

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

**UNITED STATES,**

*Appellee,*

v.

**Noah D. BOGERT,**  
Airman First Class (E-3),  
United States Air Force,

*Appellant.*

**SUPPLEMENT TO PETITION  
FOR GRANT OF REVIEW**

Crim. App. Dkt. No. ACM 40855

USCA Dkt. No. 26-0194/AF

**TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR  
THE ARMED FORCES:**

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## ISSUES PRESENTED

- I. The Air Force Court of Criminal Appeals abused its discretion through its erroneous interpretation of 10 U.S.C. § 866(e)(1)(A).**
- II. The Air Force Court of Criminal Appeals abused its discretion through its erroneous interpretation of 10 U.S.C. § 866(e)(1)(D).**
- III. The military judge abused his discretion when he erroneously admitted twenty-four photographs of the decedent, testimony about those photographs, and sentencing recommendations.**

## STATEMENT OF STATUTORY JURISDICTION

Airman First Class (A1C) Noah D. Bogert's approved sentence includes a dishonorable discharge and confinement for two years or more. Accordingly, the Air Force Court of Criminal Appeals (AFCCA) had jurisdiction pursuant to Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3)<sup>1</sup>. A1C Bogert now invokes this Court's Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3), jurisdiction.

## STATEMENT OF THE CASE

A military judge sitting as a general court-martial convicted A1C Bogert, pursuant to his pleas, of involuntary manslaughter by culpable negligence in violation of Article 119, UCMJ, 10 U.S.C. § 919. R. at 17, 101. The military judge sentenced him to a dishonorable discharge, confinement for forty-two months, and

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<sup>1</sup> Unless otherwise indicated, all references to the UCMJ, the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial, United States* (2024 ed.).

reduction to the grade of E-1. R. at 258. The convening authority took no action on the findings or the sentence, but deferred A1C Bogert's reduction in grade until the military judge signed the entry of judgment. Convening Authority Decision on Action. The convening authority also waived automatic forfeitures for a period of six months for the benefit of A1C Bogert's spouse. *Id.*

On March 17, 2026, the lower court affirmed the findings and the sentence. Appendix at 13. A1C Bogert timely petitioned this Court for review on May 11, 2026, and moved to file the supplement to the petition subsequently. Order May 12, 2026. On June 1, 2026, A1C Bogert requested a second extension seeking fourteen additional days to allow for filing of the supplement to the petition for grant of review on June 16, 2026. Order June 1, 2026.

#### STATEMENT OF FACTS

##### **A. A1C Bogert accidentally shot and killed his best friend.**

On February 11, 2024, A1C Bogert accidentally shot his best friend, twenty-one-year-old BA, when they were pretending to do a security forces exercise to sweep through the rooms of A1C Bogert's home to make sure they were "clear." R. at 46–47. This was an activity that they did often, but on that fateful day, A1C Bogert failed to clear the rifle that he was handling. *Id.* While A1C Bogert believed he had cleared the weapon, he "did not pull the charging handle back far enough to actually see if there was a round in the chamber or to properly clear the rifle." *Id.* When

A1C Bogert began the practice room-sweep procedure, he approached BA, called “‘contact front’ and turned the weapon off safe, and pulled the trigger.” R. at 47. The gun fired, and the round that was still in the chamber struck BA in the chest. *Id.*

A1C Bogert “‘immediately called 9-1-1” and attempted life-saving measures. *Id.* But by the time help arrived, BA was already deceased. *Id.* After fully cooperating with law enforcement, A1C Bogert pleaded guilty to involuntary manslaughter by culpable negligence in violation of Article 119, UCMJ. R. at 48; Pros. Ex. 1.

**B. Over defense objection, the Government admitted twenty-four photos, coupled with witness testimony, about A1C Bogert’s best friend’s entire life as matters in aggravation.**

During the Government’s sentencing case, the senior trial counsel introduced Prosecution Exhibit 3, a compilation of twenty-four photographs showing BA throughout his life. R. at 135. The Defense objected to the exhibit, arguing that many of the photographs it contained were not relevant, constituted improper matters in aggravation under R.C.M. 1001(b)(4), and did not pass the Mil. R. Evid. 403 balancing test. R. at 136.

Relying on *United States v. Taylor*, 41 M.J. 701 (A.F. Ct. Crim. App. 1995), the military judge overruled the Defense’s objection and found that the proffered exhibit was appropriate and relevant evidence in aggravation pursuant to R.C.M. 1001. R. at 140–41. The military judge explained that the photographs are

“evidence that is directly resulting from the crime[ of] which A1C Bogert has been convicted” as they add “some perspective to the person who cannot be here.” R. at 141. The military judge also found that the probative value of the photographs was not outweighed by the danger of unfair prejudice. R. at 141–42.

During his ruling on the admissibility of the twenty-four photographs, the military judge issued an additional ruling, clarifying how the Government could use the exhibit: “The Court finds that *coupled with the testimony of the witness[es]* such evidence is appropriate victim evidence pursuant to [R.C.M.] 1001(b).” R. at 141 (emphasis added). Pursuant to R.C.M. 1001(b)(4), the Government called multiple members of BA’s family to testify about the impact that BA’s death had on their lives. *See generally* R. at 127–90. Each described multiple photographs in the compilation and reminisced about the events depicted there. *See id.*

### **1. TA’s Testimony**

TA, BA’s mother, explained that the photograph on page 1 of Prosecution Exhibit 3 captured “the first time that [her daughters] got to meet their baby brother.” R. at 145; Pros. Ex. 3 at 1. TA went on to describe photographs of a family vacation when BA was a child, a photograph of his graduation from Basic Military Training, photographs of BA with his friends, and a photograph taken after BA returned from deployment. R. at 145–47; Pros. Ex. 3 at 6, 12, 13, 18, 19. Finally, TA said the last picture in the compilation was “priceless” to her because

“that was the last picture that [she] took of [her] three kids together.” R. at 147; Pros. Ex. 3 at 24.

In the conclusion of her testimony, the senior trial counsel asked TA if there was “anything else that [she] would like to say to the judge for him to know as he considers an appropriate sentence in this case.” R. at 156. In response, TA described the loss of BA’s potential future and concluded by saying, “I just would like, as we move forward with this sentencing, that we keep in mind that this was a great loss. He was 21 years old. He had his whole future ahead of him.” R. at 156–57.

## **2. CL’s Testimony**

Next, the Government called CL, BA’s older sister. R. at 158. Like TA, she also discussed BA’s baby photograph where she and her sister were “getting to see him for the first time.” R. at 160; Pros. Ex. 3 at 1. She reminisced about a photograph of a hunting trip that appears to have taken place when BA was in his early teens, explaining how the photograph was “very meaningful to [her]” because it captured her husband, her father, and BA all together. R. at 161; Pros. Ex. 3 at 7. The trial counsel concluded her direct examination of CL by asking if there was “anything else that [she] would like . . . the judge to know as he [considers] the right sentence to impose in this case.” R. at 177. CL responded, in part, “[W]hat is said here today . . . should carry very little weight . . . . [T]hose

actions . . . were choices that [A1C Bogert] made, and . . . should carry a severe consequence. And I say that because actions have consequences, and my brother deserves that justice.” R. at 178–79.

### **3. RA’s Testimony**

RA, BA’s other sister, was the third member of BA’s family called by the Government. R. at 181. When asked about one of their childhood photographs, RA explained that the picture was taken on Halloween and showed BA “dressed up as a dinosaur” and RA “dressed up as a princess.” R. at 183; Pros. Ex. 3 at 3. RA went on to say, “I remember every holiday just being so special. My mom put a lot of magic into our holidays and into our childhood.” R. at 183. When asked whether “there [is] anything else that [she] would like the judge to know in considering the appropriate sentence for this case,” RA responded, in part, that “there will be justice for what happened for him . . . .” R. at 188.

### **4. JA’s Testimony**

The last member of BA’s family to testify was JA, BA’s father. R. at 190. He described a photograph showing BA in Little League baseball that JA helped to coach. R. at 193; Pros. Ex. 3 at 4. RA also discussed a hunting trip where teenage BA shot his “first buck,” a photograph of BA “hanging out” with JA, and a photograph from BA’s technical school graduation that JA could not attend. R. at 194–95; Pros. Ex. 3 at 7, 15, 20. Just as with previous witnesses, the Government

inquired whether there was “anything else . . . that [he] would like to tell the judge, for him to know as he determines an appropriate sentence for this crime.” R. at 198. JM responded, in part, that “there just needs to be justice, of course, done, fair, but just.” R. at 198–99.

