19 June 2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	Crim. App. No. S32534
Airman Basic (E-1), KEVIN S. CHANDLER, USAF, *Appellant.*	)	USCA Dkt. No. 20-0618/AF

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

GRANTED ISSUE

THE STAFF JUDGE ADVOCATE NEGOTIATED THE INCLUSION OF AGGRAVATING EVIDENCE IN A STIPULATION OF FACT. OVER DEFENSE OBJECTION, AND AFTER DISPUTING THE DEFENSE'S VERSION OF EVENTS, THE STAFF JUDGE ADVOCATE PROVIDED POST-TRIAL ADVICE TO THE CONVENING AUTHORITY. DID THE STAFF JUDGE ADVOCATE'S PRE-TRIAL CONDUCT WARRANT DISQUALIFICATION?

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, Uniform Code of Military Justice (UCMJ). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's Statement of the Case is generally correct. The terms of Appellant's pre-trial agreement (PTA) were: to plead guilty to all charges and specifications; to enter into a reasonable stipulation of fact with the government; to not request witness employment or travel at the government expense; to waive the right to trial by members and to elect trial by military judge alone; to waive all waivable motions; and to waive all expert consultations. (JA at 179.) In exchange for Appellant's performance of the above terms, the convening authority agreed to limit Appellant's possible sentence—if confinement were adjudged, the approved sentence would not exceed six (6) months. (JA at 182.) At trial, the military judge sentenced Appellant to a bad conduct discharge, five months confinement, and forfeitures of $1,000 pay per month for five months. (JA at 119.)

STATEMENT OF FACTS

Pre-Trial

Prior to Appellant's trial, trial defense counsel, Capt Cox,[1] and the Tinker Air Force Base legal office (namely the Chief of Military Justice and other assistant staff judge advocates) engaged in several conversations about a pre-trial agreement for Appellant, as well as exchanged some drafts of a "reasonable"

[1] Major Cox was a Captain at the time of the negotiations and trial, and for ease of reference will be referred to as Captain (Capt.). (JA at 3.)

stipulation of fact. (JA at 33.) Capt Cox felt the stipulation "only needed to indicate 'more than one' use for each drug" in order to be legally sufficient. (JA at 33.) Given Capt Cox's unreasonable position, trial and defense counsel were at an impasse about how many uses needed to be contained in the stipulation in order for it to be both legally sufficient *and* reasonable. (JA at 32.) The stipulation of fact in question was already in draft form with trial and defense counsel for days before the phone call which is now the main subject of this appeal. (JA at 32.)

This phone call occurred on or about 2 March 2018, about 11 days before the final pre-trial agreement was signed and 20 days before the trial date. (JA at 1; 32; 180-82.) Lieutenant Colonel (Lt Col) Amer Mahmud, the base Staff Judge Advocate (SJA), called Capt Cox to discuss the stipulation of fact. (JA at 32.) In addition to Lt Col Mahmud, government trial counsel, defense counsel and defense paralegal were a part of this phone call. (JA at 27; 32.) Lt Col Mahmud became involved because counsel were unable to agree to terms in the stipulation and because he wanted to avoid any costly delays for the government or any negative mission impacts. (JA at 32.) Lt Col Mahmud participated in this phone call with counsel in his capacity as the senior legal advisor to the convening authority. (JA at 32.)

Lt Col Mahmud communicated to all parties that the current version of the stipulation was insufficient to meet the terms of the proposed pre-trial agreement

as it did not include Appellant's admission to "150 uses of cocaine and 40 uses of marijuana." (JA at 32-33.) Lt Col Mahmud wanted to have this information included in the stipulation in order to ensure there was a *reasonable* PTA for the convening authority to sign which appropriately covered the nature of the charged misconduct. (JA at 32.) According to the defense paralegal, Lt Col Mahmud "specifically requested [inclusion of the number of uses of cocaine] *as part of the PTA negotiations*." (JA at 27.)(emphasis added.) During this call, Lt Col Mahmud told Capt Cox that the options available to Appellant were: include the information requested in the stipulation as a required part of the PTA, stop negotiations and litigate the case fully, or submit the proposed agreement to the convening authority as the defense saw fit. (JA at 32.) Lt Col Mahmud did not insist or demand any particular outcome for Appellant and had no personal interest in whether there was a pre-trial agreement or a litigated case. (JA at 32.)

On 13 March 2018, Appellant and the convening authority reached an agreement in his case, including a reasonable stipulation of fact detailing the exact number of uses as discussed by the SJA and all parties. (JA at 180-82.) The agreement was signed by Appellant, his counsel, the staff judge advocate and the convening authority. (JA at 180-81.)

The Trial

Although Appellant had signed the pre-trial agreement prior to trial, the military judge carefully inquired about the terms and Appellant's understanding of the pre-trial agreement with Appellant at trial. (JA at 77-87.) To ensure both understanding of and compliance with the pre-trial agreement, the military judge walked through each of the terms of the agreement with Appellant, including the term to enter into a reasonable stipulation of fact with the government. (JA at 79.) During this inquiry, 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. (JA at 79.) During the inquiry into the PTA on the record, Appellant acknowledged he was not forced to enter into the agreement, and he understood all of the terms contained in the agreement. (JA at 77-78.) Appellant understood his agreement would be cancelled if he failed to agree with trial counsel on reasonable stipulations concerning facts and circumstances. (JA at 180.)

In addition to reviewing the terms of the pre-trial agreement with Appellant at trial, the military judge carefully reviewed the stipulation of fact with Appellant. (JA at 39-47.) The stipulation was labeled Prosecution Exhibit 1, and was described to Appellant as an agreement among trial counsel, defense counsel and Appellant that the contents of the stipulation were true and uncontradicted [sic]

facts. (JA at 40.) Appellant stated on the record that he understood what the stipulation was and what it would be used for, and affirmed he was voluntarily entering into the stipulation because he believed it was in his best interest to do so. (JA at 40.) The military judge specifically asked Appellant about stipulating to his 150 uses of cocaine, and 40 uses of marijuana and the burden of corroboration. (JA at 45.) Appellant agreed stipulating to these facts was the "right thing to do" in his case. (JA at 45.) At 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. (JA at 45.)

