July 27, 2022

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

UNITED STATES,
Appellee,

v.

WILLIAM C. MCALHANEY
Airman Basic (E-1),
United States Air Force,
Appellant.

USCA Dkt. No. 22-0170/AF

Crim. App. Dkt. No. ACM 39979

BRIEF ON BEHALF OF APPELLANT

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IN THE UNITED STATES COURT OF APPEALS
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UNITED STATES, *Appellee*, v. **WILLIAM C. MCALHANEY** Airman Basic (E-1), United States Air Force, *Appellant*.	**BRIEF ON BEHALF OF APPELLANT** Crim. App. No. 39979 USCA Dkt. No. 22-0170/AF

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

ISSUE PRESENTED

DID THE LOWER COURT ERR BY APPLYING PLAIN ERROR REVIEW IN CONSIDERING A QUESTION OF SENTENCE APPROPRIATENESS, TO WIT: WHETHER THE WORDING OF THE REPRIMAND RENDERED APPELLANT'S SENTENCE INAPPROPRIATELY SEVERE?

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d).[1] This Honorable Court may exercise jurisdiction pursuant to Article 67(a)(3), U.C.M.J., 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

On July 7, 2020, Appellant was tried at a general court-martial before a military judge alone at Sheppard Air Force Base (AFB), Texas. Consistent with Appellant's pleas, the military judge found him guilty of one specification of wrongful receipt of child pornography, and one specification of wrongful possession and viewing of child pornography, each in violation of Article 134, UCMJ, 10 U.S.C. § 934. Joint Appendix (JA) at 045-046. The military judge sentenced Appellant to a bad conduct discharge, three months of confinement for each specification of the Charge (to be served concurrently), and a reprimand. *Id.* On July 22, 2020, the convening authority took no action on the findings or sentence, and issued the adjudged reprimand. JA at 044. On July 29, 2022, the

[1] Unless indicated otherwise, all references to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

military judge signed the entry of judgment. JA at 045-046. On February 28, 2021, the AFCCA affirmed the findings and sentence. JA at 010.

STATEMENT OF FACTS

The Offenses

In June 2018, prior to joining the Air Force, Appellant communicated with NC via the mobile phone applications Snapchat and iMessage. JA at 048. NC was fifteen years old at the time, and told Appellant so; Appellant was nineteen years old. *Id*. The two did not communicate while Appellant attended basic military training, but resumed after he was assigned to Sheppard AFB for technical training. *Id*. In January 2019, Appellant paid NC $30.00 in exchange for her sending him a forty-five second video of her having sex with a seventeen-year-old male whom Appellant did not know. JA at 002, 048. Appellant subsequently viewed the video. *Id*.

Appellant also communicated with ST via various mobile messaging applications. JA at 049. ST was fifteen years old at the time, and told Appellant so. JA at 049, 292. In January 2019, Appellant offered to buy ST a sex toy. JA at 049. When Appellant asked ST whether she would let him "see" her use the sex toy, ST responded "Sure" and "Yeah

why not." JA at 116-117. When Appellant noted he had never seen ST orgasm, she responded, "You haven't? We can change that." JA at 118. When Appellant responded, "You want me to see you [orgasm]?", ST said, "I could care less who see [sic] me." JA at 119. A few days later, ST sent Appellant an electronic image depicting the handle of a hairbrush penetrating her vulva, which Appellant viewed. JA at 049. No evidence in the record suggests Appellant paid ST for this image.

Both NC and ST were sixteen years old when they sent Appellant the video and image forming the basis of the specifications, and Appellant was twenty years old. JA at 048-049. As stipulated by the parties, Appellant's conversations with NC and ST when they were fifteen, and his receipt and viewing of the video and the image in which they were sixteen, were not illegal under the laws of Colorado, where Appellant, NC, and ST were all from. JA at 048 (citing Colorado Revised Statutes § 18-3-405.4, Internet sexual exploitation of a child).

Prior to trial, the government disclosed[2] that neither NC nor ST "appear to have been negatively affected" by Appellant's conduct, and

[2] This disclosure was made in accordance with R.C.M. 701(a)(6), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 450 U.S. 150 (1972). JA at 264.

that both "appear to have been willing participants" in sharing the video and image with Appellant. JA at 264. Neither NC nor ST personally appeared at Appellant's court-martial.[3] ST provided a written unsworn statement (JA at 268) which seemed to contradict the government's pretrial disclosure, but which trial counsel did not reference in sentencing argument. JA at 300-306, 319-321. Although trial counsel sought a bad conduct discharge, sixteen months of confinement, and total forfeitures of pay and allowances for Appellant's offenses, she nevertheless acknowledged, "We are aware that the accused is not a terrible person," "[W]e understand the accused is considered to be a good person," and that he was considered "hardworking and dependable." JA at 301, 306, 319.

The government presented no evidence at trial establishing any link between Appellant's offenses and human sex trafficking.

