IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 39979
Airman Basic (E-1), WILLIAM C. MCALHANEY, USAF, *Appellant.*	)	USCA Dkt. No. 22-0170/AF

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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 under Article 66(d), UCMJ.[1] This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

[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.) (MCM).

STATEMENT OF THE CASE

On 7 July 2020, Appellant was tried by a general court-martial composed of a military judge alone. (JA at 045.) Consistent with Appellant's pleas and pursuant to a plea agreement, the military judge found Appellant guilty of one specification of wrongful receipt of child pornography and one specification of wrongful possession and viewing of child pornography, in violation of Article 134, UCMJ. (JA at 045-46.) The military judge sentenced Appellant to a bad conduct discharge, confinement for 3 months for each specification of the Charge,[2] and a reprimand. (Id.)

The convening authority took no action in the case. (JA at 002.) Appellant raised three assignments of error at AFCCA. (Id.) AFCCA found no error materially prejudiced Appellant's rights and affirmed the findings and sentence. (Id.)

STATEMENT OF FACTS

Appellant's Convicted Offenses

Specification 1: Wrongful Receipt of Child Pornography

Approximately five months before entering active duty, Appellant began communicating with NC using various mobile phone applications. (JA at 048.) On 25 June 2018, Appellant asked NC how old she was. (Id.) NC told Appellant

[2] In accordance with the plea agreement, the military judge ordered the confinement terms to be served concurrently. (Supp. JA at 323-24.)

she was 15 years old. (Id.) By the end of June 2018, Appellant and NC had begun talking about sexually explicit topics. (Id.) Appellant and NC continued their sexually explicit conversations until approximately November 2018, when Appellant enlisted in the Air Force and entered Basic Military Training (BMT). (Id.)

Appellant and NC began communicating again after Appellant completed BMT and arrived at Sheppard Air Force Base (AFB) for technical school. (JA at 002.) Sometime between January and April 2019, Appellant asked NC if she would send him a nude photograph or video of herself. (JA at 277.) NC told Appellant she had a video of herself having sexual intercourse with another male whom Appellant did not know. (Id.) Appellant offered to give NC $30.00 for the video. (Id.) NC agreed, and sent Appellant the video sometime between January and April 2019. (Id.) Appellant watched the video, which depicted NC engaged in "penetrative, vaginal sexual intercourse" with an unknown male for approximately 45 seconds. (JA at 048.) NC was 16 years old at the time she sent the video to Appellant. (Id.)

On 21 April 2019, NC asked Appellant if he was going to send her the $30.00 he had offered for the video. (JA at 233.) NC reminded Appellant he had owed her the $30.00 "for a while." (Id.) NC suggested Appellant send her the money through PayPal. (JA at 241.) On 27 April 2019, Appellant asked NC, "Can I see more of those vids or pics[?]" and "Can I get more after I send [money]

again[?]" (JA at 195-96.) NC replied, "Why would you get more pics?" (JA at 195.) NC then told Appellant he still had not paid her for the first video. (JA at 194.) After this conversation, Appellant deposited $30.00 in NC's PayPal account. (JA at 189.)

Specification 2: Wrongful Possession and Viewing of Child Pornography

In early 2018, Appellant began communicating with ST using various mobile phone applications. (JA at 049.) ST told Appellant she was 15 years old. (JA at 292.) Appellant's conversations with ST sometimes would turn to sexually explicit matters. (JA at 049.) On multiple occasions, Appellant initiated the sexually explicit conversations. (Id.)

Appellant and ST continued exchanging messages after Appellant entered active duty and arrived at Sheppard AFB. (JA at 049.) On 14 January 2019, Appellant offered to buy ST a sex toy. (JA at 116.) When ST asked why, Appellant said he wanted to see how ST reacted with the sex toy inside her. (Id.) On 15 January 2019, Appellant asked ST to show him her "ass" and "pussy," and requested that ST help him "cum."[3] (JA at 049.) By sending these messages to ST, Appellant intended for ST to send him sexually explicit images or videos. (Id.)

[3] Paragraph 8 of the Stipulation of Fact states that Appellant made these comments to ST on 15 January 2020. (JA at 049.) This appears to be a scrivener's error. The correct date of these comments is 15 January 2019.

On 20 January 2019, Appellant asked ST if he could see her masturbating. (Id.) In response, ST sent Appellant a photograph of her nude lower body with a wooden hairbrush handle penetrating her vulva. (Id.) After viewing the photograph, Appellant told ST he "want[ed his] cock [inside of ST] instead of that brush." (Id.) ST was 16 years old at the time she sent the photograph to Appellant. (Id.)

The Reprimand

On the same day his court-martial adjourned, Appellant was served a copy of the Statement of Trial Results (STR). (Supp. JA at 326.) Page 2 of the STR reflected, inter alia, that a reprimand had been adjudged. (Supp. JA at 324.) The STR did not specify the wording of the reprimand, in accordance with R.C.M. 1003(b)(1).[4] (Id.)

On 22 July 2020, the convening authority issued her Convening Authority Decision on Action Memorandum (CADAM). (JA at 044.) The convening authority took no action on the sentence. (Id.) In paragraph 3 of the CADAM,

[4] R.C.M. 1003(b)(1) provides: "A court-martial shall not specify the terms or wording of a reprimand. A reprimand, if approved, shall be issued, in writing, by the convening authority." The Discussion to R.C.M. 1003(b)(1) states, "Only the convening authority may specify the terms of the reprimand. When a court-martial adjudges a reprimand, the convening authority shall issue the reprimand in writing or may disapprove, reduce, commute, or suspend the reprimand in accordance with R.C.M. 1109 or R.C.M. 1110." (JA at 035.)

pursuant to R.C.M. 1003(b)(1), the convening authority issued the specific language of the adjudged 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 or society at large. Be warned, further misconduct will result in additional criminal liability.

(Id.)

The military judge signed the Entry of Judgment (EoJ) on 29 July 2020. (JA at 046.) The military judge entered, verbatim, the reprimand language contained in the CADAM into the EoJ. (JA at 044, 046.) Appellant's trial defense counsel received a copy of the EoJ and CADAM on 31 August 2020. (Supp. JA at 327.) Appellant's trial defense counsel did not file a post-trial motion alleging error in the wording of the convening authority's reprimand.

The AFCCA Opinion

Appellant's third assignment of error before AFCCA claimed the reprimand issued by the convening authority was "unduly severe, inflammatory, inaccurate, and unsupported by the evidence in the record," and as a result inappropriate and substantially prejudicial. (JA at 006.)

AFCCA chose to address this assignment of error in two different ways. First, AFCCA addressed "whether the reprimand or other elements of Appellant's

sentence were overly severe." (JA at 007.) As to this question of sentence appropriateness, AFCCA stated it was applying the de novo standard of review and gave "individualized consideration to Appellant, the nature and seriousness of his offenses, his record of service, and all other matters contained in the record of trial." (Id.) AFCCA noted,

> "Appellant's receipt, possession, and viewing of child pornography were not a passive venture. . . Rather, Appellant initiated the exchange of a child pornography video for money in Specification 1 of the Charge, and he convinced another teen to create an image of child pornography in Specification 2 of the Charge."

