

No 19 -

In The Supreme Court of the United States

Richard M. Camacho,

Petitioner,

v.

United States,

Respondent.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Army's Sexual Harassment Assault Response and Prevention Program (SHARP) reversed the constitutional presumption of innocence, diluted the "guilty beyond a reasonable doubt" standard of proof in criminal prosecutions, violated Fundamental Due Process, and disregarded the Sixth Amendment's guaranty of a full and fair trial.

II. Whether the trial court, conditioned by the SHARP program's reversal of the presumption of innocence, deprived Petitioner of his Constitutional Right to Fundamental Due Process where it allowed 13 instances of serious prosecutorial misconduct, to include making material misrepresentations in open court about digital images with which the prosecution tampered and on which the prosecution relied at trial, which further deprived Petitioner of the ability to put on a complete defense.

III. Whether the trial court, influenced by the SHARP program's degradation of the presumption of innocence, wrongly admitted an unsigned, undated, typed copy of an "apology" letter introduced as uncharged misconduct to prove Petitioner may have assaulted his spouse and the purported victim a decade earlier, and hearsay testimony of her mother describing a graphic and degrading sexual assault of her daughter, which she did not witness.

IV. Whether the Army Court, predisposed to affirming guilt due to the SHARP program, misapplied its 10 U.S.C. § 866 plenary *de novo*

jurisdiction when it declined to weigh the credibility of the complaining witness, where the record was replete with indications of her lack of candor and untrustworthiness, in violation of this Court's precedent in *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979) (standard for sufficiency of evidence to support conviction).

V. Whether the Army Court, oriented to affirming guilt due to the SHARP program, failed to follow Sixth Amendment Supreme Court precedent when it declined to factor into its ineffective assistance of counsel analysis the trial judge's having found 12 instances where trial defense counsel did not exercise reasonable due diligence to uncover and develop exonerating and mitigating evidence.

**PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT**

Petitioner is Richard M. Camacho, appellant below.
Respondent is the United States of America, appellee
below. Petitioner is not a corporation.

PROCEEDINGS BELOW

United States v. Camacho, No. 19-0157/AR, 2019
CAAF LEXIS 370 (C.A.A.F. May 23, 2019).

United States v. Camacho, No. ARMY 20140495, 2018
CCA LEXIS 607 (A. Ct. Crim. App. Nov. 30, 2018).

Trial Court – *United States v. Richard M. Camacho*,
Army Case Number 20140495, Fort Bragg, North
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JURISDICTION

The United States Court of Appeals for the Armed Forces (CAAF) decided this case on May 23, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1259(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend V

U.S. Const. amend VI

STATUTORY PROVISIONS INVOLVED

- | | |
|-----------------|--|
| 10 U.S.C. § 866 | (US Army Court of Criminal Appeals “Army Court” mandate to conduct <i>de novo</i> plenary review and approve only convictions and sentences “correct in law and fact”) |
| 10 U.S.C. § 920 | (aggravated sexual contact and abusive sexual contact) |
| 10 U.S.C. § 928 | (assault) |
| 10 U.S.C. § 934 | (kidnapping and indecent language) |

INTRODUCTION

This case ought to be viewed as one of the many that are part of a rising tide of Article I cases revealing to Article III courts and the public serious problems in the military justice system. On August 1, 2019, the

Chief of Naval Operations (CNO), the highest-ranking officer in the US Navy, ordered investigation of the US Navy Judge Advocate General's Corps (JAG) in the wake of its apparent abandonment of the Constitution in the investigation and recent prosecution of a Navy SEAL and others. Although the investigation continues as of the time of this filing, a professional review should bring to the surface problematic trends common to the entire military justice system: widespread turning of a blind eye to the Constitution's guarantees of individual liberties in military criminal prosecutions and appeals.

The prosecution of US Army Captain (CPT) Richard M. Camacho (Camacho) comes before the Court during a time when disturbing examples of the military justice system's reluctance to safeguard constitutional protections are coming to light. These include not only secret prosecutorial "bugging" of defense counsel emails, domestically spying on American citizens without legal authorization, and irresponsibly using grants of immunity.¹ In another military justice case, the prosecution sought the death penalty without examining *mens rea* in light of involuntary Larium poisoning (anti-malarial drug now proven to cause long term psychotic effects).² In

¹ See *Navy SEAL Edward Gallagher found not guilty of murder, war crimes*, Axios, Jul. 2, 2019, available at <https://www.axios.com/navy-veteran-edward-gallagher-found-not-guilty-of-first-degree-murder-war-crimes-1a9fb87b-440a-4ce4-b53f-b4d5d09445a1.html>

² *Robert Bales v. Commandant, United States Disciplinary Barracks*, Case Number 19-3112 (D. Kansas June 24, 2019) (prosecution flew known terrorist bombmakers into the United States under alias visas on Delta airlines, but held them out to

yet another prosecution, the government urged that foreign nationals shot on the Afghanistan battlefield were “civilians” when the prosecution had access to evidence that they were terrorist bombmakers,³ and senior General Officers, to include a Chief Appellate Judge, misrepresented convictions about which an accused was found not guilty.⁴

The military’s repudiation of the Constitution was on full display in the investigation, trial, and appeal in this case. It allowed and endorsed substantial prosecutorial misconduct, overlooked clear evidence tampering, permitted material misrepresentations made in open court about the evidence, and approved the wrongful withholding of exculpatory evidence.

the jury as “gardeners;” prosecution initially sought death penalty without disclosing to the competency board government directed ingestion of Lariam, an anti-malarial drug now known to produce long-term psychotic effects).

³ *Clint Lorange v. Commandant, United States Disciplinary Barracks*, Case Number 18-3297 (D. Kansas December 18, 2018) (prosecution claimed Afghans killed during combat patrol in Kandahar, Afghanistan were “civilians” but failed to disclose or produce fingerprint and DNA evidence victims left on improvised-explosive devices; failed to disclose report that Lorange’s platoon was being scouted for an enemy attack or ambush, and that at least one enemy was killed-in-action; failed to disclose aerostat (blimp) operator’s film and report that Lorange’s platoon was being scouted by three fighting aged males armed with AK-47 assault rifles).

