IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

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

USCA Dkt. No. 24-0212/AF

Crim. App. Dkt. No. ACM 40321

REPLY BRIEF ON BEHALF OF APPELLANT

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Pursuant to the briefing schedule established by this Court's order of October 7, 2024, __ M.J. __, No. 24-0212/AF, 2024 CAAF LEXIS 592 (C.A.A.F. Oct. 7, 2024), Senior Airman (SrA) Monica R. Arroyo, Appellant, hereby replies to the Government's Answer filed on December 17, 2024.

ARGUMENT

The Air Force Court of Criminal Appeals (Air Force Court) erred in its sentence severity analysis under Article 66(d), UCMJ, 10 U.S.C. § 866(d). It considered the benefit SrA Arroyo enjoyed by the sexual assault specifications being dismissed when weighing whether her sentence to a bad-conduct discharge was inappropriately severe. While SrA Arroyo stood convicted solely of a leg touch with no other aggravating factors, the Air Force Court still considered the fact that specifications of sexual assault were dismissed in assessing the appropriateness of her sentence for assault consummated by a battery. JA at 22-23. The Air Force Court should have assessed whether a bad-conduct discharge was appropriate for the single leg touch.

A. During its sentence appropriateness review, the Air Force Court considered the benefit SrA Arroyo received by the sexual assault specifications being dismissed—this was error.

The Air Force Court considered the benefit SrA Arroyo enjoyed by the sexual assault specifications being dismissed when weighing the appropriateness of her sentence to a bad-conduct discharge. SrA Arroyo did not misstate how the Air Force

Court considered the dismissed sexual assault Specifications. *See* Ans. at 13. Contrarily, the Air Force Court began its sentence severity additional background section with the statement, "[a]s consideration for [SrA Arroyo's] guilty plea to one specification of assault consummated by a battery against LP, the convening authority agreed to dismiss, with prejudice, two specifications of sexual assault upon LP." JA at 19. It then went on to note discussion on the record regarding the mandatory bad-conduct discharge. JA at 19-20. In its analysis under the same sentence-severity section, the Air Force Court again stated that SrA Arroyo "received the benefit of having two specifications of sexual assault withdrawn and dismissed with prejudice, in exchange for her plea of guilty to a separate offense."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 then emphasized that "[t]his benefit not only reduced [SrA Arroyo's] criminal exposure, but it also ensured [she] would not be exposed to additional significant collateral consequences that were possible under the dismissed specifications." *Id.* As such, the Air Force Court found SrA Arroyo "received the benefit of her bargain." *Id.*

The Air Force Court weighed SrA Arroyo's sentence to a bad-conduct discharge against the benefit she received for the sexual assault specifications. The Air Force Court did not need to "mention the maximum authorized punishment for sexual assault" (Ans. at 13) when it explicitly mentioned the "reduced. . . criminal exposure" and "additional significant collateral consequences that were possible

under the dismissed specifications." JA at 22. In any event, the Government made sure to cite the maximum punishment available for a "single specification of sexual assault." Ans. at 13 n.2. The Government proved this point in part by later explaining that "'[c]riminal exposure' refers to the maximum *possible* punishment a court-martial can adjudge based on an accused's alleged crimes." Ans. at 14. So, when the Air Force Court discussed the reduced criminal exposure SrA Arroyo received, it was discussing the reduced maximum possible punishment the court-martial could adjudge after the plea agreement.

The Government then dug in and justified the Air Force Court's consideration of the reduced "criminal exposure" under its argument about how such analysis did not violate SrA Arroyo's presumption of innocence. Ans. at 14-16. There, the Government described the maximum punishment SrA Arroyo would have faced for two specifications of sexual assault—"a mandatory minimum of a dishonorable discharge, with a maximum punishment of confinement for 60 years and forfeiture of all pay and allowances." Ans. at 15. It then described that SrA Arroyo "reduced her exposure to a bad-conduct discharge." *Id.* The Government contended the Air Force Court's acknowledgement of the same "was simply a statement of fact," similar to this Court's "observations" in *United States v. Furth*, 81 M.J. 114, 117-18 (C.A.A.F. 2021), and not indicative of the Air Force Court violating SrA Arroyo's

presumption of innocence. The Government's arguments fail for the reasons explained below.

a. The Air Force Court may consider the plea agreement in its sentence severity analysis, but it went too far here.