(Id.) The lower court also noted that Appellant was sentenced to less than the maximum allowable sentence. (Id.) Consequently, AFCCA concluded that the sentence as a whole – including the reprimand – was not inappropriately severe. (Id.)

Having concluded the reprimand was not inappropriately severe, AFCCA next addressed what it considered to be the separate, but related, question of whether the reprimand was factually inaccurate. (JA at 008.) AFCCA began its analysis of this question by noting that Appellant had not objected to the reprimand's language prior to his appeal, and thus the Court would evaluate "whether the reprimand was factually inaccurate such that it constituted plain or obvious error." (Id.) In a later footnote, AFCCA explained that plain error was the appropriate standard of review because Appellant had forfeited the issue by failing

to raise a post-trial motion under R.C.M. 1104(b)(2)(B).[5] (JA at 009.) AFCCA then analyzed the reprimand and found no plain or obvious error. (Id.) AFCCA further noted it was "[not] convinced that Appellant was materially prejudiced by the convening authority's choice of wording in the reprimand." (JA at 009.)

SUMMARY OF ARGUMENT

The lower court properly applied the de novo standard of review to the question of whether Appellant's reprimand, as written, was appropriate. AFCCA gave "individualized consideration to Appellant," his offenses, and matters contained in the record of trial. (JA at 007.) AFCCA noted that "Appellant initiated the exchange of a child pornography video for money . . . and he convinced another teen to create an image of child pornography." (Id.) By highlighting these specific facts, AFCCA rebutted Appellant's claim that the language of the reprimand rendered his sentence unduly severe. AFCCA concluded its sentence appropriateness review by finding that Appellant's sentence as a whole—including the reprimand—was not inappropriately severe. (JA at 008.) AFCCA's sentence appropriateness review of Appellant's reprimand, while not lengthy, was done under the proper standard of review and exceeded what this

[5] The Government agrees with Appellant that the lower court's citation to "R.C.M. 1104(d)(2)(B)" in footnote 11 of its opinion was a scrivener's error, and that the lower court intended to cite R.C.M. 1104(b)(2)(B).

Court requires of a Court of Criminal Appeals (CCA). United States v. Guinn, 81 M.J. 195, 204 (C.A.A.F. 2021).

Having completed its review of Appellant's reprimand for sentence appropriateness, AFCCA turned to an analysis of the separate question of whether the reprimand was legally correct—in other words, whether the sentence was correct in law and fact. (JA at 008.) AFCCA began its analysis of this question by finding Appellant had forfeited the issue by failing to object to the language of the reprimand in a post-trial motion under R.C.M. 1104(b)(2)(B). (JA at 008-09.) Finding forfeiture, AFCCA analyzed the reprimand's legal correctness under a plain error standard. (JA at 008.)

The Government acknowledges that whether AFCCA erred by applying plain error review in considering the legal correctness of Appellant's reprimand is debatable. But the standard of review AFCCA applied to this question does not matter to this Court's analysis of the granted issue, because AFCCA had already reviewed the sentence appropriateness of Appellant's reprimand using the correct de novo standard.

Even if this Court finds that AFCCA reviewed the legal correctness of Appellant's reprimand using the wrong standard of review, this Court should not return this case to the lower court. Instead, this Court should exercise its authority under Article 67(c)(1), UCMJ, and independently assess whether the reprimand is legally correct. In doing so, this Court should evaluate whether the convening

authority abused her discretion in choosing the words of Appellant's reprimand. Given the facts of Appellant's case, the convening authority's word choice was not "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." United States v. Lloyd, 69 M.J. 95, 99 (C.A.A.F. 2010) (citations and quotation marks omitted). Therefore, this Court should affirm the decision of the lower court.

ARGUMENT

THE LOWER COURT PROPERLY APPLIED A DE NOVO STANDARD OF REVIEW WHEN EVALUATING WHETHER THE WORDING OF THE REPRIMAND RENDERED APPELLANT'S SENTENCE INAPPROPRIATELY SEVERE.

Standard of Review

This Court recognizes a Court of Criminal Appeal's (CCA) "broad discretion" in conducting its Article 66, UCMJ review. Guinn, 81 M.J. at 199 (quoting United States v. Swift, 76 M.J. 210, 216 (C.A.A.F. 2017)). Thus, this Court will review a CCA's sentence appropriateness decisions for an abuse of discretion. Guinn, 81 M.J. at 199. The scope and meaning of the CCA's Article 66, UCMJ authority is a question that this Court reviews de novo. United States v. Gay, 75 M.J. 264, 267 (C.A.A.F. 2016).

Law

1. Sentence appropriateness review

The CCAs "may affirm only . . . the sentence or such part or amount of the sentence, as [they find] correct in law and fact and determine[], on the basis of the entire record, should be approved. Article 66(d)(1), UCMJ. "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988). CCAs review the question of sentence appropriateness de novo. United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006).

Generally, CCAs determine sentence appropriateness "by individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender." United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982) (internal quotations omitted). CCAs have broad discretion under Article 66, UCMJ, to disapprove part or all of a sentence. United States v. Nerad, 69 M.J. 138, 145 (C.A.A.F. 2010). But this discretion is not unfettered. CCAs may not, for example, grant sentence relief on equitable grounds or in an exercise of clemency. Id. at 143, 146.

While a CCA "*must* determine whether it finds the sentence to be appropriate," a CCA is given significant discretion to determine "*how* that . . . sentence appropriateness review should be resolved." United States v. Baier, 60 M.J. 382, 384-85 (C.A.A.F. 2005) (emphases added). Moreover, a CCA's duty to

conduct sentence appropriateness review "cannot properly be viewed as being unduly onerous." Guinn, 81 M.J. at 203. Thus, this Court does not require a CCA to devote lengthy analysis to every assignment of error raised by an appellant. "[A]s long as a CCA indicates that it has considered an issue raised by an appellant, a single sentence disposition is sufficient. Id. at 204 (citing United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987)).

2. R.C.M. 1104(b)(2)(B) post-trial motions

"The President made substantial changes to post-trial processing with the 2019 R.C.M." United States v. Miller, 82 M.J. 204, 207 (C.A.A.F. 2022). One of these changes was the addition of a new rule, R.C.M. 1104. This rule provides an opportunity for either party to file a post-trial motion to address, among other matters, "[a]n allegation of error in the convening authority's action." R.C.M. 1104(b)(1)(F). Parties have five days after receiving the convening authority's action to file a post-trial motion alleging "error in the action of the convening authority." R.C.M. 1104(b)(2)(B). Should the military judge find error in the convening authority's action, the military judge can either "return the action to the convening authority for correction," or "with the agreement of all parties, correct the action of the convening authority in the entry of judgment." R.C.M. 1104(b)(2)(B)(i)-(ii).