After the military judge accepted Appellant's pleas of guilty to the charges and specifications, the United States presented additional evidence for sentencing. By the time of his trial, Appellant had served in the Air Force for two (2) years and four (4) months. (JA at 129.) In this time, and before his trial for drug use and distribution, Appellant had received: a non-judicial punishment for underage drinking (JA 130-37); a letter of counseling being late to work (JA at 138-141); a letter of reprimand for being late to work (JA at 142-145); a letter of reprimand for failing to pay for a haircut on base (JA at 146-149); a letter of counseling for failing to maintain dorm room standards (JA at 149-51); non-judicial punishment for failing to report to work on time and failing to obey a lawful order (JA at 152-57); and a vacation action of a non-judicial punishment for violating restriction.

(JA at 158-60.) Appellant's prior, and still deferred, plea of guilty to misdemeanor assault in the territory of Guam in 2016 was also admitted into evidence at sentencing. (JA at 165-172.) The United States also offered as evidence Appellant's confession to Air Force law enforcement, dated 13 October 2017, confessing to the charged conduct in this court martial, including his using cocaine "regularly, every weekend to every day for about 5 months," and the fact that he spent a lot of time in Oklahoma smoking marijuana. (JA at 163.) Notably, Appellant was already an Airman Basic (E-1) by the dates of his court-martial for the drug-related misconduct. (JA at 129.)

During sentencing argument, trial counsel recommended Appellant be sentenced to a bad conduct discharge and eight months confinement. (JA 102-03.) As support for this recommendation, trial counsel highlighted Appellant's "array of crimes" committed while serving his country, Appellant's admission of 190 separate and individual uses of marijuana or cocaine and the embarrassment Appellant caused to the military. (JA at 103.) Trial counsel argued Appellant showed "a special kind of disregard for the mission of the Air Force and respect for his command to continue to abuse drugs after confessing to OSI that he was distributing cocaine and marijuana and using cocaine and marijuana." (JA at 104.) Trial counsel argued eight months of confinement was appropriate in order to protect society from Appellant and to deter Appellant, especially in light of the

multiple failed attempts at rehabilitation of Appellant in the past. (JA at 104-05.) In trial counsel's words, "since [Appellant] can't confine his behavior, the court should. Confinement stops [Appellant] from further infecting the military community with drugs. Confinement stops [Appellant] from continuing to contribute to the drug trade in the local area." (JA at 106.) In conclusion, trial counsel stated, "The bottom line here, Your Honor, is that the crimes before the court today are an egregious departure from the uniform that [Appellant] is wearing right now. There is no meritorious service here, but rather a drastic escalation of unacceptable criminal misconduct." (JA at 107.)

During sentencing, trial defense counsel presented evidence of Appellant's traumatic past which led to his life of crime and drugs as a means to escape, as well as Appellant's assistance to law enforcement after he was caught. (JA at 173-77.) However, despite the evidence offered by the defense, the sentencing argument focused on other aspects of the case. It is undeniable that trial defense counsel's theme and theory for extenuation and mitigation in argument was his client's willingness to admit and stipulate to the 190 uses now in question. To begin, Appellant's trial defense counsel argued that Appellant pled guilty and that "99 percent" of the evidence against Appellant was provided by Appellant. (JA at 109.) Trial defense counsel then argued that the only reason the court knew about the extent of his drug use was because Appellant stipulated to that fact,

because it was the right thing to do. (JA at 110.) Trial defense counsel further stated it was a "remarkable" and "noble" thing for Appellant to confess to all of these uses to law enforcement. (JA at 110.) Trial defense counsel asked the judge to consider that Appellant had the moral and legal right to plead not guilty, yet despite knowing the government cannot corroborate Appellant's confession, Appellant's willingness to still plead guilty shows he is a "man who wants to take responsibility," and in so doing Appellant had taken the first step of rehabilitation and accountability. (JA at 110-11.) Trial defense counsel continued to reiterate that the government was touting Appellant's 190 uses, but urged the court to consider that Appellant "gave" the court 190 uses, "putting himself at [the judge's] mercy to sentence him." (JA at 111.) Trial defense counsel argued his client's willingness to stipulate to 190 uncorroborated uses was incredibly important, and emphasized Appellant's integrity as he asked the judge to consider a sentence without a bad conduct discharge and little to no jail time. (JA at 112.)

Trial defense counsel further argued that if the Air Force truly valued integrity, that Appellant "deserved points" for his integrity by pleading to the multiple uses above and beyond what was required. (JA at 113.) In fact, counsel argued that this point was "undeniable," and that Appellant deserved credit, as "more jaded people might not believe the Air Force would even care that [Appellant] has taken ownership and he is being honest." (JA at 113.) Trial

defense counsel surmised that if the judge did not give Appellant appropriate credit for pleading to the 190 uses, it would make integrity a "catch phrase" and pose the risk that our judicial system only used integrity when convenient or served one purpose. (JA at 113.) Trial defense counsel argued that the government was "[h]appy to admit that [Appellant] used 190 times, but then when it comes to [Appellant] saying that he wants to change, he wants to get past all this, that's a lie." (JA at 113.) Defense counsel suggested that it was hypocritical for the government to rely on Appellant's admissions in order to convict him, but then to discount any evidence Appellant presented in extenuation or mitigation because the military judge could not trust Appellant since "[h]e's a dirt bag." (JA at 113.) Finally, trial defense counsel also mentioned Appellant's work with law enforcement as a confidential informant in dangerous situations. (JA at 114.) In conclusion, trial defense counsel recommended the judge not adjudge a bad conduct discharge and only adjudge a fraction of the confinement asked for by the United States. (JA at 118.)

After hearing all of the evidence and argument in sentencing, the military judge sentenced Appellant "to forfeit $1,000 pay per month for five months; to be confined for five months; and, to be discharged from the service with a bad conduct discharge." (JA at 119.) The pre-trial agreement did not limit this

sentence, as the adjudged confinement was under the cap agreed upon by the convening authority and Appellant. (JA at 182.)

