

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES
Appellant

v.

CHASE J. EASTERLY
Senior Airman (E-4),
United States Air Force,
Appellee

USCA Dkt. No. 19-0398/AF

Crim. App. Dkt. No. ACM 39310

ANSWER TO APPELLANT'S BRIEF IN SUPPORT OF CERTIFIED ISSUE

DAVID A. SCHIAVONE, Captain, USAF
U.S.C.A.A.F. Bar No. 36214
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604
(240) 612-4770
david.a.schiavone2.mil@mail.mil

Counsel for Appellee

INDEX

Statement of Statutory Jurisdiction.....	1
Statement of the Case.....	1
Statement of Facts.....	2
<i>SrA Easterly’s Diagnosis</i>	2
<i>Relationship with E.E. and the Charged Conduct</i>	2
<i>Disability Evaluation</i>	7
<i>SrA Easterly’s Court-Martial</i>	8
Summary of the Argument.....	12
Argument.....	14
THE AIR FORCE COURT OF CRIMINAL APPEALS DID NOT ERR IN FINDING THAT THE MILITARY JUDGE COMMITTED PLAIN AND PREJUDICIAL ERROR BY FAILING TO INSTRUCT THE PANEL <i>SUA SPONTE</i> REGARDING THE IMPACT OF A PUNITIVE DISCHARGE ON APPELLEE’S POTENTIAL PERMANENT DISABILITY RETIREMENT.	14
<i>It was error for the military judge not to sua sponte instruct the court-martial members on the effect a punitive discharge would have on SrA Easterly’s permanent disability retirement.</i>	15
<i>The military judge’s error was clear and obvious.</i>	20
<i>The military judge’s clear and obvious error affected SrA Easterly’s substantial rights.</i>	22

TABLE OF AUTHORITIES

Cases

<i>Kotteakos v. United States</i> , 328 U.S. 750 (1946)	25, 26
<i>Denedo v. United States</i> , 66 M.J. 114 (C.A.A.F. 2008)	19
<i>United States v. Becker</i> , 46 M.J. 141 (C.A.A.F. 1997).....	18
<i>United States v. Boyd</i> , 55 M.J. 217 (C.A.A.F. 2001)	<i>passim</i>
<i>United States v. Gilley</i> , 56 M.J. 113 (C.A.A.F. 2001)	19
<i>United States v. Greaves</i> , 46 M.J. 133 (C.A.A.F. 1997)	18
<i>United States v. Grier</i> , 53 M.J. 30 (C.A.A.F. 2000).....	14
<i>United States v. Griffin</i> , 25 M.J. 423 (C.M.A. 1988)	22
<i>United States v. Knapp</i> , 73 M.J. 33 (C.A.A.F. 2014).....	21
<i>United States v. Luster</i> , 55 M.J. 67 (C.A.A.F. 2001)	18, 22, 25
<i>United States v. Maynard</i> , 66 M.J. 242 (C.A.A.F. 2008)	21, 22
<i>United States v. Perry</i> , 48 M.J. 197 (C.A.A.F. 1998).....	16
<i>United States v. Talkington</i> , 73 M.J. 212 (C.A.A.F. 2014)	22, 24
<i>United States v. Van Syoc</i> , 36 M.J. 461 (C.M.A. 1993)	16

Statutes

10 U.S.C. § 1201 (2018)	18
10 U.S.C. § 8914 (2018)	18

Other Authorities

Black’s Law Dictionary 278 (8th ed. 2004)24

Department of Defense Instruction 1332.18, Disability Evaluation System, (Aug. 5, 2014, Incorporating Change 1, May 17, 2018).....17

Military Judges’ Benchbook, Department of the Army Pamphlet 27-9 (19 Aug. 2019)21

Rule for Courts-Martial 1001A (2016).....10

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,
Appellant

v.

CHASE J. EASTERLY,
Senior Airman (E-4),
United States Air Force,
Appellee

**APPELLEE’S ANSWER TO
UNITED STATES’ BRIEF IN
SUPPORT OF CERTIFIED ISSUE**

Crim. App. Dkt. No. 39310

USCA Dkt. No. 19-0398/AF

Pursuant to Rule 19 of this Court’s Rules of Practice and Procedure, Appellee hereby files his Answer to Appellant’s Brief in Support of the Certified Issue, filed on August 28, 2019.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (Air Force Court) reviewed this case pursuant to Article 66, UCMJ. Appellee has submitted a motion to dismiss for lack of jurisdiction based on the failure of the Judge Advocate General of the Air Force to make appropriate notification to the other Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps. Should this Court deny Appellee’s motion to dismiss, its jurisdiction to review this case is pursuant to Article 67(a)(2), UCMJ.

Statement of the Case

Appellee generally accepts Appellant’s statement of the case.

Statement of Facts

SrA Easterly's Diagnosis

While deployed to Al Udeid Air Base, Qatar in September 2015, SrA Chase Easterly began having persistent auditory hallucinations and thoughts of wanting to harm another individual. (JA at 258; 266). On his own volition, SrA Easterly immediately sought help through the chaplain and his medical provider. (JA at 294). SrA Easterly was medically evacuated to Landstuhl, Germany, where he was diagnosed with schizophrenia. (JA at 003).