**C. The Air Force Court of Criminal Appeals held that the military judge did not abuse his discretion in admitting the disputed Government evidence.**

The AFCCA treated the admission of photographs and testimony by the military judge as threshold inquiries, concluding that the Court was “*required to find in Appellant’s favor as to at least one other raised issue*” before it could consider whether the sentence violated the law or was plainly unreasonable. Appendix at 2 (emphasis added). The AFCCA concluded that the threshold was not satisfied. *Id.*

But the AFCCA then went on to “consider[ ] whether the sentence violates the law [and] . . . is ‘plainly unreasonable’” anyway. *Id.* (citing then quoting Article 66(e)(1)(A), (D), 10 U.S.C. § 866(e)(1)(A), (D). Circling back to the purported threshold requirement and “finding no error that materially prejudiced [A1C Bogert]’s substantial rights on” the admission of evidence and testimony issues, the AFCCA determined its resolution of those Article 66(e), UCMJ, 10 U.S.C. § 866(e), questions “warrant[ed] neither discussion nor relief.” *Id.* (citing *United States v. Guinn* 81 M. J. 195, 204 (C.A.A.F. 2021)).

On the merits of the evidence and testimony, the AFCCA found that the military judge did not abuse his discretion when he admitted twenty-four photographs of BA spanning all twenty-one years of his life because “[e]ach photo . . . related to the social and psychological impact on the victims, the family members, which is specifically allowed by R.C.M. 1001(b)(4).” *Id.* at 7. Similarly, the AFCCA found that the “testimony associated with the photos is admissible as a matter in aggravation under R.C.M. 1001(b)(4).” *Id.* at 9. As to the sentencing recommendations, the AFCCA found no error and specifically noted that, under R.C.M. 1001(b)(4), there was no error in a “mother’s request for the sentence to be on the higher end for the sake of her son and for the sake of Appellant.” *Id.* at 12.

The AFCCA found the sentence to be “correct in law and fact” and affirmed the findings and the sentence. *Id.* at 13.

### ARGUMENT

This Court should grant review because this case presents several questions of law that have not been, but should be, settled by this Court. C.A.A.F. R. 21(b)(5)(A). This case offers a compelling basis for this Court to interpret the new statutory sentencing review scheme under Article 66(e), UCMJ, through the lens of three compounding and consequential errors. C.A.A.F. R. 21(b)(5)(A).

This case provides an opportunity to clarify an accused’s rights when the new sentencing scheme is triggered and how it operates by explaining when a

sentence is “in violation of the law” and when a sentence is “plainly unreasonable” under Article 66(e)(1)(A) and (D), UCMJ, 10 U.S.C. § 866(e)(1)(A), (D), respectively.

Furthermore, this case presents an opportunity to define when victim impact evidence violates the law when presented by the Government under R.C.M. 1001(b)(4). Current caselaw is silent about the limits on the use of photographic evidence as victim impact evidence for sentencing. In *United States v. Curtis*, this Court found no plain error in a military judge’s decision to admit a single wedding photograph of the decedent. 44 M.J. 106, 140 (C.A.A.F. 1996). However, *Curtis* does not instruct the field on how many photographs of a decedent may be permissible to show what they looked like before their death and does not opine on whether childhood photos of adult victims may be admitted as matters in aggravation. *See id.* at 140–41. Additionally, this case presents an opportunity to clarify the scope of this Court’s rulings in *United States v. Edwards*, 82 M.J. 239 (C.A.A.F. 2022), and *United States v. Hamilton*, 78 M.J. 335 (C.A.A.F. 2019), and to reinforce the distinction between victim impact evidence and testimony permitted under R.C.M. 1001(b)(4) and victim’s right to make an unsworn statement under R.C.M. 1001(c).

**I. The Air Force Court of Criminal Appeals abused its discretion through its erroneous interpretation of 10 U.S.C. § 866(e)(1)(A).**

**A. Standard of Review.**

When reviewing CCA’s decision on sentence appropriateness, this Court “is limited to the narrow question of whether there has been an obvious miscarriage of justice or abuse of discretion.” *United States v. Armsbury*, \_\_\_ M.J. \_\_\_, No. 25-0233, 2026 CAAF LEXIS 274, at \*7 (C.A.A.F. Mar. 24, 2026) (quoting *United States v. Swisher*, 85 M.J. 1, 4 (C.A.A.F. 2024)). Such an abuse of discretion occurs when a Court of Criminal Appeals (CCA) acts “arbitrarily, capriciously, or unreasonably as a matter of law.” *United States v. Arroyo*, 86 M.J. 89, 93 (C.A.A.F. 2025) (citing *United States v. Flores*, 84 M.J. 277, 282 (C.A.A.F. 2024)). If the CCA misunderstands the applicable law, then a remand for new sentence appropriateness review is appropriate. *Flores*, 84 M.J. at 282 (citing *United States v. Baier*, 60 M.J. 382, 385 (C.A.A.F. 2005)); *United States v. Spencer*, \_\_\_ M.J. \_\_\_, USCA Dkt. No. 25-0192/MC, 2026 CAAF LEXIS 143, at \*7 (C.A.A.F. Feb. 9, 2026).

This court reviews “[q]uestions of statutory construction, including articles under the Uniform Code of Military Justice . . . de novo.” *Armsbury*, 2026 CAAF LEXIS 274, at \*7 (citing *United States v. Fetrow*, 76 M.J. 181, 185 (C.A.A.F. 2017)).

**B. The Air Force Court of Criminal Appeals erroneously construed Article 66(e)(1)(A), UCMJ.**

In addressing whether A1C Bogert's sentence violated the law, the lower court's fundamental error of statutory construction was that it created two separate inquiries out of one. As the AFCCA saw things, "review" for whether the sentence violated the law was out of reach without first making it past whether there was some other prejudicial error during sentencing proceedings. Appendix at 2. But as Article III caselaw interpreting parallel language shows, the determination of prejudicial error during sentencing is the sole inquiry to determine whether the sentence violates the law.

The amended Article 66, UCMJ, 10 U.S.C. § 866, limits the powers of CCAs to consider sentencing issues to five distinct avenues. 10 U.S.C. § 866(e). Two of them are implicated below: "whether the sentence violates the law" under Article 66(e)(1)(A), UCMJ, 10 U.S.C. § 866(e)(1)(A), or whether it is "plainly unreasonable" under Article 66(e)(1)(D), UCMJ, 10 U.S.C. § 866(e)(1)(D). Appendix at 2.

While these subsections are undefined under the UCMJ, the text of Article 66(e), UCMJ, plainly parallels its counterpart applied in Article III criminal proceedings under 18 U.S.C. § 3742(e). The similarities between these two statutes are not coincidental. In its Recommendation 56.2, the Military Justice Review Group suggested "establishing sentencing parameters and criteria to provide

guidance to military judges in determining an appropriate sentence” and opined that the “general structure” of the amended statute would be “adopted from 18 U.S.C. § 3742, with modifications that reflect military practice.” Military Justice Review Group, REPORT OF THE MILITARY JUSTICE REVIEW GROUP PART I: UCMJ RECOMMENDATIONS, 514 (December 22, 2015).

The result is a schema for an accused’s appeal of the sentence under Article 66(e), UCMJ, that closely resembles its 18 U.S.C. § 3742(e) counterpart. Where 10 U.S.C. § 866(e)(1)(A) authorizes CCAs to consider “whether the sentence violates the law”, 18 U.S.C. § 3742(e)(1) authorizes an Article III court to determine whether the sentence “was imposed in violation of the law.” Likewise, 10 U.S.C. § 866(e)(1)(D) empowers CCAs to consider “whether the sentence was plainly unreasonable,” and like language is found in 18 U.S.C. § 3742(e)(4), which empowers an Article III court to determine whether the sentence “was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.” Other parallels also exist. *Compare* 10 U.S.C. § 866(e)(1)(B)(i) (CCAs may consider whether the sentence is “inappropriately severe . . . for an offense for which the President has not established a sentencing parameter”), *with* 18 U.S.C. § 3742(e)(4) (an Article III court determines whether the sentence “was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable”); *compare* 10 U.S.C. § 866(e)(1)(C) (CCAs may consider

whether the sentence is “is a result of an incorrect application of the parameter”), with 18 U.S.C. § 3742(e)(4) (an Article III court determines whether the sentence “was imposed as a result of an incorrect application of the sentencing guidelines”).

The meaning of 18 U.S.C. § 3742(e) is informed by robust case law developed over the last three decades and, where parallel language is used, should guide the construction Article 66(e). *See e.g., United States v. Powell*, 22 M.J. 141, 143 (C.M.A. 1986) (“As the [Fed. R. Evid. 803(24)] has been construed on numerous occasions by the Federal courts, we are obliged to pay particular attention to the manner in which those courts have applied it”); *United States v. Kuemmerle*, 67 M.J. 141, 143 (C.A.A.F. 2009) (“In the absence of a statutory definition, [this Court] consider three sources,” among them “the manner in which Article III courts have interpreted the term.”). This Court’s past practice indicates that parallels between the UCMJ and an existing statute applicable to criminal proceedings in Article III courts support using the latter to guide the construction of the Title 10 provision. *See, e.g., United States v. Stellato*, 74 M.J. 473, 484 (C.A.A.F. 2015) (using Article III courts’ precedent to find a discovery violation where the evidence in question was held at the Sheriff’s Department); *Kuemmerle*, 67 M.J. at 143–44 (turning to the construction of “distribute” in Article III courts to assess similar—but undefined—text in the UCMJ); *United States v. Czachorowski*, 66 M.J. 432, 435 (C.A.A.F. 2008) (analyzing a split between

Article III courts and adopting the approach of those courts which did not require a formal notice under Fed. R. Evid. 807). The AFCCA failed to do so in A1C Bogert's case.