⁴ *Id.* at Petition for Habeas Corpus pursuant to 28 U.S.C. § 2241, pgs. 40 – 47. Chief Judge of the US Army Court of Criminal Appeals, Brigadier General Joseph Berger III to the Center for Strategic and International Studies in March 2018 and Lieutenant General Charles Pede, The Judge Advocate General of the Army to US Congressman Garrett Graves in June 2018.

Ultimately, the trial court's decision was wrongly affirmed by an appellate court that refused to apply the Constitution in the search for truth and justice – all revealing an Article I criminal justice process that is influenced by the SHARP program, and whose actions expose the intent to protect and defend the Army no matter the law or the facts.

Without this Court's intervention, review, and corrective action, the American public will remain in the dark about the significant departures from the Constitution in which the military regularly engages, made worse by the knowing refusal to abide by the Constitution because there is no consequence imposed by Article III legal authorities to check Article I disobedience of constitutional protections, that is, Article III courts regularly defer to Article I, except in those cases involving the Constitution.

The military justice system is not keeping pace with its civilian counterparts when it comes to adherence to this Court's binding precedents about the most fundamental rights protecting individual liberties from government overreaching.⁵

⁵ See, e.g., *Jeffrey T. Page v. Commandant, United State Disciplinary Barracks*, Case Number 19-3020 (D. Kansas February 11, 2019) (murder conviction affirmed by military justice system where 12 witnesses testified under oath at pretrial hearing that accused had no specific intent to kill, but trial defense counsel called none of the witnesses at trial); see also *Anthony V. Santucci v. Commandant, United States Disciplinary Barracks*, Case Number 19-3116 (D. Kansas June 28, 2019) (sexual assault convictions affirmed even though trial judge refused to give mistake of defense instruction to jury to which accused was entitled by evidence adduced during testimony, and, trial judge unconstitutionally instructed jury

West Point graduate and combat-proven helicopter pilot Camacho was ensnared in a justice process touted by the uninformed or underinformed as observant of the Constitution, but where in practice, basic American values, rights, and legal protections against the Federal government went unobserved, resulting in unlawful convictions and an unlawful sentence, after civilian authorities refused to prosecute, after the Army initially declined to prosecute, and after the purported victim changed her story for the third time.

The Army's SHARP program was enacted with the laudable goal of correcting for sexual assault failures in the past. However, the pendulum has swung too far past corrective balance and now encourages unlawfully infringing upon the presumption of innocence and right to a fair trial with equal access to all witnesses and evidence.

The current climate of affixing and affirming guilt when it comes to sexual assault cases has set the conditions for materially prejudicial constitutional errors in which military leaders, prosecutors, and appellate judges decline to engage in objective investigation, fair-minded charging analyses, or corrective action on appeal, abdicating their special roles to critically assess evidence in favor of following lock-step the current trend. Camacho has been swept up by this climate that favors protection of career trajectories through loyalty over fundamental

that it could find assaultive intent by preponderance of the evidence).

Constitutional guarantees, and comes to this Court seeking relief. The Article I courts refused to apply, or misapplied, the Constitution as a result of a pervasive and systemic atmosphere of guilt upon accusation when it comes to sexual assault.

FACTUAL BACKGROUND

Camacho and AA, whose initials are used here to protect her identity, met while cadets at the United States Military Academy, West Point, and later married. After the two were commissioned as Army Officers, they became helicopter pilots, and each deployed to different locations in Afghanistan in 2012. AA has a black belt in judo, and at one point was offered, but declined, a position on the “All Army” Judo Team, which competes in various national and international events.

In Afghanistan, AA engaged in an adulterous sexual affair with a junior enlisted Soldier in her chain-of-command, where they would arrange to meet, return to her quarters, and have sexual relations throughout the deployment.

Upon redeployment to Fort Bragg, North Carolina, the Soldier’s wife found naked images of AA and salacious texts between the two on her husband’s cell phone. The Soldier’s wife reported the betrayal to her husband’s chain-of-command. Affairs such as these are criminalized under 10 U.S.C. § 934 because senior officers can order junior soldiers to their deaths, show favoritism, create friction disserving good order and discipline, and bring discredit upon the armed forces.

AA's commanders, at three separate levels, uniformly recommended discipline for her misconduct. The proposed discipline included a General Officer Memorandum of Reprimand (GOMOR), non-judicial punishment under Article 15, Uniform Code of Military Justice (UCMJ), a suspension of favorable personnel actions, and a "referred" Officer Evaluation Report (OER), on the premise that AA demonstrated no capacity for greater responsibility over the lives of junior personnel because she slept with a subordinate, and was married at the time.

The general court-martial convening authority, *i.e.*, the senior officer with primary responsibility over which charges may be brought to trial, had previously delegated junior officer misconduct cases to the assistant division commander, who, consistent with the chain-of-command recommendations, issued a GOMOR to AA, to which she was entitled to present matters in rebuttal.

On November 19, 2012, Camacho and AA met with two friends to discuss AA's command having learned of her months-long sexual affair with a junior Soldier. AA and her West Point friend, fellow black-belt Judo teammate and with whom she deployed to Afghanistan, YD, (whose initials are used to protect privacy), agreed that the best course of action would be to throw AA's cellular phone/SIM card into the river to destroy evidence, and delete images, emails, texts, and social media postings involving the sexual affair. Later that night, Camacho and AA argued.

At 5:30 a.m. the next morning, November 20, Camacho and AA drove onto Fort Bragg so they could attend the daily physical training (PT) formation with their unit. AA interacted with her battalion commander, the battalion's sergeant major, and two female officer colleagues.

AA did not mention to any of these colleagues that something had happened the night before - none saw anything indicating an assault, *i.e.*, bruising, wounds, cuts, or scratches.