In October 2015, after returning home from his deployment to Joint Base Pearl Harbor-Hickam, SrA Easterly began mental health treatment with Maj E.R. (JA at 208; 296-297). Maj E.R. confirmed the diagnosis of schizophrenia and began treatment of SrA Easterly, which consisted of medication and counseling sessions on a weekly basis. (JA at 212; 297; 307). SrA Easterly continued to suffer symptoms of his schizophrenia, including “los[ing] three days of time” without memory in April 2016. (JA at 209).

Relationship with E.E. and the Charged Conduct

In May 2016, SrA Easterly met E.E. online through a dating website. (JA at 003). E.E. was 60 years old, and SrA Easterly was 22 years old. (*Id.*) They arranged to meet for the first time at a restaurant, where E.E. arrived to find SrA Easterly

dressed nicely and waiting with champagne. (JA at 170). E.E. found SrA Easterly charming and witty, and described the evening as “splendid.” (*Id.*)

After dinner, E.E. and SrA Easterly went to Kaimana Beach and sat on a park bench in order to continue their “exciting conversation.” (JA at 172). E.E. said she was cold and wanted SrA Easterly to put his arm around her; however, SrA Easterly told E.E. that he was raised to not show affection in public. (*Id.*) When they returned to their cars, SrA Easterly said he really liked E.E. and wanted to give her a goodnight kiss. (*Id.*) E.E. reminded SrA Easterly that kissing her goodnight in public would be contrary to what he told her at the beach. (*Id.*) That, and the fact that SrA Easterly had smoked a cigar earlier in the day, made E.E. become disinterested in SrA Easterly. (*Id.*) Nevertheless, E.E. agreed to go country dancing with SrA Easterly the next night. (JA at 173).

E.E. testified that SrA Easterly picked her up the next evening and the two went country dancing. (*Id.*) E.E. described SrA Easterly as a “complete gentleman” and the night as “wonderful.” (*Id.*) SrA Easterly dropped E.E. off at home and the two arranged to see each other again a few days later on Friday to go for a nighttime hike. (*Id.*)

After SrA Easterly picked up E.E. for the hike, his car broke down. (JA at 175). E.E. noticed that SrA Easterly seemed nervous and his stutter really “[got] thick.” (*Id.*) They had dinner at a nearby restaurant and took a cab back to E.E.’s

car so E.E. could drive SrA Easterly home. (JA at 175-176). SrA Easterly asked to go up to E.E.'s apartment to use the restroom, and also to determine what hardware he would need to hang a mirror that E.E. had asked him to hang the following day. (JA at 176).

Once inside, E.E. and SrA Easterly talked for a bit before SrA Easterly offered to perform oral sex on E.E. (JA at 178). E.E. agreed, but, within moments, "sat up like the Exorcist" and yelled, "I hope someone's having fun because I'm not." (*Id.*) SrA Easterly "stuttered very, very thickly, and he said that he wanted to take a short walk." (*Id.*) E.E. realized at that point that she had emasculated SrA Easterly and did not intend to be so harsh, but still told SrA Easterly to take a long walk instead of a short one. (*Id.*)

E.E. figured that SrA Easterly would still call her in the morning to hang the mirror and go to the beach, but SrA Easterly did not call. (JA at 179). E.E. called SrA Easterly mid-day the following day, which was a Saturday. (*Id.*) When SrA Easterly failed to answer, E.E. called again. (*Id.*) E.E. called SrA Easterly repeatedly and left voicemail messages, ending her final message by calling SrA Easterly a coward. (JA at 004). SrA Easterly did not return any of her calls. (JA at 179).

The next day, SrA Easterly drove to E.E.'s apartment with a Nike duffel bag containing gloves, trash bags, extra clothes, bleach, and a paint mask, as well as

lighter fluid and a knife SrA Easterly had purchased at the Base Exchange. (JA at 298). SrA Easterly rode the elevator to E.E.'s apartment and knocked on the door. (JA at 290). Because she was not expecting anyone, E.E. did not answer the door. (JA at 195). SrA Easterly called out E.E.'s name and "a string of apologies." (*Id.*) After waiting for about ten or fifteen minutes at E.E.'s door, SrA Easterly left. (JA at 291).

SrA Easterly went to see the chaplain on Wednesday, June 1, 2016, after he realized what had happened over the weekend. (JA at 259). The chaplain recommended that SrA Easterly go talk to his mental health provider, which SrA Easterly did. (*Id.*) SrA Easterly walked-in to see Maj E.R. at mental health without an appointment. (JA at 208). SrA Easterly described showing up to E.E.'s apartment door with a duffel bag containing certain items that could have been used to harm E.E. and conceal evidence, but Maj E.R. was unsure of what would have happened had E.E. answered the door. (JA at 206; 207). Maj E.R. recalled that SrA Easterly was "in distress" and "very significantly worried about what had occurred, and what could [have] potentially occurred, and his role in that." (JA at 209). Following this session, SrA Easterly voluntarily agreed to enter inpatient mental health treatment. (JA at 209).