Failure to file a motion within the prescribed timeline constitutes forfeiture of the issue on appeal. R.C.M. 801(g). This Court has applied the forfeiture rule

to post-trial motions. "An accused's failure to file a post-trial motion within the allotted time forfeits his or her right to object to the accuracy of the convening authority's decision on an action, absent plain error." Miller, 82 M.J. at 207. Under the plain error standard of review, an appellant must show "(1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." Id. at 207-08.

While R.C.M. 1104(b)(2)(B) and its five-day deadline to file a post-trial motion apply to allegations of error in the *action* of the convening authority, two judges of this Court have previously expressed their inclination to apply forfeiture should an accused fail to file a post-trial motion alleging error in "the convening authority's decision on an *action memorandum*." United States v. Brubaker-Escobar, No. 20-0345, 2021 CAAF LEXIS 508, at *14 (C.A.A.F. 2021) (Ohlson, J. and Sparks, J., concurring in the result) (emphasis added), *vacated on other grounds*, 81 M.J. 471 (C.A.A.F. 2021) ("Two judges would hold that Appellant is entitled to no relief because he forfeited this issue by failing to raise it in a timely manner under R.C.M. 1104(b)(2)(B) . . . . However, these two judges decline to write separately because neither party asked for reconsideration of this issue.").

Analysis

1. The lower court applied the correct de novo standard of review when it reviewed Appellant's reprimand for sentence appropriateness.

As an initial matter, the Government suggests that the lower court's analysis of the reprimand can be divided into two parts. In Part 1, AFCCA reviewed the reprimand in the context of sentence appropriateness review.[6] In Part 2, AFCCA again reviewed the reprimand, this time in the context of whether the language therein was factually inaccurate.[7]

The Government agrees with Appellant that his challenge to the reprimand before the lower court was "encompassed by sentence appropriateness review," and therefore "AFCCA was required to apply the *de novo* standard of review." (App. Br. at 17). The Government also agrees that AFCCA ended its de novo review of the appropriateness of the reprimand in the first full sentence of page 8 of its opinion—at the conclusion of Part 1. (App. Br. at 18). The Government does not agree, however, with Appellant's contention that AFCCA's sentence appropriateness review of the reprimand in Part 1 was deficient.

In Part 1, AFCCA assessed the appropriateness of Appellant's reprimand. AFCCA began by stating the applicable standard of review. The lower court

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[6] Part 1 begins at the top of page 7 and ends with the last full sentence on page 8. (JA at 007-08.)

[7] Part 2 begins with the first full paragraph of page 8 and ends with the last full paragraph of page 9. (JA at 008-09.) The Government will address Part 2 below, at pages 18-24 of this brief.

plainly stated it would review the appropriateness of Appellant's sentence de novo. (JA at 007.) AFCCA then stated the issue: "whether *the reprimand* or other elements of Appellant's sentence were overly severe." (Id.) (emphasis added).

AFCCA did not conduct a lengthy analysis of the text of the reprimand in Part 1. But it was not required to do so. Once AFCCA indicated it was considering the issue, all AFCCA was required to do was address the issue in "a single sentence disposition." Guinn, 81 M.J. at 204. AFCCA did more than what was required. The lower court first gave "individualized consideration to Appellant, the nature and seriousness of his offenses, his record of service, and all other matters contained in the record of trial." (JA at 007.) AFCCA then directly addressed the allegedly erroneous language of the reprimand. Appellant took issue with the language in the reprimand that stated Appellant had "promoted the abuse and harm of children, and furthered the criminal enterprise of human sex trafficking." (JA at 009.) In response, AFCCA noted that 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." (JA at 007.) Rather, AFCCA noted that "Appellant initiated the exchange of a child pornography video for money . . . and he convinced another teen to create an image of child pornography." (Id.) Based on the above, AFCCA concluded neither the reprimand nor any other element of the sentence was inappropriately severe. (JA at 007-08.)

Appellant claims that AFCCA's sentence appropriateness review of Appellant's reprimand in Part 1 was deficient compared to AFCCA's sentence appropriateness review of the reprimand in United States v. Wolcott, No. ACM 39639, 2020 CCA LEXIS 234 (A.F. Ct. Crim. App. 15 July 2020) (unpub. op.).[8] (App. Br. at 11-12). Yet, in Wolcott, AFCCA offered less Article 66, UCMJ sentence appropriateness review of the reprimand than it did in Appellant's case. (JA at 022.) In Wolcott, AFCCA spent the vast majority of its analysis discussing the appellant's challenges to the reprimand under the Eighth Amendment and Article 55, UCMJ, and devoted a mere seven lines at the end of its opinion to its analysis of the reprimand for sentence appropriateness. (JA at 017-22.) Per this Court's holding in Guinn, 81 M.J. at 204, AFCCA did enough in Wolcott. By exceeding what it did in Wolcott, AFCCA also did enough in Appellant's case.

Appellant also argues that AFCCA's sentence appropriateness review in Part 1 was deficient because AFCCA applied the de novo standard of review only as to the question of whether "the court-martial's imposition of a reprimand was inappropriate," and not to the question of whether the text of the reprimand was

[8] In any event, Wolcott is distinguishable because the 2016 version of the Rules for Courts-Martial applied in that case. Wolcott, unpub. op. at 2 (JA at 012.). In contrast to the 2019 version, the 2016 version of the Rules for Courts-Martial did not contain R.C.M. 1104(b)(2)(B), which provides the opportunity for parties to file post-trial motions. Therefore, in Wolcott, AFCCA could not have found that the appellant had forfeited his challenge to the reprimand by failing to file a post-trial motion.

inappropriate. (App. Br. at 16-17). Appellant's argument fails for two reasons. First, AFCCA never claimed that Appellant had forfeited his right to an Article 66(d)(1), sentence appropriateness review of the reprimand. Rather, AFCCA explicitly stated it would review "whether *the reprimand* . . . [was] overly severe"—a question of sentence appropriateness—de novo. (JA at 007) (emphasis added). Appellant asks this Court to interpret the words "the reprimand" as referring only to a reprimand as a punishment *in general*. (App. Br. at 18). However, the plain meaning of these words must control. United States v. Bergdahl, 80 M.J. 230, 235 (C.A.A.F. 2020) ("[C]ourts adhere to the plain meaning of any text"). The plain meaning of "the reprimand" is a reference to the only reprimand in Appellant's case: the reprimand that was issued by the convening authority, wording and all. Second, AFCCA in fact addressed the text of the reprimand when it highlighted specific facts about Appellant's offenses that supported the accuracy of the reprimand language: that Appellant had given money in exchange for child pornography, and that Appellant had convinced a minor to create child pornography. (JA at 007.) AFCCA was not required to engage in an "unduly onerous" sentence appropriateness review. Guinn, 81 M.J. at 203.