Later that morning, after carrying on with the four witnesses without indicating anything out of the ordinary, AA met with YD, who was at AA's house the night before, and both went together to women's restroom room where, according to their testimony, YD took digital images of bruises alleged to have been inflicted by Camacho, 76 of which became a seminal part of the prosecution's case against Camacho.

Thereafter, AA complained to authorities that Camacho had physically assaulted her during the evening of November 19, 2012. AA's complaints against Camacho did not include any allegation of sexual force or misconduct. In fact, on March 13, 2013, four months after the alleged assaults, AA swore under oath and during a video-taped interview with the Criminal Investigative Command (CID), *that "there was no sexual force or anything."* Army officials found insufficient evidence to prosecute or propose any disciplinary action against Camacho.

In April 2013, five months after the alleged assault, AA reported to civilian authorities at the Harnett County, North Carolina Sheriff's Office that her husband assaulted her by "ramming his fingers into her vagina." Both the Sherriff Office and State's Attorney determined not to proceed with any action against Camacho.

On December 19, 2013, AA's rebuttal to her GOMOR (a potentially career-ending administrative sanction) was due to the convening authority. She retained civilian counsel. After having retained civilian counsel, a senior retired Army judge advocate, who was well-versed in the SHARP Program, the recent initiative created to address sexual assault offenses, AA changed her allegations to the Army to include sexual assault, namely, that Camacho, while confining her to their home, beat her throughout the night of November 19, 2012, held her against her will, and then, after tossing a giant ottoman onto her, uttered "all of this testosterone makes me horny," and then proceeded to masturbate onto AA's hand while she sat on the couch.

AA's civilian counsel then began a series of email exchanges—undisclosed to the defense until after trial — with: the staff judge advocate (*i.e.*, the senior attorney advising the court-martial convening authority); the deputy staff judge advocate, a "Special Victim Prosecutor" (SVC), which was a newly-created position under the SHARP Program; the Special Victim Counsel (SVC), likewise a newly-created position; and the prosecutors, known as trial counsel.

These emails cast Camacho in a negative light and cautioned the Army against disciplining a female officer for her own sexual misconduct with a subordinate, while at the same time, urging maximum punishment for Camacho.

Months before the general court-martial convening authority decided to send Camacho's case to trial, AA personally wrote the convening authority that "***sexual assaults are a critical issue currently facing the military.***" Her own sexual misconduct, the ostensible reason for her letter, however, had nothing to do with sexual assault.

Thereafter, the convening authority held an in-person meeting with AA, her civilian counsel, her SVC, the SJA, and the brigade commander where civilian and SVC counsel, unbeknownst to Camacho, advocated against him. Eight command legal officers were aware of this meeting, but failed to disclose it. A defense motion to dismiss based on Unlawful Command Influence was pending at the time (claiming that the case against Camacho was based not on a careful review of the evidence, but instead on pressure to be tough on sexual assault), which the prosecution opposed largely on the grounds that influence had no connection to the case.

The clear intent of the email messages AA's civilian attorney sent, AA's letter to the court-martial convening authority, and the in-person meeting without Camacho's attorneys' awareness, was to focus on Camacho as an alleged sex offender, and to divert attention from AA's own misconduct. The scheme

worked. In the end, AA avoided discipline altogether. Her career was allowed to progress. The Soldier with whom she had the affair received non-judicial punishment under Article 15, UCMJ. Camacho, who was put in for the Distinguished Flying Cross for combat action in Afghanistan for three “gun runs” in response to a call for help by a ground force commander, severely wounded and pinned down during an insider attack, went to prison.

In contrast to the concerted attack AA made after she hired her civilian counsel, before trial, she had made two inconsistent statements. First, she told Army investigators that the interaction was a simple assault, with “no sexual force or anything.” In contrast, she later told North Carolina authorities that Camacho “jammed” his fingers into her. Then at trial, she testified that he made her touch his penis while he masturbated.

Defense counsel did not cross examine AA by playing the CID video where she swore, “no sexual force or anything.” Nor did counsel question AA by contrasting her first claim of simple assault with her second claim of “jamming fingers” as inconsistent with her trial testimony of masturbating on her, while she, a recognized judo expert, sat on the couch.

In all, AA testified 97 times that she could not remember or recall various aspects of the evening in question. She also admitted that she lied when it was convenient for her at least eight times, and confessed to disobeying Army flight regulations and making false official statements. Moreover, two officers

testified that AA's integrity was questionable, and AA's mother testified that she encouraged her daughter to lie to medical officials. Yet the Army Court declined to weigh these ostensibly critical credibility matters as part of its review, all of which occurred amid the landscape the SHARP program created.

STATEMENT OF THE CASE

In 2014, Camacho faced a total of 17 offenses for allegedly masturbating on his spouse while she sat on the living room couch after he confined her to their marital home, struck her throughout the evening and early morning hours of November 19 and 20, 2013, after having learned that she had a months-long secret sexual affair with a junior Soldier while deployed to Afghanistan.

A jury of Army officers sitting as a general court-martial convicted Camacho of 10 specifications and found him not guilty of seven specifications. His trial convictions include one specification of violating Article 120, 10 U.S.C. § 920 ("abusive sexual contact" with his wife), seven specifications of violating Article 128, 10 U.S.C. § 928 (assault), and two specifications of violating Article 134, 10 U.S.C. § 934 (kidnapping and indecent language).

The panel reduced the severity of three of these convictions specifications by finding Camacho not guilty of the offenses as alleged, but guilty of lesser included offenses.

The jury acquitted Camacho of seven specifications: one specification of violating Article 120 (aggravated sexual assault), three specifications of violating Article 128 (assault), and two specifications of violating Article 134.

Camacho's sentence included forfeiture of pay and allowances, confinement for two years, and dismissal from the Army (officer equivalent of a Dishonorable Discharge).

On November 30, 2018, the Army Court reversed the convictions for kidnapping and indecent language under Article 134, finding them factually insufficient, affirmed the remaining findings, and declined to adjust the sentence in light of the two reversals. Appendix A.

Camacho timely filed a Petition for a Grant of Review to the court which exercises civilian oversight of the military courts of appeal and trial courts worldwide, the CAAF in Washington DC.

