IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	Docket No. ARMY 20220620
Private (E-2) **MATTHEW Z. CONNER** United States Army Appellant	Tried at Fort Campbell, Kentucky, on 14 July and 5 December 2022, before a general court-martial appointed by Commander, Fort Campbell, Colonel Travis Rogers and Colonel Sean S. Park, military judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignment of Error

WHETHER THE MILITARY JUDGE PLAINLY ERRED BY ALLOWING THE VICTIM TO PROVIDE A RECOMMENDATION OF A SPECIFIC SENTENCE IN HIS UNSWORN STATEMENT.

Statement of the Case

On 5 June 2023, appellant filed his brief on these issues. On 25 September 2022, the government filed its brief. This is appellant's reply brief.

Argument

The military judge committed a plain error by allowing the victim to provide a specific sentencing recommendation of "maximum jail sentence available" in violation of R.C.M. 1001(c)(3). (R. at 58). Contrary to the government's contention, this statement did not lack specificity. *See United States v. Goldberg*,

2007 CCA LEXIS 8, at *12 (N-M. Ct. Crim. App. 24 Jan 2007) (setting aside sentence where the expert's stipulated opinion that a range between minimum of 48 eight months was required to complete child sex offender treatment and "eight or more years of confinement is the optimal sentence" constituted a specific sentence.). This error was clear and obvious because this is a well-established limitation as stated in the rules and in case law. *See United States v. Ohrt*, 28 M.J. 301, 305 (C.M.A. 1989) (holding it improper to admit presentencing testimony opining that an accused has "[n]o potential for continued service," which it found was tantamount to saying "[g]ive the accused a punitive discharge."). The Court held, "The question of appropriateness of punishment is one which must be decided by the court-martial; it cannot be usurped by a witness." *Id*.

The government's contention that their case was strong is unconvincing, because they introduced no aggravation evidence. Contrary to the government's portrayal that the facts of the case justified a higher end of agreed maximum, the fact supports the opposite conclusion. The accused and the victim had a flirtatious relationship where appellant's expressions of attraction and invitations were accepted by the victim. (R. at 30 and Pros. Ex. 1). On the night of the incident the victim voluntarily came up to appellant's room by himself, after being invited at the bar to watch a movie together. (Pros. Ex. 1, pg. 3). Appellant stated that when he found the victim's penis erect, whist he was sleeping next to him, he started

touching it because he thought that they were "at that point where that was acceptable." (R. at 30). While this assumption was not enough to constitute a reasonable mistake of fact defense, it should be considered as mitigation evidence.

The government also contends that the defense's sentencing case was weak. (Appellee's Br. at 8). However, they overlook the fact that appellant called five different witnesses who attested to his professional and personal character, as well as his rehabilitation potential in detail. (R. 59-89). In addition to that testimony, appellant provided remorseful unsworn testimony, personal photos, and professional certificates, covering various aspects of extenuation and mitigation factors.

The government contends "the error did not substantially influence the sentence." (Appellee Br. at 7). In the presentencing context, the courts sometimes employs the *Saferite* test to analyze whether the error "substantially influenced the adjudged sentence." *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005) (Crawford, J., concurring in part and dissenting in part) (citing *United States v. Saferite*, 59 M.J. 270, 274-75 (C.A.A.F. 2004)); *see also United States v. Padilla*, 2017 CCA LEXIS 629, at *10 (N-M. Ct. Crim. App. 29 Sep 2017); *United States v. Vanvalkenburgh*, 2020 CCA LEXIS 157, *15 (A. F. Ct. Crim. App. 13 May 2020). The factors of *Saferite* test are:

(1) the probative value and weight of the evidence;

(2) the importance of the evidence in light of other sentencing considerations, including the military judge's instructions;

(3) the danger of unfair prejudice resulting from the evidentiary ruling; and

(4) the sentence actually imposed, compared to the maximum and to the sentence the trial counsel argued for.

Id. Aside from the victim's unsworn statement containing a recommendation for the maximum available confinement, no other significant aggravation factors came into play. Moreover, the usual significance of personal appearance of the victim was absent here since the SVC read the statement. (R. at 93). Besides the unsworn statement and appellant's age, the government did not point to any other evidence or facts in their argument. Despite failing to put on any evidence of aggravation, the government requested the maximum jail sentence available under the agreement. (R. at 95). Consequently, the military judge imposed a sentence just one moth short of this limit. Therefore, the government's contention that the error did not substantially influence the sentence is groundless.

Conclusion

WHEREFORE, the appellant respectfully requests this honorable court grant appropriate relief.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Army Court and Government Appellate Division on 3 October 2023.

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