In Part 1 of its analysis of Appellant's reprimand, the lower court reviewed the reprimand for sentence appropriateness. In so doing, the lower court applied the proper de novo standard of review and determined "the reprimand"—a

reference to the reprimand that was issued by the convening authority in this case—was not inappropriately severe. Thus, in answer to the question presented in the granted issue, AFCCA did not err, because it applied the correct de novo standard of review to the question of sentence appropriateness.

2. Appellants who fail to challenge the wording of an adjudged reprimand in a post-trial motion forfeit the issue on appeal. Even if AFCCA erred by applying a plain error standard in reviewing the legal correctness of Appellant's reprimand, this does not matter to the granted issue.

Having reviewed Appellant's reprimand for sentence appropriateness, AFCCA pivoted in Part 2 to the separate question of "whether the reprimand was factually inaccurate." (JA at 008.) 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 and required to be reviewed de novo. AFCCA did not frame the issue in this way because it had already completed in Part 1 its sentence appropriateness review of the reprimand, and was now moving on to the separate question of the alleged factual inaccuracy of the reprimand. AFCCA's approach was logical, given that Appellant's third assignment of error encompassed numerous claims within. Indeed, Appellant's third assignment of error claimed not only that the reprimand was "unduly severe"—a question of sentence appropriateness which the lower court fully addressed in Part 1—but also that the reprimand was "inaccurate, and unsupported by the evidence in the

record." (JA at 006.) It is this second claim, which AFCCA summarized as "whether the reprimand was factually inaccurate," that AFCCA analyzed in Part 2. In other words, because AFCCA had already analyzed under Article 66(d)(1) whether the sentence "should be approved," it then turned to analyze whether the sentence was "correct in law and fact."

AFCCA began its analysis of the factual accuracy of the reprimand by finding Appellant had forfeited the issue by failing to object to the language of the reprimand in a post-trial motion under R.C.M. 1104(b)(2)(B). (JA at 008-09.) The Government agrees 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.

The convening authority issues the wording of an adjudged reprimand in the CADAM. Air Force Guidance Memorandum (AFGM) to Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, para. 13.23.4 (30 October 2019) ("The convening authority's decision on action memorandum must include any reprimand language in cases in which a reprimand was adjudged by the court.").[9]

[9] The Judge Advocate General of the Air Force issued the 30 October 2019 AFGM to AFI 51-201 to supplement AFI 51-201, *Administration of Military Justice* (18 January 2019) and clarify procedures and requirements implemented in the Military Justice Act of 2016 and 2019 Manual for Courts-Martial. (Supp. JA at 332.) Both the AFGM to AFI 51-201 and AFI 51-201 were in effect during the relevant time period in Appellant's case. The AFGM became void on 30 October 2020, and AFI 51-201 was superseded by Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice* (14 April 2022).

(Supp. JA at 333.) Thus, any alleged error in the language of the reprimand is akin to an error in the "action of the convening authority" within the meaning of R.C.M. 1104(b)(2)(B), and thereby should be treated as having been forfeited unless raised in a post-trial motion. United States v. Jackman, No. ACM 39685, 2021 CCA LEXIS 26, at *5 (A.F. Ct. Crim. App. 26 January 2021) (unpub. op.) ("[c]oncerns with a convening authority's *decision memorandum* should be addressed with the trial court before the EoJ is signed, long before an Article 66 review by a Court of Criminal Appeals.") (emphasis added); Brubaker-Escobar, 2021 CAAF LEXIS 508 at *14 ("Generally, concerns about a convening authority's *decision memorandum* should be addressed with the trial court before the military judge signs the entry of judgment . . . . An appellant's failure to file a post-trial motion . . . forfeits his right to object to the accuracy of the convening authority's *decision on an action memorandum*, absent plain error.") (Ohlson, J. and Sparks, J., concurring in the result) (emphases added), *vacated on other grounds*, 81 M.J. 471 (C.A.A.F. 2021).

The CADAM is then served on trial defense counsel. AFGM to AFI 51-201, para. 13.24.1 ("The SJA must promptly serve the convening authority's decision to take action or no action on . . . counsel for the accused"). (Supp. JA at 333.) After the CADAM is served, the military judge normally waits five days before she signs the EoJ to "ensure[] parties have five days to motion the military judge to correct an error in the CADAM in accordance with R.C.M. 1104(b)(2)(B)." DAFI 51-201,

para. 20.40.1.[10] (JA at 039.) Thus, upon receiving the CADAM, an accused has both the notice of any potential error, as well as the opportunity, to lodge complaints about the reprimand in a post-trial motion. Should the military judge find error in the reprimand, the military judge can resolve the error by either returning the action to the convening authority for correction or, should the parties agree, correct the action herself in the entry of judgment. R.C.M. 1104(b)(2)(B)(i)-(ii) (JA at 037). If, despite the notice and opportunity, an appellant fails to file a post-trial motion challenging the wording of the reprimand, reviewing courts should find the issue forfeited. Indeed, "[f]ailure to raise a claim of error should matter to the standard of review on appeal." Jackman, No. ACM 39685, at *5.

Appellant argues that a post-trial motion to fix an error in the reprimand would be futile. (App. Br. at 21). According to Appellant, the military judge does not have the authority to resolve errors in a reprimand because by doing so the military judge would be specifying the words of a reprimand, in violation of R.C.M. 1003(b)(1). (App. Br. at 23). Stated differently, Appellant argues that because military judges are prohibited from specifying the words of a reprimand, military judges cannot, upon finding an error in the reprimand, direct the convening authority to fix the error. This argument fails for two reasons. First,

[10] While DAFI 51-201, para. 20.40.1 guides military judges today, DAFI 51-201 was not in effect during the post-trial processing of Appellant's case. Moreover, neither AFGM to AFI 51-201 nor AFI 51-201 contains a similar provision that suggests military judges wait a certain amount of time before signing the EoJ.

R.C.M. 1104(b)(2)(B) gives the military judge the authority to resolve errors in the convening authority's action. Only the convening authority can take action on the sentence of a court-martial. Article 60a, UCMJ. Yet, the military judge has the authority to direct the convening authority to fix an erroneous action—for example, if the convening authority had illegally disapproved a bad conduct discharge. In so doing, the military judge is not taking action herself under Article 60a, UCMJ, but rather recognizing a legal issue in the action and directing the convening authority to try again. Similarly, should the military judge agree with an accused's post-trial motion that the wording of a reprimand is legally insufficient, the military judge can direct the convening authority to rewrite or remove certain portions of the reprimand. Such an action cannot be characterized as the military judge specifying the words of a reprimand, in violation of R.C.M. 1003(b)(1).