Maj E.R. told SrA Easterly's first sergeant that SrA Easterly planned to kill E.E., had purchased items to do so, and had shown up at E.E.'s apartment and

knocked on the door. (JA at 006). Maj E.R. believed this disclosure to be an exception to the psychotherapist-patient privilege. (*Id.*) Had SrA Easterly *not* gone to Maj E.R. for mental health treatment, no law enforcement agency would have known about his actions that weekend. (JA at 008).

SrA Easterly waived his right to an attorney and agreed to speak with agents of the Air Force Office of Special Investigations (OSI). (JA at 257). SrA Easterly described why he showed up at E.E.'s door with a knife:

That's what I'm trying to figure out here right now. I actually took a series of psych tests over the past two days and I'm hoping to get the results today about it, about what exactly happened. 'Cause when it did occur, this event, I wasn't in my right mind. Like my brain like clicked, to like where it switched. 'Cause actually I'll just tell you guys [I have] schizophrenia, so I hear voices and like see things. So with that like I've had a series of like strange events to where I actually like lose time and things like that, to where I don't know what I did. And this is kind of like one of those times to where I still knew what I was doing somewhat, but my brain, like I could not stop myself from doing things. So that's kind of what happened, almost like a psychotic break in a way, to where like I didn't understand it. That's why I immediately went over here, sought treatment, 'cause I was like I don't know what's going on. Like I need the help.

(JA at 258). SrA Easterly attested that while he "might have actually harmed her in some way" if she had answered the door, he would not have killed her. (JA at 266).

OSI asked SrA Easterly to clarify how he would have harmed E.E., to which SrA Easterly responded "[m]aybe try to cut her arm or something . . . but I don't think I could actually fully go through with it. I don't think [my] actual like mind and body would let me do that." (*Id.*)

Disability Evaluation

SrA Easterly's schizophrenia diagnosis initiated a Medical Evaluation Board (MEB) to determine SrA Easterly's fitness for continued service in the Air Force. (JA at 212; *see also* JA at 448-449). On April 26, 2016, an Informal Physical Evaluation Board (IPEB) recommended SrA Easterly's discharge from the service because he was unfit for duty based on his medical condition, "Schizophrenia Spectrum, Persistent Auditory Hallucinations." (Pros. Ex. 23, JA at 422). Notably, it found that SrA Easterly's schizophrenia existed prior to SrA Easterly's military service, and had not been permanently exacerbated by military service. *Id.* The IPEB's determination would cause SrA Easterly to be discharged with no compensable disability, despite his "significant risk of recurrence and/or progression of his disease and need for frequent follow-up with a medical specialist." (JA at 003) (internal quotation marks omitted).

SrA Easterly appealed the IPEB's decision. (JA at 212). On June 21, 2016, the Formal Physical Evaluation Board (FPEB) determined that SrA Easterly's schizophrenia "[is] a chronic disease that has no cure and is characterized by unpredictable exacerbations and remissions. Clinical notes state that SrA Easterly will require lifelong treatments." (Pros. Ex. 24, JA at 424). Overriding the finding of the IPEB, the FPEB found that SrA Easterly's schizophrenia was permanently aggravated by military service and recommended "Permanent Retirement" with a

disability rating of 100 percent. (*Id.*) Disability retirement for servicemembers with fewer than 20 years of service is tied to their disability rating; that is, permanent disability retirement is directed when a servicemember's disability rating is at least 30 percent. (JA at 450).

SrA Easterly's Court-Martial

The convening authority referred to general court-martial two charges against SrA Easterly: attempted premeditated murder in violation of Article 80, UCMJ, 10 U.S.C. § 880; and communicating a threat to kill any doctor responsible for changing his diagnosis, in violation of Article 134, UCMJ, 10 U.S.C. § 934, of which SrA Easterly was eventually acquitted. Trial counsel, defense counsel, the military judge, and several witnesses discussed SrA Easterly's disability rating and resulting permanent retirement during the course of the proceedings.

During findings, 1st Lt T.R., a medical student employed in the psychiatry department of Tripler Army Medical Center, described the context of SrA Easterly's alleged threat. He explained that as of June 2016, SrA Easterly was on a certain "treatment [and] diagnosis pathway" that would enable him to receive lifelong treatment at a military healthcare facility. (JA at 225). During a routine medical interview with 1st Lt T.R., SrA Easterly expressed concern that if his access to that treatment was taken away, he may find the urge to kill the doctors responsible. (*Id.*) As for how SrA Easterly believed his access to medical treatment at a military

facility could be taken away, 1st Lt T.R. explained, “if he was discharged without getting the . . . if they changed his diagnosis and he was discharged without . . . if he was discharged he would not get the appropriate medical treatment at a military facilities[.]” (JA at 226). On both cross-examination and re-direct examination, 1st Lt. T.R. recounted the statement using essentially the same language: “[SrA Easterly] was nervous that if the doctors changed his diagnosis or eliminated it he would be discharged without means of obtaining treatment at a military medical facility, and he might find the urge to kill the doctors who made that happen.” (JA at 231; *see also* JA at 241 (“he was worried that he would find himself not be able to be treated at a military medical center”)).

