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

REPLY BRIEF ON BEHALF OF APPELLANT

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WILLIAM C. MCALHANEY, Airman Basic (E-1) United States Air Force, *Appellant*	)	Crim. App. Dkt. No. ACM 39979
	)	USCA Dkt. No. 22-0170/AF
	)	September 6, 2022

Pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, Airman Basic William C. McAlhaney, Appellant, hereby replies to the Government's Answer (Gov. Ans.), filed on August 26, 2022.

ARGUMENT

The United States acknowledges that it is "debatable" whether the AFCCA erred in finding Appellant forfeited his challenge to the language of the reprimand and in applying the plain error standard of review to the same. Gov. Ans. at 9. Nevertheless, it labors to defend the AFCCA's error. This court should decline to do the same.

A. Notwithstanding the United States' varying defenses of the AFCCA's analysis, it is plain and obvious that the lower court did not apply the *de novo* standard of review to the question of whether Appellant's reprimand was appropriate, as it was required to do.

The United States first underlines the distinction the AFCCA drew between its *de novo* review of the appropriateness of Appellant's sentence and its plain error review of the "factual inaccuracy" of the reprimand (referring to the former portion of the opinion as "Part 1" and the latter as "Part 2"). Gov. Ans. at 14. But this is a distinction without a difference, both in the AFCCA opinion and in the government's Answer.

The United States writes, "Notably, AFCCA did not frame the issue in Part 2 as 'whether the reprimand was factually inaccurate *such that the reprimand was overly severe*.' Had AFCCA framed the issue in this way, the issue would have been one of sentence appropriateness" requiring *de novo* review. Gov. Ans. at 18 (emphasis in original). But AFCCA's separation of Appellant's allegation of error[1] into two issues—one being the appropriateness of the entire sentence and the other being

[1] 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?" Appellant's Brief (App. Br.) at 6, n.4.

whether the reprimand was factually inaccurate—was inapt.[2] The three components of service CCAs' Article 66(d), UCMJ authority are 1) legal sufficiency ("correct in law"), 2) factual sufficiency ("correct…in fact"), and 3) sentence appropriateness ("may affirm only…such part or amount of the sentence as it…determines, on the basis of the entire record, should be approved."). *See United States v. Bauerbach*, 55 M.J. 501, 504 (A. Ct. Crim. App. 2001). Appellant's challenge to the language of the reprimand implicated this third component. Appellant argued the reprimand was inappropriately severe *because* it was factually inaccurate.[3] Thus, the question of the *factual accuracy* of the reprimand was subsumed into the question of the *appropriateness* of the reprimand. The United States concedes this question was "required to be reviewed *de novo*." Gov. Ans.

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[2] Despite having only challenged the reprimand, Appellant does not allege the AFCCA erred by *sua sponte* considering the appropriateness of his entire sentence. *See United States v. May*, 47 M.J. 478, 481 (C.A.A.F. 1998) ("…Courts of Criminal Appeals have a broad mandate to review the record unconstrained by an appellant's assignments of error[.]"). Rather, Appellant alleges the AFCCA erred by applying two different standards of review to the question of whether this entire sentence was appropriate and whether this reprimand was appropriate.

[3] Argued Appellant before the AFCCA, "The language in Appellant's reprimand is unduly severe, inflammatory, inaccurate, and unsupported by the evidence in the record." Joint Appendix (JA) at 006.

at 18.

Even if the AFCCA's separation of Appellant's alleged error into two distinct issues was apt, the lower court is still not absolved of error. This is because questions of factual sufficiency are also reviewed by service Courts of Criminal Appeals (CCAs) *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). So even if the AFCCA evaluated the factual accuracy of the reprimand separately from the appropriateness of Appellant's sentence, it nevertheless erred in applying the plain error and not the *de novo* standard of review to that question.

Straining to read the AFCCA's opinion in a way to overcome the court's "debatable" error, the United States next argues the AFCCA's analysis in "Part 1," i.e., sentence appropriateness, encompassed the *specific language* of the reprimand, not just whether the reprimand was an appropriate punishment *generally*. Gov. Ans. at 14-15. A straightforward reading of the AFCCA's opinion belies this claim.

The United States recognizes the AFCCA "did not conduct a lengthy analysis of the *text* of the reprimand in Part 1." Gov. Ans. at 15 (emphasis added). A more accurate statement would omit the word "lengthy." While the AFCCA indeed applied *de novo* review to the question of whether "the

reprimand or the other elements of Appellant's sentence were overly severe," it conducted no *de novo* analysis of the *text* of the reprimand, which is what Appellant specifically challenged. Indeed, in the final paragraph of "Part 1," wherein the AFCCA summarized why it found Appellant's sentence appropriate, the court only mentioned the reprimand once, and only in a prefatory sentence reiterating the adjudged punishment ("Appellant's adjudged sentence included three months of confinement for each specification to run concurrently, a bad-conduct discharge, and a reprimand."). JA at 007.

