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

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**UNITED STATES**,
*Appellee*,

v.

**MONICA R. ARROYO**,
Senior Airman (E-4),
United States Air Force,
*Appellant.*

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USCA Dkt. No. 24-0212/AF

Crim. App. Dkt. No. ACM 40321

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# BRIEF ON BEHALF OF APPELLANT

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# INDEX

## TABLE OF AUTHORITIES

### Cases



### Statutes and Rules

## ISSUE PRESENTED

**During its sentence severity analysis, the Air Force Court considered the benefit enjoyed by Senior Airman Arroyo when the Government dismissed specifications. Did the Air Force Court err?**

## STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (Air Force Court) had jurisdiction to review this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d).[1] This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

## STATEMENT OF THE CASE

On March 9, 2022, a military judge sitting as a general court-martial convicted Senior Airman (SrA) Monica R. Arroyo, consistent with her pleas, of one charge and one specification of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928. JA at 77. Pursuant to a plea agreement, one charge and two specifications of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920, were withdrawn and dismissed with prejudice. JA at 191. The military judge sentenced SrA Arroyo to a reduction to the grade of E-2, confinement for 37 days, and a bad-conduct discharge. JA at 94.

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

On August 25, 2023, the Air Force Court issued its first unpublished opinion in the case. JA at 1-6. The Air Force Court found that the convening authority erred by not giving SrA Arroyo an opportunity to rebut the matters submitted by L.P., the named victim in the case. JA at 2. It remanded the case to the Chief Trial Judge, Air Force Trial Judiciary, and deferred addressing the other assignments of error until the record was returned. *Id.* On December 21, 2023, this case was re-docketed with the Air Force Court. JA at 9. The Air Force Court heard oral argument in the case on April 10, 2024. JA at 7 n.1. On June 18, 2024, the Air Force Court affirmed the findings but modified the sentence to "affirm only so much of the sentence that includes a bad-conduct discharge, confinement for 14 days, and reduction to the grade of E-2." JA at 9.

## STATEMENT OF FACTS

1. After an evening of drinking, SrA Arroyo touched L.P.'s leg with her hand.

On December 31, 2020, SrA Arroyo attended a New Year's Eve party at J.C.'s house. JA at 95. Four other people, including the named victim (L.P.), were also at the party. JA at 96. They ate dinner and played drinking games. *Id.* At approximately 2315, SrA Arroyo was sitting on the couch next to L.P. JA at 97. While sitting next to L.P., SrA Arroyo touched L.P.'s leg with her hand. *Id.* SrA Arroyo agreed that she did so without L.P.'s consent. *Id.* Though SrA Arroyo had been drinking with the group that night, she agreed that her act of touching L.P.'s

leg with her hand was done intentionally and that voluntary intoxication was not a defense under the facts and circumstances. *Id.* During the *Care*[2] inquiry, SrA Arroyo also explained that she did not ask permission to touch L.P.'s leg, nor had L.P. asked to be touched. JA at 43. SrA Arroyo admitted she had no excuse for her behavior and apologized for what she did. *Id.*

2. The Government withdrew and dismissed two specifications of sexual assault; SrA Arroyo pleaded guilty to a single specification of assault consummated by a battery.

SrA Arroyo was originally charged with committing two sexual acts upon L.P. while L.P. was incapable of consenting due to alcohol impairment. JA at 27. Pursuant to the plea agreement, the Government withdrew this charge and both specifications after the acceptance of SrA Arroyo's plea and dismissed them with prejudice after the sentence was announced. JA at 76-77, 94, 191. The additional charge of assault consummated by a battery was preferred two days before the court-martial and referred the same day as the court-martial. JA at 29-30. The stipulation of fact was signed on March 8, 2022, the day in between the two days. JA at 97-98. SrA Arroyo waived the five-day statutory waiting period. JA at 39. SrA Arroyo was found guilty of the Article 128, UCMJ, violation—touching L.P.'s leg earlier in the night. JA at 77. SrA Arroyo agreed to a minimum sentence of 14 days of confinement and a bad-conduct discharge. JA at 191.

[2] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

3. Circuit trial counsel argued that SrA Arroyo deserved a bad-conduct discharge—a lifelong punishment—and serious confinement.