The Reprimand

After Appellant was convicted and sentenced, the convening

[3] Trial counsel indicated the government was unable to reach NC to provide her notice of her Article 6b, UCMJ rights. JA at 270. It is unclear from the record whether the government, despite its extensive resources, was simply unable to reach NC, or if NC declined to participate.

authority issued the following written reprimand:

> YOU ARE HEREBY REPRIMANDED! Your decision to wrongfully view and possess child pornography *promoted the abuse and harm of children, and furthered the criminal enterprise of human sex trafficking, which is directly linked to child pornography*. Your conduct has no place within the Armed Force [sic] or society at large. Be warned, further misconduct will result in additional criminal liability.

JA at 044 (emphasis added).

On appeal, Appellant challenged the propriety of the convening authority's reprimand as written—specifically its inclusion of the language emphasized above.[4]

The AFCCA Opinion

The AFCCA first applied *de novo* sentence appropriateness review to the question of whether "the reprimand or the other elements of Appellant's sentence were overly severe." JA at 007. But in so doing, the AFCCA did not analyze the *text* of the reprimand. Instead, after obliquely referencing "matters in extenuation and mitigation," and noting "Appellant's receipt, possession, and viewing of child pornography was

[4] In his Assignments of Error brief, Appellant presented the issue as follows: "Whether an improper reprimand in Appellant's case made his sentence inappropriately severe?" *See* Brief on Behalf of Appellant, June 8, 2021.

not a passive venture," it opined:

> Appellant's adjudged sentence included three months of confinement for each specification to run concurrently, a bad-conduct discharge, and a reprimand. The maximum punishment available under the plea agreement was forfeitures of all pay and allowances, 16 months of confinement, and a bad-conduct discharge, which the trial counsel suggested in argument. The military judge sentenced Appellant to less than the maximum allowable sentence under his plea agreement. We find the sentence is not inappropriately severe.

JA at 007-008.

The lower court then added, "As Appellant did not object to the language used in the reprimand prior to his appeal, we next consider whether the reprimand was factually inaccurate such that it constituted *plain or obvious error*." JA at 008 (emphasis added). Using this "plain or obvious error" rubric, the AFCCA first credited the military judge's determination that a reprimand was an appropriate punishment for Appellant's crimes. *Id.* It also presumed the military judge understood the reprimand's terms would be dictated by the convening authority pursuant to R.C.M. 1003(b)(1). *Id.* It concluded, "In our view, if the military judge did not want to grant the convening authority the opportunity to punitively censure Appellant, then she would not have adjudged a reprimand." *Id.* The lower court further noted, "It is

important to recognize that a convening authority does not issue a reprimand without assistance from a trained legal professional." *Id.*

The AFCCA next analyzed the text of the reprimand for any impermissible reference to dismissed offenses or offenses for which Appellant was found not guilty. *Id.* Finding none, the AFCCA then evaluated the text for any plain factual error. JA at 009. It found the convening authority's claim that Appellant "promoted the abuse and harm" of NC was not plain error by arguing Appellant taught or reinforced in her the notion "that there is a financial market for sexual related images of herself." *Id.* The AFCCA found the convening authority's claim that Appellant "promoted the abuse and harm" of ST was not plain error by arguing he "convinced" her "to create an image of child pornography." *Id.*

With respect to the factual accuracy of the convening authority's claim that Appellant "furthered the criminal enterprise of human sex trafficking," the AFCCA reiterated in a footnote: "Appellant did not raise a post-trial motion with the military judge under R.C.M. 1104(d)(2)(B)

[sic[5]]. Accordingly, we find Appellant forfeited review of this issue on appeal, and we review it under a plain error standard of review." JA at 009. In determining whether this particular clause of the reprimand was plain error, the AFCCA acknowledged, "this appears to be a much closer call" before ruling it out. *Id.* In reaching this conclusion, the AFCCA deferred to the "significant discretion" afforded convening authorities to "choose the wording for a reprimand." *Id.* The AFCCA also remarked, "federal definitions of human sex trafficking have been expanded in recent years to incorporate a wide spectrum of sexual offenses that vary greatly in terms of violence and severity," and that Appellant's wrongful receipt, possession, and viewing of child pornography "matches some of the conduct described in the definitions of sex trafficking of children." *Id.* The AFCCA provided no citation to any authority to support its claim that the federal definition of human sex trafficking had recently expanded or that Appellant's conduct fit those expanded definitions.

[5] The AFCCA's citation to R.C.M. 1104(d)(2)(B) appears to be a scrivener's error, and it is inferable the lower court intended to cite R.C.M. 1104(b)(2)(B).

SUMMARY OF ARGUMENT

The AFCCA erred by applying the plain error standard of review to a question of sentence appropriateness. A reprimand is a component of the adjudged sentence. The issue presented before the AFCCA was not whether a reprimand was *per se* inappropriate in this case, but whether the *particular* reprimand assessed was inappropriate insofar as it was inaccurate and inflammatory. Accordingly, the AFCCA should have assessed the appropriateness of the reprimand, both generally *and* as written, using the plenary, *de novo* review authority granted by Article 66, UCMJ.

The AFCCA's reasoning for applying plain error is that Appellant forfeited the issue by not objecting to the wording of the reprimand in a post-trial motion prior to entry of judgment. Following this flawed reasoning to its logical conclusion, every appellant forfeits the ability to raise legal or factual insufficiency as an assignment of error unless they first litigate the issue in post-trial proceedings. This result is incompatible with the plain text of Article 66, UCMJ, and this Court's binding interpretation of that statute. Moreover, the AFCCA's reasoning imposes an unnecessary procedural burden upon appellants' substantial

right to appellate review.