Post-Trial

On 8 June 2018, Lt Col Mahmud signed the Staff Judge Advocate Recommendation (SJAR.) (JA at 19.) Lt Col Mahmud advised the convening authority he had the ability to grant clemency in the form of disapproving, commuting or suspending, in whole or in part, the adjudged forfeitures and the confinement. (JA at 19.) Lt Col Mahmud advised that the adjudged sentence was appropriate for the offenses for which Appellant was convicted, and that the convening authority should approve the adjudged sentence. (JA at 19-20.)

Capt Cox still represented Appellant during his clemency. (JA at 26.) In Appellant's request for clemency, Capt Cox raised the issue of Lt Col Mahmud's participation in the phone call, as well as other alleged legal errors. (JA at 21-27.) Capt Cox reiterated the same theme from the trial in his clemency request, claiming that Appellant "admitted to offenses that could not have been proven otherwise." (JA at 25.)[2] Appellant requested clemency in the form of early release

[2] During the trial, the military judge asked Appellant if he "understand that it is a very low bar, in fact, the term used in some cases is a scintilla of evidence may be used to corroborate a confession." (JA at 45.) Appellant stated he understood. (JA at 45.) The United States had already secured immunity for AB Stuteville, and was in possession of several positive drug tests, but the record does not indicate the extent of the testimony AB Stuteville would have given. (JA at 32, 91.) Law

from confinement through disapproval of some of the adjudged confinement, as well as reduction of the adjudged forfeitures. (JA at 26.)

In his addendum to the SJAR, Lt Col Mahmud advised the convening authority that all raised issues in clemency had no merit. (JA at 28-29.) Consistent with his declaration to the Court on appeal, Lt Col Mahmud stated in the Addendum to the SJAR that, "[t]he conversation raised by defense counsel centered on certain facts being stipulated between defense counsel and the government for the stipulation of fact, which was to be part of the defense offer for the pre-trial agreement." (JA at 29.) He continued, "[a]side from that one telephonic conversation with the parties, I have not actively participated in the preparation of this case, and I have had only an official interest in the case based on my role as advisor to the convening authority per RCM 1106(b)." (JA at 29.) Lt Col Mahmud concluded this advice to the convening authority by stating that the matters submitted in clemency did not change his earlier recommendation to approve the adjudged sentence. (JA at 29.) The convening authority approved the sentence as adjudged. (JA at 31.)

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enforcement officers testified that their initial investigation revealed "zero" people who could testify they used drugs with Appellant. (JA at 90.) Had this been a litigated trial, there is the possibility the United States could have found additional witnesses. At the point of the guilty plea trial, these witnesses, if any, had not been identified.

The Air Force Court reviewed the same issue on appeal below. (JA at 1-10.) In a 2-1 vote, the majority concluded that the SJA did not err in providing post-trial advice after his participation in the phone call. (JA at 7-9.) The majority reached this conclusion relying on the "narrow factual basis for the asserted disqualification," in considering that the context of the phone call was closely-related, in substance and in time, to the negotiation of the PTA, and because of the absence of a material factual controversy or personal interest in the case. (JA at 7-9.) The CCA continued that even if the SJA did act in a prosecutorial capacity on the phone call, Appellant did not demonstrate a colorable showing of possible prejudice. (JA at 9-10.)

SUMMARY OF THE ARGUMENT

Although the staff judge advocate took an unusual step in calling trial defense counsel to discuss the contents of the stipulation of fact, in light of the facts of this case and the timing of the phone call, the SJA's actions were conducted strictly in the performance of an SJA's role as allowed by R.C.M. 705(d)(1). In total, the SJA's actions did not amount to prosecutorial conduct, reflect personal interest in the case or appear unfair, and therefore did not warrant future recusal of Lt Col Mahmud for post-trial advice. Further, even if the actions of the SJA on 2 March 2018 were inherently prosecutorial, Appellant was not

prejudiced. The Air Force Court did not err in affirming Appellant's approved convictions and sentence.

ARGUMENT

THE AIR FORCE COURT DID NOT ERR IN AFFIRMING APPELLANT'S CONVICTIONS AND SENTENCE SINCE THE SJA ACTED WITHIN THE SCOPE OF HIS EXPRESS AUTHORITY. EVEN IF THE SJA ERRED, APPELLANT WAS NOT PREJUDICED.

This Court reviews de novo the question of whether a staff judge advocate is disqualified from participating in the post-trial review, as it is a question of law. United States v. Taylor, 60 M.J. 190, 194 (C.A.A.F. 2004). Appellant bears the burden of setting out a prima facie case for disqualification. Id, citing United States v. Wansley, 46 M.J. 335, 337 (C.A.A.F. 1997). To find reversible error, an appellant must make "some colorable showing of possible prejudice." United States v. Stefan, 69 M.J. 256, 259 (C.A.A.F. 2010)

Appellant contends the SJA, Lt Col Mahmud, was disqualified from providing the convening authority post-trial advice on his case because (1) he performed a function of trial counsel by directly shaping the evidence that was presented to the military judge in a prosecution exhibit; (2) his actions reflected a personal interest in the case; (3) there was a legitimate factual controversy over his

pre-trial conduct; and (4) his conduct created the appearance of unfairness during the post-trial process. (App. Br. at 14.) Appellant is mistaken on all counts.

The SJA did not perform a prosecutorial function

Both Article 6(c), UCMJ, 10 U.S.C. § 806(c), and Rule for Courts-Martial (R.C.M.) 1106(b), provide that "an SJA is disqualified from the post-trial review process if the SJA acted as a member, military judge, prosecutor, defense counsel, or an investigating officer." United States v. Sorrell, 47 M.J. 432, 433 (C.A.A.F. 1998). A person need not be detailed as trial counsel in order to "act" as trial counsel for purposes of Article 6(c), UCMJ. Stefan, 69 M.J. at 258. A person is disqualified if that person performed the duties of the disqualifying position. Stefan, 69 M.J. at 258. When considering if a person has performed disqualifying duties, the factors to be considered are "the action taken, the position of the person that would normally take that action, and the capacity in which the action is claimed to have been taken." Stefan, 69 M.J. at 258. Applying these factors to the facts at bar clearly shows that Lt Col Mahmud did not perform disqualifying duties.