The Air Force Court may consider a plea agreement as part of the entire record, but the nature of the appellate issue dictates to what extent and how it may consider it. *See United States v. Jessie*, 79 M.J. 437, 440 n.6 (C.A.A.F. 2020). The Air Force Court pointed to *United States v. Hendon*, 6 M.J. 171, 175 (C.M.A. 1979), for the position that a specific sentence bargained for and then argued for "is a 'reasonable indication of its probable fairness'" to SrA Arroyo. JA at 23. While it may be considered as one factor, that does not mean the Air Force Court should "surrender" its "duty to determine sentence appropriateness." JA at 24-25 (Ramirez, J., dissenting) (quoting *United States v. Williams*, No. 202300217, 2024 CCA LEXIS 111, at *6 (N-M. Ct. Crim. App. Mar. 15, 2024)).

Hendon was not a sentence appropriateness case. Rather, it concerned an irregularity in the members' announcement of the sentence. 6 M.J. at 174. The Court looked at the pretrial agreement terms and the fact that the sentence fell within that range as one factor in assessing whether the irregularity prejudiced the appellant. *Id.* at 174-75. In contrast to *Hendon*, SrA Arroyo argues her sentence to a bad-conduct discharge was inappropriately severe based on the nature and severity of the sole offense of which she was found guilty, her military record, and the lack of

aggravating factors.

Further, whether a sentence is within the range of that in a plea agreement is not the end of the analysis. The sentence still must be "sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline." Article 56(c)(1). Courts-martial are supposed to adjudge sentences in accordance with that mandate. *Id.* Regardless, Courts of Criminal Appeal (CCA) are also mandated to conduct sentence severity review. Article

. "[A] sentence within the range of a plea agreement may still be inappropriately severe." JA at 24 (Ramirez, J., dissenting). The additional safeguard provided by CCAs' sentence appropriateness review is to be afforded to all convicted servicemembers whose cases go before them. Article 66(d). The Air Force Court's consideration of the benefit SrA Arroyo received in having sexual assault specifications dismissed deprived her of a review of the appropriateness of the sentence for the sole offense of which she was convicted.

b. <u>The Air Force Court presumed SrA Arroyo would have been convicted of the dismissed specifications when weighing the benefit of her bargain against the sentence she received.</u>

The entire point of the Air Force Court considering the reduced criminal exposure created by the plea agreement was in relation to sentence severity, not "simply factual statements about the plea agreement" as the Government contended. *Compare* JA at 22 (subsection "3. Analysis" follows under the "C. Severity" heading

(JA at 18)), *with* Ans. at 13-14. The reduced exposure due to the dismissed specifications was not discussed anywhere else in the opinion. In that vein, the Air Force Court deemed the bad-conduct discharge not inappropriately severe specifically because SrA Arroyo had already received the benefit of her bargain. JA at 22-23. By doing so, the Air Force Court presumed SrA Arroyo would have been found guilty of the sexual assault specifications. There is no benefit to the dismissal of specifications of which the accused would be acquitted.— The benefit arises only if the accused would otherwise have been convicted. By implicitly assuming SrA Arroyo would have been convicted, the Air Force Court violated her presumption of innocence regarding the sexual assault allegations. *See United States v. Hills*, 75 M.J. 350, 356 (C.A.A.F. 2016) (observing that an accused is presumed innocent until proven guilty pursuant to the foundational tenant of the Due Process Clause, U.S. CONST. amend. V). When the Air Force Court weighed the bad-conduct discharge SrA Arroyo received against the "criminal exposure" and "additional significant collateral consequences" she could have received from the dismissed specifications, it found she had already received the benefit of her plea agreement. JA at 22. This disregarded the very real possibility that SrA Arroyo would have been acquitted of the sexual assault specifications. Therein lies the most important benefit the Government received in this case—the certainty of a conviction to any charge.