The AFCCA's erroneous interpretation is expressed in a short passage early in its decision. The Court first wrote, "To review [the issue of whether the sentence violates the law or is plainly unreasonable], we are required to find in Appellant's favor as to at least one [of the evidence and testimony issues]." Appendix at 2. Taken in isolation, this sentence has two potential meanings. One could be that the prefatory clause "[t]o review" means "as part of," leading to the conclusion that analysis of sentence appropriateness includes assessment of the merits of the evidence and testimony issue as part of the analysis. The other is that the AFCCA determined that finding error on the merits of the evidence and testimony issues was a threshold question that had to be resolved in A1C Bogert's favor before the Court could even get to the question of whether the sentence violates the law. In its next sentence, the AFCCA made clear that its position was the latter, holding that "because we find no error as to the [evidence and testimony] issues, we are not required to separately address" whether the sentence violates the law or is plainly unreasonable. *Id.* The key word is "separately," thereby cementing that the AFCCA saw that the sequence of the analysis to be the merits of alleged errors

with regard to evidence and testimony before it could even address the question of whether the sentence violated the law.

The flaw in the AFCCA’s construction of Article 66(e), UCMJ, is that it comports with neither the statute’s text nor the corresponding meaning afforded to the parallel language of “in violation of law” in 18 U.S.C. § 3742(e)(1). CCAs possess “limited jurisdiction, defined entirely by statute.” *United States v. Arness*, 74 M.J. 441, 442 (C.A.A.F. 2015) (citing *United States v. Politte*, 63 M.J. 24, 25 (C.A.A.F. 2006)). CCAs no longer have the statutory authority to exercise their awesome plenary powers to “affirm only such . . . sentence . . . as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved.” *Compare* 10 § U.S.C. 866(e), *with* 10 U.S.C. 866(d)(1) (*Manual for Courts-Martial* (2019 ed.)). Rather, Article 66(d)(1)(A), UCMJ, authorizes CCAs to “act only with respect to the findings and sentence as entered into the record . . . .” 10 U.S.C. § 866(d)(1)(A). Whereas Article 66(d)(1)(A), UCMJ, 10 U.S.C. § 866(d)(1)(A), allows findings to be assessed for whether they are correct “in law, and in fact in accordance with” Article 66(d)(1)(B), UCMJ, 10 U.S.C. § 866(d)(1)(B), the how-to of sentence appropriateness is taken up in the next provision. There, it is cabined by the statutory text with an exhaustive list of five

avenues.<sup>2</sup> 10 U.S.C. § 866(e). As such, any issue on appeal before the CCA related to the sentence may proceed only through one of those avenues.

When the AFCCA “separate[d]” the analysis of whether the sentences violates the law from a purportedly “required” predicate question of whether there was error, it went outside the box of its statutory authority. Appendix at 2. This analytical move also demonstrated the AFCCA’s misapprehension of what “violates the law” means, as informed by its Title 18 counterpart applicable when a sentence is “imposed in violation of law.” 18 U.S.C. § 3742(e).

“The courts of appeals review sentencing decisions for unreasonableness.” *United States v. Booker*, 543 U.S. 220, 264 (2005). Reasonableness is reviewed for abuse of discretion. *Gall v. United States*, 552 U.S. 38, 56 (2007). An unreasonable sentence is one that is “imposed in violation of law.” *United States v. Gonzalez*, 62 F.4th 954, 958 (5th Cir. 2023). “A sentence is ‘imposed in violation of law’ when it contravenes a statutory or constitutional provision or is in some other way unlawful.” *In re Sealed Case*, 449 F.3d 118, 122 (D.C. Cir. 2006) (quoting 18

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<sup>2</sup> Although the five subdivisions of Article 66(e), UCMJ, are joined by “and,” whereas 18 U.S.C. § 3742(e)’s subdivisions are linked by “or,” the only reading that could give any effect to the text of Article 66(e), UCMJ, is to treat this as one of the occasions where the ordinarily conjunctive “and” really represents the ordinarily disjunctive “or.” See *Arness*, 74 M.J. at 445–46 (Baker, J., concurring) (quoting *United States v. Moore*, 613 F.2d 1029, 1040 (D.C. Cir. 1979)) (noting that “as several federal circuit courts have recognized, at times the conjunctive ‘and’ and the disjunctive ‘or’ are interchangeable, particularly where ‘a strict grammatical construction will frustrate legislative intent’”).

U.S.C. § 3742(a)(1)), *cert. denied*, 550 U.S. 927 (2007). A sentence that is “based on some illegal reason” or “influenced by unlawful considerations” is imposed “in violation of law.” *Id.* (first quoting *United States v. Sammoury*, 74 F.3d 1341, 1343 (D.C. Cir. 1996), then quoting *United States v. Townsend*, 173 F.3d 558, 566 (D.C. Cir. 1999)).

Here, the military judge imposed a sentence in violation of the law. *See* 10 U.S.C. § 866(e)(1)(A). Improperly admitted photographs and testimony about the history behind those photographs, discussed in Issue III, demonstrate that the military judge was “influenced by unlawful considerations” and imposed A1C Bogert’s sentence “in violation of law.” *See In re Sealed Case*, 449 F.3d at 168. It is indisputable that the military judge considered this testimony and the photos, thought both were lawful, and gave this evidence due consideration. R. at 141 (“The Court finds that *coupled with the testimony of the witness[es]* such evidence is appropriate victim evidence pursuant to [R.C.M.] 1001(b).” (Emphasis added)). Additionally, as discussed in Issue III.D, the military judge’s clear and obvious error in allowing the Government to repeatedly introduce sentencing recommendations for a harsher punishment as matters in aggravation serves as further evidence that the deliberative process which led to A1C Bogert’s sentence contravened a R.C.M. 1001(b) and was thus unlawful. *See In re Sealed Case*, 449 F.3d at 168; 10 U.S.C. § 866(e)(1)(A).

While the question of whether the military judge abused his discretion in erroneously admitting evidence and testimony necessarily becomes part of the analysis addressing whether A1C Bogert’s sentence violates the law under 10 U.S.C. § 866(e)(1)(A), the AFCCA’s initial error was to treat those as “separate[ ]” and distinct inquiries. Appendix at 2. This error also prejudiced A1C Bogert because the AFCCA’s analysis of the alleged violations of the law by the military judge were also wrong. Therefore, A1C Bogert’s case should be remanded to the AFCCA for a new analysis under Article 66(e)(1)(A), UCMJ.

**II. The Air Force Court of Criminal Appeals abused its discretion through its erroneous interpretation of 10 U.S.C. § 866(e)(1)(D).**

Assuming *arguendo* that the sentence announced by the military judge is not in violation of the law under Article 66(e)(1)(A), UCMJ, it still should have been reconsidered as it was—at a minimum—“plainly unreasonable” under Article 66(e)(1)(D), UCMJ, because the military judge did not explain the reasons behind his sentencing decision as required by R.C.M. 1002(c).

**A. Standard of Review.**

The same standard of review discussed in Issue I.A, *supra*, applies here.

**B. The Air Force Court of Criminal Appeals erred in requiring error in admission of evidence and testimony before it could consider whether the sentence was “plainly unreasonable.”**

The AFCCA’s even more glaring error was its treatment of whether A1C Bogert’s sentence was “plainly unreasonably” because it collapsed its

analysis into—and made it contingent on as a threshold—whether there was any error in admitting evidence and testimony.

“In considering a sentence on appeal, . . . the Court of Criminal Appeals may consider . . . whether the sentence is plainly unreasonable.” 10 U.S.C.

§ 866(e)(1)(D). This is a different question from whether the sentence “violates the law.” 10 U.S.C. § 866(e)(1)(A). As discussed in section I.B, *supra*, the text of neither provision requires an initial showing of some kind of underlying error before reaching the issue of whether the sentence “violates the law” or is “plainly unreasonable.” 10 U.S.C. § 866(e).

The AFCCA’s flawed statutory construction was three-fold. First, it erroneously determined such an error was “required” before reaching the “separate[ ]” issue of whether the sentence was “plainly unreasonable.” Appendix at 2. The errors alleged related to evidence and testimony needed to be analyzed specifically as part of Article 66(e)(1)(A), UCMJ, provisions, not separately. Second, the AFCCA treated the question of whether the sentence was “plainly unreasonable” the same as the question of whether it “violate[d] the law.” Appendix at 2. Third, even when it purported to consider whether A1C Bogert’s sentence was “plainly reasonable,” the AFCCA treated the disposition of that question as turning on the merits of the alleged errors in admitting evidence and testimony. For this last deficiency, federal courts construing similar language from

18 U.S.C. § 3742(e) indicate the analysis should have been far more searching and far less deferential to the military judge.

Federal courts of appeals “evaluate the reasonableness of the sentence using the standards of appellate review applicable to criminal sentences generally.”