With respect to the single phone call made by Lt Col Mahmud to trial and defense counsel, Lt Col Mahmud was expressly *allowed* to partake in this action as an SJA, not as a prosecutor. An SJA has a complex role in the prosecutions that occur under his or her watch. One clearly defined role is to participate in pre-trial

agreement negotiations. R.C.M. 705(d)(1) provides, inter alia, that "[p]retrial agreement negotiations may be initiated by the accused, defense counsel, trial counsel, the *staff judge advocate, convening authority*, or their duly authorized representatives." (emphasis added.) During the phone call, the SJA was acting in his advisory capacity to the convening authority with regard to Appellant's proposed pre-trial agreement offer. One portion of that PTA offer included a term that Appellant would enter into a "reasonable stipulation of fact with the government."[3] The SJA, in this instance, was charged through the Rules for Court Martial with advising the convening authority on whether or not to enter into a PTA with Appellant and further charged with ensuring one portion of the PTA, namely Appellant entering into a reasonable stipulation of fact, was satisfied.

Still, Appellant fails to recognize or acknowledge an SJA's duty to advise the convening authority as to each term of a PTA and whether those terms have been met before recommending acceptance of the PTA. Here, Lt Col Mahmud's discussion with Capt Cox regarding the stipulation of fact was inextricably tied in form and function to the PTA term of entering into a "reasonable stipulation of fact." Lt Col Mahmud was merely laying out the conditions under which the convening authority would or would not enter into a PTA with Appellant as the

[3] R.C.M. 705(c)(2)(A) dictates that "a promise to enter into a stipulation of fact concerning offenses to which a pela of guilty . . . will be entered" is a permissible term or condition of a pre-trial agreement.

Rules for Court Martial allow an SJA to do. Therefore, such an action by the SJA in this circumstance did not warrant disqualification.

The record shows trial and defense counsel were unable to reach an agreement before Lt Col Mahmud, as the advisor to the convening authority, made the convening authority's position known. Lt Col Mahmud rightfully believed such a stance by Appellant and his counsel would not result in a "reasonable stipulation of fact," or ultimately no signed PTA. The evidence in this case included a confession by Appellant to specific amounts of drug use. The government had evidence of over 150 uses of cocaine and 40 uses of marijuana, yet trial defense counsel readily admitted that he only wanted to "indicate 'more than one' use" for each of these drugs in the Stipulation of Fact. (JA at 33.) Lt Col Mahmud appropriately explained what facts, in his opinion, needed to be included in the stipulation for it to be a "reasonable stipulation of fact" as required by Appellant's own PTA offer to the convening authority.

In his affidavit, Capt Cox focuses on the unusual communication with the SJA that initially seemed out of place in order to show the SJA acted as a prosecutor. (*See* JA at 33.) However, the lower court aptly noted "the context of the conversation in question is highly significant. Specifically, this conversation regarding the stipulation of fact was *closely-related, in substance and in time, to*

the negotiation of the PTA—a negotiation an SJA is expressly authorized to participate in." (JA at 8.)

Importantly, this discussion occurred prior to the PTA being signed or agreed upon, so the record supports the premise that the acceptance of the PTA was conditioned on the specific number of uses being included. While there are times where a PTA is signed and the prosecutors, not the SJAs, toil over the details of the stipulation until the eve of trial, that is not this case. The conversation between the parties and the SJA did not occur after a PTA was signed—it is undisputed that this was an active and ongoing negotiation to arrive at a PTA between Appellant and the convening authority.

AFCCA's later words of warning to the SJA in its opinion show that this case was a close call,[4] but AFCCA's assessment should not be read to admit error. This would be a different case, and perhaps different result, had the SJA called Capt Cox on the eve of trial, after a signed PTA, and tried to add facts for the presentation at trial. But here, there is a clear distinction that a "reasonable stipulation of fact," including the scope of the charged misconduct, was a

[4] "[W]e do not indorse Lt Col AM's direct participation in negotiating the content of the stipulation of fact. It is not clear from the record why Lt Col AM felt the need to do so, as opposed to participating by communicating with trial counsel; but in doing so he created a risk the conversation might have blossomed into a material factual dispute or legal controversy with the Defense that would have been disqualifying." (JA at 9.)

necessary for the convening authority to agree to Appellant's PTA offer. Further, it follows that an unreasonable stipulation omitting the full facts and circumstances of the charged conduct, would have resulted in the SJA, in his advisory capacity to the convening authority, recommending rejection of the offer for a pre-trial agreement. Finally, despite Appellant and the dissenting judge's implication, negotiating what evidence will be put before the fact finder as part of a PTA is a fairly typical occurrence that should not automatically disqualify the SJA. (See, e.g., United States v. Gibson, 29 M.J. 379 (C.M.A. 1990) (finding an agreement not to object to the introduction of certain evidence is a permissible term of a PTA.)

This is also not a case where the SJA singled out the defense counsel for a private conversation or completely replaced the prosecutor with himself in the discussion. Instead, the SJA included *all* parties in the phone call. In context, because this call occurred while PTA negotiations were still active, it is clear Lt Col Mahmud was acting as the SJA, not a prosecutor. There is no talismanic quality to a phone call from the SJA to a base defense counsel that transforms an SJA into a prosecutor. Taken in the context of this case, the SJA was properly performing his duties as an SJA and did not transform himself into a prosecutor. Notably, besides this one telephone call, neither Appellant nor Capt Cox alleges that Lt Col Mahmud was otherwise involved in Appellant's case.