Second, Appellant's argument would lead to unnecessary appeals that could be resolved at the trial level. Assume a scenario in which an accused was charged with two offenses but found guilty of just one. The convening authority issues a reprimand that mistakenly includes language about the offense of which the accused was acquitted. Pursuant to Appellant's argument, the military judge would have no authority to send the reprimand back to the convening authority for correction, and the problems with the reprimand could only be resolved on appeal.

Surely military judges are not powerless to correct such obvious errors at the trial level.

While the Government agrees with AFCCA that, in general, appellants who fail to object to the language of a reprimand in a post-trial motion forfeit the issue on appeal, AFCCA's determination that Appellant forfeited this issue was not so clear-cut. Forfeiture is the "failure to make the timely assertion of a right." United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009). In this case, the convening authority signed the CADAM on 22 July 2020. (JA at 044.) The reprimand language was contained in the same document. (Id.) As the United States pointed out in its brief to AFCCA, for reasons unknown, the CADAM was not served on Appellant's trial defense counsel until 31 August 2020. (Supp. JA at 328.) The military judge signed the EoJ on 29 July 2020 – before Appellant could have been aware of the language of the reprimand. (JA at 046.) Since an EoJ "terminates the trial proceedings and initiates appellate review," and after signature, an EoJ, may only be corrected for "clerical and computational errors," *see* R.C.M. 1111(a)(2); 1111(c)(1), it may well have been futile for the defense to file a motion objecting to the language of the reprimand.

Although there could be some plausible reasons why AFCCA chose to apply forfeiture,[11] the United States will assume that AFCCA erred by finding forfeiture

[11] AFCCA could have found that the military judge's premature entry of judgment did not excuse Appellant's requirement under R.C.M. 1104(b)(2)(B) to at least

and applying the plain error standard. But ultimately, whether AFCCA erred by applying plain error review in considering the legal correctness of Appellant's reprimand does not matter to this Court's analysis of the granted issue. As discussed above, AFCCA already considered the sentence appropriateness of Appellant's reprimand under the correct de novo standard in Part 1 of its analysis. In Part 2, AFCCA addressed the separate issue of the legal correctness of the reprimand. The standard AFCCA used to address this separate issue—erroneous or not—has no bearing on whether AFCCA properly reviewed the sentence appropriateness of Appellant's reprimand de novo.

3. The convening authority did not abuse her discretion by wording the reprimand the way she did.

Even if this Court finds that AFCCA reviewed the legal correctness of Appellant's reprimand using the inappropriate standard of review, this Court should not return this case to the lower court. Rather, as it did in United States v. Hawes, 51 M.J. 258 (C.A.A.F. 1999), and is authorized to do under Article 67(c)(1), UCMJ, this Court should conduct an independent review of the legal correctness of the reprimand.

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preserve the issue by filing an objection to the action decision within five days. Or AFCCA might have determined that Appellant could have preserved the issue by filing a motion under to correct a clerical or computational error in the EoJ under R.C.M. 1104(b)(2)(C). Notably, Appellant has not claimed on appeal that he desired to file a motion to challenge the reprimand under R.C.M. 1104(b)(2)(B), but was dissuaded from doing so by the military judge's premature entry of judgment.

At trial, the appellant in Hawes was found guilty of wrongful use of marijuana and fraternization. Hawes, 51 M.J. at 258-59. The sentence included a dismissal, forfeiture of pay, and a reprimand. Id. at 259. AFCCA set aside the appellant's fraternization conviction but affirmed the sentence. Id. This Court determined AFCCA had not abused its discretion in affirming the sentence despite dismissing one of the offenses. Id. at 260-61. On its own, this Court then noted that the lower court had not "remove[d] the reference to 'fraternization' from appellant's reprimand." Id. at 261. To remedy the erroneous reprimand, the Court set aside the offending language and affirmed the remainder of the reprimand. Id.

Just as in Hawes, the granted issue before this Court does not encompass whether the underlying reprimand withstands legal scrutiny. Nonetheless, as this Court did in Hawes, this Court can and should dispose of the question of whether the reprimand was legally correct. If this Court independently determines the reprimand to be legally correct, then this Court has no reason to remand this case to rectify any misstep by AFCCA in applying plain error review, because Appellant will not have suffered any prejudice.[12]

[12] If AFCCA erred in conducting its sentence appropriateness review, then remand would be appropriate for two reasons: (1) this Court does not have independent authority to review sentence appropriateness under Article 67, UCMJ; and (2) AFCCA is statutorily obligated under Article 66(d)(1) to consider whether the adjudged sentence "should be approved." But as explained in this brief, AFCCA correctly reviewed sentence appropriateness de novo. Any error that occurred was in the standard of review AFCCA used in determining whether the reprimand was legally correct.

A reprimand is a unique punishment in that it does not take its final form until the convening authority specifies its terms. R.C.M. 1003(b)(1), Discussion ("A reprimand, if approved, shall be issued, in writing, by the convening authority.") (JA at 035). Should the convening authority approve an adjudged reprimand, she provides the language of the reprimand in the CADAM. AFGM to AFI 51-201, para. 13.23.4 (Supp. JA at 333). A reprimand is a punitive censure. R.C.M. 1003(b)(1), Discussion (JA at 035). "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). In choosing the wording of a reprimand, a convening authority may look to "the offenses, the evidence and testimony admitted at trial, and other matters that are properly before the convening authority." (Id.) "With few objections, in the Air Force, convening authorities are senior officers with a responsibility to preserve good order and discipline for the Airmen in their command." (Id.) In reviewing reprimands, AFCCA recognizes that convening authorities are given significant discretion to choose the words of the reprimand. (JA at 009, 019.) This Court should do the same by evaluating the reprimand under an abuse of discretion standard. *Cf.* United States v. Sloan, 35 M.J. 4, 6 (C.M.A. 1992) (reviewing a convening authority's denial of a deferment request for an abuse of discretion), *overruled on other grounds by* United States v. Dinger, 77 M.J. 447, 453 (C.A.A.F. 2018).

A convening authority abuses her discretion when her actions are "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." Lloyd, 69 M.J. at 99. The convening authority did not abuse her discretion by stating Appellant's crimes "promoted the abuse and harm of children." Appellant in fact "promoted the abuse and harm of children" when he initiated sexually explicit conversations with NC and ST, whom he knew were children (JA at 048-049), and convinced them over the course of several months to send him nude images of themselves. (JA at 049.) This was a "common-sense expression of formal disapproval" by the convening authority to Appellant for the very conduct to which he pleaded guilty.

