an unloaded firearm to aggravated assault with a loaded firearm. Gov. Br. at 26. However, Appellant does not assert that the military judge mistook the offense to be aggravated assault with a *loaded* firearm. Appellant's assertion remains that the military judge believed the offense was *aggravated assault with a dangerous weapon, other cases,* which carries a maximum punishment of three years. MCM, part IV, para. 77.d.(3)(a)(iii). This explains how the military judge came to the same maximum punishment as trial counsel while simultaneously misunderstanding the charged offense. *See* JA at 78.

The Government next argues the military judge "had evidence before him supporting a sentence of six months confinement" (Gov. Br. at 26), however, the Supreme Court in *Kotteakos* specifically disavowed this argument when evaluating prejudice at the lower standard for nonconstitutional error. 328 U.S. at 765. The Supreme Court explained:

> [I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence.

Id.

Appellant maintains that the Government's burden is proof beyond a reasonable doubt and that it cannot demonstrate Appellant's sentence was "surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Nevertheless, should this Court disagree, the military judge's incorrect understanding had a substantial influence. It impacted his entire view of the offense and allowed him to consider the use of a dangerous weapon and specific intent to harm in his evaluation of the sentence that should be meted out. With this incorrect understanding, the military judge sentenced Appellant to the maximum punishment permissible for the offense under the plea agreement. There

is a reasonable probability that Appellant was sentenced more severely due to the military judge's incorrect and aggravated perception of the severity of the offense.

To the extent the Government argues this sentence was appropriate (Gov. Br. at 26-28), that is not an appropriate consideration for this Court. The authority and responsibility to determine the appropriateness of an approved sentence is granted to the CCAs under Article 66, UCMJ, and a CCA's sentence appropriateness decisions are reviewed by this Court for an abuse of discretion. *See United States v. Guinn*, 81 M.J. 195, 199 (C.A.A.F. 2020).

The Government argues Appellant did not suffer prejudice because his sentence fell within the lawful range for the offense of simple assault with an unloaded firearm and within the terms of his plea agreement. Gov. Br. at 29. However, this ignores the reality that if additional punishment was adjudged, even within the allowable range, Appellant has been materially prejudiced. *See United States v. Cunningham*, No. 23-0027, 2023 CAAF LEXIS 520, at *24 (C.A.A.F. Jun. 21, 2023) (Maggs, J., dissenting). "Any amount of actual jail time is significant, and has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907, 201 L. Ed. 376 (2018) (internal quotations and citations omitted).

Finally, the offense code listed on the statement of trial results and entry of judgment is a red herring and does not evidence that the military judge understood the offense at the time he was sentencing Appellant. The Government was responsible for drafting the statement of trial results in this case, not the military judge. The scheduling order in this case detailed the "draft statement of trial results" was due to "opposing counsel and the military judge" on June 11, 2021. *See* App. Ex. I. At the time it was due, Judge Milam had been detailed to the case. JA at 40 (Judge Milam was detailed to Appellant's case on June 4, 2021).

Additionally, as acknowledged by the Government, the post-trial documents are reviewed and adopted by the military judge. Gov. Br. at 31 (explaining the military judge reviews the statement of trial results and entry of judgment). If the military judge reviewed these documents before trial, the listing of the offense code on the documents did not help him to understand the offense. *See* JA at 72-75.

There is clear and ample evidence the military judge skipped over things and erred on basic and significant matters. Therefore, the military judge should not benefit from a presumption that he in fact confirmed the offense code before signing either document. *See United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) ("Military judges are presumed to know the law and to follow it absent clear evidence to the contrary.").

Moreover, the statement of trial results and entry of judgment list the charges and specifications but nothing on the face of the document lists the names of the offenses. JA at 35-36. Given the military judge's misapprehension in *Dominguez-Garcia* in April 2021 (2022 CCA LEXIS 582, *1) and then similar misapprehension in this case in June 2021, there is even less reason to suggest that the military judge did or would have recognized his error upon reviewing the offense code.

The military judge believed two additional aggravating elements applied to the offense and were relevant for consideration when he sentenced Appellant. He was wrong. Even assessing material prejudice for a nonconstitutional error results in finding there is a reasonable probability Appellant was prejudiced by the military judge's errored understanding of the offense. This Court "cannot say, with fair assurance" the military judge's judgment in determining Appellant's sentence "was not substantially swayed by the error" and therefore, "it is impossible to conclude that substantial rights were not affected." *Kotteakos*, 328 U.S. at 765. As a result, regardless of how this Court assesses material prejudice in this case, Appellant was materially prejudiced.

CONCLUSION

The Government concedes the military judge erred and does not contest the error was plain or obvious. The military judge's errors violated Appellant's constitutional rights, and this Court should therefore place the burden on the

Government to prove the errors were harmless beyond a reasonable doubt. If this Court disagrees and finds Appellant must demonstrate material prejudice, the military judge's incorrect and aggravated understanding of the offense substantially influenced Appellant's sentence.

WHEREFORE, Appellant respectfully requests that this Court reverse with respect to the sentence and return the record to the Judge Advocate General of the Air Force for remand to the Air Force Court to either reassess the sentence or order a sentence rehearing.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on September 15, 2023.

CERTIFICATE OF COMPLIANCE WITH RULES 24(b) and 37

This brief complies with the type-volume limitation of Rule 24(b) because it contains 5,304 words.

This brief complies with the typeface and type style requirements of Rule 37.

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