Prosecution Exhibits 23 and 24 are the written findings and recommendations of the IPEB and FPEB, respectively. (JA at 245). Defense counsel initially objected to Prosecution Exhibit 23, which led to an Article 39(a) session regarding the exhibits. (*Id.*) Defense counsel later withdrew his objection to the IPEB report once the government offered the FPEB report. (*Id.*) It was uncontested that the FPEB report established SrA Easterly’s eligibility for permanent disability retirement. (JA at 424; *see also* JA at 025).

Prosecution Exhibit 22 is SrA Easterly’s interview with OSI. (JA at 247). During that interview, SrA Easterly spoke about his permanent disability retirement compensation: “I know right now, especially with my medical and everything like

that when I get out I will get paid more than I do now so I don't want to mess that up and all.” (JA at 274). This became a central aspect of trial counsel's findings argument as to the Article 134 charge; that is, SrA Easterly did not want his diagnosis to change because permanent disability retirement would result in greater pay than he was receiving on active duty. (JA at 323; *see also* JA at 329 (“he's going to be getting paid more with that retirement [than] he makes as a senior airman”); JA at 330 (“someone might take away a lot of money from his future”)). Trial counsel played the above excerpt from Prosecution Exhibit 22 for the members, subsequently arguing “[SrA Easterly is] threatening to kill somebody that could take away a lot of money that he has riding for his future, the money that he's depending on. He needs that MEB to come back favorably for him.” (JA at 324). Trial counsel and defense counsel referenced SrA Easterly's 100 percent disability rating or “100 [percent] compensation” 10 times during findings argument. (JA at 349; *see also* JA at 334; 344; 347; 348; 353; 354).

The evidence adduced at sentencing consisted mainly of character witnesses and testimony from Col D.B., a board-certified forensic psychiatrist.¹ Col D.B. addressed the “not inexpensive” medication that SrA Easterly would need to take to

¹ The government presented only a Personal Data Sheet and SrA Easterly's Enlisted Performance Reports. (JA at 102). The government prompted E.E. to deliver her unsworn statement during its sentencing case, however, this should have occurred after the government rested. *See* Rule for Courts-Martial 1001A (2016).

treat schizophrenia, as well as the importance of consistency in treatment. (JA at 367). Further, defense counsel elicited from Col D.B. the import of SrA Easterly's disability rating and approved retirement:

So, certainly, a finding of 100% disability would suggest that a person who has that is severely disabled by their illness. What that would afford them, in addition to disability payments is, lifelong access to medical care and treatment through the VA system and through actually the active duty system for a part of their time as well. So, it's an acknowledgement that a person has an illness that is going to require treatment over time and that will likely interfere with their ability to lead a productive life in any occupation. And certainly, it implies that their illness has rendered them unfit for military service.

(JA at 368).

A number of character witnesses for SrA Easterly described his rehabilitative potential, and his proficiency at mechanical, construction, or other hands on work. (JA at 377; 385; 425-438) SrA Easterly's unsworn statement tied his access to treatment and medication with his ability to be a productive member of society. (JA at 387).

In argument, trial counsel argued for a punitive discharge by stating that it would specifically deter SrA Easterly:

[I]t's evident members what he wants. He wants that money. He's all about that money. That's what he says to OSI. He says, I'm going to be making more money when I get out than I am now. He wants that money. You don't get what you want when you're an attempted murderer. You should not be given what you want after you go to a woman's house because she said you were a coward, with a bag packed with a knife, and lighter fluid, and a lighter, and a change of clothes,

you don't get what you want then. You forfeit that right. You get discharged.

(JA at 407-408). Defense counsel focused on SrA Easterly's mental illness, reiterating from the beginning of his argument SrA Easterly's desire for treatment and continued medication. (JA at 410).

The military judge never instructed the members on how a punitive discharge would affect SrA Easterly's permanent disability retirement. (JA at 393-400).

Summary of the Argument

The Air Force Court correctly held that Prosecution Exhibit 24 was an "evidentiary predicate that established [SrA Easterly's] eligibility for permanent disability retirement," and therefore the military judge's failure to instruct was error. (JA at 025). Prosecution Exhibit 24 established that the Air Force was prepared to retire SrA Easterly with a diagnosis of schizophrenia. SrA Easterly's retirement eligibility was not in question, and this Court has consistently rejected arguments that an accused must have a vested retirement in order to receive an instruction on the loss of retirement benefits. It was error for the military judge not to instruct the members on the effect of a punitive discharge on SrA Easterly's retirement.

The military judge's error was clear and obvious. SrA Easterly's eligibility for permanent disability retirement was presented to the members during the *findings* portion of the trial, and was a principal aspect of the government's attempt to prove that SrA Easterly had communicated a threat to kill any doctor who changed his

diagnosis. Additionally, defense counsel relied on SrA Easterly's 100 percent disability rating to argue that SrA Easterly lacked mental responsibility for his offenses. Beyond being uniquely relevant during findings, SrA Easterly's retirement benefits were discussed throughout the sentencing proceedings as well. Testimony of Col D.B., SrA Easterly's unsworn statement, and arguments of counsel all pertained to the benefits to which SrA Easterly would be entitled with permanent disability retirement. The government speculates that "the trial defense team deliberately chose to avoid the retirement instruction," but points to nothing in the record to support its assumption, other than the fact that the instruction was not requested. The Air Force Court correctly found that the military judge's error was clear or obvious.