Similarly, the convening authority did not abuse her discretion by stating Appellant's crimes "furthered the criminal enterprise of human sex trafficking." In exercising her significant discretion to choose the words of the reprimand, the convening authority chose to refer to the common-sense link between Appellant's crimes—possessing, receiving, and viewing child pornography—and sex trafficking. Appellant offers a lengthy argument as to why Appellant's crimes do not fit within federal definitions of "human sex trafficking" and various other related terms. However, in choosing the words of a reprimand, convening authorities should not be required to engage in a thorough review of every statute or regulation. All that is required is that they exercise their "common-sense" and choose the words of a reprimand based on matters properly before them. (JA at 008.) Here, Appellant paid NC $30.00 in exchange for child pornography. (JA at

049.) Because Appellant engaged in a monetary transaction for child pornography, the convening authority could have concluded that his conduct was commercial in nature, and thereby constituted "sex trafficking" as that term is commonly used and understood. Given the facts of the case, the convening authority's word choice was not arbitrary, fanciful, clearly unreasonable, or clearly erroneous. Thus, even if AFCCA incorrectly applied the plain error standard, Appellant suffered no prejudice from AFCCA's error, because he still would not have prevailed under the more favorable abuse of discretion standard. This Court can affirm AFCCA's ultimate decision, and there is no reason for this Court to return this case to AFCCA for further consideration of this issue.

If this Court disagrees and finds any of the language in the reprimand to be an abuse of the convening authority's discretion, this Court still should not return this case to the lower court. Although not strictly part of the granted issue, as argued above, it is appropriate for this Court to evaluate the legality of the reprimand in order to determine whether Appellant was prejudiced by any error in AFCCA's chosen standard of review. Having already engaged in this analysis, this Court need not unnecessarily prolong appellate review with a remand. If this Court finds legal error, in the interest of judicial economy, it should simply set aside the erroneous language from the reprimand and affirm the remainder, as it did in Hawes, 51 M.J. at 261.

Appellant was convicted of wrongfully receiving, possessing, and viewing child pornography. The convening authority's reprimand was "a frank and common-sense expression of formal disapproval" of the crimes Appellant committed, and well within the bounds of the convening authority's discretion. Even if AFCCA erred in application of the standard of review to the legality of the reprimand, Appellant has suffered no prejudice. As a result, Appellant is not entitled to any relief.

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court deny Appellant's requested relief and affirm the decision of the Air Force Court of Criminal Appeals.

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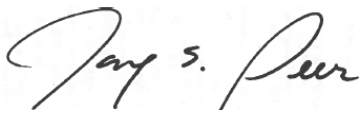
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 26 August 2022.



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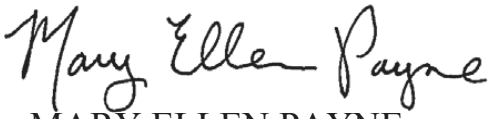

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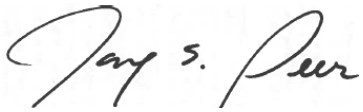

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Date: 26 August 2022

APPENDIX

Cited Unpublished Opinions

United States v. Jackman

United States Air Force Court of Criminal Appeals

January 26, 2021, Decided

No. ACM 39685 (f rev)

Reporter
2021 CCA LEXIS 26 *; 2021 WL 267665

UNITED STATES, Appellee v. James D. JACKMAN, Airman First Class (E-3), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Prior History: **[*1]** Appeal from the United States Air Force Trial Judiciary. Upon Further Review. Military Judge: Shelly W. Schools (trial); Andrew R. Norton (record of trial correction). Sentence: Sentence adjudged on 19 March 2019 by GCM convened at Nellis Air Force Base, Nevada. Sentence entered by military judge on 8 April 2019: Bad-conduct discharge, confinement for 9 months, forfeiture of all pay and allowances, and reduction to E-1.

United States v. Jackman, 2020 CCA LEXIS 273, 2020 WL 4919690 (A.F.C.C.A., Aug. 21, 2020)

Counsel: For Appellant: Major Mark J. Schwartz, USAF.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Lieutenant Colonel Brian C. Mason, USAF.

Judges: Before MINK, LEWIS, and D. JOHNSON, Appellate Military Judges. Senior Judge LEWIS delivered the opinion of the court, in which Judge D. JOHNSON joined. Senior Judge MINK filed a separate opinion con-curring in part, and dissenting in part and in the result.

Opinion by: LEWIS

Opinion

LEWIS, Senior Judge:

Appellant's case is before this court for the second time. In *United States v. Jackman, No. ACM 39685, 2020 CCA LEXIS 273, at *3, 14-15 (A.F. Ct. Crim. App. 21 Aug. 2020)* (unpub. op.), we found the record of trial defective under Rule for Court-Martial (R.C.M.) 1112(d)(2)[1] and returned it to the Chief Trial Judge, Air Force Trial Judiciary for correction. Subsequently, the detailed court reporter corrected the defect by removing audio recording files that were not sessions **[*2]** of the court. A detailed military judge gave the parties notice of the proposed correction and an opportunity to examine and respond to the notice. No party requested access to the recordings and no objections were made to the proposed correction. On 27 August 2020, the military judge signed the certificate of correction in accordance with R.C.M. 1112(d)(2).

On 2 September 2020, the record of trial was returned to our court for completion of appellate review. Appellant has not raised any issues for our consideration upon further review. We find the defect in the record of trial has been properly corrected and we may complete appellate review.

This leads us to address one new issue, whether the convening authority failed to take action on the entire sentence as required by Executive Order 13,825, § 6(b), *83 Fed. Reg. 9889, 9890 (8 Mar. 2018)*, and *Article 60, UCMJ, 10 U.S.C. § 860* (*Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*)).[2] While our panel is split on the approach to this issue and its outcome, the majority finds no material prejudice to the substantial rights of Appellant and therefore affirms the findings and

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[1] Unless otherwise specified, all references to the Uniform Code of Military Justice (UCMJ) and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] We did not order the Government to show cause as to why this case should not be remanded. We are familiar with the recent responses submitted by the Government on this issue in prior and pending cases. This decision was made for judicial economy.

sentence in the entry of judgment (EoJ).

I. BACKGROUND [*3]

In our earlier review of this case, we provided the following overview of its post-trial processing:

> A general court-martial composed of a military judge sitting alone sentenced Appellant to a bad-conduct discharge, confinement for ten months, forfeiture of all pay and allowances, and reduction to the grade of E-1. In undated clemency letters, Appellant and his defense counsel requested the convening authority "disapprove two-thirds of the adjudged total forfeitures." The convening authority's decision memorandum on action did not state that he reviewed Appellant's clemency request. In taking action on the sentence, the convening authority reduced the confinement from ten to nine months to comply with the [pretrial agreement (PTA)] but he did not disapprove any of the forfeitures. The military judge signed the [EoJ] the same day the convening authority took action on the sentence. The parties did not file any post-trial motions with the military judge. On 17 April 2019, the court reporter certified the record of trial and on 3 May 2019, the record of trial was docketed with our court.

*Jackman, 2020 CCA LEXIS 273, at *2*.