On May 23, 2019, the CAAF Court granted Camacho's Petition for a Grant of Review, on the same day set aside and disapproved Charge III (the Article 134 Charge comprised of the kidnapping and indecent language Specifications), but declined to reassess the sentence. Appendix B.

This Petition is timely filed pursuant 28 U.S.C. 1259(1).

ARGUMENTS

I. Application of the Army's SHARP program to Camacho resulted in an unconstitutional Article I criminal trial.

The unfair tilting of the scales of justice the SHARP program had on Camacho's Due Process and Sixth Amendment rights impermissibly sacrificed the presumption of innocence in favor of political correctness. Application of the SHARP program reversed and dishonored these constitutional precepts in at least six substantial ways.

First, the title *special victim* attached upon the victim's simple, unadjudicated, naked allegation alone.

Second, the Army appointed her a *special victim counsel*, ascribing a status of greater significance than an "ordinary" complainant.

Third, the Army appointed a *special victim prosecutor*, with specialized training to make the case against Camacho and for AA.

Fourth, as the *special victim* and chief government witness against Camacho, the convening authority allowed AA an in-person meeting, represented by her civilian counsel and her "special victim counsel," to advocate for her and castigate Camacho. That is, the SHARP program set conditions for *special victim counsel* to sit at the convening authority's table and advocate against Camacho, and, say to the convening

authority that national command authority already determined her a *special victim* deserving of a *special counsel*. It is by now apparent that this meeting, which was set under the guise of addressing how the convening authority would approach AA's misconduct, was actually a ruse by AA to use the SHARP program to target Camacho.

Fifth, the dozens of uses of *special victim* and *victim* at trial, coupled with the presence in the courtroom of both a *special victim counsel* and *special victim prosecutor* in front of the members was so inherently prejudicial that it is an unacceptable encroachment on Camacho's right to a fair trial. The clear message to the panel of officers - a determination of guilt has already been made - before any properly constituted legal body has rendered a competent determination. This is the veritable equivalent of the accused being made to wearing an orange "jump-suit" as he stands trial, rather than a business suit that would ordinarily be worn by one who is presumed innocent.

Sixth, the prosecution, trial court, Army Court, and the CAAF ignored the Secretary of Defense's valid concerns about the constitutionality of the SHARP program. In May 2015, the Secretary of Defense commissioned a subcommittee to the Judicial Proceedings Panel (JPP Report) to review "barriers to the fair administration of justice in sexual assault cases." The May 2017 report "identified a number of problems with how the military justice system treats sexual assault offenses," which included one

conclusion that “convening authorities feel public pressure to refer sexual assault cases to trial.”⁶

Judge advocates overwhelmingly reported a perception of pressure on convening authorities to refer sexual assault cases to court-martial, regardless of merit. According to many of the judge advocates interviewed on site visits, this pressure extends to weak cases that civilian jurisdictions would not prosecute and, in some cases, have already declined to prosecute.

Id. at 14.

The civilian jurisdiction in this case, Harnett County, North Carolina, through its Sheriff and Prosecuting Attorney, would not prosecute, and had already declined to prosecute after having interviewed AA and Camacho. The Army originally declined to prosecute because the claim first reported did not include sexual assault.

Only when AA retained retired Army JAG counsel experienced in the SHARP program did she change her report to the Army to sexual assault, to avail herself of the pressure on the convening authority to refer her sexual assault claim, regardless of merit, to

⁶ See Subcommittee of the Judicial Proceedings Panel Report on the Barriers to the Fair Administration of Military Justice in Sexual Assault Cases, May 9, 2017, *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_SubcommReport_Barriers_Final_20170512.pdf.

trial in order to spare herself discipline for her sleeping with a subordinate and thereby save – and indeed, advance – her career.

That the convening authority could be influenced, and his mindset amenable to those points, are the product of the heightened scrutiny concerning charging decisions about sexual assault which the JPP found problematic. Like the convening authorities in the JPP report, the convening authority's actions here were informed such that he decided in a manner which freed him from having to answer for disciplining AA (a female special victim of sexual assault) and risk losing promotion and career trajectory, but which unfairly prejudiced Camacho's constitutional rights.

Another point the JPP found troublesome: “false accusations are now more likely to make it through the system and, as a result, innocent people face allegations that could ruin their lives.” *Id.* at 21.

AA ultimately made two reports vastly inconsistent with her trial testimony: domestic assault, “no sexual force or anything,” jamming fingers, and masturbated on her hand.

Outside the SHARP program, such inconsistent statements suggest a reasonable and justifiable decision not to prosecute given the weaknesses of the complaining witness/victim's version of events - as evidenced by both the civilian and Army authorities' initial declinations to prosecute.

As the JPP Report concluded, “The perception of pressure on convening authorities to refer sexual assault cases to courts-martial and . . . the consequent negative effects on the military justice system are more harmful than the problems that such provisions were originally intended to address.” *Id.* at Recommendation Number 5. *See also United States v. Barry*, 78 M.J. 70 (C.A.A.F. 2018) (convening authority sought to reverse conviction for sexual assault, but military attorney advised against it).

Although fully briefed to the Army Court and the CAAF, these Article I courts chose not to make the JPP report a part of their analyses. Doing so would have made reaching affirmance, the culture SHARP itself created, a bridge too far.

This Court has held that “certain practices pose such a threat to the ‘fairness of the factfinding process’ that they must be subjected to ‘close judicial scrutiny.’” *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986) (quoting *Estelle v. Williams*, 425 U.S. 501, 503-505 (1976) (holding that where a defendant is forced to wear prison clothes when appearing before the jury may affect a juror's judgment)).

This is very much a matter that demands the “close judicial scrutiny” that this Court referenced above. Before the trial judge instructed the jury, the term *victim* had been used 53 times. The term *special victim* was used nine times, and, the prosecution used the term *victim* eight times in front of the jury.

The cumulative effect: reversal of the sacrosanct constitutional principle that an accused is presumed innocent until proven guilty beyond a reasonable doubt, by the evidence properly admitted, and nothing else.