The AFCCA's misapplication of the plain error standard of review led it to err again in finding the reprimand appropriate as written. These errors were only compounded by the AFCCA's failure to provide any support—either by citation to the record or to any authority—for its claim that Appellant's conduct fit the federal definition of "human sex trafficking." Its theory as to how Appellant "promoted the abuse and harm" of NC and ST also finds no firm footing in the record. Though he need not demonstrate prejudice to avail himself of his right to complete appellate review of the appropriateness of his sentence, Appellant nevertheless can.

If the AFCCA had applied the correct standard of review in assessing the appropriateness of the reprimand (as it did just two years ago in *United States v. Wolcott*, No. ACM 39639, 2020 CCA LEXIS 234

(A.F. Ct. Crim. App. Jul. 15, 2020) (unpub. op.)[6] (*see* JA at 019, 022)), the question of whether the reprimand was accurate, and thus appropriate, was not "a clos[e] call" but a resounding "no."[7] As officers entrusted to carry out the Executive's solemn duties as Commander-in-Chief, military commanders wield considerable power in matters of use of force and the administration of military justice. Because commanders' orders must be heeded, their words must be measured and precise. If words are presumed to bear their ordinary meaning, the words chosen by the convening authority in the reprimand are inaccurate, inflammatory, and unsupported by the record. Thus, they rendered Appellant's sentence

[6] In *Wolcott*, the AFCCA determined the text of a reprimand did not constitute cruel or unusual punishment in violation of the Eighth Amendment of the U.S. Constitution or Article 55, UCMJ, 10 U.S.C. § 855, nor did it render appellant's sentence inappropriately severe. JA at 022. The AFCCA conducted its cruel and unusual punishment and sentence appropriateness analyses using the *de novo* standard of review, and did not address whether (much less find) appellant forfeited a challenge to the reprimand by not objecting to it in a post-trial hearing. JA at 018-019. Judge Lewis authored the unanimous *Wolcott* opinion in which Judge D. Johnson and Senior Judge Mink joined. JA at 011. Judge Lewis and Judge Annexstad joined the unanimous opinion in this case, authored by Judge Goodwin. JA at 001.

[7] Appellant maintains the inaccurate and inflammatory reprimand language *was* plain error, even if it should not have been reviewed under this standard.

inappropriately severe.

Therefore, this Honorable Court should decide the AFCCA erred by applying the plain error standard of review in determining the appropriateness of Appellant's sentence and exercise its authority under Article 67(e), UCMJ, 10 U.S.C. § 867(e) to direct the Judge Advocate General to return the record of this case to the AFCCA for further review in accordance with that decision.

ARGUMENT

THE LOWER COURT ERRED BY APPLYING PLAIN ERROR REVIEW IN CONSIDERING A QUESTION OF SENTENCE APPROPRIATENESS, TO WIT: WHETHER THE WORDING OF THE REPRIMAND RENDERED APPELLANT'S SENTENCE INAPPROPRIATELY SEVERE.

Standard of Review

This Court reviews a service Court of Criminal Appeals' (CCA) sentence appropriateness determination for abuse of discretion. *United States v. Gay*, 75 M.J. 264, 267 (C.A.A.F. 2016) (citation omitted); *see also United States v. Tardiff*, 57 M.J. 219, 223-24 (C.A.A.F. 2002 ("this Court reviews the sentencing decisions of the [CCAs] for obvious miscarriages of justice or abuses of discretion." (internal quotations omitted)). The scope and meaning of Article 66, UCMJ, is a matter of statutory

interpretation, a question of law reviewed *de novo*. *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008).

Law

The service CCAs "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence" as they find "correct in law and fact," and which they determine "on the basis of the entire record, should be approved." Article 66(d), UCMJ, 10 U.S.C. § 866(d). The phrase "correct in law and fact" in Article 66, UCMJ, is synonymous with legal and factual sufficiency. *United States v. Nerad*, 69 M.J. 138, n.1 (C.A.A.F. 2010) (citing *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007)). The service CCAs review issues of legal and factual sufficiency *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted).

Through Article 66, UCMJ, Congress has vested responsibility for determining sentence appropriateness in the service CCAs. *United States v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001). This power "reflects unique history and attributes of the military justice system" and includes "considerations of uniformity and evenhandedness of sentencing decisions." *Id.*; *see also United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F.