The AFCCA then centered its sentence appropriateness determination in "Part 1" not around the text of the reprimand, or even on the reprimand generally, but on other, unchallenged components of Appellant's sentence, such as the confinement term, the forfeitures, and the punitive discharge. JA at 007. It noted the "maximum punishment available under the plea agreement was forfeitures of all pay and allowances, 16 months of confinement, and a bad-conduct discharge," and that the military judge "sentenced Appellant to less than the maximum allowable sentence under his plea agreement," before concluding, "[w]e find the sentence is not inappropriately severe." JA at 007-008. While the

AFCCA's reference to the reprimand in the prefatory sentence of the last paragraph of "Part 1" merely *suggests* at best that it considered the appropriateness of the reprimand *de novo*, the AFCCA did not *explicitly* analyze whether the reprimand was appropriate, as written or even generally, under this standard. *Id*. Instead the AFCCA saved *all* of its *explicit* analysis of the reprimand—both as a general punishment and its specific text—for "Part 2," wherein it erroneously applied a standard of review far less favorable to Appellant. JA at 008-009.

The United States tries to reconfigure portions of the AFCCA opinion to make it appear as if the lower court "directly addressed the allegedly erroneous language of the reprimand" under the *de novo* standard applied in "Part 1." Gov. Ans. at 15. It asserts that in "response" to Appellant taking "issue" with the text of the reprimand, the AFCCA "noted Appellant's crimes 'were not a passive venture' as 'Appellant did not simply engage in the viewing, possessing, and receipt of existing child pornography images.'" *Id*. But this quotation must be placed in its proper context within the opinion. In its Analysis section, the AFCCA did not mention the fact that Appellant took "issue" with the *text* of the reprimand until the first full paragraph of page eight of its opinion, the

point at which the government agrees the court began "Part 2" of its analysis. *See* JA at 008-009 *and* Gov. Ans. at 14, n.7 ("Part 2 begins with the first full paragraph of page 8 and ends with the last full paragraph of page 9."). Thus, the AFCCA's "passive venture" finding was not in "response" to Appellant having taken "issue" with the *text* of the reprimand, and even though the AFCCA makes this "passive venture" finding in "Part 1," it never *applied* this finding to the *text* of the reprimand in order to determine whether that text was "improper" such that it rendered Appellant's sentence inappropriately severe under the *de novo* standard. *Id.*

Contrary to the United States' claim (made at Gov. Ans. at 17), Appellant does not (and did not in his opening brief) ask this Court to "interpret" the words "the reprimand" as the AFCCA uses it in "Part 1" as referring only to a reprimand generally and not to its actual text. Rather, Appellant argues the determination of whether a reprimand is appropriate necessarily includes a determination as to whether a reprimand is appropriate generally *and* whether the specific text of the reprimand is appropriate. Moreover, Appellant submits that just because the AFCCA obliquely referenced the "reprimand" in "Part 1" of its

opinion, it does not follow that the AFCCA considered the *text* of the reprimand in that analysis. The AFCCA's analysis of the text of the reprimand in "Part 1" was wholly absent, saved exclusively for its "Part 2" analysis. The very existence of a "Part 2"—wherein the AFCCA, for the first and only time, grapples with the reprimand specifically—bolsters the argument that the AFCCA *did not* consider the text of the reprimand in "Part 1"; if it had, its analysis would have been complete and there would have been no need to engage in a "Part 2." The United States asks this Court to ignore what is plain and obvious from the AFCCA's opinion: it reserved its entire analysis of the reprimand, including its text, for "Part 2," and erroneously applied plain error in so doing.

Even if the AFCCA's opinion is merely confusing at best, this Court should nevertheless remand as it did in *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005). In reviewing a service CCA's sentence appropriateness analysis, the *Baier* Court found it "impossible" to determine whether the lower court had "conducted an independent assessment [i.e., a *de novo* review] of the appropriateness" of the appellant's sentence where the lower court's recitation of an incorrect

standard suggested it "may have relied" on an "erroneous view of the law." *Baier*, 60 M.J. at 383, 386.