Proving the unlawful effect the SHARP program had on the trial can be seen in the testimony of the original investigating officer (IO):

I thought I was obligated to push things forward at the time because of her statement, regardless of my opinions now. At what point do we say hey, I'm sorry to all the pressure from above.

The SHARP program brought all of this together to send Camacho to trial and prison after having been cleared twice, and pressure those concerned about their careers to unfairly favor the accuser and disfavor Camacho.

The SHARP program, the prosecution's application of it, and the appellate courts' failure to professionally probe the constitutional issues presented violated Camacho's absolute right to the presumption of innocence until the government has proven every element of every offense "beyond a reasonable doubt," and the jury may only determine that the accused is guilty if the government has met that burden. *In re Winship*, 397 U.S. 358, 364 (1970); *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978).

II. The trial court, conditioned by the SHARP program's reversal of the presumption of innocence, deprived Camacho of his Constitutional Right to Fundamental Due Process where it allowed 13 instances of serious prosecutorial misconduct, to include making material misrepresentations in open court about digital images with which the prosecution tampered and on which the prosecution relied at trial, which further deprived Camacho of the ability to put on a complete defense.

This Court has recognized the "special role played by the American prosecutor" in the search for truth. *Strickler v. Greene*, 527 U.S. 263, 281 (1999). Prosecutors have a continuing interest in preserving the fair and effective administration of criminal trials. Accordingly, the American Bar Association states that a prosecutor's duty is "to seek justice within the bounds of the law, not merely to convict." A.B.A. Standards for Criminal Justice: *Prosecution and Defense Function*, Standard 3-1.2(c) (4th ed. 2015).

If reversal of the presumption of innocence on a programmatic level (prosecution, trial judge, Army Court, CAAF, and the Secretary of Defense) were not enough, the military justice trend of prosecutorial misconduct repeatedly reared its head here. The prosecution engaged in the following improper methods that resulted, in whole or in part, in Camacho's convictions:

(1) Nearly every legal officer within the Office of the Staff Judge Advocate (OSJA) knew of a meeting at

which AA, her civilian attorney (a retired judge advocate), and her SVC met in-person with the convening authority, during which unfavorable remarks were made by AA to the convening authority. Yet neither the meeting nor its substance were disclosed to the defense, even though a motion to dismiss based on unlawful command influence was pending.

(2) None of these legal officers, each bound by the Fifth Amendment, *Brady v. Maryland*, 363 U.S. 83 (1963), Rule for Court-Martial (RCM) 701(a)(6), Army Regulation (AR) 27-26, the ABA guidelines, and acting in the face of a written defense request for any and all statements made by prosecution witnesses per RCM 701(a)(2), disclosed to defense counsel the one-sided secret meeting where prejudicial remarks were made by AA and her attorneys against Camacho.

(3) During a post-trial Article 39(a) hearing, the SJA testified that the meeting should have been disclosed: “Certainly, the fact of the meeting should have been disclosed. . . that is ultimately on me as the senior attorney for the division at the time.”

(4) If the meeting were properly disclosed, the defense and the military judge would have had the benefit of the in-person testimony, taken only days after the meeting, while the prosecution’s opposition to Camacho’s motion to dismiss based on UCI was pending before the military judge.

(5) The SJA and AA’s Battalion Commander (*i.e.*, the officer two levels above her in the chain-of-command)

testified that they were aware of reports that AA had additional sexual affairs. The prosecution failed to disclose reports of additional unlawful sexual affairs involving AA, the main prosecution witness against Camacho, which could have been developed for impeachment.

(6) The prosecution failed to disclose *Brady/Giglio v. United States*, 405 U.S. 150 (1972) (required disclosure of impeachment evidence) about the prosecution's second witness against Camacho, which could have been used to impeach her and reveal her bias against Camacho. This witness, YD, not only destroyed evidence relating to AA's officer misconduct, but is also AA's friend from West Point, fellow judo expert, who took the digital images of AA's bruising which became a central part of the prosecution's case against Camacho. Had the prosecution not tampered with the digital images, Camacho could have used the time on AA's watch to establish her whereabouts for 96 minutes during the morning at issue, and develop an alternative attacker/source of injury. Such evidence likely would have created the reasonable doubt necessary for the jury to acquit Camacho of the ten remaining specifications, in what was already a split jury decision.

(7) The prosecution withheld a series of vitriolic emails from AA's civilian defense counsel to prosecutors before, during, and after referral vilifying Camacho, encouraging severe discipline, while urging AA be given no discipline.

(8) Appellate Exhibits CVIII and CIX detail no fewer than 46 instances of prosecutorial failures to disclose evidence favorable to the defense, each of which would have been helpful to Camacho's defense.

(9) The DSJA provided legal counsel to AA's civilian attorney, offering: "[y]ou may want to consider having a medical officer offer a short narrative – that explains the extent of the damage." By contrast, the DJSA did not provide legal counsel to Camacho's attorney.

(10) The prosecution introduced manipulated and tampered digital images and held them out as genuine as part of prosecution exhibit 6, which deprived Camacho of the opportunity to develop an alternative attacker/cause of injury defense, as AA's whereabouts the morning at issue. All of this occurred after AA had spoken with leaders in her unit, none of whom reported not seeing any marks, cuts, or bruises on AA.

(11) The prosecution misrepresented in open court that there were no substantial differences in the versions of manipulated digital images when there was clear evidence of significant differences in the images disclosed piecemeal and evidence of willful concealment, *e.g.*, the watch was cropped out of the first images, but only revealed in detail after trial.

(12) The prosecution failed to disclose the meta-data associated with prosecution exhibit 6, which deprived Camacho of the use of the time and date information to establish that AA's whereabouts on the date she

reported injuries could not be established for 96 minutes.

(13) The prosecution falsely stated to the jury during argument that Camacho “ejaculated in her face,” when there was no evidence whatsoever of such conduct admitted at trial.