*United States v. Sanchez*, 900 F.3d 678, 682 (5th Cir. 2018) (citing *Gall*, 552 U.S. at 50–51 (“[A]fter giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the 18 U.S.C. § 3553(a) factors to determine whether they support the sentence requested by a party”)).

When it comes to the “plainly unreasonable” language in paragraph (C) of 18 U.S.C. § 3742, there is a circuit split on how to interpret it in light of the overall requirement to evaluate sentences imposed under 18 U.S.C. § 3742 for “reasonableness” under *Booker*. While some federal circuit courts of appeals either implicitly adopted the reasonableness standard for all sentences or expressly held that “unreasonable” and “plainly unreasonable” are indistinguishable, others maintain that “plainly unreasonable” is still a valid standard post-*Booker*. See *United States v. Miller*, 634 F.3d 841, 843 (5th Cir. 2011) (citing *Booker*, 543 U.S. at 259–62) (finding that while “*Booker* rendered the Sentencing Guidelines advisory, and directed courts to review sentences under a reasonableness standard,” it left a gap open to interpretation in cases where Sentencing Guidelines

do not apply, enabling some jurisdiction to apply the “plainly unreasonable” standard in those cases).<sup>3</sup>

Both jurisdictions begin their inquiry by asking whether the sentence is reasonable under the abuse of discretion standard. *See Sanchez*, 900 F.3d at 682 (quoting *United States v. Winding*, 817 F.3d 910, 913 (5th Cir. 2016) (The appellate court must first ensure the district court committed no “significant procedural error, such as failing to consider the [18 U.S.C.] § 3553(a) factors . . . or failing to adequately explain the chosen sentence.” Then, the court must consider “the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.”). However, the jurisdictions that utilize the plainly unreasonable standard will “vacate the sentence only if the identified error is ‘obvious under existing law,’ such that the sentence is not just unreasonable but plainly unreasonable.” *Id.* (quoting *Miller*, 634 F.3d at 843).

Notably, the courts that still hold to the plainly unreasonable standard apply it only in select cases, such as review of sentence revocation, and utilize the

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<sup>3</sup> *Comparing United States v. Flemming*, 397 F.3d 95, 99 (2nd Cir. 2005), and *United States v. Miqbel*, 444 F.3d 1173, 1176 n.5 (9th Cir. 2006) (both adopting reasonableness standard), with *United States v. Crudup*, 461 F.3d 433, 437–39 (4th Cir. 2006), and *United States v. Kizeart*, 505 F.3d 672, 674–75 (7th Cir. 2007) (both maintaining the plainly unreasonable standard); also citing *United States v. Sweeting*, 437 F.3d 1105, 1106–07 (11th Cir. 2006), and *United States v. Cotton*, 399 F.3d 913, 916 (8th Cir. 2005) (both finding that “unreasonable” and “plainly unreasonable” are functionally the same).

reasonableness standard for sentences imposed under the Sentencing Guidelines. *United States v. Finley*, 531 F.3d 288, 293 (4th Cir. 2008). These courts also apply the plainly unreasonable standard for offences that do not have established federal sentencing guidelines. *See id.* at 294. The latter application is precluded by Article 66(e)(1)(B)(i), UCMJ, 10 U.S.C. § 866(e)(1)(B)(i) in the military justice system, as it addresses sentence severity review for category offenses. Furthermore, Article 66(e)(1)(D), UCMJ, applies both to sentences imposed pursuant to the Sentencing Guidelines and to the category offenses, making the less deferential reasonableness standard more appropriate. This approach ensures that sentences for category offenses receive the same standard of review as offenses imposed under the Sentencing Guidelines—abuse of discretion. *See Booker*, 543 U.S. at 259–62. When deciding whether a sentence is reasonable (or plainly unreasonable), the relevant question is whether the lower court “committed significant procedural error, such as failing to consider the [applicable] factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence.” *Sanchez*, 900 F.3d at 682 (alteration in original) (internal quotation marks omitted) (quoting *United States v. Winding*, 817 F.3d 910, 913 (5th Cir. 2016)).

Article III courts discern whether a sentence is reasonable by looking to the trial judge’s application of 18 U.S.C. § 3553 sentencing factors. A sentencing colloquy where a trial judge provides reasons for imposing a specific sentence is

vital in determining whether these factors were correctly applied. For example, in *United States v. Sanchez*, Fifth Circuit Court of Appeals found no abuse of discretion where the district judge’s sentencing colloquy explained that a harsher sentence was warranted because appellant failed to deescalate a situation that led to the homicide of which he was convicted. 900 F.3d at 682. In *United States v. Santiago*, Sixth Circuit Court of Appeals found no abuse of discretion where a district court explained that a term of confinement in the middle of the Sentencing Guidelines range was appropriate because while appellant had a poor record with firearms, he did not intend to commit a crime aside from unlawfully carrying a weapon. 139 F.4th 570, 575 (6th Cir. 2025). In *United States v. Cozad*, Tenth Circuit Court of Appeals found district court abused its discretion because the court’s sentencing colloquy indicated that lack of a plea agreement was one of the factors informing a harsher sentence. 21 F.4th 1259, 1265–66 (10th Cir. 2022).

Here, because the military judge did not explain his sentencing decision, the sentence imposed is unlawful or at a minimum plainly unreasonable. The sentencing criteria listed in Article 56, UCMJ, 10 U.S.C. § 856, parallel the sentencing factors found in 18 U.S.C. § 3553. The importance of these criteria is evidenced in the updated R.C.M. 1002(c), which now incorporates the sentencing criteria described in Article 56(c), UCMJ, 10 U.S.C. § 856(c). The inclusion of Article 56(c), UCMJ, criteria in R.C.M. 1002(c) indicates that a consideration of

these factors is now a requisite part of the trial procedure. When the military judge failed to provide an explanation for the sentence imposed, he deprived A1C Bogert of this procedural right to understand and ultimately contest the reasons for the specific sentence adjudged. Because the military judge did not explain his sentencing decision, the record lacks the information that could allow A1C Bogert to appeal his sentence as one imposed due to improper consideration of the sentencing factors.

This Court has long recognized the importance of military judges sufficiently articulating their decisions on the record even where the relevant rule does not specifically state so. *See e.g. United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010) (quoting *United States v. Berry*, 61 M.J. 91, 96 (C.A.A.F. 2005)) (holding that an “evidentiary ruling will receive less deference from this [C]ourt” if a military judge fails to perform a Mil. R. Evid. 403 balancing test). Because the trial judge did not discuss his R.C.M. 1002(c) analysis, his sentencing decision should get little deference. Had the AFCCA done its analysis under Article 66(e)(1)(D), UCMJ, it would have seen that a sentence where the military judge does not provide even minimal explanation for his sentencing decision is plainly unreasonable.

### **III. The military judge abused his discretion when he erroneously admitted twenty-four photographs of the decedent, testimony about those photographs, and sentencing recommendations.**

#### **A. Standard of Review.**

“[W]hen reviewing a military judge’s ruling for an abuse of discretion, [this Court] pierce[s] the CCA’s opinion and examine[s] the military judge’s ruling directly.” *United States v. Ruiz*, 86 M.J. 75, 80 (C.A.A.F. 2025) (alterations in original) (quoting *United States v. Carpenter*, 77 M.J. 285, 287 n.5 (C.A.A.F. 2018)).

This Court reviews evidentiary rulings for an abuse of discretion. *Id.* (quoting *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019)). The abuse of discretion standard “requires ‘more than a mere difference of opinion. The challenged action must be arbitrary . . . , clearly unreasonable, or clearly erroneous.’” *Id.* (alterations in original) (quoting *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014)).

“Where an appellant has not preserved an objection to evidence by making a timely objection, that error will be forfeited in the absence of plain error.” *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014) (quoting *United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007)). “Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused.” *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F.

2005) (citing *United States v. Rodriguez*, 60 M.J. 87, 88–89 (C.A.A.F. 2004)). “[A] military judge is presumed to know the law and apply it correctly absent clear evidence to the contrary.” *United States v. Bridges*, 66 M.J. 246, 248 (C.A.A.F. 2008) (citing *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007); *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997)).

**B. The military judge abused his discretion when he admitted twenty-four photographs of the decedent, including his childhood photos, as matters in aggravation.**

R.C.M. 1001(b)(4) permits the Government to present “any aggravating circumstance *directly relating to or resulting from* the offenses of which the accused has been found guilty.” (Emphasis added). The rule envisions evidence in aggravation including “evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused . . . .” R.C.M. 1001(b)(4). Admissibility of aggravation evidence is limited by two factors: the requirement that such evidence is “‘directly relat[ed]’ to the offenses of which the accused has been found guilty” and that it passes the Mil. R. Evid. 403 balancing test. *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007).

When the offense results in the loss of a life, it is appropriate to show the decedent as they looked before death. *See United States v. Curtis*, 44 M.J. 106, 140–41 (C.A.A.F. 1996) (finding no error where the military judge allowed the

Government to introduce decedent's wedding photograph); *Taylor*, 41 M.J. at 705 (finding no abuse of discretion for admission of the decedent's basic Air Force Training photo). However, there are limits to this type of evidence, both temporally and quantitatively. Here, the military judge abused his discretion by overlooking both.