Circuit trial counsel argued that SrA Arroyo's "conduct was so bad that she deserved" a bad-conduct discharge. JA at 85. He asserted SrA Arroyo deserved a lifelong punishment and "serious confinement for her crime." *Id.*

4. L.P. referenced the withdrawn and dismissed specifications in her submission of matters to the Convening Authority.

L.P.'s submission of matters to the Convening Authority began by stating that she supported the plea agreement. JA at 205. L.P. believed SrA Arroyo's sentence was appropriate and that SrA Arroyo did not "deserve any additional leniency for her *crimes*." *Id.* (emphasis added). L.P. continued:

> Moreover, *had we gone to trial and SrA Arroyo been found guilty of the charge and two specifications of sexual assault, she could have up to 60 years confinement and a dishonorable discharge*. As such, SrA Arroyo has already received the benefit of her plea agreement, and any clemency is not warranted.

*Id.* (emphasis added). L.P. also said that SrA Arroyo's actions were "disgusting" and "SrA Arroyo, the predator she is, took advantage of my intoxicated state and assaulted me." *Id.* Since the plea agreement was approved, L.P. was "plagued by thoughts about whether [she] made the right decision in supporting it." JA at 206.

5. In its sentence severity analysis, the Air Force Court considered the benefit SrA Arroyo received when the sexual assault specifications were withdrawn.

The Air Force Court found portions of L.P.'s impact statement to violate the rules but concluded no relief was warranted after testing for prejudice. JA at 10.

Those portions referenced the impact of the expedited transfer L.P. received due to the sexual assault allegations. JA at 10, 110-12.

The Air Force Court stated that the "consideration" for SrA Arroyo pleading guilty to one specification of Article 128, UCMJ, was for the convening authority to withdraw and dismiss with prejudice two specifications of Article 120, UCMJ. JA at 19. The Air Force Court noted that SrA Arroyo negotiated and secured a deal "where she received the benefit of having two specifications of sexual assault withdrawn and dismissed with prejudice, in exchange for her plea of guilty to a separate offense." JA at 22. The Air Force Court pointed out that the deal reduced her criminal exposure and "ensured [SrA Arroyo] would not be exposed to additional significant collateral consequences." *Id*.

## SUMMARY OF THE ARGUMENT

The Air Force Court improperly considered dismissed specifications of sexual assault when assessing the appropriateness of SrA Arroyo's sentence for an assault consummated by a battery. In assessing whether SrA Arroyo's sentence to a bad-conduct discharge for a leg touch was appropriate, the Air Force Court weighed the benefit SrA Arroyo received from the sexual assault specifications being withdrawn and dismissed with prejudice. JA at 19, 22. This was error. In assigning benefit, the Air Force Court implicitly presumed SrA Arroyo would have been found guilty of the sexual assault specifications. However, SrA Arroyo was not proven guilty

beyond a reasonable doubt of the sexual assault charge. Therefore, she maintained the presumption of innocence.

Further, the military judge received no evidence in findings or sentencing regarding the sexual assault charge. The only offense of which she was found guilty was a leg touch. That is what she was supposed to be sentenced for, and that is the only offense the Air Force Court should have considered when reviewing the sentence. CCAs must review the sentence to ensure it is sufficient but no more than necessary for the convicted offense—not those withdrawn and dismissed. A bad-conduct discharge for a leg touch with no other aggravating factors is inappropriately severe.

## ARGUMENT

**The Air Force Court erred during its sentence severity analysis when it considered dismissed specifications.**

### Standard of Review

Courts of Criminal Appeals (CCA) review the appropriateness of sentences. *United States v. Flores*, 84 M.J. 277, 281 (C.A.A.F. 2024) (citing *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005); Article 66(d)(1), UCMJ (CCAs "may affirm only . . . the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved."). "In reviewing the exercise of this power, [this Court] asks if the CCA abused its discretion or acted inappropriately—or i.e., arbitrarily, capriciously,

or unreasonably—as a matter of law." *Flores*, 84 M.J. at 282 (quoting *United States v. Nerad*, 69 M.J. 138, 142 (C.A.A.F. 2010)). Interpreting Article 66(d), UCMJ, is a matter of statutory interpretation that is reviewed de novo. *Id.* at 280 (citing *United States v. Hiser*, 82 M.J. 60, 64 (C.A.A.F. 2022)).