Finally, the military judge's failure to instruct on the effect of a punitive discharge on SrA Easterly's disability retirement substantially influenced the sentence and therefore affected SrA Easterly's substantial rights. The defense's sentencing case focused on SrA Easterly's mental health, including his ability to obtain treatment and medication for his condition and how that would affect the rest of SrA Easterly's life. The Air Force Court discussed its reasoning for finding the error prejudicial:

While we appreciate the gravity of [SrA Easterly's] convicted offense of attempted premeditated murder, we also weigh [SrA Easterly's] particular circumstances as a young man who will be released from confinement before he turns 30, who faces a lifetime of uncertain

educational and employment opportunities, and who must deal with a mental health condition that was permanently aggravated by military service and that, if left untreated, could make him a danger to himself and others.

(JA at 027). Had they been properly instructed, the court-martial members very well could have determined that the appropriate sentence for SrA Easterly did not include a punitive discharge.

Appellee respectfully requests this Court affirm the ruling of the Air Force Court and remand the case for further proceedings in a summary disposition.

Argument

THE AIR FORCE COURT OF CRIMINAL APPEALS DID NOT ERR IN FINDING THAT THE MILITARY JUDGE COMMITTED PLAIN AND PREJUDICIAL ERROR BY FAILING TO INSTRUCT THE PANEL *SUA SPONTE* REGARDING THE IMPACT OF A PUNITIVE DISCHARGE ON APPELLEE'S POTENTIAL PERMANENT DISABILITY RETIREMENT.

Standard of Review

When an instruction on the effect of a punitive discharge on disability retirement is not requested, this Court reviews a military judge's failure to instruct *sua sponte* for plain error. See *United States v. Boyd*, 55 M.J. 217, 222 (C.A.A.F. 2001). "To be plain error: (1) there must be an error; (2) the error must be plain (clear or obvious); and (3) the error must affect the substantial rights of the defendant." *United States v. Grier*, 53 M.J. 30, 34 (C.A.A.F. 2000).

Law and Analysis

The Air Force Court correctly found that the military judge's failure to instruct the members that a punitive discharge terminates SrA Easterly's eligibility to receive retired pay and benefits was error, as there was an evidentiary predicate for such an instruction. The error was clear and obvious based on the evidence presented and overt discussion of SrA Easterly's eligibility for retirement benefits. Finally, the Air Force Court properly evaluated the prejudicial effect of the military judge's error in the context of the sentencing proceedings, and determined that the failure to instruct on SrA Easterly's disability retirement affected SrA Easterly's substantial rights.

It was error for the military judge not to sua sponte instruct the court-martial members on the effect a punitive discharge would have on SrA Easterly's permanent disability retirement.

The military judge's failure to sua sponte instruct the members on the effect a punitive would have on SrA Easterly's permanent disability retirement was error because the evidence produced at trial contained the factual predicate for such an instruction. In the context of a military judge's failure to provide an instruction that was not requested by a party, whether there is error turns on whether there was an evidentiary or factual predicate for the instruction at issue. *See Boyd*, 55 M.J. at 222. In *Boyd*, this Court found no factual predicate for an instruction on temporary disability retirement – and therefore no error – when there was no evidence before the members reflecting appellant's eligibility for disability retirement. *See id.*

Addressing Capt Boyd’s request for an instruction on length-of-service retirement, this Court found no evidentiary predicate existed when “[d]efense counsel made no mention of retirement benefits until the sentencing hearing was completed and the parties were reviewing the military judge's proposed instructions.” *Boyd*, 55 M.J. at 221.

This Court also discussed the evidentiary predicate for an instruction in *United States v. Perry*, 48 M.J. 197 (C.A.A.F. 1998), in deciding whether the military judge erred when he failed to give an instruction regarding recoupment of expenditures for the appellant’s education at the United States Naval Academy. The trial defense counsel requested an instruction on the fact that ENS Perry may have to repay his tuition, but failed to present any evidence “the Secretary of the Navy routinely initiated collection action or that such action was contemplated in this case.” *Perry*, 48 M.J. at 199. This Court held that the military judge did not abuse his discretion in failing to give the instruction, stating “there was no evidentiary predicate for the requested instruction.” *Id.* (citing *United States v. Van Syoc*, 36 M.J. 461, 464 (C.M.A. 1993) (a military judge’s duty to instruct arises when “some evidence” is presented raising the issue)).

The present case is distinguishable from *Boyd* and *Perry* in that there was a significant factual predicate for an instruction on the loss of retirement benefits. Specifically, the government’s own exhibit – Prosecution Exhibit 24 – established

that SrA Easterly's disease "will require lifelong treatments," has "no cure and [is] characterized by unpredictable exacerbations and remissions." (JA at 424). Prosecution Exhibit 24 made clear the FPEB's determination that SrA Easterly should be rated 100 percent disabled, and permanently retired because his condition was "permanently aggravated though [his] military service." (*Id.*) Prosecution Exhibit 24 clearly provides the evidentiary predicate for an instruction on the effects of a punitive discharge on retirement, and there appears to be no question that the parties and military judge understood Prosecution Exhibit 24 as the document that definitively established SrA Easterly's eligibility for disability retirement. (*See* JA at 355-356).