The United States misapprehends other arguments raised by Appellant. For example, to rebut Appellant's claim that the AFCCA's sentence appropriateness review of Appellant's reprimand in "Part 1" was "deficient" compared to its sentence appropriateness review of a reprimand in *United States v. Wolcott*, No. ACM 39639, 2020 CCA LEXIS 234 (A.F. Ct. Crim. App., July 15, 2020) (unpub. op.), the United States argues, "Yet, in *Wolcott*, AFCCA offered less Article 66, UCMJ sentence appropriateness review of the reprimand than it did in Appellant's case." Gov. Ans. at 16. But Appellant does not argue the AFCCA's evaluation of his reprimand was "deficient" because it was pithy or lacked substance; rather, Appellant argues the AFCCA's evaluation of his reprimand was *erroneous* because the lower court applied the wrong standard of review (unlike in *Wolcott*).

B. Where it cannot elide the AFCCA's error, the United States embraces it by arguing an appellant who fails to object to the language of a reprimand—which it considers a "unique" punishment—in a post-trial motion forfeits the issue on appeal. This position is unsupported by the plain text of the applicable provisions of the UCMJ and R.C.M., and conflicts with this Court's precedent.

Though the United States argues a reprimand is a "unique" punishment (an argument Appellant rebuts *infra*), it nevertheless appears to agree that a reprimand is a component of an adjudged sentence, and that, to complete sentence appropriateness review, service CCAs should evaluate both whether a reprimand is appropriate generally *and* as written. Gov. Ans. at 17, 26.

Despite these agreements, the United States has adopted the position that "reviewing courts should find that appellants who fail to object to the language of a reprimand in a post-trial motion forfeit the issue on appeal." *Id.* at 19. While the United States tries to cage its position to the challenge of reprimands exclusively, the flawed logic underlying this position is not so circumscribed, and could be (albeit erroneously) applied to other forms of adjudged punishments, too; the natural consequence of the government's position is that any appellant who fails to file a post-trial motion to challenge *any component* of their

adjudged sentence in post-trial proceedings forfeits his or her ability to challenge the appropriateness of those sentence components on appeal. This is an extraordinary consequence, one which this Court should spurn. Appellant was not required to challenge his reprimand via post-trial motion to enjoy his right to *de novo* review of its appropriateness on appeal. *See United States v. Jenkins*, 60 M.J. 27, 29 (C.A.A.F. 2004) *and United States v. Chin*, 75 M.J. 220, 223 (C.A.A.F. 2016); *see also* Article 66(d), UCMJ, 10 U.S.C. § 866(d).

To support its position, the United States argues reprimands are "unique" sentence components in that they are *adjudged* by the court-martial but *specified* by a convening authority. Gov. Ans. at 26. It advances this argument to justify the AFCCA's finding of forfeiture in this case, and to limit the applicability of this finding to reprimands exclusively. But reprimands are in fact not unique in the way the government claims.

For example, convening authorities or their subordinate commanders specify the terms of adjudged hard labor without

confinement.[4] Convening authorities have some discretion to specify in which facility a convicted servicemember will serve an adjudged confinement sentence,[5] thereby dictating the *quality* of the confinement. Sentence appropriateness review under the *de novo* standard encompasses these types of punishments; service CCAs have long reviewed *de novo* the appropriateness of sentences to confinement or hard labor without confinement, both generally and as applied, quantitatively and qualitatively, despite the fact that these punishments, while *adjudged* by a court-martial, are *specified* by a convening authority (or subordinate commander), *and* despite appellants' failure to file post-trial

[4] "The court-martial shall not specify the hard labor to be performed." R.C.M. 1003(a)(6). "Ordinarily, the immediate commander of the accused will designate the amount and character of the labor to be performed." *Id.* at Discussion.

[5] "The place of confinement shall not be designated by the court-martial." R.C.M. 1003(a)(7). "A commander shall deliver the accused into post-trial confinement when the sentence of the court-martial" includes it. R.C.M. 1102(b)(2). "The place of confinement…shall be determined by regulations prescribed by the Secretary concerned…[A] sentence to confinement…may be ordered to be served in any place of confinement under the control of any of the armed forces or in any penal or correctional institution under the control of the United States or which the United States may be allowed to use." R.C.M. 1102(b)(2)(F).

motions challenging the propriety of those punishments.[6] Reprimands should be treated no differently.

The United States furthers its "uniqueness" argument by pointing out that, in addition to *specifying* reprimands, convening authorities typically issue them via the same instrument as the action. But this does not render reprimands "unique" from other sentence components in a material way. Nor does the issuance of an inappropriate reprimand on the action memorandum render that reprimand a mere "error in the convening authority's action," which must be first addressed via a post-trial motion to preserve an appellate challenge thereto. R.C.M.