First, “[t]he meaning of ‘directly related’ under R.C.M. 1001(b)(4) is a function of both what evidence can be considered and how strong a connection that evidence must have to the offenses of which the accused has been convicted.” *Hardison*, 64 M.J. at 281. “[T]he strength of the connection required between admitted aggravation evidence and the charged offense” is substantial and the two must be “closely related in time.” *See id.* at 281–82. Here, the vast array of photographs from BA's life were not directly related to the charged misconduct as these images were not close temporally and were not evidence of how his death impacted his loved ones. *See* R.C.M. 1001(b)(4); *Hardison*, 64 M.J. at 281–82. In admitting these photographs, the military judge disregarded the plain requirement of R.C.M. 1001(b)(4) that the evidence in aggravation must be directly related to the convicted offenses. *See id.* at 281.

*United States v. Taylor*, the case the military judge relied on to admit the photos, does not lead to a different conclusion. There, a single photograph of the victim taken in basic training was used to “bring to life” the decedent who, up until

that point, was depicted through the crime scene photographs. *Taylor*, 41 M.J. at 705. In that premeditated murder case, there was no error in admitting evidence that “remind[ed] the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and particularly to his family.” *Id.* (citing *Payne v. Tennessee*, 501 U.S. 808, 826 (1991)). The photo provided context in *Taylor*, “a quick glimpse of the life petitioner chose to extinguish,” but here, the twenty-four photos went beyond that to show, in an extended manner, BA at every stage of his life beginning with his birth. *Payne*, 501 U.S. at 830 (O’Connor, J., concurring) (quoting *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, J., dissenting)). Such evidence goes beyond being “directly related” to the offense.

Second, “victim impact evidence can become prejudicial toward the defendant simply through ‘sheer volume.’” Alexander H. Updegrave, *Victim Impact Evidence in Capital Cases: Regulating the Admissibility of Photographs and Videos in the Payne Era*, 34 NOTRE DAME J.L. ETHICS & PUB. POL’Y 167, 185 (2020) (quoting *Mosley v. State*, 983 S.W.2d 249, 263 (Tex. Crim. App. 1998)). “Even if not technically cumulative, an undue amount of this type of evidence can result in unfair prejudice under Rule 403.” *Mosley*, 983 S.W.2d at 263.

Volume and “directly related” collide when photographs depict adult victims during their childhood years. Several state courts found that childhood photographs

of adult victims are unduly prejudicial and are not appropriate victim impact evidence. *E.g.*, *People v. Prince*, 156 P.3d 1015, 1093 (Cal. 2007) (“[c]ourts must exercise great caution in permitting the prosecution to present victim-impact . . . . [particularly when it] emphasizes the childhood of an adult victim”); *State v. Hess*, 23 A.3d 373, 393–94 (N.J. 2011) (finding that the photographs of the victim’s childhood have “no probative value” because they “do not project anything meaningful about the victim’s life as it related to his family and others at the time of his death”). In *Salazar v. State*, the Court of Criminal Appeals of Texas held a 17-minute video montage of photographs inadmissible where nearly half of the photos depicted the adult victim as a child because “appellant murdered an adult, not a child. He extinguished [decedent’s] future, not his past.” 90 S.W.3d 330, 337 (Tex. Crim. App. 2002), *aff’d*, 118 S.W.3d 880 (Tex. App. 2003). While the value of such photographs is “*de minimis* . . . . their prejudicial effect is enormous.” *Id.* Here, the sheer volume of photographs, repeatedly explained by multiple family members, containing numerous depictions of BA as a child, should have been excluded.

The AFCCA’s failure to recognize this was erroneous and materially prejudicial to A1C Bogert’s right to receive a sentence that is free from considerations of improper evidence and testimony. Given the ease with which photographs can be shared and displayed in the court room, should decisions like

the one issued by the AFCCA be permitted to stand, there is substantial and grave potential for more violations like this to occur in the future. This Court should grant review to clarify this issue, stave off future rulings that embrace the same error, and demonstrate how such an error impacts the analysis under Article 66(e)(1)(A), UCMJ, and potentially Article 66(e)(1)(D), UCMJ.

**C. The military judge abused his discretion when he allowed decedent’s family members to testify about each of the twenty-four photographs as part of matters in aggravation.**

The military judge’s ruling to allow the Government to elicit old family memories about BA was an abuse of discretion because it allowed the Government to present matters in aggravation in a manner not permitted under R.C.M. 1001(b)(4) and that error substantially influenced the sentence.

Evidence in aggravation concerning victim impact is distinct from a victim’s right to be heard. *Hamilton*, 78 M.J. at 340. While the Government may admit evidence of victim impact in presentencing, it should be noted that “the Government admits aggravation evidence, to include victim impact statements, under R.C.M. 1001(b)(4), and victims exercise their right to reasonably be heard at presentencing under R.C.M. [1001(c)(2)(B)].” *United States v. Barker*, 77 M.J. 377, 382 (C.A.A.F. 2018).

Here, the Government elicited the testimony of BA’s mother, father, and sisters under R.C.M. 1001(b)(4) to explain the photos the Government also offered

under R.C.M. 1001(b)(4). The testimony described BA’s sisters meeting him for the first time at the hospital, R. at 145, 160; family vacations taken in years past, R. at 145–46; memories from a hunting trip, R. at 161, 194; and past visits, family events, and holidays, R. at 168–71, 183, 185–86, 193–94. The military judge’s error in admitting both the photos and this testimony go hand-in-hand. As with the photographs themselves, the Government introduced statements that do not meet the requirements of R.C.M. 1001(b)(4). *See supra* Part I.B. While all are cherished memories of shared happiness, they are not “aggravating circumstance[s] *directly relating to or resulting from* the offense[ ] of which [A1C Bogert] has been found guilty.” R.C.M. 1001(b)(4) (emphasis added). For this issue, the Texas Court of Criminal Appeals said it best: while “[e]very homicide victim is an individual . . . . the punishment phase of a criminal trial is not a memorial service for the victim,” and “[w]hat may be entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a criminal trial.” *Salazar*, 90 S.W.3d at 335–36.<sup>4</sup>

The AFCCA rejected this and held that the “testimony associated with the photos is admissible as a matter in aggravation under R.C.M. 1001(b)(4) because

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<sup>4</sup> Sharing these types of memories is *possibly* appropriate in a victim unsworn statement under R.C.M. 1001(c)(2)(B), but then such statements could not have been accompanied by photographs or presented in a question-and-answer format as they were here. R.C.M. 1001(c)(2)(B); *United States v. Harrington*, 83 M.J. 408, 418 (C.A.A.F. 2023).

the testimony is evidence of social and psychological impact.” Appendix 1 at 9. However, this holding is conclusory and it impossibly strains the “directly relating to” requirement of R.C.M. 1001(b)(4) by attempting to connect a victim’s childhood to the impact of an offense committed decades later. The crux of the problem lies in the complete retelling of family history, to include childhood memories, rather than the impact “directly related” to the offense of negligently killing an adult. The plain language of the rule does not leave room for testimony that “implicit[ly] suggest[s] . . . that appellant murdered this angelic infant[ or that] he killed this laughing, light-hearted child.” See *United States v. Sampson*, 335 F. Supp. 2d 166, 192 (D. Mass. 2004) (quoting *Salazar*, 118 S.W.3d at 884).

The improper admission of the testimony substantially influenced A1C Bogert’s sentence by making the focus of the Government’s sentencing case a memorial to BA’s life, rather than the direct impact of his death on his family. But the testimony does not stand alone. Coupling this evidence with the photos, the Government cannot overcome its burden to prove that the military judge’s abuse of discretion in admitting both did not substantially affect A1C Bogert’s sentence.

This Court should grant A1C Bogert’s case to clarify the scope of “directly related” under R.C.M. 1001(b)(4). Even where there are no photos or accompanying media, the Government cannot admit any and all family memories

as evidence of aggravation. The addition of the photos in this case allows this Court to address both and prevent future violations.

**D. It was plain error to allow the Government to elicit statements requesting a strong punishment for Airman First Class Bogert.**

During the direct examination of BA's family members, the Government asked each of the four witnesses if they had anything they would like the military judge "to know as he considers an appropriate sentence in [A1C Bogert's] case." R. at 156, 177, 188, 198. Each witness responded in a manner consistent with a sentencing recommendation that crime victims may make pursuant to R.C.M. 1001(c)(3) when providing a victim impact statement, but not consistent with matters in aggravation under R.C.M. 1001(b)(4). *Compare* R.C.M. 1001(c)(3) ("[I]n a noncapital case, the victim may recommend a specific sentence."), *with* R.C.M. 1001(b)(4) (permitting only evidence of victim impact).

TA told the judge that she would like, "as we move forward with this sentencing, that we keep in mind that this was a great loss." R. at 156–57. CL was more explicit in her sentencing recommendation, telling the military judge that mitigating evidence presented by A1C Bogert "should carry little weight" and that his actions "should carry a severe consequence . . . because actions have consequences, and [her] brother deserves that justice." R. at 178–79. RA was more succinct, expressing her certainty that "there will be justice for what happened for

him . . . .” R. at 188. JA echoed that sentiment, stating, “there just needs to be justice, of course, done, fair, but just.” R. at 198–99.