The government attempts to obfuscate the import of this evidence by posing a series of hypothetical questions intended to demonstrate the uncertain nature of SrA Easterly's disability retirement. This argument is unpersuasive for at least two reasons. First, Department of Defense Instruction 1332.18 mandates retirement when a service member has less than 20 years of service and a disability rating of 100 percent for a service-connected condition. It states: "retirement for a permanent compensable disability is *directed* pursuant to [10 U.S.C. § 1201] . . . when the total disability rating is at least 30 percent." Dep't of Defense Instr. 1332.18, *Disability Evaluation System*, app. 6 to encl. 3, para. 5 (Aug. 5, 2014, Incorporating Change 1, May 17, 2018) (emphasis added); (JA at 450).

Even if – despite Department of Defense Instruction 1332.18 – SrA Easterly’s permanent disability retirement was uncertain, disability retirement is no more uncertain than retirement after 20 years of service. That is, “the Secretary [of the Air Force] may retire the member” for a permanent compensable disability when the total disability rating is at least 30 percent, just as regular enlisted members of the Air Force with at least 20 years of service “may” be retired pursuant to 10 U.S.C. § 8914. 10 U.S.C. § 1201 (2018); 10 U.S.C. § 8914 (2018). This Court’s precedent is well-established that the accused need only be nearing retirement *eligibility* to be entitled to an instruction on retirement. *See, e.g. United States v. Luster*, 55 M.J. 67, 71 (C.A.A.F. 2001) (holding that the military judge erred when she required retirement to be essentially “guaranteed” and with “no possible regulatory impediment” before retirement instruction was relevant for appellant with 18 years and 3 months of service); *United States v. Greaves*, 46 M.J. 133, 139 (C.A.A.F. 1997) (noting that at 19 years and 10 months, appellant was “perilously close” to retirement); *United States v. Becker*, 46 M.J. 141, 144 (C.A.A.F. 1997) (requiring an instruction when the appellant had served fewer than 20 years but was “knocking on retirement’s door”). The government’s suggestion that the military judge did not err because SrA Easterly did not have a vested retirement is the exact *per se* rule, based in speculation, that this Court rejected in *Luster*. *See Luster*, 55 M.J. at 71.

Prosecution Exhibit 24, the record of the FPEB superseding the IPEB and finding SrA Easterly's 100% compensable disability to have been aggravated by his military service, was before the members in SrA Easterly's court-martial. This alone sets the case apart from *Boyd*, since the members had direct evidence of SrA Easterly's retirement eligibility. Testimony from 1st Lt T.R. and Col D.B. also established that SrA Easterly was eligible for permanent disability retirement. (JA at 225; 368). The members were not instructed on whether or how to consider the impact a punitive discharge would have on SrA Easterly's permanent disability retirement. A sufficient evidentiary predicate existed to entitle SrA Easterly to an instruction to that effect, therefore the military judge erred in failing to inquire about it or give the instruction *sua sponte*.²

² The government's primary argument for why the military judge in did not err in this case is that SrA Easterly's defense counsel did not request the instruction. (Appellant's Brief at 20). This argument appears to conflate two distinct aspects of *Boyd*: (1) the "prospective rule requiring military judges to instruct on the effect of a punitive discharge on retirement benefits, if requested by the defense and supported by the evidence;" and (2) the Court's holding that *absent a request for the instruction*, a military judge's failure to give the instruction *sua sponte* would be reviewed for plain error. *Denedo v. United States*, 66 M.J. 114, 131 (C.A.A.F. 2008) (emphasis added) (discussing the Court's holding in *Boyd*). *See also Boyd*, 55 M.J. at 222; *United States v. Gilley*, 56 M.J. 113, 129 (C.A.A.F. 2001). If, as the government suggests, an accused has to request the instruction in order for there to be error, there would be no plain error review at all. (*See Appellant's Brief at 25-26*).

The military judge's error was clear and obvious.

The military judge's error was clear and obvious because there was ample information before the members about SrA Easterly's disability retirement, and even more discussion on the record that was outside the presence of the members. In addition to Prosecution Exhibit 23 and 24, the testimony of 1st Lt T.R. and Col D.B. bore an obvious connection to SrA Easterly's permanent disability retirement. In findings, 1st Lt T.R. repeated throughout his testimony that SrA Easterly was concerned with lifelong treatment at a *military* healthcare facility and how devastating it would be for him to lose his retirement benefits. (*See* JA at 225; 226; 231; 241-242). This concern formed the government's theory of motive for one of the two charges against SrA Easterly, making SrA Easterly's potential loss of disability retirement relevant in findings in a way that length of service retirement usually is not. It should have been plainly apparent to the military judge that SrA Easterly would be similarly devastated to lose his retirement benefits as a result of a punitive discharge instead of a change in diagnosis.

In sentencing, defense counsel elicited from Col D.B. that SrA Easterly's disability rating and approved retirement would "afford [him] disability payments [and] lifelong access to medical care and treatment," as well as what the nature of that treatment would be. (JA at 368). Prior to calling Col D.B., and outside the

presence of the members, the military judge acknowledged that “the Air Force is prepared to retire [SrA Easterly] with a diagnosis of schizophrenia.” (JA at 356).