Moreover, Appellant's characterization that the number of uses was only aggravating evidence is incorrect. *See* United States v. Vickers, 13 M.J. 403 (C.M.A. 1982.) Here, Capt Cox's proposed bare-boned stipulation of fact that included only the elements of proof language of "more than one" use wholly omitted other relevant facts and circumstances as to Appellant's charged offenses, namely Appellant's own admission to the number of times he had used drugs. Moreover, Appellant's claim that Lt Col Mahmud's actions were designed solely to increase Appellant's punishment is misplaced, as it discounts an SJA's duty to the convening authority to ensure that relevant facts and circumstances of a case will be brought before a court-martial should a PTA offer be accepted. Appellant was charged with divers use, and the number of uses alleged are necessary facts to prove the element of divers use of the charged offenses. The number of uses are needed to satisfy the elements of the offense, and depending on the level of usage, could be aggravating or mitigating in sentencing.[5]

[5] Appellant was charged with divers use of both cocaine and marijuana. (JA at 50.) Had Appellant only used each drug twice, it is likely Appellant would want to put the number of uses in the stipulation to show the "mitigating" circumstances as "only" two uses rather than divers, prolific use. Here, it is no fault of the government, or the SJA, that the number of uses by Appellant is aggravating. One-hundred and fifty (150) and forty (40) uses sounds aggravating because it is aggravating—and is the criminal conduct Appellant alone committed and for which Appellant pled guilty.

The United States does not debate that the stipulation of fact, once final, is a prosecution exhibit signed and entered into evidence at trial by the United States. However, while in draft form, and while a bargained-for of a larger PTA, it is no such exhibit. While a stipulation of fact does ultimately put facts before a trier of fact, in this case during the time surrounding phone call it was a piece of the PTA negotiation, and therefore well within the SJA's purview to comment on as the SJA. It also does not follow that the SJA erred by "directly shaping the evidence presented to the military judge at trial." (JA at 015.) *Appellant* is the one who confessed to the crimes at OSI, and, in written form, made them known to the government. Appellant is the one who chose to plead guilty, and to enter into a pre-trial agreement of his own free will. Appellant is the one who signed the stipulation of fact, presenting these facts to the judge as he so desired at trial.

The majority court opinion below correctly noted "[n]either Appellant nor our dissenting colleague has cited any decision by our superior court . . . or our sister courts in which an SJA's participation in the creation of a stipulation of fact required by a PTA resulted in the SJA's disqualification, and we are aware of none." (JA at 8.) Thus, the cases cited by Appellant and discussed by the dissenting judge below are not binding--there is no precedent for determining whether the specific actions taken by the SJA in this case were clearly prosecutorial.

As a case in support of whether an SJA has the authority to discuss the contents of a stipulation of fact without irreversibly transforming into a prosecutor, Appellant cites United States v. Dean, 67 M.J. 224 (C.A.A.F. 2009). In Dean, a convening authority and servicemember entered into a pre-trial agreement, but the servicemember refused to enter into a modified stipulation of fact on the eve of trial that included information about additional offenses he allegedly committed as evidence in aggravation, so the convening authority withdrew from the pre-trial agreement. This Court held that the convening authority did not properly withdraw from the pre-trial agreement in Dean, because under R.C.M. 705(d)(4)(B), the servicemember had already performed several tasks he agreed to perform. This case is distinguishable from Dean in several ways. First, unlike this case, the stipulation in Dean was being negotiated *after* the pre-trial agreement was signed, and the issue revolved around the potential to withdraw from the agreement and performance of promises. Dean, 67 M.J. 227-28. Further, in that case, the stipulation of fact attempted to include uncharged misconduct as aggravation evidence. That is very different than what was requested to be included here, which were facts directly related to the charged misconduct. Notably, in Dean, the proposed changes came on the eve of trial and after the appellant had already begun performance of his portion of the agreement. For all these reasons, Dean does not control the outcome of this case.

In conclusion, in looking at the narrow action taken by Lt Col Mahmud, the express permission given to him to take that action as SJA, and the context of the case, it is clear that Lt Col Mahmud did not act as a prosecutor in this case. Therefore, there was no reason to disqualify himself from advising the convening authority during post-trial proceedings, as the court below correctly concluded.

Appellant has failed to show how Lt Col Mahmud's actions reflected a personal interest in the case

The Discussion to R.C.M. 1106(b) establishes that an SJA will be disqualified if he or she has an "other than official interest" in the case, or must review [his or her] own pre-trial action . . . when the sufficiency or correctness of the earlier action has been placed in issue. "Other than official interest" is defined as "a personal interest or feeling in the outcome of a particular case." United States v. Rice, 33 M.J. 451, 453 (C.M.A. 1991).

There is no showing of any fact that Lt Col Mahmud had a personal interest in this case. Appellant argues that because SJA wanted to include more uses to secure a harsher sentence, this shows he had a personal interest in the outcome of the case. (App. Br. at 20.) This argument falls short for several reasons. To begin, in this case the SJA had one "narrow" interaction related to the stipulation of fact. That it was only one conversation cuts against the idea he was trying to create or effect an outcome for the entire trial. Had Appellant shown that Lt Col Mahmud's

influence was stoking the fire of Appellant's trial frequently or in great detail, that could be a different case, but it simply is not the case at bar. Further, and importantly, the sentence in this case was capped by agreement of Appellant and the convening authority regardless of the facts discussed during the phone call with SJA.

Appellant also argues that because Lt Col Mahmud showed *any* interest in obtaining a pre-trial agreement (rather than a litigated trial), this interest must have been personal. (App. Br. at 20.) That argument bears no fruit on the facts of this case or as a whole in our justice system. As the United States discusses infra, there are valid, official government interests in obtaining a pre-trial agreement for a guilty plea in a court martial. Specific to the facts of this case, in Lt Col Mahmud's declaration to this Court, his stated interests aligned with those of official business, saving the government time and money. (JA at 32.) Absent evidence to the contrary or a showing of specific personal investment or bias by Lt Col Mahmud, Appellant fails to make his case. On the whole, when an SJA is acting as an SJA allowed under the R.C.M.'s, the starting point for this Court should be to presume the interests in securing a PTA are *only* official in nature. Appellant has made no showing to the contrary, nor should this Court find one.

