IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES *Appellee* v. **ISRAEL E. FLORES** Senior Airman (E-4) U.S. Air Force *Appellant*	**REPLY BRIEF ON BEHALF OF APPELLANT** Crim. App. No. 40294 USCA Dkt. No. 23-0198/AF

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

Pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, Senior Airman (SrA) Israel E. Flores, the Appellant, hereby replies to the Government's Answer concerning the granted issues, filed on September 20, 2023.

1. The Government conceded the granted issue.

"The United States agrees with [SrA Flores] that the correct sentence appropriateness review at the [Courts of Criminal Appeal (CCA)] level when the military judge adjudged segmented sentences at [the] trial level is to consider the appropriateness of each segmented sentence individually, not the overall sentence." Ans. at 10. The Government thus conceded the granted issue and only disagrees as to whether the Air Force Court of Criminal Appeals (AFCCA) actually performed the sentence appropriateness review for each segmented sentence individually.

2. The AFCCA did not conduct sentence appropriateness review for each segmented sentence—namely for the false official statement.

The Government asserts that the AFCCA "scrutinized the false official statement sentence." Ans. at 11. Further, the Government spent over 12 pages describing how the AFCCA's one-page analysis supposedly encompassed sentence appropriateness review for each segmented sentence. *Compare* Ans. at 10-23, *with* JA at 9-10. But a close reading of the AFCCA's opinion belies the Government's assertion.

The AFCCA only briefly stated there were mitigating circumstances and rehabilitative potential evidence before concluding that SrA Flores's adjudged sentence was not inappropriately severe. JA at 9. The next paragraph of the AFCCA's opinion meshed the two specifications of assaults and the false official statement together as well. In fact, the first sentence was that "[t]he circumstances surrounding the assault consummated by a battery and underlying the false official statement are aggravating." *Id.* The Government quoted this line, adding emphasis to the word "and," and then propounded that "[t]he language employed by [the] AFCCA shows they considered each offense separately, and the sentence applied to each offense separately. Ans. at 11. The Government's conclusion reflects the problem with this case—it is reading the AFCCA's analysis to treat the offenses separately despite the lower court combining the circumstances for both. The

AFCCA did not conduct sentence appropriateness review for each offense individually.

The AFCCA's main analysis follows:

> [SrA Flores] was reluctant to admit that he struck JF on the head and face because JF had spilled coffee grounds. The fact JF was a helpless two-year-old child who could not express for himself what he had endured compounds [SrA Flores's] actions. Then, in light of the anguish JF was exhibiting, [SrA Flores] chose to minimize the assault—leaving EF to rely on a friends' advice instead of arming her with a full, accurate, and timely disclosure of the events so that she could decipher JF's symptoms and make well-informed medical decisions for her toddler as quickly as possible.

JA at 9. The first sentence above references SrA Flores's hesitancy in admitting to EF that he struck JF—not the charged false official statement. JA at 28. Of note, SrA Flores did admit to EF that he struck JF. *Id.* The second sentence relates again to the assaults—not the charged false official statement. The third sentence relates to SrA Flores's statements to EF the evening of the assaults—not the charged false official statement.

The AFCCA only dedicated one line of its entire analysis to the facts of the false official statement: "When [SrA Flores] told SMSgt OM, that he 'wasn't even there,' he continued to attempt to escape responsibility for his actions." JA at 9.

Not only did the AFCCA lump all facts and circumstances for the assaults in with the false official statement, it then condoned the trial court in doing the same: "It was proper to consider the *totality of the circumstances* and [SrA Flores's]

rehabilitation potential in determining an appropriate sentence for the false official statement[] and an appropriate sentence for the *crimes* of which [SrA Flores] was convicted." JA at 9-10 (emphasis added). Interestingly enough, the Government also quoted this line and again emphasized the word "and" to show the AFCCA "was considering the false official statement *independently* from the other crimes [SrA Flores] pleaded guilty to." Ans. at 12 (emphasis added). The word "and" is a conjunction and far from meaning "separate" or "independent." Even if read a different way, the context of this sentence flowing after the AFCCA's analysis combining the assaults with the false official statement demonstrates it did not conduct a separate or independent sentence appropriateness review.

The AFCCA ended by saying "[w]e conclude that the nature and seriousness of the offenses support the adjudged sentence." Ans. at 10. Ultimately, the AFCCA wrote 465 words in conducting their sentence appropriateness review, and the Government used 2,898 words injecting meaning not found in the AFCCA's words themselves. At no point did the AFCCA's opinion directly analyze whether 12 months' confinement was an appropriate sentence for a single false official statement.

3. At a minimum, the AFCCA did not clearly conduct sentence appropriateness review for each segmented sentence and, as such, this case should be remanded.

This Court holds CCAs to their Article 66(d), Uniform Code of Military Justice (UCMJ), 18 U.S.C. § 866(d), duties. When it is unclear whether the CCAs have properly followed the law, this Court has remanded for clarification.

In *United States v. Thompson*, the AFCCA stated at two different points that there was no direct evidence supporting a mistake of fact as to consent and concluded that "the Defense failed to meet its burden." 83 M.J. 1, 5 (C.A.A.F. 2022) (quoting *United States v. Thompson*, No. ACM 40019, 2021 CCA LEXIS 641, at *23-24 (A.F. Ct. Crim. App. Nov. 29, 2021)). This Court found "certain language in the [CCA's] opinion supports [a]ppellant's argument" that the AFCCA erroneously required direct evidence for a mistake of fact defense. *Id.* at 2. Had the AFCCA "*merely expressed an observation*" as opposed to stating "and as such" implying that it "rested its decision on an erroneous view that the mistake of fact defense required direct evidence," this Court would not have questioned the AFCCA's understanding of the correct law. *Id.* In the end, this Court found the AFCCA's language left "an open question" as to whether the court accurately applied the rule, which was a "contrary indication" that it knew the law. 83 M.J. at 4 (quoting *United States v. Nerad*, 69 M.J. 138, 147 (C.A.A.F. 2010)).