2005) (concluding the sentence appropriateness provision "is a sweeping Congressional mandate to ensure a fair and just punishment for every accused."). Congress intended for the service CCAs to not only uphold the law, but "provide a source of structural integrity to ensure the protection of service members' rights within a system of military discipline and justice where *commanders themselves retain awesome and plenary responsibility*." *United States v. Jenkins*, 60 M.J. 27, 29 (C.A.A.F. 2004) (emphasis added). Sentence appropriateness review is a substantial right of an accused. *Id.*

This Court has distinguished Article 66, UCMJ's plenary power to determine sentence appropriateness from the constraints of Article 59(a), UCMJ, 10 U.S.C. § 859(a). *Gay*, 75 M.J. at 268. The service CCAs have an affirmative obligation to carry out their Article 66, UCMJ duties in cases in which a sentence approved by a convening authority includes, *inter alia*, a punitive discharge. *United States v. Chin*, 75 M.J. 220, 223 (C.A.A.F. 2016). Article 66, UCMJ, contains no waiver exception, and this Court has rejected the invitation to read one into the statute. *Id.* While an accused is precluded from raising on appeal those issues waived at trial, an accused cannot waive a service CCA's statutory mandate under

Article 66, UCMJ (unless, through the procedures of Article 61, UCMJ and R.C.M. 1115, the accused waives the right to appellate review). *Id.*

A reprimand is a punitive censure, and is an authorized punishment for persons found guilty of an offense at a court-martial. R.C.M. 1003(a); (b)(1); (b)(1), Discussion. If adjudged and approved, a reprimand shall be issued in writing by the convening authority; a court-martial "shall not" specify the terms or wording of a reprimand. R.C.M. 1003(b)(1). In *Wolcott*, the AFCCA found that a convening authority's discretion to reprimand an accused is not "unfettered," and that in practice, a reprimand is "a frank and common-sense expression of formal disapproval by the convening authority to the accused regarding the offenses for which the individual was sentenced." JA at 019-020. The reprimand may be based on "the offenses, the evidence and testimony admitted at trial, and other matters that are properly before the convening authority[.]" JA at 019.

Analysis

A. The AFCCA erred in applying different standards of review to the questions of whether the reprimand was appropriate generally and whether it was appropriate as written.

Appellant did not argue to the AFCCA that the court-martial's

imposition of a reprimand was inappropriate, but rather the convening authority's use of inaccurate and inflammatory language in the reprimand was. Appellant's challenge to the reprimand is akin to challenging, for example, not whether confinement is an inappropriately severe punishment *per se*, but whether the *quantity* or the *quality* of the confinement is. Both questions, however, are encompassed by sentence appropriateness review, and as such, in answering both questions, the AFCCA was required to apply the *de novo* standard of review. *See Gay*, 75 M.J. at 269 (finding service CCAs have "discretionary sentence appropriateness authority" and may reduce a sentence based on "a legal deficiency in the post-trial confinement conditions."); *see also United States v. Towns*, 52 M.J. 830, 833 (A. F. Ct. Crim. App. 2000) (holding Article 66, UCMJ bestows jurisdiction on service CCAs to consider claims of post-trial maltreatment in confinement (i.e., the *quality* of confinement) as part of those courts' determination of sentence appropriateness), *aff'd*, 55 M.J. 361 (C.A.A.F. 2001); *see also Washington*, 57 M.J. at 399 (finding service CCAs are required to conduct *de novo* review of legal and factual sufficiency); *cf. United States v. Casey*, 32 M.J. 1023, 1023 (A.F.C.M.R. 1991) ("We would not be performing our required

[Article 66, UCMJ] review if we were to approve an unspecified reprimand, any more than if we were to approve an unspecified period of confinement or an unspecified amount of forfeitures").

The AFCCA started and ended its *de novo* review of the appropriateness of the convening authority's reprimand by determining Appellant's entire sentence was "not inappropriately severe." JA at 008. But its statutory responsibilities were not yet fulfilled. In determining whether Appellant's sentence, to include the reprimand, was inappropriately severe, the AFCCA was required to assess the *text* of the reprimand (i.e. the *quality* of the reprimand, or the reprimand *as applied*), and should have done so *de novo*. It erred in distinguishing between and applying different standards of review to a punishment in general and a punishment as applied.

B. The AFCCA's finding that Appellant forfeited his challenge to the appropriateness of the reprimand by failing to object to it prior to entry of judgment is erroneous because it vitiates Article 66, UCMJ, and contradicts this Court's interpretation of service CCAs' responsibilities thereunder.

The AFCCA determined Appellant would have had to lodge his objection to the reprimand in a post-trial motion filed pursuant to R.C.M. 1104(b)(2)(B) in order to preserve *de novo* review of the reprimand on

appeal. This contention runs counter to the thrust of this Court's ruling in *Chin*, in which it found the rule precluding appellate review of waived issues "does not apply to a CCA's wholly dissimilar statutory review." 75 M.J. at 223. If an accused "has no authority to waive a CCA's statutory mandate [under Article 66, UCMJ] unless, through Article 61, UCMJ procedures, the accused waives the right to appellate review altogether," (*Id.*) it would be illogical to find an accused could *forfeit* this review.

Moreover, the inaccurate and inflammatory reprimand is not an "error in the convening authority's action" (R.C.M. 1104(b)(1)(F)); it is a substantive error in the application of a sentence distinct from the procedural errors considered in cases like *United States v. Brubaker-Escobar*, 81 M.J. 471 (C.A.A.F. 2021)[8] and *United States v. Miller*, No. 21-0222, 2022 CAAF LEXIS 272 (C.A.A.F. 4 Apr. 2022).[9] Accordingly, Appellant's failure to file a post-trial motion under R.C.M. 1104(b)(2)(B)

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[8] In which this Court distinguished between non-jurisdictional (i.e., procedural) versus jurisdictional (i.e., substantive) convening authority errors on action. *See id.* at 472.