**Law and Analysis**

In its sentence appropriateness review, the Air Force Court compared the sentence SrA Arroyo could have received for the originally referred charge and specifications of sexual assault with the sentence she did receive after being convicted of assault consummated by a battery. JA at 19, 22-23. This was error. SrA Arroyo maintained the presumption of innocence for the dismissed sexual assault specifications. *See United States v. Hills*, 75 M.J. 350, 356 (C.A.A.F. 2016) ("A foundational tenant of the Due Process Clause, U.S. Const. amend. V., is that an accused is presumed innocent until proven guilty.") (citing *In re Winship*, 397 U.S. 358, 363 (1970); *Coffin v. United States*, 156 U.S. 432, 453-54 (1895)). To consider the benefit SrA Arroyo received by having the sexual assault specifications withdrawn and dismissed, the Air Force Court presumed SrA Arroyo would have been found guilty of them. But SrA Arroyo should have only been sentenced for the convicted leg touch. R.C.M. 1001(b)(3)(A), Discussion. The Air Force Court's sentence severity analysis went beyond that. Of note, no evidence regarding the sexual assault specifications was presented in findings or sentencing. As a result of

the Air Force Court's consideration of a more serious offense, SrA Arroyo's sentence to a bad-conduct discharge for a leg touch was "greater than necessary" and thereby inappropriately severe. R.C.M. 1002(f).

1. The Air Force Court violated SrA Arroyo's right to the presumption of innocence for the dismissed specifications.

The Air Force Court erred in its mandated sentence appropriateness review in this case and in the process violated SrA Arroyo's constitutional right to the presumption of innocence. In considering whether SrA Arroyo's sentence for a leg touch was appropriate, the Air Force Court weighed the benefit she received when the originally charged sexual assault specifications were withdrawn and dismissed. JA at 19, 22. "This benefit not only reduced [SrA Arroyo's] criminal exposure, but it also ensured [SrA Arroyo] would not be exposed to additional significant collateral consequences that were possible under the dismissed specifications." JA at 22. The Air Force Court concluded that SrA Arroyo received the benefit of her bargain. JA at 22. However, assigning benefit to the withdrawn and dismissed charge violated SrA Arroyo's presumption of innocence.

SrA Arroyo is presumed innocent of all charges until they are proven by competent evidence beyond a reasonable doubt. *Coffin*, 156 U.S. at 460 ("Concluding, then that the presumption of innocence is evidence in favor of the accused introduced by the law in his behalf."). It is antithetical to the presumption of innocence to consider the punishment SrA Arroyo could have received for

dismissed specifications when analyzing whether her sentence is appropriate. *See Hills*, 75 M.J. 350 (stating the use of charged conduct to show a propensity to commit other charged conduct directly opposed the presumption of innocence). In *United States v. Hills*, the appellant was charged with one specification of abusive sexual contact and two specifications of sexual assault. *Id.* at 352. The military judge granted the Government's motion to admit evidence under Mil. R. Evid. 413 of the appellant's charged conduct as evidence of his propensity to commit the charged sexual assaults. *Id.* This Court explained that proper use of Mil. R. Evid. 413 evidence must be of either uncharged conduct or offenses an accused has pleaded guilty to or already been found guilty of. *Id.* at 354 (citing *United States v. Wright*, 53 M.J. 476, 479 (C.A.A.F. 2000) (The accused had already pleaded guilty to the misconduct the Government used pursuant to Mil. R. Evid. 413 to bolster a different charge.). However, this Court held Mil. R. Evid. 413 could not be used to admit evidence of charged conduct that an accused has plead not guilty to for the purpose of showing propensity to commit that same charged conduct. *Id.*

Here, SrA Arroyo was charged with the sexual assault specifications, but never proven guilty of those offenses. She maintains a presumption of innocence for those allegations. She no longer maintained the same presumption of innocence for the leg touch because she pleaded guilty to it, and that was the offense for which she was supposed to be sentenced. There was no way for the Air Force Court to

consider the purported benefit of avoiding the potential punishments for the dismissed sexual assault specifications without assuming SrA Arroyo would have been found guilty of those specifications.

The Air Force Court went beyond what it did in *Flores*. 84 M.J. at 279. There, it compared the maximum punishment the appellant could have received for the offense of which he was *convicted* with the terms of the plea agreement. *Id.* Here, the offense of which SrA Arroyo was convicted was less severe than the dismissed offenses. JA at 27-35. Additionally, the appellant in *Flores* did not maintain the presumption of innocence once he was found guilty of the charge for which he was sentenced. As such, it was more appropriate for the Air Force Court there to consider the maximum sentence for the offense of which the appellant was found guilty as a factor in determining whether the sentence was inappropriately severe.