None of these recommendations were appropriate victim impacts matters under R.C.M. 1001(b)(4). The military judge plainly erred when he allowed the Government to introduce, without any regard for the clearly articulated constraints of R.C.M. 1001(b)(4), statements addressing the sentence to be adjudged, a topic only permitted under R.C.M. 1001(c). *See generally Edwards*, 82 M.J. 239 (discussing how the right to make an unsworn statement solely belongs to the victim and cannot be transferred to trial counsel such that when the trial counsel invades this right, the statement becomes the trial counsel’s, not the victim’s). Allowing this testimony was error and the error was plain and obvious. *See Fletcher*, 62 M.J. 175.

While R.C.M. 1001(c)(3) allows a victim or a victim’s designee to make a sentence recommendation, BA’s family members were not making victim impact statements under R.C.M. 1001(c) when they testified. They were called as Government witnesses to present evidence under R.C.M. 1001(b)(4) and were limited by its rules to “evidence of financial, social, psychological, and medical impact” and other aggravating circumstance “*directly relating to or resulting from* the [convicted] offenses.” (Emphasis added); *see* R. at 127–200.

The AFCCA dismissed the impermissible scope of the evidence by opining that how the “family shared in their crucible of loss” was “a model of propriety and grace.” Appendix 1 at 9. However, grace is not a metric by which the military justice system measures admissibility of evidence and testimony. This Court should grant review to clarify the distinction between R.C.M. 1001(b)(4) and R.C.M. 1001(c) with respect to sentencing recommendations by victims, and to show how such error factors into the analysis under the amended Article 66(e).

#### CONCLUSION

A1C Bogert respectfully requests that this Honorable Court grant review of his case.

Respectfully submitted,



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APPENDIX

UNITED STATES AIR FORCE  
COURT OF CRIMINAL APPEALS

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No. ACM 40855

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UNITED STATES

*Appellee*

v.

Noah D. BOGERT

Airman First Class (E-3), U.S. Air Force, *Appellant*

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Appeal from the United States Air Force Trial Judiciary

Decided 17 March 2026

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*Military Judge:* Wesley A. Braun.

*Sentence:* Sentence adjudged 10 March 2025 by GCM convened at Holoman Air Force Base, New Mexico. Sentence entered by military judge on 22 April 2025: Dishonorable discharge, confinement for 42 months, and reduction to E-1.

*For Appellant:* Captain Olga Stanford, USAF.

*For Appellee:* Major Vanessa Bairos, USAF; Mary Ellen Payne, Esquire.

Before DOUGLAS, RAMÍREZ, and KUBLER, *Appellate Military Judges*.

Judge RAMÍREZ delivered the opinion of the court, in which Senior Judge DOUGLAS and Judge KUBLER joined.

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**This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.**

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RAMÍREZ, Judge:

A military judge sitting as a general court-martial convicted Appellant, in accordance with his pleas and pursuant to a plea agreement, of one specification of involuntary manslaughter in violation of Article 119, Uniform Code of

Military Justice (UCMJ), 10 U.S.C. § 919.<sup>1</sup> The military judge sentenced Appellant to a dishonorable discharge, confinement for 42 months, and reduction to the grade of E-1. The convening authority took no action on the findings or the sentence but granted a deferment of the reduction in grade until the entry of judgment was signed by the military judge, and waiver of automatic forfeitures for a period of six months for the benefit of Appellant's spouse.

Appellant raises four issues on appeal, which we have rephrased: (1) whether the military judge abused his discretion in overruling the Defense's objection to the photographs in Prosecution Exhibit 3;<sup>2</sup> (2) whether the military judge abused his discretion in admitting certain aggravation testimony; (3) whether the military judge plainly erred in allowing the Government to elicit statements requesting "strong punishment" for Appellant; and (4) whether the sentence imposed by the military judge violates the law because his sentencing decision was informed by considerations of improper evidence and testimony.

As discussed below, we find no error that materially prejudiced Appellant's substantial rights concerning issues (1)–(3). To review issue (4), we are required to find in Appellant's favor as to at least one other raised issue. However, because we find no error as to any of the first three issues, we are not required to separately address issue (4).

Nonetheless, we have carefully considered both assertions made by Appellant in issue (4). First, we considered whether the sentence violates the law under Article 66(e)(1)(A), UCMJ, 10 U.S.C. § 866(e)(1)(A). Second, we considered whether the sentence is "plainly unreasonable" under Article 66(e)(1)(D), UCMJ, 10 U.S.C. § 866(e)(1)(D). After finding no error that materially prejudiced Appellant's substantial rights concerning issues (1)–(3) and reviewing the entire record we find issue (4) warrants neither discussion nor relief. See *United States v. Guinn*, 81 M.J. 195, 204 (C.A.A.F. 2021) (citing *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987)).

We find no error that materially prejudiced Appellant's substantial rights, and we affirm the findings and sentence.

## I. BACKGROUND

Appellant entered the Air Force in 2021, and at the time of his offense, Appellant was stationed at Holloman Air Force Base (AFB), New Mexico. BA

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<sup>1</sup> Unless otherwise noted, all references to the UCMJ, the Rules for Courts-Martial and the Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial, United States* (2024 ed.).

<sup>2</sup> The exhibit is a series of 24 photographs that reflect the life of the victim in this case.

was also stationed at Holloman AFB, and they were both assigned to the security forces squadron. The two had met at their technical school and became friends.

On 11 February 2024, Appellant and his wife drove from their home in New Mexico to El Paso, Texas, to pick up BA at the airport, as BA had been on leave visiting his family. After stopping at a sporting goods store for BA to buy a new stock for one of his firearms, they went to Appellant's house. Appellant kept two of his own firearms at his house. He had an AR-15 "style" rifle<sup>3</sup> and a handgun. Appellant had last shot the rifle on or about 27 January 2024. While at Appellant's house, Appellant took the rifle out and BA removed the stock to see if the new stock that he had just purchased would fit on Appellant's gun.

When BA gave the AR-15 back to Appellant, Appellant pulled the rifle's charging handle, but he did not properly clear the rifle. Instead, Appellant only partially pulled it back and was not able to visually inspect the chamber to ascertain whether a bullet was in the chamber. If Appellant had properly cleared the rifle and properly visually inspected the chamber, he would have identified and removed the round in the chamber.

After he took the AR-15 from BA, Appellant walked to his bedroom at the back of the house, attached a loaded 9mm handgun to his belt, and decided he would "clear" his house. This simulates a training exercise he performed as part of his security forces training.

While incorrectly believing the AR-15 was unloaded, he held the loaded AR-15 in his hand and kept his loaded handgun strapped to his belt. Appellant then exited his bedroom and began clearing the house. He started by taking the door wide to look for "threats." Appellant then saw BA standing near the dining room table. He was approximately six feet from Appellant. Appellant swiveled towards BA, said "contact front," switched the AR-15 from safety to the "fire" position and pulled the trigger. A single round fired, and Appellant killed BA.

## **II. DISCUSSION**

### **A. Admission of Photographs as Aggravation Evidence**

#### **1. Additional Background**

During the presentencing phase of Appellant's court-martial, the Prosecution moved to admit Prosecution Exhibit 3 (PE 3), a series of 24 photographs

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<sup>3</sup> An AR-15 "style" rifle refers to rifles that look like, operate like, or are patterned after the AR-15 design, but are not necessarily the exact same model or brand. We will simply refer to the weapon as an AR-15.

that reflect the life of the victim BA. BA's mother laid the foundation for the photos, but each family member discussed them during their testimony. These photographs show BA as a baby, a child growing up, on family trips, and his life in the Air Force. Various family members of BA testified about the photographs and what they meant to the family.

The Defense objected to the admission of PE 3. The basis for the objection was threefold: relevance, improper matters in aggravation under Rule for Courts-Martial (R.C.M.) 1001(b)(4), and Mil. R. Evid. 403. The Prosecution responded,

[I]mages from a victim's life, particularly in a homicide or a manslaughter case, is appropriate victim impact. It is appropriate for this [c]ourt, in order to assess the impact of this crime on the named victim in the charge as well as the other victims of this crime, to assess what was lost.

The Prosecution continued, "These photos demonstrate the memories that the family has with [BA] and that's all that they have left of him is those memories."

When he considered Defense's objection to PE 3, the military judge relied on *United States v. Taylor*, which found no error in admitting a murder victim's Air Force basic training photograph in sentencing because "just as the [accused] should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and particularly to his family." 41 M.J. 701, 705 (A.F. Ct. Crim. App. 1995) (citing *Booth v. Maryland*, 482 U.S. 496, 517 (1987) (White, J., dissenting)).

The military judge then continued his analysis under R.C.M. 1001. He stated,

First, the [c]ourt finds that this evidence is evidence that is directly resulting from the crimes to which the accused has been convicted. The accused has ple[a]d guilty and has been found guilty of involuntary manslaughter by culpable negligence. These photos depict the victim of the accused's crime, who is no longer with us, and adds some perspective to the person who cannot be here. The [c]ourt finds that coupled with the testimony of the [the victim's mother,] such evidence is appropriate victim evidence pursuant to [R.C.M.] 1001(b).