The law regarding an instruction on the effect of a punitive discharge on retirement benefits was not new at the time of SrA Easterly’s court-martial. *Cf. United States v. Knapp*, 73 M.J. 33, 37 (C.A.A.F. 2014) (finding clear or obvious error when the Court’s condemnation of human lie detector testimony predated the appellant’s court-martial). This Court decided *Boyd* in July 2001, and the language of the instruction was included in the Military Judges’ Benchbook even prior to that. *See Boyd* 55 M.J. at 221 (citing Military Judges’ Benchbook (Department of the Army Pamphlet 27-9 (1 Apr. 2001))). Currently, there is a lengthy paragraph in the Benchbook that provides even more notice to the military judge that an instruction on retirement might be appropriate, depending on the facts of the case and evidentiary predicate for it. *See Military Judges’ Benchbook*, Department of the Army Pamphlet 27-9 at 2-6-10 (19 Aug. 2019).

The government asserts that “[i]t is reasonable to conclude that the trial defense team deliberately chose to avoid the retirement instruction,” and cites *United States v. Maynard*, 66 M.J. 242 (C.A.A.F. 2008), for the proposition that defense counsel may not want to highlight certain evidence to the members by having the military judge instruct on it. (Appellant’s Brief at 35). *Maynard* is obviously distinguishable, in that the defense counsel in *Maynard* affirmatively stated on the

record that he did not object in front of the members or request an instruction on the evidence in question “because of the issue of placing an emphasis on it that the members would focus on.” *Maynard*, 66 M.J. at 244 (C.A.A.F. 2008). That is, court did not merely guess what the defense was thinking. In the present case, however, the government asks this Court to speculate as to the defense counsel’s intent. SrA Easterly’s defense counsel did not shy away from discussing retirement benefits in findings argument, direct examination of Col D.B., and sentencing argument; and, more importantly, made no statement about deliberately avoiding a retirement instruction. The government presents no compelling argument why this Court should attempt to divine defense counsel’s intent in light of the absence of facts in the record. The military judge’s error in failing to instruct the members on the effect a punitive discharge would have on SrA Easterly’s permanent disability retirement was clear and obvious.

The military judge’s clear and obvious error affected SrA Easterly’s substantial rights.

The military judge’s error had a substantial influence on the sentence, and therefore affected SrA Easterly’s substantial rights. The loss of retirement benefits is “a direct consequence of the imposition of a punitive discharge.” *United States v. Talkington*, 73 M.J. 212, 217 (C.A.A.F. 2014). Furthermore, “[t]he impact of an adjudged punishment on the benefits due an accused who is eligible to retire is often the single-most important sentencing matter to that accused and the sentencing

authority.” *United States v. Griffin*, 25 M.J. 423, 424 (C.M.A. 1988); *see also Luster*, 55 M.J. at 71 (retirement pay “is a critical matter of which the members should be informed in certain cases before they decide to impose a punitive discharge”). Citing these cases, the Air Force Court found that the affected right of SrA Easterly was “[the] right to have the court-martial panel members consider all of the information they were allowed to consider before they adjudged his sentence.” (JA at 025-026).

The government acknowledges that SrA Easterly “made a zealous case for preserving his medical treatment benefits.” (Appellant’s Brief at 34). Defense counsel began his sentencing argument by telling the members, “[SrA Easterly] wanted help. He wants medication. . . . Help and medication is in the best interest of SrA Easterly and that means, that’s in the best interest of society.” (JA at 410). Later, defense counsel argued: “A dishonorable discharge you know strips him of all his benefits. It strips him of all his Veteran Affairs benefits . . . We know how expensive these medications are. . . . We need to get him treatment [and a] punitive discharge doesn’t help him.” (JA at 417). Prior to arguments, in an unsworn statement, SrA Easterly told the members himself that he was “worried [] about [his] ability to continue to receive medication.”

As noted by the Air Force Court, the members were left to work through this information on their own, without instruction from the military judge about whether

or how they could consider the retirement benefits that SrA Easterly would lose as a result of a punitive discharge. (JA at 025). The military judge added to the confusion by giving an instruction, over defense objection, telling the members: “[t]he consequences that flow from a federal conviction, other than the punishment, if any you impose, are collateral consequences of the conviction. The collateral consequences stemming from a federal conviction should not be part of your deliberations in arriving at a sentence.” (JA at 398). A collateral consequence is “a penalty for committing a crime, in addition to the penalties included in the criminal sentence.” *Talkington*, 73 M.J. at 215 (internal citation and quotation marks omitted) (quoting Black’s Law Dictionary 278 (8th ed. 2004)). But the military judge had not instructed whether loss of retirement benefits was (1) a collateral consequence of the conviction; (2) a collateral consequence of the sentence; (3) a direct result of the sentence; or (4) a direct result of the conviction; any of which uninstructed court-martial members could reasonably believe.