To the contrary, SrA Arroyo did maintain the presumption of innocence in the sexual assault specifications that were withdrawn and dismissed. Thus, comparing the sentence she could have received for two specifications of sexual assault with what she received for a leg touch is fundamentally unfair. *Compare MCM*, pt. IV-87, ¶ 60.d.(2) (The maximum punishment for two specifications of sexual assault is 60 years of confinement, forfeiture of all pay and allowances, and a mandatory minimum of a dishonorable discharge.), *with MCM*, pt. IV-121, ¶ 77.d.(2)(a) (The maximum punishment for one specification of assault consummated by a battery is

a bad-conduct discharge, forfeiture of all pay and allowances, and six months of confinement with no mandatory minimum punishment.). It also goes against how guilty pleas are normally viewed in sentencing—as a mitigating factor. R.C.M. 1001(g)(1). Avoiding the harsher penalties was only a real benefit if one presumes SrA Arroyo would have been convicted of the dismissed specifications.

Under Article 66(d)(1), UCMJ, the Air Force Court was to only approve "the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." 10 U.S.C. § 866(d)(1) (2018). The words "on the basis of the entire record" does not give a Court of Criminal Appeals (CCA) leave to consider anything attached to the record of trial for any purpose. *See United States v. Jessie*, 79 M.J. 437, 440 n.6 (C.A.A.F. 2020) (stating the nature of the appellate issue dictates to what extent and how a CCA may consider the matters attached to the record). One example is a CCA may consider a rejected exhibit on the issue of a challenged ruling. *Id.* In contrast, a CCA reviewing legal and factual sufficiency of the evidence is constrained to only consider admitted evidence in the record of trial. *Id.* Here, if SrA Arroyo had been tried and acquitted of the sexual assault offenses, that evidence would be in the record, but there is no question it would be inappropriate for the Air Force Court to consider it when assessing sentence appropriateness. As noted in the dissent, the military judge did not, nor did the Air Force Court, have specifics about the sexual

assault specifications. JA at 25 (Ramirez, J., dissenting).

While the agreed-to sentence in SrA Arroyo's plea agreement was a "reasonable indication of its probable fairness," it is just that—an indication, not the conclusion. JA at 23 (quoting *United States v. Hendon*, 6 M.J. 171, 175 (C.M.A. 1979)). The Air Force Court still needed to assess whether the sentence adjudged was appropriate and should be approved. Based on the language of Article 66(d), the Air Force Court may not approve any sentence or portion of a sentence it finds excessive. *Jessie*, 79 M.J. at 440 (citing *Nerad*, 69 M.J. at 141). The Air Force Court weighed the withdrawal and dismissal of the sexual assault specifications as a benefit received by SrA Arroyo. In comparison to the sentence she could have received absent the plea agreement, the Air Force Court found SrA Arroyo's sentence to a bad-conduct discharge—the most severe punishment available—appropriate. This error violated SrA Arroyo's right to the presumption of innocence for the sexual assault charge and led to the Air Force Court approving a punishment that was inappropriately severe.

2. No evidence of the dismissed offenses was presented in findings or sentencing. Yet, the severity of her sentence was reviewed by weighing the maximum punishment for the dismissed offenses.

Evidence admitted during the findings and presentencing proceedings "may be considered." R.C.M. 1002(g). However, no evidence pertaining to the sexual assault allegations was admitted in either findings or presentencing. *See* JA at 25

("What the military judge did not have, and what we do not have, are any specifics about the specifications that were dismissed.") (Ramirez, J., dissenting). Since such information was not before the military judge for sentencing, it should not have been considered by the Air Force Court in its sentence appropriateness review.

Furthermore, even considering the plea agreement terms, the military judge should not have adjudged a bad-conduct discharge for SrA Arroyo touching L.P.'s leg. *See United States v. Kerr*, No. 202200140, 2023 CCA LEXIS 434, at *8 n.23 (N-M. Ct. Crim. App. Oct. 17, 2023) (where the court set aside a negotiated-for bad-conduct discharge after finding the punitive discharge inappropriate based on matters presented in extenuation and mitigation). A sentence to 14 days of confinement and reduction in grade to E-2 was "sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces." Article 56, UCMJ, 10 U.S.C. § 856; R.C.M. 1002(f). However, the military judge here "rubber stamp[ed]" the bad-conduct discharge instead of adhering to his statutory mandate. JA at 25 (Ramirez, J., dissenting). Then the Air Force Court affirmed the rubber stamped bad-conduct discharge because SrA Arroyo avoided 60 years of confinement, a mandatory dishonorable discharge, and "significant collateral consequences." JA at 22. That was not a proper sentence severity review.