Further, Lt Col Mahmud correctly notes that the agreed upon reasonable stipulation also "included mitigating information for the defense." (JA at 32.)[6] The *actual* stipulation signed cuts against Appellant's argument that "only" aggravating information needed to be included in the stipulation, and cuts against the argument that the SJA showed a personal interest in increasing Appellant's punitive exposure. The final language in the agreed upon stipulation read that Appellant "used marijuana approximate 40 times by smoking it. The Air Force may not have evidence to corroborate all of the 40 uses individually, but [Appellant] wants to admit what he did and take accountability for those uses." (JA at 120.) Later, it states that Appellant "used cocaine on approximately 150 different occasions. Although the government may not be able to corroborate all 150 specific uses [Appellant] admitted to AFOSI, [Appellant] agreed to admit to this fact because he believes it is the right thing to do." (JA at 121.) If the SJA had been acting with a personal vendetta, hard-set on only increasing Appellant's possible punishment, the mitigating language surrounding the uses might not have been agreed upon. Regardless, the narrow phone conversation resulted in inclusion of both aggravating, and mitigating, facts which were reasonable and appropriate

[6] According to Lt Col Mahmud, the phone call discussion was about including the information from the confession, including both the number of uses and the mitigating evidence. (JA at 32.) Capt Cox's declaration is silent about other mitigating evidence discussed during the phone call, but does not contradict Lt Col Mahmud's assertion on this point. (JA at 33.)

for the SJA to request on behalf of the convening authority and support the interests of justice, not any personal interests of the SJA.

Moreover, the fact that Lt Col Mahmud did not recuse himself after Appellant raised the issue post-trial does not indicate he had a personal interest in the case. (App. Br. at 21.) To the contrary, that he was put on notice, considered the issue and did not recuse himself shows he believed in good faith his interests were only official. There are also practical reasons an SJA would not want to set a precedent that every recusal request has merit and automatically requires recusing himself. If that were the case, the SJA's would be overly cautious and frequently remove themselves to avoid appellate issues, which would radically undermine the SJA's ability to consistently, or ever, advise his convening authority. To find the correct balance, this Court should consider the analogy proposed by AFCCA: "We find this situation akin to a military judge's ruling on a motion that the military judge should recuse himself—in such situations, the motion is not per se disqualifying; rather, the military judge has discretion to decide the matter, subject to appellate review." (JA at 7-8.) (citing United States v. Butcher, 56 M.J. 87, 90–91 (C.A.A.F. 2001.) In reviewing the SJA's choice to remain advisor, as this Court would do with a military judge, this Court should find the SJA's decision was permissible and appropriate.

Finally, upon review of the entire case here, there are no comments or actions by the SJA of a personal or unprofessional nature that begin to question the actions of Lt Col Mahmud. As AFCCA recognized, "Appellant does not allege any unlawfulness or legal deficiency with either the stipulation of fact or the PTA itself." (JA at 7.) Individually, and in sum, the facts support that Lt Col Mahmud acted only in an official capacity in this case.

Appellant has failed to show how Lt Col Mahmud's participation raised a material factual controversy

Although providing pre-trial advice to a convening authority will not disqualify a staff judge advocate from preparing the SJAR, "where a legitimate factual controversy exists between the staff judge advocate and the defense counsel, the staff judge advocate must disqualify himself from participating in the post-trial recommendation." United States v. Lynch, 39 M.J. 223, 228 (C.M.A. 1994) (citing United States v. Caritativo, 37 M.J. 175, 183 (C.M.A. 1993) *See also* United States v. Dresen, 47 M.J. 122, 124 (C.A.A.F. 1997).

No factual controversy exists in this case. Both Capt Cox and Lt Col Mahmud agree that Lt Col Mahmud spoke with counsel about evidence for the stipulation related the Appellant's divers use. While Capt Cox and Lt Col Mahmud did not agree on whether such a conversation disqualified Lt Col Mahmud from providing a recommendation in the SJAR, there was no

factual controversy as to the conversation itself. Appellant saying so does not make it so. The test for a legitimate factual controversy, is not simply a "he said, she said," test. Such a low threshold would open the door for overzealous defense counsel to recount every conversation with the staff judge advocate slightly differently in order to create appellate issues. Moreover, and importantly, in this case, there was another person who related the contents of this conversation to resolve any "dispute" as to the facts. The defense paralegal opined that the discussion was within the SJA's role of *negotiating the pre-trial agreement*, which shows there is no actual factual dispute to resolve. (JA at 27).

Even so, as the lower court stated, any factual difference must be material. The majority of judges below were correct in asserting that "[w]hether Lt Col AM's position is characterized as "insistence" or as "explaining options" is not the material point. [Capt] CC's post-trial objection to Lt Col AM's involvement was a question of law, not a factual dispute." (JA at 7.) Appellant now claims "Lt Col Mahmud chose to remain on the case after receiving a clemency package that he believed mischaracterized his pretrial conduct." (App. Br. at 23.) However, as a matter of *law*, either description of the SJA's conduct – whether "insisting" or "explaining options" – describes an appropriate position for the SJA to have taken as a negotiator on behalf of the convening authority. Therefore, his actions did not

create a *material* factual dispute requiring his disqualification. This should end the inquiry.

In conclusion, the SJA acted properly and in his official capacity when negotiating the terms of the pre-trial agreement. There is no question as to who was on the phone call, what was discussed or the outcome of that phone call. Even in light of Taylor, where this Court emphasized the need for the actual and perceived objectivity, fairness and integrity of the post-trial review, the facts of this case are not problematic. Taylor, 60 M.J. at 193. Here, the SJA's involvement in the pre-trial negotiations was merely ensuring that the entire range of Appellant's misconduct for which he was charged be put in from of the trier of fact, which has nothing to do with prejudging the post-trial review and clemency processes or outcome. Therefore, the lower Court did not error in upholding Appellant's approved convictions and sentence.

Nothing about Appellant's trial was or appeared to be unfair. This Court should not interpret the Rules for Courts-Martial to place limits on the SJA's ability to freely negotiate on the convening authority's behalf.