In SrA Flores's case, not only did the AFCCA focus on the details underlying the assaults, but any reference to the charged false official statement was only in the context of the assaults. The first paragraph of the AFCCA analysis covers the maximum punishment, plea agreement, and adjudged sentence. JA at 9. The second paragraph covers SrA Flores's argument that there was mitigating circumstances and evidence of rehabilitative potential. *Id.* The third paragraph, as noted above, concludes that the circumstances surrounding both the assaults and the false official statement were aggravating. *Id.* The brief recitation of facts covers the assaults with only one line regarding the false official statement. *Id.* The AFCCA then doubles down on the propriety of considering the totality of the circumstances when determining an appropriate sentence for SrA Flores's convictions. JA at 9-10. The AFCCA concludes that "the nature and seriousness of the offenses support the adjudged sentence." JA at 10. The repetitive use of the term "offenses" supports SrA Flores's argument that the AFCCA did not conduct sentence appropriateness review for each segmented sentence independently.

In *United States v. McAlhaney*, this Court noted that "[t]he Government admits that whether the [AFCCA's] applying plain error review in considering the legal or factual correctness of Appellant's reprimand is 'debatable.'" 83 M.J 164, 167 (C.A.A.F. 2023). The Government contended that the AFCCA did apply the correct de novo standard while conducting its sentence appropriateness review of

the reprimand. *Id.* This Court disagreed. *Id.* It "appeared" from this Court's review that the AFCCA applied a two-pronged analysis, which involved first applying the de novo standard to whether the reprimand was inappropriately severe and then applying the plain error standard when looking at the factual accuracy of the language. *Id.* After finding the AFCCA failed to evaluate the reprimand under the correct *de novo* standard, this Court remanded the case for a new Article 66(d), UCMJ, review. 83 M.J. at 167-68. This was done "[t]o ensure that [a]ppellant was not prejudiced by the [AFCCA's] seemingly erroneous view of the law." 83 M.J. at 168.

Here, the Government argues that the AFCCA's use of the word "and" demonstrated that it considered the sentences for the offenses "independently" and "separately." Gov. Ans. at 11-12. The Government's reasoning is flawed. Instead, it appears from the AFCCA's analysis that the court combined the totality of the circumstances for all the offenses when conducting its review. This Court should remand, just as it did in *McAlhaney*, to ensure SrA Flores is not prejudiced by the AFCCA's seemingly erroneous view of the law. 83 M.J. at 168.

In *United States v. Steele*, this Court similarly remanded the case to the Army Court of Criminal Appeals (ACCA), because "the ACCA's opinion does not specify whether it considered the [new] issue to be waived or forfeited" and that determination was "essential to the resolution of the case." 83 M.J. 188, 189

(C.A.A.F. 2023). Further, "the ACCA did not expressly state whether [a]ppellant had waived or forfeited his claim that Article 120c, UCMJ, [18 U.S.C. § 920c] was unconstitutionally vague." *Id.* at 190. In fact, [t]he ACCA never mentioned forfeiture and address waiver only obliquely in its discussion of whether [a]ppellant had shown good cause for failing to assert this argument earlier." *Id.* The ACCA stated in a footnote that it could decide the merits of the issue using its "should be approved power" under Article 66(d), but it "did not say that waiver or forfeiture had occurred." *Id.*

In SrA Flores's case, the AFCCA's opinion was also "unclear" as it did not "expressly" state whether it was conducting a sentence appropriateness review for the false official statement independent of the other convictions. *Steele*, 83 M.J. at 191. Despite the Government's attempt to show the sentences were reviewed separately, the AFCCA did not expressly state that it did, nor did the analysis specify such. In fact, the AFCCA never expressly stated that it found 12 months' confinement was not inappropriately severe for the single false official statement.

Reading *Thompson*, *McAlhaney*, and *Steele* together, the consistent theme is that remand is the appropriate remedy where the Court is uncertain whether the CCAs applied the law appropriately. Uncertainty pervades the AFCCA's approach to segmented sentencing here. It is "an open question" whether the AFCCA's Article 66(d), UCMJ, review in this case was "consistent with a correct view of the

law" that requires them to assess sentence severity for each segmented sentence separately. *Thompson*, 83 M.J. at 4, 5 (quoting *Nerad*, 69 M.J. at 147). As such, SrA Flores respectfully asks this Court to remand his case for a new and correct Article 66(d), UCMJ, review of whether 12 months for a single false official statement is inappropriately severe.

WHEREFORE, SrA Flores respectfully requests this Court remand this case to the AFCCA to conduct sentence appropriateness review for each segmented sentence.

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense counsel
U.S.C.A.A.F. Bar No. 36722
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
heather.caine.1@us.af.mil

MEGAN P. MARINOS
Senior Counsel
U.S.C.A.A.F. Bar No. 36837
Air Force Appellate Defense Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
megan.marinos@us.af.mil

Counsel for Appellant

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 October 2, 2023.

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36722
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
heather.caine.1@us.af.mil

Counsel for Appellant

CERTIFICATE OF COMPLIANCE
WITH RULES 24(b) AND 37

This Reply Brief complies with the type-volume limitation of Rule 24(b) because it contains 1,917 words. This Reply Brief complies with the typeface and type style requirements of Rule 37.

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36722
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
(240) 612-4770
heather.caine.1@us.af.mil

Counsel for Appellant