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[6] *See United States v. Davis*, No. ACM 38359, 2014 CCA LEXIS 402, *9 (A.F. Ct. Crim. App. Jul. 18, 2014) (unpub. op.) *and United States v. Altier* (2012 CCA LEXIS 156, *9 (N.M. Ct. Crim. App., April 30, 2012) (unpub. op.) (assessing the appropriateness of hard labor without confinement under the *de novo* standard); *United States v. Driscoll*, No. ACM 39889 (f rev), 2022 CCA LEXIS 496, at *56 (A.F. Ct. Crim. App. Aug. 23, 2022) (unpub.op.) (finding confinement for forty years and nine months was inappropriately severe); *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 as part of those courts' determination of sentence appropriateness) *and United States v. Pullings*, 2021 CCA LEXIS 648 *22 ("Under this court's Article 66(d), UCMJ [] mandate to approve only so much of the sentence as we find 'correct in law,' we cannot affirm 'an unlawful sentence, such as one that violates the prohibition against cruel and unusual punishment in the Eight Amendment and Article 55, UCMJ." (citing *United States v. Jessie*, 79 M.J. 437, 440 (C.A.A.F. 2020)).

1104(b)(1)(F). The government conflates the action and the issuance of a written reprimand. Neither the UCMJ nor the Rules for Courts-Martial require these two acts to be effectuated via the same instrument or even at the same time. Rules for Courts-Martial 1109 and 1110, which govern post-trial convening authority actions, make no mention of written reprimands, let alone establish any requirement that a convening authority issue the written reprimand with action. Similarly, R.C.M. 1003(b)(1) governing reprimands makes no mention of action, or any other instrument by which the convening authority shall issue a reprimand, specifying only that a reprimand shall be issued in writing. Therefore, a convening authority need not specify the written terms of the reprimand on the action memorandum but could instead execute that punishment in a separate memorandum.[7] If a convening authority chose this course of action, a post-trial motion challenging the reprimand filed

[7] The Air Force regulation governing, *inter alia*, post-trial processing in effect at the time of action in this case directed, "The convening authority's decision on action memorandum must include any reprimand language in cases in which a reprimand was adjudged by the court." JA at 333. But Appellant contends this provision is meant to effectuate two distinct post-trial convening authority decisions with one instrument solely for the sake of economy.

under R.C.M. 1104(b)(1)(F) to address "an allegation of error in the convening authority's action" would be inapt.[8] Regardless of the title of the document on which it is written, an inappropriate reprimand remains an inappropriate punishment (or, more accurately, an inappropriately executed one), reviewable *de novo* under Article 66(d), UCMJ by the service CCAs. Because the government's argument that reprimands are "unique" fails, so too does its argument that its forfeiture position in this case is applicable only to reprimands.

The plain text of R.C.M. 1104(b)(1)(F) weighs in favor of the argument Appellant advanced in his opening brief, namely that the rule was meant to address procedural or other errors in the convening authority's action. *See* App. Br. at 21 and n.11. The rule is specifically meant to address "[a]n allegation of error in the convening authority's action *under R.C.M. 1109 or 1110*." (emphasis added). Again, R.C.M.

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[8] A similar situation arose in *United States v. Samples*, No. ACM S32657, 2021 CCA LEXIS 463 (A.F. Ct. Crim. App., September 15, 2021) (unpub. op.), wherein the convening authority denied the accused's deferment and waiver requests and memorialized that decision not, as is typical, on the Decision on Action memorandum, but on a separate memorandum which the government could not prove was served on the accused. *Id*. at *10. The court found non-prejudicial error, and did not first determine whether the accused had filed a post-trial motion to "correct" any "error" in the action. *Id*.

1109 and 1110 make no mention of reprimands, how they shall be issued, and what they can or cannot say. Thus, R.C.M. 1104(b)(1)(F) is not meant to address inappropriately severe reprimands. Even if it were, nothing in that rule (or its parent rule, R.C.M. 1104(b)) establishes a *requirement* that an appellant file such a motion in order to preserve *de novo* review of the propriety of a reprimand on appeal.[9]

Even if one accepts the AFCCA's flawed rationale that Appellant had to file a post-trial motion to preserve his challenge to the propriety of the reprimand, that the United States should adopt this position in this particular case is confounding. The United States does not attempt to rebut Appellant's argument (*see* App. Br. at 24, n.13) that the window of opportunity to file a post-trial motion challenging the wording of a reprimand is fleetingly short, and thus any scheme requiring the filing of a post-trial motion in order to secure *de novo* sentence appropriateness review of a reprimand is impracticable. But moreover, the United States acknowledges that in this case, it served Appellant and his counsel with the convening authority's action memorandum—containing the reprimand—and the already-executed entry of judgment *at the very same*

[9] *See* App. Br. at 18-20, n.10, and n.11.

time. Gov. Ans. at 23; JA at 328. Thus, the United States admits that instead of a fleeting window of time to file a post-trial motion to challenge the wording of the reprimand, Appellant had no window at all.[10] Submitting a post-trial motion to a court-martial no longer in existence would be a "futile act[]." *United States v. Palacios Cueto*, ___ M.J. ___, No. 21-0357/AF, slip. op. at 9 (C.A.A.F. Jul. 19, 2022).