The foregoing suggests prosecutorial misconduct deprived Camacho of a trial compliant with constitutional Due Process. Yet, Article I courts did not evaluate these points in the decisions below, further suggesting that direct appellate review was neither full nor fair, due in large measure, to the constraints under which the relevant actors operated due to the SHARP program.

Accordingly, the Constitution was absent without leave throughout the investigation, trial, and direct appeal which has implications across the entire military justice system.

III. Predisposed to guilt due to the SHARP program, the trial court wrongly admitted over defense objection an unsigned, undated, typed, copy of an “apology” letter introduced as “bad person” uncharged misconduct to prove Camacho may have assaulted AA a decade earlier, and wrongly admitted the hearsay testimony of AA’s mother, who described a sexual assault of her daughter she did not witness.

A. *Letter.* The prosecution offered a copy of a typed, unsigned, undated, “apology” letter in unsullied condition attributed to Camacho for his having

allegedly assaulted AA while they were cadets years prior. The “apology” was a crucial but unfairly prejudicial component of the prosecution’s case admitted into evidence over defense objection in violation of Mil. R. Evid. 1003, 1002, 901, 801, and 404(b), 403, 402, and 401. The letter was offered as uncharged misconduct evidence to show that Camacho had the propensity to commit violence toward AA. The panel received it that way, that is, the letter encouraged the jury to convict because of extrinsic conduct as opposed to charged conduct.

Military Rule of Evidence 1002 states that an original writing is required. Copies may be accepted pursuant to Mil. R. Evid. 1003 unless “a genuine question is raised to the authenticity of the original.” The military judge should have denied admission of the copy, or at least directed the prosecution to produce the original pursuant to the “best evidence rule,” especially where authenticity was challenged.

Military Rule of Evidence 901 states that “[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” The letter should not have been admitted because it was not sufficiently established that Camacho was the author of it. *Devbrow v. Gallegos*, 735 F.3d 584 (7th Cir. 2013) (email inadmissible because unsigned and undated in violation of Fed. R. Evid. 901). There are several reasons why the military judge’s decision to admit the letter violates Mil. R. Evid. 901.

- (1) No witness claimed to have observed the letter's creation.
- (2) No witness saw Camacho type the letter.
- (3) The letter is not signed to compare with Camacho's signature.
- (4) The letter is not dated, making it impossible to prove that it was made at a time when Camacho was a West Point cadet.
- (5) The letter contains no penmanship to evaluate.
- (6) The letter is typed and therefore anybody could have created it at any time.
- (7) The sponsoring witness for the letter's authenticity, AA, had a compelling motive to shift attention away from her wrongdoings and deflect them onto Camacho to protect her Army career.
- (8) AA, like Camacho, was in a position to know obscure details that were not common knowledge.
- (9) AA testified that before a formation run as cadets at West Point years prior to trial, Camacho personally handed her the original of the letter. Detracting from the reliability of this testimony, however, is not only AA's motive to fabricate noted above, but also the physical condition of the letter itself at trial. The letter apparently made it through a formation PT run (ostensibly it would have been folded to carry during a formation run or gripped tightly by a sweaty hand),

and was kept for over six years, yet the “exact copy” the prosecution tendered had no fold marks, wrinkles, or other signs of distress ordinarily associated with an aged paper. Even if a copy were introduced, logically it should have reflected evidence of age, wear, folding, holding, storage.

Since neither the authentication requirements nor the hearsay barriers to admission had been overcome, the letter was inadmissible, given the bars against “bad person” or uncharged misconduct propensity evidence pursuant to Mil. R. Evid. 404(b). *Michelson v. United States*, 335 U.S. 469 (1948) (character evidence has the tendency to encourage jury to convict because of extrinsic conduct as opposed to charged conduct). Put differently, because the letter was not authenticated, its admission for any other purpose is error.

That the panel was directed away from the charged offenses and focused on sheer speculation about Camacho’s past life can be shown by the statements of the former battalion commander. He stated in June 2015 that the letter was a confession and convinced him that Camacho did it before and so he did it again.

Even if the prosecution satisfactorily made the necessary showings pursuant to Mil. R. Evid. 1003, 1002, 901, 801, and 404(b), Mil. R. Evid. 403, 402, and 401 counseled against admission into evidence. Any probative value the letter may have legitimately had, is substantially outweighed by the unfair prejudice, confusion of the issues, and misleading of the jury. Consequently, the letter is irrelevant and

inadmissible. Mil. R. Evid. 401 and 402.

At trial, the military judge misapplied eight rules of evidence to reach the incorrect conclusions: 1003, 1002, 901, 801(d)(2), 404(b), 403, 402, and 401. This is an abuse of discretion. *United States v. Mott*, 72 M.J. 319, 329 (C.A.A.F. 2013) (decision to admit evidence reviewed as abuse of discretion, which occurs where trial court's decision is influenced by erroneous view of the law).

The military judge abused her discretion a ninth time on the same issue when she denied Camacho's RCM 905(f) request to reconsider her ruling to admit the letter in light of sworn testimony by AA that Thomas Marks was an eyewitness to an alleged altercation that occurred at West Point. Marks provided his declaration to the military judge, in which he declared that none of the physical violence described in the letter actually occurred. His sworn declaration eliminated any indicia of reliability that the letter was what AA and the prosecution held it out to be.

The unfairly prejudicial effects to Camacho's right to a fair trial can be seen by the prosecution's having used the "apology" letter throughout its closing argument to convict Camacho. The unfair "bad person" evidence resulting from the letter can be seen over the first two pages of facts in Appellee's Brief before the lower court. The Government's reliance on this evidence in its closing statement and Appellee's Brief shows that its admission was not harmless beyond a reasonable doubt. *United States v. Powell*, 49 M.J. 220, 225 (CAAF 1998). That so many errors

concerning basic evidentiary rules were made and affirmed reveals the inflexible lock-step mindset the SHARP program injected into the proceedings, exposing that Camacho was guilty upon mere accusation, a total departure from the Constitution.

B. *Inadmissible Hearsay*. Although not present on the night in question, AA's mother, over defense objection, was allowed to testify before the members as follows:

TC. What did she tell you in particular, ma'am?

