IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

KEVIN S. CHANDLER,
Airman Basic (E-1), USAF
Appellant.

Crim. App. No. S32534

USCA Dkt. No. 20-0168/AF

REPLY BRIEF

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INDEX

TABLE OF AUTHORITIES

Cases

Court of Appeals for the Armed Forces

Statutes, Rules, Regulations, and Constitutional Provisions

Pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, Airman Basic (AB) Kevin S. Chandler, the Appellant, hereby replies to the Government's Answer (Govt Ans.) concerning the granted issue, filed June 19, 2020.

ARGUMENT

1. *The Government conflates a Staff Judge Advocate's authorization to initiate pretrial agreement negotiations with the unauthorized ability to negotiate specific terms of a stipulation of fact.*

The Government concedes that Lieutenant Colonel Amer Mahmud took "an unusual step" in calling Captain Clayton Cox to discuss the contents of the stipulation of fact. (Govt Ans. at 13.) Nevertheless, the Government argues that this call was "inextricably tied" to Lt Col Mahmud's normal authority to engage in pretrial agreement (PTA) negotiations. (Govt Ans. at 16.) To be clear, Appellant does not dispute Lt Col Mahmud's authority to initiate PTA negotiations, as Rule for Courts-Martial (R.C.M.) 705(d)(1) (2016) expressly allows such conduct. However, the Government conflates this authorization with the ability to negotiate the specific terms of a stipulation of fact.

This Court applies the ordinary rules of statutory construction when analyzing the Rules for Courts-Martial. *See, e.g.*, *United States v.*

Reese, 76 M.J. 297, 301 (C.A.A.F. 2017) (citations omitted). Under the Rules for Courts-Martial, PTAs and stipulations of fact are discrete entities. *See*, *e.g.*, R.C.M. 705(c)(2)(A) (noting that a promise to enter into a stipulation of fact is permissible term of a PTA). And the plain language of R.C.M. 705(d)(1) limits an SJA's authority to PTA negotiations—it does not reference stipulations of fact. When read in context with the rules as a whole, this omission is logical. An accused has a right to a full and fair review of his case by a neutral convening authority advised by a neutral legal officer. *See* R.C.M. 1106(b); R.C.M. 1106(c)(1); R.C.M. 1107(a) Discussion; *cf. United States v. Davis*, 58 M.J. 100, 102 (C.A.A.F. 2003) (discussing requirement for impartial convening authority). It would be antithetical to this fairness requirement to allow an SJA who helped build the Government's case against an accused to later advise the convening authority on whether clemency is warranted for that same accused.

The Government attempts to equate this case to *United States v. Gibson*, 29 M.J. 379 (C.M.A. 1990), wherein this Court's predecessor upheld the validity of waivers of evidentiary objections in PTAs. (Govt Ans. at 19.) *Gibson* is inapt for any number of different reasons,

including the fact that there was no initial dispute regarding the waivers at issue; in fact, the appellant himself proposed them. 29 M.J. at 380. But to the extent the Government suggests that an SJA or convening authority can utilize a PTA to control what evidence is introduced against an accused at trial, such action represents a usurpation of the prosecutorial function of trial counsel (R.C.M. 502(d)(5)) and correspondingly undercuts assertions of neutrality by parties who are required to be so, in both fact and appearance. (JA at 16.)

Finally, the Government attempts to distinguish between a finalized stipulation of fact offered as a prosecution exhibit at trial from a stipulation in draft form, suggesting that an SJA can help form the latter without embodying the role of trial counsel since the SJA is not ultimately responsible for presenting the document as evidence. (Govt Ans. at 21.) Taken to its logical extreme, the Government's proposition would allow an SJA to locate and interview witnesses hostile to an accused, prep these witnesses to testify against the accused, gather evidence against the accused, and prep this evidence for trial; all without encroaching upon the role of trial counsel and without raising questions

regarding the SJA's impartiality. For obvious reasons, this should not be the rule.

2. *The Government overstates its parade of horribles.*

The Government implores this Court to carefully define the role of the SJA with respect to pretrial agreements, and cautions that "any holding now that chills their ability to freely negotiate would have drastic consequences, namely decreasing the likelihood of reaching agreements that benefit both the United States and an accused." (Govt Ans. at 30.) As a starting point, this dire prediction is contradicted by the Government's own concession that Lt Col Mahmud took "an unusual step" in personally discussing the stipulation of fact. (Govt Ans. at 17.) The lower court similarly suggested Lt Col Mahmud's conduct was atypical, expressly noting how it did not indorse his "direct participation in negotiating the content of the stipulation of fact." (JA at 9.) As all parties seem to acknowledge that SJAs rarely (if ever) negotiate stipulations of fact, then surely the sky will not fall if this Court agrees with Appellant's position.