The military judge was to consider multiple factors when deciding on a sufficient punishment. R.C.M. 1002(f). None of those factors include evidence of

being charged with other crimes—only prior convictions. R.C.M. 1001(b)(3). Even then, the discussion section states, "an accused may only be punished for the offenses of which he or she was convicted in that same court-martial." R.C.M. 1001(b)(3)(A), Discussion.

The convening authority and SrA Arroyo agreed to her pleading guilty to an additional charge of assault consummated by a battery in exchange for the sexual assault specifications being withdrawn and dismissed with prejudice. JA at 190-94. After the military judge accepted SrA Arroyo's plea to the leg touch, the Government and Defense were allowed to present matters to assist the military judge in "determining an appropriate sentence." R.C.M. 1001(a)(1). The Government may present service data from the charge sheet, personal data and character of prior service, evidence of prior convictions, evidence in aggravation, and evidence of rehabilitative potential. R.C.M. 1001(a)(1)(A), (b). Here, the Government presented the stipulation of fact, a personal data sheet, and one enlisted performance report. JA at 95-109. There was no aggravating evidence relating to the leg touch, as noted in the dissent. JA at 25 (Ramirez, J., dissenting) (SrA Arroyo "touched LP on the leg. There were no additional facts in aggravation.").

After the Government's presentation, L.P. was allowed to offer a victim impact statement "directly relating to or arising from the offense of which the accused has been found guilty." R.C.M. 1001(c)(2)(B). The Air Force Court did

find portions of L.P.'s impact statement to violate the rules but concluded no relief was warranted after testing for prejudice. JA at 10. The portions of L.P.'s impact statement the Air Force Court found violated the rules referred to the impact of the sexual assault allegations—subsequently requesting an expedited transfer due to the assaults and the following two-week quarantine due to COVID-19.[3] JA at 15, 110-12. But while L.P. should not have addressed the impact of the sexual assault allegations, the Air Force Court still considered them when finding her sentence appropriate.

Finally, in the presentencing hearing the Defense may offer matters in extenuation, mitigation and/or a statement by the accused. R.C.M. 1001(d). In contrast to the Government's presentencing case, the Defense presented twenty exhibits including character letters. JA at 113-44. SrA Arroyo was a 23-year-old college graduate at the time who achieved the rank of senior airman below the zone. JA at 107, 131-33. She had already demonstrated high rehabilitative potential in the time since the leg touch and her court-martial. JA at 130, 144-45.

This was not a case where a bad-conduct discharge was justified or even necessary. The dissent noted three ways the record could have supported the sentence: (1) trial counsel could have included facts in the stipulation of fact that

[3] SrA Arroyo maintains that L.P.'s description of the impact, "a piece of me died that night," was directly related to the sexual assault allegations. JA at 110-12.

warranted the bad-conduct discharge (and confinement); (2) the military judge could have asked questions necessary to get a factual predicate on the record justifying the sentence; or (3) the military judge could have not accepted the plea agreement to follow the mandate of R.C.M. 1002(f) based on consideration of SrA Arroyo specifically, her character, and the nature and seriousness of the offense. JA at 27 (Ramirez, J., dissenting). The record does not reflect any of these options. Unfortunately, the military judge did not ensure R.C.M. 1002(f) was followed, and the Air Force Court failed in its Article 66(d), UCMJ, sentence appropriateness review as well.

3. Conclusion.

The Air Force Court abused its discretion when it unreasonably considered the benefit SrA Arroyo received when the Government withdrew and dismissed specifications in assessing sentence severity. *Flores*, 84 M.J. at 282. It violated SrA Arroyo's right to the presumption of innocence for the charge of sexual assault against her—evidence of which was never presented, let alone proved beyond a reasonable doubt. This error led to the Air Force Court approving an inappropriately severe sentence—a bad-conduct discharge for a leg touch. The Government did not present aggravating facts necessary to justify the lifelong punishment of a bad-conduct discharge, and the Air Force Court failed to conduct an appropriate sentence severity review.

SrA Arroyo requests that this Court set aside the decision of the Air Force Court regarding sentence appropriateness and remand this case to provide the Air Force Court the opportunity to conduct the proper sentence appropriateness review required by Article 66(d), UCMJ.

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 Government Trial and Appellate Operations Division at AF.JAJG.AFLOA.Filng.Workflow@us.af.mil on November 12, 2024.

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**CERTIFICATE OF COMPLIANCE**
**WITH RULES 24(b) AND 37**

This brief on behalf of appellant complies with the type-volume limitation of Rule 24(b) because it contains 3,991 words. This brief on behalf of appellant complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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