Notably, both cases the Government offered in an attempt to show that consideration of criminal exposure is permissible and not a violation of an accused's presumption of innocence involved granted issues regarding ineffective assistance of counsel (IAC). JA at 15 (citing *Furth*, 81 M.J. 114, and *United States v. Bradley*, 71 M.J. 13 (C.A.A.F. 2012)). In *Furth*, this Court considered whether there was IAC when the appellant was incorrectly advised that if his resignation request were approved, it would vacate his guilty plea.[1] 81 M.J. at 115. Of note, the plea to one specification of absence without leave (AWOL) and one specification of wrongful appropriation in *Furth* came with a sentence comprised of a reprimand, 3 months of confinement, and a dismissal. *Id.* The CCA in *Furth* only approved 3 months of confinement and a reprimand—a prime example of what the Air Force Court should have done in SrA Arroyo's case. *Id.* (*see* JA at 26 (Ramirez, J., dissenting) ("I would find that a sentence to 14 days of confinement and a two-grade reduction for touching LP's leg adequately reflects the seriousness of the offenses committed . . . I find the bad-conduct discharge to be inappropriately severe.")). Contrary to the Government's suggestion, the issue this Court reviewed in *Furth* was not about the CCA's sentence appropriateness review at all.

Similarly, in *Bradley*, this Court granted review of issues that related only to

[1] This Court assumed deficient performance but found no prejudice. 81 M.J. at 115.

IAC and ultimately held that even if defense counsel had been deficient, there was no prejudice. 71 M.J. at 14. Under the IAC issue, the appellant argued there was little to no reason for him to plead guilty if he had known that there was a specific issue that was not preserved on appeal. *Id.* at 17. Of note, the appellant in *Bradley* did not deny his involvement in the charges or argue he was entitled to an affirmative defense. *Id.* Regardless, the consideration of such was under the issue of IAC not sentence severity. *Id.* Here, SrA Arroyo argues the specific point that the Air Force Court, based on its own precedent, should have assessed her sentence considering the nature and seriousness of the offense of which she was convicted, her record of service, and all matters contained in the record of trial. *See United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (en banc) (per curiam).

The Air Force Court's consideration of the dismissed sexual assault allegations in finding her sentence was appropriate violated her due process rights. Affirming a CCAs' consideration of dismissed offenses as part of a plea agreement during sentence appropriateness review would perpetuate those violations.

c. <u>The issue is not whether the plea agreement was bargained for by both sides—it was—but whether the sentence to a bad-conduct discharge is inappropriately severe—it is.</u>

The Air Force Court is mandated to conduct sentence appropriateness review and mandated to not approve an inappropriately severe sentence. Article 66(d). It is self-evident that the Air Force Court's mandate, while plenary and great, does not

include ensuring the Government gets its "primary benefit." Ans. at 19. The Government on appeal took issue with SrA Arroyo receiving the initial benefit of a conviction to a lesser offense and then getting a "windfall" if the Air Force Court did not rubber stamp the military judge's decision. *See id.* (*citing United States v. Cook*, 12 M.J. 448, 455 (C.M.A. 1982))). The Government framed the issue as the Air Force Court enforcing a bargained-for-contract—the plea agreement—but that is not the issue before this Honorable Court. Ans. at 16. (*citing Ricketts v. Adamson*, 483 U.S. 1, 9 n.5 (1987)). *Cook* and *Ricketts* were both about whether prosecution for other offenses was barred by double jeopardy after (1) the plea entered was found improvident upon review (*Cook*, 12 M.J. at 449) or (2) there was a breach of a plea agreement wherein the appellant plead guilty to a lesser offense (*Ricketts*, 483 U.S. at 3). The issue before this Court is not about whether the sentence was bargained for; whether setting aside the bad-conduct discharge would be a windfall or eradicate the Government's primary benefit; or even about holding "offenders accountable and secur[ing] justice for victims." Ans. at 21 (*citing United States v. Timmreck*, 441 U.S. 780, 784 (1979)). The issue is that the Air Force Court improperly found SrA Arroyo's sentence to a bad-conduct discharge was appropriate when erroneously weighing the benefit SrA Arroyo received in the dismissed specifications.