As it relates to the Mil. R. Evid. 403 balancing test and the potential for prejudice based on cumulativeness, the military judge began his analysis by stating that he "has to look at the balancing test under [Mil. R. Evid.] 403 as sentencing evidence is subject to the limitations of said balancing test." In looking at the probative value, the military judge "[found] that there is probative

value to the evidence being offered by the [G]overnment” because it “helps illustrate the testimony of the witness on the stand, the mother of the victim. It also helps the [c]ourt better appreciate the victim of the crime.” While the military judge did have some concern that the nature of the evidence may be cumulative, he “note[d] that there is more than one picture -- 24 photos, more than a picture of the age of the victim,” and stated, “I don’t know if that in and of itself is problematic, but it is a consideration of the [c]ourt.” The military judge also considered “whether such evidence is likely to inflame the passions of the sentencing authority, a common concern in cases of this type, especially when dealing with pictures of victims.” However, “in reviewing thoroughly the individual photos contained in [PE] 3 for identification,” the military judge found “that while there is some prejudicial effect,” he was not convinced that the prejudicial effect substantially outweighed the probative value of this evidence. Further, “[a]t a minimum,” the military judge did not feel “that this is a question of admissibility, but perhaps a question of weight,” and concluded that “[c]ounsel are always welcome to, and often do, argue weight that the [c]ourt should give particular pieces of evidence, and this case is no different.”

The military judge concluded by explaining:

The [R]ules of [E]vidence, obviously, are written to encourage the admission of relevant evidence. The [c]ourt finds this as relevant. The [c]ourt finds that its probative value is not substantially outweighed by a danger of unfair prejudice; and as such, is going to admit the -- is going to admit [PE] 3 for identification as [PE] 3 over the objection of the [D]efense.

In doing so, the [c]ourt is confident that in determining a sentence, the [c]ourt can give [PE] 3 the weight that it deserves in determining what sentence is appropriate under the circumstances. So with that, [PE] 3 is admitted.

The Prosecution then asked questions of BA’s family, which included his mother, his father, and his two sisters. These questions directly related to the photographs and how they were tied to BA’s life and their mourning of his life. The testimony and the photographs included BA as a baby; BA with family on family vacations; and BA celebrating with family after he graduated from his basic military training; his friendship with others at Holloman AFB; he and his family the day he returned from military deployment; and also the last picture that he and his siblings took together before Appellant unlawfully killed him.

## **2. Law**

We review a military judge’s decision to admit sentencing evidence for an abuse of discretion. *United States v. Barker*, 77 M.J. 377, 383 (C.A.A.F. 2018).

“A military judge abuses his or her discretion when: (1) the military judge predicates a ruling on findings of fact that are not supported by the evidence of record; (2) the military judge uses incorrect legal principles; (3) the military judge applies correct legal principles to the facts in a way that is clearly unreasonable; or (4) the military judge fails to consider important facts.” *United States v. Rudometkin*, 82 M.J. 396, 401 (C.A.A.F. 2022) (citations omitted).

“The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous.” *United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013) (quoting *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010)). “The standard requires that the military judge be clearly wrong in his determination of the facts or that his decision be influenced by an erroneous view of the law.” *United States v. Dooley*, 61 M.J. 258, 262 (C.A.A.F. 2005) (footnote omitted). “When testing for an abuse of discretion, [a reviewing court] does not substitute its judgment for the military judge’s.” *United States v. Grant*, 38 M.J. 684, 688 (A.F.C.M.R. 1993).

The purpose of the Rules at the presentencing phase is “to aid the court-martial in determining an appropriate sentence.” R.C.M. 1001(a)(1). Additionally, the Prosecution may present matters in aggravation. R.C.M. 1001(b)(4). The matters in aggravation include evidence “directly relating to or resulting from the offenses of which the accused has been found guilty.” *Id.* It also includes evidence of social and psychological impact on any victim of an offense committed by the accused. *Id.* Victim impact statements may be admitted as aggravation evidence under R.C.M. 1001(b)(4). *Barker*, 77 M.J. at 382.

Finally, R.C.M. 1001(b)(4) evidence must also pass the Mil. R. Evid. 403 balancing test, “which requires balancing between the probative value of any evidence against its likely prejudicial impact.” *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007) (citation omitted). If the probative value of the evidence at issue is “substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence,” the military judge may exclude the evidence. Mil. R. Evid. 403. “Where a military judge properly conducts the balancing test under [Mil. R. Evid.] 403, we will not overturn [his] decision unless there is a clear abuse of discretion.” *United States v. Ruiz*, 86 M.J. 75, 81 (C.A.A.F. 2025) (internal quotation marks and citations omitted).

### **3. Analysis**

“Victims of a murder are not faceless individuals.” *United States v. Curtis*, 44 M.J. 106, 140 (C.A.A.F. 1996). Nonetheless, Appellant argues that in allowing the 24 photographs at various stages of BA’s life into evidence, “the military

judge relied on a case [*Taylor*] that never contemplated either the number or the nature of photographs that the Government sought to introduce here.”

While Appellant is correct in that *Taylor* did not specifically consider 24 photographs in its analysis, it did not limit a sentencing authority to considering only one photo during the presentencing phase of the court-martial. In *Taylor*, this court explained that “[d]uring the sentencing proceeding, the prosecution attempted to bring to life the bloated, bloody image on the photos by introducing the victim’s basic Air Force Training photo and the testimony of his sister and brother.” 41 M.J. at 705. Additionally, this court pointed out that “[t]he sister and brother testified about the victim, his background, and what his death meant to them.” *Id.* Similarly, *Curtis* allowed a wedding photo of the homicide victim during the presentencing phase after allowing three photos of the dead victim, without stating how many non-death photos would be appropriate. 44 M.J. at 140.

Here, we cannot find that the military judge abused his discretion in allowing 24 photographs of BA. Each photo, whether concerning family vacations, military graduations, or deployments, related to the social and psychological impact on the victims, the family members, which is specifically allowed by R.C.M. 1001(b)(4). Each witness testified to the memories that the photographs evoked and how they suffered direct emotional harm as a result of the manslaughter. When these family members testified to the direct harm they suffered as victims these photos aided them in their testimony to the court.

Additionally, R.C.M. 1001 does not limit the amount of evidence, in the form of exhibits, which the Prosecution may offer during the presentencing phase of the court-martial. We are cognizant that a military judge should limit cumulative evidence under Mil R. Evid. 403, but that was not necessary here. The military judge also recognized this as reflected in his ruling. To that point, each photo served a different purpose. The photos showed BA in different stages of his life and conjured different memories and pain for his family.

The military judge’s findings were supported by the evidence; he relied on correct legal principles and applied them correctly, and did not fail to consider important facts. *Rudometkin*, 82 M.J. at 401. Additionally, we do not disturb the military judge’s decision on the Mil. R. Evid. 403 balancing test, especially where the military judge places his reasoning on the record as he did here. *See United States v. Carter*, 74 M.J. 204, 206–07 (C.A.A.F. 2015). Appellant argues that “the photographs had an undue tendency to suggest a decision on the improper basis of emotion.” However, emotion alone is not sufficient to exclude relevant evidence under Mil. R. Evid. 403. The probative value of the evidence must be substantially outweighed by a danger that emotion would result in unfair prejudice. Here, each photograph was put in its proper context and the military judge explained that he was “confident that in determining a sentence,

[he could] give PE 3 the weight that it deserves in determining what sentence is appropriate under the circumstances.” As such, the probative value of the photos was not substantially outweighed by a danger of unfair prejudice, confusing the issues, undue delay, wasting time, or needlessly presenting cumulative evidence. Put simply, the military judge did not abuse his discretion. *See Barker*, 77 M.J. at 383.

## **B. Admission of Family Testimony Regarding Photographs**

### **1. Additional Background**

As explained above, PE 3 was a collection of 24 photographs of BA before Appellant unlawfully killed him. The Prosecution did not prepare the photos. Instead, BA’s mother chose and collected the photos and provided them to the Prosecution. Once the military judge admitted the photographs as PE 3, he allowed BA’s family to testify about the meaning and significance of the photos and how they personally affected them.

Again, the testimony included BA as a baby, family vacations, celebrating after he graduated from his basic military training, his friendship with others at Holloman AFB, he and his family the day he returned from military deployment, and the last picture that he and his siblings were together before he was unlawfully killed.

According to Appellant, the military judge abused his discretion by allowing what Appellant refers to as “family lore” about the victim because the testimonies were impermissible under R.C.M. 1001.

### **2. Law**

We rely on the law from the issue explained above concerning the abuse of discretion standard and the general rules concerning aggravation evidence under R.C.M. 1001(b)(4) and will not repeat that law here.

Evidence in aggravation “includes, but is not limited to, evidence of financial, social, psychological, or medical impact on . . . any person or entity who was the victim of an offense committed by the accused . . .” R.C.M. 1001(b)(4).