We also noted the following regarding appellate processing of Appellant's case: **[*4]**

> Appellant submitted his case to us without a specific assignment of error. Appellant's counsel noted in his merits brief that he "identified a potential post-trial error, but . . . concluded that any such error would be non-prejudicial to Appellant." We are unsure of the nature of the error that appellate defense counsel identified, as he chose not to disclose the error to us.

*2020 CCA LEXIS 273, at *2-3*.

In our first review, we identified three post-trial processing issues—one of which was the defective record of trial that was remedied by our remand.[3] However, we did not address whether the convening authority's decision memorandum was erroneous because it did not state the convening authority approved each sentence component found in the EoJ. In light of recent unpublished opinions by our court—two of which are cited below—we directly address this issue.

The two judges who make up the majority here recently addressed this same issue in *United States v. Way, No. ACM 39723, 2020 CCA LEXIS 473, at *16 (A.F. Ct. Crim. App. 23 Dec. 2020)* (unpub. op.). In that 2-1 decision, we assumed without deciding that it was a plain or obvious error when the convening authority did not approve the entire sentence in the EoJ but we affirmed the findings and sentence after testing for **[*5]** prejudice and finding none. Unpub. op. at *16-18. We again follow the approach from *Way*. [4] Applying our approach, we discern no prejudice to Appellant.

Our esteemed colleague who concurs in part and dissents in part and in the result would find error and remand because the action is not "clear and unambiguous." *See* *United States v. Politte, 63 M.J. 24, 26 (C.A.A.F. 2006)*. We are familiar with this approach as it is the same one taken by the separate opinion in *Way* by a different esteemed colleague. *2020 CCA LEXIS 473, at *19-20* (Cadotte, J., concurring in part, dissenting in part and in the result); *see also e.g.,* *United States v. Lopez, No. ACM S32597, 2020 CCA LEXIS 439 (A.F. Ct. Crim. App. 8 Dec. 2020)* (unpub. op.). However, we still see the best approach is to first consider whether Appellant waived or forfeited the

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[3] The other two issues were: (1) whether the signed Statement of Trial Results (STR) and EoJ must be modified where the pleas and findings to both Charge I and II are omitted; and (2) whether prejudicial error exists when there is no documentation in the record of trial that the convening authority considered Appellant's clemency matters. *Jackman, 2020 CCA LEXIS 273, at *3*. On the first issue, we found the errors were "obvious" but that remand under *Article 66(f)(3), UCMJ*, was unwarranted as the pleas and findings for the specifications under Charges I and II were accurately shown in the STR and EoJ. *2020 CCA LEXIS 273, at *10-12*. On the second issue, we found no prejudice existed even if we assumed the error was plain or obvious. *2020 CCA LEXIS 273, at *12-14*.

[4] We also tested for prejudice in prior cases with a related though different issue when the convening authority's decision memorandum either stated *no* action was taken on the sentence, or in the case. *See, e.g.,* *United States v. Cruspero, No. ACM S32595, 2020 CCA LEXIS 427, at *12-15 (A.F. Ct. Crim. App. 24 Nov. 2020)* (unpub. op.); *United States v. Aumont, No. ACM 39673, 2020 CCA LEXIS 416, at *29-37 (A.F. Ct. Crim. App. 20 Nov. 2020)* (en banc) (unpub. op.) (Lewis, S.J., concurring in part and in the result); *United States v. Finco, No. ACM S32603, 2020 CCA LEXIS 246, at *13-16 (A.F. Ct. Crim. App. 27 Jul. 2020)* (unpub. op.).

issue, and if forfeited, determine whether Appellant prevails under a plain error standard of review.

Appellant has never claimed error in the convening authority's decision memorandum. His initial merits brief—filed before our first review of his case—noted unnamed post-trial processing errors but disclaimed prejudice. Since his case was re-docketed with our court, more than four months have **[*6]** passed and Appellant has not filed or requested to file a supplemental brief alleging error or prejudice. Still, we can see that the convening authority's decision on action memorandum did not use the word "approve" regarding any portion of the sentence in the EoJ and so we will examine this matter further.

II. Law and Analysis

Proper completion of post-trial processing is a question of law this court reviews de novo. *United States v. Sheffield, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004)* (citation omitted). Interpretation of a statute and a R.C.M. provision are also questions of law that we review de novo. *United States v. Hunter, 65 M.J. 399, 401 (C.A.A.F. 2008)* (citation omitted); *United States v. Martinelli, 62 M.J. 52, 56 (C.A.A.F. 2005)* (citation omitted). Executive Order 13,825, § 6(b), requires that the version of *Article 60, UCMJ*, "in effect on the date of the earliest offense of which the accused was found guilty, shall apply to the convening authority . . . to the extent that *Article 60*: (1) requires action by the convening authority on the sentence." *See 2018 Amendments to the Manual for Courts-Martial, United States, 83 Fed. Reg. 9889, 9890* (8 Mar. 2018). The version of *Article 60, UCMJ*, in effect on the date of the earliest charged offense in this case, 1 May 2017, stated "[a]ction on the sentence of a court-martial shall be taken by the convening authority." *10 U.S.C. § 860(c)(2)(A) (2016 MCM)*.

Our approach requires a determination of whether Appellant waived or forfeited **[*7]** the issue by not filing a post-trial motion within five days after receipt of the convening authority's decision memorandum to allege the action was incomplete, irregular, or contained error. *See* R.C.M. 1104(b)(2)(B). In our view, Appellant's opportunity to challenge the decision memorandum before the military judge and his failure to file such a motion warrants appropriate consideration. Such consideration distinguishes the review of cases with an EoJ—like Appellant's—from those cases referred to trial prior to 1 January 2019 with a traditional action. In cases with a traditional action, the military judge retained "control over a court-martial until the record [was] authenticated and forwarded to the convening authority for review." *United States v. Neal, 68 M.J. 289, 296 (C.A.A.F. 2010)* (citation omitted); *see also* R.C.M. 1104 (2016 *MCM*). Here, the Defense had the opportunity to claim error in the action before the military judge for up to five days after receipt of the convening authority's decision memorandum. *See* R.C.M. 1104(b)(2)(B).

Appellant received written advice of his opportunity to claim error in the convening authority's decision memorandum before the military judge. The written post-trial appellate rights advisement that Appellant and his trial defense counsel signed is **[*8]** an appellate exhibit in the record of trial. The post-trial rights advisement stated, "[P]ost-trial court proceedings are to inquire into and resolve anything that comes up after trial that substantially affects any offense of which you were convicted or the sentence, submitting a request may help highlight and/or preserve issues for appeal." We wholeheartedly agree. Concerns with a convening authority's decision memorandum should be addressed with the trial court before the EoJ is signed, long before an *Article 66* review by a Court of Criminal Appeals. Failure to raise a claim of error should matter to the standard of review on appeal. Therefore, as we found in *United States v. Cruspero, No. ACM S32595, 2020 CCA LEXIS 427, at *13-14 (A.F. Ct. Crim. App. 24 Nov. 2020)* (unpub. op.), and adopting the same reasoning, we find Appellant's failure to file a post-trial motion forfeited his right to object to the accuracy of the convening authority's decision on action memorandum, absent plain error. We followed an identical path in *Way*. *See 2020 CCA LEXIS 427, at *17-18*.