[9] In which this Court found a convening authority's failure to consider a military judge's post-trial ruling on a R.C.M. 1104 motion prior to action was procedural, not substantive, error. *See id.* at *7.

to correct "an error in the action of the convening authority" within five days of receiving the action did not amount to forfeiture of the challenge such that plain error review of the issue on appeal is appropriate.

This is because R.C.M. 1104 does not impose any *requirement* that convicted servicemembers challenge the legal or factual sufficiency of their sentence in a post-trial hearing to avail themselves of the service CCAs' *de novo* review.[10] If it did, it would arguably violate Article 36, UCMJ, 10 U.S.C. § 836, which permits the President to prescribe, *inter alia*, post-trial procedures so long as they are not "contrary to or inconsistent with" any provision of the UCMJ—including, saliently, Article 66, UCMJ. Nor do this Court's precedents establish such a requirement. The AFCCA's imposition of this requirement frustrates the congressional intent expressed plainly in Article 66, UCMJ, itself.

For the same reasons, Appellant's failure to challenge the reprimand with any other kind of post-trial motion enumerated under R.C.M. 1104 cannot preclude him from enjoying the benefit of *de novo*

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[10] "Post-trial motions *may* be filed by either party or when directed by the military judge" to, *inter alia*, "set aside one or more findings because the evidence is legally insufficient[.]" R.C.M. 1104(b) (emphasis added). "Ordinarily, 'may' is a permissive rather than mandatory term." *United States v. Moss*, 73 M.J. 64, 68 (C.A.A.F. 2014).

review. The inaccurate and inflammatory reprimand is not, for example, a "computational, technical, or other clear error in the sentence" (R.C.M. 1104(b)(1)(C)) akin to miscalculating pretrial confinement credit or misstating the amount of adjudged forfeitures.[11]

C. The AFCCA's conditioning of *de novo* review of sentence appropriateness on an appellants' objection to the sentence prior to entry of judgment impermissibly shifts responsibility for this review upon a court-martial while imposing a futile procedural requirement on appellants.

Determining whether the quality or quantity of a punishment renders the punishment inappropriate after it has been adjudged is a question Congress intended for the service CCAs, not courts-martial, to

[11] The clause "or other clear errors" in this rule arguably does not encompass the reprimand in this case. The rule of *ejusdem generis* should guide the interpretation of this general clause because it follows a list of specific types of errors. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 163 (2012); *see also United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008) (finding ordinary rules of statutory construction apply to interpreting the R.C.M.). Interpreting this clause to mean errors similar to but not the same as "computational" or "technical" errors would not narrow its scope to the point of "obscur[ing] and defeat[ing]" the President's "intent and purpose" in prescribing the rule, nor would it render these "general" words "meaningless." *Id.* (internal citation omitted). Nevertheless, to the extent the inaccurate and inflammatory reprimand in this case was "clear" error under the meaning of the rule, a post-trial motion challenging it was not a pre-requisite for *de novo* sentence appropriateness review for the reasons articulated herein.

answer. *See* Article 66, UCMJ. Historically, and in accordance with the plain language of Article 66, UCMJ, the service CCAs have applied *de novo* review when answering this question, regardless of the nature of the challenge to the sentence, or whether said challenge was preserved at trial. *See Washington*, 57 M.J. at 399; *Gay*, 75 M.J. at 269; *see also United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999) (recognizing that the sentence review function of the service CCAs is "highly discretionary.").

While Article 60(b), UCMJ states military judges "shall" address all post-trial motions and other post-trial matters that may affect, *inter alia*, the sentence, it limits this requirement to those matters "subject to resolution by the military judge before entry of judgment." 10 U.S.C. § 860(b)(1), (2). Neither the UCMJ nor the R.C.M. place in the hands of a military judge the post-trial authority or responsibility to determine whether an adjudged and executed sentence is inappropriate.[12] Stated differently, the question of whether a sentence is "correct in law and fact"

[12] Tellingly, the list of permissible post-trial motions enumerated in R.C.M. 1104(b) does not include "a motion to reassess the punishment because the adjudged sentence is legally insufficient or inappropriately severe," or any other similar motion. *See* JA at 037.

and should be approved "on the basis of the entire record" (10 U.S.C. § 866(d)) is placed before the service CCAs exclusively; indeed, not even this superior Court retains such authority. *See Lacy*, 50 M.J. at 288 ("The power to review a case for sentence appropriateness, including relative uniformity, is vested in the Courts of Criminal Appeals, not in our Court, which is limited to errors of law."); *compare* Article 66(d), UCMJ *with* Article 67(c), UCMJ.