A. She told me that, after being beaten, Richard told her he was very horny -- and just -- I'm sorry -- and pulled out his penis and made her touch it and he masturbated on her.

TC. What else did she tell you about the sexual assault, ma'am?

A. She told me that she just -- she told me it was the most horrible, horrible feeling to feel like nothing more than an animal.

The trial judge erred by admitting unfairly prejudicial and inadmissible testimony from the purported victim's mother relaying graphic and degrading sexual details to the jury about her daughter that she did not witness. Mil. R. Evid. 802; 602 (witness must have personal knowledge). This was a prosecutorial

effort to make the government's case appear stronger than it was - to bolster the only evidence of sexual assault, AA's shaky testimony.

Any probative value was substantially outweighed by the unfair prejudice to Camacho's right to a fair trial, the clear misleading of the jury to emotionally-charged hearsay evidence from a sympathetic witness, and confusing of the jury by stamping in their minds the terrible image of a mother describing lurid sexual details about her daughter being degraded and treated "like nothing more than an animal." *See, e.g., United States v. Owens*, 16 M.J. 999 (A.C.M.R. 1983) (describing unfair prejudice as existing "if the evidence is used for something other than its logical, probative force").

Again, that the trial judge would allow, and the appellate courts would affirm, on such a clearly incorrect point of law, demonstrates inelastic lock-step mindset the SHARP program injected into the proceedings, further exposing that Camacho was guilty upon mere accusation.

IV. The Army Court, inclined to affirm guilt due to the SHARP program, misapplied its 10 U.S.C. § 866 plenary *de novo* jurisdiction when it declined to weigh the credibility of the complaining witness, where the record was replete with indications of her lack of candor and untrustworthiness.

"Article 66(c)[s] . . . awesome, plenary, *de novo* power of review" grants the Army Court the authority to substitute their judgment for that of the military

judge. It also allows a “substitution of judgment” for that of the court members. *United States v. Cole*, 31 M.J. 270 (C.M.A. 1990); *see also United States v. Holt*, 58 M.J. 227 (C.A.A.F. 2003) (Court of Criminal Appeals can be reversed where Appellant is deprived of proper Article 66, UCMJ review).

In the decision below, the Army Court adopted an extremely narrow and curtailed view of its awesome plenary *de novo* powers of review, which must be a misapplication of its statutory mandate, and an unfairly prejudicial deprivation of full and fair appellate review. The following 14 material evidentiary points were not made a part of the lower court’s review:

- (1) The only eyewitness at trial, AA, testified under oath that she could not remember or could not recall at least 97 times about probably the most significant night of her adult life.
- (2) AA admitted that she lied at least eight times.
- (3) AA confessed to disobeying Army flight regulations and making false official statements.
- (4) Two officers testified that AA’s integrity was questionable.
- (5) AA’s mother testified that she encouraged her daughter to lie to medical officials.
- (6) AA changed her story three times before and at trial.

(7) AA's reports changed in order to deflect attention from her own misconduct and redirect it to Camacho. Her first report, in which she told Army investigators there was "no sexual force or anything," resulted in the Army's determination not to proceed. She then changed her story. In the second evolution of her story, this time to local authorities, she accused Camacho of "ramming" his fingers inside of her. County prosecutors decided not to proceed. She then changed her story again before the jury, and accused Camacho of masturbating on her hand. Thus, although AA's initial report was assault, her testimony changed to include sexual assault directly after she retained retired Army civilian counsel, in order to avail herself of protected status in the face of her own sexual misconduct with an enlisted soldier in her direct chain of command, and thereby misuse and manipulate the SHARP program.

(8) Months before the convening authority referred to case to trial, AA personally wrote him a letter, pleading that "***sexual assaults are a critical issue currently facing the military.***" While perhaps true as a matter of principle, the correspondence constitutes an *ex parte* communication impacting Camacho's due process rights, that clearly framed this as a sexual assault case, despite AA's creating those allegations after retaining retired Army civilian counsel familiar with the SHARP program, in contradiction of her initial reports.

(9) Months before Camacho's commander "preferred" charges against him, *i.e.*, formally charged him, legal

officers, to include the SJA, received an email that officials at the Engineer School, which AA was nominated to attend, had concerns about allowing her career to progress, and were hesitant to even contact AA about these concerns because they feared it would prompt her to complain to the Inspector General (IG) to allege she had been retaliated against as a “victim.” As the Brigade Judge Advocate explained to the SJA:

Sir, *they are hesitant to even pull her out of the course without a GOMOR for fear of an IG complaint.* This would allow her to graduate and pursue a Master’s Degree.... The response that an officer who engages in a year-long sexual relationship with an NCO from her and her husband’s unit would receive an honorable baffle me, even considering recent events.

(10) The lower court decision does not evaluate the impact of the pressure AA and her legal counsel, unfairly leveraging the SHARP program to gain a personal advantage, put on command legal officers and the convening authority prior to referral, which if properly and timely disclosed, could have been used during Camacho’s UCI motions to dismiss.

(11) The lower court did not evaluate the impact of the undisclosed in-person convening authority meeting on Camacho’s then pending motion to dismiss based on UCI, the mortal enemy of the military justice system, especially where the SJA himself testified the meeting should have been disclosed and the facts of

the secret conversation would have been fresh in witnesses' memories for use to resolve the UCI motion.

(12) The lower court decision does not address the effects the passage of time had on witnesses' memories of what was said during the undisclosed meeting in the convening authority's office resulting from the prosecution's failure to disclose the secret convening authority meeting.

(13) The lower court decision does not weigh the substantial evidence of prosecutorial misconduct noted above as bearing on the legality and constitutionality of the findings and the sentence.

(14) The lower court incorrectly concluded that metadata relating to digital images was not marked or admitted, when the information was indeed marked and admitted into evidence during a post-trial Article 39(a).

These undisputed points suggest that if a reviewing court were ever inclined to substitute its own judgment for the military judge's and the jury's, this is the right case pursuant to 10 U.S.C. § 866. By contrast, the lower court limited its vast powers of plenary *de novo* review because they too were influenced by the SHARP program, which set conditions for their turning a blind eye to significant legal errors.