In a creative turn to defending an inappropriately severe sentence, the

Government justified multiple times that the inappropriately severe sentence—a bad-conduct discharge—was somehow less inappropriate, or severe, because it afforded her the right to an automatic appeal. Ans. at 10, 19. But by statute, the sentence itself was severe because of the automatic appellate review. As framed by the Government, the acceptance of a contract of adhesion was somehow a strategic, manipulative tactic employed by SrA Arroyo. However, had she not received a bad-conduct discharge, she would not have appealed the fact that she did. It is a circular and Government-serving argument.

This entire issue started with the Government at trial when it failed to include necessary facts in the stipulation of fact that would warrant a bad-conduct discharge. JA at 26 (Ramirez, J., dissenting). Even after that failure, the Government's proposed sentence could have been saved, or maybe justified, by the military judge asking questions during the *Care*[2] inquiry to establish the factual predicate needed to justify a bad-conduct discharge. *Id.* Ultimately, the military judge should not have accepted the plea agreement per the mandate of R.C.M. 1002(f). *Id.* SrA Arroyo's sentence of a bad-conduct discharge for a single leg touch that occurred while both parties were under the influence of alcohol and which lacked aggravating factors—such as the touch being at the hip as opposed to the knee; under the clothes as opposed to over; or the touch taking place for an elongated time, etc.—

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

is inappropriately severe especially considering the twenty defense exhibits related to SrA Arroyo and particularly to her time in service. *See* JA at 24 (Ramirez, J., dissenting).

d. SrA Arroyo did not knowingly and voluntarily enter into a plea agreement with the understanding that the dismissed sexual assault specifications would be considered when the Air Force Court assessed her sentence.

If the Government is correct in its position that the Air Force Court not only can but should consider dismissed allegations as part of the entire record in deciding whether a punishment is appropriate (Ans. at 16-21), then SrA Arroyo did not knowingly and voluntarily enter into a plea agreement. SrA Arroyo understood that she was to be sentenced for the offense she pleaded to and of which she was found guilty. R.C.M. 1001(b)(3)(A), Discussion. SrA Arroyo was entitled to expect that same principle to guide the Air Force Court when reviewing the appropriateness of her sentence. The military judge failed to advise her that, contrary to that principle, the Air Force Court would consider the dismissed specifications when conducting its sentence appropriateness review. Absent such advice, her relinquishment of her constitutional rights to be presumed not guilty and to be convicted only upon proof of each and every element beyond a reasonable doubt was not knowing or voluntary.

B. Conclusion.

The military judge had (1) two Prosecution Exhibits including the stipulation of fact and SrA Arroyo's personal data sheet (PDS); (2) twenty Defense Exhibits

including character letters, documents of her achieving senior airman below the zone ahead of her peers, and an unsworn statement where SrA Arroyo apologized; and (3) LP's impact statement when adjudging a sentence that was "sufficient, but not greater than necessary." JA at 95-144; Article 56; R.C.M. 1002(f). The military judge rubber stamped the agreed-upon bad-conduct discharge. JA at 25 (Ramirez, J., dissenting). The Air Force Court then considered the benefit SrA Arroyo received under the plea agreement when the Government dismissed the sexual assault specifications—presuming SrA Arroyo would have been found guilty—in finding her sentence to a bad-conduct discharge was appropriate. The Air Force Court's actions violated SrA Arroyo's right to the presumption of innocence, resulting in its affirmance of a sentence that was inappropriately severe.

WHEREFORE, SrA Arroyo respectfully requests this Court reverse the Air Force Court's decision and remand her case to the Air Force Court to conduct a proper sentence severity analysis.

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 at AF.JAJG.AFLOA.Filng.Workflow@us.af.mil on December 27, 2024.

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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 2,850 words. This Reply Brief complies with the typeface and type style requirements of Rule 37.

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