Particularly, the question of whether a convening authority's reprimand is inappropriate falls outside those matters "subject to resolution" by a military judge, because a court-martial "shall not specify the terms or wording of a reprimand." R.C.M. 1003(b)(1). By removing inaccurate and inflammatory language from a reprimand, a military judge acting as the court-martial would, in effect, "specify" the wording of the reprimand in violation of the rule. Thus, even if Appellant had challenged the wording of the reprimand in a post-trial hearing before a military judge (as the AFCCA would have had him do in order to obtain the benefit of their *de novo* review), the military judge would have lacked the authority to grant Appellant relief. This exposes yet another flaw in the AFCCA's reasoning: the lower court presumed the military judge

"was aware of R.C.M. 1003(b)(1), which required a reprimand to be issued in writing by the convening authority" (JA at 008), but failed to recognize the same rule precluded the military judge from granting Appellant the relief they denied him.[13]

It makes little judicial sense to sanction a scheme that would have an appellant re-open court-martial proceedings to seek relief he cannot get from that tribunal, only so that he can raise the issue on appeal under a more favorable standard of review. Such post-trial proceedings would amount to an "empty ritual" (*United States v. Allen*, 8 C.M.A. 504, 507 (C.M.A. 1957)), and (assuming most litigants are represented by counsel)

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[13] Even if a military judge could remedy an inappropriate reprimand, this framework would be impracticable. An accused challenging a reprimand via post-trial motion would have to file it within five days of being served with the action (on which the convening authority's reprimand first appears—*see* JA at 038) but *prior* to entry of judgment. *See* JA at 036-037. Action and entry of judgment often occur very close in time (while the aforementioned instruction states military judges "should" wait five days after receipt of action before signing the entry of judgment to allow parties the opportunity to move to correct an error in the action, the use of the permissive "should" does not create a requirement. *See* JA at 039). Thus, the period during which an accused can consider the reprimand, consult with counsel, and draft and file a post-trial motion is fleeting. *Cf. United States v. Jessie*, 79 M.J. 437, 448 (C.A.A.F. 2020) (J. Sparks, dissenting) ("Sentence appropriateness is a somewhat fluid issue. It is conceivable that sentencing issues could arise or ripen or come to defense counsel's attention only after the convening authority has acted.").

would counter this Court's recent affirmation that "[A]ttorneys do not need to undertake futile acts." *United States v. Palacios Cueto*, ___ M.J. ___, No. 21-0357/AF, slip. op. at 9 (C.A.A.F. Jul. 19, 2022). This scheme makes even less sense when an appellant is *entitled by law* to that favorable standard of review. *See Jenkins*, 60 M.J. at 29.

Accordingly, where Appellant could not have received the relief he sought in post-trial proceedings, he cannot be said to have waived or forfeited his opportunity for relief. *Cf. United States v. Gaskins*, 72 M.J. 225, 232 (C.A.A.F. 2013) (finding appellant, at a sentence rehearing, did not waive a motion to dismiss findings for failure to allege the terminal element of an Article 134, UCMJ offense because such a motion was beyond the military judge's authority to consider, let alone grant, given the limited scope of the hearing).

D. The AFCCA's abuse of discretion prejudiced Appellant because it deprived him of a substantial right.

Because the AFCCA applied the wrong standard of review to a component of Appellant's sentence, he has not yet received the benefit of his substantial statutory right to sentence appropriateness review. *See Jenkins*, 60 M.J. at 29; *see also United States v. Guinn*, 81 M.J. 195, n.5 (C.A.A.F. 2021) ("[W]e note that a *complete* Article 66, UCMJ review is a

substantial right of an accused, and without this complete review, an appellant suffers material prejudice to a substantial right." (internal citations, quotations, and alterations omitted)).

E. The AFCCA's abuse of discretion prejudiced Appellant because under any standard of review, but certainly under *de novo* review, the convening authority's reprimand was inaccurate and inflammatory, rendering Appellant's sentence inappropriately severe.

Appellant does not claim his criminal conduct was beyond reproach from the convening authority. *See* JA at 265-267. Nor does Appellant argue that a convening authority's reprimand must be generic or insipid. But Appellant does contend that a reprimand, just like any other component of the sentence, must be rooted in the record, proportional to the offense, and tied to a legitimate sentencing consideration. In other words, it must be legally and factually sufficient. This reprimand is not.

The notion that Appellant "abused" and "harmed" NC and ST is belied by the government's pretrial disclosure that neither NC nor ST "appear[ed] to have been negatively affected" by Appellant's conduct, and that both "appear[ed] to have been willing participants" in sharing the video and image with Appellant. The AFCCA's justification for affirming the convening authority's claim that Appellant promoted the abuse and

harm of ST—that he "convinced" ST to "create an image of child pornography"—is also controverted by the exchanges between ST and Appellant on the day she provided him with the explicit image of herself. ST offered on her own to "change" the fact that Appellant had not seen her masturbate, and conveyed nonchalance to being seen in this fashion by him or others. Appellant undeniably viewed an image of child pornography (as defined by the UCMJ) that he received from ST, but contrary to the convening authority's claim, the record demonstrates Appellant did not "convince" or compel[14] ST into producing and sharing an explicit image of herself.

The AFCCA's justification for affirming the convening authority's claim that Appellant promoted the abuse and harm of NC—that he "arguably" taught or "reinforce[ed]" to her that "there is a financial market for sexual related images of herself"—stretches the record further than it can bear. The factfinder received no evidence that NC became

[14] While ST stated in her victim impact statement that she was "coerced" by Appellant into "taking inappropriate pictures and videos" of herself (JA at 268), these unsworn assertions are belied not only by the government's legally required disclosures, but by ST's clear and contemporaneous willingness ("Sure"; "Yeah why not") to share an explicit image of herself with Appellant.

aware of a "financial market" for her nude images, or that the implication of that awareness—that she sold more explicit images of herself to others—came true. Appellant did not "commission" the video of NC having sex with another person; rather, NC filmed the video on her own volition. JA at 277. NC made Appellant aware of the existence of the video after Appellant asked her for an illicit photograph or video of herself but before he offered to pay for it. JA at 048, 277. NC's unwillingness to communicate with trial counsel leading up to the court-martial—much less deliver a victim impact statement to the court—only bolsters the government's pretrial disclosure that she was not negatively affected by Appellant's crimes. JA at 270.