V. The Army Court, induced to affirming guilt due to the SHARP program, failed to follow Sixth Amendment Supreme Court precedent when it declined to factor into its ineffective assistance of counsel analysis the trial judge's having found 12 instances where trial defense counsel did not exercise reasonable due diligence to uncover and develop exonerating and mitigating evidence.

In *Strickland v. Washington*, 466 U.S. 668, 685 (1984), this Court held that the Sixth Amendment entitles criminal defendants to the "effective assistance of counsel"—that is, representation that does not fall "below an objective standard of reasonableness" in light of "prevailing professional norms." To prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate: (1) that his counsel's performance was deficient and (2) that this deficiency resulted in prejudice. *United States v. Green*, 68 M.J. 360, 361-62 (C.A.A.F. 2010).

After a post-trial hearing, the judge found 12 instances where counsel had evidence favorable to the defense available to it, but lacked the diligence to secure it and use it. Accordingly, counsel unreasonably failed to investigate "all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." See, *ABA Standards for Criminal Justice: Prosecution and Defense Function*, Standard 4-4.1(a) (3d ed. 1993).

This deficient pretrial preparation resulted in actual prejudice to Camacho. *United States v. Scott*, 24 M.J. 186, 192 (C.M.A. 1987) (finding ineffective assistance

of counsel when defense counsel failed to conduct adequate pretrial investigation). Yet, the Army Court did not address these 12 failures the military judge specifically found in its denial of Camacho's Sixth Amendment claim.

The most critical piece of exonerating evidence as to the sexual assault is AA's sworn statement, preserved by video, to CID that "***there was no sexual force or anything.***" This compelling evidence stood to be a game-changer. *United States v. Gibson*, 51 M.J. 198 (C.A.A.F. 1999) (counsel ineffective for failing to pursue leads contained in the CID report). If the members had seen this video evidence that there was no sexual assault, they would have acquitted, especially when viewed within the context of AA's shaky testimony. However, counsel inexplicably failed to introduce it. There can be no reasonable tactical reason not to use the video denying sexual assault. *Peoples v. Lafler*, 734 F.3d 503 (6th Cir. 2013) (counsel constitutionally ineffective when he failed to impeach credibility of key witness based on false testimony).

The lower court disagreed, and found "Appellant has not shown how this clip ... would have resulted in a different outcome at trial." What the lower court apparently overlooked, however, was the following discussion showing how reasonable use of the CID video-tape would have resulted in a different outcome at trial:

However, [defense counsel] did not play the CID video interview where AA tells

the interviewing Agent, months before she retained civilian counsel, that “there was no sexual force or anything.”

Use of the CID videotape during cross-examination, not only for questioning, but also to play for the members, did not occur. *Raether v. Meisner*, 608 Fed. Appx. 409 (7th Cir. 2015) (counsel’s failure to make use of the crucial prosecution witnesses’ prior inconsistent statements in cross-examination rendered counsel’s representation deficient).

Not only would CPT AA’s credibility have been thoroughly degraded to all but zero, but also the [defense] counsel’s cross-examination of every prosecution witness, as well as her closing argument during which the video should have been played, would have been more forceful and convincing, producing a more favorable result for CPT Camacho.

This critically exonerating evidence which stood to directly impeach the credibility of the only witness to all charged offenses, was not used in cross-examination of CPT AA, any prosecution witnesses, or during closing argument before the panel.

Use of the CID videotape during cross-examination, not only for questioning, but also to play for the members, did not occur. *Raether v. Meisner*, 608 Fed. Appx. 409 (7th Cir. 2015) (counsel's failure to make use of the crucial prosecution witnesses' prior inconsistent statements in cross-examination rendered counsel's representation deficient).

* * * * *

Had [defense counsel] introduced the CID video and used it during cross-examinations and closing argument, the legal elements would not have been satisfied in the minds of the panel. *United States v.*, 74 M.J. 297 (C.A.A.F. 2015) (conducting *de novo* review of evidence, court concluded that evidence did not support conviction); *United States v. Brooks*, 60 M.J. 495, 497 (C.A.A.F. 2005) (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)); *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991).

Because of the SHARP program and the rigid mindset it instills, the lower court side-stepped a constitutional issue and erred under *de novo* and plenary review by overlooking the foregoing discussion.

Also, in connection with the CID interview where the main witness swears that no sexual assault occurred, the lower court correctly found that the video tape was neither marked nor admitted at trial. Understandably, this is a substantial premise supporting Camacho's constitutional claim – in other words, that's the very point Camacho seeks to make – it should have been marked, introduced, used during cross examination and played during closing arguments.

However, the lower court concluded there is no evidence of record to support Camacho's Sixth Amendment assignment of error. To be sure, the basis for the Sixth Amendment claim is largely that counsel did not admit the videotape or use it to impeach. The SHARP program encouraged the Army Court to affirm, even in the face of clear constitutional error.

In all, the lower court did not apply the military judge's findings of 12 defense counsel errors, as well as defense counsel's failure to mark, admit, and use the exculpatory interview during cross-examination of AA amidst her inconsistent statements, during closing argument, or any other number of uses.

The lower court's analysis on this point is more of an advocate's briefing defending the Army's position, rather than an objective application of the Sixth Amendment during Article 66 review. The Constitution demands more for Camacho, and this Court should step in to ensure that the protections the Constitution provides are alive and well, especially in the military justice system.

Indeed, the military justice system, drawn away from the Constitution by the SHARP program's reversal of the presumption of innocence and "outcome determinative" appellate review, failed in its constitutional and statutory mandates to ensure that Camacho's constitutional rights were respected in compliance with the Court's holding in *Burns v. Wilson*, 346 U.S. 137 (1953).

The constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers – as well as civilians – from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civilian courts.

Burns, 346 U.S. at 142.

CONCLUSION

For these reasons, the Court should grant Camacho's Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces.

Respectfully submitted,

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