The government points to *Luster* to say that “this Court has found prejudice only when the appellant requests the retirement instruction at trial and the punitive discharge is a ‘close call’” (Appellant’s Brief at 44). However, the relative lack of cases evaluating prejudice for a military judge’s failure to instruct on loss of retirement benefits – and the age of those cases – do not suggest that appellants cannot be prejudiced by such an omission. It suggests that military judges have been

giving the instruction when the evidence raises it. The government also cites *Luster* to argue that because SrA Easterly was allowed to “substantially present his particular sentencing case to the members,” he was not prejudiced by the omission of an instruction. (Appellant’s Brief at 47). This language is appropriate in evaluating prejudice where the error is a military judge’s exclusion of evidence, as it was in *Luster*, but has no application here. *See Luster*, 55 M.J. at 72.

The government also argues that prejudice turns on “whether the omitted instruction *actually* influenced the adjudged sentence.” (Appellant’s Brief at 42) (emphasis added). This misstates the standard for prejudice and creates a much higher burden. Rather, this Court analyzes whether the omitted instruction had a substantial influence on the sentence. *See Boyd*, 55 M.J. at 221 (citing *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). In *Kotteakos*, the Supreme Court explained:

If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand[.] . . . But if 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. If so, or if one is left in grave doubt, the conviction cannot stand.

Id. That is, the Air Force Court correctly rejected the government’s contention that “a punitive discharge was a foregone conclusion” and evaluated prejudice by

considering the circumstances of SrA Easterly's case: "[he] will be released from confinement before he turns 30, [will face] a lifetime of uncertain educational and employment opportunities, and [] must deal with a mental health condition that was permanently aggravated by military service and that, if left untreated, could make him a danger to himself and others." (JA at 027).

Finally, the government cites *Boyd* to support its argument that SrA Easterly was not prejudiced; however, the nature of the sentencing argument in this case is quite distinct from that in *Boyd*. In *Boyd*, the Court determined that even if there was error in the military judge's failure to give an instruction on the loss of retirement benefits, such error did not have a substantial influence on the sentence when "[t]he focus of the defense sentencing case was on preserving appellant's ability to continue with his drug rehabilitation program, retaining his ability to practice his profession, and restoring his ability to be a worthy member of the community." *Boyd*, 55. M.J. at 221. That is, the defense case focused on the present, not "preserving the possibility of military retirement in [five] years." *Id.*

In the present case, the defense emphasized SrA Easterly's future. Through SrA Easterly's unsworn statement and defense counsel's sentencing argument, SrA Easterly asked the members to consider that his retirement benefits would protect society and rehabilitate him by affording him the treatment and medication that his permanent, service-connected condition requires. The condition for which he sought

lifelong treatment is the very condition that led him to go to E.E.'s apartment when he "wasn't in his right mind" due to a schizophrenic episode, and his subsequent desire for and access to treatment is the only reason his conduct was discovered. (JA at 258). Character witnesses for SrA Easterly described his rehabilitative potential and proficiency at mechanical, construction, or other hands on work, especially if he has access to treatment. (*See* JA at 428; 436. *See also* JA at 377; 385; 425-427; 429-435; 437-438). SrA Easterly's verbal unsworn statement tied his access to treatment and medication with his ability to be a productive member of society, stating "I ask that you give me hope that I can continue to receive my medication once I leave jail. I want to be a normal person and I definitely do not want to hurt others. Thank you again for the time that you spend determining what the rest of my life will like." (JA at 387). SrA Easterly's potential loss of retirement benefits was incorporated through all aspects of his sentencing proceedings, and SrA Easterly continued to address his concerns when he wrote to the convening authority: "[B]efore this conviction, I had been approved for 100% VA and USAF disability benefits. Because my medication for schizophrenia averages around \$1000 a month . . . I need my benefits just to survive in this world." (JA at 447).

The military judge's failure to instruct the members on the effect of a punitive discharge on his retirement benefits substantially influenced the adjudged sentence to SrA Easterly's detriment, as it kept from the members an instruction needed for

proper analysis of the matter central to his sentencing case: SrA Easterly's need for disability retirement benefits.

WHEREFORE, Appellee respectfully requests that this Court affirm the ruling of the Air Force Court and remand for further proceedings in a summary disposition.



DAVID A. SCHIAVONE, Captain, USAF
U.S.C.A.A.F. Bar No. 36214
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604
(240) 612-4770
david.a.schiavone2.mil@mail.mil

Counsel for Appellee

CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on September 27, 2019, pursuant to this Court's order dated July 22, 2010, and that a copy was also electronically served on the Air Force Appellate Government Division on the same date.



DAVID A. SCHIAVONE, Captain, USAF
U.S.C.A.A.F. Bar No. 36214
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604
(240) 612-4770
david.a.schiavone2.mil@mail.mil

Counsel for Appellee

CERTIFICATE OF COMPLIANCE WITH RULES 24(b), 24(c) & 37

This supplement complies with the type-volume limitation of Rules 24(b) and 24(c) because it contains fewer than 30 pages and 6,822 words.

This brief complies with the typeface and type-style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word Version 2016 with Times New Roman 14-point typeface.



DAVID A. SCHIAVONE, Captain, USAF
U.S.C.A.A.F. Bar No. 36214
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604
(240) 612-4770
david.a.schiavone2.mil@mail.mil

Counsel for Appellee