Just as Appellant did not abuse or harm NC or ST, nor did he "promote" the same. There is no evidence in the record that Appellant showed the video or the image to anyone else (or even that he saved the video or the image for viewing later). Appellant did not encourage others to reach out to NC or ST for the purpose of soliciting child pornography, or even make others aware that NC or ST were producing and sharing—willingly or not—child pornography.

The AFCCA cited no authority to support its claim that the federal

definition of human sex trafficking had recently expanded, or that Appellant's conduct fell within that expanded definition. Congress has not proscribed "trafficking" or "sex trafficking" in the UCMJ, nor has the President enumerated it as a general article offense under Article 134, UCMJ, 10 U.S.C. § 934.[15] These facts alone should have weighed in favor of a finding that the convening authority abused her discretion in reprimanding Appellant for an act not proscribed in the jurisdiction in which he was tried (let alone for an act for which he was not convicted). *Cf. United States v. Hawes*, 51 M.J. 258, 261 (C.A.A.F. 1999) (holding a convening authority cannot include language in a reprimand that directly references an offense that has been dismissed or resulted in an acquittal). However, examining where Congress and the Executive have spoken on the issue of sex trafficking is also informative in determining whether the convening authority's reprimand was inappropriate.

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[15] The closest analog appears to be "forcible pandering" under Article 120c, UCMJ, 10 U.S.C. § 920c, which authorizes punishment for any person "who compels another person to engage in an act of prostitution with any person." The statute defines an "act of prostitution" as a sexual act or sexual contact on account of which anything of value is given to, or received by, any person. 2019 *MCM*, part IV, para. 63.a.(b), (d)(1). Appellant was not charged or convicted of this offense, nor did his conduct meet its elements, for the same reasons it did not meet the elements of 18 U.S.C. § 1591 discussed *infra*.

Air Force Instruction (AFI) 36-2921, *Combatting Trafficking in Persons* (CTIP), September 20, 2019, implements Department of Defense Instruction (DoDI) 2200.01 of the same title. JA at 040. Both departments' stated policy goal in implementing this instruction is to "[o]ppose prostitution, forced labor, and any related activities contributing to the phenomenon of trafficking in persons." *Id.* The instruction's definitions are drawn directly from 22 U.S.C. § 7102,[16] wherein Congress defined "sex trafficking" as "the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act." JA at 030. A "commercial sex act" is any sex act on account of which anything of value is given to or received by any person. JA at 027.

Congress has proscribed "sex trafficking of children or by force, fraud, or coercion" in the federal criminal code. *See* 18 U.S.C. § 1591 (JA at 023). With respect to sex trafficking of children (i.e. persons under the age of eighteen), the statute authorizes punishment for:

Whoever knowingly—

(1) in or affecting interstate or foreign commerce, or

[16] Title 22 of the United States Code pertains to "Foreign Relations and Intercourse."

> within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or
>
> (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),
>
> knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, …that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act[.]

Id.

This statute adopts the same definition of "commercial sex act" enumerated in 22 U.S.C. § 7102(4). *Compare* JA 024 at *with* JA at 027. While Congress did not define "sex act" in either statute, it of course did so in Article 120, UCMJ, 10 U.S.C. §920:

> The term 'sexual act' means—
>
> (A) the penetration, however slight, of the penis into the vulva or anus or mouth;
>
> (B) contact between the mouth and the penis, vulva, scrotum, or anus; or
>
> (C) the penetration, however slight, of the vulva or penis or anus of another by any part of the body or any object, with an intent to abuse, humiliate, harass, or degrade any person

or to arouse or gratify the sexual desire of any person.[17]

2019 *MCM*, part IV, para. 60.a.(g)(1).

Nothing in the record establishes that Appellant recruited, harbored, transported, provided, obtained, patronized, or solicited anyone for the purpose of committing commercial sex acts. Indeed, nothing in the record establishes that Appellant committed *any* sex acts with NC or ST, commercial or otherwise, under the definitions provided in the above-cited statutes.[18]

While Appellant paid NC for a video of her having sex with another individual, this does not constitute a "commercial sex act." The record does not establish that Appellant recruited, harbored, transported, provided, obtained, patronized, or solicited NC to commit sex acts with

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[17] This definition largely mirrors the definition of "sex act" contained in 18 U.S.C. §§ 2241-2248 covering sexual offenses. 18 U.S.C. § 2246(2).