CONCLUSION

To maximize the prejudice of her reprimand, the convening authority wrenched words apart from their plain meaning to slap opprobrious and undeserving labels on Appellant—those of child abuser and human sex trafficker. These words are inaccurate and inflammatory,

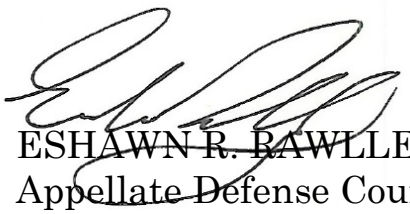
[10] In attempting to justify the AFCCA's finding of forfeiture despite the lack of a legal window in which Appellant could have challenged the reprimand, the United States speculates the AFCCA "could have found" that the military judge's "premature" entry of judgment did not "excuse" the "requirement" to preserve the issue by "filing an objection to the action" within five days (to whom, the government does not make clear). Gov. Ans. at 23-24, n.11. Alternatively, the United States theorizes the AFCCA "might have determined" that Appellant could have preserved his challenge to the reprimand by filing a motion "to correct a clerical or computational error" in the entry of judgment via R.C.M. 1104(b)(2)(C) (an argument Appellant rebuts in his opening brief at 21, n.11). In the absence of any explication by the lower court of its finding of forfeiture despite Appellant's lack of opportunity to file a post-trial motion, this Court should decline to entertain the government's suppositions.

and render the reprimand inappropriately severe. The lower court erred in its analysis of Appellant's challenge to this reprimand. Unable to mend the error, the United States now adopts the lower court's "debatabl[y]" flawed reasoning. It claims Appellant forfeited his challenge on appeal by failing to first raise it in post-trial proceedings, despite acknowledging that it shut and locked the door to those proceedings. And the government adopts this position without regard to its natural consequences, which is that every appellant could be found to have forfeited the right to *de novo* sentence appropriateness review for *any sentence component* unless they first litigate the issue in post-trial proceedings. This Court should decline to endorse this position.

WHEREFORE, this Honorable Court should decide the AFCCA erred by finding Appellant forfeited his challenge to the wording of the reprimand and by applying the plain error standard of review in determining the appropriateness of that 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.[11]

Respectfully submitted,



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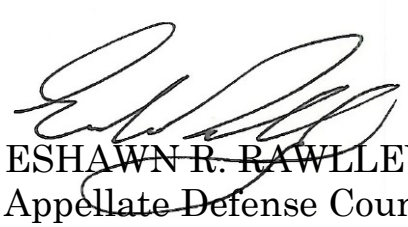
[11] Citing *United States v. Hawes*, 51 M.J. 258 (C.A.A.F. 1999) and *United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992), the United States argues at length that this Court need not remand, and can instead resolve any error in the reprimand by "conduct[ing] an independent review" of its "legal correctness" using an abuse of discretion standard of review. Gov. Ans. at 24-29. Appellant disagrees, finds *Hawes* and *Sloan* distinguishable from this case, and avers the proper course of action for this Court would be to remand to the AFCCA to reconsider what is a matter reserved exclusively to the service CCAs. *See United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999) ("The power to review a case for sentence appropriateness…is vested in the [service CCAs], not in our Court, which is limited to errors of law."); *see also Baier*, 60 M.J. at 385.

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 September 6, 2022.



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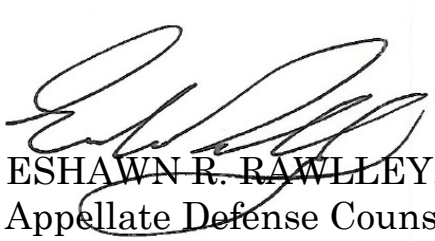
RULE 24(d) CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 24(c) of this Court's rules: excluding the cover page, index, table of authorities, and certificates of counsel, it consists of nineteen pages, 3,996 words, and 408 lines of text. This brief complies with Rule 37 of this Court's rules as it is printed in 14-point proportional typeface.



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