This Court has "broadly applied" Article 6(c), UCMJ, "in light of its well-established purpose 'to assure the accused a thoroughly fair and impartial review.'" United States v. Lynch, 39 M.J. 223, 227–28 (C.M.A. 1994)) (quoting United States v. Crunk, 15 C.M.R. 290, 293 (C.M.A. 1954)). Conduct by an SJA other

than performing one of the disqualifying roles specified in Article 6(c), UCMJ, and R.C.M. 1106(b) "'may be so antithetical to the integrity of the military justice system as to disqualify him from participation' in the post-trial review." Id. at 228 (quoting United States v. Engle, 1 M.J. 387, 389 (C.M.A. 1976)) (additional citation omitted). An SJA who advises a convening authority on action on the result of a court-martial needs to "be, and appear to be, objective." United States v. Dresen, 47 M.J. 122, 124 (C.A.A.F. 1997) (citations omitted).

As a case of first impression, it is important to carefully define the role of the SJA with respect to negotiating pre-trial agreements and their terms. SJAs are expressly allowed to initiate and participate in negotiating pre-trial agreements; 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. As this Court has said, pre-trial agreements are "a creature of a criminal justice system . . . a vehicle by which an accused agrees to make the prosecution's case against him easier in some substantial respect in return for some hedge in how severely he will be punished . . . [and] tend to promote efficiency in the criminal justice system." United States v. Gansemer, 38 M.J. 340, 345 (C.A.A.F. 1993). Therefore, this Court should not hold that any discussion by an SJA about the terms of a stipulation of fact as related to a term of a pre-trial agreement is *per se* prosecutorial and disqualifying.

Instead, this Court's proper application of the circumstantial test from Stefan—that is, "the action taken, the position of the person that would normally take that action, and the capacity in which the action is claimed to have been taken," will allow for the proper outcome. Stefan, 69 M.J. at 258. In the instant case, the timing and context of this conversation is the key. Again, there is no talismanic quality to a phone call from the SJA to a base defense counsel that should transform an SJA into a prosecutor, especially before there is a signed pre-trial agreement. Open and honest communications between all parties during such sensitive, and common, negotiations must freely continue unhampered by an opinion which narrows expressly granted rights. This argument is similar to one this Court has made before in another context; "Any exception to this rule [on attorney-client privileged communications] must ensure that there is no chilling effect on defendants freely speaking with their military lawyers." United States v. Godshalk, 44 M.J. 487, 490 (C.A.A.F. 1996.) (internal citation omitted). Allowing future SJAs to freely negotiate PTAs, including reasonable stipulations of fact prior to any pre-trial agreement being signed, is not only the desired outcome of the United States, but the required outcome for justice.

As to the appearance of fairness, there is nothing in this case that would raise the eyebrow of someone outside looking in on our justice system. To begin, recall the narrow circumstances which raise the question of recusal—Lt Col Mahmud's

single phone call. This phone call was not done privately, or in an improper manner. The phone call did not occur on the eve of trial, leaving Appellant with little to no choice to comply with the convening authority's terms or lose the deal. Lt Col Mahmud did not appear at or participate in the trial in any way, and the military judge, selected by Appellant to sit as trier of fact, was unaware as to any involvement by the SJA in the case. Instead, Lt Col Mahmud never entered the courtroom, never acted as a trial counsel, never argued for a specific sentence, or performed any other act which has been held to disqualify an SJA from a case. To the contrary, Lt Col Mahmud involved himself in one phone call that included "all parties" to explain (1) that the current draft did not, in his opinion on behalf of the convening authority, amount to a reasonable stipulation of fact; and (2) the facts that, in Lt Col Mahmud's opinion, would need to be included for the stipulation to meet the required "reasonable stipulation of fact" term of Appellant's PTA offer. Such a conversation was well within an SJA's authority to participate in PTA negotiations consistent with R.C.M. 705.

All told, the SJA did not err, and Appellant has failed to make any other *prima facie* case for his disqualification. As a whole, the lower court correctly determined there was no error by Lt Col Mahmud in preparing the SJAR. This Court should so find.

Even if the SJA erred, Appellant was not prejudiced

The United States has shown that disqualification was not necessary in this case. However, if this Court were to find Lt Col Mahmud should have been disqualified from providing post-trial advice to the convening authority, Appellant has still failed to show any colorable prejudice.

This Court "has not held that 'recommendations prepared by a disqualified officer [are] void.'" Stefan, 69 M.J. at 259 (quoting United States v. Edwards, 45 M.J. 114, 115 (C.A.A.F. 1996)). Rather, the test to be applied is one for prejudice under Article 59(a), UCMJ, 10 U.S.C. § 859(a), which requires material prejudice to the substantial rights of the accused. Id. To find reversible error, the appellant must, inter alia, "make[ ] 'some colorable showing of possible prejudice.'" Taylor, 60 M.J. at 195 (quoting United States v. Wheelus, 49 M.J. 283, 289 (C.A.A.F. 1998)).

"While minimal conduct can contravene Article 6(c), it is obvious that when the conduct is relatively minimal, the likelihood of actual prejudice is substantially diminished." Stefan 69 M.J at 259. Lt Col Mahmud's narrow pre-trial conduct was the definition of minimal, and his post-trial advice was legally accurate, reasonable and unchallenged on appeal but-for the phone call discussed supra. Also, the post-trial recommendation in this case was like that in Stefan,[7] minimal

[7] Stefan 69 M.J at 259

or "plain-vanilla in substance" and in compliance with R.C.M. 1106. After summarizing matters in clemency, the SJA simply stated "my earlier recommendation remains unchanged. I recommend you approve the findings and sentence as adjudged." (JA at 29.) In contrast, the cases cited in Stefan as showing prejudice were instances where an acting SJA was detailed as trial counsel, actively prosecuted the case, requested a harsher sentence than adjudged, or, in one instance, called an accused a "worthless individual." See Stefan, 69 M.J. at 259 (citing United States v. Johnson-Saunders, 48 M.J. 74, 74-75 (C.A.A.F. 1998); United States v. Coulter, 3 C.M.A. 657, 658-59 (1954)). Lt Col Mahmud's involvement in this case certainly did not rise to such a level, as he made no argument for a specific sentence, did not testify against, degrade Appellant or force Appellant to plead guilty.