### **3. Analysis**

The parties do not agree as to the standard for reviewing this issue. Appellant argues that it should be an abuse of discretion. The Government counters that the standard should be plain error because there was no specific objection to the testimony associated with the photos. Appellant points to the intertwining of the issues as a sufficient objection. Specifically, Appellant points to the military judge, “find[ing] that coupled with the testimony of the witness [the photographic] evidence is appropriate victim evidence pursuant to [R.C.M] 1001(b).”

While the Government is correct that Appellant did not specifically object to testimony associated with the photos, he did object to the photos themselves. Therefore, we will treat this issue as one subject to the abuse of discretion standard.

According to Appellant, the military judge abused his discretion by allowing what Appellant refers to as “family lore” about the victim<sup>4</sup> because the testimony was impermissible under R.C.M. 1001. Appellant argues that this testimony led “to a sentencing decision tainted by inadmissible information.” Appellant also claims that the testimony at issue violates our superior court’s holding in *United States v. Edwards*, 82 M.J. 239 (C.A.A.F. 2022), in that while the Government may offer victim impact statements in aggravation, “nothing in *Edwards* suggests the Government may introduce statements that do not meet the requirements of R.C.M. 1001(b)(4) or R.C.M. 1001(c)(2)(B).” We disagree.

The testimony associated with the photos in PE 3 fell squarely within R.C.M. 1001. Each family member who testified in relation to the photographs provided sworn testimony. Each witness suffered direct emotional harm as a result of the death. Furthermore, everyone that testified about their individual memories from the photographs and how they were affected is specifically authorized under law. This testimony associated with the photos is admissible as a matter in aggravation under R.C.M. 1001(b)(4) because the testimony is evidence of social and psychological impact on any victim of an offense committed by Appellant. *Id.*

Further, this testimony does not run afoul of Mil. R. Evid. 403. The probative value of testimony from these photos of social or psychological impact relating to the unlawful killing of BA, when BA is unable do so himself, is high. Moreover, the military judge carefully considered the potential Mil. R. Evid. 403 prejudice based upon the number of photographs, and agreed to put that in context, and invited counsel to argue the weight such evidence should be given. The careful balancing test done on the record would only be challenged for a clear abuse of discretion and the judge did not abuse his discretion. *See Hardison*, 64 M.J. at 281.

Finally, as to the *Edwards* issue of addressing unsworn testimony and precluding the Prosecution from preparing victim impact evidence, we do not see the connection. First, unlike *Edwards*, the testimony here was sworn, not unsworn. *See Edwards*, 82 M.J. at 241. Second, the photos associated with the

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<sup>4</sup> Appellant uses the word “lore” in his brief but points to nothing suggesting that the victim’s testimony was “family lore,” that is, embellished memories that may contain grains of truth but are reshaped over time.

testimony were prepared by the family alone, not with the assistance of trial counsel. *See id.* at 246.

## C. Sentencing Recommendation

### 1. Additional Background

The following sworn presentencing testimony was elicited by the Prosecution from various members of the victim's family. Each portion of the quoted testimony is from a different member of BA's family.

[Special Trial Counsel (STC)]: Is there anything else that you would like to say to the judge for him to know as he considers an appropriate sentence in this case?

[BA's Mother]: I just would like, as we move forward with this sentencing, that we keep in mind that this was a great loss. He was 21 years old. He had his whole future ahead of him.

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[STC]: Is there anything else you would like to know that -- the judge to know as he is considering the right sentence to impose in this case?

[BA's Eldest Sister]: [W]hat is said here today about [BA] or about [Appellant], I think should carry very little weight. I think what carries the most weight is what happened on February 11th. [Appellant] picked up a gun. He did not clear it. He pointed it at my brother. He took it off safety, and he pulled the trigger. None of that should have ever happened. [BA] was 21 years old, and he is gone. And I do not say that out of malice, and I do not say that out of hatred or revenge. I say that because those actions were deliberate, and they were choices that he made, and I think those should carry a severe consequence. And I say that because actions have consequences, and my brother deserves that justice. Thank you, Your Honor.

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[STC]: Is there anything else that you would like the judge to know in considering the appropriate sentence for this case?

[BA's Older Sister]: All I have to say is my brother would have done amazing things in this world if he was here. And, you know, the -- there will be justice for what happened for him, but my family and I will live in this prison for the rest of our lives. We'll never be able to escape it, and -- yeah, that's all I have.

[STC]: Is there anything else, sir, that you would like to tell the judge, for him to know as he determines an appropriate sentence for this crime?

[BA's Father]: [T]he pain is so intense to lose a child. And recently, we had been to a retreat with other parents who had lost [a child], and it was really nice. But just thinking it is just not the same as when it happens to you. And there just needs to be justice, of course, done, fair, but just. I guess that's it.

The Defense had the opportunity to cross-examine each witness after the Prosecution called them but elected not to question them.

## **2. Law**

“Where an appellant has not preserved an objection to evidence by making a timely objection, that error will be forfeited in the absence of plain error.” *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014) (quoting *United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007)). “A timely and specific objection is required so that the [trial] court is notified of a possible error, and so [that the military judge] has an opportunity to correct the error and obviate the need for appeal.” *Id.* (quoting Stephen A. Saltzburg et al., FEDERAL RULES OF EVIDENCE MANUAL § 103.02(1) (10th ed. 2011)).

Under plain error review, an appellant “has the burden of establishing (1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights.” *United States v. Lopez*, 76 M.J. 151, 154 (C.A.A.F. 2017) (internal quotation marks and citations omitted). “The plain-error doctrine ‘is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.’” *United States v. Ruiz*, 54 M.J. 138, 143 (C.A.A.F. 2000) (quoting *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982)).

“When the issue of plain error involves a judge-alone trial, an appellant faces a particularly high hurdle.” *United States v. Hays*, 62 M.J. 158, 166 (C.A.A.F. 2005) (quoting *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000)). This is because a “military judge is presumed to know the law and apply it correctly, [and] is presumed capable of filtering out inadmissible evidence . . . .” *Robbins*, 52 M.J. at 457 (citation omitted). Therefore, “plain error before a military judge sitting alone is rare indeed.” *Id.* (quoting *United States v. Raya*, 45 M.J. 251, 253 (C.A.A.F. 1996)) (additional citations omitted).

## **3. Analysis**

According to Appellant, the military judge plainly erred because “[e]ach of these statements was intended to convince the military judge to adjudge a

sentence at the higher end of the sentencing cap<sup>5</sup> and to determine that a dishonorable as opposed to bad-conduct discharge characterization was appropriate.”

We view the considerate, thoughtful testimony of the family members a model of respect and decorum for both the process and Appellant. “You deserve to have a sentence” — BA’s mother said referring to Appellant — “that you can live out and then feel like you paid a fair sentence for your crime.” We found her statement exemplary and devoid of base anger. Each family member asked for justice, fairness, and disavowed revenge. We would be remiss if we, having been asked to examine the propriety of a military judge allowing such testimony, failed to note that we view what the family shared in their crucible of loss as a model of propriety and grace.

We see no error related to their request for justice and fairness or the mother’s request for the sentence to be on the higher end for the sake of her son and for the sake of Appellant. The family members merely asked for the sentence to be fair.

Even if we took a different view of their testimony, where Appellant did not object to any of this testimony, Appellant fails under a plain error review. All three prongs of the plain error test “must be satisfied in order to find plain error, the failure to establish any one of the prongs is fatal to a plain error claim.” *United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006). Here, we do not need to address whether there was error or whether any error was plain or obvious, as even if these two prongs were satisfied, Appellant has failed to establish any material prejudice to his substantial rights.

Appellant has offered no evidence that he was prejudiced in any substantial way by the testimony of the Prosecution’s presentencing witnesses. While it is unclear what Appellant attempts to argue as prejudice, it seems that he is claiming that he may have been prejudiced because the military judge was advised by these witnesses as to how to view the evidence and goes beyond a request for a more severe sentence. We are unconvinced.

Appellant does not explain how the outcome might have been different if that portion of their testimony had been excluded, particularly in light of the fact that the sentencing was by a military judge sitting alone. Appellant also fails to explain how he was materially prejudiced when he received the protection and benefit of a plea agreement. In the absence of evidence of material prejudice, Appellant’s plain error claim must fail.

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<sup>5</sup> The plea agreement included a mandatory sentencing range of 30–48 months of confinement. There were no other requirements or limitations, including a discharge.

**III. CONCLUSION**

The findings as entered are correct in law. Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). In addition, the sentence as entered is correct in law and fact, and no error materially prejudicial to Appellant's substantial rights occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and sentence are **AFFIRMED**.



FOR THE COURT

*Carol K. Joyce*

CAROL K. JOYCE  
Clerk of the Court

## CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that: (1) this supplement complies with the type-volume limitation of Rule 21 because it contains 8,325 words; and (2) this supplement complies with the style requirements of Rule 37.

## CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically sent to the Court and electronically served on the Air Force Government Trial and Appellate Operations Division at AF.JAJG.AFLOA.Filng.Workflow@us.af.mil on June 16, 2026.



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