In any event, it is not Appellant's position that Lt Col Mahmud's "unusual step" of calling Capt Cox to discuss the stipulation of fact was

per se unlawful or that an SJA may never negotiate the terms of a stipulation of fact. Rather, once Lt Col Mahmud chose to negotiate terms to include in a Government exhibit, he stepped into the trial counsel's shoes and was disqualified from providing post-trial advice. Precluding an SJA from providing a clemency recommendation for an accused who the SJA has helped build a case against will not result in "drastic consequences." (Govt Ans. at 30.) Rather, it guarantees that Appellant and others like him receive fair and impartial post-trial reviews.

3. *The Defense's failure to raise this issue at trial is a red herring.*

The Government emphasizes how Capt Cox and Appellant did not raise the issue of Lt Col Mahmud's involvement in the stipulation of fact at trial.[1] This detail is irrelevant to this Court's analysis of the granted issue. Appellant is not contending he was unlawfully compelled into the stipulation of fact, or that the document contained unlawful terms. Rather, Appellant reiterates his objection—raised both prior to and

[1] "Appellant, and defense counsel, were silent about any concerns they had with the contents of the agreement or how the terms of the agreement were agreed upon or performed." (Govt Ans. at 5.) The Government further notes how, "[a]t trial, neither Appellant nor Capt Cox raised any concerns about the truth of these facts stipulated, or how these facts came to be included in the stipulation. (Govt Ans. at 6.)

during clemency—to Lt Col Mahmud's involvement in the post-trial review based on the SJA's earlier involvement in the stipulation of fact negotiation. (JA at 33.) Thus, this case involves a properly preserved post-trial issue rather than a potentially waived trial matter.

4. *Lt Col Mahmud's purpose in calling defense counsel was to introduce aggravating evidence in the stipulation of fact.*

In an effort to counter the appearance of Lt Col Mahmud's personal interest in the case, the Government contends that his phone call "was about including the information from the confession, including the number of uses and the mitigating evidence." (Govt Ans. at 25 citing JA at 32.) But the record does not support this assertion.

Lt Col Mahmud never averred that his role in the negotiation of the stipulation of fact was to present the convening authority with both aggravating and mitigating evidence. (Govt Ans. at 25 citing JA at 32.) Rather, his efforts were solely to ensure "the pretrial agreement captured appropriately the nature of the misconduct." (JA at 3, 32-33.) This apparently meant it had to include substantially more criminal activity by Appellant—expanding his drug use from one or more instances to nearly two hundred. That the defense subsequently tried to make lemonade out of the lemons Lt Col Mahmud provided does not sanitize

the SJA's earlier motivation and personal interest in the case. Indeed, Lt Col Mahmud had already evinced his personal stake in the case when, despite his claim to not care whether there was PTA or not, he felt compelled to take the "unusual step" of personally contacting the defense counsel after his assigned trial counsel had failed to secure the information he desired in the stipulation of fact. (JA at 32.)

Assuming, *arguendo*, that Lt Col Mahmud showed magnanimity in allowing *some* mitigating evidence in the stipulation of fact, this evidence was far outweighed by Appellant's "about 190 separate and individual uses of marijuana and cocaine." (JA at 128.) Even the Government acknowledged this disparity at trial, arguing that despite Appellant's confessions and truthfulness, an appropriate punishment would be the maximum 12 months confinement available at a Special Court-Martial.[2] (JA at 103.) Consequently, while the Government was able to emphasize Appellant's multiple and repeated acts of criminal activity, the Defense could only point to Appellant's willingness to take responsibility—a fact

[2] If not for Appellant's work as a confidential informant, the Government apparently would have recommended the maximum punishment. (JA at 103.)

already apparent to a military judge presiding alone as the sentencing authority in a guilty plea court-martial.

Finally, as discussed *supra*, there is no authority for an SJA to negotiate any specific terms in a PTA, mitigating or aggravating in nature. Determining what evidence to offer on behalf of the Government remains within the exclusive province of trial counsel, and Lt Col Mahmud overstepped when he assumed this responsibility. R.C.M. 502(d)(5).