To prevail under a plain error analysis, Appellant must show "(1) there was an error; (2) [the error] was plain or obvious; and (3) the error materially prejudiced **[*9]** a substantial right." *See United States v. LeBlanc, 74 M.J. 650, 660 (A.F. Ct. Crim. App. 2015)* (en banc) (quoting *United States v. Scalo, 60 M.J. 435, 436 (C.A.A.F. 2005))*. We have applied the threshold of "some colorable showing of possible prejudice" as the appropriate standard for an error impacting an appellant's request for clemency in cases like Appellant's. *See, e.g., Cruspero, unpub. op. at *14-15* (quoting *LeBlanc, 74 M.J. at 660*).

Applying plain error, even if we assume without deciding that there was plain or obvious error in the convening authority's decision memorandum, we can discern no

colorable showing of possible prejudice to Appellant given the clemency submission. Appellant's only request in clemency was for the convening authority to "disapprove two-thirds of the adjudged total forfeitures." We will not speculate why Appellant made this request but even if the convening authority granted Appellant exactly what he asked for, Appellant would still automatically forfeit all of his pay and allowances for "any period of confinement or parole" under *Article 58b, UCMJ, 10 U.S.C. § 858b*, given the adjudged bad-conduct discharge and nine months of confinement.[5] Appellant's automatic forfeitures took effect the same day as his adjudged forfeitures: 14 days after announcement of sentence under *Article 57(a)(1)(A), UCMJ, 10 U.S.C. § 857(a)(1)(A)*; R.C.M. 1102(b)(1)(A). Appellant did **[*10]** not request the convening authority defer the automatic forfeitures under *Article 57(b)(1)*. *See also* R.C.M. 1103(b). Finally, because Appellant had no dependents—at least according to the personal data sheet admitted at trial—he was not eligible to have the automatic forfeitures waived and directed to be paid to a dependent for a period not to exceed six months under *Article 58b(b), UCMJ, 10 U.S.C. § 858b*.

From our review of the record of trial and the applicable law, we conclude that even if the convening authority granted Appellant's clemency request in full it would have not resulted in financial relief to Appellant while he was in confinement.[6]

This leaves us with considering whether there is evidence in the record that Appellant would have been denied financial relief after release from confinement if the convening authority had granted his entire clemency request. The record provides us little on this matter. We only know that the convening authority's decision on action memorandum, dated 8 April 2019, required Appellant to be placed on appellate leave under *Article 76a, UCMJ, 10 U.S.C. § 876*, unless superior competent authority directed otherwise. In contrast, the record does not contain the paperwork used to **[*11]** place Appellant on appellate leave or show whether he had any accrued leave.[7] Similarly, the record contains no definitive information on when Appellant completed his term of confinement, whether he was paroled, or how his adjudged forfeitures of all pay and allowances were applied, if at all, after his confinement ended.[8] Under these circumstances, we find no colorable showing of possible prejudice from the assumed error in the convening authority's decision on action memorandum.

Finally, there is no question that the convening authority took some action on the sentence in this case as he reduced Appellant's confinement term from ten months to nine. This reduction in confinement was pursuant to the PTA's terms. The PTA contained no limitation on the amount or type of forfeitures so we have no question that Appellant received the full benefit of his PTA with the convening authority.

III. Conclusion

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

Concur by: MINK (In Part)

Dissent by: MINK (In Part) **[*12]**

Dissent

MINK, Senior Judge (concurring in part, and dissenting in part and in the result):

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[5] Pursuant to *Article 60(c)(4)(A), UCMJ*, we do not believe the convening authority could disapprove the bad-conduct discharge or further reduce the confinement below nine months as the exceptions listed in *Article 60(c)(4)(B)* or *(C)* could not be utilized to further reduce the sentence. *See 10 U.S.C. § 860(c)(4)(A)*, *(B)*, *(C)* (2016 *MCM*).

[6] According to the record of trial, after accounting for the reduced confinement term per the PTA, Appellant's minimum release date from confinement was on 3 November 2019 and his maximum release date was on 18 December 2019.

[7] If Appellant had accrued leave he would have been permitted to choose to either (1) receive pay and allowances during the period of accrued leave, then continue on unpaid required excess leave; or (2) receive a lump sum payment of his base pay for the accrued leave, as of the day before the required excess leave begins, and serve the entire period of required leave on unpaid excess leave. *See* Air Force Instruction 51-201, *Administration of Military Justice*, Figure A9.14 (18 Jan. 2019, as amended by AFGM 2019-02, 30 Oct. 2019).

[8] R.C.M. 1102(b)(1)(B) prohibits the execution of forfeitures beyond "two-thirds forfeiture of pay" if Appellant was "not confined" and was "performing military duties." Appellant has not claimed he forfeited his allowances or more than two-thirds of his pay after his release from confinement.

I agree with the conclusion of the court that the defect in the record of trial has been properly corrected. However, I would remand this case to the Chief Trial Judge, Air Force Trial Judiciary, to resolve a substantial issue with the decision memorandum as the convening authority's decision on action taken on Appellant's adjudged sentence was ambiguous and incomplete. I adopt the reasoning of the majority in *United States v. Lopez, No. ACM S32597, 2020 CCA LEXIS 439 (A.F. Ct. Crim. App. 8 Dec. 2020)* (unpub. op.), and find the convening authority here, as in *Lopez*, "was required to explicitly state his approval or disapproval of the sentence." *2020 CCA LEXIS 439, [WL] at *11*. The convening authority failed to do so, thus I conclude the convening authority failed to take action on the entire sentence in accordance with Executive Order 13,825, § 6(b), *83 Fed. Reg. 9889, 9890 (8 Mar. 2018)*, and *Article 60, Uniform Code of Military Justice, 10 U.S.C. § 860* (*Manual for Courts-Martial, United States* (2016 ed.)).

I continue to hold the view expressed in the dissenting opinion in *United States v. Aumont, No. ACM 39673, 2020 CCA LEXIS 416, at *92-105 (A.F. Ct. Crim. App. 20 Nov. 2020)* (en banc) (unpub. op.) (J. Johnson, C.J., dissenting in part and in **[*13]** the result), and, therefore, I do not agree with the majority's approach in conducting a plain error analysis. The convening authority's action must be "clear and unambiguous," and in this case it is not. *See United States v. Politte, 63 M.J. 24, 26 (C.A.A.F. 2006)* (citing *United States v. Loft, 10 M.J. 266, 268 (C.M.A. 1981))*. I further disagree with my esteemed colleagues' decision to test for material prejudice. Accordingly, I would find error and remand regardless of whether Appellant was materially prejudiced.

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