[18] Notably, if Appellant had committed consensual sexual acts with NC, or with ST at the time she sent him the image, such conduct would have been legal under the UCMJ. *See* Article 120b, UCMJ, 10 U.S.C. § 920b (proscribing the commission of sexual acts or sexual contact with a person who has not attained the age of sixteen years); Appellant "was in the unique position of having a relationship with someone he could legally see naked and…legally have sex with, but could not legally possess nude pictures of her that she took and sent to him." *United States v. Nerad*, 67 M.J. 748, 751 (A.F. Ct. Crim. App. 2009).

the other individual depicted in the short video. ST's penetration of her own vulva with an object was not an act committed by Appellant; even if that act could somehow be imputed to Appellant (and it reasonably cannot), and he "solicited" ST to photograph herself committing the act and share that single image with him, with the knowledge that she was under eighteen years of age, he nevertheless did not transact "anything of value" for that image to render the "sex act" a "commercial" one.

The convening authority's claim that Appellant furthered a "criminal enterprise" is equally unwarranted. There is no evidence in the record to suggest Appellant distributed or attempted to distribute the video and the image NC and ST provided him, for profit or otherwise, or that the video and image in question directly "furthered" the interests of any group of persons working in conjunction to commit crimes.

Aside from being inaccurate and inflammatory, these accusations make no measureable contribution to acceptable goals of punishment and

are grossly out of proportion to the severity of Appellant's crimes.[19] The convening authority could have *fairly* reprimanded Appellant for the acts of wrongfully receiving, possessing, and viewing child pornography, used *appropriate* language to deter him and others from committing future misconduct, and could have *accurately* commented on how his crimes directly affected any named victims and the discipline and efficiency of the command. *See* Article 56, UCMJ. Instead, the convening authority exceeded the bounds of fair comment on the offenses. Thus, the reprimand renders Appellant's sentence inappropriately severe.

Neither the convening authority's reprimand nor Appellant's objection thereto is trivial. The punitive reprimand is included in the

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[19] In *Wolcott*, the AFCCA found it "obvious" that "if trial counsel can argue for punishment using general sentencing philosophies then a convening authority may also utilize one or more of them in a reprimand." JA at 020. But it is doubtful reprimand's claims would have been admissible during sentencing proceedings under R.C.M. 1001(b)(4) ("Trial counsel may present evidence as to any aggravating circumstances *directly relating to or resulting* from the offenses of which the accused has been found guilty" (emphasis added)); *see also United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995) ("[A]n accused is not responsible for a never-ending chain of causes and effects." (internal quotations omitted)). Trial counsel argued Appellant's crimes were "serious" and "morally wrong," (JA at 300, 303) but did not argue that he had "abused" the named victims or that his actions abetted human sex trafficking.

entry of judgment and is thus accessible to the public[20] (including Appellant's fellow Airmen, potential employers, educational institutions, etc.[21]), who, upon reading the words of a high-ranking military commander, can only be left with the impression that Appellant actually did and was convicted of the acts they catalog. This causes severe and undue prejudice to Appellant, who, in addition to carrying the stigma of a federal conviction and a dishonorable discharge, also bears the unfitting mark of "sex trafficker." He will bear this indelible mark not for transporting people against their will to deliver or subject them to sexual slavery (or aiding others in doing the same), or for inappropriately touching young children, but for (legally, under the laws of his state of residence) receiving and viewing an explicit but consensually-provided short video and single image depicting individuals with whom he was legally permitted under the UCMJ to have sexual relations.

In assessing whether the reprimand was inappropriate, the AFCCA was bound to apply *de novo* review, and thus had broad, "*carte blanche*"

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[20] *See* Article 140a, UCMJ, 10 U.S.C. § 940a.

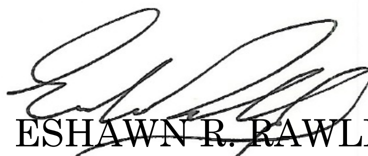
[21] During sentencing proceedings, Appellant's father testified about Appellant's intention to go to school to become a heating and air conditioning technician after serving his sentence. JA at 299.

(*United States v. Claxton*, 32 M.J. 159, 162 (C.A.A.F. 1991)) discretion to ensure "justice is done" (*Towns*, 52 M.J. at 833) by setting aside or modifying the reprimand.

CONCLUSION

WHEREFORE, this Honorable Court should decide the AFCCA erred by applying the plain error standard of review in determining the appropriateness of Appellant's reprimand and exercise its authority under Article 67(e), UCMJ, 10 U.S.C. § 867(e) to direct the Judge Advocate General to return the record of this case to the AFCCA for further review in accordance with that decision.

Respectfully submitted,



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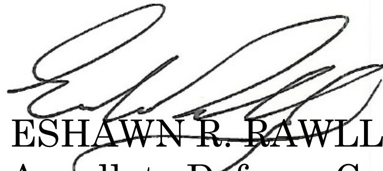
CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Government Trial and Appellate Operations Division on July 27, 2022.



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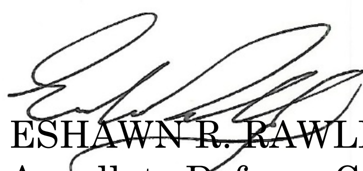
RULE 24(d) CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 24(c): excluding the cover page, index, table of authorities, and certificates of counsel, it consists of thirty-six pages, 7,354 words, and 769 lines of text. This brief complies with the typeface and style requirements of Rule 37.



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