5. *AB Chandler demonstrated a colorable showing of possible prejudice when Lt Col Mahmud refusing to disqualify himself.*

The threshold for demonstrating prejudice is low and only requires a "colorable showing of possible prejudice." *United States v. Stefan*, 69 M.J. 256, 259 (C.A.A.F. 2010) (citations omitted). The Government argues that this case is similar to *Stefan* in that the post-trial recommendation was "plain-vanilla in substance." (Govt Ans. at 33-34.) However, this case is different in multiple ways. In *Stefan,* the chief of military justice, who had previously signed the charge sheet, also signed the addendum to the SJA's recommendation, advising against appellant's request to reduce his dishonorable discharge. 69 M.J. at 257. This Court did not find any prejudice, opining that the chief of military

justice's involvement was relatively minimal with only a succinct recommendation of no clemency without further elaboration of the appellant's case. *Id.* at 259. Moreover, the appellant never objected to the chief of military justice's actions, as the issue was first raised *sua sponte* in a dissenting opinion at the lower court. *Id.* at 258.

In this case, Capt Cox raised the issue of Lt Col Mahmud's disqualification both prior to and during clemency. (JA at 24, 33.) Moreover, Lt Col Mahmud's involvement was not limited to a mere signature indicating service had been effected. *Stefan,* 69 M.J. at 258. Instead, Lt Col Mahmud's took the "unusual step" of personally calling defense counsel, which resulted in the inclusion of facts that "dramatically changed the scope of the misconduct that would be presented to the military judge for use in determining an appropriate sentence." (JA at 16.) From there, Lt Col Mahmud authored both the Staff Judge Advocate Recommendation (SJAR) and its addendum. (JA at 19-20, 28-30.) And in this addendum, he notably disputed Capt Cox's factual assertions, assuring the convening authority that he had not "actively participated" in the preparation of the case. (JA at 29.) So despite believing Capt Cox guilty of a "mischaracterization" of his own

conduct (JA at 32), Lt Col Mahmud chose to review the legal sufficiency of Capt Cox's argument; ultimately concluding it was "without merit." (JA at 29.) These circumstances are wholly different from providing a "plain-vanilla" recommendation in an addendum which merely echoes an SJAR written by another legal officer. *Stefan,* 69 M.J. at 258.

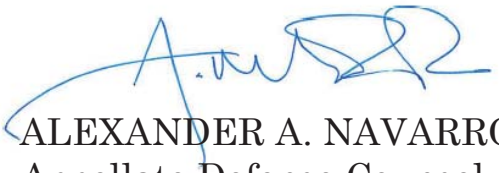
A disqualified staff judge advocate's participation in the post-trial review process is a serious deficiency. *United States v. Taylor*, 60 M.J. 190, 195 (C.A.A.F. 2004). This Court has frequently observed that "a military accused's 'best hope for sentence relief from a court-martial judgment comes in the convening authority's action.'" (*Id.* (citation omitted.)) The staff judge advocate's recommendation "plays a pivotal role in an accused's chances for relief. Thus, the staff judge advocate's disqualification in preparing this recommendation cannot be said to be a technical matter without impact on the outcome of these proceedings." (*Id.*)

As applied here, there was realistic chance of clemency. The convening authority was "a very reasonable man" and Appellant's request was minimal but meaningful. (JA at 21, 33.) Appellant had only two weeks or so left of his adjudged confinement. (JA at 26, fn 6.) The

short time he requested in relief would have allowed his release just prior to July 4th—a meaningful and positive show of mercy by the convening authority. (*Id.*) Given these facts, this Court should not be confident that "an impartial staff judge advocate would have made the same recommendation or that a convening authority advised by such an impartial staff judge advocate would not have granted Appellant some degree of sentence relief." (JA at 18.)

WHEREFORE, Appellant respectfully requests this Honorable Court reverse the Air Force Court of Criminal Appeals decision and remand the case for new post-trial processing involving an impartial SJA.

Respectfully Submitted,



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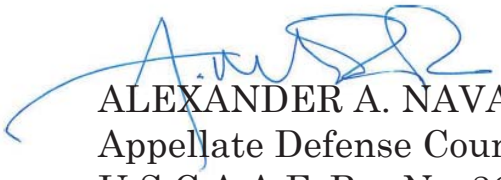
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served via electronic mail on the Air Force Government Division on June 29, 2020.



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