More importantly, Appellant suffered no prejudice considering he also used the evidence Lt Col Mahmud discussed during the phone call as a significant matter in mitigation. The theme and theory of Appellant's sentencing case revolved around his magnanimous integrity for pleading to such facts, and given the relatively light adjudged sentence to confinement, it is likely he benefited from their inclusion. This case ultimately revolves around the judgement of the SJA, Lt Col Mahmud. If the inclusion of the facts discussed during the phone call could have, and arguably did, equally benefit Appellant at trial, then it follows that the

SJA who insisted on their inclusion could not have been so biased such that he was disqualified from signing the SJAR. In other words, Appellant cannot use the SJA-influenced evidence in the stipulation to his benefit at trial, without complaint, and then claim he was subsequently prejudiced by the SJA's involvement post-trial. The fact that the agreed upon stipulation language could also be used to Appellant's benefit shows that Lt Col Mahmud would not have, and did not have, a bias against Appellant in his post-trial advice.

Moreover, to have some "colorable showing of prejudice," Appellant must show that the recommendation of another SJA would have been different than Lt Col Mahmud's and that, ultimately, there would have been a different action by the convening authority. Considering the facts and circumstances of the case, the outcome would have been no different. Here, Appellant stood convicted of divers uses and distributions of marijuana and cocaine, as well as two additional single use specifications of marijuana and cocaine *after* he had been working as a confidential informant. As the trial counsel summarized in his sentencing argument,

> [f]rom the day that [Appellant] entered the Air Force to today covers about 28 months. The charged time frame is 15 months. That means that after basic training and tech school [Appellant] started this domino effect of misconduct within weeks . . . [Appellant] continued to use marijuana and cocaine after he was already facing court-martial for distribution of marijuana and cocaine [and

> working as a CI.] It shows a special kind of disregard for the mission of the Air Force and respect for his command to continue to abuse drugs after confessing to OSI.

(JA at 104.) On separate occasions Appellant distributed marijuana to two civilian acquaintances in exchange for money. (JA at 2.) During the same time frame, Appellant also twice distributed cocaine to another Airman who was an AFOSI informant—once by mail without payment, and once in person in exchange for money. (JA at 3.) Prior to his trial, Appellant had also been subject to significant progressive discipline for being late to work, stealing a haircut on base, underage drinking, disobeying an order, breaking restriction and assault, seriously undermining any argument for rehabilitation or remorse. (JA 125-60.)

Appellant relies heavily, in clemency and now on appeal, on his work as a confidential informant to show prejudice, as he claims this "necessary" information was "missing" from the SJAR addendum. First, these facts were highlighted during his trial at sentencing and likely factored into the sentence given by the military judge. (See, e.g. trial defense counsel's sentencing argument at JA 109, 114, 118.) Even so, Appellant's work as an informant did not stop his misconduct, as he relapsed and used drugs again afterwards. (JA at 3, 33-34.) It is logical that any SJA reviewing this case would not have believed Appellant deserved *more* credit for the CI work than was already given at trial. Also, despite his assistance

to law enforcement, there is no evidence Appellant agreed to testify against anyone else at a trial. In light of the agreed upon confinement cap of only six months, and the fact that the adjudged sentence was below the pre-trial agreement, and given the landscape of Appellant's criminal culpability, it is incredibly unlikely another SJA would have recommended, and Appellant would have received, additional sentence relief from the convening authority.[8] Finally, Appellant focuses on the evidence of his multiple uses while seemingly ignoring the multiple distributions of drugs to civilians and a military member. While the divers use of drugs is aggravating, coupled with the divers distributions there is no sound argument to be made that another SJA would have made a different recommendation than Lt Col Mahmud did.

"By definition, assessments of prejudice during the clemency process are inherently speculative. Prejudice, in a case involving clemency, can only address possibilities in the context of an inherently discretionary act." Taylor, 60 M.J. 190 at 195. Ultimately, the exercise of determining hypothetical prejudice in this case is not necessary. No one forced Appellant and Capt Cox to present a PTA or enter into the stipulation of fact in this case, and no one forced either Appellant or Capt

[8] See Taylor, 60 M.J. 190 at 196 (Crawford, J, dissenting), "Based on the information contained in the record, including the serious offenses described above, it is extremely unlikely that a new staff judge advocate or convening authority would have granted Appellant any relief."

Cox to include a particular version of the Stipulation of Fact in their PTA offer. At his court-martial, Appellant stated that no one forced him to enter into the stipulation of fact and told the military judge he entered into it voluntarily. A reading of Appellant's own Care[9] inquiry, as well as the stipulation of fact, shows Appellant's approved sentence raised no issue as to either the providency of his guilty plea or the appropriateness of the adjudged sentence. Taking a step back, the adjudged and approved sentence of five months confinement and a bad conduct discharge were well-deserved and would have been approved by the convening authority no matter who the SJA was providing him a recommendation.

In sum, Appellant has not shown prejudice in this case. Appellant's conduct was severe, ongoing and significant. Appellant's case as a whole was presented to the chosen trier of fact, an experienced military judge, with the appropriate evidence in mitigation and extenuation as well as the evidence of criminal conduct. After the conclusion of the trial, there is no reason to believe any other SJA would have recommended clemency for Appellant, as his adjudged and approved sentence was fair for the convictions and below the agreed upon cap of the pre-trial agreement This Court should find the CCA's holding was correct, and uphold Appellant's approved convictions and sentence.

[9] United States v. Care, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (C.M.A. 1969).

Conclusion

The Air Force Court of Criminal Appeals applied the proper legal framework in this case and came to the correct conclusion. All told, Lt Col Mahmud did not act in a manner which required his disqualification from acing as the SJA in the post-trial processing of Appellant's case. Appellant fails to provide any evidence that Lt Col Mahmud took an active role in either advocating for a particular sentence, actively being involved as a trial counsel, or any other role that military courts have found to disqualify an SJA. Further, even if the SJA did err, Appellant was not prejudiced as there is no reason to believe another SJA would have recommended anything different in the SJAR.

CONCLUSION

WHEREFORE, the United States respectfully requests that this Honorable Court affirm the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, civilian counsel, and the Air Force Appellate Defense Division on 19 June 2020 via electronic filing.

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